



## CHAPTER TWO

# *Judicial Interpretation of the Constitution*

The Constitution speaks its values and commands to a variety of public officials and to the public at large. Throughout our history, political leaders have taken seriously their sworn duty to uphold the Constitution. Consider, for example, Thomas Jefferson's pardon of those convicted under the Alien and Sedition Acts, Andrew Jackson's veto of legislation reauthorizing the national bank, Harry Truman's executive order desegregating the U.S. military, and the administrative enforcement of *Brown v. Board of Education* under Lyndon Johnson. Or consider Congress's enactment of voting rights legislation during Reconstruction, civil rights legislation during the 1960s and 1970s, or protections for religious freedom in recent decades. In each instance, non-judicial actors acted on their best understanding of the Constitution's broad principles to uphold individual rights or to define the proper scope of governmental powers and responsibilities.

Still, the judiciary has a special role in our system with respect to constitutional interpretation, even though the Constitution does not explicitly provide for judicial review. The reason is not simply that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>1</sup> That famous line from *Marbury v. Madison*, in the context of 1803, was not an assertion of interpretive supremacy but a claim of interpretive parity: the courts "as well as other departments" are bound by the Constitution and must interpret it when a dispute so requires.<sup>2</sup> Yet two centuries later, the judiciary's unique (though not exclusive) competence and authority to interpret the Constitution have become widely accepted "as a permanent and indispensable feature of our constitutional system."<sup>3</sup> In this way, judicial review itself exemplifies

the adaptation of our constitutional system to the structural principle of checks and balances and to the Constitution's purposes of "establish[ing] Justice" and "secur[ing] the Blessings of Liberty."<sup>4</sup>

The interpretive authority of the courts is rooted in a familiar duality. On one hand, the judiciary by virtue of life tenure enjoys independence from the political branches and public passions of the moment. Insulated from partisan pressures, the judiciary bears a responsibility to render decisions without fear or favor toward the political majority. As Alexander Hamilton said, independent courts serve as an "excellent barrier to the encroachments and oppressions of the representative body," and they play a "peculiarly essential" role in safeguarding individual rights and liberties.<sup>5</sup> On the other hand, the judiciary "has no influence over either the sword or the purse"; it has "neither FORCE nor WILL, but merely judgment."<sup>6</sup> As a practical matter, the voice of the judiciary on constitutional questions must ultimately draw its authority from the public's acceptance of its institutional role, even when its specific decisions are controversial. The Court's judgment must reflect the nation's best understanding of its fundamental values, "[f]or the power of the great constitutional decisions rests upon the accuracy of the Court's perception of this kind of common will and upon the Court's ability, by expressing its perception, ultimately to command a consensus."<sup>7</sup>

Constitutional adjudication thus combines both countermajoritarian and majoritarian elements. In interpreting and applying the Constitution, the judiciary must exercise independence from politics and reflect the common will in order to secure the democratic legitimacy of its decisions. These institutional features frame the challenge that the judiciary uniquely faces in interpreting the Constitution.

## CONSTITUTIONAL FIDELITY

The methodology that judges use to interpret the Constitution has garnered significant public attention in recent decades, as judicial nominations, confirmation hearings, and constitutional controversies have enlarged the issue's political salience. In the simplest terms, the debate over methodology has been framed as a contest between two views.

On one side are those who argue that the text of the Constitution should be construed according to its original understanding—that is, the way the

text was understood by the people who drafted, proposed, and ratified it. On this view, modern constitutional controversies should be resolved on the basis of what the framing generation understood the text to mean in application because that understanding is what the people of the United States, acting in their sovereign capacity, endorsed as the supreme law of the land. When judges interpret a constitutional provision, the argument goes, they are bound by this original understanding, which can only be changed through the formal process of constitutional amendment under Article V.

By contrast, others have argued in favor of treating the Constitution as a living document. On this approach, the Constitution is understood to grow and evolve over time as the conditions, needs, and values of our society change. Proponents of this view contend that such evolution is inherent to the constitutional design because the Framers intended the document to serve as a general charter for a growing nation and a changing world. Thus, constitutional interpretation must be informed by contemporary norms and circumstances, not simply by its original meaning.

In this book, we develop a different approach to interpretation that respects the endurance of our written Constitution and explains how its text and principles retain their authority and legitimacy over decades and centuries. Preserving the document's meaning and its democratic legitimacy requires us to interpret it in light of the conditions and challenges faced by succeeding generations. We use the term *constitutional fidelity* to describe this approach. To be faithful to the Constitution is to interpret its words and to apply its principles in ways that sustain their vitality over time. Fidelity to the Constitution requires judges to ask not how its general principles would have been applied in 1789 or 1868, but rather how those principles should be applied today in order to preserve their power and meaning in light of the concerns, conditions, and evolving norms of our society. As Jack Balkin has put it, "if each generation is to be faithful to the Constitution and adopt the Constitution's text and principles as its own, it must take responsibility for interpreting and implementing the Constitution in its own era."<sup>8</sup>

In our legal culture, it is often argued that fidelity to the Constitution requires constancy in interpretation whereas "change betrays infidelity."<sup>9</sup> This rendition of fidelity may be valid when the object of interpretation is one of the Constitution's concrete and precise commands. For example, all bills for raising revenue must originate in the House of Representatives, military

appropriations cannot last more than two years, the seat of the national government may not exceed ten square miles, and no person can be elected President more than twice.<sup>10</sup> But when it comes to the many provisions that are phrased as broad and general principles, change rather than constancy in interpretation may be necessary to preserve constitutional meaning over time. “Sometimes change is essential for fidelity” whereas “refusing to change in light of changed circumstances would be infidelity.”<sup>11</sup>

Justice Brandeis powerfully articulated this point in his famous dissent in *Olmstead v. United States*,<sup>12</sup> a case examining whether the protections of the Fourth and Fifth Amendments apply to private telephone conversations intercepted by law enforcement through wiretapping. The Court held that, because wiretapping did not involve physical trespass upon the defendant’s person or property, it did not implicate a search or seizure as those terms were understood when the Fourth Amendment was adopted.<sup>13</sup> “The amendment itself shows that the search is to be of material things—the person, the house, his papers, or his effects” and not “voluntary conversations secretly overheard,” the Court said.<sup>14</sup>

Although this view is historically correct insofar as the Framing generation understood Fourth Amendment “searches” to apply only to physical spaces and “seizures” to apply only to physical things, Justice Brandeis was nonetheless right to reject it. He explained the notion of constitutional fidelity this way:

“We must never forget,” said Mr. Chief Justice Marshall in *McCulloch v. Maryland*, “that it is a Constitution we are expounding.” Since then this court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the fathers could not have dreamed. We have likewise held that general limitations on the powers of government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the states from meeting modern conditions by regulations which a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world. It was with reference to such a clause that this court said in *Weems v. United States*:

“Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had

theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of Constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a Constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a Constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality."<sup>15</sup>

Applying these precepts to the issue of wiretapping, Justice Brandeis continued:

When the Fourth and Fifth Amendments were adopted, "the form that evil had theretofore taken" had been necessarily simple. Force and violence were then the only means known to man by which a government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry. Protection against such invasion of the sanctities of a man's home and the privacies of life was provided in the Fourth and Fifth Amendments by specific language. But "time works changes, brings into existence new conditions and purposes." Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet. Moreover, "in the application of a Constitution, our contemplation cannot be only of what has been, but of what may be." The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. . . . Can it be that the Constitution affords no protection against such invasions of individual security?<sup>16</sup>

Justice Brandeis's reasoning in *Olmstead*, later vindicated in *Katz v. United States*,<sup>17</sup> demonstrates how a changed interpretation in response to changed circumstances can be an act of fidelity to the Constitution. The text of the document must be construed to have the "capacity of adaptation to a changing world"; otherwise, "[r]ights declared in words may be lost in reality."<sup>18</sup>

Of course, any method of constitutional interpretation can be abused. But when the method of constitutional fidelity just illustrated is conscientiously applied, it does not give judges unchecked power to determine what society's values are or to impose their own values on society. Further, the idea that constitutional meaning is capable of evolving over time is not license to disregard text or precedent or to undermine the rule of law. As we explain below, these criticisms are more often based on caricatures of judicial decision-making than on a careful examination of the methodology that judges actually use. More fundamentally, they misapprehend the character of the Constitution and the role of courts in maintaining its authority and legitimacy as the nation and the world continually change.

Rather than acknowledge the need to adapt the Constitution's text and principles to evolving social conditions, critics of this approach have sought to reduce constitutional interpretation to something more mechanical or formulaic. Originalism is one such effort; so-called "strict construction" is another. The first Justice Roberts once described the task of judicial review as requiring nothing more than "lay[ing] the article of the Constitution which is invoked beside the statute which is challenged and . . . decid[ing] whether the latter squares with the former."<sup>19</sup> The current Chief Justice Roberts declared in his confirmation hearing that "[j]udges are like umpires" whose job is simply "to call balls and strikes."<sup>20</sup>

Although these attempts to simplify constitutional interpretation may have a surface appeal, they do not withstand scrutiny, as we show in this chapter and beyond. Ironically, the significance of Chief Justice Roberts's baseball analogy is actually the opposite of what he intended. Just as baseball players and many fans know that umpires over time have interpreted the strike zone differently in response to changing aspects and contemporary understandings of the game,<sup>21</sup> so too do lawyers, judges, and ordinary citizens know that the faithful application of constitutional principles to new and specific circumstances demands attention to evolving social context.

At the same time, the claim that ours is a “living Constitution” has been vulnerable to the criticism that our Constitution is a written document and, as such, does not grow or evolve except by formal amendment. The metaphor of a “living Constitution” misleadingly suggests that the Constitution itself is the primary site of legal evolution in response to societal change and that the Constitution can come to mean whatever a sufficient number of people think it ought to mean. Describing our Constitution as a “living” document unduly minimizes the fixed and enduring character of its text and principles. We approach the Constitution quite differently. In our view, interpretations, applications, and understandings of the Constitution's text and principles may change, but the Constitution itself does not change unless properly amended. Our approach explains the dynamic character of constitutional law by focusing on how courts, political leaders, and everyday citizens interpret, apply, and adapt our written Constitution.

There has never been one and only one legitimate, mechanical, and timeless way to derive constitutional meaning, and notably the Constitution itself does not prescribe a specific method of interpretation. The 1789 Founders, over half of whom were lawyers or had some legal education, were no doubt aware of longstanding debates over how to interpret legal texts, yet they declined to specify any interpretive rules or guidelines. It is thus no surprise that, from the Founding to the present day, arguments about what the Constitution requires, permits, and prohibits have always looked to multiple sources of wisdom and authority: the Constitution's text and structure, the framing and ratification history, the broad purposes and principles reflected in the document, the lessons of precedent and historical experience, our shared and evolving popular understandings of the Constitution, and the practical consequences of any given interpretation. Throughout our history, these sources have been invoked by judges of every stripe, even those who purportedly adhere to originalism or strict construction. In our interpretive tradition, reading the Constitution's text and principles in light of changing norms and societal consequences is not radical. What is radical is an insistence that the Constitution's meaning is static and divorced from contemporary context. That approach, as we illustrate throughout this book, cannot explain many of the constitutional understandings we cherish today. When static interpretation fails to preserve the vitality of the Constitution's text and principles, our nation's judges have typically rejected it in favor of the method of constitutional fidelity.

## AN EXAMPLE: INTERPRETING THE SECOND AMENDMENT

A recent case, *District of Columbia v. Heller*,<sup>22</sup> illustrates the multifaceted approach to constitutional interpretation that is routinely applied by judges across the ideological spectrum. As *Heller* shows, it is caricature to say that conservative judges decide cases based only on text and original meaning, without considering social context or practical consequences,<sup>23</sup> or that liberal judges ignore text and history, and instead decide cases based on contemporary values or their own policy preferences. What divided the Court in *Heller* was not interpretive methodology but rather the substantive accounts of text, history, structure, precedent, contemporary norms, and social consequences that the dueling Justices offered. We do not weigh the merits of the contrasting opinions in *Heller* here. Instead, we simply describe the opinions in order to elucidate the methodology our courts have commonly used in constitutional interpretation.

*Heller* involved the Second Amendment, which says: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” The issue before the Court was whether the amendment bars the District of Columbia from enforcing its law prohibiting handgun possession against individuals who wish to keep handguns in their homes for self-defense.

All of the Justices—the five in the majority as well as the four dissenters—devoted a great deal of attention to parsing the text of the amendment. Both sides relied on dictionaries, contemporaneous commentaries, and the work of grammarians and linguists to unpack the words of the amendment. The majority read “the right of the people” to refer to a right possessed by individuals acting on their own, akin to the Fourth Amendment “right of the people to be secure . . . against unreasonable searches and seizures.” And it read the phrase “keep and bear Arms” to refer generally to the possession and use of weapons, including for hunting and individual self-defense. The dissenters, by contrast, read “the right of the people” to protect individuals engaged in collective action through participation in the militia, akin to the First Amendment “right of the people peaceably to assemble,” which also protects a collective activity. And it construed “keep and bear Arms” as a reference to military use of weapons.

Each side also defended its reading by invoking historical evidence, including English antecedents of the Second Amendment, the amendment’s drafting



history, analogous provisions in state constitutions and statutes during the colonial and Founding eras, and post-ratification commentary in case law and other published sources. The majority argued that the amendment's opening clause simply "announces the purpose for which the right was codified" and "does not suggest that preserving the militia was the only reason Americans valued the ancient right."<sup>24</sup> Among other sources, it cited contemporaneous state constitutional provisions expressly protecting an individual right to keep and bear arms for self-defense to demonstrate the prevailing understanding of the scope of the right.<sup>25</sup> Meanwhile, the dissenters observed that the Framers considered but rejected more expansive language concerning the right to keep and bear arms, including several proposals from state ratifying conventions that would have clearly protected civilian use and possession of weapons.<sup>26</sup> According to the dissenters, the drafting history and the language that was ultimately adopted reflected the Founding generation's "overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States' militias as the means by which to guard against that danger."<sup>27</sup>

Both sides also grappled with precedent, especially the 1939 case, *United States v. Miller*, in which a unanimous Court held that possession of a sawed-off shotgun is not protected by the Second Amendment "[i]n the absence of any evidence tending to show that [its] possession or use . . . at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia."<sup>28</sup> The dissenters understood *Miller* to turn "on the basic difference between the military and nonmilitary use and possession of guns,"<sup>29</sup> with the latter falling outside the scope of Second Amendment protection. The majority, by contrast, read *Miller* to say that the Second Amendment right "extends only to certain types of weapons," namely, "those weapons . . . typically possessed by law-abiding citizens for lawful purposes."<sup>30</sup>

Moreover, in applying the Second Amendment to the District of Columbia handgun ban, both sides in *Heller* demonstrated that the modern-day application of a constitutional principle must take into account contemporary social practices and anticipated social consequences. Despite Justice Scalia's insistence elsewhere that the Constitution's meaning is determined by how members of the Founding generation would have applied it,<sup>31</sup> his opinion for the Court in *Heller* ultimately adopts an interpretation that depends on current social norms and conditions. This is apparent from the Court's answers to two questions arising under its view that the Second Amendment protects

a right to bear arms for self-defense as well as military purposes: What kinds of “Arms” are covered by the amendment? And what constitutes a forbidden “infringe[ment]”?

As to the first question, the Court squarely rejected the idea that the word “Arms” covers only those weapons that would have been covered in 1791:

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, e.g., *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, e.g., *Kyllo v. United States*, 533 U.S. 27, 35–36 (2001), the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.<sup>32</sup>

Why is that so? It is because many words in the Constitution are properly read to stand for broad principles—here, the right to use technology, or “instruments,” for self-protection—whose practical meaning depends on interpretation that is responsive to evolving social conditions, including advances in technology.

At the same time, the Court recognized that not all weapons available today fall within the Second Amendment’s scope. As a historical matter, the Court explained, the amendment accommodated the tradition of prohibiting the carrying of “dangerous and unusual weapons” and covered only arms “of the kind in common use at the time,” since those were the arms that men called for militia service would have brought with them.<sup>33</sup> With this reading, the Court reaffirmed its holding in *Miller* that the Second Amendment does not protect possession of a sawed-off shotgun.<sup>34</sup> But what distinguishes protected handguns from unprotected sawed-off shotguns? Nothing straightforwardly textual or historical. Instead, the difference lies in contemporary social practice—or, as Justice Scalia put it, the fact that “handguns are the most popular weapon chosen by Americans for self-defense in the home.”<sup>35</sup> By limiting the Second Amendment’s protection to weapons “in common use at the time,” the Court interpreted the constitutional principle to have the “capacity of adaptation to a changing world.”<sup>36</sup> Indeed, just as a sawed-off shotgun is not what “the American people have considered . . . to be the

quintessential self-defense weapon,”<sup>37</sup> the American people may some day reach the same conclusion about handguns on the belief that they pose greater risks inside the home than their potential benefits to self-defense. Evolving social norms can change the ambit of the Second Amendment’s protection as interpreted by the Court.

Moreover, even with respect to handguns, the Court in *Heller* indicated its receptivity to a broad range of government regulation, including “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”<sup>38</sup> Although the amendment itself gives no indication whether such regulations “infringe” the right to bear arms, their validity does not appear to be in doubt. Why? The most plausible reason is that such regulations reflect an acceptable balance between “the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other.”<sup>39</sup> As the Framers understood, and as the Court has recognized in many areas, no right has absolute applicability regardless of how severely it may clash with other important values.<sup>40</sup> Thus, attention to real-world consequences—or to the reasonableness of legislative judgments concerning real-world consequences<sup>41</sup>—is an ordinary part of constitutional adjudication. The Court’s readiness to uphold various firearms regulations simply illustrates this point, despite Justice Scalia’s purported disavowal of an “interest-balancing” approach.<sup>42</sup> Although the majority and the dissenters ultimately disagree on the validity of the District of Columbia handgun ban, the difference between the two sides is not that one engages in interest-balancing while the other does not. It is that one side does so “explicitly”<sup>43</sup> while the other does not.

## **JUDICIAL METHODOLOGY: FIVE OBSERVATIONS**

From *Heller* and other cases we discuss throughout this book, we see that judges generally look to a variety of sources to elucidate the meaning of the Constitution. These sources include the document’s text, history, structure, and purposes, as well as judicial precedent. They also include contemporary social practices, evolving public understandings of the Constitution’s values, and the societal consequences of any given interpretation. The latter sources

of meaning, no less than the former, are legitimate components of the methodology that courts use when applying the Constitution's general principles to present-day problems.

Five observations help to summarize the essential features of this methodology. First, constitutional meaning is a function of both text and context. In many instances, a court cannot be faithful to the principle embodied in the text unless it takes into account the social context in which the text is interpreted. The relevant context includes not only social conditions and facts about the world, but also public values and social understandings as reflected in statutes, the common law, and other parts of the legal landscape. Just as the range of "Arms" protected by the Second Amendment and the types of "searches and seizures" covered by the Fourth Amendment depend upon social norms and practices, so too do the definitions of interstate "commerce" under Article I, "cruel and unusual punishment" under the Eighth Amendment, and "equal protection" and "liberty" under the Fourteenth Amendment. In these and other areas, a court that ignores changes in context will end up changing—and defeating—the meaning of the text.<sup>44</sup> The words of the Constitution must be read in context, and interpretations must sometimes change as the context changes, if the meaning of the text is to be preserved over time. That is what fidelity to the Constitution requires.

Second, constitutional fidelity serves not only to preserve the Constitution's meaning over time, but also to maintain its authority and legitimacy. The words and principles of the Constitution endure as our fundamental law because they have been made relevant to the conditions and challenges of each generation through an ongoing process of interpretation. As we show in later chapters, an interpretive approach that takes into account social context has been central to the process by which each generation of Americans comes to see the Constitution's text and principles as its own.

Third, in legitimizing the consideration of evolving norms and practical consequences in constitutional interpretation, the method of constitutional fidelity is not a license for judicial activism, for such considerations have often served to constrain not enlarge the judicial role in our democracy. Consider, for example, the demise of the *Lochner* doctrine and the erosion of judicially imposed limits on federal power as our courts came to understand the severity of the Great Depression and the government response required to ensure a fair and efficient economy.<sup>45</sup> Consider also the judicial deference to

popular and legislative understandings of constitutional equality in the 1960s and 1970s that undergird our transformative civil rights laws.<sup>46</sup> *Heller*, too, demonstrates the constraining effect of judicial attention to social practice and widely shared understandings. While recognizing an individual right to bear arms for self-defense, the Court limited the right to cover only weapons “in common use” today and to exempt “longstanding” regulations on commercial sales, possession by felons and the mentally ill, and the carrying of firearms in sensitive places.<sup>47</sup>

Fourth, the interpretive methodology we describe does not dictate a single “right answer” in every case. As the contrasting opinions in *Heller* demonstrate, the multiple sources of constitutional meaning do not always yield unambiguous inferences as to how a given constitutional provision or principle should be applied. But once we recognize that it is appropriate for judges to examine those sources, we can free ourselves from distracting debates over methodology and instead focus our attention on the substantive reasoning in support of one interpretation or another. Thus, in *Heller*, the key questions are not whether it is important to parse the text, but rather who offers the best reading of the text; not whether it is appropriate to consult the drafting history, but rather who marshals the strongest historical evidence; not whether it is necessary to acknowledge precedent, but rather who provides the most faithful reading of precedent; and not whether contemporary context and consequences must be taken into account, but rather who provides the most persuasive account of the context and consequences. As the Framers understood, the application of constitutional principles to difficult problems often involves conflict among important values and requires an irreducible element of judgment.<sup>48</sup> What is important is that courts exercise their judgment with “transparency” and “lay[] bare [their] reasoning for all to see and criticize.”<sup>49</sup> Such transparency enables the citizenry to assess the correctness or wisdom of judicial decision-making and is therefore central to the legitimacy of constitutional interpretation by independent courts.

Fifth, our view of constitutional fidelity is not at odds with originalism if originalism is understood to mean a commitment to the underlying principles that the Framers’ words were publicly understood to convey, as opposed to the Framers’ expectations of how those principles would have applied at the time they were adopted. In explaining this view of originalism, a number of scholars have distinguished between “the [original] expected application

of constitutional texts, which is not binding law, and the original meaning, which is.”<sup>50</sup> When “original meaning” refers to the core principles that underlie the Constitution’s broad and general terms, fidelity to the Constitution requires that its original meaning be preserved over time. Adherence to original expected applications often fails to preserve original meaning because it is “[b]lind to the effect of context on meaning.”<sup>51</sup> Applications of constitutional text and principles must be open to adaptation and change if the Constitution’s original meaning is to retain its vitality as the conditions and norms of our society become ever more distant from those of the Founding generation.

Originalism, however, is not widely understood as a commitment to original meaning as defined above. The significance of originalism as a polemic in ongoing debates over judicial methodology is rooted in the claim that judges should adhere to a historically fixed understanding of what principles the Constitution contains *and* how the Framing generation would have applied those principles to specific situations. We thus conclude this chapter by discussing the problems with originalism so understood and also by examining the oft-heard calls for “judicial restraint” and “strict construction” in constitutional interpretation.

## ORIGINALISM

In the hands of some judges, most notably Justice Scalia, originalism requires a judge confronted with a constitutional dispute to ask how informed individuals living at the time the Constitution was ratified would have applied it to a similar dispute. This methodology has led Justice Scalia to conclude, for example, that the Eighth Amendment prohibits only those punishments considered cruel and unusual according to the “moral perceptions of the time” and not to ones “we consider cruel today.”<sup>52</sup> It has also led to the claim that the Establishment Clause merely bars Congress from establishing a national church and does not declare a general principle of separation between church and state.<sup>53</sup> In deciding whether a posting of the Ten Commandments in a county courthouse violates the First Amendment, Justice Scalia recently argued, “[w]hat is more probative of the meaning of the Establishment Clause than the actions of the very Congress that proposed it, and of the first President charged with observing it? . . . [T]hese official actions show *what it meant*.”<sup>54</sup> Originalism thus posits that the best way to ascertain the Constitution’s

meaning in particular cases is to explore how the members of the Framing generation would have applied them to such cases.

As mentioned earlier, the original understanding of a particular constitutional provision, no less than the text of the provision itself, is an important consideration in constitutional interpretation. For example, it is surely relevant to contemporary debates over affirmative action that the same Congress that enacted the Fourteenth Amendment also enacted a variety of social welfare programs expressly designed to benefit black Americans.<sup>55</sup> It is likewise relevant to modern questions of executive power that the Founding generation crafted our system of checks and balances largely to avoid concentrating too much power in executive hands.<sup>56</sup> But original understandings such as these cannot alone be dispositive, for originalism as a complete and exclusive theory of constitutional interpretation founders on two decisive objections.

The first is a problem of indeterminacy, which itself has several layers. To begin with, it is unclear how a judge is to decide whose original understanding should be controlling.<sup>57</sup> In deciding what “due process of law” means in a particular case, should a judge examine what James Madison meant when he drafted the Fifth Amendment, what the House and Senate meant when they passed it and sent it to the states, what the ratifiers in each state meant when they voted for it, what the phrase meant when used in other legal settings at the end of the eighteenth century, or something else? Another choice has to do with the information or data to be examined when determining those persons’ understanding. In making sense of an open-ended phrase like “the privileges or immunities of citizens of the United States,” should a judge look to how the relevant persons understood the general concept, what specific rights they thought were covered by the term, how they thought a future judge should interpret the term, or something else?

Different originalists have proposed different answers to these questions. But even if there were consensus on whose understanding to consult and what information to seek, an additional layer of indeterminacy arises from the fact that members of the Framing generation did not always share the same understanding of particular constitutional provisions. For example, the question whether Congress had power under the Necessary and Proper Clause to establish a national bank famously produced divergent views among constitutional Framers such as Hamilton, Madison, and Randolph. Likewise, the question whether the Senate can or must approve the removal of officers who

have been appointed subject to its advice and consent produced disagreement within each chamber of the First Congress and also between the Senate and the House. In short, the Constitution in several places embodies principles and ideas whose meaning was indeterminate even among the document's contemporaries.

The problem of indeterminacy is further compounded by the fact that no original understanding could have existed with respect to many modern controversies. For example, the Founding generation could not have foreseen the Fourth Amendment implications of modern surveillance technology. Because many technologies do not involve physical trespass into a protected space, they go beyond the ambit of unlawful intrusions that the Framers apparently had in mind.<sup>58</sup> In response, some originalists argue that historically fixed principles in the Constitution ought to extend to new circumstances that are analogous to original applications. But in that case, why isn't a punishment that is viewed as cruel in contemporary times sufficiently analogous to punishments viewed as cruel in 1791, such that the Eighth Amendment prohibits the former as well as the latter? Opening the door to analogies across generations is premised on treating the Constitution's provisions as expressions of general principle and not as shorthand for a list of specific applications. That is the right way to think about the Constitution, and it underscores why an originalism of expected applications cannot serve as a complete and exclusive method of constitutional interpretation. A principle functions as a mapping of an idea onto the world in which we live. As our world changes, the aspects of the world that give meaning to a general principle are susceptible to change as well.

The second principal objection to originalism is that it cannot account for many of the constitutional understandings that Americans take for granted today. The most obvious example is *Brown v. Board of Education*. The Framing generation most likely did not believe the Fourteenth Amendment outlawed segregation; at best, they had no clear view on the issue. Further, it is doubtful that the Framers believed the Fourteenth Amendment protected women against gender discrimination. However, these elementary propositions are now settled features of our constitutional law. An originalism of expected applications cannot explain the legitimacy of these basic understandings and instead regards them either as mistakes or as exceptions to sound constitutional interpretation.<sup>59</sup>

More broadly, the history of our country has been marked by an enlarging appreciation of the individuality and equal dignity of all persons, of the



pernicious effect of stereotypes and intolerance in limiting human potential, of the role of government in addressing the nation's challenges, and of the need to continually update the protection of individuals from arbitrary government action. It is no surprise that our society's understanding of the proper application of many constitutional principles has enlarged as well. Originalism would create a wide divergence between how many constitutional principles are widely understood today and how those principles are implemented as a matter of constitutional doctrine.

The infirmities of originalism serve to underscore that the Framers' act of constitutional creation was also an important act of delegation—an expectation that future generations would ascertain the specific meaning of concepts and principles only dimly specifiable at the time of ratification. Perhaps for this reason, Madison recognized that many provisions of the Constitution would be considered “more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”<sup>60</sup> Similarly, Hamilton said that only time “can mature and perfect so compound a system, liquidate the meaning of all the parts, and adjust them to each other in a harmonious and consistent whole.”<sup>61</sup>

Madison and Hamilton's view that the specific meaning of the Constitution's provisions would develop through a process of interpretation coheres with the Framers' decision to make the Constitution difficult to amend. Under Article V, constitutional amendments can be enacted only with the approval of large supermajorities. The Framers understood that “maintaining stable agreement on the fundamental organizing principles of government has a number of clear political advantages over a system whose basic structure is always up for grabs.”<sup>62</sup> Madison explained that the amendment process should be reserved “for certain great and extraordinary occasions” because “frequent appeals [to the popular amendment process] would, in a great measure, deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability.”<sup>63</sup>

The Framers succeeded in creating a remarkably stable document. Aside from the ten amendments comprising the Bill of Rights, which were introduced in the First Congress to fulfill a commitment made during the ratification debates and essentially comprise part of the original document, the Constitution has been amended formally only seventeen times, while our nation has continued to evolve and change, often in dramatic ways that the

Framers did not anticipate. By using broad language to set forth basic principles of government, the Framers ensured that ongoing interpretation, not formal amendment, would be the primary way that the Constitution would retain its relevance, legitimacy, and authority over time. In our actual constitutional practice, judicial decisions as well as important legislation have played a much larger role than formal amendments in preserving the Constitution's vitality and practical significance as the nation has grown and changed.<sup>64</sup>

Ironically, originalism—by invoking the Framers' understanding of how the Constitution should apply to specific situations—actually diminishes their accomplishment. In writing the Constitution, the Framers sought to vest a set of fundamental principles with authority and permanence. At the same time, they understood that the Constitution could not spell out answers to every important controversy. As revolutionaries themselves, they were not so parochial as to bind future generations to their own specific understandings of broad principles.<sup>65</sup> They chose general language to anchor a set of basic values that the nation could adapt as it grew and changed in unforeseeable ways.<sup>66</sup> The genius of the Framers' accomplishment is not that they had answers to every imaginable challenge facing our society. It is that they correctly anticipated that a constitution written in general terms, open to interpretation and adaptation by succeeding generations, would endure and retain its legitimacy even as the nation experienced profound social, economic, and political transformations.

## JUDICIAL RESTRAINT

In addition to originalism, the lexicon of judicial critique has long included calls for “judicial restraint” and condemnation of “judicial activism.”<sup>67</sup> These terms have been variously defined, but whatever the definition, it is evident that judicial activism—long wielded as a critique of judicial liberals—appropriately characterizes many decisions of judicial conservatives in recent years.<sup>68</sup> This is true whether judicial activism is defined as lack of deference to democratic decision-making,<sup>69</sup> failure to adhere to constitutional text<sup>70</sup> or original meaning,<sup>71</sup> lack of deference to judicial precedent,<sup>72</sup> selective provision of access to the courts,<sup>73</sup> or the use of judicial power to achieve partisan objectives.<sup>74</sup>

Judicial restraint is an important value, and as mentioned above, the method of constitutional fidelity has served to promote judicial restraint in areas where originalism or strict construction would have licensed antidemocratic judicial activism.<sup>75</sup> But judicial restraint, by itself, is not a meaningful guide to constitutional interpretation. Although we rightly expect unelected judges to be cautious in exercising their power, we also expect an independent judiciary to serve as a crucial bulwark against majoritarian abuse of individual rights. Judicial restraint requires judges to refrain from enacting their own policy preferences into law, but it does not clarify how judges should interpret and apply broad principles such as “liberty,” “property,” “freedom of speech,” or “equal protection of the laws.” Faithful application of these and other principles may sometimes require a robust judicial role. Moreover, a commitment to democratic decision-making itself may call for a strong judicial role in circumstances where the democratic process does not function properly.<sup>76</sup> Thus, while the notion of judicial restraint instructs judges to be vigilant against abuses of their own power, it does not provide much guidance as to what interpretive methods or substantive judgments properly fall within the scope of judicial power.

That is why criticizing a decision as judicial activism, whether liberal or conservative, often conveys little of substance beyond the fact that the decision has produced a result with which the critic disagrees. Judges across the ideological spectrum believe in good faith that it is their duty to uphold the Constitution and to apply its principles according to their best understanding of the law. More important than whether a decision exhibits activism or restraint is whether it persuasively construes text, history, structure, and precedent, and properly takes into account social context and practical consequences.

## **STRICT CONSTRUCTION**

At least since Richard Nixon, numerous Presidents and presidential candidates have promised to appoint “strict constructionists” to the bench. President Nixon used the term to indicate his opposition to court-ordered busing and to the Warren Court’s interpretation of the rights of criminal defendants. His successors have invoked the term to signal opposition to abortion rights,

affirmative action, and government regulation. While campaigning in 2000, George Bush promised to appoint “strict constructionists” in the mold of Justice Scalia and Justice Thomas.<sup>77</sup> In 2008, presidential candidate John McCain cited Chief Justice Roberts and Justice Alito as his models for judicial nominees who will “strictly interpret” the Constitution.<sup>78</sup>

Like critics who denounce judicial activism, however, proponents of strict construction rarely provide a clear definition of the term. It is often said that judges should not “legislate from the bench” and should not “make law” but apply it. Beyond these agreeable platitudes, strict construction seems to suggest a method of interpretation that takes the words of the Constitution literally. In other words, judges must read the Constitution to mean simply what it says, nothing more and nothing less. In this way, its proponents say, strict construction limits judicial discretion.

The problems with this approach are apparent on a moment’s reflection. For one thing, the Constitution contains phrases that do not bear a literal reading. The First Amendment, for example, says “Congress shall make no law . . . abridging the freedom of speech.” Does “no law” really mean *no* law, *no* exceptions?<sup>79</sup> And does the directive to “Congress” mean that the First Amendment should not be read to apply to the President or the states?<sup>80</sup> If constitutional interpretation were simply an exercise in literalism, much of First Amendment doctrine would be unnecessary. As another example, consider the Necessary and Proper Clause in Article I. Does the term “necessary” mean that Congress’s power is limited to what is truly *necessary*, indispensable, or essential to carrying out the powers of government enumerated in the Constitution? Here again, strict construction has long been rejected.<sup>81</sup>

An additional difficulty has to do with phrases whose meaning is indeterminate. “Equal protection of the laws,” for example, may be understood in a variety of ways. What does it mean to strictly construe those words? Justices who are so-called strict constructionists have found the phrase to be compatible with unequal funding of public schools and unequal rates of capital sentencing associated with the race of the crime victim<sup>82</sup>—even though a strictly literal construction of the term “equal” might well be thought to cast constitutional doubt on such disparities. Because the Framers stated the equal protection guarantee in general terms, it is difficult to see how courts could faithfully interpret the phrase without seeking guidance from the Constitution’s history, purpose, and structure as well as precedent and evolving social

understandings. The same is true of other words in the Constitution such as “due process of law,” “unreasonable searches and seizures,” and “cruel and unusual punishment.” As Justice Holmes explained, the application of constitutional text in specific cases “must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.”<sup>83</sup> Historically, the process of interpreting the broadly worded provisions of the Constitution has more closely resembled common-law adjudication than statutory interpretation.<sup>84</sup> Our constitutional practice has generally heeded Chief Justice Marshall’s admonition to treat the Constitution as a charter of general principles lacking “the prolixity of a legal code.”<sup>85</sup>

Alternatively, strict construction may mean an interpretive approach that is not literal but narrow. That is, courts should give a narrow construction to the Constitution’s general phrases in order to avoid over-reaching. But here, too, there are obvious problems. Most importantly, there is no reason to think that the substantive meaning of the Constitution’s open-textured language should always have a narrow scope. The “separate but equal” doctrine is a strict (both literal and narrow) construction of the Equal Protection Clause; the doctrine itself incorporates the constitutional term “equal.” Yet all agree that the Equal Protection Clause means something more. The fallacy of “separate but equal” lies not in its implausibility as a parsing of constitutional text, but in its deliberate inattention to the social meaning of segregation and the irreconcilability of that meaning with the Fourteenth Amendment’s promise of equal citizenship.<sup>86</sup>

The same objection applies in the context of enumerated powers, where the Supreme Court considered and rejected strict construction early in our constitutional history. In 1824, the Court in *Gibbons v. Ogden* explained:

What do gentlemen mean, by a strict construction? . . . If they contend for that narrow construction which, in support or [sic] some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the object for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded.<sup>87</sup>

Notably, the Justices who are most often cited as strict constructionists themselves reject the term. Justice Scalia has called strict constructionism “a degraded form of textualism,” declaring: “I am not a strict constructionist, and no one ought to be . . . . A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.”<sup>88</sup> Justice Thomas considers himself an originalist and has not hesitated to construe the text of the Constitution broadly, not strictly, when it comes to executive power and state sovereign immunity.<sup>89</sup> Indeed, even as they decry judicial recognition of unenumerated rights, Justice Thomas, Justice Scalia, and Chief Justice Rehnquist do not flinch when they say that the Eleventh Amendment, which bars *federal* courts from hearing suits “against one of the United States by Citizens of *another* State,” merely exemplifies a broader principle of sovereign immunity that “extends beyond the literal text of the Eleventh Amendment” to bar suits under federal law against a state by citizens of the *same* state, even in *state* court.<sup>90</sup>

President Nixon revealed the hollowness of his concern with judicial methodology when, six years before promising to appoint strict constructionists to the bench, he complained that the Supreme Court “had followed its usual pattern of interpreting the Constitution rigidly” in striking down school prayer.<sup>91</sup> Nixon knew well what is now transparent in debates over judicial methodology: strict construction, at bottom, is a political calling card and not a genuine method of constitutional interpretation.

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Ultimately, what accounts for our enduring faith in the Constitution is not that we have rigidly adhered to original understandings frozen in amber or to so-called strict construction of the text. It is that we have continually interpreted the Constitution’s language and applied its principles in ways that are faithful to its original purposes and to the social context in which new challenges arise. As we said in Chapter 1, the Constitution should be read for what it is—not a legal code or a lawyer’s document, but “the basic charter of our society, setting out in spare but meaningful terms the principles of government.”<sup>92</sup> As such, the Constitution does not supply a ready answer for every problem or every question that our nation might face. But the American people have kept faith with the Constitution because its text and principles

have been interpreted in ways that keep faith with the needs and understandings of the American people.

The balance of this book further describes and defends the interpretive approach we call constitutional fidelity. In Chapters 3 through 8, we explain how several constitutional principles have acquired concrete and widely shared meaning throughout our history. We focus on the role of the Supreme Court in the development of constitutional meaning across a variety of areas. In each area, we see how the Court has adapted and applied the Constitution's general principles to the specific challenges that have confronted our nation. In interpreting the Constitution, the Court analyzes text, history, structure, and precedent, but it does not do so in a legal vacuum. It also considers social practices, evolving norms, and practical consequences in order to give concrete, everyday meaning to text and principle. And it looks to the constitutional understandings forged by ordinary Americans and their representatives through vigorous debate and engagement. As we show, many of the fundamental constitutional understandings that we take for granted today came into being through this dynamic process of interpretation.