



## INTRODUCTION

Justice Oliver Wendell Holmes was right when he said that the words of the Constitution “have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.”<sup>1</sup>

The reason the United States Constitution is the world’s most enduring written constitution is not simply the genius of fifty-five men who met in Philadelphia in 1787. Rather, it is the way that generation after generation of Americans has made the Constitution ours. The Constitution endures because its meaning and application have been shaped by an ongoing process of interpretation. That process includes both judicial interpretation and transformations in constitutional understanding pressed by political leaders and ordinary citizens throughout our history. Our Constitution retains its vitality because it has proven adaptable to the changing conditions and evolving norms of our society. Its words and principles still resonate centuries after they were written because time and again, as Justice Holmes urged, we have interpreted the Constitution in light of “what this country has become.”<sup>2</sup> Americans of all backgrounds can wholeheartedly take an oath to support and defend the Constitution when they are naturalized, join the armed forces, gain admission to the bar, or are sworn into elective office not because of how our founding text was understood in 1789, or even in 1870, but because of how we understand it today.

In recent decades, this common-sense understanding of the Constitution has been eclipsed by alternative conceptions of our founding document and the proper way to interpret it. Originalism—an exclusive reliance on public understandings of the text at the time it was ratified—has been vigorously championed by judges such as Antonin Scalia, Clarence Thomas, and Robert Bork, and by prominent conservatives such as Edwin Meese, who as Attorney General issued litigation

## 2 Keeping Faith with the Constitution

guidelines directing government attorneys to “advance constitutional arguments based only on [the document’s] ‘original meaning.’”<sup>3</sup> In addition to (and allied with) calls for originalism, a familiar refrain among conservative politicians is their promise to appoint only “strict constructionists” to the bench. Although the meaning of strict construction is far from clear, popular invocations of the term, like appeals to originalism, have served as a powerful polemic in opposition to evolving understandings of individual liberty, equal protection, federalism, and other constitutional concepts. Whether applied with rigor or intoned as rhetoric, originalism and strict construction have also served to legitimize conservative dominance of the federal judiciary for more than three decades.

In this book, we describe and defend an approach to constitutional interpretation that is richer than originalism or strict construction, more consistent with the history of our constitutional practice, and more persuasive in explaining why the Constitution remains authoritative over two hundred years after the nation’s founding. Interpreting the Constitution, we argue, requires adaptation of its broad principles to the conditions and challenges faced by successive generations. The question that properly guides interpretation is not how the Constitution would have been applied at the Founding, but rather how it should be applied today in order to sustain its vitality in light of the changing needs, conditions, and understandings of our society.

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 preserve the Constitution’s meaning and democratic legitimacy over time. Original understandings are an important source of constitutional meaning, but so too are the other sources that judges, elected officials, and everyday citizens regularly invoke: the purpose and structure of the Constitution, the lessons of precedent and historical experience, the practical consequences of legal rules, and the evolving norms and traditions of our society. A dynamic process of interpretation informed by these considerations is what enables the American people to keep faith with the Constitution from one generation to the next.

In elaborating this approach, we start from the premise that constitutional interpretation must be faithful to the character of the document itself. Three features are particularly important. First, the Constitution is “the basic charter of our society, setting out in spare but meaningful terms the principles

of government.”<sup>4</sup> Although some of its provisions establish clear and precise rules—for example, the age of eligibility to serve as a member of Congress or as President<sup>5</sup>—the Constitution, for the most part, does not “partake of the prolixity of a legal code.”<sup>6</sup> As Chief Justice Marshall observed, the nature of a constitution “requires that only its great outlines should be marked [and] its important objects designated,” and the language of the U.S. Constitution makes clear that “this idea was entertained by [its] framers.”<sup>7</sup> Our Constitution was not intended to supply a ready answer for every problem or every question that might arise. The Framers memorialized our basic principles of government with broad language whose application to future cases and controversies would be determined not by a mechanical formula but by an ongoing process of interpretation. The Constitution is “intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs”; it is a charter of general principles open to “fair and just interpretation” over time.<sup>8</sup> That is “the character of the instrument” that Chief Justice Marshall emphasized when he said “we must never forget that it is a constitution we are expounding.”<sup>9</sup>

Second, the Constitution is a document designed to be “understood by the public.”<sup>10</sup> To quote President Franklin Roosevelt, it is “a layman’s document, not a lawyer’s contract.”<sup>11</sup> Throughout our history, the meaning of the Constitution’s text and principles has been the subject of public debate and, at times, intense mobilization among the American people and their representatives. Judges, of course, play a critical role in interpreting the Constitution. But the popular character of the Constitution has meant that constitutional interpretation is not a task for the judiciary alone. Thus it is neither surprising nor illegitimate that judicial doctrine often incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice. Public engagement with the meaning of the Constitution is what has enabled our founding document to retain its democratic authority through changing times.

Third, the Constitution is a declaration of our ideals as well as a set of operational commands. The Constitution does not state our ideals as merely lofty aspirations; it records our commitment to put our ideals into practice. To keep faith with the Constitution is to fulfill its promises “not as a matter of fine words on paper, but as a matter of everyday life in the Natio[n].”<sup>12</sup> What this means for constitutional interpretation is that the application of the

## 4 Keeping Faith with the Constitution

Constitution's broad principles to specific controversies must take into account the lived experience and practical consequences of the law. In this way, the task of interpretation serves to realize the Constitution's guarantees "not simply as a matter of legal principle but in terms of how we actually live."<sup>13</sup>

In presenting these ideas, our approach is both descriptive and normative. It is descriptive insofar as it provides an account of our actual constitutional practice. As an historical matter, many of our fundamental constitutional understandings came into being through the adaptation of text and principle to the changing needs and norms of our society. At the same time, our project is normative insofar as it defends the dominant features of our constitutional practice against critics who would reduce the process of interpretation to something more mechanical or formulaic. Unlike alternatives such as originalism, interpretation that strives for constitutional fidelity succeeds over time in preserving the vitality of our founding text and securing the democratic legitimacy that ultimately anchors our continuing allegiance to the Constitution.

We begin in Chapter 1 with an overview of the text and historical development of the Constitution. Our discussion starts with the Founding context and the principles set forth in the unamended Constitution, and then examines the concerns that shaped the adoption of the Bill of Rights. From there, we turn to the next burst of additions to the Constitution, the Reconstruction Amendments, whose transformative principles forged what many have called America's Second Founding. We conclude this chapter with a brief discussion of the amendments adopted over the last century. In its entirety, the Constitution charts the centuries-long progress of our nation toward greater liberty and equality and more effective and democratic government. At each critical juncture, the Framers inscribed our fundamental values into the Constitution with broad language and expansive principles open to future interpretation.

Chapter 2 focuses on judicial interpretation of the Constitution. We use the term *constitutional fidelity* to describe an approach to interpretation that sustains the vitality of the Constitution's text and principles over time. This approach does not disavow original understandings as a legitimate source of constitutional meaning. But the overarching question it poses is not simply how the Constitution would have applied during the Framing era, but rather how it should apply today in order to preserve its meaning and authority in the light of evolving precedent, historical experience, practical consequences,

and societal change. As many examples show, these considerations inform the constitutional reasoning of judges of all stripes, and their importance and legitimacy are well established in our interpretive tradition. By contrast, neither originalism nor strict construction has proven to be a persuasive or durable methodology, not least because they cannot explain many of the basic constitutional understandings we now take for granted.

In Chapters 3 through 8, we illustrate our interpretive approach with historical narratives that show how several constitutional principles have acquired the meaning they have today. Individually and collectively, the narratives provide a textured account of how the Constitution's values have endured through adaptation to contemporary challenges posed by social, economic, and political change. They also demonstrate how our courts interact with the political branches and with the American people in giving practical effect to individual rights and structural guarantees. Finally, the narratives show that the actual practice of constitutional interpretation has never been reducible to a singular inquiry into original understandings or the plain meaning of the text. Throughout our history, judicial and non-judicial interpreters have rejected such narrow methodologies in favor of a more dynamic and multifaceted approach to interpretation that is faithful to the character of the Constitution itself.

Chapter 3 discusses the interpretive approach underlying *Brown v. Board of Education*, the modern jurisprudence of gender equality, and civil rights protections enacted by Congress as constitutional enforcement measures. Chapter 4 examines the New Deal transformation of constitutional understandings regarding the proper scope of government power to meet our social and economic needs. Chapter 5 discusses the application of the principle of checks and balances to contemporary challenges posed by the war on terrorism. Chapter 6 addresses the interplay of judicial and legislative solutions to malapportionment and vote dilution. Chapter 7 examines the revolution in criminal procedure that now informs our understanding of due process of law. And Chapter 8 traces the evolving scope of constitutional protection for individual liberty to make decisions concerning intimate aspects of our lives. Similar narratives could be written on how our society has come to understand freedom of speech, free exercise of religion, separation of church and state, and other constitutional principles. Our purpose here is not to provide a comprehensive survey but to illustrate a general and widely applicable approach to constitutional interpretation.

## 6 Keeping Faith with the Constitution

In Chapter 9, we conclude with a brief summary and a glimpse at future challenges that will continue to require an interpretive approach that adapts the words and principles of our founding document to the evolving conditions and norms of our society and, in so doing, sustains the faith of the American people in our enduring Constitution.