Keeping Faith: Chapter 2 - Judicial Interpretation of the Constitution

I. The Role of Courts

The Role of Other Branches

- 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. Examples include 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.

Courts and the Constitution

- 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. 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." 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.

II. Constitutional Fidelity

What it Means

- *Keeping Faith* develops 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."

- 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.

- From the Founding to the present day, arguments about what the Constitution means 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 cannot explain many of the constitutional understandings we cherish today.

The Example of Heller

- *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 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.

- 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.

- 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.

- Both sides also grappled with precedent.

- And 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, his opinion for the Court in *Heller* ultimately adopts an interpretation that depends on current social norms and conditions.

III. Judicial Methodology: Five Observations

- 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.

- 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. 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.

- Constitutional fidelity is not a license for judicial activism, for considerations such as evolving norms and practical consequences have often served to constrain, not enlarge, the judicial role in our democracy.

- Constitutional fidelity does not necessarily 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. 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 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.

- 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." 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."

IV. Originalism and its Discontents

Originalism as Practiced

- 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."

Two Fundamental Problems of Originalism

- Originalism does not provide the certainty its adherents claim. How a judge is to decide whose original understanding should be controlling. 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? In addition, what information or data is to be examined when determining those persons' understanding?

    - 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 produced divergent views among Framers such as Hamilton, Madison, and Randolph.

- 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. 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.

- Taken seriously and applied rigorously, originalism would result in a radical reordering of the Constitution as we understand it and our society as we know it. 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.

The Framers themselves were not originalists.

- 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." 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."

- This view is consistent 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. 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."

- 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. They chose general language to anchor a set of basic values that the nation could adapt as it grew and changed in unforeseeable ways. 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.

V. Additional Critiques

Judicial Restraint

- It is evident that judicial activism—long wielded as a critique of judicial liberals—appropriately characterizes many decisions of judicial conservatives in recent years. This is true whether judicial activism is defined as:
    - lack of deference to democratic decision-making (*District of Columbia v. Heller*; *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*; *Lorillard Tobacco Co.v. Reilly*; *Boy Scouts v. Dale*; *Phillips v. Washington Legal Found.*; *Lucas v. S.C. Coastal Council*; *City of Richmond v. J.A. Croson Co.*)
    - failure to adhere to constitutional text (*Fed. Mar. Comm'n v. S.C. State Ports Auth.*; *Alden v. Maine*);
    - original meaning (*Adarand Constructors, Inc. v. Peña*; *Lucas v. S.C. Coastal Council*);
    - lack of deference to judicial precedent (*FEC v. Wis. Right to Life, Inc.*; *Morse v. Frederick*; *Hein v. Freedom from Religion Found.*; *Bowles v. Russell*; *Gonzales v. Carhart*); or
    - the use of judicial power to achieve partisan objectives (*Bush v. Gore*).

- 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."

Strict Construction

- 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 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? And does the directive to "Congress" mean that the First Amendment should not be read to apply to the President or the states?

- 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. 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.

- 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 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.

- 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."