The Living Constitution

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Introduction

Do We Want a Living Constitution?

Do we have a living constitution? Do we want to have a living constitution? A "living constitution" is one that evolves, changes over time, and adapts to new circumstances, without being formally amended. On the one hand, the answer has to be yes: there's no realistic alternative to a living constitution. The written U.S. Constitution, the document under glass in the National Archives, was adopted more than 220 years ago. It can be amended, but the amendment process is very difficult. The most important amendments were added to the Constitution almost a century and a half ago, in the wake of the Civil War, and since that time many of the amendments have dealt with relatively minor matters.

Meanwhile, the world has changed in incalculable ways. The United States has grown in territory, and its population has multiplied several times. Technology has changed, the international situation has changed, the economy has changed, social mores have changed—all in ways that no one could have foreseen when the

Constitution was drafted. And it is just not realistic to expect the cumbersome amendment process to keep up with these changes.

So it seems inevitable that the Constitution will change, too. This is a good thing, because an unchanging constitution would fit our society very badly. Either it would be ignored or, worse, it would be a hindrance, a relic that would keep us from making progress and prevent our society from working in the way it should.

On the other hand, there seem to be many reasons to insist that the answer to that question—do we have a living constitution that changes over time?—cannot be yes. In fact, the critics of the idea of a living constitution have pressed their arguments so forcefully that, among people who write about constitutional law, the term "living constitution" is hardly ever used, except derisively. The U.S. Constitution is supposed to be a rock-solid foundation, the embodiment of our most fundamental principles: that's the whole idea of having a constitution. Public opinion may blow this way and that, but our basic principles—our constitutional principles—must remain constant. Otherwise, why have a constitution at all?

There's an even bigger problem with the living Constitution, or so it might seem. A living constitution is, surely, a manipulable constitution. If the Constitution is not constant—if it changes from time to time—then someone is changing it. And that someone is changing it according to his or her own ideas about what the Constitution should look like. The "someone," it's usually thought, is some group of judges. So a living constitution would not be the Constitution at all; in fact it is not even law any more. It is just a collection of gauzy ideas that appeal to the judges who happen to be in power at a particular time and that they impose on the rest of us.

So it seems we want to have a constitution that is both living, adapting, and changing and, simultaneously, invincibly stable and impervious to human manipulation. How can we escape this predicament?

The good news is that we *have* mostly escaped it, albeit unself-consciously. Our constitutional system, without our fully realizing it, has tapped into an ancient source of law, one that antedates the Constitution itself by several centuries. That ancient kind of law is the common law. The common law is a system built not on an authoritative, foundational, quasi-sacred text like the Constitution. Rather, the common law is built out of precedents and traditions that accumulate over time. Those precedents allow room for adaptation and change, but only within certain limits and only in ways that are rooted in the past. Our constitutional system—I'll maintain—has become a common law system, one in which precedent and past practices are, in their own way, as important as the written U.S. Constitution itself. A common law constitution is a "living" constitution, but it is also one that can protect fundamental principles against transient public opinion. And it is not one that judges (or anyone else) can simply manipulate to fit their own ideas.

The bad news is that, perhaps because we do not realize what a good job we have done in solving the problem of how to have a living constitution, inadequate and wrongheaded theories about the Constitution persist. One theory in particular—what is usually called "originalism"—is an especially hardy perennial. Originalism is the antithesis of the idea that we have a living constitution. It is the view that constitutional provisions mean what the people who adopted them—in the 1790s or 1860s or whenever—understood them to mean. (There are different forms of originalism, but this characterization roughly captures all of them.) In the hands of its most aggressive proponents, originalism simply denies that there is any dilemma about the living Constitution. The Constitution requires today what it required when it was adopted, and there is no need for the Constitution to adapt or change, other than by means of formal amendments.

There is something undeniably natural about originalism. If we're trying to figure out what a document means, what better place to start than with what the authors understood it to mean? Also, as a matter of rhetoric, everyone is an originalist sometimes: when we think something is unconstitutional—say, widespread electronic surveillance of American citizens—it is almost a reflex to say something to the effect that the "founding fathers" would not have tolerated it. And there are undoubtedly times when originalism is the right way to approach a constitutional issue. But when it comes to difficult, controversial constitutional issues—such as whether the Constitution forbids discrimination against minorities and women or, to give a recent example, whether a local government has the power to ban handguns—originalism is a totally inadequate approach. It is worse than inadequate: it hides the ball by concealing the real basis of the decision.

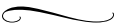
In the first chapter of this book, I will discuss originalism and show why its view of the Constitution—as an unchanging document whose meaning was determined when it was ratified—should be rejected. But you can't beat somebody with nobody, and if the idea of a living constitution is to be defended, it is not enough to show that the competing theory is badly flawed. So, in the rest of the book, I will describe and defend the approach that I think is at the core of our constitutional tradition—our living constitutional tradition—an approach derived from the common law and based on precedent and tradition. That approach addresses the issues that have been raised by the critics of the living constitution. It shows how the Constitution can evolve and yet still provide the solid principles that a constitution should provide—and not become the plaything of judges.

In chapter 2, I will describe the common law approach: how it works and why it might be justified. Then, in chapters 3 and 4, I will show how two of the most important developments in our constitu-

tional system are the products not of the text of the Constitution, and not of the original understandings, but of a common law approach to the Constitution. That is, they are products of a living constitution. Chapter 3 is about freedom of speech—the First Amendment, as we usually say, although the point is that much more is involved than those lines of constitutional text. Chapter 4 describes how racial segregation became unconstitutional, in the case of *Brown v. Board of Education*—the most famous case of the last hundred years, or more, and for many people the Supreme Court's, and maybe the Constitution's, finest hour. But the story of *Brown* is not a story about the words of the Constitution, nor about the views of the people who drafted and ratified its provisions. It is a story about the evolutionary common law processes of the living Constitution.

In chapter 5, I will turn back to the written Constitution, the one in the National Archives. The living Constitution is a central part of our law, but it is only a part. The written Constitution remains absolutely crucial. The problem is how to reconcile the two: how we can have both a static written constitution and a dynamic living constitution in the same system. I will explain the vital role that the written Constitution plays in our system, and how that role complements our evolving, living Constitution. Then, since the idea behind a living constitution is that the Constitution must change, in chapter 6 I will explain how the living Constitution fits together with the formal amendment process that the written Constitution prescribes. The amendment process is, perhaps surprisingly, nearly irrelevant. It is the living Constitution that is responsible for keeping the U.S. Constitution from becoming obsolete, or worse.

CHAPTER ONE



Originalism and Its Sins

WHY CAN'T WE JUST READ THE WORDS?

At first, it seems that interpreting the Constitution cannot be such a difficult thing to do. The document is short—even shorter than it appears, if we leave out provisions that are never invoked today—and mostly written in plain English. Why not just do what the words say?

Sometimes we can. Many provisions of the U.S. Constitution are quite precise and leave no room for quarreling, or for fancy questions about interpretation. The president must be thirty-five years old. Each state shall have two senators. Members of Congress take office on January 3 of the year after an election; the president takes office on January 20. Senators are elected every six years, representatives every two, the president every four.

Those provisions, by and large, do not generate a lot of controversy. We really can do just what the words say. Law professors

could come up with hypothetical situations that might uncover hidden ambiguities or uncertainty in the words, because law professors are paid to do things like that. But those situations are likely to remain hypothetical, and the words tell us, pretty much exactly, what to do in the real world.

But other provisions of the Constitution, while written in plain enough English, do not give us such unequivocal instructions. The First Amendment says that "Congress shall make no law…abridging the freedom of speech." Those words don't seem especially obscure or technical, and some important figures in the history of American law have claimed that, as with the provision about the president's being thirty-five, all we have to do is follow the plain meaning of the First Amendment. That was the position, notably, of Justice Hugo Black, one of the intellectual leaders of the Supreme Court during the 1950s and 1960s, when the Court greatly expanded the civil rights and civil liberties of Americans. When Justice Black was asked a question about what the First Amendment required, he was fond of pulling a copy of the Constitution out of his pocket (a well-worn copy, of course) and reading it aloud. I think "no law" means *no law,* he would say: what do you think it means?

Justice Black's way of dealing with the First Amendment was certainly rhetorically effective; it has adherents today; and Justice Black was in many ways a force for good. But the fact is that, when we're dealing with the First Amendment—and other provisions of the Constitution about which people actually argue, and bring lawsuits—just reading the words is not remotely enough. OK, "no law" means no law; let's stipulate that. But what is "the freedom of speech"? Surely it does not include the freedom to make harassing phone calls, or to scream into the ear of a cardiac patient, or to transmit military secrets to an enemy agent. Does it include the freedom to post pornography on the internet in, let's say, a way that

is especially attractive to children? Or to spread false rumors about a person running for public office? Or to publish truthful information that grievously invades the privacy of an ordinary citizen? You can squint at the words as hard as you want, and you won't get an answer to those questions.

And what does "abridging" mean? Does it include laws that deny public funds to a speaker? So if the National Endowment for the Humanities denies me a grant to stage a play I have written, because it's a bad play, has the NEH violated my First Amendment rights? Obviously not. But what if it denies someone a grant because her play criticizes the president? That looks a lot more problematic. But looking up the word "abridge" in the dictionary won't tell you that, or tell you how to draw the line between acceptable and unacceptable denials of public subsidies. And then there is the first word of the First Amendment, which is "Congress"; so the courts, or the president, or the city of Chicago can freely abridge my freedom of speech? That can't be right, and, under clearly established law, it is not right. But that established law isn't derived from the words alone.

Many other provisions of the Constitution raise similar questions. If a state forbids gay men and lesbians from being nursery school teachers, does that state deny "equal protection of the laws," in violation of the Fourteenth Amendment? If police officers search a car that has been stopped just for a minor traffic violation, is that an "unreasonable search," which the Fourth Amendment forbids? The list of questions like this—ones that cannot be settled just by reading the words of the Constitution—is long, and these questions are the ones that are disputed in the courts and in society at large.

Having said all of that about the provisions of the Constitution whose implications are not clear, we have to be careful to recognize how important the clear provisions of the Constitution are. It is a very good thing that we know precisely when one president leaves

office and another takes over; imagine the mess it would create if the Constitution said that the presidential succession occurs "at an appropriate time," or that presidents should serve terms not of four years, as they do now, but of "a number of years commensurate with the national interest." The point is not that everything in the Constitution is subject to varying interpretations, or that the clear provisions are trivial; they most certainly are not. But the provisions of the Constitution that get fought over, inside and outside the courts, are not so clear.

ORIGINALISM

When we are dealing with one of the provisions that is not so clear, how should we go about deciding what the Constitution requires? One view—the view that is commonly called "originalism"—gives an answer that seems appealing to many people; in fact, to many people, it seems obvious. The core idea of originalism is that when we give meanings to the words of the Constitution, we should use the meanings that the people who adopted those constitutional provisions would have assigned. Those were the people who made the First Amendment, or the Equal Protection Clause, part of the Constitution. According to originalists, it is impermissible—it's a kind of cheating, really—to take the words of the Constitution and give those words a meaning that differs from the understandings of the people who were responsible for including those words in the Constitution in the first place.

There are different kinds of originalism. Some professed originalists will object that the criticisms I am about to make are unfair and turn originalism into a strawperson. I think those originalists actually define "original meaning" in a way that ends up making

originalism indistinguishable from a form of living constitutionalism. For now, I'll leave those variations aside; I'll return to them later. There are also relatively subtle refinements in originalism. For example, are the crucial meanings those of the authors of the constitutional provisions, or those of the people who ratified the provisions, or—in the form of originalism that is currently ascendant—simply the meanings that were generally accepted by the public at large at the time the provisions were adopted? These refinements are not important at the moment, because each of these versions of originalism is vulnerable to decisive objections.

The best place to start, in considering the merits and demerits of originalism, is with a particularly rigorous form of originalism, one that is the polar opposite of living constitutionalism. Take, as an example, the Eighth Amendment of the Constitution. It provides that no "cruel and unusual punishments" may be inflicted on people. Of course, the meaning of the word "cruel" (or the phrase "cruel and unusual") is not clear in the way that "January 20" is clear. But we do know that when the Eighth Amendment was adopted in 1791, it was not generally believed that the amendment made the death penalty unconstitutional; in fact, the notion that the Eighth Amendment outlawed the death penalty would have seemed, at the time, to be completely implausible.

According to originalists of the kind I'm discussing, it follows that the death penalty cannot ever be "cruel and unusual." If capital punishment was not understood to violate the Eighth Amendment in 1791, it cannot violate the Eighth Amendment today or at any time in the future. If a constitutional provision was generally understood to permit or forbid something when it was adopted, then it must be understood in the same way today. The Second Amendment says that "the right of the people to keep and bear arms shall not be infringed"; if that phrase, in the context of the amendment, was understood in

1791 to mean that ordinary citizens had a right to have weapons, then today—according to originalists (and according to a majority of the Supreme Court, in a 2008 decision)—the Second Amendment still guarantees ordinary citizens the right to have weapons.

THE ORIGINALISTS' AMERICA

There are many things wrong with originalism. Let's begin with what we would have to give up if we were all to become originalists. There are many principles, deeply embedded in our law, that originalists, if they held their position rigorously, would have to repudiate. The list could be a long one; here is just a sample of what the law would be if originalism were to prevail.

- *Racial segregation of public schools would be constitutional.* In the famous case of *Brown v. Board of Education*, the Supreme Court held that state-imposed racial segregation of schools is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. But it is clear that when the Fourteenth Amendment was adopted, it was not understood to forbid racial segregation in public schools. At that time, even northern states segregated their schools, if they did not simply exclude African-American children outright. The Congress that proposed the Fourteenth Amendment segregated the schools of the District of Columbia. In fact, while the Fourteenth Amendment was being debated, the Senate galleries themselves were racially segregated. To be sure, some originalists have claimed that *Brown* can be reconciled with originalism, and I will address their arguments later. But even the Supreme Court that decided *Brown*—a Court that had every incentive to invoke the original understandings, since it knew its decision would be attacked as

lawless—essentially conceded that the original understandings did not support its holding, saying, "we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted."

• *The government would be free to discriminate against women.* Since the 1970s, the Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment limits the power of states to discriminate against women. Even originalists who argue that *Brown* is consistent with original understandings give up when it comes to sex discrimination. At least the Equal Protection Clause was intended to deal with race discrimination of certain kinds, even though it was not understood to outlaw racial segregation in schools. But no one in 1868, when the Fourteenth Amendment was adopted, thought that the amendment outlawed discrimination against women, which was endemic in society and vigorously opposed only by what was regarded as a feminist fringe. Section 2 of the Fourteenth Amendment—a provision, never used, that was designed to penalize states that kept African Americans from voting—actually enshrines sex discrimination, by assuming that the electorate will consist only of men. Feminists Susan B. Anthony and Elizabeth Cady Stanton were furious that the Fourteenth Amendment not only ignored discrimination against women but actually seemed to ratify it, and they actively opposed the Fourteenth Amendment for that reason.

Of course, a lot has happened since 1868. But as far as sex discrimination is concerned, not a lot has happened to the Constitution. The Nineteenth Amendment guaranteed women the right to vote, but that's all. No amendment was ever adopted to guarantee other rights to women. The Equal Rights Amendment, which would have protected women against discrimination, was rejected: Congress proposed it, but too few states ratified it, and it did not become part of the Constitution.

• *The federal government could discriminate against racial minorities (or anyone else) pretty much any time it wanted to.* Even the originalists who think they can justify *Brown* find it difficult to escape this conclusion. The provisions of the Constitution that the Supreme Court relied on in *Brown*, when it declared race and sex discrimination unconstitutional, are in the Fourteenth Amendment—in particular, the clause that says "no state shall…deny to any person within its jurisdiction the equal protection of the laws." But that clause applies only to states—"no state shall…deny"—not to the federal government. The Fourteenth Amendment was adopted in the immediate aftermath of the Civil War, which was fought over the question of states' prerogatives against the federal government. It is inconceivable that the drafters of the Fourteenth Amendment would have sloppily written "state" when they meant "state or federal government."

But on the same day in 1954 that the Supreme Court decided *Brown v. Board of Education,* it also ruled that the federal government could not segregate the public schools in the District of Columbia. The Court has since ruled, without any apparent difficulty, that the same principles that forbid the states to discriminate on the basis of race or sex apply, with equal force and in the same way, to the federal government. As the basis of those rulings, the Supreme Court has relied on a clause in the Fifth Amendment, one that forbids the federal government from denying any person "life, liberty, or property" without "due process of law." The verbal fit between that clause and a principle forbidding discrimination is awkward enough for originalists. But even worse, the Due Process Clause of the Fifth Amendment was adopted in 1791—when race-based slavery was the dominant economic institution in half the country, and the idea that women had equal rights to men was, at best, a radical notion. Yet that is the clause that is used to prohibit

the federal government from discriminating. The idea that the original understanding of the Due Process Clause included a principle that the federal government could not discriminate against blacks and women is beyond implausible.

• *The Bill of Rights would not apply to the states.* We are used to thinking that the various provisions of the Bill of Rights apply to "the government." But the Bill of Rights, when it was adopted, applied only to the federal government. Nothing in the U.S. Constitution prohibited the states from abridging religious freedom, subjecting criminal defendants to double jeopardy, conducting unreasonable searches and seizures, or restricting freedom of speech—all things that the Bill of Rights forbids.

When the Fourteenth Amendment was adopted in the wake of the Civil War, there was some discussion about whether that amendment would apply the Bill of Rights to the states. But the language of the Fourteenth Amendment does not explicitly apply the Bill of Rights to the states, and historians differ widely on just how far the Fourteenth Amendment was understood to go in "incorporating" the Bill of Rights. Today, the Bill of Rights—most of it—applies to the states because of a series of Supreme Court decisions. But those decisions have outrun any consensus about the original understandings.

• *States could freely violate the principle of "one person, one vote" in designing their legislatures.* Since 1964, the Supreme Court has insisted that state legislative and congressional districts conform to the principle of one person, one vote. Before the Court's rulings, the legislatures of many states were grotesquely malapportioned. It was common for some districts to have hundreds or even a thousand times as many voters as other districts, even though each district had the same number of representatives. The one person, one vote principle required that each representative in the state legislature represent roughly the same number of people.

This principle is nowhere to be found in the original understandings. The Court relied on the Equal Protection Clause of the Fourteenth Amendment, but that clause, as originally understood, had nothing to do with voting. The Equal Protection Clause was designed to protect recently freed slaves against certain forms of discrimination. But the idea that the ex-slaves could vote was intensely controversial when the Fourteenth Amendment was adopted, and the antidiscrimination provisions of the Fourteenth Amendment were understood not to deal with voting. That was why it was necessary to add, later, the Fifteenth Amendment—which explicitly provides that the right of citizens to vote "shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."

Beyond that, malapportioned legislatures were well known to the framers of the original Constitution and to the people who drafted and ratified the Fourteenth Amendment. Neither group gave any indication that it had a constitutional problem with malapportionment. The principle of one person, one vote—very controversial when the Supreme Court first embraced it in 1964—is today hardly controversial at all. But few originalists—I cannot think of any—even try to argue that it follows from the original understandings.

• *Many federal labor, environmental, and consumer protection laws would be unconstitutional.* The size and power of the national government was one of the main subjects of discussion, and controversy, at the Constitutional Convention in 1787. The Constitution establishes a government of limited powers, mostly described in Article I. We do not have a clear picture of the size and power of the federal government that the framers of the Constitution, and the people who ratified it, thought would emerge; no doubt, they disagreed among themselves. But it is clear that the federal government as we know it today is far beyond anything they could have imagined, much less what they thought they were authorizing.

There are many other similar examples. Most of the examples are familiar, and originalists have, to varying degrees, conceded, ducked, or rationalized them. But these are important principles. It is not as if originalism works well for everything except a few esoteric constitutional provisions that don't matter much to anyone. Originalism is inconsistent with principles that are at the core of American constitutional law, and, for the most part, originalists do not claim otherwise.

Justice Antonin Scalia, who is probably the most prominent defender of originalism today, likes to say that he is a "fainthearted originalist," because he is willing to abandon originalism when it leads to implausible results like the ones I described. "I'm an originalist—I'm not a nut," he says. That way of putting it is disarming, but it seems fair to respond: if following a theory consistently would make you a nut, isn't that a problem with the theory?

Less polemically, the problem with fainthearted, or qualified, or sometime originalism is that it gives away most of the qualities that purported to make originalism appealing in the first place. Originalism is supposed to be a bulwark against transient popular sentiment and judges who would impose their own values. But if you're going to say that originalism is only sometimes the right approach, then you have to answer at least two other questions. What principle determines when it is right to abandon originalism? And, once you decide not to be an originalist in a certain category of cases, what do you do instead? The challenge for the fainthearted originalist, the originalist-but-not-a-nut, is to answer these questions without making yourself vulnerable to the same objections that are routinely leveled against living constitutionalism: when push comes to shove, you're just going to do what seems right to you, instead of following the law. And even if the sometime-originalists can rebut those objections, haven't they just turned themselves into sometime-living-constitutionalists? They have acknowledged that the Constitution changes with the times.

The implausible results that originalism produces are actually just symptoms of originalism's deep-seated flaws. There are at least three fundamental problems with originalism.

- On the most practical level, it is often impossible to uncover what the original understandings were: what people thought they were doing when they adopted the various provisions of the Constitution. Discovering how people in the past thought about their world is the task of historians, and there is no reason to think that lawyers and judges are going to be good at doing that kind of history—especially when they are dealing with controversial legal issues that arouse strong sentiments.
- Even if we could uncover the original understandings, we would be faced with the task of translating those understandings so that they address today's problems. The framers or ratifiers of the Constitution had, at best, understandings about *their* world. How do we apply those understandings to *our* world?
- Most fundamental of all, originalists have yet to come to grips with the most obvious and famous issue, one raised by Thomas Jefferson, among others. The world belongs to the living, Jefferson said. Why should we be required to follow decisions made hundreds of years ago by people who are no longer alive? For most of us, the people who made the central decisions about the provisions of the Constitution were not even our ancestors; and it's hard to see why it would matter if they were.

The Problem of Amateur History

Originalism requires us to recover something from the past: the understandings or decisions or meanings of people who adopted the

provisions of the U.S. Constitution. That means that judges have to be historians.

In fact, originalist judges have to be better than historians. Historians can choose their subject; if the ideas in circulation at a particular time in history were an incomprehensible mess, a historian can just write her book on a different period, when things made more sense. Originalist judges don't have that luxury. If the case before them is about the Fourth Amendment's ban on unreasonable searches and seizures, then they have to figure out the intellectual history of the Fourth Amendment, however hard that may be. What's more, they have to figure out the intellectual history not just well enough to tell an interesting and illuminating story, as a historian would; judges have to answer the precise question presented by the case before them. It is not enough to try to come to some understanding of the founding generation's ideas about searches of homes and papers, as a historian might. A judge has to decide whether the Fourth Amendment was understood to require, for example, a search warrant before the police looked into a briefcase carried by a person they had arrested.

That kind of fine-grained inquiry into history can be brutally hard. Think about how hard it is even for history that is much more recent. In the 1970s, Congress proposed, and the states nearly ratified, the Equal Rights Amendment to the Constitution, which would have forbidden the federal and state governments from discriminating on the basis of sex. Many of us lived through the debates over the ERA. Do we have a clear idea what the ERA would have required, had it been ratified? Would the ERA have abolished all-girls and all-boys public schools? Would it have required public employers to give women pregnancy leave? Would it have required accommodations for part-time work by women (but not men?) who were caring for children? Those questions were

bruited about during the debates over the ERA. Proponents and opponents no doubt postured strategically, in their rhetoric, to try to portray the ERA as either relatively innocuous or as radical and threatening. Different people had different hopes and expectations. No one, I believe, can candidly say that "an understanding" emerged on questions like these. And if we cannot identify clear understandings about something so recent, we have very little chance of accurately uncovering the original understandings of something like the Bill of Rights.

Originalists might respond that the fact that a task is difficult is no reason to refuse to undertake it, and that is a fair point. But the sheer difficulty of uncovering original understandings should give us pause, for several reasons. First, this is a difficult task that is being undertaken by people who have no apparent qualifications for it: judges, most obviously. Judges are lawyers, and there is no reason to think that lawyers will be good at understanding the political culture of a distant century.

Second, and more important, the risk is not just a risk of error, serious as that can be. When historical materials are vague or confused, as they routinely will be, there is an overwhelming temptation for a judge to see in them what the judge wants to see in them. In *District of Columbia v. Heller*, the Supreme Court's 2008 decision about the right to keep and bear arms, the justices divided sharply about the original understanding of the Second Amendment—and the division corresponded neatly to the Court's usual ideological lines. The justices whom one would expect to be sympathetic to the claims of gun owners thought that the original understandings validated their position. The justices whom one would expect to be sympathetic to the claims of cities and states that want to regulate guns thought that the original understandings supported them. No one was surprised at this lineup. Time and again, judges—and

academics, too—have found that the original understandings said pretty much what the person examining them wanted them to say. A central criticism of the idea of a living constitution is that it is too manipulable—that a living constitution amounts to substituting judges' own views for the Constitution itself. Originalism, it turns out, is vulnerable to the same criticism.

But what if the original understandings are clear? Everyone agrees, for example, that the Eighth Amendment was not understood, when it was adopted, to forbid capital punishment. Perhaps originalism should be redefined as the view that *clear* original understandings must control. That redefinition would mean that originalism can be used only sometimes. And even in those circumstances, there is still a further problem with originalism, one that can arise no matter how clear the original understandings are. It is the problem of translating those original understandings into principles that can apply to today's issues.

The Problem of Translation

Suppose we know what the original understandings are. Suppose we know for certain, for example, that the Second Amendment was understood to guarantee individual citizens the right to keep firearms in their homes for self-defense. There would be a further, more fundamental problem. The founders (on this hypothesis) wanted to establish this right—in *their* society. They wanted people to have that right in a small, relatively homogeneous, predominantly rural country in which, compared to today, weapons were primitive and the mobility of both people and weapons was limited.

It does not follow that the founders would want the same thing for *our* society. It is possible that, if they had been able to envision the twenty-first century, they would have said that firearms could be

extensively regulated. Of course, we don't know that for sure; it's just speculation. But that's the point.

These arguments might seem like too-clever debater's points, but they are not. This basic problem—what do you do when circumstances change?—can occur whenever someone has an obligation to follow instructions given by another person and cannot communicate with the person who gave the instructions. Take a simple example: a military commander's orders to a subordinate. The subordinate has a duty to follow the orders. But what if circumstances change in a crucial way after the subordinate receives the orders, and communications are cut off? (We cannot, after all, communicate with the framers or ratifiers of the Constitution.) The subordinate has to make a judgment about whether the commander intended the orders to be followed literally even in the changed circumstances. If the answer is that the commander probably did not foresee these circumstances and therefore, in that sense, did not so intend, the subordinate then has to decide, perhaps, on what course of action most closely corresponds to the commander's intentions. When the orders were given recently, and the change in circumstances was not too dramatic, and the commander and subordinate are similar in their general views, then these questions might have reasonably clear answers. But when the commanders lived in the late eighteenth or mid-nineteenth century, and the subordinate has to act in the twenty-first century, it is delusive to think that these questions can be answered with any confidence.

This kind of problem arises over and over in constitutional interpretation. The Constitution gives Congress the power to regulate "Commerce . . . among the several States." Today, that provision is interpreted to authorize Congress to regulate a wide range of conduct that occurs within states, on the theory that the intrastate conduct has some connection to other states or to interstate

commerce. Is that interpretation inconsistent with the original understandings? It's quite clear that, when the founders adopted the Commerce Clause, they did not understand themselves to be authorizing such sweeping federal regulatory power.

But that was their understanding about how the Commerce Clause would operate in their society and economy. Our society and economy are incomparably more complex and interconnected. What could have been the understanding, in 1787, about what Congress's Commerce Clause power should be in a society that looks like ours today, with today's means of transportation and communication, and today's institutions of trade and finance? A society like ours would have been, literally, almost inconceivable at that time. Even if it had been conceivable, why would people who were intensely engaged in resolving their own difficult constitutional issues have tried to formulate a view about such a futuristic question? And if some people had, remarkably, formulated such a view, what is the chance that a general understanding existed?

Asking about the original understanding of how the Second Amendment or the Commerce Clause would apply to twenty-first-century America would be a little like asking: what was the 1970s understanding of how the ERA would apply to a world in which, say, babies could be born without women going through pregnancy, and men and women shared child-care duties equally? It's an unanswerable question: of course there was no generally shared understanding about how the ERA would apply in such an imaginary world. Asking how the ERA would apply in that world would be, at best, an abstract, academic question that would produce—well, among most people, it would produce an impatient shrug or an indulgent smile. The idea that there was an understanding about the correct answer to this question is absurd. But originalism requires us to pretend that, in the past, there were just those kinds of understandings.

Jefferson's Problem

The most fundamental problem with originalism is the one that Thomas Jefferson, among others, identified in the earliest days of the Constitution. "The earth belongs… to the living," Jefferson wrote to James Madison in 1789. One generation cannot bind another: "We seem not to have perceived that, by the law of nature, one generation is to another as one independent nation is to another." To paraphrase (and update) Jefferson's contemporary Noah Webster, twenty-first-century Americans have infinitely more in common with, say, the present-day residents of New Zealand—demographically, morally, culturally, and in our historical experiences—than we do with the people who gave us the Constitution more than 200 years ago. But it would be bizarre to suggest that we should let the people of New Zealand decide fundamental questions about our law. Why do we submit to the decisions of the much more distant and alien founders?

I believe there are answers to these questions, but the answers do not support originalism—and I do not believe that the originalists have given a good answer. It is not sufficient to say, as many do, that the Constitution is law. Of course the Constitution is law, but declaring that it is law does not determine how it should be interpreted. Nor is it a good answer to say that we are engaged in a multigenerational project with our forebears who brought forth the Constitution. In some sense that is true, too, but it does not follow that we must adhere to our forebears' understandings. First we have to determine the nature of the multigenerational project. It is also not satisfactory, in my view, to say (as many do) that we must show "fidelity" to the founding generations. I think we should be uncomfortable, in general, with the invocation of quasi-religious notions like fidelity in a diverse society like ours, where there is no orthodoxy and people may choose

to give fidelity to any of a countless number of cultural and religious traditions. But in any event, talk of "fidelity" just raises the question of what fidelity requires. It may require adapting the Constitution to modern circumstances, à la the living Constitution, rather than adhering to the original understandings.

Jefferson's argument is, I think, ultimately fatal to originalism, at least if originalism is offered as a general approach to interpreting the U.S. Constitution. But it is important not to be facile about this. There is a sense in which Jefferson's claim proves too much. Everyone—originalist or not—believes that the text of the Constitution is law. No one would cast aside the Constitution altogether. Why does each state get two senators, regardless of population? The answer is that this is the arrangement that the framers made more than 200 years ago. To that extent, no one is a thoroughgoing Jeffersonian. In chapter 5, I will propose a way in which we might adhere to the text of the Constitution—as, to some degree, everyone does—without encountering Jefferson's objection. But for now, the important point is that originalists—who believe that the understandings of people long dead should govern, in principle, every aspect of constitutional law—have not given Jefferson a satisfactory answer.

MODERATE ORIGINALISM

I have criticized a particularly rigorous form of originalism, one that insists that the original understandings of constitutional provisions provide answers to every dispute about what the Constitution requires. Many people who call themselves originalists do not accept originalism in this form. Perhaps the most common alternative form of originalism says that what is binding is not the specific original

understandings but instead the principles that the framers or ratifiers of the Constitution were understood to be establishing.

Take, for example, *Brown v. Board of Education*, the school segregation case. As I said earlier, it is quite clear that the Fourteenth Amendment, when it was adopted, was not understood to forbid school segregation. But according to the moderate originalists (as I'll call them), that is beside the point. The important thing about the original understandings is not the specific outcomes that the drafters and ratifiers envisioned. What is important is that the Fourteenth Amendment was understood, at the time, to be establishing a principle of racial equality. The fact that the principle was understood to be consistent with segregated schools is neither here nor there. If we determine, today, that segregation is *not* consistent with racial equality, we can forbid segregation without violating the original understandings—because we are faithfully adhering to the principle of racial equality that the Fourteenth Amendment embodies. We have no obligation to adhere to the specific outcomes that the earlier generations envisioned, so long as we follow their principles.

This kind of moderate originalism is very popular, and it takes a variety of forms—for example, that we are obligated to follow the original "meanings" but not the original "applications." But the key point about this kind of moderate originalism is that it changes the level of generality at which the original understandings are described. Instead of saying that the original understanding is that "school segregation is acceptable," we should say that the original understanding is that "racial equality is required." Moderate originalism of this kind can easily accommodate the examples I gave earlier of settled constitutional rules that are inconsistent with rigorous originalism. Once the original understandings are described at a certain level of generality—at the level of principle rather than

specific outcomes—all of those rules (*Brown*; one person, one vote; and so on) are consistent with the original understandings.

The problem with this kind of moderate originalism is that it can justify anything. Once we say that we are bound only by the principle, rather than by the specific outcomes, that the founders envisioned, we can always make the principle abstract enough to justify any result we want to reach.

The Eighth Amendment, for example, forbids "cruel and unusual punishments" but was understood, when it was adopted, not to outlaw the death penalty. For rigorous originalists, that original understanding about the death penalty is decisive. Moderate originalists, though, might say that the proper description of the original understanding is the principle that "cruel punishments are forbidden." Given that original understanding, it is up to us, today, to decide whether the death penalty is cruel. Judges can disagree with the founders about whether the death penalty is constitutional but still act in a way that is consistent with the original understandings, because they are adhering to the principle that cruel punishments are unconstitutional.

But now judges are free to declare any punishment unconstitutional, as long as they conclude that it is cruel. If the idea behind originalism is to provide some limit on what judges can do (or on what can be done by other constitutional interpreters, for example in the executive branch), moderate originalism fails. Judges are free to do what they want; they just have to derive from some constitutional provision a "principle" that supports them. Given the abstract and general language of the text of the Constitution, that will seldom be much of an obstacle.

School segregation is another example. Moderate originalists admit that, when the Fourteenth Amendment was adopted, the general understanding was that school segregation was constitutional;

they justify *Brown* by saying that, for purposes of constitutional interpretation, the original understanding should be characterized not at that level of specificity but at the level of the principle of racial equality. The problem is: why stop there, with *racial* equality? Why not say that the original understanding was that equality should be guaranteed for all minorities who are oppressed in the way that the newly freed slaves were being oppressed? That is not a false description of the original understanding, even if the view, back then, was that only the newly freed slaves fell into that category. (In fact, the framers of the Fourteenth Amendment probably did think that other groups fell into that category.) Once we treat "equality for oppressed minorities" as the true original understanding, the courts, acting consistently with (moderate) originalism, are free to strike down, say, laws that discriminate against women or gays—or, for that matter, laws that discriminate against landlords—if the judges think that women or gays or landlords are the appropriate kind of oppressed minority. We have no reason to suppose that the drafters and ratifiers of the Fourteenth Amendment thought that women or gays or landlords fell into the same category as African Americans. But under moderate originalism, we are not bound by their views on who fell into that category, any more than we are bound by their view that segregation is consistent with racial equality.

In a word, the problem with moderate originalism is that, once we move away from the specific outcomes that were envisioned, the choice of a level of generality at which to describe the original understandings is an arbitrary choice. That's not to say that moderate originalism is necessarily disingenuous, or anything of that kind. It is perfectly fine to try to identify ways in which we are maintaining continuity with the principles of earlier generations, even while we disagree with the way those principles are applied. The point is that this form of originalism does not do what originalism is supposed to

do. It does not confine judges or other constitutional interpreters. It leaves them free to decide cases based mostly on their own values. (Is capital punishment cruel? Is the treatment of gays, today, sufficiently similar to the treatment of blacks in the South after the Civil War?) Originalism, so understood, cannot even claim the one advantage it purports to have over living constitutionalism.

WHY IS ORIGINALISM APPEALING?

None of these criticisms of originalism is new; most of them, in one form or another, have been around for decades. Today, we think of originalism as an approach that conservatives favor, because for the last generation the most prominent defenders of originalism have been conservatives. But in the 1940s, '50s, and '60s, the most prominent originalist was Justice Black, who would, on most issues, certainly be considered a liberal—and whose influence on the law far surpassed the influence of today's conservative originalists. Justice Black's conservative critics made many of the same points against his originalism that today's anti-originalists make against conservative originalists.

The real puzzle about originalism is how it survives in the face of repeated and telling criticism. There are, I think, at least three reasons. The first is that there is something natural about originalism. Constitutional law is supposed to consist in the interpretation of a written text. Routinely, when we interpret a text, we think about how the authors of the text understood the words they used. That would usually be true of a personal letter, for example, or of a commanding officer's order in the military analogy I gave earlier. (Literary interpretation presents separate issues, but there is at least a prominent school of literary criticism that takes the view that the

authors' understandings are controlling.) Why shouldn't this be true of the Constitution?

The answer is that it is true of a constitution—sometimes. If a constitutional provision has been enacted recently, the understandings should control. Suppose that the Constitution were amended to allow "voluntary prayer" in public schools, and the generally shared understanding was that the amendment authorized officially prescribed prayers, led by a teacher; the prayers would be considered voluntary as long as students could remain silent or leave the classroom. If that was the general understanding, then in the immediate aftermath of such an amendment, it would, in my view, be an incorrect interpretation of the Constitution to hold that the amendment had any other meaning. It would be wrong, for example, to say that teacher-led prayer was necessarily not "voluntary" and therefore was not authorized.

But the understandings are often not so clear. More important, even if they are clear, as time passes, the reasons for adhering to the original understandings begin to fade. The fundamental flaws of originalism that I discussed earlier begin to appear. It becomes difficult to know how to apply the original understandings to new circumstances. And, in particular, Jefferson's problem asserts itself.

All of the constitutional provisions that give rise to today's controversies are old. The most controversial are more than a century old. Originalism is no longer a natural way to interpret those provisions. And we do not, in fact, interpret the Constitution in the way demanded by rigorous originalism. That is evident from the many examples I gave earlier of settled constitutional principles that are inconsistent with original understandings; and in the later chapters of this book, I will show in detail that American constitutional law is the product of an evolutionary form of living constitutionalism, not of originalism.

The second reason that originalism persists, despite the force of the criticisms, is that originalism is not actually a way of interpreting the Constitution. It is a rhetorical trope. People defend a position—a position that they hold for some other reason—by attributing it to the founders. Originalism is a particularly valuable rhetorical device for people who are trying to overturn part of the established legal order. If current law is against you, you have to appeal to something—so you invoke the founders. Justice Black was a leading critic of the constitutional order that he inherited, one that protected economic liberties more vigorously than freedom of speech or the rights of disadvantaged minorities. He invoked the founders as part of his (highly successful) crusade against that old order. A generation later, conservatives reacted against what they saw as the excesses of the Supreme Court led by Chief Justice Earl Warren; now, it was their turn to invoke the founders.

The third reason originalism persists is that, for all its flaws, it has no established competitor. A proponent of the living Constitution is open to the withering objections I described at the outset: that the living Constitution is infinitely flexible and has no content other than the views of the person who is doing the interpreting. Living constitutionalism means that the restraints are off, and anything goes.

In the remaining chapters, I will describe a kind of living constitutionalism that is not open to these objections—and that, unlike originalism, corresponds to the way in which American constitutional law actually develops.