ARTICLE

ENLIGHTENED ORIGINALISM

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Plus ça change, plus c'est la même chose.[1]

ABSTRACT

This Article proposes a novel, unique theory of constitutional interpretation, namely "enlightened originalism." According to enlightened originalism, when contemporary constitutional actors give meaning to the terms of the Constitution, they should use the meaning those terms had when the relevant provisions were originally adopted. But we do not find the original meaning of terms such as "equal protection," "due process," and "cruel and unusual punishment" by seeking the meaning intended by the relevant framers or ratifiers; nor by looking to any original public meaning. These terms incorporate moral concepts, the meaning of which is objective and independent of the views of any particular cohort of people as to their meaning or application. According to enlightened originalism, the meaning of the concept of equality, for example, has not changed. Rather, we have become more enlightened as to the full ramifications—the true meaning—of equality. We do not say that the meaning of equality has changed since the Founding Fathers accepted slavery alongside the professed self-evident truth of equality. We instead say that the Founding Fathers were wrong about equality. Similarly, we should say that past generations were wrong not to realize that limiting marriage to opposite-sex couples violated the concept of equality incorporated by the Equal

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1. "The more things change, the more they stay the same." Jean-Baptiste Alphonse Karr, *Les Guêpes* [The Wasps], Jan. 1849.

Protection Clause. The Constitution has not changed or evolved. It is instead our understanding of the Constitution's moral requirements that has evolved. Enlightened originalism instructs that fidelity to original meaning does not require us to defer to the flawed moral views of people long since dead, but rather to bring to bear our own moral judgment to determine, as best we can, the objective meaning of the Constitution's core moral terms.

In its recent landmark decision *Obergefell v. Hodges*, the Supreme Court declared that prohibitions on same-sex marriage violate the Equal Protection Clause and Due Process Clause of the U.S. Constitution. According to the prevailing scholarly and judicial wisdom, the Court's opinion is the epitome of the "living constitutionalism" approach to constitutional interpretation. In this Article, I argue that Justice Kennedy's methodology is better understood as an example of enlightened originalism and demonstrates the effectiveness of enlightened originalism as a theory of constitutional interpretation.

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I. INTRODUCTION

This Article presents a novel and unique theory of constitutional interpretation. I call this theory "enlightened originalism." Enlightened originalism is the view that the Constitution employs moral terms—such as "equal protection" and "cruel and unusual"—whose meaning is both unchanging and independent of the way in which a given linguistic community uses the terms. Because the meaning of these terms has not changed since the terms were originally adopted, contemporary constitutional actors should follow the original meaning of these terms—the terms mean now what they meant then, and vice-versa.

This does not mean, however, that contemporary constitutional actors should follow the meaning ascribed to these terms by the people who adopted them: I argue that the meaning of terms such as "equal protection" is not delineated by the intended meaning or expected application of the drafters or ratifiers of the Fourteenth Amendment. I argue that the phrase "equal protection" invokes the concept of *equality*, and that equality has a set meaning that is not determined by what any group of people *think* it means. Therefore, it is possible that a majority of people at any given time—even an entire generation of people—could simply be wrong about the meaning of equality. Indeed, I argue that people in the 18th and 19th century were wrong in their beliefs about equality and cruelty. In my view, it is not that equality and cruelty mean something different now than they did in the past; rather, their meaning has remained constant but we have become more *enlightened* in our understanding of what equality and cruelty mean, and have always meant.

In the broadest of brushstrokes, then, enlightened originalism is the idea that the meaning of constitutional terms has not changed as society's values have evolved. The meaning of the Constitution's moral terms have remained constant, but our *understanding* of the meaning has evolved—has, for the main part, improved. As a general matter, we have become more *enlightened* about the requirements of moral concepts such as equality (and, similarly, other concepts such as liberty and excessive punishment). Equality doesn't mean something

different now than it did in 1868; rather, we now have a better, more sophisticated understanding of the requirements of equality than we did in 1868.

As the name suggests, this new theory of enlightened originalism is, in a sense, a version of originalism—but only in a sense. It's originalism, but not as we know it. Enlightened originalism shares the following, important trait with existing theories of originalism: According to enlightened originalism, the current legal meaning of some terms in the U.S. Constitution—specifically, moral terms such as equal protection and cruel and unusual punishment—is equivalent to the meaning these terms had at the time the terms were adopted. The Eighth Amendment's Cruel and Unusual Punishment Clause means now what it did in 1791; the Equal Protection Clause of the Fourteenth Amendment has the same meaning today as it did in 1868.

In other respects, however, enlightened originalism aligns more closely with non-originalist theories of constitutional interpretation, with interpretive theories that posit a "living" or "evolving" constitution. According to enlightened originalism, while the *meaning* of (some) constitutional terms has not changed since they were adopted, our *understanding* of their meaning has changed. We have, as a society, become on the whole more *enlightened* about the true meaning of equality and cruel punishment, for example. We now recognize that what many people once believed about equality—that it did not require them to extend equal rights to African-Americans, or women, or gay people—was wrong. Prior generations did not employ a different meaning of equality; they were wrong in their beliefs about what equality meant. Similarly, we now recognize that people in the past were wrong in their belief that the death penalty was an appropriate punishment for young children and for relatively minor offenses. Again, it's not that the meaning of cruelty, or proportionality between a crime and its punishment, has changed. Rather, our *understanding* of what counts as cruel has changed—has become, on the whole, more enlightened. These beliefs about equality and cruelty were just as wrong when they were widely shared—such as when the Bill of Rights and the Civil War Amendments were adopted—as they are today, when significantly more of us recognize the views as wrong.

Because enlightened originalism takes into account evolving social standards in our understanding, and therefore application, of the Constitution's moral terms, enlightened originalism resolves constitutional controversies in a manner

more in line with living or justice-seeking[2] constitutionalism than with the various, already familiar flavors of originalism. Enlightened originalism is a progressive theory of constitutional interpretation. To the extent that the originalism/non-originalism divide in constitutional interpretive theory tracks the conservative/liberal political divide, enlightened originalism falls squarely to the left of center. Proponents of other originalist theories (with some exceptions, such as Jack Balkin[3]) are therefore likely to find enlightened originalism unpalatable, and therefore reject it. Nor would this be their only ground of disagreement: I differ sharply from other originalists in my rationale for why the original meaning of some constitutional terms is still applicable today: other originalists argue that meaning is determined by reference to the intentions or understanding of some original community of authors or audiences, whereas my central argument is that the meaning of these terms is independent from the intentions or understandings of any particular community.

On the other hand, enlightened originalism will, I believe, appeal to non-originalists in the judiciary and academy. Indeed, I shall argue that enlightened originalism matches the moral intuitions and constitutional commitments of progressive legal theorists better than the non-originalist interpretive approaches proposed up till now. Take, as an evocative and illuminating example, the Supreme Court's recent landmark decision on marriage equality, *Obergefell v. Hodges*.[4] The *Obergefell* Court held that prohibitions on same-sex marriage violate the Equal Protection Clause and the Due Process Clause of the U.S. Constitution.[5] Writing for the Court, Justice Kennedy declared:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.[6]

While the conventional view treats this as an example of living constitutionalism, it is better understood as exemplifying

2. *See, e.g.*, LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES (2004).
3. *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM (2011).
4. 135 S. Ct. 2584 (2015).
5. *Id.* at 2604–05.
6. *Id.* at 2598.

the attitude of enlightened originalism. Justice Kennedy is not declaring that the meaning of liberty has changed; instead he argues that we have achieved new insight into the meaning of liberty—we have learned more about the meaning of liberty since the generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment.[7]

Similarly, the Supreme Court's view that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" is conventionally viewed as the epitome of living constitutionalism.[8] However, it can also be understood—indeed, ought to be understood—as another example of enlightened originalism. Consider, for instance, Chief Justice Burger's dissenting opinion in *Furman v. Georgia*:

> For reasons unrelated to any change in intrinsic cruelty, the Eighth Amendment prohibition cannot fairly be limited to those punishments thought excessively cruel and barbarous at the time of the adoption of the Eighth Amendment. A punishment is inordinately cruel, in the sense we must deal with it in these cases, chiefly as perceived by the society so characterizing it. The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.[9]

Like Justice Kennedy in *Obergefell*, Chief Justice Burger argues that cruelty has intrinsic meaning, such that the standard of cruelty remains the same, but our understanding or beliefs about what qualifies as cruel change as society's basic moral views change. His position, in other words, is one of enlightened originalism.

This Article has the following structure. In Part II of the Article, I set out my theory of enlightened originalism as a method of constitutional interpretation. The Part begins with a general description of enlightened originalism intended to indicate the intuitive appeal and plausibility of the approach. I then provide a more detailed and theoretical description and defense of enlightened originalism. Since my theory focuses on the moral *concepts* that are incorporated into the Constitution, such as equality, liberty, and proportional punishment, this Part

7. *Compare* Trop v. Dulles, 356 U.S. 86, 100–01 (1958), *with Obergefell*, 135 S. Ct. at 2598 (both Courts reasoning that constitutional protection of individual liberty is an evolving standard).

8. *Trop*, 356 U.S. at 101.

9. 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting).

discusses the meaning of concepts. I then define and explicate the twin pillars upon which my theory primarily rests: the Moral Right Answer Thesis and the Moral Incorporation Thesis. The first thesis posits that there is a moral fact-of-the-matter to matters of morality (including matters of political justice, including equality): moral questions have right answers that are independent of what people believe the right answer to be. In the nomenclature of moral philosophy, I am therefore a "realist," or "objectivist" about morality.[10] The second thesis is the claim that some moral concepts, primarily equality, have been incorporated into the U.S. Constitution. The central idea of enlightened originalism—that the meaning of, for instance, equal protection has remained constant over time and is independent of what the framers, or ratifiers, or we, believe the meaning to be—follows from these two premises. If the moral concept of equality has objective meaning independent of what any group of people believe it to mean, and the moral concept of equality is incorporated into the Equal Protection Clause, then the meaning of the Equal Protection Clause has remained constant, and is independent of what the framers or ratifiers took it to mean, or how they expected it to apply.

Part III of the Article demonstrates the uniqueness of enlightened originalism. To do so, I sketch the landscape of the various other theories of originalism—what Mitch Berman refers to as "originalist logical space."[11] As this Part demonstrates, originalism comes in enough flavors to challenge Baskin Robbins.[12] I focus on contrasting the theory that is most similar to enlightened originalism, namely Jack Balkin's theory of "living originalism."[13] In Part III, I also distinguish enlightened originalism from several prominent theories of living

10. There is a voluminous, rich, and sophisticated literature on the objectivity of morality. The debate has many dimensions, with different conceptions of what it means for morality to be "objective." As Richard Joyce notes, "there is much confusion—perhaps a *hopeless* confusion—about how the terms of the debate should be drawn up." Richard Joyce, *Moral Anti-Realism*, STAN. ENCYCLOPEDIA PHIL., http://plato.stanford.edu /archives/sum2015/entries/moral-anti-realism/ [https://perma.cc/ST5Y-9JY4] (last updated Feb. 11, 2015). I do not attempt to dispel the confusion in this Article. For now, it is enough to say that the Moral Right Answer Thesis claims that (a) there are unique, right answers to moral questions and that these right answers are not fixed by what we believe those answers to be, and consequently (b) the meaning of moral concepts and terms is not fixed by how any community of people employ those terms. I discuss the relationship between Moral Right Answer Thesis and theories of moral objectivity in Part II.B.

11. Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 9 (2009).

12. *See, e.g.*, CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 26 (2001) ("Originalism comes in a bewildering variety of colors and flavors."); Berman, *supra* note 11, at 9–16 (arguing that "literally thousands of discrete theses can plausibly claim to be originalist").

13. *See generally* BALKIN, *supra* note 3.

constitutionalism, including Ronald Dworkin's "moral reading" of the Constitution,[14] Lawrence Sager's "justice-seeking account" of constitutional law,[15] and Justice Brennan's defense of living constitutionalism.[16] I then distinguish enlightened originalism from living constitutionalism, and highlight the advantages of the former over the latter.

Part IV consists of two examples of the application of enlightened originalism, the first relating to the Fourteenth Amendment and the second relating to the Eighth Amendment. Both these Amendments have been interpreted in ways that have traditionally been held up as classic representatives of living constitutionalism. I argue that both are better understood through the prism of enlightened originalism.

I first show that, contrary to the quickly-formed consensus that the Supreme Court's recent marriage equality landmark decision, *Obergefell v. Hodges*, is best understood not as "an ode to living constitutionalism"[17] but rather an application of enlightened originalism to the issue of same-sex marriage. I then contrast this enlightened originalist approach taken by the Court with the narrower, more anemic originalism employed by Justice Scalia in his *Obergefell* dissent, as well as in his accusation in an important recent Eighth Amendment case, *Glossip v. Gross*,[18] that a judge who employs moral reasoning "rejects the Enlightenment."[19]

Second, I show that the evolving standards of decency approach to interpreting the Cruel and Unusual Punishment Clause also demonstrates an enlightened originalist, rather than a living constitutionalist, approach. As the Court has pointed out several times, "[t]he standard itself remains the same,"[20] but advances in our understanding of the goals of punishment, the brain development of adolescents, and so on, mean that the set of punishments that we recognize to be cruel has evolved over time.

Finally, in Part V I argue that the living constitutionalist approach can be beneficially reconceptualized as enlightened

14. *See generally* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996).

15. *See generally* SAGER, *supra* note 2.

16. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986).

17. Pema Levy, *Why Justice Kennedy's Gay Marriage Opinion Is a Bigger Liberal Victory Than You Think*, MOTHER JONES (June 26, 2015, 2:16 PM), http://www.motherjones.com/politics/2015/06/justice-kennedy-gay-marriage-opinion-bigger-liberal-victory-than-you-think [https://perma.cc/EYB6-NZ9H] (quoting UCLA law professor Adam Winkler).

18. 135 S. Ct. 2726 (2015).

19. Glossip v. Gross, 135 S. Ct. 2726, 2750 (2015) (Scalia, J., concurring).

20. Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting).

originalism. As *Obergefell v Hodges* powerfully demonstrates, such a reconceptualization would achieve the same purposes of living constitutionalism—primarily allowing constitutional law to take account of moral and social progress—while maintaining a stronger connection to the Constitution's text, and to the notion of a binding written constitution, than the metaphor of a living, organic document.

II. THE THEORY OF ENLIGHTENED ORIGINALISM

A. A Sketch of Enlightened Originalism

The core idea underlying enlightened originalism is that the meaning of moral concepts is objective, in the sense that their meaning is not fixed or determined by people's beliefs about them.[21] People can be wrong about the meaning of moral concepts such as equality, liberty, and proportional punishment. When there is a difference of opinion about whether certain actions or institutions satisfy these concepts, we do not generally consider this as an indication that there are different, equally valid meanings at play. We treat these disagreements as disputes in which the parties each see themselves as invoking the true meaning of the concept, and see their interlocutors as being mistaken about the real meaning. This is especially true of intergenerational disagreement. When we look back on past generations whose moral attitudes accepted social institutions we now consider immoral, we do not generally treat this as indicating that the meaning of moral terms and concepts has changed or evolved. Rather, we consider these situations to be examples of past generations being wrong about the meaning of moral terms and concepts.

This characterization of intergenerational disputes applies when people in past generations expressly invoked moral terms such as "equality" and "liberty." When we apply these terms differently, we do not consider that to evince a change in the meaning of equality or liberty. We treat that as the consequence of becoming more enlightened about the objective "real" meaning

21. As I explain in detail in Part II.B, I am using "objective" in the sense it is used in the philosophical arguments about moral realism. That is, moral terms are objective in that there is a fact-of-the-matter about the meaning of these terms—moral values are, at least on some objectivist view, "objective realities." Philip Pettit, *Embracing Objectivity in Ethics*, *in* OBJECTIVITY IN LAW AND MORALS 234, 242 (Brian Leiter ed., 2001). I am not using "objective" in the sense it is often used in the literature on originalist theories, where the term "objective meaning" refers to "the meaning reasonably suggested by the words of the Constitution, as used in context at the time that they were adopted." To avoid confusion, I refer to this below as the "original public meaning" of the Constitution's text.

of equality or liberty. And so when those moral concepts are incorporated into the text of the Constitution, we are in fact retaining the original meaning of those concepts when we interpret them in light of new insights as to their meaning and application. The meaning of the terms has not changed; our understanding of that meaning has changed, and hopefully progressed. Fidelity to the original meaning of the Constitution therefore does not require that we acquiesce to the framers and ratifiers' misguided beliefs about terms such as equal protection and liberty.

To evoke this idea, consider the Declaration of Independence, and its declaration that, "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."[22] The signatories to the Declaration included slave owners. The signatories also believed that women did not have the right to vote. Today, we would not take seriously any claim that equality and liberty, properly understood, are consistent with slavery. Moreover, we would not say (at least, I would not say, and my intuition is that others would not say) that the meaning of equality and liberty has changed since 1776. We do not tend to say, "Well, in 1776, only property-owning white men deserved equal treatment. It is only in more modern times, now that the meaning of equality has changed, that African Americans and women can make a legitimate claim to equal treatment." We instead treat equality, for example, as having constant meaning, and justly criticize the framers, despite their genius on some matters, for their hypocrisy, their short-sightedness, or for being captives of their times. In other words, we say that the framers were wrong. They were wrong about the very concept they proclaimed, and they applied it incorrectly. They invoked the same concept of equality that we invoke today. But they didn't fully appreciate the meaning and proper application of the concept they were espousing.[23]

22. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

23. Similarly, humility requires us to concede that we will also prove to be flawed, to be wrong, in our understanding of equality and other moral concepts. It is inevitable that future generations will look back on some of our views and shake their heads in the same bewilderment as we do with past generations. Maybe they will be shocked that we didn't give animals equal moral consideration. Maybe they will consider current wealth disparities with the scorn we have for apartheid. Perhaps it will be something else entirely. But no doubt, there will be some things—many things—that will perplex future generations. But as I will explain below, humility about the limits of our own understanding of moral concepts does not mean we must accept all views as equally valid. Nor does it preclude us from engaging our own normative judgment. It is perfectly

A similar story can be told about proportional punishment, the core concept in the Eighth Amendment's Cruel and Unusual Punishment Clause.[24] As many commentators have pointed out, at the time the Eighth Amendment was ratified, public lashings and branding the hands of thieves were considered appropriate.[25] It does not make sense to me to say that, at the time, such punishments were not in fact disproportionate, were not in fact cruel. It does make sense to say that the framing generation *believed* such punishments to be proportional. But the obvious resolution, it seems to me, is to simply say the framing generation was *wrong*. They didn't fully understand what levels and kinds of punishment were appropriate, and what constituted unjustified cruelty. Applying this understanding of the moral concept to interpreting the concept as incorporated into the Constitution, I argue that we should consider public lashings and branding hands as violating the Eighth Amendment's original meaning (as contrasted with the original understanding of the Eighth Amendment).[26]

As goes the Declaration of Independence and the Eighth Amendment, so goes the Equal Protection Clause of the Constitution. Equal protection means something—it meant something then, and it means the same something now. Louis Seidman provides a useful, straightforward definition of what equal protection means: "The Equal Protection Clause requires that likes be treated alike, but when two things are not alike, it violates rather than vindicates equality to treat them in the same way."[27]

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reasonable, and rational, to prefer our own moral judgments to those of an earlier generation—especially when we have experienced the fraught consequences of those earlier judgments—while recognizing that our moral conclusions are defeasible, and that future generations of constitutional actors will determine the meaning of the Constitution's moral terms by employing their own moral reasoning faculties.

24. Graham v. Florida, 560 U.S. 48, 59 (2010) ("The concept of proportionality is central to the Eighth Amendment.").

25. *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

26. These are the very examples of excessive punishment that make even Justice Scalia's originalism faint of heart. Justice Scalia concedes,

> Even if it could be demonstrated unequivocally that [public lashing or branding of the right hand] were not cruel and unusual measures in 1791, and even though no prior Supreme Court decision has specifically disapproved them, I doubt whether any federal judge—even among the many who consider themselves originalists—would sustain them against an eighth amendment challenge.

Id. Enlightened originalism accounts for these examples better than faint-hearted originalism—not as exceptions to the general rule that we are bound by the original meaning, but as clear examples that the framing generation didn't fully appreciate the meaning of the concepts they enshrined in the Constitution.

27. Louis Michael Seidman, *The Triumph of Gay Marriage and the Failure of Constitutional Law*, 2015 SUP. CT. REV. 115, 127.

It may well be that the people who ratified the Fourteenth Amendment did not believe (or would not have believed, had they turned their mind to it) that equal protection of the law required allowing homosexual couples the same access to the institution of marriage as their heterosexual counterparts.[28] But—at least for those of us who believe equal protection requires allowing same-sex marriage—the most appropriate response is to declare that the ratifiers were wrong about what equal protection means, and what equal protection requires of a legal system. To invoke Seidman's definition, we should say that we now recognize that same-sex marriage and different-sex marriage are alike in all relevant respects—that prior generations were wrong to believe that the spouses' sex was morally relevant in the context of marriage—and therefore that failing to treat the two as alike violated equality.

To some extent, enlightened originalism defuses the disagreement between originalists and non-originalists.[29] The disagreement, as Judge Sutton correctly points out, is premised on change—change in the meaning of the relevant constitutional terms.[30] The conflict arises in situations where, but-for being constrained by the original meaning, we would allocate to the constitutional terms meanings that are different from their original meanings. I argue that there is no such change in meaning. There is change, certainly, but the change is in our understanding of the (constant) meaning. We have become more *enlightened* (on the whole) about the moral concepts embodied in the Constitution's text. We have become more enlightened about the meaning of equality, and proportional punishment, and so on, and that enlightenment, that greater understanding, informs our application of the text's meaning, a meaning the text has had since the beginning—even if the framers didn't realize it. The

28. While this is an argument for the claim that prohibiting same-sex marriage violates the Fourteenth Amendment as it was originally understood, its rationale is different to that advanced in support of the same proposition by Steven Calabresi and Hannah Begley. *See* Steven G. Calabresi & Hannah Begley, *Originalism and Same Sex Marriage* 70 U. MIAMI L. REV. 648 (2016) (arguing that "newspaper accounts, public speeches, and contemporary discussions of the Amendment" demonstrate that the Fourteenth Amendment, on its original meaning, banned "systems of caste—and class-based discrimination").

29. In this way, enlightened originalism plays a similar role to Jack Balkin's theory of "living originalism." *See, e.g.*, BALKIN, *supra* note 3, at 3 ("[Living originalism's] method of text and principle is both originalist and living constitutionalist. It is faithful to the original meaning of the constitutional text and to its underlying purposes. It is also consistent with a basic law whose reach and application evolve over time . . . ."). I address living originalism, and describe the differences between living originalism and enlightened originalism, in Part III.C below.

30. DeBoer v. Snyder, 772 F.3d 388, 395–96 (6th Cir. 2014).

results of applying enlightened originalism to particular constitutional questions, such as same-sex marriage, will therefore track closely with various versions of living constitutionalism. Indeed, I suggest that enlightened originalism more accurately captures the attitudes of many living constitutionalists than the notion that the meaning of the Constitution has changed. (I speculate that most living constitutionalists would have applauded a decision of the Supreme Court in 1870 requiring states to allow same-sex marriage, had the Court been sufficiently enlightened to do so.)

The "enlightened" in enlightened originalism is doubly appropriate since the methodology also reflects the spirit of the Enlightenment period and Enlightenment thought. Immanuel Kant defined enlightenment as escape from the "inability to make use of [one's] understanding without direction from another."[31] According to the Stanford Encyclopedia of Philosophy, "Enlightenment is the process of undertaking to think for oneself, to employ and rely on one's own intellectual capacities in determining what to believe and how to act."[32] Enlightened originalism takes this approach to the meaning of the Constitution's moral concepts. Enlightened originalism denies that the moral beliefs of the framers and ratifiers are authoritative and definitive when it comes to the meaning of the Constitution's moral concept, and in so doing accords with the Enlightenment's "hostility toward other forms or carriers of authority (such as tradition, superstition, prejudice, myth and miracles), insofar as these are seen to compete with the authority of reason."[33] Enlightened originalism rejects the notion that the traditional understanding of equal protection, among other constitutional concepts, trumps the meaning that we come to by employing normative reasoning. Enlightened originalism is also consistent with Thomas Jefferson's understanding of an enlightened approach to law and social change:

> I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times.

31. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT? 85 (Lewis White Beck trans., Bobbs-Merrill 1959) (1785).

32. William Bristow, *Enlightenment*, STAN. ENCYCLOPEDIA PHIL. (Aug. 20, 2010), http://plato.stanford.edu/archives/sum2011/entries/enlightenment/.

33. *Id.*

> We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.[34]

At the same time, the enlightened originalist methodology is both textualist and genuinely originalist in its insistence that while our understanding of the meaning of these concepts has progressed, the concepts have retained their original, objective meaning.

A mere three days after *Obergefell* was handed down the Supreme Court also decided *Glossip v. Gross*,[35] which upheld the use of new lethal injection drugs. In his concurring opinion, Justice Scalia declares that the dissenting Justice Breyer "rejects the Enlightenment" by "arrogating to himself" the power to decide whether a punishment is cruel and unusual.[36] But this actually shows that Justice Scalia misunderstands the Enlightenment and its lesson for constitutional interpretation. The lesson of the Enlightenment was precisely that we *should* think and decide for ourselves.[37] Yet in both *Obergefell* and *Glossip*, Justice Scalia mocks the audacity of judges using their own "reasoned judgment."[38] He describes as "hubris"[39] the notion that today's justices might think for themselves rather than defer to the framers and the other revered moral and legal minds of the past.[40]

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34. Inscription on Panel Four of the Jefferson Memorial. *See Quotations on the Jefferson Memorial*, MONTICELLO, http://www.monticello.org/site/jefferson/quotations-jefferson-memorial#_note-9 [https://perma.cc/6UHQ-JSCR] (last visited Feb. 1, 2017). The passage is taken from a Letter from Thomas Jefferson to H. Tompkinson (Samuel Kercheval), (July 12, 1816), *reprinted in* X THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 1816–1826, at 42–43 (Paul Leicester Ford ed., 1899).

35. 135 S. Ct. 2726, 2731 (2015).

36. *Id.* at 2750 (Scalia, J, concurring).

37. Bristow, *supra* note 32.

38. Obergefell v. Hodges, 135 S. Ct. 2584, 2628 (2015) (Scalia, J., dissenting).

39. *Id.* at 2629. He also describes Justice Kennedy's approach in *Obergefell* as "egotistic" and "pretentious." *Id.* at 2630. It is egotistic and pretentious, according to Justice Scalia, for a judge to apply her own normative judgment to determine the meaning of concepts like equality and liberty, instead of bowing to the authority of past constitutional actors.

40. Justice Scalia caustically declares,

> The five Justices who compose today's majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriage in 2003. They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser minds—minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly—could not.

Id. at 2629 (citations omitted). Following this paean to his pantheon of American constitutional thought, Justice Scalia continues:

It is the narrow originalism championed by Justice Scalia, which demands that judges leave their own normative reasoning at the courtroom door and defer instead to the moral beliefs of a generation long dead, that requires contemporary judges to reject the Enlightenment. To find a judicial embodiment of Enlightenment—and what I call enlightened originalism—we in fact need look no further than *Obergefell*, which I discuss in detail in Part IV.A below.

B. Theoretical Foundations of Enlightened Originalism

1. Meaning and Concepts. Throughout this Article, I refer to the *concept* of equal protection, the *concept* of cruel and unusual punishment, and so on. I am not alone in describing these as concepts rather than (or in addition to) as words or terms. For example, the Supreme Court routinely refers to the concept of proportional punishment embodied in the Eighth Amendment.[41] Balkin similarly identifies the meaning of the concepts embodied in the constitutional text as the appropriate object of interpretation. After pointing out that "we use the word *meaning* to refer to at least five different kinds of things,"[42] Balkin writes:

> Fidelity to "original meaning" in constitutional interpretation refers only to the first of these types of

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> They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when that is called for by their "reasoned judgment." These Justices *know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every nation in history until 15 years ago, cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.

Id. at 2629–30 (citations omitted). In *Glossip v. Gross*, handed down three days after *Obergefell*, Justice Scalia is similarly derisive of justices presuming to employ their own normative faculties rather than defer to those Scalia takes to be takes to be moral authorities. In response to Justice Breyer questioning the constitutionality of capital punishment, Scalia suggests:

> With all due respect, whether the death penalty and life imprisonment constitute more-or-less equivalent retribution is a question far above the judiciary's pay grade. Perhaps Justice BREYER is more forgiving—or more *enlightened*—than those who, like Kant, believe that death is the only just punishment for taking a life. I would not presume to tell parents whose life has been forever altered by the brutal murder of a child that life imprisonment is punishment enough.

135 S. Ct. at 2748 (Scalia, J., concurring) (emphasis added).

41. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 59 (2010) ("The concept of proportionality is central to the Eighth Amendment.").

42. BALKIN, *supra* note 3, at 12.

> meaning: the semantic content of the words in the clause. . . . To be faithful to original meaning in the sense I am concerned with, we need to know the concepts that the words in the equal protection clause referred to when the clause was originally enacted.[43]

It is therefore worthwhile to be a little more explicit about what we mean by a "concept," and how we determine what concept is picked out by a word or phrase. Theories of constitutional interpretation have been somewhat lacking in precision on this point. In an earlier work,[44] however, I found philosopher Frank Jackson's approach to conceptual analysis[45] provided a useful framework for understanding concepts and their connection to language. Jackson describes a "concept" as referring to "the possible situations covered by the *words* we use to ask our questions."[46] The concept of X is the set of all possible situations $x_1, \ldots, x_n$ covered by the term "X." The concept of *whale*, for example, is the set of all possible situations that can be correctly referred to by the term "whale." Similarly, the concept of equality is the set of all possible situations that can be correctly referred to by the term "equality."

But a concept is different from a word. A single word may be used to refer to multiple different concepts. Since we're discussing same-sex marriage, I will use the word "gay" to illustrate this point. The word "gay" can be used to refer to a cheerful frame of mind, on the one hand, or a sexual orientation, on the other. And while the same word is used, it would seem appropriate to differentiate these usages as applying to distinct concepts. It also seems plausible that when a word is used in the constitutional text, it embodies a single concept or usage of that term, rather than any usage that the word allows. (Hence if there was to be a (misguided) textual constitutional ban on "gay marriage," it could not reasonably be interpreted as prohibiting cheerful heterosexual marriages.) So it makes sense to treat the Equal Protection Clause as embodying the concept of equal protection, and not just as using the words "equal protection."

We can distinguish between these different usages by making explicit an idea that is implicit whenever we treat a term as embodying a concept, namely the implicit claim of coherence. That is, when we talk of a concept, we talk of a set of instances to

43. *Id.* at 13.

44. Ian P. Farrell, *H.L.A. Hart and the Methodology of Jurisprudence*, 84 TEX. L. REV. 983 (2006).

45. FRANK JACKSON, FROM METAPHYSICS TO ETHICS: A DEFENCE OF CONCEPTUAL ANALYSIS (1998).

46. *Id.* at 33.

which a term applies that are related in some way. As I explained in a previous article,

> When we take "*X*" to denote a concept *X*, we implicitly claim that there is a set of possible situations that constitute the concept that is *coherent* or structured in some way: that is, the members $x_1, \ldots, x_n$ of the set are related to each other in some deeper way than simply bearing the same label "*X*." We imply that some *sense* can be made of this set, that there is some degree of internal structure by which the particular instances are related. The most obvious relationship would be that the members $x_1, \ldots, x_n$ share a common property or set of properties by virtue of which each x_i is an *X*.[47]

For example, the set of all whales are related in that they share various properties—being warm-blooded, utilizing oxygen via lungs, and so on—that are not shared by fish. Conversely, examples of the emotion-usage of "gay" are not related to the sexual orientation-usage of "gay" in any deeper way than simply bearing the same label "gay." I will return to this in more detail below, in my argument for why enlightened originalism is preferable to (or a useful reframing of) living constitutionalism.[48]

We can also think of two different types of concepts: what Jackson refers to as "folk" concepts and "explicit" concepts.[49] Folk concepts "are by definition delineated by the situations to which 'we'—the ordinary folk—take the word to refer."[50] Most words embody folk concepts: their meaning is defined by their usage. It is for this reason that dictionaries are compilations of usage.[51] As new terms are created, they are added to the dictionary. As existing words take on new usage, once that new usage reaches a critical mass, the dictionary definition is amended to include the new usage. And once that critical mass of competent speakers who use the word to refer to a new situation is reached, the usage

47. Farrell, *supra* note 44, at 997.

48. In short, enlightened originalism allows us to treat the current meaning of constitutional terms as involving the same concept as was originally enacted, whereas living constitutionalism treats the words of the constitutional as text having multiple meanings—an old concept and a new concept that just happen to be referred to using the same term. Enlightened originalism therefore retains a deeper tie to the text as ratified, and hence greater legitimacy as an interpretive theory, while still taking into account progress in social and moral understanding.

49. Robert Cummins, *Reflection on Reflective Equilibrium*, *in* RETHINKING INTUITION: THE PSYCHOLOGY OF INTUITION AND ITS ROLE IN PHILOSOPHICAL ENQUIRY 113, 121 (Michael R. DePaul & William Ramsey eds., 1998); *see also* JACKSON, *supra* note 45, at 32.

50. Cummins, *supra* note 49, at 121; Farrell, *supra* note 44, at 997.

51. *See* JACKSON, *supra* note 45, at 32 n.4 ("[F]olk conceptions should be thought of as amalgams of individual conceptions.").

is considered correct (albeit new) rather than incorrect or deviant. The meaning of a word (and the concept it entails) changes with its usage by competent speakers of the language.

We can make sense of many of the points of disagreement in constitutional interpretation by realizing that most theorists[52] treat constitutional concepts as folk concepts, the meaning of which is determined by the situations to which the folk use the relevant words to refer. Disagreement among originalists, and between originalists and some living constitutionalists, is disagreement about which "folk" have priority in determining the concept's meaning, as well as disagreement about how we determine what the appropriate "folk" referred to by the relevant terms. Framers' intent originalists treat the framers as the folk whose intended usage sets the meaning of the concepts embodied in the constitutional text. Other originalists take the ratifiers as the semantically authoritative folk, while original public meaning originalists treat American English-speakers at the time of ratification as the folk whose usage determines the meaning of the Constitution's terms. Many living constitutionalists, by contrast, can be understood as defining the (current) meaning of the Constitution's text by reference to the usage of the term by contemporary folk.[53] As the usage of terms have changed, so too has the meaning of the Constitution's terms. On this view, just as language and norms evolve, so too does the Constitution's meaning—hence the metaphor of the Constitution as a "living" document.

The analysis of "folk" concepts is controversial in philosophy, including moral philosophy and analytical jurisprudence. Philosophers have expressed (justified) skepticism about how the way we use language can illuminate anything about the nature of the world.[54] Of course, this critique does not apply when we analyze folk concepts in order to determine the meaning of the words used to denote folks concepts—in, say, a constitution—since the meaning of folk concepts is fixed by the way we use the associated words. But as I explain below, I do not consider terms such as "equal protection" to denote folk concepts, but rather "explicit concepts."

In contrast to folk concepts, "explicit concepts" are those that are not delineated by the situations to which the ordinary folk take the word to refer. To use the language of constitutional

52. There are notable exceptions, including Ronald Dworkin. *See* Part III.C *infra*.

53. DAVID A. STRAUSS, THE LIVING CONSTITUTION 31 (2010).

54. *See, e.g.*, BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 183–99 (2007); Farrell, *supra* note 44, at 1000.

interpretation, explicit concepts are those whose meaning is not determined by the concrete intentions or expected applications of the people who use them, either at the time of ratification or currently. They are concepts about which we can say: The consensus of competent speakers of the language at a particular time was that the word X correctly applied to situation y, but they were wrong. We can say that there is a fact-of-the-matter about explicit concepts, independent of people's opinions or usage.

As an illustrative example, consider the set of explicit concepts that philosophers call "natural kind terms."[55] Natural kind terms "pick out natural properties that figure in the laws of the sciences."[56] The concepts embodied by natural kind terms as terms, or concepts, that are not defined by the beliefs of competent users of the relevant language. Two common examples used in the literature are "whale" and "gold." There was a time when everyone believed that whales were a type of fish, since they were both marine animals. If you had asked competent users of English in, say, the 18th century whether whales were fish, they would have replied in the affirmative. Today we consider whales not to be fish, for scientifically sensible reasons. Moreover, we don't generally say that the meaning of the term "whale"—or the term "fish"—has changed. Rather, it seems sensible for us to say that we now have a clearer understanding of how different animals, species, and so on, are related, and how they should be categorized in light of their various natural properties. It seems sensible, in other words, for us to say that when people used to think whales were fish, they were simply mistaken.

A similar argument is made with respect to "gold" and "fool's gold." Let's assume people once believed that iron pyrite—fool's gold—was a form of gold. We now know that it is not a form of gold; it consists of molecules with the elements iron and sulfur, and we categorize metals by their constitutive elements.[57] (Moreover, fool's gold does not exhibit the qualities that make gold valuable: malleability, for instance.) Just as we are willing to say that people were wrong when they believed whales were fish, we

55. Brian H. Bix, *Raz on Necessity*, 22 LAW & PHIL. 537, 540 (2003).

56. Brian Leiter, *Introduction* to OBJECTIVITY IN LAW AND MORALS 1, 10 n.8 (Brian Leiter ed., 2001); s*ee also* Alexander Bird & Emma Tobin, *Natural Kinds*, STAN. ENCYCLOPEDIA PHIL., http://plato.stanford.edu/archives/spr2015/entries/natural-kinds/ (last updated Jan. 27, 2015) ("To say that a kind is *natural* is to say that it corresponds to a grouping that reflects the structure of the natural world rather than the interests and actions of human beings.").

57. Indeed, chemical elements and compounds are quintessential examples of natural kinds. *See* Bird & Tobin, *supra* note 56 ("Chemistry provides what are taken by many to be the paradigm examples of kinds, the chemical elements, while chemical compounds, such as H_2O, are also natural kinds of stuff.").

also say that people were wrong to think of fool's gold as a type of gold. The meaning of "gold" hasn't changed. As a result of scientific progress—scientific enlightenment—we just understand that meaning better than we used to. There is a fact-of-the-matter about what truly counts as gold, and that is the case regardless of how competent users of the language employ the term.

I argue that we should think of moral terms such as "equality" or "equal protection" as similar to natural kind terms and scientific theories, in that their meaning does not change. We make sense of differences in usage between past and present by declaring past usage to be flawed. Let's call them "moral kind terms." Another way of putting this is to say that there are right answers to questions of morality. There is a "true" meaning of, say, equality—a "fact of the matter" about equality—that is independent of what the majority of competent users of the language believe at any given time.

This distinguishes my view from most theories of constitutional interpretation, both originalist and living constitutionalist. Most interpretive theories treat the words of the constitution like folk theories: their meaning is determined by reference to their usage—how they're understood—by people at a given time.[58] They just disagree about whose usage, which understanding, trumps for the purposes of constitutional law.[59] Original intent advocates argue that we owe fidelity to how the framers expected the text to apply, original public meaning proponents that we owe fidelity to the prevailing usage at the time the text was ratified, and living constitutionalists counter that *we folk* are entitled to apply our folk theory—that is, the current understanding and usage of the term.[60]

2. The Moral Right Answer Thesis. As I have already indicated, I posit that there is a right answer to questions of morality. That is, there is a fact-of-the-matter about whether something is morally permissible, whether people are being treated as equal, whether a situation or outcome is just, and so on. That is not to say that we know what this answer is: there may be a single right answer, but we are unaware of it, or mistaken about it. We may never know the right answer, and we may never be able to say with certainty that our belief about the answer to a moral question is free of cultural, personal or generational bias. We may have a different view about what the

58. STRAUSS, *supra* note 53, at 31.

59. *Id.* at 30.

60. Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 8–9 (2006).

right answer is, than people of past generations, or future generations, or different cultures.[61] And the right answer to a question of morality may be such-and-such even though there is a unanimous belief that the answer is so-and-so. The Moral Right Answer Thesis is essentially a statement about moral realism, the objectivity of morality, and a rejection of radical moral relativism and radical moral subjectivity.[62]

I shall not present a comprehensive argument for the truth of the Moral Right Answer Thesis in this Article.[63] Much has been written on both sides about this issue; the literature is sophisticated, complex, and insightful.[64] Many moral philosophers of note support the Moral Right Answer Thesis,[65]

61. That we do not know with certainty what the answer to a question is—that we perhaps cannot ever know with certainty—does preclude there being a right answer. To take a (literally) outlandish example, there either is or is not intelligent life outside our solar system. Whether we think this likely or unlikely, we simply don't know. We may never know. But that doesn't change the fact that there is fact-of-the-matter about whether there is extraterrestrial intelligence.

62. I say a rejection of "radical" moral subjectivity and relativism, to acknowledge that morality is certainly contextual and situational. The right thing to do in one context or situation may not be the right thing to do in a different context or situation. The right answer to questions of morality may take into account the cultural context of an action or situation, as well as particular attributes of the individuals involved.

63. I shall also remain agnostic, for the purposes of this Article, with respect to many questions associated with the debate about the objectivity of morality. For example, I shall not choose between a "naturalistic" conception of objectivity and a conception based on "susceptible to reasons." Similarly, I will not adjudicate between "internal" and "external" objectivity, and I will say little about the relationships between "semantic," "ontological" and "justificatory" objectivity. I shall address these theories in my future scholarship. But for enlightened originalism, it suffices simply to claim that the meaning of moral terms is independent of conventional usage in the manner I describe below.

64. *See generally* S. W. Blackburn, *Moral Realism*, *in* MORALITY AND MORAL REASONING 101 (John Casey ed., 1971); Richard N. Boyd, *How to Be a Moral Realist*, *in* ESSAYS ON MORAL REALISM 181–228 (Geoffrey Sayre-McCord ed., 1988); DAVID O. BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS (1989); DAVID ENOCH, TAKING MORALITY SERIOUSLY: A DEFENSE OF ROBUST REALISM (2011); STEPHEN FINLAY, CONFUSION OF TONGUES: A THEORY OF NORMATIVE LANGUAGE (2014); ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT (1990); JACKSON, *supra* note 45; J. L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG (1977); John McDowell, *Anti-Realism and the Epistemology of Understanding*, *in* MEANING AND UNDERSTANDING 225 (Herman Parret & Jacques Bouveresse eds., 1981); GEORGE EDWARD MOORE, PRINCIPIA ETHICA (reprt. 1965) (1903); 2 DEREK PARFIT, ON WHAT MATTERS (Samuel Scheffler ed., 2011); Pettit, *supra* note 21, at 234; T.M. SCANLON, BEING REALISTIC ABOUT REASONS (2014); RUSS SHAFER-LANDAU, MORAL REALISM: A DEFENCE (2003); BERNARD WILLIAMS, MORAL LUCK 101–13 (1981); Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996); Peter Railton, *Moral Realism*, 95 PHIL. REV. 163 (1986); Geoff Sayre-McCord, *Moral Realism*, STAN. ENCYCLOPEDIA PHIL., http://plato.stanford.edu/archives/spr2015/entries/moral-realism/ (last updated Feb. 3, 2015).

65. Those who defend moral realism include Boyd, *supra* note 64; BRINK, *supra* note 64; ENOCH, *supra* note 64; FINLAY, *supra* note 64; JACKSON, *supra* note 45; McDowell, *supra* note 64; PARFIT, *supra* note 64; Pettit, *supra* note 21; SHAFER-LANDAU, *supra* note 64; Dworkin, *supra* note 64; Railton, *supra* note 64.

and people generally treat questions of morality as having objectively true answers. Despite what many commentators would have us believe, radical moral relativism is not taking over the world, one liberal atheist professor at a time.[66] We do not say that slavery was morally permissible when the Constitution was adopted. We do not say that moral norms have changed in the intervening centuries, so that what was morally permissible is now morally prohibited. We say that slavery is morally reprehensible: it was reprehensible then and it is reprehensible now. We similarly decry Nazism, the treatment of married women as the property of their husbands, female genital mutilation, and countless other examples as morally impermissible regardless of whether the "folk" at a particular time or particular place believed them to be permissible. And we are correct to do so.

Some readers may disagree with me on this point. You may believe that there is no such thing as objective morality, that moral norms are determined by the attitudes of the relevant community, so that what is impermissible for one community is permissible for another. This is not my view, and, I suggest, it is not the view of most people. It is a view at odds with the way we normally employ moral judgments: we judge slave-owners, for example, as morally wrong rather than right in their time, and so on. The fact that most people's intuitions are that morality is objective, and the fact that we generally employ moral language in a manner that presumes the objectivity of morality, places the burden of persuasion on those who deny that morality is objective. As Geoff Sayre-McCord points out:

> [I]t is pretty clear that people do generally regard their moral claims, and the moral claims of others, as purporting

66. *See, e.g.*, Richard Cocks, *Students Are Moral Relativists: Problem and Solution*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Aug. 12, 2016), http://www.jamesgmartin.center/2016/08/students-moral-relativists-problem-solution/ [https://perma.cc/U6S6-X8S6] ("One thing I've learned in my years of teaching in the U.S. is that many young Americans are moral relativists. As students in elementary and secondary schools, they were taught that there is no moral fact of the matter. Thus, when people disagree about moral issues, their different perspectives are equally valid. It would be wrong to criticize anyone from another culture who sees things differently."); Jonathan Merritt, *The Death of Moral Relativism*, THE ATLANTIC (March 25, 2016), http://www.theatlantic.com/politics/archive/2016/03/the-death-of-moral-relativism/475221/ [https://perma.cc/JK7N-A7ZU] (asserting that moral relativism—the notion "that liberals had accepted a view that morality was culturally or historically defined"—has been "a conservative bogeyman since at least the Cold War"); *Moral Relativism & Abortion*, LIFE RESOURCES CHARITABLE TR., http://www.life.org.nz/abortion/abortionethicalkyissues/moral-relativism-abortion/ [https://perma.cc/VN68-XF2G] (last visited Feb. 1, 2017) ("Studies indicate 75% of American college professors currently teach that there is no such thing as right and wrong. Rather, they treat the questions of good and evil as relative to 'individual values and cultural diversity.'").

> to report facts, and to the extent they themselves sincerely advance such claims they seem to be regarding at least some such claims as actually true. The burden is on the anti-realists about morality to argue that that this involves a mistake of some sort.[67]

Since the Moral Right Answer Thesis accords with general usage and moral intuitions, and the burden is consequently on moral skeptics to refute the realist claim, I will proceed on the basis that there are, in fact, unique answers to questions of morality which are not fixed by what people believe those answers to be.[68] If you reject this position—if you are not convinced that slavery is objectively wrong, that slavery is objectively inconsistent with equality, and so on—we may as well politely part company now. Nothing that follows will be at all convincing to you.

I chose the phrase "Moral Right Answer Thesis" to intentionally echo Ronald Dworkin's Right Answer Thesis. The two theses are distinct but related. Dworkin's Right Answer Thesis states that there is a single right answer to every question of law, even in "hard cases."[69] Dworkin's thesis derives from a combination of his view about the relationship between law and justice, and his position that there is a single right answer about questions of justice, or morality.[70] That is, Dworkin claims that

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67. Sayre-McCord, *supra* note 64; *see also* Pettit, *supra* note 21, at 256 ("The fact that people practice ethical conversation suggests, if semantic objectivism is correct, that they succeed in finding something to talk about. If there were no such thing as ethical values and disvalues, then we would expect ordinary people to have tumbled to their unreality: the fact that they continue in discussion as if such values remained steadfastly available would certainly require special explanation. This means, then, that just as the onus on the issue of semantic objectivism lies squarely with those of an expressivist outlook, so the onus on the issue of ontological objectivism lies on the side of the eliminativists. Expressivists and eliminativists are alike in denying the ethical appearances: in holding that things in the ethical domain are not what they seem to be. It is up to them rather than their opponents, therefore, to say why they maintain their particular position.").

68. In fact, the notion that moral values were objective realities seemed so intuitively obvious that the position went unquestioned even in moral philosophy until surprisingly recently. *See* Pettit, *supra* note 21, at 241 ("It is a striking feature of moral philosophy that the possibility of being ontologically (as distinct from semantically) nonobjectivist about ethical discourse—the possibility of ethical eliminativism—has only recently been identified. But once the possibility is identified, it is clear that anyone who aspires to defend ethical objectivism must reject it. . . . Ethical objectivism, so I say, is bound to uphold not just semantic objectivism about ethical discourse but also ontological. It is bound to maintain that not only do ethical assessments posit values and disvalues, those properties are rightly posited: they are, as we say, objective realities." (citations omitted)). The first philosopher to suggest moral properties were not objective realities was John Mackie in MACKIE, *supra* note 64.

69. RONALD DWORKIN, A MATTER OF PRINCIPLE 119 (1985).

70. For an excellent summary of the relationship between Dworkin's theory of constitutional interpretation and his general jurisprudential commitments, see Michael

there are right answers to questions of law *because* there are right answers to questions of morality.[71] I share Dworkin's view that morality is objective[72] but not his position on the relationship between law and morality. I believe that there are right answers to questions of morality, and therefore right answers to *some legal questions*—namely, questions where the law has incorporated moral concepts—but not all legal questions.[73]

As there are right answers to the questions of morality, there are also correct and incorrect usages of moral concepts. The term "equality" embodies a moral concept, a concept of political justice. There is a fact-of-the-matter about whether a particular situation is consistent with equality, regardless of whether a given community believes the situation is consistent with equality. For example, many among the Founders believed in "equality"—that "all men are created equal"—yet defended and participated in an institution of race-based slavery.[74] These men apparently believed a society that endorsed slavery was among the situations to which the terms "equality" could be applied. But even assuming

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C. Dorf, *Truth, Justice, and the American Constitution*, 97 COLUM. L. REV. 133, 138 (1997) ("Morality is crucial to Dworkin's reading of the Constitution, but it is morality within the framework of law as integrity.").

71. Conversely, if there aren't right answers to questions of morality, then on Dworkin's conception of the nature of law, there will also not be right answers to questions of law. As Mackie put it:

> [W]hat the law is, on Professor Dworkin's view, may crucially depend on what is morally best—what is best, not what is conventionally regarded as best in that society. Now I would argue . . . that moral judgments of this kind have an irreducibly subjective element. If so, then Professor Dworkin's theory automatically injects a corresponding subjectivity into statements about what the law is.

John Mackie, *The Third Theory of Law*, 7 PHIL. & PUB. AFF. 3, 9 (1977).

72. I am not, however, endorsing Dworkin's "unusual" position on why and how morality is objective. Brian Leiter, *Objectivity, Morality, and Adjudication*, *in* OBJECTIVITY IN LAW AND MORALS, *supra* note 21, at 66. Leiter describes Dworkin's position on objectivity as follows:

> According to Dworkin, when we claim that there is an objective fact about whether one interpretation is better than another, or whether one principle is morally better than another, we are not making a claim *external* to the practice of substantive moral or interpretive argument in which these claims arise. "Slavery is objectively wrong" is simply a *moral* claim internal to the practice of argument in which we offer reasons for the proposition that "Slavery is wrong." Two thousand years of metaphysics notwithstanding, there simply are no *metaphysical* questions about value; there are only *evaluative* questions. To the extent that Protagoras, Plato, Hume, Nietzsche, G. E. Moore, A. J. Ayer, Charles Stephenson, John Mackie, Gilbert Harman, Richard Boyd, Peter Railton, Michael Smith, and Allan Gibbard thought they were answering questions of *meta*ethics, they are wrong.

Id. at 68.

73. I say more about how I differ from Dworkin in Part III.C below.

74. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 409–10 (1857).

arguendo that this was the consensus view at the time, we do not—and should not—react to this by saying that "equality" meant something different then than it does now. Instead we point to the inconsistency in Thomas Jefferson, for example, declaring the equality of all men to be a self-evident truth while owning slaves.[75] We take examples like this to demonstrate that the Founders did not fully appreciate the true meaning, the full ramifications, of the concepts they employed, the principles on which they fought a revolutionary war. Our attitude towards the concept of equality—that the Founders were wrong, rather than the meaning of equality has changed—is clearly and evocatively expressed by Martin Luther King's famous declaration that, "I have a dream that one day this nation will rise up, live out the *true meaning* of its creed: 'We hold these truths to be self-evident, that all men are created equal.'"[76] The word "equal" has a true meaning, independent of the beliefs or usage of any linguistic community, a meaning the Founders were not able to fully appreciate. To the extent that people currently apply terms like "equality" and "inequality" to different situations than the Founders, this is not evidence that the meaning has changed; rather, it demonstrates genuine (moral) disagreement, intergenerational disagreement about the true meaning of the concept of equality.

The same can be said of gender equality. The Founders, as well as the framers and ratifiers of the Civil War Amendments, considered a governmental system in which women were excluded from the franchise, as "equal." Most would have denied a claim that such a system should be described as "unequal." Were equality a folk concept, the usage of these terms by competent speakers of the language would be the end of the semantic story: the words would simply mean what competent speakers took them to mean. The meaning of the word "equal" would be determined by the situations to which competent speakers applied the word. Any disagreement between the

75. *See, e.g.*, HENRY WIENCEK, MASTER OF THE MOUNTAIN: THOMAS JEFFERSON AND HIS SLAVES 65 (2012) ("Laid end to end, his utterances present a rolling paradox of contradictions that inspire his detractors to call him a hypocrite, his defenders to call him compartmentalized, and baffled onlookers to call him 'human.'"); Jonathan Yardley, *"Master of the Mountain: Thomas Jefferson and His Slaves" by Henry Wiencek*, WASH. POST (Oct. 13, 2012), http://www.washingtonpost.com/opinion/master-of-the-mountain-thomas-jefferson-and-his-slaves-by-henry-wiencek/2012/10/13/33eee7ee-09c9-11e2-858a-5311df86ab04_story.html [https://perma.cc/UG9P-Q57E] (describing the biography as "Wiencek's brilliant examination of the dark side of the man who gave the world the most ringing declarations about human liberty, yet in his own life repeatedly violated the principles they expressed").

76. Martin Luther King, Jr., Speech at the March on Washington: I Have a Dream (Aug. 28, 1964), https://www.archives.gov/files/press/exhibits/dream-speech.pdf [https://perma.cc/V2VB-WHVS] (emphasis added).

Founders, framers, and ratifiers, and those of us now (hopefully all of us now!) who believe that a male-only franchise cannot be called "equal" would, if equality were a folk concept, merely reflect a change in the meaning of equality. But this is not the way we think of disagreements about equality.

3. The Moral Incorporation Thesis. As I discussed above, the Moral Right Answer Thesis rests on the claim that moral concepts are objective, in the sense that the meaning of moral concepts is not fixed by conventional usage. The Moral Incorporation Thesis connects this claim to the text of the federal Constitution. I claim that the U.S. Constitution has incorporated several moral concepts, including equality, liberty, and proportional punishment. The Fifth, Eighth, and Fourteenth Amendments include terms that are not merely broad and abstract, but also sound in morality and justice. By using such moral language, the Constitution invokes the related moral concepts. And since the meaning of moral concepts is not fixed by prevailing usage or expected application, with respect to the specific concept of equality, the meaning of these constitutional terms is likewise objective in this sense.

In this Article, I focus primarily on the concept of equality incorporated into the Constitution via the Equal Protection Clause of the Fourteenth Amendment, and the concept of cruel punishment incorporated into the Constitution via the Eighth Amendment. I focus on equality and cruel punishment for two reasons. First, there is a closer textual nexus between equality and equal protection, and between cruel punishment and the Eighth Amendment, than there is, for example, between liberty and fundamental rights, and the Due Process Clause. The second reason my analysis emphasizes (but is not limited to) equality is that, in my view, the strongest argument against prohibitions on same-sex marriage is that they violate the principle of moral equality incorporated into the Constitution via the Equal Protection Clause.

My argument for the Moral Incorporation Thesis is essentially textual. The text of the Constitution includes moral terms, and the meaning of a moral term simply *is* the meaning of the associated moral concept. Section One of the Fourteenth Amendment provides *inter alia* that "[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[77] Since the term "equal" in this content refers to equality in the moral sense (rather than the mathematical or numerical

77. U.S. CONST. amend. XIV, § 1.

sense[78]), the scope of "protection of the laws" mandated by the Equal Protection Clause is delineated by the meaning of the moral concept of equality. To require that people not be denied the equal protection of the law is to provide explicit legal protection to the moral concept that all persons are morally equal, should be treated as equals, and should be protected by the law as equals.

The abstract moral language of the Equal Protection Clause and other "liberty-bearing provisions"[79] of the Constitution stands in marked contrast to the concrete specific language employed in much of the Constitution's text. Many scholars have pointed out this linguistic difference. To take a relatively recent example, Jack Balkin notes:

> The text of our Constitution contains different kinds of language. It contains determinate rules (the president must be thirty-five, there are two houses of Congress). It contains standards (no "unreasonable searches and seizures," a right to a "speedy" trial). And it contains principles (no prohibitions of the free exercise of religion, no abridgements of the freedom of speech, no denials of equal protection).[80]

Balkin also points out that different kinds of language are used within the liberty-bearing provisions of the Constitution, including the Fourteenth Amendment:

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78. As I discussed above in Part II.B.1, the same word can sometimes refer to different concepts. "Equal" is such a word; it can also refer to, for example, mathematical equivalence. When a word can refer to multiple concepts, the appropriate concept is determined by the context in which the word is used. The context and surrounding text of the Equal Protection Clause precludes the mathematical meaning of "equal," in contrast to the use of the words "equal" and "equally" in other constitutional provisions, where the mathematical concept of equality is clearly invoked. *See, e.g.*, U.S. CONST. art. I, § 3 ("Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. . . . The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided."); *id.* art. II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . . [I]f there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President . . . . But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President."); *id.* art. V ("[N]o State, without its consent, shall be deprived of its equal suffrage in the Senate.").

79. SAGER, *supra* note 2, at 5 ("At least with regard to the liberty-bearing provisions of the Constitution, the popular constitutional decision-maker typically speaks at a high level of generality and moral abstraction."); *id.* at 35 ("The liberty-bearing provisions of the Constitution typically speak at a high level of generality . . . .").

80. BALKIN, *supra* note 3, at 6; *see also id.* at 25 ("Constitution makers from the American Constitution to the present day have also included rights guarantees that use the vague and abstract language of principles.").

> To see how these ideas about constitutional language work in practice, consider the different sections of the Fourteenth Amendment, sent to the states in 1866 and ratified in 1868. Section 1 of the amendment is the most familiar to us today: its first sentence offers a fairly clear and determinate rule for citizenship, which was added at the last minute. But most of section 1 is written in abstract and vague language that employs standards and principles. It speaks of "privileges or immunities of citizens of the United States," "due process of law," and "equal protection of the laws."
>
> . . . .
>
> With the glittering generalities of section 1 contrast the more rulebound and hardwired features of sections 2, 3, and 4. Section 2 finesses the problem of black suffrage in a compromise: states that denied black men the right to vote would have a proportionate share of their population uncounted for purposes of calculating representation in the House and in the Electoral College. Section 3 bars former rebels from holding federal and state offices unless Congress, "by a vote of two-thirds of each House, remove[s] such disability." Section 4 guarantees the validity of the debt of the Union and prohibits the government from paying off any of the debt of the Confederacy; it also extinguishes any property claims of former slaveholders.[81]

When interpreting this broad and abstract language, Balkin and other theorists have claimed, it is inappropriate to determine the meaning by reference to the concrete, particular intentions of the framers or ratifiers. According to Balkin:

> [W]here the text offers an abstract standard or principle, we must try to determine what principles underlie the text in order to build constructions that are consistent with it. . . . [T]he principles we derive from history must be at roughly the same level of abstraction as the text itself. The question is not what principles people specifically intended but what principles the text enacts. Indeed, the fact that adopters chose text that features general and abstract concepts is normally the best evidence that they sought to embody general and abstract principles of constitutional law, whose scope, in turn, will have to be worked out and implemented by later generations.[82]

81. *Id.* at 25–26 (citations omitted).

82. *Id.* at 14.

I agree with Balkin and other scholars[83] who assert that the meaning of general, abstract constitutional terms is not fixed by the specific intentions or expected applications of the framers or ratifiers. But I go one step further: the terms in question—such as "equal protection"—are not just general and abstract. They are *moral* terms. This distinction is crucial for how we understand the processes of constitutional interpretation and construction, and especially the relationship between original meaning and current meaning. For theorists such as Balkin, Strauss, and Sager, the abstraction and generality of the liberty-bearing provisions indicates that their original meaning was incomplete, was undetermined, such that the role of the contemporary constitutional actor is to "flesh out"[84] the meaning of the terms. Strauss asserts that because of the open-ended nature of the Constitution's broad terms "we are able to read our own content into them."[85] Balkin considers provisions such as the Equal Protection Clause as incorporating "principles," which he defines as "norms that, when relevant, are not conclusive but must be considered in reaching a decision."[86] Balkin also states that, "[i]n addition to being nonconclusive, many principles—like the guarantees of freedom of speech and the equal protection of the

83. The list of other scholars who have argued that the meaning of abstract constitutional terms is not fixed by the specific intentions or expected applications of the framers or ratifiers includes, but is not exhausted by: RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) (describing abstract and specific intent as concepts and conceptions respectively, and arguing that the constitutional interpreter should be guided by the framers' concepts rather than conceptions); SAGER, *supra* note 2, at 9 ("Constitutional judges are partners rather than agents, and are expected to do much of the heavy normative lifting in the course of bringing detail to the abstract generalities of the liberty-bearing portions of the Constitution."); STRAUSS, *supra* note 53, at 113 ("The drafters and ratifiers of the First Amendment may well have thought that blasphemy could be prohibited; the drafters and ratifiers of the Fourteenth Amendment thought that sex discrimination was acceptable. Had the amendments said those things, in terms that could not be escaped by subsequent interpreters, our Constitution would work less well today. But the text does not express those specific judgments. As a result . . . we are able to read our own content into them . . . ."); Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 320–24 (1992). Lawrence Lessig and Akhil Amar are two other broad originalists. *See* David O. Brink, *Legal Interpretation, Objectivity, and Morality*, *in* OBJECTIVITY IN LAW AND MORALS 12, 28 (Brian Leiter ed., 2001) ("[W]hen the language of the legal provision is abstract, this tends to show that the dominant intention was abstract."); James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785, 1792–93 (2013) ("[W]hat is broad about [Lessig, Amar, and Ackerman's] forms of originalism is that these theorists and historians conceive original understanding or original meaning (to which they argue fidelity is owed) at a considerably higher level of abstraction than do the narrow originalists like Bork and Scalia . . . ."); *id.* at 1789 ("[C]oncrete intentionalism is untenable as a theory of interpretation of our Constitution, which establishes a charter of abstract aspirational principles and ends and an outline of general powers, not a code of detailed rules.").

84. BALKIN, *supra* note 3, at 14.

85. STRAUSS, *supra* note 53, at 113.

86. BALKIN, *supra* note 3, at 349.

laws—are also vague or abstract: hence, it may take considerable practical reasoning to decide whether they apply to a given situation."[87]

Balkin therefore conceives of the Constitution as delegating the fleshing out of the terms' meanings to future constitutional actors. He argues that "constitutional framers and ratifiers very often use open-ended language that deliberately delegates questions of application to future interpreters."[88] Larry Sager similarly sees the Constitution's broad, open-ended language as delegating normative authority to future judges:

> The justice-seeking view values the active partnership of the constitutional judiciary on the grounds that judicial judgment guided broadly by the text of the Constitution will steer us reasonably well in the enterprise of bringing our political community better into conformity with fundamental requirements of political justice. On this view, judges are not confined to the role of taking instructions in some mechanical sense.[89]

I depart from these other scholars who focus on the abstract generalizations of constitutional terms in that I do not consider the meaning of these terms to require fleshing out. I do not consider moral terms such as "equal protection" to be incomplete, vague or open-ended. To the contrary, terms such as "equal protection" invoke and incorporate moral concepts which are complete at the time of enactment, but whose (complete) meaning was not fully appreciated at the time. It does take "considerable practical reasoning to decide whether they apply to a given situation," not because they are open-ended, but because that is the nature of the concepts they incorporate. Since moral concepts are not folk concepts, we do not determine the meaning and application of moral concepts by mechanically referring to the terms usage by, for instance, the framers and ratifiers. We apply normative reasoning to determine the meaning because we're interpreting normative concepts.

On this view, the framers of the Equal Protection Clause did not "leave open certain questions . . . to a later time."[90] They did not merely provide an unfinished "initial framework for governance that sets politics in motion and must be filled out over time."[91] Whether sex discrimination or sexuality discrimination violated the concept of equality incorporated by

87. *Id.*
88. *Id.* at 27.
89. SAGER, *supra* note 2, at 19.
90. BALKIN, *supra* note 3, at 25.
91. *Id.* at 21.

the Equal Protection Clause were not open questions at the time of incorporation. There were right answers to those questions in 1868; unfortunately the framers and ratifiers did not realize what these answers were. (Had constitutional actors in the latter half of the Nineteenth Century concluded that sex and sexuality discrimination violated equal protection, we would have applauded their moral insight; we would not have scolded them for foreclosing what should have been left open.) These objective answers existed at the time, but because they are not fixed by what the framers or ratifiers believed the answers to be, we retain the moral autonomy to determine, as best we can, the true meaning of the Constitution's moral terms, and consequently what the right answers are to these moral questions.

Among constitutional theorists who have written about the Constitution's abstract language, David Brink comes closest to arguing for the position I have described. Brink even makes use of natural kinds (or, as he calls them, scientific kinds) as an analogy to evoke the objective nature of moral concepts:

> [Legal interpretation] requires the interpreter to distinguish between the meaning of general terms in the law and conventional beliefs about their extension; she must make and defend commitments about the nature of the properties these terms pick out, commitments that may outstrip conventional wisdom about the extension of these terms. If legal rules refer to *scientific kinds* (as our environmental regulation refers to toxins), then the semantic constraint requires the interpreter to make substantive judgments about the nature of the kinds (toxins); she should make use of the best available theories about the kinds in question (toxins), which may well outstrip conventional wisdom about the extension of the kinds (conventional wisdom about which substances are toxic). Similarly, when legal provisions are formulated using general terms that are *normative*, the semantic constraint requires interpreters to make and defend substantive normative judgments about the extension of the normative terms.[92]

92. Brink, *supra* note 83, at 33 (emphasis added). Brink makes this point more specifically with respect to the Eighth Amendment:

> [T]he abstract language of the Eighth Amendment seems to be evidence for the priority of abstract intent. Though the framers' moral beliefs about punishment may have led them to expect a prohibition on cruel and unusual punishment to prohibit only certain specific forms of torture and capital punishment, the fact that they chose the general language of "cruel and unusual punishment" is evidence that their dominant intention was to prohibit punishments that *are in fact* morally outrageous or disproportionate, not just these specific forms of torture and capital punishment.

Id. at 27–28 (emphasis added).

Even Brink, however, appears to treat the meaning of Constitution's abstract moral terms as a work in progress. He refers to the provisions of the Bill of Rights and the Fourteenth Amendment as "open-ended," and warns us that "if we are to avoid the perils of pure textualism, language cannot be our only guide."[93] Brink appears to treat moral abstract language such as "equal protection" on the same footing as non-moral abstract language, such as "vehicles."[94] I consider these two examples to be fundamentally different. The concept *vehicle* is a folk concept and, as H. L. A. Hart points out, an excellent example of "open-textured" language.[95] The concept of *equality*, on the other hand, is a moral concept with a unique, fixed meaning that is independent of our conventional beliefs as to its meaning. The phrase "equal protection" is not open-textured; rather, our *beliefs* about its meaning, and application to specific situations, are fallible and defeasible.

4. The Declaration of Independence. The Declaration of Independence bolsters the claim that the Equal Protection Clause incorporates the moral concept of equality. The second paragraph of the Declaration of Independence declares that, "We hold these Truths to be self-evident, that all Men are created equal."[96] Most scholars accept that the Declaration of Independence has no independent constitutional force.[97] But some constitutional scholars do treat the Declaration of Independence as an appropriate guide for interpreting the text of the Constitution proper.[98] More specifically, Scott Gerber argues

93. *Id.* at 28. Brink elaborates by arguing that, "[t]o avoid the perils of textualist literalism, the semantic aspects of interpretation must be supplemented by construction of abstract corporate intentions of the provisions and decisions under interpretation." *Id.* at 33. On my view, determining the true meaning of moral concepts is a semantic task: the semantic meaning of a constitutional provision with moral language is fixed by the true meaning of the moral concept incorporated via that language.

94. *Id.* at 28 (addressing "Hart's municipal ordinance forbidding vehicles in the park" alongside the Constitution's liberty-bearing provisions).

95. H. L. A. HART, THE CONCEPT OF LAW 128–36 (2d ed. 1994).

96. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

97. *See, e.g.*, Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J.L. & PUB. POL'Y 489, 490, 507–08 (2004) ("What role ought the Declaration of Independence play in interpreting the Constitution? Average Americans would probably be surprised that the subject has received relatively little scholarly attention."); Alexander Tsesis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693, 694–95, 698 (2012) (noting that the Declaration of Independence is generally not regarded as a source of binding constitutional law, but arguing that despite having "no enforcement provisions, it nevertheless sets constitutional obligations to protect life, liberty, and the pursuit of happiness").

98. *See, e.g.*, JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 19 (2011) (arguing that ignoring the earlier document's ideals would be to make an "empty shell" of the Constitution); SCOTT DOUGLAS GERBER, TO SECURE

that the Equal Protection Clause of the Fourteenth Amendment, and, as applied to the federal government, the Fifth Amendment, "are the Constitution's vehicles through which the Declaration's concept of equality should be implemented."[99] Gerber also proposes that the Equal Protection Clause "was intended to embody the broad principles of equality and natural rights articulated in the Declaration of Independence."[100]

I agree with Gerber that the Equal Protection Clause embodies the Declaration's moral concept of equality, but I would put it slightly differently. The Declaration's description of equality as a self-evident truth reinforces my claim that the Founders considered moral equality to be a matter of objective truth. Since equality is self-evident, by definition it needs no justification; it goes without saying. We can think of the Declaration, then, as installing the concept of equality as an *axiom* of the American politico-legal system.[101] In mathematics, axioms are statements accepted as true without proof, and from whose truth all other results are derived. I suggest something similar in constitutional interpretation: the moral equality of all people is a self-evident truth, and text of the Constitution—and *a fortiori* provisions that use the language of equality—should be interpreted against the backdrop of this axiomatic commitment.[102]

THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 3 (1995) (arguing that the Declaration is "at the heart of the Constitution"); Sandefur, *supra* note 97, at 505 (arguing that the Constitution should be viewed through the lens of the Declaration of Independence); Dan Himmelfarb, Note, *The Constitutional Relevance of the Second Sentence of the Declaration of Independence*, 100 YALE L.J. 169, 170 (1990) (arguing that the Declaration "is fundamental to a proper understanding of the Constitution").

99. GERBER, *supra* note 98, at 169.

100. *Id.*

101. *Merriam-Webster* defines "axiom" as "1. a maxim widely accepted on its intrinsic merit; 2. a statement accepted as true as the basis for argument or inference; 3. an established rule or principle or a self-evident truth." *Axiom*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/axiom [https://perma.cc/V8FK-XHU3] (last visited Feb. 1, 2017).

102. Somewhat strangely, Justice Thomas relies on the Declaration of Independence in his *Obergefell* dissent to refute Justice Kennedy's reference to human dignity as supporting his conclusion that prohibiting same-sex marriage is unconstitutional. Thomas cites the Declaration as demonstrating that "[h]uman dignity has long been understood in this country to be innate." Obergefell v. Hodges, 135 S. Ct. 2584, 2639 (2015) (Thomas, J., dissenting). But Thomas then draws a perverse conclusion from this principle: "The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved." *Id.* at 2639 (Thomas, J., dissenting). This corollary completely misconstrues the relationship between law and human dignity. While allowing slavery does not "take away" innate dignity, in the sense Thomas means, it certainly violates this innate dignity. Allowing slavery treats those whom it allows to be slaves as though they do not have this dignity, and is to be condemned for precisely this

C. Summary

We are now in a position to summarize enlightened originalism as a method of constitutional interpretation. Enlightened originalism is the claim that those constitutional provisions that use moral language should be interpreted in light of the Moral Right Answer Thesis and the Moral Incorporation Thesis. According to the Moral Incorporation Thesis, constitutional provisions such as the Equal Protection Clause incorporate moral concepts, so that the meaning of a provision is determined by reference to the meaning of its associated moral concept. And according to the Moral Right Answer Thesis, the meaning of a moral concept is objective and unchanging, in that the concept's meaning is not determined by conventional usage or understanding among a given community, or at a given time. What appears to be, and is often taken as, a change in the meaning of equal protection, for instance (or an argument that the meaning of equal protection has changed) is really a change in *understanding* of the static meaning. We apply the Equal Protection Clause differently now than in 1868 not because the meaning of the Equal Protection Clause has changed—nor because we have fleshed out the incomplete original meaning. We apply the Equal Protection Clause differently now because we have changed our mind about what equality really means. We have, as a general matter, progressed in our moral understanding. We have obtained greater insight into what features are morally relevant to deciding whether two situations are alike, and must be treated alike to vindicate equal treatment. We have, in other words, become more *enlightened* about what it means to provide equal protection of the law.

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reason. As Louis Seidman points out, while there is a tradition of treating human dignity as pre-political natural law, "no one identified with that tradition, including presumably Justice Thomas, would claim that because government cannot deprive people of their intrinsic dignity, we should therefore defer to political decisions that are inconsistent with dignity." Seidman, *supra* note 27, at 120. Seidman concludes that:

> The more conventional understanding of the natural law tradition is that claims to dignity give courts a place to stand when they invalidate government decisions that are inconsistent with human dignity. And if courts should do this for slaves and internees, then why not for gay men and lesbians? Justice Thomas's invocation of natural law is therefore in tension with his own criticism of the majority for not deferring to positive law and the political process.

Id. at 120–21.

III. THE UNIQUENESS OF ENLIGHTENED ORIGINALISM

Now that I've given a detailed exposition of my theory of enlightened originalism, I shall argue that enlightened originalism is not just a novel lens through which to read the Court's decision in *Obergefell*, but is also a unique theory of constitutional interpretation. I do this by distinguishing enlightened originalism from other interpretive theories already postulated by judges and other scholars. The first step in that task is to describe those theories. For the sake of (some) clarity, I shall divide the terrain into originalism and living constitutionalism, and address each set of theories in turn.[103] I cannot, of course, describe every theory that falls on the spectrum encompassing various versions originalism and living constitutionalism. Instead, I shall describe the core features of each family of theories, as well as a number of representative examples.

A. Theories of Originalism

Originalism comes in many different forms, and is more accurately understood as a family of more-or-less related theories rather than a single, unified, coherent theory.[104] Many scholars have collated and categorized the various versions of originalism.[105] In the interests of up-to-dateness, I shall rely on James Fleming's very useful recent mapping of the terrain.[106]

We can start by distinguishing old originalism (the original originalism, perhaps) and new originalism. As Fleming describes, old originalism emerged in reaction to the Warren Court, championed by Robert Bork and Raoul Berger. Old originalism consists of the following principles:

> (1) The original meaning is determined by the "concrete intentions of the Framers or their original expected applications (as distinguished from their abstract intentions)";[107]

103. Given the Cambrian explosion of originalist theories in the last decade or two, it is now almost certainly true that there are larger differences among some versions of originalism than there are between some originalist and non-originalist theories. *See* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244 n.22 (2009) ("[T]he line that separates originalists from nonoriginalists itself is hazy at best."). There is some dispute about whether, for example, Ronald Dworkin's moral reading of the constitution counts as originalist or non-originalist; ditto Fleming's "Constitution-perfecting theory." *See* Fleming, *supra* note 83, at 1787.

104. Fleming, *supra* note 83, at 1789.

105. *See, e.g.*, Berman, *supra* note 11, at 8–9.

106. Fleming, *supra* note 83, at 1788–94.

107. *Id.* at 1788.

(2) "[F]idelity in constitutional interpretation requires following the rules laid down by, or giving effect to the relatively specific original understanding of, the Framers of the Constitution";[108] and

(3) "[T]hese concrete intentions or original expected applications are determinative concerning constitutional doctrine."[109]

The focus of old originalism was judicial restraint; the point being that insisting that judges be bound by concrete original intentions would curb judicial discretion, and hence avoid the evil of judicial activism. But if this was the goal of old originalism, it clearly failed dismally. Such is the uncertainty about the concrete intentions of the framers (assuming there even *were* concrete intentions shared by the framers), and the impossibility of surmising their expected applications about how the text would apply to circumstances and technologies not yet dreamt of, that old originalism does very little to limit judicial discretion and provide dispositive answers. Moreover, it provides judges with cover: by choosing a historical analysis that suits their purpose, judges can gesture at the "original meaning" and use it to justify the desired result while claiming not to be making a conscious choice.

The vanguard of critics of old originalism includes the new originalists, among the most prominent of whom are Keith Whittington and Larry Solum. In synthesizing the critiques of old originalism, Fleming identifies three "incorrigible flaws"[110] in addition to the flaws I describe above:

(1) [T]he moral burden of the old originalism with regard to both rights and powers: its concrete intentionalism entails that *Brown v. Board of Education* was wrongly decided and that most of the modern federal government is unconstitutional;

(2) [T]he . . . old originalism is a massive insult to the dignity of both the founders and us—it attributes arrogance to the authors of the norms of the Constitution and subservience to the subjects of those norms (to add further insult, its proponents serve it up to us in the name of democracy!); and

(3) [I]ts concrete intentionalism is untenable as a theory of interpretation of our Constitution, which establishes a charter of abstract aspirational principles and ends and

108. *Id.*

109. *Id.* at 1789.

110. *Id.*

> an outline of general powers, not a code of detailed rules.[111]

The new originalists seek to elucidate interpretive theories that overcome the deficiencies of old originalism.[112] Solum, for example, defines originalism as follows:

> (1) *The fixation thesis*: The linguistic meaning of the constitutional text was fixed at the time each provision was framed and ratified.
>
> (2) *The public meaning thesis*: Constitutional meaning is fixed by the understandings of the words and phrases and the grammar and syntax that characterized the linguistic practices of the public and not by the intentions of the framers.
>
> (3) *The textual constraint thesis*: The original meaning of the text of the Constitution has legal force: the text is law and not a mere symbol.
>
> (4) *The interpretation-construction distinction*: Constitutional practice includes two distinct activities: (1) constitutional interpretation which discerns the linguistic meaning of the text, and (2) constitutional construction, which determines the legal effect of the text.[113]

One of the main differences between old originalism and Solum's new originalism is the public meaning thesis. Instead of locating original meaning in the concrete intentions of the framers, Solum and other new originalists point to the public meaning of the text at the time the text was ratified.[114] This move from framers' intent to public meaning serves two purposes. First, it ties the original meaning of the Constitution to the basis for the binding force of the Constitution. That is, the Constitution is legally binding because it was ratified, not because it was drafted. So it makes sense to say that the text of the Constitution means what those who voted it into law believed it to mean. The various parts of the Constitution have the meaning that the people who voted for them believed them to have; the Constitution is what they believed themselves to be

111. *Id.* (footnotes omitted).

112. Whittington developed his new originalism to replace the old originalists' negative reaction against the liberal Warren Court with a governing constitutional theory for conservative judges, now that they are in power. Solum, by contrast, developed his new originalism to overcome the theoretical errors and excesses not only of the old originalists but also of Legal Realism and Critical Legal Studies.

Id. at 1792 (footnotes omitted).

113. ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 4 (2011).

114. *Id.*

ratifying. A simple thought experiment illustrates this point. Suppose the drafters of an amendment intended it to mean something different from the "natural" or most obvious meaning of the language at the time. Suppose further that this intention was not communicated to the ratifiers at large, that the public assumes the language bears its natural meaning, and that they would not have ratified the amendment had they understood it to have the effect intended by its drafters. A compelling case can be made that the amendment should be interpreted according to the ratifiers' understanding; to foist the private intentions of the drafters onto "we the people" as binding law runs counter to the point of the (democratic) ratification process.

The second purpose, or at least beneficial consequence, of shifting from original intent to original public meaning is that it avoids several problems associated with the search for original intent. First, identifying original meaning with concrete intentions of the framers presumes there is a single concrete intention on the part of the framers. This is by no means obvious or inevitable. Second, even assuming *arguendo* that there is a single concrete intention on the part of the framers, determining that intention requires significant historical excavation. It requires delving into a great deal of materials external to the constitutional text, including debates and private letters, and the intentions may remain elusive despite the best efforts of historians. The original public meaning, by contrast, seems an easier target. One need only refer to a "law-infused dictionary" and other public uses of the relevant terms to deduce how the public, how ordinary competent speakers, would have understood the terms at the time.[115]

Now that we understand the move from intent to public meaning, it should come as no surprise that Justice Scalia is best understood as a new originalist. Like Solum, Scalia determines—or purports to determine[116]— the original meaning by reference to the public meaning at the time.[117] This preference correlates with Scalia's general distaste for looking behind the legal text, whether it be constitutional and statutory, to determine legal meaning.

Fleming (following Berman and Toh[118]) also includes "broad originalists" among the new originalists. These broad

115. I point out some of the flaws of this position below.

116. Several commentators have expressed skepticism about the extent to which Justice Scalia adheres in practice to the methodology he espouses. *See, e.g.*, Barnett, *supra* note 60, at 13.

117. Scalia, *supra* note 25, at 861.

118. *See generally* Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545 (2013).

originalists, whom Fleming describes as "liberals who want to reclaim history from the narrow originalists," include Lawrence Lessig, Akhil Amar, and Bruce Ackerman.[119] Fleming describes the broad originalists agenda as follows:

> The broad originalists undertake the "turn to history" to show that their constitutional theories, aspirations, and ideals are firmly rooted in our constitutional history and practice, and indeed provide a better account of our constitutional text and tradition than do those of the conservative narrow originalists. In general, what is broad about their forms of originalism is that these theorists and historians conceive original understanding or original meaning (to which they argue fidelity is owed) at a considerably higher level of abstraction than do the narrow originalists like Bork and Scalia (to say nothing of Whittington). At the same time, they typically argue that the quest for fidelity in constitutional interpretation requires that we reject abstract theories like Dworkin's moral reading of the Constitution.[120]

In addition to the broad originalists, the new originalists can also be taken to include "abstract originalists" such as Jack Balkin[121] (whose theory I touched on above), Barber and Fleming[122], and perhaps even Ronald Dworkin.[123] Fleming points to the ways in which Balkin's "living originalism" aligns with other new originalist approaches:

Like Solum, he stresses original public meaning and the significance of the distinction between interpretation and construction. Like the broad originalists, he argues that the original public meaning of the Constitution to which fidelity is owed is not only rules but also general standards and abstract principles. And he, like Dworkin and Fleming, rejects efforts by originalists to recast abstract principles as if they were rules (or terms of art) by interpreting them as being exhausted by their original expected application. In short, he argues that fidelity to

119. Fleming, *supra* note 83, at 1792.

120. *Id.* at 1792–93 (footnotes omitted).

121. BALKIN, *supra* note 3.

122. SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS xiii, 155 (2007); JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 210–11 (2006). Note, however, that Fleming himself resists characterizing his theory—and also Dworkin's—as originalist (which is one way in which Fleming's approach differs from enlightened originalism). *See* Fleming, *supra* note 83, at 1794 ("But I would resist characterizing Dworkin as a new originalist, for doing so seems to presuppose that anyone who argues that she or he has the best constitutional theory—of what the Constitution is, what is interpretation, and what is fidelity in constitutional interpretation—is claiming thereby to be an originalist.").

123. DWORKIN, *supra* note 14. *See also* Fleming, *supra* note 83, at 1794.

original meaning entails fidelity to our abstract framework and commitments.[124]

B. Distinguishing Enlightened Originalism

Enlightened originalism contains a number of factors in common with these originalist theories that merit characterizing it as "originalist." According to enlightened originalism, the semantic meaning of the Constitution's terms was fixed at the time of ratification of those terms, and that the semantic meaning (properly understood) determines the legal meaning, including the legal meaning today. That is, like other theories of originalism, enlightened originalism asserts that the legal meaning of the Constitution—as well as the semantic meaning—has not changed in the time since the various provisions were ratified. And like other originalist theories, enlightened originalism proposes a manner in which the original meaning is to be determined.

But this last similarity also marks the crucial point of departure. For enlightened originalism has both a different conception of, and method of determining, the original meaning of constitutional terms than other originalist theories previously proposed. Other theories of originalism, both new and old, broad and narrow, conceive of the text of the Constitution as embodying folk theories, whose meaning is determined by the community wielding the concepts, and the language referring to those concepts.[125] Some of the disagreement among originalists comes down to which folk matter: for example, whether the community that fixes the meaning of constitutional terms is the framers, the ratifiers, or reasonable competent speakers at the time of ratification. Other disagreements boil down to how we understand the usage of the relevant community: Is it what the framers *intended?* Is it how the ratifiers expected the term would apply to specific circumstances? Is it what the framers intended or ratifiers expected at a high level of abstraction? And so on.

What all these approaches have in common, though, is that an original community of language users determines the semantic meaning of constitutional terms (and thereby fixes the legal meaning of the constitutional terms). But with respect to the Constitution's moral terms, enlightened originalism proposes a different understanding of semantic meaning. On this account, moral terms can have a meaning—that is, a set of situations to which it refers—about which every member of a linguistic

124. Fleming, *supra* note 83, at 1793.

125. *See supra* note 96 and accompanying text.

community could be wrong. In 1868, equality meant same-sex couples must be treated like opposite-sex couples even if every American alive in 1868 believed otherwise, at any level of abstraction.

Consequently, the method of ascertaining the original meaning is completely different under enlightened originalism. In order to figure out the meaning of the Constitution's moral terms, we first identify the moral concept incorporated and then engage in normative analysis to ascertain the objective meaning of that moral concept. This is a far cry from the historical digging required by other originalist theories, whether looking for clues about what a particular constitutional drafter intended when using a particular word, which particular practices or institutions were legally permitted (and hence considered consistent with the Constitution's requirements), or considering contemporaneous documents and dictionaries to formulate the original public meaning.

It has been pointed out regularly that legal scholars and judges make poor historians.[126] One advantage of enlightened originalism is therefore that it does not require judges to be historians. A critic may respond that enlightened originalism merely replaces the need for judges to be experts at history with the need for judges to be experts at philosophy, a role for which they are no better trained or equipped. Perhaps, but a number of factors undermine the strength of this criticism. First, originalist judges are already doing philosophy, or at least making philosophical assumptions: they were making claims (or assumptions) about how to determine the semantic meaning of the Constitution's terms. They were therefore engaging in the philosophy of language. Second, the shift from history and semantic theory to moral philosophy is a change for the better even if judges are not experts, because at least then judges are trying to figure out the answers to the right questions. Even if their aim is not perfect, at least they are aiming at the right target. When judges try to ascertain how a certain community understood or applied a certain word a hundred or more years ago, they are (poorly) engaged in an irrelevant activity; it is all a distracting non-sequitur.

Third, if judges engage instead in moral or political philosophy with respect to the meaning of the Constitution's

126. For a recent example of this criticism, see Saul Cornell, *Conflict, Consensus & Constitutional Meaning: The Enduring Legacy of Charles Beard*, 29 CONST. COMMENT. 383, 390 (2014) ("Understanding how historians and originalists have interpreted this text cuts to the very core of the difference between a genuinely historical approach and the pseudo-historical approach favored by originalists.").

moral terms, the practice has the advantage of transparency. When judges engage in history to determine the meaning of constitutional terms, they will often be confronted with ambiguous evidence. Judges will therefore smuggle in their own values (consciously or subconsciously). I suggest it is preferable for the normative judgment to occur out in the open, with moral argument addressed explicitly in judicial opinion. Moreover, contrary to the claim that judges make poor philosophers, I suggest that the judicial branch has greater institutional competency for the task than other branches of government. Judges are required to provide reasons for their decisions, and the giving of reasons is at the heart of the philosophical approach.

The originalist theory that enlightened originalism most closely resembles is Balkin's "living originalism."[127] Like enlightened originalism, living originalism is a conscious attempt to bridge the gap, or collapse the distinction, between originalism and living constitutionalism. Balkin's view, the relevant aspects of which he sometimes also refers to as "framework originalism," is that the Framers intentionally chose broad, general terms in some sections of the constitutional text precisely to allow future generations to fill in the gaps.[128] According to this approach, the Framers created a framework, but delegated to future constitutional actors the discretion to flesh out the details, the specific meaning, and accepted that those details would likely change over time.[129]

I have already discussed some of the ways in which enlightened originalism differs from Balkin's approach to the meaning of the Constitution's broad or abstract provisions.[130] The primary point of difference relates to our different understandings of the Constitution's broad or general terms. To Balkin, these terms are just that: broad and general, to be interpreted at a high level of abstraction, but otherwise not of a different *kind* than other constitutional terms.[131] They are still folk concepts, whose meaning is determined by usage. But because we are attempting to ascertain meaning at a high level of abstraction, their meaning will necessarily be uncertain, open-ended, incomplete. At a high level of abstraction, constitutional provisions often take the form of *principles*, which Balkin understands as "norms that are normally indeterminate in reach,

127. BALKIN, *supra* note 3.

128. *Id.* at 3–7.

129. *Id.* at 14, 21.

130. *See infra* Part II.B.4, for a discussion of the Moral Incorporation Thesis.

131. BALKIN, *supra* note 3, at 14.

that do not determine the scope of their own extension, that may apply differently given changing circumstances, and that can be balanced against other competing considerations."[132] The Constitution "included rights guarantees that use the vague and abstract language of principles"[133] and "open-ended language capable of growth"[134] precisely to leave the meaning of the guarantees open, thereby delegating to future generations the task of refining their meaning. Balkin provides the Fourteenth Amendment as an example:

> The framers of the Fourteenth Amendment understood section 1 as a statement of general principles, and they wanted to leave open certain questions—including the tricky questions of racial segregation, miscegenation, and black suffrage—to a later time. They wanted to offer a general statement of principles about the rights of citizens—not limited to questions of black equality—that would no doubt be filled out by courts and especially by Congress, acting under its enforcement powers under section 5.[135]

It appears, then, that Balkin is committed to the position that whether excluding same-sex couples from marriage was an open question in 1868. According to Balkin, "[b]y deliberately using language containing broad principles, specific applications would be left to future generations to work out."[136] At least until either judges or Congress addressed this specific question, then, there was no right or wrong answer to whether a marriage institution limited to opposite-sex couples violated equal protection. The exclusion of same-sex marriage existed in the limbo of Schrödinger's cat, neither constitutional nor unconstitutional until acted upon by the courts or Congress. Enlightened originalism provides a very different resolution of this issue. Limiting marriage to opposite-sex couples *was* a violation of equal protection in 1868. Nobody at the time believed that (or at least, nobody that I'm aware of expressed this view at the time), but it was a violation all the same. Had a judge of the period, counterfactually, been presented with a challenge to opposite-sex-only marriage, he would have been wrong, as a matter of constitutional meaning, to interpret the Equal Protection Clause as permitting the exclusion of same-sex couples from marriage. More recently, on my view the Supreme

132. *Id.* at 44.
133. *Id.* at 25.
134. *Id.* at 26 (foonote omitted).
135. *Id.* at 25–26 (foonote omitted).
136. *Id.* at 26.

Court was wrong in *Baker v. Nelson*[137] in "holding the exclusion of same-sex couples from marriage did not present a substantial federal question."[138] According to enlightened originalism, *Baker v. Nelson*, like *Bowers v. Hardwick*[139], "was not correct when it was decided, [and] is not correct today."[140]

In sum, enlightened originalism differs from Balkin's living originalism in that, according to enlightened originalism, the text of provisions such as the Equal Protection Clause is not mere scaffolding. Unlike Balkin, I do not consider the Amendment's words to be shells into which future interpreters can pour any meaning those shells can bear. Rather, I consider the constitutional text as incorporating moral concepts, which had a fixed meaning at the time of incorporation—because they always have a fixed meaning. The Framers chose fixed, objective, and *unchanging* concepts, the meaning of which they had incomplete knowledge and mistaken beliefs.[141]

C. Theories of Living Constitutionalism

While living constitutionalism does not exhaust the field of non-originalist interpretive theories[142], living constitutionalism as it is conventionally understood is considered originalism's "archnemesis."[143] And like originalism, "living constitutionalism is itself a broad tent."[144] The central ideas of living constitutionalism are clearly stated by Justice William Brennan—"the originalists' own boogeyman"[145] in much the same way that Justices Scalia and Thomas are to living constitutionalists.

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137. 409 U.S. 810 (1972), *overruled by* Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015).

138. *Obergefell*, 135 S. Ct., at 2598.

139. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

140. *Lawrence*, 539 U.S. at 578.

141. This does not mean, however, that there was no constitutional law building left to be done post-ratification. My claim is that the *meaning* of these constitutional terms was complete. Interpretation of the Constitution's moral terms is an ongoing process of identifying their (complete) meaning, with the modest understanding that any meaning we assign is defeasible, in that other interpreters may have insights that allow them to realize our beliefs about equality and liberty, and so on, were themselves mistaken. And as the new originalists and others have pointed out, interpretation—ascertaining meaning—does not exhaust the practice of constitutional law. *See* Fleming, *supra* note 83, at 1787 (discussing the interpretation-construction distinction); *see also* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV 1, 7–8 (2004).

142. Berman, *supra* note 11, at 24 (arguing that "non-originalism and living constitutionalism . . . are best viewed as nonidentical").

143. Colby & Smith, *supra* note 103, at 263.

144. *Id.* at 263 n.119; *see also* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 711 (1975); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 13–14 (1998).

145. Colby & Smith, at 263 n.119.

Justice Brennan argues that the meaning of the constitutional text changes over time, such that the ultimate goal of constitutional interpretation is to ascertain the meaning of the text at that particular time. He asserts:

> Current Justices read the Constitution in the only way that we can: as twentieth-century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be: *What do the words of the text mean in our time?* For the genius of the Constitution rests *not in any static meaning* it might have had in a world that is dead and gone, but in the *adaptability of its great principles* to cope with current problems and current needs. What the constitutional fundamentals *meant to the wisdom of other times* cannot be the measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time.[146]

Brennan also argues that "[t]o remain faithful to the content of the Constitution, therefore, an approach to interpreting the text must account for . . . [the Constitution's] substantive value choices and must accept the *ambiguity* inherent in the effort to apply them to modern circumstances."[147]

These passages highlight the contrast between the commitments of living constitutionalism and enlightened originalism. According to living constitutionalism, the *meaning* of the Constitution's words *changes* over time, its principles are *adaptable*, and its application to modern circumstances is *ambiguous*. According to enlightened originalism, by contrast, the meaning of the Constitution's words does not change over time (our beliefs about and understanding of the meaning changes); its principles are not adaptable (they are better understood), and its application to modern circumstances is not ambiguous. Rather, the application of the Constitution's great moral concepts is unclear or non-obvious, not because they are ambiguous, but because their (specific, static) moral meaning is difficult for we flawed moral beings to ascertain.

But these passages also indicate the ways in which enlightened originalism and living constitutionalism are similar. Both insist that contemporary Justices must "read the Constitution in the only way that [they] can"[148]: as contemporary Americans. Both insist that interpreting the Constitution

146. Brennan, *supra* note 16, at 438 (emphasis added).

147. *Id.* at 437 (emphasis added).

148. *Id.* at 438.

requires us to account for its "substantive value choices."[149] And both insist that the wisdom of other times "cannot be the measure to the vision of our time"[150] just as our wisdom cannot be the measure of our descendant's vision. The difference between the two approaches is not in the core notion that the Constitution must be applied in a way that accounts for changing social values and moral progress, but rather in the relationship between those changes and the *meaning* of the Constitution's moral concepts. Living constitutionalism locates that change in the meaning of the language of the Constitution, whereas enlightened originalism locates that change in peoples' understanding of and beliefs about the static meaning of the Constitution's moral terms. In Part IV, I argue that this gap is not insurmountable, and that living constitutionalism can be re-conceptualized as enlightened originalism in a way that retains the advantages living constitutionalism has over past versions of originalism, while also defusing some of the criticisms of living originalism as currently conceptualized.

Before I do that, however, I shall first address Ronald Dworkin's theory of constitutional interpretation, which he calls the moral reading of the Constitution, and point out the differences between his theory and enlightened originalism.[151] I focus on Dworkin not because his theory is representative of living constitutionalism, but because of the apparent parallels between his moral reading and my own approach (including our shared belief that moral questions have unique right answers). [152]

Dworkin presents his comprehensive theory of constitutional interpretation in his book "Freedom's Law."[153] Unfortunately for present purposes—and by present purposes, I mean providing the reader with a sketch of Dworkin's interpretive theory—Dworkin's interpretive theory can only be understood within the

149. *Id.* at 437.

150. *Id.* at 438.

151. DWORKIN, *supra* note 14.

152. Whether Dworkin is appropriately characterized as an originalist, a living constitutionalist, or a different kind of non-originalist is a contested question. As Fleming points out:

> After all, Dworkin professes fidelity to original meaning, conceived as abstract moral principles rather than particular historical conceptions. Similarly, Amy Gutmann portrayed Dworkin as an abstract originalist in her introduction to *A Matter of Interpretation* . . . . Dworkin has sought to turn the tables on the narrow originalists like Bork and Scalia: he argues that commitment to fidelity (understood as pursuing integrity with the moral reading of the Constitution) entails the very approach that they are at pains to insist it forbids and prohibits the very approach that they imperiously maintain it mandates.

Fleming, *supra* note 83, at 1794.

153. DWORKIN, *supra* note 14.

context of his general theory of law. As Michael Dorf puts it, "To appreciate fully Dworkin's jurisprudential argument in *Freedom's Law*, one needs to understand it as part of his larger jurisprudential project."[154] A brief excursion into general jurisprudence (well, somewhat brief) is therefore required, for which I apologize in advance.

Dorf summarizes Dworkin's interpretive theory as follows:

> He argues that the abstract guarantees of the United States Constitution—especially its prohibition on deprivations of life, liberty, or property without due process, its guarantee of equal protection of the laws, and its protection of freedom of speech—should be read as embodying moral principles rather than political compromises. The *moral reading*, as Dworkin would have judges practice it, requires that particular decisions be justified by reference to principles of political morality. In *Freedom's Law*, as in his earlier works, Dworkin argues both for his *approach* to constitutional interpretation—*some* moral reading—and for his *implementation* of that approach—a *particular* moral reading.[155]

Dorf goes on to point out that "*Freedom's Law* does not, however, offer much in the way of an affirmative case for morality as the guiding spirit of constitutional interpretation. Dworkin's defense of his favored interpretive method appears in his earlier works, especially *Law's Empire*."[156] Given the dearth of justification for the moral reading in *Freedom's Law*, Dworkin's theory of constitutional interpretation is only going to be convincing if one buys into his more general, ambitious theory of law. As Dorf puts it, "the constitutional argument in *Freedom's Law* is strengthened if one accepts Dworkin's general jurisprudential commitments."[157] More specifically, "[m]orality is crucial to Dworkin's reading of the Constitution, but it is morality within the framework of law as integrity."[158]

Dworkin's case for the moral reading thus depends on his case for law as integrity. An exposition that does justice to law as integrity is beyond the scope of this paper, but hopefully a few key points will suffice for our present purposes. When interpreting and applying a piece of constitutional text, the Dworkinian judge must balance two concerns (among others).

154. Dorf, *supra* note 70, at 135–36.
155. *Id.* at 134.
156. *Id.* at 136.
157. *Id.*
158. *Id.* at 138.

First, the judge must apply the requirement of "fit."[159] He assembles a list of principles that could potentially be of use in deciding the case before him. The judge then proceeds as follows:

> He eliminates from his list all of those candidates that are inconsistent with so much of the accepted body of law as to fail to qualify as interpretations of that law. Dworkin analogizes the process to the creation of a chain novel—a novel written by successive authors. Once n chapters have been written, the n+1th chapter may take a variety of different forms, but many candidates will be ruled out as having too little to do with the content of chapters one through n.[160]

Having whittled down the list of candidate principles to those that meet the requirement of fit, the Dworkinian judge chooses the one principle among them that "puts the law as a whole in its best possible light."[161] By this, Dworkin means the best possible *moral* light—hence his description of his approach as the moral reading of the constitution.[162] But it is a moral reading of a particular, and some would say peculiar, kind—being bounded, as it is, by the principle of best fit, which Dworkin conceives of as a principle of integrity. Dorf explains:

> This task engages moral judgment, but it also engages fit, because Hercules will sometimes sacrifice his conception of ideal justice to conform his judgment to the remaining body of law. This is because integrity itself serves a moral principle—that the law should be interpreted as if it emanated from a single author, committed to laying down principled norms.[163]

As Dorf acknowledges, "Dworkin's argument for the single-authorship principle is complex and subtle."[164] But one need not know the subtle intricacies and complexities of Dworkin's rationale for law as integrity to see that there are substantial and substantive differences between his theory of interpretation and my own.

First, my theory of enlightened originalism is not dependent on Dworkin' idiosyncratic understanding of the task of interpretation. It does not depend on, or require acceptance of a claim about single-authorship (or consistency with single authorship) as a requirement of integrity in a legal system. Nor

159. *Id.* at 141.
160. *Id.* at 141–42.
161. *Id.* at 142.
162. DWORKIN, *supra* note 14, at 2.
163. Dorf, *supra* note 70, at 142.
164. *Id.*

does it require one to buy into a broader jurisprudential theory, whereas Dworkin's interpretive approach depends upon the general jurisprudential theory of law as integrity.

Second, I do not suggest that the moral "best light" analysis is a requirement of legal interpretation—and hence constitutional interpretation—generally. Quite the contrary. A moral enquiry is only appropriate in situations where a moral concept has been incorporated into the document being interpreted. A moral reading is not essential to law, or to legal interpretation, or to constitutional interpretation. When determining whether a presidential candidate meets the age requirement of 35, for example, a judge need not—and should not—engage in moral enquiry at all. In jurisprudential terms, I am an inclusive positivist,[165] whereas Dworkin is, well . . . not a positivist. A quasi-natural law theorist, or a "third theorist"[166]—his nuanced theory defies easy categorization—but not a positivist.

Third, enlightened originalism is much simpler than Dworkin's moral reading of the Constitution—and I mean that as a compliment (to myself, not Dworkin, in case that wasn't clear) as well as a point of differentiation. This simplicity makes it potentially more convincing. To accept my view, one need only accept the Moral Right Answer Thesis and the Incorporation Thesis, both of which I think are intuitively appealing. The rest of my approach flows from those twin premises. Enlightened originalism is also less ambitious, more modest in scope. I do not purport to provide a comprehensive theory of the enterprise of legal interpretation, and connect that to a broader theory of the concept of law. In contrast, I am proposing an approach to interpreting the explicitly moral concepts enshrined in the Constitution.

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165. *See, e.g.,* Leiter, *supra* note 56, at 4 ("Some Legal Positivists ('soft' or 'inclusive' positivists) . . . hold that, as a contingent matter, morality can be a criterion of legal validity if it is the practice of legal officials in some society to employ moral considerations as criteria of legal validity. For these positivists—who include the century's leading defender of the doctrine, H. L. A. Hart—legal reasoning in such societies will include moral reasoning.") According to enlightened originalism, the United States is such a society. Legal officials engage in moral reasoning, in the context of constitutional law, precisely because the text of the Constitution incorporates moral concepts. But this is a contingent matter: the Constitution's text need not have included moral terms, in which case ascertaining the Constitution's meaning need not have required moral reasoning. The inclusive positivist footing of enlightened originalism distinguishes it not only from Dworkin's moral reading of the Constitution, but also from Fleming's constitution-perfecting theory. Fleming argues that his approach to constitutional interpretation "understands that the quest for fidelity in interpreting our imperfect Constitution exhorts us to interpret it so as to make it the best it can be, gives us hope of interpreting our imperfect Constitution in a manner that may deserve our fidelity, or at least may be able to earn it." FLEMING, *supra* note 122, at 227.

166. *See, e.g.*, Mackie, *supra* note 71, at 169.

My approach is also more modest when it comes to the Right Answer Thesis. Dworkin famously believes there are right answers to questions of morality, and therefore right answers to questions of law, even in hard cases.[167] A substantial portion of *Freedom's Law* is devoted to addressing specific examples of these hard cases, including abortion and free speech.[168] Not only does Dworkin assert that there *is* a right answer to each of these hard questions; he also believes he has found them.[169] But as Dorf points out,

> Dworkin's views often rest on assumptions or intuitions that are less widely shared than he acknowledges. Most opponents of the abortion right or Dworkin's vision of free speech will likely remain opponents after reading *Freedom's Law*. The moral principles involved in debates about abortion and (to a somewhat lesser degree) free speech are hotly contested in part because they rest on different moral premises. Dworkin's interpretive method—which gives moral principles an important role—will naturally produce different results depending upon the moral principles employed.[170]

I agree with Dworkin that there are right answers to moral questions, and therefore that there are right answers to legal questions that turn on moral concepts. I do not suggest that I have those right answers. I do not suggest that *any* of us have those rights answers. The right answers may be unknowable—or at least, we may not be able to know that we have them, even if we do, or to convince others that their answers are wrong. I explicitly acknowledge that my approach of enlightened originalism, by its lights alone, provides the much-sought-after definite answers to hotly contested issues, or constrain judges to such an extent that they are precluded from bringing to bear their individual policy and policy preferences. I do not consider this a fatal flaw; indeed, it is a trait shared by every single theory of interpretation (including, despite his assertions to the contrary, Dworkin's own). I might even go so far as to call it a feature, not a bug. Law is irreducibly uncertain, at least from the practical and/or epistemological point of view. Anybody who says otherwise is trying to sell you something.

This is not to say that I do not have views on what the right answer is—including, most importantly for present purposes, on what the right answer is with respect to the status of same-sex

167. *See* DWORKIN, *supra* note 69, at 119.

168. *See* DWORKIN, *supra* note 14, at 41, 165.

169. *Id.* at 36.

170. Dorf, *supra* note 70, at 137.

marriage under the Equal Protection Clause, including the Equal Protection Clause immediately following the ratification of the Fourteenth Amendment. I have a strong view on that issue, which I have described above and which aligns closely with the Court's view of marriage equality in *Obergefell*. I also believe that there is greater agreement on the underlying moral concept of equality than current political discourse would have us believe. But I am neither so naïve or so arrogant that I am sure that mine is the last, best word on the subject, or that I will change the mind of anyone who does not already share a large swath of moral principles with me. The point of my proposing this enlightened originalism theory of constitutional interpretation is to suggest that we can make arguments that take account of evolving social and moral understandings, of moral progress, that are informed by our more enlightened understanding of the full ramifications of concepts like equality—or liberty, or excessive punishment—without ceding an iota of ground to those originalists to whom the notion of incorporating modern moral insights into constitutional law to is antithetical to the very practice of having fidelity to a written constitution.

IV. EXAMPLES OF ENLIGHTENED ORIGINALISM

A. Marriage Equality

In its recent landmark decision on marriage equality, *Obergefell v. Hodges*[171], the Supreme Court held that prohibitions on same-sex marriage violate the Equal Protection Clause and the Due Process Clause of the U.S. Constitution. According to the prevailing consensus, the Court's *Obergefell* opinion, authored by Justice Kennedy, is the epitome of living constitutionalism. In its coverage of the decision, the New York Times declared that "Justice Kennedy embraced a vision of a living Constitution, one that evolves with societal changes."[172] U.C.L.A. law professor Adam Winkler lauded the Court's opinion as "an ode to living constitutionalism" and "one more nail in the coffin of originalism."[173] Other reactions to the decision in the media and among constitutional scholars included calling the opinion "a

171. 135 S. Ct. 2584 (2015).

172. Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html?_r=0 [https://perma.cc/M5EH-327D].

173. Pema Levy, *Why Justice Kennedy's Gay Marriage Opinion is a Bigger Liberal Victory Than You Think*, MOTHER JONES (June 26, 2015) http://www.motherjones.com/politics/2015/06/justice-kennedy-gay-marriage-opinion-bigger-liberal-victory-than-you-think [https://perma.cc/9P28-BHB3].

ringing endorsement of a 'living Constitution,'"[174] and one that "reaffirms the Supreme Court's commitment to the tradition of a 'living Constitution.'"[175]

Similarly, the Supreme Court's Eighth Amendment jurisprudence has traditionally been considered a paradigm of living constitutionalism. The Court has repeatedly approved Chief Justice Warren's assertion in *Trop v. Dulles* that the Cruel and Unusual Punishment clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[176] Scholars have described this interpretive approach as "reflect[ing] a model of living constitutionalism based on the idea of progress"[177], as "embrac[ing] the notion of a 'living Constitution,'"[178] and as "a paean to the living Constitution."[179]

For the reasons I set out below, however, both *Obergefell* and the "evolving standards" approach to the Eighth Amendment are more accurately, and more usefully, understood as examples of enlightened originalism

1. The Obergefell *Decision.* In 2013, the Supreme Court decided *United States v. Windsor*, striking down the federal Defense of Marriage Act as unconstitutional.[180] The Act

174. *Id.*

175. Roland Nikles, *Obergefell v. Hodges: The Constitution Lives!*, NEWS, REVIEWS & VIEWS (June 27, 2015), http://rolandnikles.blogspot.com/2015/06/obergefell-v-hodges-constitution-lives.html [https://perma.cc/LR9D-2JZQ]; *see also* Carl Eric Scott, *The Post-Obergefell Political Trap*, NATIONAL REVIEW (July 3, 2015) http://www.nationalreview.com/postmodern-conservative/420740/post-obergefell-political-trap-carl-eric-scott [https://perma.cc/V8VS-J3DP] (describing Obergefell as the result of a "living constitution interpretation"); Nan D. Hunter, *The Undetermined Legacy of 'Obergefell v. Hodges'*, THE NATION (June 29, 2015) http://www.thenation.com/article/the-undetermined-legacy-of-obergefell-v-hodges/ [https://perma.cc/WDH8-CJEW] ("Therein lies the transcendent importance, not of marriage in any form, but of reading the Constitution as a living text."); Jack Balkin, *Obergefell, Democratic Constitutionalism, and Judicial Review*, BALKINIZATION (June 29, 2015) http://balkin.blogspot.com/2015/06/obergefell-democratic-constitutionalism.html [https://perma.cc/KP48-SJUX] ("Justice Kennedy is describing . . . what I have called the processes of living constitutionalism.").

176. 356 U.S. 86, 101 (1958); *see also* Weems v. United States, 217 U.S. 349, 378 (1910) (holding that the punishment of *cadena temporal*, involving fifteen years hard and painful labor while bound at the wrist day and night as well as "incidents" including permanent deprivation of the right to vote, to hold office, and to receive retirement pay, as well as the requirement to require written permission before any change in domicile after release, was disproportionate to the crime of falsifying public documents and was therefore cruel and unusual).

177. David Aram Kaiser, *Putting Progress Back into Progressive: Reclaiming a Philosophy of History for the Constitution*, 6 WASH. U. JURIS. REV. 257, 257 (2013).

178. Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 123 (2010).

179. Diane Marie Amann, *International Law and Rehnquist-Era Reversals*, 94 GEO. L.J. 1319, 1335 (2006).

180. 133 S. Ct. 2675 (2013).

"exclude[d] a same-sex partner from the definition of 'spouse' as that term is used in federal statutes."[181] The Court held the Defense of Marriage Act to be "unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."[182] The Court therefore denied that the federal Government could limit the definition of marriage, for federal purposes, to those marriages in which the spouses were of opposite sex. The Court left open, however, the issue of whether a state law limiting marriage to opposite-sex couples would survive constitutional scrutiny.[183]

The wake of *Windsor* saw challenges to state prohibitions on same-sex marriage wend their way through federal District and Circuit Courts across the country. Reflecting a rising tide of popular support for legalizing same-sex marriage, the majority of federal Courts struck down the various state prohibitions on same-sex marriage.[184] Among the Courts of Appeals, there was near-unanimity on the issue.[185] As the *Obergefell* decision points out, "With the exception of the opinion here under review and one other, the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution."[186] But that was enough to create a circuit split with respect to fundamental federal constitutional rights, and so the Supreme Court finally decided to resolve the issue it left open in *Windsor*.

The Supreme Court granted certiorari in *Obergefell* on two questions. The first question was "whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex."[187] The second question was "whether the Fourteenth Amendment requires a State to recognize a same-sex

181. *Id.* at 2682.

182. *Id.* at 2695.

183. The *Windsor* Court gave mixed signals on this question, on the one hand emphasizing the marriage regulation has traditionally been a state concern. *Id.* at 2691–93. But the Court ultimately held that the Defense of Marriage Act violated due process and equal protection. *Id.* at 2693. These mixed signals prompted Justice Scalia, in his *Windsor* dissent, to ask:

> What to make of this? The opinion never explains. My guess is that the majority, while reluctant to suggest that defining the meaning of "marriage" in federal statutes is unsupported by any of the Federal Government's enumerated powers, nonetheless needs some rhetorical basis to support its pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term). But I am only guessing.

Id. at 2705 (Scalia, J., dissenting). Time proved Justice Scalia's guess to be wrong—but only by a single term.

184. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015).

185. *Id.*

186. *Id.* (citation omitted).

187. *Id.* at 2593.

marriage licensed and performed in a State which does grant that right."[188] The Court answered both questions in the affirmative, holding that excluding same-sex couples from the legal institution of marriage violated both the Due Process Clause and Equal Protection Clause.[189] With respect to whether a state is required to allow a same-sex couple to marry, the Court declared:

> These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.[190]

The answer to the second question of whether a state was required to recognize a same-sex marriage from another state flowed, the Court held, inexorably from its answer to the first question:

> The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.[191]

The Court's opinion, penned by Justice Kennedy, is notable for its tone as well as its content.[192] The opinion is replete with the lofty language of moral aspiration, equal dignity, and the profound worth of the marriage commitment. The Court's concluding paragraph provides a representative example:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the

188. *Id.*

189. *Id.* at 2604–05.

190. *Id.*

191. *Id.* at 2607–08.

192. Justice Scalia in his dissent made the same observation in less than laudatory terms, declaring that, "The opinion is couched in a style that is as pretentious as its content is egotistic." *Id.* at 2630 (Scalia, J., dissenting).

> petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.[193]

This was not the first time a Kennedy-authored majority opinion concluded on a high note of moral aspiration. When the Supreme Court declared that criminalizing sodomy similarly violated the Fourteenth Amendment, the majority opinion concluded:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. *They knew times can blind us to certain truths and later generations can see* that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[194]

This final passage from *Lawrence* sounds not just in moral aspiration, but in enlightenment: The concept of liberty endures unchanged; the drafters and ratifiers were blind to the truth about the meaning of liberty in its manifold possibilities; but as generations can invoke their greater insight into the true meaning of the Constitution's principles.[195] In other words, *Lawrence* planted the seed of enlightened originalism that came fruition in *Obergefell*.

2. Obergefell *as Enlightened Originalism.* In *Obergefell*, the Court identifies several concepts of justice or morality that are incorporated into the Constitution via the Fourteenth

193. *Id.* at 2608; *see also id.* at 2594. ("[I]t is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.").

194. Lawrence v. Texas, 123 S. Ct. 2472, at 578–79 (2003) (emphasis added).

195. That the Court considers our new insights as revealing what always were the true dimensions of liberty, rather than changing or expanding the meaning of liberty, is demonstrated by his overruling of *Bowers v. Hardwick*: "*Bowers* was not correct when it was decided, and it is not correct today." Lawrence v. Texas, 123 S. Ct. 2472, at 578.

Amendment: concepts such as freedom or liberty (which includes a guarantee of the fundamental right to marry), equality, dignity, and autonomy.[196] The Court conceives of these moral concepts as interrelated. For example, the opinion repeatedly refers to the concept of "equal dignity."[197] It also connects liberty to dignity and autonomy, stating that the Constitution's "liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[198] With respect to the constitutional text more specifically, the Court understands the Due Process Clause and Equal Protection Clause as overlapping and mutually reinforcing: "Each concept—liberty and equal protection—leads to a stronger understanding of the other."[199] Excluding same-sex couples from the institution of marriage therefore violates both the Due Process Clause and the Equal Protection Clause:

> The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to *capture the essence of the right* in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles *furthers our understanding of what freedom is and must become.*[200]

In addition to articulating the interrelationship between the Equal Protection and Due Process Clauses, this passage suggests that the Court considers the concepts or principles that represent the "essence" of the Clauses to have constant, objective meaning—and that we continue to "further our understanding" of these essential concepts. We further our understanding of what freedom *is*, in truth, and what it *must become*, in the

196. *Obergefell*, 135 S. Ct. at 2597, 2602.

197. *See id.* at 2595 ("[A]s society began to understand that women have their own equal dignity, the law of coverture was abandoned."); *id.* at 2603 ("[I]nvidious sex-based classifications in marriage . . . denied the equal dignity of men and women."); *id.* at 2608 (stating that the petitioners "ask for equal dignity in the eyes of the law").

198. *Id.* at 2597.

199. *Id.* at 2603.

200. *Id.* at 2602–03 (emphasis added and citations omitted).

practical application of our law. This approach to concepts such as freedom and equality aligns quite closely with enlightened originalism.

The enlightened originalist character of the Court's opinion is evoked even more clearly in several other passages. He asserts that we may not recognize the true, objective meaning of justice and morality in our own time. We learn this meaning over time, and we apply these new insights about the meaning of the Constitution's moral concept in ways that previous generations would not, limited as they were by their less insightful beliefs about these concepts. He points out, for example, that:

> The nature of injustice is that *we may not always see it* in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment *did not presume to know the extent of freedom in all of its dimensions*, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty *as we learn its meaning*. When *new insight* reveals discord between the Constitution's *central protections* and a received legal stricture, a claim to liberty must be addressed.[201]

The Court then applies this notion of enlightened understanding to same-sex marriage specifically, asserting that: "[t]he limitation of marriage to opposite-sex couples may long have *seemed* natural and just, but its inconsistency with the central meaning of the fundamental right to marry is *now manifest*."[202] Note that the majority is not saying that the limitation of marriage to opposite-sex couples *is only now inconsistent* with the central meaning of the constitutional principle. The limitation on marriage to opposite-sex couples *always was* inconsistent with the central meaning of the fundamental right to marry—but the inconsistency is *only now manifest*. This is precisely the distinction between living constitutionalism and enlightened originalism: we discover new insights about what the meaning of the Constitution's concepts is and always has been. It is only with our more enlightened knowledge of, among other things, the nature and moral status of sexual orientation and the relationship between this nature and moral status and the reasons for protecting the right to marry, that we realize the limitation to opposite-sex couples violates liberty and equality. The Court states that, "With that *knowledge* must come the *recognition* that laws excluding same-sex couples

201. *Id.* at 2598 (emphasis added).

202. *Id.* at 2602 (emphasis added).

from the marriage right impose stigma and injury of the kind prohibited by our basic charter."[203]

The Court continues this theme with respect to the Constitution's concepts of liberty and equality by declaring:

> The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a *better informed understanding of how constitutional imperatives define a liberty* that remains urgent in our own era. . . . Under the Constitution, same-sex couples seek in marriage *the same legal treatment* as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.[204]

The *Obergefell* Court also points out that this enlightened originalist dynamic—new insights revealing previously unrecognized inequality—is at play in the Court's past cases interpreting the Equal Protection Clause: "Indeed, in interpreting the Equal Protection Clause, the Court has recognized that *new insights and societal understandings can reveal unjustified inequality* within our most fundamental institutions that *once passed unnoticed and unchallenged*."[205] Even putting aside sexual orientation, the history of the fundamental institution of marriage is one of new insights and societal understandings revealing unjustified inequalities that once passed unnoticed and unchallenged. As the *Obergefell* Court reminds us, "The ancient origins of marriage confirm its centrality, but it has not stood in isolation from *developments in law and society*. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has *evolved over time*."[206] The social developments have come hand-in-hand with an increased appreciation for—that is, greater enlightenment regarding—the equal dignity of women, and the extent to which former aspects of the marriage institution violated that equal dignity:

> For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. *As the role and status of women changed, the institution further evolved*. Under the centuries-old doctrine of coverture, a married man and woman were treated by

203. *Id.*
204. *Id.*
205. *Id.* at 2603 (emphasis added).
206. *Id.* at 2595 (emphasis added).

> the State as a single, male-dominated legal entity. As women gained legal, political, and property rights, and *as society began to understand that women have their own equal dignity,* the law of coverture was abandoned.[207]

The Court reminds us that "[t]hese and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential."[208] But despite the concerns expressed by the defendants and their supporters that extending the marriage franchise to opposite-sex couples will wreak havoc on the institution, these previous changes have not destroyed marriage. Kennedy insists that "[t]hese new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation *where new dimensions of freedom become apparent to new generations*."[209]

Once again, note that the Court describes the new dimensions of freedom as becoming apparent to new generations, not as being created by new generations.[210] That is, past generations were blind to the pre-existing objective fact-of-the-matter regarding the meaning and extent of freedom. While we cannot claim to be the repository of all wisdom on the meaning of freedom and equality, to the extent that we have incremental insights into these concepts, we have altered our institutions accordingly. The Court suggests that such a response is characteristic of a society that has, at least as a general matter, manifested gradual moral progress.[211]

The *Obergefell* opinion also reminds us that some of the changes to the institution of marriage as a result of insights into equality were effectuated by the Court applying the Equal Protection Clause:

> To take but one period, this occurred with respect to marriage in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of coverture, invidious sex-based classifications in marriage remained common through the mid–20th century. These classifications *denied the equal dignity* of men and women. One State's law, for example, provided in 1971 that "the husband is the head of the family and the wife is subject to him; her legal civil

207. *Id.* (emphasis added).

208. *Id.* (emphasis added and citations omitted).

209. *Id.* at 2596 (emphasis added).

210. *Id.*

211. *Id.*

> existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit." *Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage.* Like *Loving* and *Zablocki,* these precedents show the Equal Protection Clause *can help to identify and correct inequalities* in the institution of marriage, *vindicating* precepts of liberty and equality under the Constitution.[212]

The evolution of the institution of marriage in the United States is therefore, on the Court's explication, an example of enlightened originalism at work. New insights about how aspects of marriage were inconsistent with the objective meaning of equality resulted in changes to the institution, often via application of the Equal Protection Clause.[213] The inclusion of same-sex couples in the institution of marriage is merely a continuation of this evolution, this dynamic—this time as we have also become more enlightened about sexual orientation and equality. The *Obergefell* opinion states:

> This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid–20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have *dignity in their own distinct identity*. . . . Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and *widespread social conventions.*[214]

The Court continues by pointing out that:

> For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric

212. *Id.* at 2603–04 (emphasis added) (citing the following examples of marriage inequality struck down as violating equal protection: Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); Califano v. Westcott, 443 U.S. 76, (1979) Orr v. Orr, 440 U.S. 268 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977) (plurality opinion); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973)).

213. In contrast to moral terms such as equality and liberty or freedom, I do not consider marriage to be a concept with objective, unchanging meaning. Marriage is a human institution that we can define as we will, in ways that suit our needs. The institution as defined from time to time may or may not be one that satisfies the moral concept of, say, equality. Hence the characterization, by both me and the *Obergefell* Court, of the institution of marriage evolving as a result of increased insight into the objective nature and meaning of equality, and hence equal protection.

214. *Obergefell*, 135 S. Ct., at 2596 (emphasis added).

> Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.[215]

That is, we have in recent years become more enlightened, more knowledgeable, about the nature of sexual orientation. We have—most of us, at least—come to realize that homosexuality is not immoral, but rather is a normal and immutable characteristic of human sexuality. These insights about sexual orientation have in turn led to insights about the objective meaning of equality, and what equality demands with respect to differing sexual orientations. They have taught us that we were wrong about which features were appropriate for treating cases as like or different for the purposes of moral equality.[216] They taught us we were wrong to treat homosexuality as a morally salient point of difference; we were wrong to think we could treat homosexuals differently without violating equality. Recall Seidman's definition of equal protection, discussed in Part I.B: "The Equal Protection Clause requires that likes be treated alike, but when two things are not alike, it violates rather than vindicates equality to treat them in the same way."[217] In order to determine the requirements of equal protection according to this definition, we need to ascertain which features or characteristics are morally relevant to determining whether two things are like, and should be treated alike. We can think of sexual orientation, or the gender of the two people who want to be married, as features that people used to wrongly believe were morally relevant to determining whether two relationships were like. But with greater insight into sexual orientation and so on, we have since realized gender and sexual orientation are not morally relevant to determining whether two relationships are like for the purposes of equal protection. As the Court describes it, voluminous deliberation[218] about the nature of

215. *Id.* (emphasis added).

216. Seidman, *supra* note 27, at 127.

217. *Id.*

218. The majority opinion argues that even with respect to the specific issues before the Court,

> [T]here has been far more deliberation than [the defendants'] argument acknowledges. There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in

sexual orientation and its relationship to marriage equality "has led to *an enhanced understanding of the issue*—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law."[219]

In resolving the issue of same-sex marriage as a matter of constitutional law—including, specifically, as a matter of equal protection—the Court applied the original meaning of equal protection. On its original meaning, equal protection invoked the moral concept of equality, or equal dignity as *Obergefell* often styles it. The meaning of that moral concept is not determined and fixed by conventional usage or expected application, as the nature of our moral conversations, assertions and disagreements makes clear. As the *Obergefell* opinion makes clear, the majority of the Court recognizes that entire generations can be blind to the true nature of moral concepts such as equality that are incorporated into the Constitution. So when social progress provides us with new insights into the requirements of equality, fidelity to the true meaning—the original and objective meaning—of the Constitution's text demands that we apply this more enlightened understanding when resolving constitutional questions. For these reasons, I suggest *Obergefell* is a powerful example of enlightened originalism in practice.

B. Cruel and Unusual Punishment

1. Evolving Standards. The keystone of modern Eighth Amendment jurisprudence is Chief Justice Warren's declaration that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,"[220] and that the Cruel and Unusual Punishment Clause is therefore "not static."[221] At first glance, this seems like an expression of living constitutionalism. There are, however, several reasons to consider the Court's evolving standards approach as enlightened originalism.

The evolving standards approach has its roots in the earlier case of *Weems v. United States*.[222] The *Weems* Court asserted that

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> American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question.

Obergefell, 135 S. Ct., at 2605.

219. *Id.* (emphasis added).

220. Trop v. Dulles, 356 U.S. 86, 101 (1957).

221. *Id.*

222. Weems v. United States, 217 U.S. 349 (1910); *see also* Ian P. Farrell, *Strict Scrutiny Under the Eighth Amendment*, 40 FL. ST. L. REV. 853, 859 (2013).

the Cruel and Unusual Punishment Clause "may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes *enlightened* by a humane justice."[223] Despite the phrase "acquire meaning," this passage suggests an enlightened originalist sensibility. As society becomes enlightened as to the nature and scope of justice—including the concept of cruelty in the context of punishment—we should discard our old and unenlightened view of whether a punishment violates the Eighth Amendment. The *Weems* Court is clearly staking out a normative position on the meaning of justice, and consequently the meaning of the cruel and unusual punishment. That is, the *Weems* Court is not merely pointing out that public opinion changes. It is asserting that public opinion becomes more *enlightened*. Prior opinion about justice was not just different: It was wrong. Living constitutionalism doesn't capture this notion that the prior position should be discarded because it is wrong, unenlightened, and obsolete. For the living constitutionalist, the meaning has simply changed; we apply the current meaning simply because, currently, that is the meaning.

The core insight of enlightened originalism—that the meaning of the constitutional provision does not change, only our understanding of that meaning—was expressed by Chief Justice Burger in his dissenting opinion in *Furman v. Georgia*:

> For reasons *unrelated to any change in intrinsic cruelty*, the Eighth Amendment prohibition cannot fairly be limited to those punishments thought excessively cruel and barbarous at the time of the adoption of the Eighth Amendment. A punishment is inordinately cruel, in the sense we must deal with it in these cases, chiefly as perceived by the society so characterizing it. The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The *standard itself remains the same*, but its applicability must change as the basic mores of society change.[224]

Chief Justice Burger's passage is an excellent summary of enlightened originalism. The language of cruel and unusual punishment "necessarily embodies a moral judgment"—in my terminology, necessarily embodies a moral concept.[225] It is not merely descriptive of the views of any particular community, including the framing generation. The embodied concept of cruelty has an "intrinsic" meaning—that is, a meaning whose

223. *Weems*, 217 U.S., at 378 (emphasis added).

224. Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting) (emphasis added).

225. *Id.*

truth is objective and unchanging. The standard of cruelty enshrined in the Eighth Amendment remains the same, but its application changes as society's understanding of cruelty improves.[226]

2. The Court's Independent Judgment. The Supreme Court's application of evolving standards of decency involves two prongs. The first prong considers "objective indicia" of contemporary standards of decency. The second prong involves the Court applying its own independent moral judgment about whether the punishment in question is cruelly disproportionate. Justice Kennedy described this two-pronged approach in *Graham v. Florida*:[227]

> The Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.[228]

Looking to objective indicia of society's standards to determine whether a particular punishment is cruel and unusual fits comfortably within the living constitution model of interpretation. That is, just as some originalists look to the beliefs of the framing generation to determine how "cruel and unusual" was understood at the time the Eighth Amendment was adopted, it makes sense for living constitutionalists to look to contemporary beliefs to determine how "cruel and unusual" is understood—and therefore what it means—today. However, the Court's insistence that it also apply its own independent moral judgment does not fit as neatly with the living constitution approach—especially with a living constitution approach that posits the legal meaning of the Constitution has changed in tune

226. Another example of the Supreme Court employing language evocative of enlightened originalism is Chief Justice Sutherland's declaration, in the context of the constitutional rights to liberty and property, that "while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation." Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

227. 560 U.S. 48 (2010).

228. *Id.* at 61 (citations omitted); *see also* Farrell, *supra* note 222, at 874–77 (discussing the relationship between objective indicia analysis and the Court's application of its independent moral judgment).

with the change in the semantic meaning of the Constitution's terms, which in turn depends on the usage of the linguistic community.

The Court's application of its independent moral judgment makes far more sense from the point of view of enlightened originalism. If the phrase "cruel and unusual punishment" incorporates a moral concept, the meaning of which is both unchanging and independent of the beliefs of any particular linguistic community, then application of the Court's independent moral judgment *is precisely what enlightened originalism demands.* That is, the Court's Justices should seek to determine whether the punishment in question is *in fact* cruel—not whether a majority of people *believe* it is cruel—in light of the advances we have made in our understanding of the factors relevant to whether the punishment is morally disproportionate. These factors include, for example, greater understanding of the degree to which punishments deter; whether classes of people such as juveniles or the mentally disabled have the decision-making capacity required for the punishment to be deserved. By recognizing the progress made in these areas, the Court applies the static meaning of the incorporated moral concept, namely that a punishment is cruel when "none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification"[229] for the severity of the punishment. But the Court applies this static meaning in a manner informed by our more enlightened understanding of whether a punishment is in fact so justified.

The Supreme Court's decision in *Miller v. Alabama*[230], holding mandatory life imprisonment without parole for those under the age of 18 is unconstitutional, illustrates this approach. The Court explained that:

> Our decisions rested not only on common sense—on what "any parent knows"—but on science and social science as well. In *Roper,* we cited studies showing that "[o]nly a relatively small proportion of adolescents" who engage in illegal activity "develop entrenched patterns of problem behavior." And in *Graham*, we noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"—for example, in "parts of the brain involved in behavior control." We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess

229. *Graham*, 560 U.S. at 71.

230. 132 S. Ct. 2455 (2012).

> consequences—both lessened a child's "moral culpability" and enhanced the prospect that, as the years go by and neurological development occurs, his "deficiencies will be reformed."[231]

The Court's approach in *Miller* is best understood as demonstrative of enlightened originalism for two reasons. First, the meaning that the Court assigns to "cruel and unusual punishment" is unchanged from the meaning assigned in earlier cases, namely that a punishment is unconstitutionally cruel if it is not supported by any of the moral justifications of punishment.[232] Second, the *Miller* Court's understanding of whether mandatory life imprisonment of juveniles is morally justified was informed by an improved understanding of juvenile traits—via "developments in psychology and brain science"—that are relevant to moral culpability, retribution, and the utilitarian penal goals of deterrence and rehabilitation.[233] The *Miller* Court's approach therefore parallels the *Obergefell* Court's application of our improved understanding of the nature of sexual orientation and the relevance of sexual orientation to the moral question of equality in marriage.

V. LIVING CONSTITUTIONALISM AS ENLIGHTENED ORIGINALISM

Conceiving of constitutional interpretation as requiring an attempt to fully understand moral concepts such as equality, is extremely helpful in demonstrating the kind of approach that judges (and other constitutional actors) should take when interpreting and applying these sections of the Constitution. Like living originalism, it casts the Constitution as, in part, an aspirational document. Unlike many other versions of originalism, enlightened originalism endorses an approach in which judges strive to maximize constitutional justice when applying provisions such as the Equal Protection Clause, and are not fettered by the concrete moral conclusions of people who have not only been dead a century or two, but whose moral credibility we all acknowledge is severely lacking—on precisely the moral questions at issue, such as equality. We do not need to go back in time so far as the Framing generation and point to the inconsistency between slavery and equality to illustrate this lack of moral credibility. Even the Fourteenth Amendment was ratified and endorsed by a cohort of men who seem not to have

231. *Miller*, 132 S. Ct. at 2464–65 (citations omitted).

232. *Id.* at 2487–90.

233. *Id.* at 2464–65.

recognize the incongruence between enacting a requirement of equal protection of the laws, on the one hand, and denying women the right to vote, on the other. The advantage of enlightened originalism, over both other forms of originalism and living constitutionalism, is that it endorses an approach to constitutional interpretation in which we show genuine fidelity to the true meaning of the text of the Fourteenth Amendment (as other originalists insist we ought) while not being bound by the anachronistic moral beliefs of preceding generations (as living constitutionalists insight we ought not).

As the Court's decision in *Obergefell* has recently and powerfully demonstrated the central goal of living constitutionalism—ensuring that the Constitution incorporates contemporary moral values—can be effectively achieved by employing enlightened originalism. And enlightened originalism has advantages over living constitutionalism. It identifies the relevant change and evolution in society, in our *understanding* of the equality, liberty, and so on, rather than in the *meaning* of the Constitution's language. This difference renders enlightened originalism less open to criticism from those who see changing the meaning of the Constitution's language (by unelected judges) as tantamount to rewriting of the Constitution (by unelected judges). The textualist nature of enlightened originalism therefore communicates greater respect for the writtenness of the Constitution. Values of justice and morality, from the viewpoint of justice and morality, are written into the Constitution's text, rather than imposed upon it by an unelected judicial super-legislature.

I therefore suggest that significant benefits would flow from living constitutionalist theorists recasting their approach as enlightened originalism. For the two approaches are not necessarily inconsistent. A living constitutionalist may argue to the contrary, that the "originalist" aspect of enlightened originalism would require them to sign onto the view that prior generations have political or legal authority over contemporary constitutional actors. Living constitutionalists deny this, arguing that that "following an ancient constitution amounts to dead generations governing the living."[234] But accepting enlightened originalism does not entail that we are governed by the "dead hand of the past."[235] It is not originalist in the sense that the original meaning of the Constitution trumps the current meaning

234. Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 609 (2008).

235. *See* Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127 (1998).

of the Constitution. Instead, it denies that the original meaning and the current meaning are different. The meaning of the Constitution has not changed—neither the semantic meaning nor the legal meaning. We owe fidelity to the *text* of the Constitution, not to the moral beliefs of those who drafted or ratified it. We continue to accept ourselves as bound by that text—that is why the meaning of the text matters. And when the text uses moral terms, the meaning of the text is now the same as when it was framed and ratified, not because the framers and ratifiers have authority over us, but because of the nature of moral concepts.

This is why, even more than Balkin's living originalism, enlightened originalism bridges the Great Divide between originalists and living constitutionalists. The very framing of that debate presumes there are two potential meanings to choose between: the original meaning, and the current meaning that has evolved due to social and normative changes. The argument between originalists and living constitutionalists boils down to which meaning trumps: the original meaning, or the changed meaning. Enlightened originalism defuses this agreement by denying the premise: there is only one meaning (of the Constitution's moral terms) that has remained constant over the centuries. That meaning is the objective meaning of the Constitution's moral concepts. Regardless of whether you believe that the original meaning is binding on contemporary constitutional actors, or you deny that past generations have political or legal authority over us, the meaning of the Constitution is the same.

Nonetheless, enlightened originalism will likely still be subjected to the counter majoritarian criticism. That is, by allowing leeway for judges to bring to bear their personal moral beliefs—nay, perhaps encouraging, even demanding, moral enquiry on the part of individual judges—enlightened originalism approach elevates the individual preferences of an unelected, elite, unrepresentative minority over the views of the democratic majority, as manifest in the decisions of elected legislatures. I have several responses to this critique. First, I would say that the same charge can be leveled at any theory of constitutional law—not just constitutional interpretation, but constitutional law—that provides for judicial review of, and concomitant striking down of, legislative enactments. As I pointed out briefly above, and as any number of commentators from the legal realists on down have conclusively shown, law is inherently and irreducibly uncertain, and therefore judicial decision makers will always be faced with cases in which judgment is (literally) required. No theory of interpretation can completely reduce constitutional

interpretation, and hence constitutional decision making, to the mechanical precision of a mathematical formula. If you have a problem with that, your beef is with Chief Justice Marshall, not with me.

Secondly, I would say that enlightened originalism does not necessarily require, or even invite, judges to apply their own personal moral views. Enlightened originalism is consistent with other mechanisms for determining the present-best understanding of moral concepts. For example, a judge who is aware that her personal moral views may not align with the prevailing view, and who is sufficiently modest (or lacking in confidence) that her view is better than the prevailing view, may look to some external measure or position on the moral concept at issue. For example, in the Eighth Amendment context, courts routinely look to "objective indicia" of evolving standards of decency to inform their decision as to whether a particular punishment practice is excessive.[236] I am not suggesting this is the best approach to determining whether a punishment is excessive. I merely point out that it is not inherently inconsistent with the interpretive theory of enlightened originalism.

Third, I would say that enlightened originalism suggests a metric by which we can choose between different ways of deciding constitutional questions (or at least those that involve incorporated moral concepts). Since enlightened originalism posits that there is a right answer to moral questions, the challenge is finding that right answer. So the question becomes one of epistemology: what mechanism(s) for deciding constitutional cases is most likely to get us closest to that right answer? What mechanisms maximize the likelihood of success, and minimize the likelihood of serious failure? (Other interests—in addition to getting the correct interpretation of a constitutional provision—are also at play in constitutional decisionmaking, such as continuity, reliability, legitimacy. Any gains in interpretive accuracy would have to be balanced against any potential losses on these other dimensions. But the point remains.) We could ask the epistemic question when crafting doctrine, including decision rules about whether to follow external indicia of moral values, or when to apply deference. We could even look at which institutions—courts or legislatures, most notably—are better placed to engage in the moral enquiry. As I suggested, courts are better placed than legislatures primarily because they are reason-giving institutions. They are

236. I have written at length on this question previously. *See* Ian P. Farrell, *supra* note 222.

required to justify, to reason and argue for, their decisions in a way that legislators and the general population are not.

VI. CONCLUSION

The Supreme Court's recent decision in *Obergefell v. Hodges* upholding marriage equality has been generally understood as epitomizing the "living constitution" approach to constitutional interpretation, in which the meaning of the Constitution evolves and grows as social values and norms evolve and grow. This reading of *Obergefell* is inaccurate. Close scrutiny of the Court's opinion reveals that the Court applied an enlightened originalist approach to interpreting the Fourteenth Amendment. According to enlightened originalism, the meaning of the Constitution's moral terms, including "equal protection," remains constant. The meaning of these terms is not fixed by their usage, either at the time they were framed and ratified or now. Rather, the constitution's moral terms incorporate moral concepts whose meaning is objective, in the sense that the meaning is not determined by people's beliefs about their meaning. As society's values and norms have changed, we have achieved moral insights that have allowed use to become more *enlightened* as to the meaning of concepts such as equal protection. This approach allows contemporary constitutional decision makers to take account of more enlightened moral understanding without rewriting the Constitution's language.

Enlightened originalism is distinct from, and has advantages over, other originalist theories as well as theories of living constitutionalism. Indeed, by refuting the premise that the semantic meaning of the Constitution's moral terms changes over time, enlightened originalism collapses the Great Divide between originalism and living constitutionalism.