

# Living Originalism

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For Reva Siegel and Robert Post

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Living Originalism

## Fidelity to Text and Principle

Is our Constitution a living document that adapts to changing circumstances, or must we interpret it according to its original meaning? For many years people have debated constitutional interpretation in these terms. But the choice is a false one. Properly understood, these two views of the Constitution are compatible rather than opposed. Once we see why they are compatible, we will also understand how legitimate constitutional change occurs in the American constitutional system.

This book offers a constitutional theory, *framework originalism*, which views the Constitution as an initial framework for governance that sets politics in motion, and that Americans must fill out over time through constitutional construction. It also offers an associated theory of interpretation and construction, the method of *text and principle*. The method of text and principle requires fidelity to the original meaning of the Constitution, and in particular, to the rules, standards, and principles stated by the Constitution's text. It also requires us to ascertain and to be faithful to the principles that underlie the text, and to build out constitutional constructions that best apply the constitutional text and its associated principles in current circumstances.

The method of text and principle is both originalist and living constitutionalist. It is faithful to the original meaning of the constitutional text and to its underlying purposes. It is also consistent with a basic law whose reach and application evolve over time, a basic law that leaves to each generation the task of how to implement the Constitution's words and principles. In each generation the American people are charged with the obligation to flesh out and implement text and principle in their own time. They do this through building political institutions, passing legislation, and creating precedents, both judicial and nonjudicial. These constitutional constructions, in turn, shape how succeeding

generations will understand and apply the Constitution in their time. That is the best way to understand the interpretive practices of our constitutional tradition and the work of the many political and social movements that have transformed our understandings of the Constitution's guarantees.

The text of our Constitution is a framework. It is a basic plan for politics. The ratification of the Constitution begins a constitutional project that spans many generations.<sup>1</sup> Each generation must do its part to keep the plan going and to ensure that it remains adequate to the needs and the values of the American people. Americans fill the project out over time through constitutional politics. People contend with each other, trying to persuade each other about the best way to realize the constitutional plan and further its goals.

Keeping the plan going over time—especially given the many disagreements—requires faith in the constitutional project. This is a faith that the constitutional system as a whole is legitimate and worthy of our respect, or will come to be so over time, despite its many faults and imperfections. Thus, fidelity to the constitutional project—and to the Constitution itself—requires faith that the Constitution can and will eventually be redeemed. Fidelity to the Constitution requires that we believe that the project is worth continuing and struggling over, even if we also believe that many current interpretations are wrong or misguided.

Constitutional change is the product of this process of debate and striving over how to continue the plan. Americans try to persuade each other about the best meaning of constitutional text and principle in current circumstances. These debates and political struggles also help generate Americans' investment in the Constitution as their Constitution, even if they never officially consented to it; and they create a platform for the possibility—but not the certainty—of the Constitution's redemption in history.

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<sup>1</sup> On the notion of the Constitution as a project that simultaneously constitutes the American people, see Mark V. Tushnet, *Taking the Constitution Away from the Court* 11–12 (Princeton University Press 1999).

What people call “constitutional interpretation” involves more than one activity. The first is the ascertainment of meaning. For example, in the First Amendment, does the word *speech* refer only to speaking, or does it point to a more general category of expression that might include writing, music, and painting? The second activity is constitutional construction—implementing and applying the Constitution using all of the various modalities of interpretation: arguments from history, structure, ethos, consequences, and precedent.<sup>2</sup> We might call the first activity “interpretation-as-ascertainment” and the second “interpretation-as-construction.”

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<sup>2</sup> On the idea of constitutional construction, see Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 5 (Harvard University Press 1999). See also Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (University Press of Kansas 1999). Whittington defines constitutional interpretation as the “process of discovering the meaning of the constitutional text,” whereas constitutional construction is “essentially creative, though the foundations for the ultimate structure are taken as given. The text is not discarded but brought into being.” *Id.* at 5.

In Whittington’s model, all branches may engage in constitutional interpretation, but constitutional construction is reserved only for the political branches. *Id.* at 9, 11–12, 221 n. 3. In contrast, Randy Barnett and I have argued that all branches may engage in constitutional construction. See Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 118–27 (Princeton University Press 2004); Jack M. Balkin, “Abortion and Original Meaning,” 24 *Const. Comm.* 291, 293–94, 300–307 (2007)

On the modalities of constitutional argument, see Philip Bobbitt, *Constitutional Interpretation* (Blackwell 1993); Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford University Press 1982). Bobbitt argues that these modalities of argument are equal in importance; where they conflict, individuals must rely on their conscience to decide between them. My view is slightly different. Interpretations and constructions may not contradict original meaning, therefore once we know the original meaning of the text, it trumps any other form of argument. Nevertheless, people can and should use all of the modalities of argument to resolve any uncertainties or ambiguities in original meaning and to build constitutional constructions that are consistent with original meaning.

Bobbitt emphasizes that people use the modalities to deliberate and exercise individual conscience in deciding between them. I emphasize that the modalities of constitutional argument are also forms of shared public rhetoric. Constitutional disagreements are aired in public among fellow citizens; constitutional understandings change over time through persuasion. The modalities of constitutional argument are common resources that help us explain to others what we think the Constitution means and why they should agree with us.

Much of what people call constitutional interpretation—especially by judges—is actually interpretation-as-construction. Judges build up systems of precedent that implement constitutional purposes and give the Constitution’s guarantees and structures meaning in practice, and then they apply these systems of precedent to particular controversies. In the process they often create new doctrinal distinctions that will apply to future cases. The political branches also develop precedents over time through practices that flesh out the respective powers of the different branches of government. In this book I will often draw on the distinction between interpretation-as-ascertainment and interpretation-as-construction. When I speak of “interpretation” generally, I will include both types, as do most people.

Constitutional construction, however, involves far more than developing doctrines and precedents that implement the Constitution. All three branches of government build institutions and create laws and doctrines that serve constitutional purposes, that perform constitutional functions, or that reconfigure the relationships among the branches of the federal government, the states, and civil society. These activities build out the American state over time.

For example, Congress has created the various parts of the executive branch—like the Defense Department and the Justice Department—to help the president carry out his duties to faithfully execute the laws and perform other constitutional functions. As a result, the president is far more powerful today than anyone could have imagined in 1787. The Administrative Procedure Act of 1946 helps the courts review federal administrative actions for conformity to law. The Federal Reserve Act of 1913 and later amendments shifted the responsibility for monetary policy to an independent federal agency. The Civil Rights Act of 1964, the Voting Rights Act of 1965, and later civil rights measures created an enduring framework of national civil rights protection. The Social Security Act of 1935 and later social welfare laws constructed a social safety net administered by the

federal government and the states. We might call these “state-building constructions.” They build out the Constitution as they build out the country.

Not all of these state-building constructions look like interpretations of specific constitutional provisions, but they rely on assumptions about the Constitution’s larger purposes and about what the Constitution permits or requires. Moreover, these constructions, once accepted in practice, may create durable expectations about what the Constitution means. Courts often shape constitutional doctrines to make sense of these state-building exercises. In fact, the construction of the administrative state during the New Deal was the occasion for a major debate about constitutional interpretation that transformed how lawyers and judges understood the Constitution’s guarantees. The New Deal and the civil rights revolution also changed how ordinary Americans understood the purposes and responsibilities of government and the rights of individual citizens.

To understand constitutional interpretation and the processes of constitutional change, we must pay as much attention to institutional development and state building as we do to judicial doctrines and decisions. To understand our Constitution, we must consider not only original meaning and judicial precedents, but also a wide variety of other state-building constructions that rely on interpretations of the Constitution and that provoke new interpretations.

### Original Meaning versus Original Expected Application

Constitutional interpretations are not limited to applications specifically intended or expected by the framers and adopters of the constitutional text. For example, the First Amendment today does not protect only speech that people in 1791 would have protected from censorship. The Eighth Amendment’s prohibitions on “cruel and unusual punishments” ban punishments that are cruel and unusual as judged by contemporary application of these concepts and principles, not by how people living in 1791 would have applied them.

The text of our Constitution contains different kinds of language. It contains determinate rules (the president must be thirty-five, there are two houses of Congress). It contains standards (no “unreasonable searches and seizures,” a right to a “speedy” trial). And it contains principles (no prohibitions of the free exercise of religion, no abridgments of the freedom of speech, no denials of equal protection). If the text states a determinate rule, we must apply the rule because that is what the text offers us. If it states a standard, we must apply the standard. And if it states a general principle, we must apply the principle. Perhaps technically we should call this the method of “text, rule, standard, and principle,” but “text and principle” is a far simpler shorthand.

The method of text and principle argues that we should pay careful attention to the reasons why constitutional designers choose particular kinds of language. Adopters use fixed rules because they want to limit discretion; they use standards or principles because they want to channel politics through certain key concepts but delegate the details to future generations. When the Constitution uses vague standards or abstract principles, we must apply them to our own circumstances in our own time. When adopters use language that delegates constitutional construction to future generations, fidelity to the Constitution requires future generations to engage in constitutional construction. This is the essence of the method of text and principle.

This assumption marks the major difference between my approach and the one popularized by one of originalism’s most prominent champions, Justice Antonin Scalia.<sup>3</sup> Justice Scalia agrees that we should interpret the Constitution according to “the original meaning of the text, not what the original draftsmen

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<sup>3</sup> See Antonin Scalia, “Originalism: The Lesser Evil,” 57 *U. Cin. L. Rev.* 849, 862–64 (1989); Antonin Scalia, “Common Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws,” in *A Matter of Interpretation: Federal Courts and the Law* 17 (Amy Gutmann ed., Princeton University Press 1997).

intended.”<sup>4</sup> He also agrees that the original meaning of the text should be read in light of its underlying principles. But he insists that the concepts and principles underlying those words must be formulated and applied in the same way that they would have been formulated and applied when they were adopted. As he puts it, the principle enacted in the Eighth Amendment “is not a moral principle of ‘cruelty’ that philosophers can play with in the future, but rather the existing society’s assessment of what is cruel. It means not .°.°. ‘whatever may be considered cruel from one generation to the next,’ but ‘what we consider cruel today [i.e., in 1791]’; otherwise it would be no protection against the moral perceptions of a future, more brutal generation. It is, in other words, rooted in the moral perceptions *of the time*.”<sup>5</sup>

Scalia’s version of “original meaning” is not original meaning in my sense, but a more limited interpretive principle, *original expected application*. Original expected application asks how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense (along with any legal terms of art). Thus, the original expected application includes not only specific results, but also the way that the adopting generation would have expected the relevant constitutional principles to be articulated and applied.

Justice Scalia can accommodate new phenomena and new technologies—like television or radio—by analogical extension with phenomena and technologies that existed at the time of adoption. But this does not mean, Scalia insists, that “the *very acts* that were perfectly constitutional in 1791 (political patronage in government contracting and employment, for example) may be *unconstitutional* today.”<sup>6</sup>

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<sup>4</sup> Scalia, “Common Law Courts,” *supra* note 3, at 38.

<sup>5</sup> Scalia, “Response,” in *A Matter of Interpretation*, *supra* note 3, at 145 (emphasis in original).

<sup>6</sup> See *id.* at 140–41 (emphasis in original).

## Mistakes and Achievements

Scalia realizes that his approach would allow many politically unacceptable results, including punishments that would clearly shock the conscience today. So he frequently allows deviations from his interpretive principles, making him what he calls a “faint-hearted originalist.”<sup>7</sup> For example, Scalia accepts the New Deal settlement that gave the federal government vast powers to regulate the economy that most people in 1787 would never have dreamed of and would probably have strongly rejected.<sup>8</sup>

Scalia’s originalism must be “faint-hearted” precisely because he has chosen an unrealistic and impractical principle of construction, which he must repeatedly leaven with respect for precedent and other prudential considerations. The basic problem with looking to original expected application for guidance is that is inconsistent with so much of our existing constitutional traditions. Many federal laws securing the environment, protecting workers and consumers—even central aspects of Social Security—go beyond original expectations about federal power; so too do independent federal agencies like the Federal Reserve Board and the Federal Communications Commission, and federal civil rights laws that protect women and the disabled from private discrimination. Even the federal government’s power to make paper money legal tender probably violates the expectations of the founding generation.<sup>9</sup> The original expected application is also inconsistent with constitutional guarantees of sex equality for married women,<sup>10</sup> with constitutional protection of interracial marriage,<sup>11</sup> with the constitutional

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<sup>7</sup> Scalia, “Originalism,” supra note 3, at 861–64.

<sup>8</sup> See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (Scalia, J., concurring).

<sup>9</sup> See Kenneth Dam, “The Legal Tender Cases,” 1981 *Sup. Ct. Rev.* 367, 389 (“difficult to escape the conclusion that the Framers intended to prohibit” use of paper money as legal tender); *Hearings before Senate Comm. on the Judiciary 100th Cong., 1st Sess. Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Part I*, at 84–85 (1987).

<sup>10</sup> See *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>11</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

right to use contraceptives,<sup>12</sup> and with the modern scope of free-speech rights under the First Amendment.<sup>13</sup>

The standard response to this difficulty is that courts should retain “nonoriginalist” precedents (i.e., those inconsistent with original expected application) if those precedents are well established, if they promote stability, and if people have justifiably come to rely on them. Interpretive mistakes, even though constitutionally illegitimate when first made, can become acceptable because we respect precedent. As Scalia explains, “[t]he whole function of the doctrine” of *stare decisis* “is to make us say that what is false under proper analysis must nonetheless be held true, all in the interests of stability.”<sup>14</sup>

There are four major problems with this solution. First, it undercuts the claim that legitimacy comes from adhering to the original meaning of the text adopted by the framers and that decisions inconsistent with the original expected application are illegitimate. It suggests that legitimacy can come from public acceptance of the Supreme Court’s decisions, or from considerations of stability or economic cost.

Second, under this approach, not all of the “incorrect” precedents receive equal deference. Judges will inevitably pick and choose which decisions they will retain and which they will discard based on pragmatic judgments about when reliance is real, substantial, justified, or otherwise appropriate. These characterizations run together considerations of stability and potential economic expense with considerations of political acceptability—which decisions would be too embarrassing now to discard—and political preference—which decisions

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<sup>12</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1971).

<sup>13</sup> E.g., *Cohen v. California*, 403 U.S. 15 (1971) (protecting public expressions of profanity); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (protecting advocacy of sedition and law violation); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding unconstitutional aspects of common law of defamation); Scalia, “Response,” *supra* note 5, at 138 (contemporary First Amendment protections are “irreversible” “whether or not they were constitutionally required as an original matter”).

<sup>14</sup> Scalia, “Response,” *supra* note 5, at 139.

particularly rankle the jurist's sensibilities. Thus, one might argue that it is too late to deny Congress's power under the commerce clause to pass the Civil Rights Act of 1964 but express doubts about the Endangered Species Act. One might accept that states may not engage in sex discrimination but vigorously oppose the constitutional right to abortion or the unconstitutionality of antisodomy statutes. This play in the joints allows expectations-based originalism to track particular political agendas and allows judges to impose their political ideology on the law—the very thing that the methodology purports to avoid.

Third, allowing deviations from original expected application out of respect for precedent does not explain why we should not read these mistakes as narrowly as possible to avoid compounding the error, with the idea of gradually weakening and overturning them so as to return to more legitimate decisionmaking. If the sex equality decisions of the 1970s were mistakes, courts should try to distinguish them in every subsequent case with the goal of eventually ridding us of the blunder of recognizing equal constitutional rights for women. If the New Deal settlement was thoroughly illegitimate, courts should find ways to strike down federal statutes, chip away at existing understandings, and ultimately overturn federal laws guaranteeing environmental quality, nondiscrimination, and workplace safety.

This brings us to the final and more basic problem: Our political tradition does not regard decisions that have secured equal rights for women, greater freedom of speech, federal power to protect the environment, and federal power to pass civil rights laws as mistakes that we must unhappily retain; it regards them as genuine achievements of American constitutionalism and sources of pride. These decisions are part of why we understand ourselves to be a nation that has grown freer and more democratic over time. No interpretive theory that regards equal constitutional rights for women as an unfortunate blunder that we are now simply stuck with because of respect for precedent can be adequate to our history as a people. It confuses achievements with mistakes, and it maintains them out of a

grudging acceptance. Indeed, those who argue for limiting constitutional interpretation to the original expected application are in some ways fortunate that previous judges rejected their theory of interpretation; this allows them to accept as a starting point nonoriginalist precedents that would now be far too embarrassing for them to disavow.

An originalism that focuses on original expected applications cannot account for how political and social movements and post-enactment history shape our constitutional traditions. It cannot explain how succeeding generations build out the Constitution through constitutional construction. Original expectations originalism argues that social movements and political mobilizations can change constitutional law through the amendment process of Article V. They can also pass new legislation, as long as that legislation does not violate original expected application—as much federal post–New Deal legislation might. But no matter how significant social movements like the civil rights movement and the women’s movement might have been in our nation’s history, no matter how much they may have changed Americans’ notion of what civil rights and civil liberties belong to them, they cannot legitimately alter the correct interpretation of the Constitution beyond the original expected application.

The model of text and principle views the work of political and social movements and post-enactment history quite differently. The constitutional text does not change without Article V amendment. But each generation of Americans can seek to persuade each other about how text and principle should apply to their circumstances, their problems, and their grievances. And because conditions are always changing, new problems are always arising and new forms of social conflict and grievance are always emerging, the process of argument and persuasion about how to apply the Constitution’s text and principles is never-ending.

When people try to persuade each other about how to interpret the Constitution, they naturally identify with the generation that framed the

constitutional text and they claim that they are being true to its deepest principles. They can and do draw analogies between the problems, grievances, and injustices the adopters feared or faced and the problems, grievances, and injustices of our own day. They also can and do draw on the experiences and interpretive glosses of previous generations—like the generation that produced the New Deal or the civil rights movement—and argue that they are also following in their footsteps.

Most successful political and social movements in America's history have claimed authority for change in just this way: either as a call to return to the enduring principles of the Constitution or as a call for fulfillment of those principles. Thus, the key tropes of constitutional interpretation by social movements and political parties are restoration, on the one hand, and redemption, on the other. Constitutional construction changes by arguing about what we already believe, what we are already committed to, what we have promised ourselves as a people, what we must return to, and what commitments remain to be fulfilled.

When political and social movements succeed in persuading other citizens that their interpretation is the right one, they replace an older set of implementing constructions and doctrines with a new one. These constructions and implementations may not be just or correct judged from the standpoint of later generations, and they can be challenged later on. But that is precisely the point. In every generation, We the People of the United States make the Constitution our own Constitution by calling upon its text and its principles and arguing about what they mean in our own time. That is how each generation connects its values to the commitments of the past and carries forward the constitutional project of the American people into the future.

From the standpoint of text and principle, it matters greatly that there was a women's movement in the 1960s and 1970s that convinced Americans that both married and single women were entitled to equal rights and that the best way to make sense of the Fourteenth Amendment's principle of equal citizenship was to

apply it to women as well as men, despite the original expected application of the adopters. The laws and judicial decisions crafted in this period that ban sex discrimination are not “mistakes” that we must grudgingly live with. They are *applications* of text and principle that have become part of our constitutional tradition. They might be good or bad applications; they might be incorrect or incomplete. That is for later generations to judge. But when people accept them, as Americans accept the notion of equality for women today, they do not do so simply on the basis of reliance interests—that we mistakenly gave women equal rights in the 1970s and now it’s just too late to turn back. They do so in the belief that this is what the Constitution *actually means*, that this is the best, most faithful interpretation of constitutional text and principles.

Originalism based on original expected applications fails because it cannot comprehend this feature of constitutional development except as a series of errors that it would now be too embarrassing to correct. Justice Scalia correctly notes that his reliance on nonoriginalist precedents is not consistent with his originalist commitments, but is rather a “pragmatic exception.”<sup>15</sup> And that is precisely the problem with his view: The work of political and social movements in our country’s history is not a “pragmatic exception” to fidelity to the Constitution. It is the lifeblood of fidelity to our Constitution—it is how Americans vindicate their Constitution’s text and principles in history.

None of this means that the original expected application is irrelevant or unimportant either to interpretation or construction. It helps us understand the original meaning of the text and the general principles that animated the text. For example, in Chapters 9 through 11, which apply the method of text and principle to the commerce clause and the Fourteenth Amendment, I draw heavily on the history of adoption to resolve ambiguities in original meaning and to suggest the best constructions. The point, however, is that original expected applications are

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<sup>15</sup> *Id.* at 140.

not part of the text and they are not themselves binding law. Rather, like other aspects of pre- and post-ratification history, they are a method or modality of interpretation, one among many others. They do not control how we should apply the Constitution's guarantees today, especially as our world becomes increasingly distant from the expectations and assumptions of the adopters' era.

### The Meaning of Original Meaning

The term *original meaning* can be confusing because we use the word *meaning* to refer to at least five different kinds of things: (1) semantic content (“What is the meaning of this word in English?”);<sup>16</sup> (2) practical applications (“What does this mean in practice?”); (3) purposes or functions (“What is the meaning of life?”); (4) specific intentions (“I didn’t mean to hurt you”); or (5) associations (“What does America mean to me?”). Thus, when we ask about the “meaning” of the equal protection clause, we could be asking (1) what concepts the words in the clause point to; (2) how to apply the clause; (3) the purpose or function of the clause; (4) the intentions behind the clause; or (5) what the clause is associated with in our minds or, more generally, in our culture.<sup>17</sup>

Fidelity to “original meaning” in constitutional interpretation refers only to the first of these types of meaning: the semantic content of the words in the clause. Fidelity to original meaning does not, however, require fidelity to any of the four other types of original meaning, although these forms of meaning may be quite relevant pieces of evidence of original semantic content. Moreover, these other kinds of meaning may be important for purposes of constitutional construction.

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<sup>16</sup> See Lawrence B. Solum, *Semantic Originalism* (Illinois Pub. Law Research Paper No. 07-24, 2008), available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244).

<sup>17</sup> Solum identifies three of these forms of meaning. See *id.* at 2-3. I also include meaning as intention and meaning as association because they are important to culture in general and constitutional culture in particular.

Fidelity to original meaning as original semantic content does not require that we must apply the equal protection clause the same way that people at the time of enactment would have expected it would be applied. It does not require that we must articulate the purposes or functions of the clause in exactly the same way the framers and ratifiers would have, or that we apply it only according to their intentions.<sup>18</sup> Finally, it does not mean that the clause can only have the same associations for us that it had for the adopting generation. Today, for example, the clause is associated with many things in our minds and our political culture—like Dr. Martin Luther King Jr. and the civil rights revolution—that the adopting generation could not have known about. These four other types of original meaning may be quite relevant to constitutional construction, and to how we should create and apply legal doctrines. But they are not dispositive on these questions.

To be faithful to original meaning in the sense I am concerned with, we need to know the concepts that the words in the equal protection clause referred to when the clause was originally enacted. This is not purely an investigation into semantic definitions. We also want to know if words in the clause were understood nonliterally—for example, as a metaphor or a synecdoche—and we want to know whether some words referred to generally recognized terms of art.

For example, the copyright clause in Article I, section 8, refers to “writings,” which is a nonliteral use. It refers to more than written marks on a page but also includes printing and (probably) sculpture, motion pictures, and other media of artistic and scientific communication. Similarly, the word *speech* in the First Amendment is a synecdoche: it is an example that stands for a larger category of

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<sup>18</sup> That we are not bound by the specific purposes of the adopters is especially important in the case of structural arguments, and in the case of textual commitments to unenumerated rights, for example, in the Ninth Amendment and the privileges or immunities clause of the Fourteenth Amendment. Some structural arguments depend on events that occurred after enactment, and unenumerated rights by their nature cannot be specified in advance. See Chapters 9 and 12, *infra*.

expression, just as the term *press* may stand for both a technology (or a class of technologies) and for a set of social institutions.<sup>19</sup>

## Implementing Text and Principles

Although the original expected application is not binding, the constitutional text is. That is because we have a written Constitution that is also enforceable law. We treat the Constitution as law by viewing its rules, standards, and principles as legal rules, standards, and principles. If the text states a determinate rule, we must apply the rule because that is what the text provides. If it states a standard, we must apply the standard. And if it states a general principle, we must apply the principle.

When the text provides an unambiguous, concrete and specific rule, the principles or purposes behind the text cannot override the textual command. For example, the underlying goal of promoting maturity in a president does not mean that we can dispense with the thirty-five-year age requirement. The language creates a rule and must be applied accordingly. On the other hand, where the text is ambiguous or vague, we look to the principles and purposes behind the text to help us understand how to apply it. And where the text offers an abstract standard or principle, we must try to determine what principles underlie the text in order to build constructions that are consistent with it. Articulating underlying principles is one of the tasks of constitutional construction. We can and should use history to articulate these constitutional principles. But the principles we derive from history must be at roughly the same level of abstraction as the text itself. The question is not what principles people specifically intended but what principles the text enacts. Indeed, the fact that adopters chose text that features general and abstract concepts is normally the best evidence that they sought to embody general and

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<sup>19</sup> See Scalia, “Common Law Courts,” *supra* note 3, at 37–38 (the text of the First Amendment must be construed as a synecdoche in which “speech” and “press” stand for a whole range of different forms of expression, including handwritten letters).

abstract principles of constitutional law, whose scope, in turn, will have to be worked out and implemented by later generations.

In some cases the constitutional text itself states a principle, like “equal protection” or “freedom of speech,” that we must flesh out by articulating subsidiary principles that explain it. In other cases we infer principles from the constitutional structure as a whole. Articulating these principles is also the task of constitutional construction. For example, there is no single separation of powers clause in the Constitution; rather we derive the principle of separation of powers from how the various institutions and structures outlined in the constitutional text relate to each other. The same is true of the constitutional principle of checks and balances. We infer a general principle from text, structure, and history.

The principle of democracy—which includes the subprinciple that courts should generally defer to legitimate majoritarian decisionmaking—is nowhere specifically mentioned in the constitutional text, and yet it may be the most frequently articulated principle in constitutional argument. It is, ironically, the principle that people most often use to object to courts’ inferring constitutional principles not specifically mentioned in the text. Although the principle of democracy does not directly appear in the text, we infer it from various textual features that presume democracy and from the basic character of our government as a representative and democratic republic. The principle of democracy is a structural principle that also informs our construction of other principles, like freedom of speech or the guarantee of equal protection of the laws.<sup>20</sup>

Finally, many other materials gloss text and principles and help apply them to concrete circumstances. These include not only the original expected application but also post-enactment history, including the work of political and social movements that have changed our constitutional common sense, and other

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<sup>20</sup> See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980). Ely famously argued against a “clause-bound textualism” and in favor of larger structural principles derived from the text as a whole.

constitutional constructions, including judicial and nonjudicial precedents. These materials offer a wide range of theories and interpretations that help us understand and apply the Constitution. They are entitled to considerable weight. Precedents not only implement and concretize principles, they also help settle difficult legal questions where reasonable people can and do disagree. Precedents also help promote stability and rule-of-law values. However, because glosses and precedents accumulate and change over time, and because they often point in contrasting directions, they are not always dispositive of constitutional meaning.

Constitutional doctrines created by courts, and institutions and practices created by the political branches, flesh out and implement the constitutional text and underlying principles. But they are not supposed to replace them. Doctrines, institutions, and practices can implement the Constitution well or poorly, depending on the circumstances, and some implementations that seem perfectly adequate at one point may come to seem quite inadequate or even perverse later on. Because the Constitution, and not interpretations of the Constitution, is the supreme law of the land, later generations may assert—and try to convince others—that the best interpretation of text and principle differs from previous implementing glosses, and hence that we should return to the best interpretation of text and principle, creating new implementing rules, practices, and doctrines that will best achieve this end. The tradition of continuous arguments about how best to implement constitutional meaning generates changes in constitutional doctrines, practices, and law. That is why, ultimately, there is no conflict between fidelity to text and principle and practices of constitutionalism that evolve over time. Indeed, 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.

## Fidelity and Institutional Constraints

Expectations-based originalists may object that the text-and-principle approach is indeterminate when the text refers to vague standards or abstract principles like “equal protection” rather than to concrete rules. Therefore it does not sufficiently constrain judges. That might be so if text and principle were all that judges consulted when they interpreted the Constitution. But in practice judges (and other constitutional interpreters) draw on a rich tradition of sources that guide and constrain interpretation, including pre- and post-enactment history, original expected application, previous constitutional constructions, structural and intertextual arguments, and judicial and nonjudicial precedents. In practice, judges who look to text and principle face constraints much like those faced by judges who purport to rely on original expected application. As we have seen, the latter cannot and do not use original expected applications for a very large part of their work, because a very large part of modern doctrine is not consistent with original expected application. So even judges who claim to follow the original understanding are, in most cases, guided and constrained by essentially the same sources and modalities of argument as judges employing the method of text and principle.

I think there is a deeper problem with the objection that the method of text and principle does not sufficiently constrain judges. Many theories of constitutional interpretation conflate two different questions. The first is the question of what the Constitution means and how to be faithful to it. The second asks how a person in a particular institutional setting—like an unelected judge with life tenure—should interpret the Constitution and implement it through doctrinal constructions and applications. The first is the question of *fidelity*; the second is the question of *institutional responsibility*.

Theories about constitutional interpretation that conflate these two questions tend to view constitutional interpretation from the perspective of judges and the judicial role; they view constitutional interpretation as primarily a task of judges,

and they assess theories of interpretation largely in terms of how well they guide and limit judges. For example, one of the standard arguments for original expectations originalism is that it will help constrain judges in a democracy. From the perspective of these theories, nonjudicial interpreters are marginal or exceptional cases that we explain in terms of the standard case of judicial interpretation.

I reject this approach. Theories of constitutional interpretation should start with interpretation by citizens as the standard case; they should view interpretation by judges as a special case with special considerations created by the judicial role. In like fashion, constitutional interpretations by executive officials and members of legislatures are special cases that are structured by their particular institutional roles. The political branches must do more than simply not violate the Constitution; they have affirmative obligations to construct institutions and laws that will carry out the Constitution's purposes. Much of the most important constitutional work does not come from courts. It comes from acts of constitutional construction by executive officials and legislatures, both at national and local levels, building institutions, programs, and practices that flesh out and implement constitutional text and principles in ways that courts cannot.

Why emphasize the citizen's perspective? People in each generation must figure out what the Constitution's promises mean for themselves. Many of the most significant changes in constitutional understandings (such as the New Deal, the civil rights movement, the second wave of American feminism) occurred through mobilizations and countermobilizations by social and political movements that offered competing interpretations of what the Constitution really means. Social and political movements argue that the way that the Constitution has been interpreted and implemented by judges or other political actors is wrong and that we need to return to the Constitution's correct meaning and redeem the Constitution's promises in our own day.

Often people do not make these claims in lawyerly ways, and usually they are not constrained by existing understandings and existing doctrines in the way that we want judges to be constrained. In fact, when social movements initially offer their constitutional claims, many people regard them as quite radical or “off-the-wall.” There was a time, for example, when the notion that the Constitution prohibited what we now call sex discrimination seemed quite absurd. Yet it is from these protestant interpretations of the Constitution that later constitutional doctrines emerge. Many of the proudest achievements of our constitutional tradition have come from constitutional interpretations that were at one point regarded as crackpot and off-the-wall.

I hasten to add that most of these arguments go nowhere. Only a few have significantly changed how Americans look at the Constitution. Successful social and political movements must persuade other citizens that their views are correct, or, at the very least, they must convince people to compromise and modify their views. If movements are successful, they change the minds of the general public, politicians, and courts. This influence eventually gets reflected in new laws, in new constitutional doctrines, and in new constitutional constructions. Successful social and political mobilization changes political culture, which changes constitutional culture, which in turn changes constitutional practices outside of the courts and constitutional doctrine within them.

The causal influences, of course, do not run in only one direction. Judicial interpretations like those in *Brown v. Board of Education*<sup>21</sup> or *Miranda v. Arizona*<sup>22</sup> can become important parts of our constitutional culture; they can be absorbed into ordinary citizens’ understandings of what the Constitution means, and they can act as focal points for citizen reaction. Nevertheless, we cannot understand how constitutional understandings change over time unless we recognize how social movements and political parties articulate new

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<sup>21</sup> 347 U.S. 483 (1954).

<sup>22</sup> 384 U.S. 486 (1966).

constitutional claims, create new constitutional regimes, and influence judicial constructions.

To understand how these changes could be faithful to the Constitution, we must have a theory that makes the citizen's perspective primary. I do not claim that all mobilizations that produce new constitutional constructions are equally faithful or equally admirable. But some are both faithful and admirable, and a theory of constitutional interpretation—which is also a theory of constitutional fidelity—must account for them. Expectations-based originalism is virtually useless for this purpose, because it views many of the most laudatory changes in our understandings of the Constitution as not faithful to the Constitution and therefore illegitimate.

For similar reasons, expectations-based originalism cannot really constrain judges because too many present-day doctrines are simply inconsistent with it; as a result, judges must pick and choose based on pragmatic justifications that are exceptions to the theory. Indeed, the exceptions threaten to swallow the theory in many areas of the law. Because original expectations originalism conflates the question of constitutional fidelity with the question of judicial constraint, it offers the wrong answer to both questions.

Constraining judges in a democracy is important. But in practice most of that constraint does not come from theories of constitutional interpretation. It comes from institutional features of the political and legal system. Some of these are internal to law and legal culture, like the various sources and modalities of legal argument listed above. Others are “external” to legal reasoning but nevertheless strongly influence what judges produce as a group.

First, judges are subject to the same cultural influences as everyone else—they are socialized both as members of the public and as members of particular legal elites. Second, the president's ability to pick jurists with views roughly similar to his own and the Senate's countervailing advise and consent power determine and limit who gets to serve as a judge, helping to ensure that most

successful judicial candidates come from within the political and legal mainstream. Third, lower federal courts are bound to apply Supreme Court precedents. Fourth, the Supreme Court is a multimember body whose decisions in contested cases are usually decided by the median or “swing” justices. Over time, this helps to keep the Court’s work near the center of public opinion.

This combination of internal and external features constrains judicial interpretation in practice far more effectively than any single theory of interpretation ever could; it helps construct which constitutional interpretations are reasonable and available to judges and which are off-the-wall. Equally important, it helps to keep judicial decisions in touch with popular understandings of our Constitution’s basic commitments, continually translating, shaping, and refining constitutional politics into constitutional law.

Fidelity to the Constitution means applying its text and its principles to our present circumstances, and making use of the entire tradition of opinions and precedents that have sought to vindicate and implement the Constitution. Reasonable people may disagree on what those principles mean and how they should apply. But the larger point about constitutional interpretation remains. We decide these questions by reference to text and principle, applying them to our own time and our own situation, and in this way making the Constitution our own. The conversation between past commitments and present generations is at the heart of constitutional interpretation. That is why we do not face a choice between living constitutionalism and fidelity to the original meaning of the text. They are two sides of the same coin.

Part Three

Change

## Rethinking Living Constitutionalism

I began this book with a central claim: fidelity to original meaning and the idea of a living Constitution that adapts to changing times and conditions are not rival theories of constitutional interpretation; they are actually compatible positions. When we understand how and why they are compatible, we will also understand how democratically legitimate constitutional change that is faithful to the Constitution's original meaning occurs in the American constitutional system. To this end I have offered what I believe is the best account of fidelity to original meaning, framework originalism, and an approach for interpretation and construction that is faithful to original meaning, the method of text and principle. By this point I hope I have convinced you that there is a version of originalism that is consistent with the great achievements of American constitutional development: the protection of modern civil rights and civil liberties and the creation of a modern state.

Just as we need to rethink originalism, however, we also need to rethink the idea of a living Constitution. Living constitutionalism has often been more of a slogan than a theory: the claim that the Constitution adapts—and should adapt—to changing times and conditions, and reflect the evolving values of the American people.

Defenders and critics alike have generally assumed that living constitutionalism is a philosophy of judging that explains and justifies how courts should interpret the Constitution. Defenders assume that it must be a distinctive interpretive approach or method—opposed to originalism—that judges could and should consciously follow to produce better or more just decisions.<sup>1</sup> Critics have

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<sup>1</sup> See, e.g., David A. Strauss, *The Living Constitution* (Oxford University Press 2010) (arguing that living constitutionalism is a common law method that both constrains judges and permits

responded that living constitutionalism is a bad methodology that gives judges too much discretion to impose their personal preferences.<sup>2</sup>

I believe this way of talking is a serious mistake. The best account of a living Constitution cannot be a sort of mirror image of originalism. It cannot be a countertheory that offers particularized advice to judges about how to decide cases.

The expression “living” Constitution compares the Constitution to a living organism growing and changing in response to its environment.<sup>3</sup> This metaphor

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evolution); Lawrence B. Solum, “Constitutional Possibilities,” 83 *Ind. L.J.* 307, 315 (2008) (“In the choice between originalism and living constitutionalism as general methods of interpretation, it’s the method or practice (ranging across an action type) and not the individual decision (or action token) that counts”); Mitchell N. Berman, “Originalism and Its Discontents (Plus a Thought or Two About Abortion),” 24 *Const. Comment.* 383, 391–95, 400–404 (2007) (discussing the method of living constitutionalism and its superiority to originalism and the method of text and principle); William J. Brennan Jr., “The Constitution of the United States: Contemporary Ratification,” 27 *S. Tex. L. Rev.* 433, 438 (1986) (arguing that courts must look to what the Constitution’s words mean today); Barry Friedman and Scott B. Smith, “The Sedimentary Constitution,” 147 *U. Pa. L. Rev.* 1, 10 (1998) (“Living constitutionalism,” .°. is the practice of interpreting the Constitution, usually in a nonhistorical way, to meet the needs of the present”); see also Charles A. Reich, “Mr. Justice Black and the Living Constitution,” 76 *Harv. L. Rev.* 673, 735–36 (1963) (arguing that judges must adapt constitutional provisions as society changes or the provisions will atrophy); cf. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 442–44 (1934) (Hughes, C.°J.) (arguing that “the great clauses of the Constitution must [not] be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them,” and calling for interpretation of the Constitution in light of changing times, and “a growing recognition of public needs”).

<sup>2</sup> See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 251–53 (Macmillan 1990) (explaining that nonoriginalist theories require judges to impose their moral views on democratic majorities in the absence of moral consensus and without any satisfactory theory of why judges have authority to do so); William H. Rehnquist, “The Notion of a Living Constitution,” 54 *Tex. L. Rev.* 693, 693, 695 (1976) (versions of living constitutionalism which see judges as “the voice and conscience of contemporary society” allow judges to impose their personal and subjective moral views on the public); Antonin Scalia, “Common-Law Courts in a Civil-Law System,” in *A Matter of Interpretation: Federal Courts and the Law* 38–39 (Amy Gutmann ed., Princeton University Press 1997) (living constitutionalism empowers judges to engage in common law reasoning based on their views of desirable outcomes); see Antonin Scalia, “Originalism: The Lesser Evil,” 57 *U. Cin. L. Rev.* 849, 863 (1989) (nonoriginalism leads judges to mistake their preferences for fundamental rights and values).

presupposes a process of change that involves larger social, political, and economic forces in which the Constitution-in-practice is situated. Judges cannot be at the center of this account because they do not control these forces and they could not successfully control them even if they tried. Moreover, the process of change must involve all of the various actors in the constitutional system and their responses to (and advocacy of) social, political, and economic change.

Therefore, a theory of living constitutionalism that focuses primarily on what judges should do is at odds with the very assumptions behind the idea of a living Constitution.

To rethink living constitutionalism, then, we have to begin by jettisoning the idea that it is primarily a theory about good judging. We must recognize that it is an account, to borrow a phrase, of the processes of constitutional decisionmaking,<sup>4</sup> and their basis in democracy and in the ideals of popular sovereignty.

Understood as an account of the processes of constitutional decisionmaking, living constitutionalism makes a great deal of sense. It also has the advantage of describing the actual history of our nation. Understood as a doctrine for correct judging, however, “living constitutionalism” is an undertheorized concept. One popular formula of living constitutionalism is that judges should adapt to changing conditions, reflect changing values, and generally keep up with the times. But such advice, directed at individual judges, is substantively empty. When judges leave issues up to the political process, they can view themselves as

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<sup>3</sup> The *locus classicus* of the metaphor of the living Constitution appears in *Missouri v. Holland*, 252 U.S. 416, 433 (1920), in which Justice Holmes compared the Constitution to an “organism” and argued that the words of the text “have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.” In *Edwards v. Canada (Attorney General)* [1930] A.C. 124, holding that women were eligible to serve in the Canadian Senate, the Canadian Supreme Court self-consciously adopted an organic metaphor to explain its version of living constitutionalism, which has come to be known as the “living tree” doctrine.

<sup>4</sup> Paul Brest, Sanford Levinson, Jack M. Balkin, Akhil Reed Amar, and Reva B. Siegel, *Processes of Constitutional Decisionmaking* (5th ed., Aspen L. & Bus. 2006).

allowing that process to respond to changing values and times. (Think of the New Deal.) When judges discipline the political process through judicial review, they can view themselves as maintaining constitutional commitments in order to respond to changing values and times. (Think of debates about free expression or privacy.) No matter what judges do, then, they can see themselves as responding appropriately to change.

In any case, it is by no means clear why individual judges have any such obligation or responsibility to “keep up with changing times” or “reflect changing values” instead of doing what they are supposed to do, which is to interpret and apply the law as best they can. But even if judges had such a responsibility, there are many possible ways that one can “adapt to changing conditions,” “reflect changing values,” and “keep up with the times.” One can “keep up with the times” as a liberal or as a conservative, as a secular person or as a religious person, as a technophile or as a technophobe. One simply does so in different ways. One can respond to changing times by changing one’s values in the face of recalcitrant events, or by maintaining one’s values in the face of trials and temptations. Civil libertarians argue for the latter position all the time, and there are many living constitutionalists among their number.

Moreover, whose account of “changing conditions,” whose interpretation of “changing times,” and whose version of “changing values” should judges look to? To my interpretation or to yours? Should they look to the values of contemporary liberals or contemporary conservatives? Both sets of values are constantly changing, and both of them are doing their very best to respond to changing times and circumstances.

These questions have no useful answers. If we want the idea of a living Constitution to do useful work, we must change our assumptions.

First, a theory of living constitutionalism must focus not on constitutional interpretation—ascertainment of original meaning—but on constitutional construction. Second, it must explain how constitutional construction occurs in

response to constitutional politics. Third, it should not be a theory about how particular judges should decide particular cases, but rather an explanation of the role that judges and judicial review play in the process of constitutional construction. Fourth, it should not be a theory about how individual decisions are consistent or not consistent with the judicial role, but rather a theory about how the entire system of constitutional construction—including the work of the political branches, courts, political parties, social movements, interest groups, and individual citizens—is consistent with democratic legitimacy. Thus, living constitutionalism is not a theory primarily addressed to judges; it is addressed to all citizens who want to know how the Constitution-in-practice changes through constitutional construction and why these processes of constitutional change are democratically legitimate.

Throughout this book I have alluded to the processes of constitutional change. In these final two chapters I describe them in more detail. In this chapter I offer a descriptive and interpretive account of how the processes of constitutional change occur and how they build on the framework of original meaning.

In Chapter 14, I consider whether this account is consistent with the theory of democratic legitimacy offered in Chapters 4 and 5. I argue that the processes I describe are examples of what Robert Post and Reva Siegel have called “democratic constitutionalism.”<sup>5</sup> These processes have been built up over long periods of time; they allow citizens to take ownership of their Constitution and, although they are far from perfect, they further democratic legitimacy. Viewed

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<sup>5</sup> See Robert C. Post and Reva B. Siegel, “Democratic Constitutionalism,” in *The Constitution in 2020* (Jack M. Balkin and Reva B. Siegel eds., Oxford University Press 2009); Robert C. Post and Reva B. Siegel, “*Roe* Rage: Democratic Constitutionalism and Backlash,” 42 *Harv. C.R.–C.L.ºL. Rev.* 373, 374–76 (2007); see also Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus and Giroux 2009) (arguing that the history of the Supreme Court demonstrates democratic constitutionalism); Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press 2004) (explaining how the institution of judicial review emerged under the assumption that there would be popular checks).

from the standpoint of participants in the constitutional project, they allow the Constitution to be “our law.” They give people a stake in the constitutional project, and allow them to change the Constitution-in-practice through persuasion and sustained social and political mobilizations. They create pathways for constitutional redemption and allow for the possibility of constitutional faith.

What is the connection between the idea of a living Constitution and redemptive constitutionalism? When people seek to redeem or restore the Constitution, they succeed or fail through the processes of living constitutionalism. All reform movements make use of these processes, including, perhaps ironically, the modern conservative movements associated with the philosophy of originalism that have viewed the very idea of a “living Constitution” as their mortal enemy.

In fact the debate between living constitutionalism and originalism as rival philosophies has often been a debate between liberals and conservatives *as both participate in the processes of living constitutionalism*. Constitutional liberals have used the term *living Constitution* as a way of describing their commitment to the preservation of liberal precedents and the promotion of liberal values through judicial review. Conservatives, in turn, have used the term *originalism* to explain their own constitutional commitments and vision. Politics and political visions have often driven choices about which methodology to champion. That is why contemporary liberals have tended to abhor originalism in all of its forms, fearing that it is merely a rhetorical device that allows conservative judges to reach results they like; and contemporary conservatives have repeatedly attacked the idea of a living Constitution, concerned that it is merely cover for liberal judicial activism.

But the concepts of fidelity to original meaning and a living Constitution, correctly understood, do not correspond to either liberal or conservative ideologies. In previous chapters I have shown that original meaning originalism is perfectly consistent with the development of the modern state and the civil rights

revolution. And in this chapter and the next I show that the idea of a living Constitution that adapts to changing times, conditions, and values is perfectly consistent with conservative constitutional constructions. Indeed, because conservatives have dominated American political life for the last several decades, and conservative presidents have appointed most of the federal judiciary, much of the living constitutionalism of this period has promoted conservative values and a conservative political vision.

Many of the processes that allow for constitutional constructions were themselves built through previous constitutional constructions. Like the Constitution-in-practice, they are flawed and imperfect. Like the Constitution-in-practice, we might well wonder whether they are adequate, and whether they can be improved over time. And so the questions of constitutional faith and redemption that apply to the Constitution also apply to the processes of constitutional change that Americans have developed.

Constitutional faith is crucial to a system of living constitutionalism precisely because we do not know what the future holds. There are no guarantees that the processes of constitutional change will not lead to great injustices or even political disaster. This is a consequence of the Constitution's openness to the future.<sup>6</sup> Advocates of conservative originalism may believe that if judges faithfully adhered to original meanings (and original expected applications), the country will be insulated from disaster. I disagree. As I have argued in this book, contemporary conservative originalism is not an alternative to the processes of living constitutionalism; it is the living constitutionalism of contemporary conservatives.

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<sup>6</sup> It is also a consequence of the Constitution's hardwired rules. As noted in Chapter 4, Sanford Levinson has argued that we should no longer have faith in the Constitution because these hardwired rules have made democratic self-government impossible. Whether or not Levinson's diagnosis is correct, we should not forget the effects of the basic constitutional framework on possible constitutional constructions.

The same resources that allow for constitutional adaptation and constitutional redemption also allow for the American people to commit great injustices and bring the constitutional project to ruin. The Constitution creates a platform for a decent politics, but it cannot guarantee that politics will have a happy ending. We know from human history that institutions do not last forever; our Constitution is no different. The goal, rather, is to make the project work as long as possible in a way that is faithful to constitutional values and particularly the goals of the Preamble. We are not sure that our constitutional project will continue to succeed, but for it to succeed, we must have faith: not only in the Constitution's text, and not only in the processes of constitutional development we have inherited, but also in the work of present and future citizens. The Constitution belongs not to the dead but to the living, and the burden of securing the Constitution's success rests not on the generations that have passed away but on the present generation and the generations to come.

### Living Constitutionalism as Constitutional Construction

The basic concern of living constitutionalism is constitutional construction—implementing and applying the Constitution in practice, and building out institutions to perform constitutional functions.<sup>7</sup> We must create doctrines and laws to concretize principles and decide cases, and we must build institutions to make the constitutional system work in practice.

We need construction in two situations. The first is when the terms of the Constitution are vague or silent on a question, and we must develop doctrines or pass laws to make its words concrete or fill in gaps.<sup>8</sup> The second is when we need

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<sup>7</sup> See Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 5 (Harvard University Press 1999); Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (University Press of Kansas 1999).

<sup>8</sup> See Richard H. Fallon Jr., *Implementing the Constitution* 5–12 (Harvard University Press 2001) (arguing that much of the judiciary's work involves creating doctrines and tests to give meaning to constitutional values); Richard H. Fallon Jr., "Judicially Manageable Standards and Constitutional

to create laws or build institutions to fulfill constitutional purposes.<sup>9</sup> Both of these practices are the work of living constitutionalism.

Framework originalism requires that we interpret the Constitution according to its original meaning. Living constitutionalism concerns the process of constitutional construction. Framework originalism leaves space for future generations to build out and construct the Constitution-in-practice. Living constitutionalism occupies this space. It explains and justifies the process of building on and building out. That is how the two ideas are related, and why they do not conflict but in fact are inextricably connected.

Put this way, you might think that the original meaning and constitutional construction do not overlap at all. One simply builds on where the other leaves off. But it is not so in practice. Because constitutional construction occurs in the same political space and time as the amendment process, the two processes can sometimes substitute for each other. Vague clauses can be built out through doctrine and institution building in ways that might also be achieved through amendment. (The same is also true with various silences and gaps in the original Constitution.) Multiple pathways for change are a characteristic feature of our constitutional system. Nevertheless, the processes of amendment and construction are not identical, and what each can achieve in practice does not always overlap.

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Meaning,” 119 *Harv. L. Rev.* 1274, 1276, 1317–18 (2006) (noting the existence of gaps between constitutional meaning and judicially enforceable rights that must be filled in through doctrinal implementation).

<sup>9</sup> See William N. Eskridge Jr. and John Ferejohn, *Republic of Statutes: The New American Constitution* (Yale University Press 2010) (offering a theory of constitutional statutes and their entrenchment over time); Bruce Ackerman, “The Living Constitution,” 120 *Harv. L. Rev.* 1737, 1742 (2007) (noting the importance of “landmark statutes that express [a new constitutional] regime’s basic principles”); William N. Eskridge Jr. and John Ferejohn, “Super-Statutes,” 50 *Duke L. J.* 1215, 1215–16 (2001) (offering an account of durable “superstatutes” that “seek[] to establish a new normative or institutional framework for state policy” and have “broad effect[s] on the law”); Ernest A. Young, “The Constitution Outside the Constitution,” 117 *Yale L. J.* 408, 411–13 (2007) (“[M]uch of the law that constitutes our government and establishes our rights derives from legal materials outside the Constitution itself”).

Some kinds of changes—like the abolition of the Electoral College or altering the length of the president’s term of office—cannot easily be achieved through construction; they require amendment. Constructions may be less durable than amendments: interbranch understandings can be altered through practice, statutes can be repealed and doctrinal constructions overturned, distinguished, or made irrelevant. Conversely, amendment may be an awkward and cumbersome way to respond to certain problems, revise previous doctrinal constructions, create new rules, or promote wholesale changes in government. Constructing doctrine gradually through case-law development and creating framework statutes and new institutions may be a more nimble and effective method.

Today people generally associate “living constitutionalism” with judicial decisions; but the political branches actually produce most living constitutionalism. Most of what courts do in constitutional development responds to these political constitutional constructions. Courts largely rationalize, legitimate, and supplement what the political branches do, creating new doctrines along the way.<sup>10</sup>

The very concept of a “living” Constitution arose in the early twentieth century due to innovations by Congress and by state and local governments in constructing early versions of the regulatory state.<sup>11</sup> At first federal courts resisted these changes, but eventually rationalized and legitimated them in a series of landmark decisions that are now foundational to modern constitutional law.<sup>12</sup> But

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<sup>10</sup> Cf. Robert A. Dahl, “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,” 6 *J. Pub. L.* 279, 294 (1957) (arguing that the “main task of the Court is to confer legitimacy on the fundamental policies of the successful coalition”).

<sup>11</sup> Howard Gillman, “The Collapse of Constitutional Originalism and the Rise of the Notion of the ‘Living Constitution’ in the Course of American State-Building,” 11 *Stud. Am. Pol. Dev.* 191 (1997).

<sup>12</sup> See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding regulation of wholly intrastate, noncommercial activity if such activity, viewed in the aggregate, would have a substantial effect on interstate commerce); *United States v. Darby*, 312 U.S. 100 (1941) (holding that Congress can regulate employment in manufacturing under the commerce clause); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (upholding the unemployment compensation provisions of the Social

such judicial decisions are only the tip of the iceberg. We should understand these changes—and living constitutionalism itself—both as a series of doctrines and as a set of new laws and institutions that the doctrines upheld. Living constitutionalism in the New Deal required adjusting older constitutional doctrines to explain and justify these changes in how governments governed.<sup>13</sup>

Landmark precedents like the New Deal decisions became durable precisely because so much of the developing structure of governance depended on their construction of the Constitution. This is the central insight of living constitutionalism: state building by the political branches and judicial constructions are, generally speaking, mutually productive and mutually supportive. To use the metaphor of the living constitution, they grow up together. That is why the New Deal precedents are durable. We have not built upon them because we think they are correct; we think they are correct because we have built so much upon them.

The example of the New Deal is hardly exceptional. Living constitutionalism is usually as much the product of the political branches (including administrative agencies and state and local governments) and changing social and cultural practices as it is the product of federal judicial decisions. Social and political movements express values and press for change both in culture and in politics. The political branches create new laws and institutions, and courts make sense of

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Security Act of 1935); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act).

<sup>13</sup> In his model of constitutional change, Bruce Ackerman originally treated the key Supreme Court decisions of the New Deal as “amendment analogues” that amended the Constitution outside of Article V. Bruce Ackerman, 1 *We the People: Foundations* (Harvard University Press 1991). In his more recent work, he has come to see constitutional amendments arising out of an interaction between what he calls “superprecedents” and “landmark statutes” like the National Labor Relations Act and the Social Security Act. See Bruce Ackerman and Jennifer Nou, “Canonizing the Civil Rights Revolution: The People and the Poll Tax,” 103 *Nw. U.°L. Rev.* 63, 65, 67–69, 83, 86–88, 108–9, 124 (2009); Ackerman, “The Living Constitution,” *supra* note 9, at 1750–53. My view is that these achievements of twentieth-century constitutionalism are constitutional constructions, not constitutional amendments.

these constructions. Courts also ratify changes in social mores and institutional practices, some of which are already reflected in new laws and institutions, or in the abolition and reform of older ones. The sexual revolution and the movement for women's liberation are two obvious examples of how constitutional change is prefigured by changes in civil society. Courts can usually do little to block widespread cultural change. Courts may slow down drastic political change in the short run, especially if their members were appointed by different parties or in different regimes; but generally they rationalize and authorize these changes over time. The political branches, in turn, continue to build out the state based on the justifications offered by the judiciary.

The New Deal Court legitimated the creation of the administrative and welfare state, particularly after Franklin Roosevelt was able to appoint new justices. It did so by reinterpreting and expanding federal and state power to regulate the economy and engage in redistributive programs, and by creating new procedures to rationalize the expansion of administrative agencies. The members of the Warren Court were largely in sync with the bipartisan liberal coalition that emerged in the 1960s. The Warren Court upheld new federal laws that prohibited local discrimination, supervised state voting practices, and brought regional majorities (especially in the South) in line with the dominant liberal values of national politics in the 1960s.<sup>14</sup> After the political mood of the country changed, the Rehnquist Court cooperated with the ascendant conservative movement,

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<sup>14</sup> See Lucas A. Powe Jr., *The Warren Court and American Politics* 214–15, 490–94 (Harvard University Press 2000); Jack M. Balkin, “What *Brown* Teaches Us about Constitutional Theory,” 90 *Va. L. Rev.* 1537, 1538–46 (2004); Lucas A. Powe Jr., “The Politics Of American Judicial Review: Reflections on the Marshall, Warren, and Rehnquist Courts,” 38 *Wake Forest L. Rev.* 697, 719–20 (2003). As Keith Whittington notes, the Warren Court’s legislative reapportionment decisions were welcomed by liberals who believed that as cities grew larger, legislative malapportionment favored more conservative rural voters over more liberal urban voters. Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* 127 (Princeton University Press 2007).

promoting state regulatory autonomy and making it easier for government to support majority religions.<sup>15</sup>

When federal courts exercise judicial review to strike down laws, they often work in cooperation with the dominant national political coalition or promote the values of national political elites. Federal courts often impose national values on regional and local majorities, and strike down statutes passed by older political regimes that are inconsistent with the current national political coalition's values.<sup>16</sup> Federal courts also respond, over long periods of time, to significant changes in constitutional culture produced by successful social and political mobilizations.

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<sup>15</sup> See cases cited *infra* notes 68, 69; see also *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Eleventh Amendment barred damage suits against states for violations of the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Eleventh Amendment barred damage suits against states for violations of the Age Discrimination in Employment Act); *United States v. Morrison*, 529 U.S. 598 (2000) (striking down a section of the Violence Against Women Act as beyond Congress's powers under the commerce clause and section 5 of the Fourteenth Amendment); *Alden v. Maine*, 527 U.S. 706 (1999) (expanding state sovereign immunity from damage suits under the Tenth Amendment); *Printz v. United States*, 521 U.S. 898 (1997) (holding that, under the Tenth Amendment, the federal government may not compel state executive officials to administer a federal regulatory program); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (Eleventh Amendment immunity applies to legislation passed under Congress's Commerce Power); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down a ban on guns near public schools as beyond Congress's powers under the commerce clause); *New York v. United States*, 505 U.S. 144 (1992) (holding that, under the Tenth Amendment, the federal government may not compel state legislatures to enact a regulatory program).

<sup>16</sup> See Whittington, *Political Foundations of Judicial Supremacy*, *supra* note 14, at 105–20 (showing the different ways that the Supreme Court enforces the values of the existing regime); see also Balkin, “What *Brown* Teaches Us,” *supra* note 14, at 1538–46 (explaining how the Court enforces the national values of the dominant coalition against outliers in state and local governments); Michael J. Klarman, “Rethinking the Civil Rights and Civil Liberties Revolutions,” 82 *Va. L. Rev.* 1, 16–18 (1996) (arguing that the Supreme Court is more likely to invalidate old statutes that no longer reflect the preferences of current national majorities). Because I emphasize the role of partisan entrenchment, my account does not assume that there will always be a close connection between Supreme Court decisionmaking and contemporaneous public opinion. Nevertheless, at least since the New Deal, the two are often connected, especially when viewed in the medium to long run. See Barry Friedman, *The Will of the People*, *supra* note 5; Terri Jennings Peretti, *In Defense of a Political Court* 80–132 (Princeton University Press 1999); Barry Friedman, “Mediated Popular Constitutionalism,” 101 *Mich. L. Rev.* 2596, 2601–13 (2003).

When most states have adopted a social policy, the Supreme Court tends to ratify these dominant values in new constitutional constructions. The Court's 2003 decision in *Lawrence v. Texas*<sup>17</sup> protected the rights of homosexuals under the due process clause only after the vast majority of states had decriminalized sodomy and new attitudes about homosexuality had swept the country.<sup>18</sup> The Court decided *Brown v. Board of Education*<sup>19</sup> only after significant changes in race relations following World War II, and after most states had already ended *de jure* racial segregation in public schools.<sup>20</sup> The Truman administration had desegregated the armed forces and pushed for civil rights in 1948; it had asked the Supreme Court to overrule *Plessy v. Ferguson*<sup>21</sup> in 1950 and again in 1952 in the first round of litigation in *Brown v. Board of Education*.<sup>22</sup> After the Republicans took office in 1953, Dwight Eisenhower's Justice Department, led by Attorney General Herbert Brownell, supported the Truman administration's position, demonstrating to the Court that administrations from both major political parties concurred.<sup>23</sup>

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<sup>17</sup> 539 U.S. 558 (2003).

<sup>18</sup> William N. Eskridge, *Gaylaw: Challenging the Apartheid of the Closet* 130, 139, 168, app. B2 (Harvard University Press 1999); Michael J. Klarman, "Brown and Lawrence (and Goodridge)," 104 *Mich. L. Rev.* 431, 443–45 (2005).

<sup>19</sup> 347 U.S. 483 (1954).

<sup>20</sup> See Balkin, "What *Brown* Teaches Us," supra note 14, at 1539–40. See generally Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 173–96 (Oxford University Press 2004) (describing broader changes in legal understandings concerning race following World War II).

<sup>21</sup> 163 U.S. 537 (1896).

<sup>22</sup> Klarman, *From Jim Crow to Civil Rights*, supra note 20, at 210. The Justice Department made this request in a trio of cases decided in 1950. See Brief for the United States at 35–49, *Henderson v. United States*, 339 U.S. 816 (1950) (No. 25); Memorandum for the United States as Amicus Curiae at 9–14, *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (No. 34); *Sweatt v. Painter*, 339 U.S. 629 (1950).

<sup>23</sup> Kevin J. McMahon, *Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown* 198–201 (University of Chicago Press 2004) (noting the importance of the Eisenhower Justice Department's support for the position taken by the Truman administration, despite Eisenhower's attempts to publicly distance himself from the controversy).

Just as federal courts usually cooperate, in the long run, with the dominant forces in national politics, national politicians have regularly buttressed and supported the institution of judicial review and the judiciary's work of constitutional construction. Keith Whittington points out that only a small number of presidents have openly resisted the Supreme Court's ability to interpret the Constitution,<sup>24</sup> and these arguments generally cease as soon as these presidents have placed like-minded jurists on the bench.<sup>25</sup> Most presidents have actively supported judicial review, or at least have seen it as a better choice than the alternatives. In fact, presidents have regularly delegated constitutional constructions and even substantial amounts of policymaking to the courts.<sup>26</sup>

Although presidents routinely assert their right to interpret the Constitution in the normal exercise of their powers, they hardly ever compete with the courts for final authority over the Constitution's meaning except in rare historical circumstances: This occurs when a new president, like Thomas Jefferson or Franklin Roosevelt, seeks to repudiate a previous and discredited constitutional regime and faces a judiciary controlled by adherents of the old order.<sup>27</sup> The attack on judicial authority, however, is only temporary. As soon as the president can stock the judiciary with ideological allies, presidential challenges to the courts tend to cease because the courts generally support and legitimate what the president is doing.<sup>28</sup> As a result, Whittington explains, "Presidents and political leaders have generally preferred that the Court take the responsibility for securing constitutional fidelity."<sup>29</sup>

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<sup>24</sup> Whittington, *Political Foundations of Judicial Supremacy*, supra note 14, at 23.

<sup>25</sup> Mark A. Graber, "The Counter-majoritarian Difficulty: From Courts to Congress to Constitutional Order," 4 *Ann. Rev. Law Soc. Sci.* 361, 366–67 (2008).

<sup>26</sup> Whittington, *Political Foundations of Judicial Supremacy*, supra note 14, at 21–27, 82–160, 287–92.

<sup>27</sup> *Id.* at 22–23.

<sup>28</sup> Graber, "The Counter-majoritarian Difficulty," supra note 25, at 366–67.

<sup>29</sup> Whittington, *Political Foundations of Judicial Supremacy*, supra note 14, at xi.

When presidents like Harry Truman or Martin Van Buren are affiliated with the existing constitutional regime of their predecessors (Franklin Roosevelt, Andrew Jackson) and try to further its goals, they usually face a court already stocked with political allies. Hence, they generally support the federal courts' powers of judicial review and constitutional construction. In fact, courts generally help presidents enforce the regime's constitutional values against political outliers and local and regional majorities.<sup>30</sup> Lyndon Johnson strongly supported the Warren Court for precisely this reason.

Finally, when presidents (like Bill Clinton, Richard Nixon, or Grover Cleveland) face a hostile political environment and/or a Congress controlled by the other party, they usually find that it is better to ally themselves with the power of the courts to restrain Congress and protect their prerogatives than to try to challenge two different branches of government at the same time. In difficult political environments “the law and the judiciary may be the best defense that a president has.”<sup>31</sup>

Mark Graber puts the point succinctly: “[a]n institution that routinely promotes presidential ambitions is no more countermajoritarian than the presidency” itself.<sup>32</sup> And even during the rare moments when the president attacks judicial authority, important parts of the national political process, including members of Congress, often support the courts against the president, because they prefer judicial construction to complete presidential control over constitutional meaning.<sup>33</sup>

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<sup>30</sup> Id. at 105, 117.

<sup>31</sup> Id. at 166–67.

<sup>32</sup> Graber, “The Countermajoritarian Difficulty,” *supra* note 25, at 367.

<sup>33</sup> See *id.* at 368 (“At the very least, a majority in at least one elected branch of the national government has historically thought government by judiciary more attractive politically than presidential authority to determine constitutional meanings”).

When Alexander Bickel famously argued that “judicial review is a deviant institution in the American democracy,”<sup>34</sup> he gave insufficient weight to these majoritarian features of judicial review. One of the great ironies of Bickel’s famous formulation of the “counter-majoritarian difficulty”<sup>35</sup> is that he offered it during a period when the Supreme Court was working hand in hand with the national political coalition and imposing its values on regional majorities.<sup>36</sup> The Supreme Court may have been nationalist, but it was not particularly countermajoritarian.

Equally ironic is that Bickel offered his diagnosis in 1962, at the beginning of a wave of popular constitutionalism that revolutionized American constitutional doctrines. America was in the early stages of powerful political mobilizations for civil rights on behalf of blacks and women, and significant changes in public attitudes about free expression and sexuality. In hindsight, it is difficult to see the work of the federal courts in this period as standing apart from these popular movements. These mobilizations, in turn, were met by countermobilizations, especially after the 1968 election, leading to new judicial appointments that once again strongly affected the shape of constitutional doctrine. Whatever else one can say about this tumultuous period, the courts were clearly responding to changes in constitutional culture created by sustained political mobilizations. Thus, ironically, the period in which Bickel asserted that the courts were countermajoritarian featured some of the most powerful examples of democratic constitutionalism in American history.

Writing at the very beginning of the civil rights and sexual revolutions, however, Bickel did not fully recognize these trends. His model of a countermajoritarian Court was no doubt influenced by the constitutional struggle

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<sup>34</sup> Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 17 (Yale University Press 1962).

<sup>35</sup> *Id.* at 16.

<sup>36</sup> Powe, *The Warren Court*, *supra* note 14, at 492.

over the New Deal, which was among the most salient examples for constitutional scholars of his generation. He imposed that model on the events of his day. Yet even here Bickel drew the wrong lesson from history: The struggle over the New Deal is not the story of a countermajoritarian Court; it is the story of a federal judiciary that gradually adjusts in response to changing political circumstances, sustained popular mobilizations, and new judicial appointments. As we have seen, judicial resistance to the New Deal was relatively short-lived. Within the space of a few years, the Supreme Court backed down from its initial opposition and began to legitimate the new constitutional regime.

### The Supreme Court Is a Player, Not a Mirror

The practice of judicial review is integrated into democratic processes and does not stand fully outside them. Courts work in conjunction with other parts of the national political system to create new constitutional constructions. But we should not confuse these facts with a simplistic claim that federal courts (or the Supreme Court) “mirror” or “reflect” popular opinion or are simply the faithful servants of a dominant national coalition. The metaphors of “mirror” and “reflection” are highly misleading, suggesting passivity and mere reproduction. Although courts are surely influenced by the same changes that influence the public generally, I certainly do not claim that judicial decisions will always move in lockstep either with popular opinion (however measured) or with the wishes of the president or Congress. Federal courts with life tenure remain relatively independent from day-to-day political influences, but not from long-run political trends. They are independent actors that mutually influence other actors in the political system, and in the long run this system of mutual influence helps maintain democratic legitimacy. Thus, neither Bickel’s model of countermajoritarian intransigence nor a simple model of mirroring or following public opinion grasps how courts and the political branches interact in producing constitutional constructions. Here are eight reasons why the mirror metaphor oversimplifies:

First, one of the most important mechanisms by which the political branches influence the federal judiciary is what Sanford Levinson and I have called *partisan entrenchment*.<sup>37</sup> When a party wins the White House, the president can seek to stock the federal judiciary with like-minded jurists. (The president's choices, of course, are also shaped by the balance of power in the Senate, which must confirm judicial appointments.) Because judges enjoy life tenure, they will normally serve for many years, extending the influence of the political forces that produced their appointment.

Presidents engage in partisan entrenchment for at least four reasons. First, they seek judicial partners who will support their policy initiatives, as Franklin Roosevelt did during the New Deal. Second, presidents seek a judiciary that will enforce national values against state and local outliers. This was President Johnson's goal during the civil rights revolution. Third, presidents may want a judiciary that will take on difficult questions—like slavery or abortion—that would split their governing coalitions, and that will resolve contentious issues like school prayer, pornography, or campaign finance so that the president and his party can avoid direct responsibility. Examples include President George W. Bush's decision to sign the McCain-Feingold campaign finance act while leaving it to a conservative federal judiciary to strike down parts of it. Fourth, presidents want judges who will protect their constitutional and policy goals after they leave office or their party loses electoral power, and will check new political

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<sup>37</sup> See Jack M. Balkin and Sanford Levinson, "The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State," 75 *Fordham L. Rev.* 489 (2006); Howard Gillman, "Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism," in *The Supreme Court and American Political Development* 138–61 (Ronald Kahn and Ken Kersch eds., University of Press of Kansas 2006); Howard Gillman, "How Political Parties Can Use the Courts to Advance their Agendas: Federal Courts in the United States, 1875–1891," 96 *Amer. Pol. Sci. Rev.* 511 (2002); Jack M. Balkin and Sanford Levinson, "Understanding the Constitutional Revolution," 87 *Va. L. Rev.* 1045, 1066 (2001). See also Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004) (analyzing the patterns and effects of judicial entrenchment in different constitutional democracies).

insurgencies. This was the goal of John Adams and the Federalist Party after the 1800 election, when the Republicans took power.

Partisan entrenchment is an imprecise strategy, and often it is only partially successful. Presidents may lack qualified candidates who match their desired combination of goals. The Senate—or presidential obligations to various constituencies—may strongly shape presidents' choice of candidates. Given the contingencies of when judges retire or die, some presidents may not be able to make many Supreme Court appointments, and the appointments they do make may not alter the identity of the swing or median justices. As time passes, the effects of partisan entrenchment weaken, because new issues arise that were not salient at the time an appointment was made. Justices' and judges' views may also shift somewhat over time as the political context evolves. In addition, changed circumstances may sometimes make judicial views that once seemed liberal quite conservative, and vice versa. For example, Felix Frankfurter, the liberal apostle of judicial restraint during the 1930s, was regarded as a conservative by the 1950s because he applied his philosophy of restraint in the civil liberties cases that were central to that period.

Nevertheless, appointments by successive presidencies eventually change the direction of the Supreme Court—sometimes slowly, sometimes more quickly, depending on circumstances. Over time these appointments help produce the Supreme Court's tendency to cooperate, in the long run, with the dominant political forces of the day. But partisan entrenchment does not make the Court simply a mirror of public opinion. Because of life tenure, the federal judiciary is staffed by persons appointed over many years by different presidents and different parties. This means that the federal judiciary, and especially the Supreme Court of the United States, represents the values and commitments of national political elites stretched over a generation or more, rather than those of current political forces. Put simply, the federal judiciary represents a temporally extended majority rather than a current majority. This feature of judicial appointments is often

important in understanding why a majority of the Supreme Court sometimes resists, delays, or inhibits what national majorities want to do. A Supreme Court majority dominated by conservative appointments from past administrations may look skeptically on legislation passed by a later, more liberal president and Congress: this is what happened during Franklin Roosevelt's first term. On the other hand, a Supreme Court majority consisting of liberal justices appointed over many years may find it easy to cooperate with a newly empowered political coalition of liberal politicians. This is what happened during the civil rights revolution of the 1960s.

In short, the phenomenon of partisan entrenchment leads courts to cooperate with the dominant forces of American politics only in the long run; they may sometimes resist in the short run, depending on who appointed them. Faced with rapid changes in basic assumptions or governing practices, courts can act as conservators of past constitutional values. The system of federal courts often slows down and temporizes change until ascendant forces have shown sustained support over time. Then, partly as a result of changed political circumstances and partly as a result of new judicial appointments, courts make sense of and rationalize the new regime, working out the details in new constitutional doctrines.

The second reason the mirror metaphor oversimplifies is that federal judges are more responsive to political elites than to public opinion; that is because federal judges are generally drawn from elites and regularly interact with them.<sup>38</sup> Sometimes there is a difference between what political elites want and what a majority of the public wants. Despite their claim to stand for all of the people of the nation, presidents may not accurately represent mainstream public opinion; instead they may seek to promote their ideological goals through judicial

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<sup>38</sup> See Lawrence Baum and Neal Devins, "Why the Supreme Court Cares About Elites, Not the American People," 98 *Geo. L.J.* 1515 (2010); Lawrence Baum, *Judges and their Audiences: A Perspective on Judicial Behavior* (Princeton University Press 2006).

appointments and through control over the federal bureaucracy.<sup>39</sup> This may lead to judicial appointments that are significantly more conservative or liberal than the center of public opinion.

Third, in addition to promoting partisan entrenchment, civil society organizations and social and political mobilizations affect federal judicial decisionmaking in other ways. Scholars like Charles Epp and Steven Teles have emphasized that successful legal change needs more than opportunities to appoint new judges. It also needs a support structure with various institutions in civil society—like think tanks, foundations, churches, religious groups, political groups, universities, law schools, law firms, and public interest organizations. These institutions generate concepts, people, and legal strategies. They offer new ideas and theories for litigators, administrators, and politicians; they produce potential judicial candidates for presidents to appoint; and they generate test cases for courts to consider.<sup>40</sup>

Civil society organizations also shape popular and elite opinion, and especially the views of legal professionals, who are often the most influential reference group for federal judges. Success in the federal courts by groups as disparate as the women's movement, the gay rights movement, religious conservatives, and corporate interests has often depended on the resources available to civil society organizations.

The breadth and diversity of this support structure—or the lack of a support structure—may importantly affect who becomes a federal judge, what kinds of cases judges hear, how often they hear them, and how they decide them. The better funded and organized these civil society organizations are, the more influence they can bring to bear in shaping constitutional culture, the opinions of

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<sup>39</sup> See, e.g., B. Dan Wood, *The Myth of Presidential Representation* (Cambridge University Press 2009).

<sup>40</sup> See Steven Teles, *The Rise of the Conservative Legal Movement* 11–14 (Princeton University Press 2007); Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* 20–22 (University of Chicago Press 1998).

political elites, the pool of judicial candidates, and the dockets of the federal courts.

Fourth, federal courts are active participants in the national political coalition of their day rather than simply servants of national political elites. When control of the national government is divided, a Supreme Court majority has greater discretion to tilt in the direction of one branch or another. Usually the Supreme Court tilts toward the presidency, but not always. After the Republicans gained control of both houses of Congress following the 1994 election, for example, the Rehnquist Court's conservative majority became increasingly active in reshaping doctrine in the areas of federalism and religion, cooperating with the values and interests of congressional Republicans.

During some periods of American history, one party has dominated national politics, and/or parties have been ideologically heterogeneous, so that it was possible for a cross-party coalition to dominate. (An example is the bipartisan coalition of racial liberals that dominated national politics in the middle of the twentieth century during the civil rights revolution.) In both cases, it is possible to speak of a dominant national coalition subsisting for periods of time. But in other periods, like the present, the parties may be sharply polarized and intensely competitive, and neither party may be able to dominate politics for very long. In such highly polarized and competitive periods, the federal courts have comparatively more slack.<sup>41</sup> Both houses of Congress and the president can claim to represent popular will, and, depending on its membership, the Supreme Court may tilt toward one group of political elites rather than another.

For the same reason, however, during periods of intense political competition where neither party dominates national politics, the federal courts will be filled with judges of very different persuasions. When politics is polarized, a Supreme Court staffed by jurists of different parties (and judges appointed when

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<sup>41</sup> See Richard H. Pildes, "Is the Supreme Court a 'Majoritarian' Institution?" *2010 Supreme Court Review* (forthcoming 2011), at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1733169](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1733169).

polarization was less marked) is likely to produce positions more moderate than those of the two major parties.<sup>42</sup> Although this will make neither side's partisans entirely happy, it may tend to produce more centrist results. At the very least it may produce constructions that check the most energetic or radical assertions by either side until one party or another is able to win a sufficient number of elections to staff most of the federal judiciary.

Fifth, although we tend to identify "federal courts" with the U.S. Supreme Court (and therefore sometimes speak of "the Court" as if it were the judiciary), there is not a single federal court in the United States, but a system of federal courts, whose membership results from successive waves of presidential appointments. At any point in time, therefore, federal judges may hold a variety of different views about important constitutional issues. For example, individual federal district court judges, who do not have to deliberate with anyone else, may be strongly ideological and reach strongly opposed results. In the long run, conformity in federal law occurs because district courts must work within the parameters set by higher-court precedents, and because litigants can appeal district court judgments to multimember panels of circuit court judges (with the further possibility of *en banc* review) and, in a small number of cases, to a multimember U.S. Supreme Court. At the same time, ideologically diverse lower federal courts play an important role in considering new kinds of legal claims and legal arguments, bringing them before the Supreme Court, and thus helping to shape its agenda.<sup>43</sup> When we speak about what "courts" do in the long run, therefore, we are talking about the systemic effects of the federal judiciary as a whole, rather than the actions of individual federal judges.

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<sup>42</sup> See Lucas A. Powe and H.°W. Perry Jr., "The Political Battle for the Constitution," 21 *Const. Commentary* 641 (2004) (noting that the Supreme Court's decisions do not correspond to the constitutional vision of either major political party).

<sup>43</sup> Balkin and Levinson, "Understanding the Constitutional Revolution," *supra* note 37, at 1074–75.

Sixth, federal courts, like federal government bureaucrats generally, enjoy greater slack and can exercise greater discretion in areas where there is not significant public attention; decisions in some of these technical areas may not fall along ideological fault lines. Indeed, the public may have no decided opinion on many of the technical issues of law that federal courts routinely decide but that significantly shape constitutional construction in the long run. Political entrepreneurs, nevertheless, may attempt to focus public attention on some of these decisions, in an attempt to change constitutional culture and put pressure on the courts.

Seventh, the political branches, and especially the president, delegate policymaking to the federal courts on a range of issues—such as criminal procedure—because they do not want direct responsibility for them.<sup>44</sup> The very fact of this delegation means that members of the dominant national coalition will not always be happy with each and every decision rendered.

Eighth, Supreme Court decisions do not simply mirror popular or elite opinion because they influence politics, creating new political opportunities and shaping political and social movement agendas. Court decisions give politicians legitimating excuses, on the one hand, and political targets for mobilization, on the other. They reshape the terrain of political combat and social movement activism.

Politicians—and especially presidents—can leave certain questions up to courts (and conveniently blame them for doing what politicians themselves are unwilling to do); in the alternative, they can use courts to legitimate their actions (or their failures to act).

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<sup>44</sup> See Mark A. Graber, “The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary,” *7 Stud. in Am. Pol. Dev.* 35, 37 (1993) (“Elected officials in the United States encourage or tacitly support judicial policymaking both as a means of avoiding responsibility for making tough decisions and as a means of pursuing controversial policy goals that they cannot publicly advance through open legislative and electoral politics”).

Political and social movements can use recent court decisions—especially decisions where they appear to have lost—to mobilize the public and energize constituents. When political entrepreneurs make court decisions highly salient, they can sometimes influence voter preferences and the results of elections.

Finally, federal court decisions affect future political struggles because they often have symbolic significance that changes people’s understandings of politics; or political entrepreneurs can give decisions symbolic significance after the fact. (Examples might include *Roe v. Wade*, *Miranda v. Arizona*, and *Lochner v. New York*.) Equally important, federal court decisions can change the law. Changing the law, in turn, may undermine certain strategies of legal and political action while opening up new possibilities for others. Moreover, by deciding cases in a particular order and at particular times, courts affect the agendas of social movements and politicians. They affect people’s understandings of what is politically possible and politically legitimate.

### Institutional Constraints on the Judiciary

Even though federal court decisions do not precisely mirror public opinion, the same institutional features of American law and politics outlined above significantly constrain the direction of judicial construction.<sup>45</sup> These institutional features explain why, in practice, living constitutionalism does not give judges unfettered discretion. It is not because legal materials prevent innovation, for the history of American constitutional law demonstrates that, over long periods of time, they can be quite flexible. Rather, it is because institutional and structural elements in the political system tend to hem in judicial constructions.

I noted some of these constraints in Chapters 1 and 5: The Supreme Court is a multimember body whose decisions in close cases tend to be resolved by the median or swing justices, whose identity (and position at the median), in turn, is

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<sup>45</sup> For discussions of institutional constraints on judges, see Barry Friedman, “The Politics of Judicial Review,” 84 *Tex. L. Rev.* 257, 270–329 (2005).

produced by successive judicial appointments. Justices and lower federal court judges are legal professionals, and professional culture demands that their decisions remain in the political and cultural mainstream and that their opinions manifest coherent professional reasoning from case to case. Lower courts are further hemmed in by appellate court and Supreme Court precedents. Additional constraints include the symbiotic relationship between courts and the political branches just described, elite and popular opinion, and above all, control of the appointments process by the president and Senate.<sup>46</sup>

Collectively, these factors tend to guarantee that judicial innovations are likely to occur only within certain boundaries. That is why the process of judicial construction of doctrine is constrained despite the Constitution's vague clauses and ambiguous silences. The Constitution's open-ended language may seem indeterminate, but at any point in time it is a constrained indeterminacy.

The fact that judicial decisions occur within certain boundaries, however, does not mean that the boundaries themselves may not change over time. And they do change, moving professional legal conceptions of reasonableness along with them. Social movements, political parties, and interest groups vie with each other to influence popular and elite views about the Constitution. Social and political mobilizations seek to alter what is off-the-wall and on-the-wall in constitutional culture and eventually in professional legal thought.<sup>47</sup> The federal judicial appointments process also reflects a tug-of-war between different social

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<sup>46</sup> See Balkin and Levinson, "The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State," *supra* note 37, at 490–506 (2006); Balkin and Levinson, "Understanding the Constitutional Revolution," *supra* note 37, at 1066–83 (2001).

<sup>47</sup> On the concept of a "constitutional culture," see Robert C. Post, "The Supreme Court 2002 Term: Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law," 117 *Harv. L. Rev.* 4, 8–11, 53–56 (2003). On the idea of "off-the-wall" and "on-the-wall" constitutional interpretations, and their importance to constitutional theory, see Jack M. Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Harvard University Press 2011); Jack M. Balkin, "How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure," 39 *Suffolk U. L. Rev.* 27, 28 (2005); Jack M. Balkin, "*Bush v. Gore* and the Boundary between Law and Politics," 110 *Yale L. J.* 1407, 1444–47 (2001).

and political constituencies. Partisan entrenchment in the judiciary, combined with changing popular attitudes and shifts in constitutional culture, eventually affects judicial decisionmaking using vague texts. Thus, as I describe in more detail in Chapter 14, the processes of living constitutionalism gradually translate constitutional politics into constitutional law.

These political and cultural influences can push doctrine to the left as well as to the right. Some of the most powerful political and social mobilizations in the past forty years have been conservative, and therefore it is no surprise that many constitutional doctrines reflect contemporary conservative ideas. Political conservatives have influenced political culture for the past generation, and have enjoyed sufficient political clout to staff most of the federal judiciary and a majority of the positions on the Supreme Court. The same basic features of constitutional politics that led courts to recognize the rights of gays in *Lawrence v. Texas* also produced recognition of an individual right to bear arms in *District of Columbia v. Heller*.<sup>48</sup> Indeed, the very same weather vane, the swing justice, Anthony Kennedy, was the fifth and deciding vote in both decisions.

In short, the judiciary cooperates with the political branches because of institutional features of democratic politics. Living constitutionalism is a process of argument and persuasion in politics and culture that is eventually reflected in law. If you don't like the living Constitution you get, you should be working harder to get the national politics you like, because that is the engine of constitutional construction and constitutional change.

The system of living constitutionalism does not depend on judges of impeccable character any more than it depends on the good character of legislators and presidents. Indeed, as critics of the federal judiciary often remind us, the members of the federal judiciary may not be wiser or more moral than the political process itself. Even so, the framers of our Constitution recognized that

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<sup>48</sup> 554 U.S. 570 (2008).

multiple institutions that compete with and check each other can add to the legitimacy of the political system. Different institutional roles foster different role moralities and perspectives. The clash of these positions restrains all of the participants in the constitutional system. We can best understand the judiciary not as a special font of wisdom or political morality but as an institution of constitutional development with a distinctive institutional role and professional ethos that competes and cooperates with constitutional development by the other branches. The judiciary generally cooperates with policies that demonstrate sustained popular support at the national level, but it also usually acts as a check on radical constitutional innovation that lacks sustained support. These judicial functions serve the larger goals of constitutionalism and thus contribute to the democratic legitimacy of the political system as a whole, even if particular members of the judiciary do not possess judgment superior to that of most members of the national political process.

The system of living constitutionalism that has developed in the United States is hardly without its flaws. It may produce very unjust results, especially in the short run. In addition, its long-run democratic responsiveness is imperfect and could be improved. For example, I have argued that partisan entrenchment is one of the most important mechanisms that helps ensure democratic responsiveness in the long run. But the effects of partisan entrenchment depend on judges regularly leaving the bench. Lower federal court judges have incentives to take senior status, freeing up spots for new appointments, and helping to ensure more or less continuous appointments of new judges by new presidents. A similar system, however, does not apply to the Supreme Court, and since the 1970s Supreme Court justices have tended to be appointed younger, live longer, and remain longer on the bench than at any other point in the nation's history. For instance, for most of the nation's history, a new slot opened up on the average every two

years or so; but from 1994 to 2005 there were no vacancies at all.<sup>49</sup> These changes give contemporary presidents fewer opportunities to affect the composition of the Supreme Court; they increase the role of luck in determining which presidents will have a chance to make appointments, and they make the Supreme Court more of a drag on constitutional change. Fewer and less regularly spaced Supreme Court appointments mean that other institutional features of the system must do more of the work of keeping the federal court system in line with national values.

I believe that it is possible to reform these practices consistent with the constitutional text. For example, Congress could give each president a Supreme Court appointment every two years and specify that the quorum for deciding appeals will consist of the nine justices most junior in service. Nothing in the constitutional text prevents Congress from structuring the Supreme Court more like the circuit courts, in which the panels that hear and decide cases consist of subsets of the total number of judges in a circuit. Under the proposed reforms, the more senior justices would continue to hold their federal judicial appointments until retirement; they would help select cases for the docket, sit on lower courts by designation, and hear Supreme Court appeals when more junior justices were disqualified or recused.<sup>50</sup>

These reforms would encourage justices to retire earlier. They would also encourage presidents to pick judges based on their ability rather than their youth. This would open up a much broader range of possible candidates who might serve the nation. Currently presidents rarely consider anyone older than their mid fifties

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<sup>49</sup> See Steven G. Calabresi and James Lindgren, "Term Limits for the Supreme Court: Life Tenure Reconsidered," *29 Harv. J.L. & Pub. Pol'y*, 769, 777–789 (2006).

<sup>50</sup> For a discussion of various proposals, see *Reforming The Court: Term Limits For Supreme Court Justices* (Roger C. Cramton and Paul D. Carrington eds., Carolina Academic Press 2006). The specific proposal mentioned in the text, drafted by Paul Carrington and Roger Cramton, is discussed in Jack M. Balkin, "Reforming the Supreme Court," *Balkanization*, February 19, 2009, at [balkin.blogspot.com/2009/02/reforming-supreme-court.html](http://balkin.blogspot.com/2009/02/reforming-supreme-court.html); Paul Carrington, "Four Proposals for a Judiciary Act," February 9, 2009, at [paulcarrington.com/Four%20Proposals%20for%20a%20Judiciary%20Act.htm](http://paulcarrington.com/Four%20Proposals%20for%20a%20Judiciary%20Act.htm).

for a Supreme Court appointment, because they want their appointees to stay on the Court as long as possible. Finally, if national politicians know that each president will receive two appointments per term and that the justices selected will decide most cases in their first eighteen years of service, this may lower the political stakes of Supreme Court appointments; and it may help make them less politically fraught and polarizing events.<sup>51</sup>

Although I believe these reforms are constitutional, they may not be realized for some time, if at all. My arguments about the democratic legitimacy of the current system of living constitutionalism should not be confused with the claim that the system could not be made more legitimate. It can, and it should.

### Varieties of Constitutional Construction

Living constitutionalism, I have argued, is primarily a theory about the processes of constitutional development produced by the interaction of the courts with the political branches. It is a descriptive and normative theory of the processes of constitutional construction. It explains how change occurs, and it gives an account of why that process is democratically legitimate. To understand living constitutionalism, therefore, we need to understand constitutional construction. And we must begin not with courts—which usually react and respond—but with constitutional constructions by the people’s elected representatives.

Political actors engage in constitutional construction when they elaborate and enforce constitutional values by creating new institutions, laws, and governing practices. Constitutional construction by political actors overlaps with the ordinary processes of policy and lawmaking, and it may be futile to try to separate them out in every case.<sup>52</sup> A particular piece of legislation may simultaneously

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<sup>51</sup> For an account of how the proposed system would work in practice, see Jack M. Balkin, “The Rotation of the Justices: A Thought Experiment,” *Balkinization*, May 20, 2009, at [balkin.blogspot.com/2009/05/rotation-of-justices-thought-experiment.html](http://balkin.blogspot.com/2009/05/rotation-of-justices-thought-experiment.html).

<sup>52</sup> See Whittington, *Constitutional Construction*, *supra* note 7, at 5–6, 107–12.

promote the political agenda of a party and implement constitutional values; a new institution may simultaneously promote policy goals and flesh out constitutional structures.

For example, the acts that created the various parts of the executive branch to carry out programs and administer laws are constitutional constructions; so too is the creation of the Office of the Attorney General<sup>53</sup> (and later the Department of Justice) to advise the president on legal matters and to defend the government in court.<sup>54</sup> The construction of the national security state in the late 1940s and early 1950s involved the transformation of American defense policy: a permanent standing army, the dispersal of American troops throughout the globe, and the creation of the Department of Defense, the National Security Council, the Central Intelligence Agency and other institutions for surveillance and intelligence gathering.<sup>55</sup> These innovations had constitutional overtones: they changed expectations about how and when Congress and the president would use military force and exert influence overseas.

Political actors also engage in constitutional construction when their decisions and actions create precedents for constitutionally permissible activities, like the Louisiana Purchase, the First and Second Banks of the United States, or the creation of the Federal Reserve System. Political actors can also create precedents about what is not constitutionally permitted, like understandings about when filibusters may be used, when laws or budget appropriations may be kept

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<sup>53</sup> See Judiciary Act of 1789, ch. 20, §35, 1 Stat. 73, 92–93 (codified as amended at 28 U.S.C. §503 (1994)) (creating the office of the Attorney General). Congress did not provide the attorney general with a clerk until 1818. See Act of April 20, 1818, ch. 87, §6, 3 Stat. 445, 447.

<sup>54</sup> Act of June 22, 1870, ch. 150, 16 Stat. 162 (codified as amended at 28 U.S.C. §§501, 503, 509 note (1994)). This Act also created the office of the Solicitor General. *Id.* at §2.

<sup>55</sup> National Security Act of 1947, Pub. L. No. 253, ch. 343, 61 Stat. 495 (codified as amended in scattered sections of 50 U.S.C.) (reorganizing the military and intelligence services and creating the Department of Defense, the National Security Council, and the Central Intelligence Agency).

secret, or the proper grounds for impeachment.<sup>56</sup> Some of the most important constitutional constructions create precedents by articulating constitutional values in new legislation or new institutions, like Congress's passage of New Deal legislation, the chartering of a national bank, and the creation of independent federal agencies. Each of these reinterpreted the scope and reach of federal powers.

Political actors also engage in constitutional construction when they create or modify constitutional norms and understandings. Examples include whether it is permissible for the president to veto legislation based on policy disagreement or only constitutional objections, what practical standards Congress will use for impeachments, and how much deference Congress should give to cabinet and judicial nominations. Sometimes constitutional construction involves filling in constitutional silences through constitutional practice, like the decision to adopt first-past-the-post voting systems or secret ballots.

Some constitutional construction involves forging compromises between different parts of the federal government—or between the states and the federal government—about their respective duties, obligations, and prerogatives. These compromises may lead to new understandings about federalism and the separation of powers.<sup>57</sup> As different parts of the government struggle with each other, push back at each other, and develop new expectations, they construct new constitutional norms or modify old ones. Examples might include the multiple compromises about protective tariffs during the antebellum era, the admission of states to the Union, and the regulation of slavery in the territories. More recent examples are the president's increasing authority to initiate legislation and control

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<sup>56</sup> See Whittington, *Constitutional Construction*, *supra* note 7, at 65–71 (discussing constructions arising from the failed impeachment of Supreme Court Justice Samuel Chase).

<sup>57</sup> See Bruce Ackerman and David Golove, *Is NAFTA Constitutional?* (Harvard University Press 1995) (describing the rise of the use of congressional-executive agreements); Whittington, *Constitutional Construction*, *supra* note 7, at 20–71, 113–57, 162–201 (describing controversies over impeachment, budgeting, and national security).

the budgeting process, the creation of a vast range of classified intelligence activities with secret budgets to pay for them and secret regulations to govern them, and the change in relative authority between Congress and the president in the conduct of foreign affairs and the use of military force.

The political branches build out the Constitution through everyday politics—passing legislation, issuing regulations, and striking political deals. In addition, constitutional culture and constitutional understandings evolve through arguments and mobilizations occurring in ordinary politics. This means that in practice it is useless to try to draw clear boundaries between activities that in hindsight we would label constitutional construction and ordinary political activity. Potentially almost all political and governmental activity could be constitutional construction. Often we may only know what counts later on when institutions become settled and practices and precedents become established. The very notion of constitutional construction involves an interpretive understanding of previous political activity as helping to build out the Constitution and its related institutions.

For example, Congress engages in construction when it passes laws that interpret the Constitution. However, every congressional enactment passed under the commerce power, and every appropriation under the general welfare clause, involves an implicit interpretation of these clauses, whether or not any court ever considers them. Every appointment of an inferior officer, indeed, even the purchase of a new stapler in a regional office of the Social Security Administration, presumes the political power to act. Should we regard all of these activities as constitutional constructions? As an interpretive matter, we would not, if the legality of these practices seems clearly established. The purchase of the stapler presumes constitutional power to act, but the activity now seems routine as opposed to a practice of institution building.

Nevertheless, the continuous repetition of actions and tasks believed to be uncontroversially authorized (and self-conscious forbearance from actions

generally believed to be unconstitutional) is not unimportant. It helps reproduce expectations about the authority of constitutional constructions and helps make constitutional constructions durable over time. The everyday activities of administrative agencies or the institutions of national security continuously enmesh these constitutional constructions in lived political experience; they reproduce understandings and expectations about their continued existence and their continued authority. Long-lived constitutional constructions—like those involved in the regulatory state or the national security state—are not simply established in a single moment. They are repeatedly performed in practice, and expectations about them are continuously reproduced in constitutional culture, confirming and reinforcing their durable character.

It follows that even minuscule tasks and quotidian legislation could in theory contribute to constitutional construction, if they help forge new understandings of the relative powers of the different branches or of the federal and state governments under the Constitution. The president's power, for example, has sometimes increased by slow accretion over two centuries. Expectations about what presidents and their administrations can do (and must do) have expanded through a series of acts great and small, some of which were actively challenged but most of which were not. In hindsight we might see the collection of these activities as part of a long-term process of constitutional construction of the executive branch.

In like fashion, the everyday micropractices of race relations, gender roles, and sexuality in civil society cumulatively may change the public's attitudes about the cultural meaning of equality; in turn this may reshape the American people's understandings of equal protection and constitutionally protected liberty. In hindsight these practices may form part of—or significantly influence—a long-term practice of constitutional construction.

In sum, it is best not to worry too much about where constitutional construction leaves off and merely ordinary politics begins. The key point,

instead, is to recognize how practices within the constitutional scheme can subtly adjust the scheme itself in addition to the formal processes of constitutional amendment.

### The Role of Courts in Constitutional Construction

Courts also build institutions through creating the federal judiciary's administrative structure, and through developing rules of standing, justiciability, evidence, and procedure.<sup>58</sup> But perhaps the most important role of federal courts in the system of constitutional construction is legitimating and rationalizing the work of the national political process and its constitutional constructions. Generally speaking, the practice of living constitutionalism by courts is a process of doctrinal construction that rationalizes and supplements constitutional constructions by the political branches, and responds to changes in political and cultural values in the nation as a whole. Although courts sometimes push back at what Congress and the president do, their constitutional constructions are usually more cooperative than competitive.

Courts engage in constitutional construction in several ways. First, courts rationalize new constitutional constructions by the political branches through creating new doctrines. Rationalization has a dual meaning. On the one hand, it means providing reasons why the constructions are faithful to the Constitution; on the other, it means subjecting these constructions to reasons—articulating rules and principles of judgment—that will presumably be binding on the political branches in the future. Rationalization is thus both a form of legitimation and a form of policing. Courts express and articulate the constitutional norms and values of the dominant national coalition in constitutional doctrine and thereby

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<sup>58</sup> See Paul Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party* 70–97 (Princeton University Press 2008) (describing twentieth-century creation of the “Legal State,” which enforces rights through building up judicial procedures and remedies).

help justify and constrain them. They redescribe political values in terms of legal rules and principles that will apply to future cases. They synthesize new values and institutions with the past by reinterpreting the past constitutional commitments of previous generations, showing how what the political branches are doing is actually faithful both to the Constitution and to the past. To do this, courts may describe past commitments in new ways or at a higher level of generality, often drawing on the entire history of readings of the Constitution by political and judicial actors.

In giving reasons and synthesizing present with past, courts also set boundaries on what the political branches can do. Thus, the process of rationalization is Janus-faced. It justifies constitutional construction by the political branches, but that justification comes with a price: The courts require the political branches to act within a set of principles, rules, and reasons that courts construct in order to maintain their legitimacy and the legitimacy of the political system.

Many of the most important decisions of the federal courts rationalize constructions by the political branches in precisely this way: They make sense of these constructions and legitimate them while subjecting them to legal authority created by courts; this, in turn, legitimates similar actions politicians may take in the future. Thus, following the New Deal the Supreme Court responded to the passage of the Social Security Act, the Fair Labor Standards Act, and other legislation by upholding these new assertions of federal power. It legitimated the emerging regulatory and welfare state that had already been created in politics, and gave doctrinal explanations for how new legislation could also pass constitutional muster.<sup>59</sup> The Administrative Procedure Act,<sup>60</sup> in turn, helped

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<sup>59</sup> See, e.g., *United States v. Darby* 312 U.S. 100, 119–20 (1941) (Congress may regulate activities which have a substantial impact on interstate commerce); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (legislation will be upheld under the due process clause if it has a rational basis); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 589–92 (1937) (use of federal funds to

articulate the values of due process and the relationship of Article III courts to the explosion of federal administrative agencies. During the civil rights revolution the Court upheld new civil rights statutes, once again explaining why Congress's actions were permissible and establishing how future civil rights laws would be judged. Many of the landmark decisions of American constitutional history, from *McCulloch v. Maryland*<sup>61</sup> to *United States v. Darby*<sup>62</sup> to *Katzenbach v. Morgan*,<sup>63</sup> have this dual character. Over time, courts work out the logical consequences of the value commitments of the new regime, as well as its landmark precedents, and synthesize them with the work of previous regimes, making them appear as coherent as possible.

Even when the Supreme Court seems to disagree with the president and Congress, it can ultimately rationalize and legitimate their constructions. During the 2000s the Supreme Court repeatedly rejected parts of the Bush administration's detention policies in the war on terror.<sup>64</sup> But the ultimate effect of these decisions was to legitimate the president's power to detain enemy combatants with only minimal due process protections; and Congress responded to the Court's invalidation of the Bush administration's military commissions by

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induce state participation in unemployment compensation scheme did not violate the Tenth Amendment where it did not unduly coerce states to participate and states were free to end participation).

<sup>60</sup> Administrative Procedure Act of 1946, Pub. L. No. 404, ch. 324, 60 Stat. 237 (codified as amended at 5 U.S.C. §§551–59, 701–6 (1994)).

<sup>61</sup> 17 U.S. 316 (1819).

<sup>62</sup> 312 U.S. 100 (1941).

<sup>63</sup> 384 U.S. 641 (1966).

<sup>64</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that constitutional habeas applies to the detention center at Guantanamo Bay, Cuba); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that Bush administration military commissions violated the Uniform Military Code of Justice and the Geneva Conventions); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that the president may detain enemy combatants consistent with the laws of war and must afford due process protections); *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that statutory habeas applied to the detention center at Guantanamo Bay, Cuba).

creating new military commissions in the Military Commissions Acts of 2006 and 2009.

Second, as noted previously, much federal judicial review is directed at state and local government officials. Federal courts cooperate with the dominant forces in national politics by policing and disciplining those who do not share the dominant coalition's values; they impose the values of national majorities on regional or local majorities. These decisions are countermajoritarian only from a local or regional perspective.

Two examples of this phenomenon that I noted previously are *Brown v. Board of Education* and *Lawrence v. Texas*. *Brown* required southern majorities to accept the constitutional values of the dominant North; *Lawrence* required the remaining thirteen states to decriminalize same-sex sodomy. In enforcing national values, the Supreme Court often looks to the direction of change in state practices to determine the meaning of vague clauses like the Eighth Amendment's cruel and unusual punishments clause. Not surprisingly, disputes in these cases often turn on whether the Court has adequately recognized a genuine trend, and whether the trend marks a truly enduring constitutional value or merely reflects a temporary and revisable policy preference.<sup>65</sup>

Along the same lines, courts apply vague clauses and fill in gaps and silences in the Constitution in response to long-term changes in social attitudes that have become reflected in national politics. During the sexual revolution, for example, the federal courts promoted liberal values by loosening legal restraints on pornography<sup>66</sup> and by protecting the right of married couples and single persons

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<sup>65</sup> See, e.g., *Kennedy v. Louisiana*, 554, U.S. 407 (2008) (holding that a statute that prescribed the death penalty for rape of a child under twelve years of age is unconstitutional); compare *id.* at 2657–58 (concluding that there is a national consensus against the death penalty in these circumstances), with *id.* at 2665–67, 2672–73 (Alito, J., dissenting) (denying the existence of consensus and arguing that the trend might even be in the opposite direction).

<sup>66</sup> See, e.g., *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975) (declaring facially invalid an ordinance making it a public nuisance and a punishable offense for a drive-in movie theater to

to use contraceptives.<sup>67</sup> After social and religious conservatives began to dominate American politics in the 1980s, the Supreme Court revised its establishment clause doctrines, making it easier for governments to support religious schools and create voucher programs.<sup>68</sup> It interpreted the free-speech clause to allow private religious groups to hold prayer services after hours in public schools and to engage in religious expression on government property.<sup>69</sup>

Third, federal courts sometimes cooperate with the reigning national political coalition by limiting or striking down laws that reflect an older coalition's values. Following the Republican takeover of Congress in 1995, the conservative majority on the Rehnquist Court tilted toward the views of the Congress led by House Speaker Newt Gingrich. It created a new set of doctrines promoting federalism. It also began to limit or strike down civil rights statutes passed by the previous Democratic-controlled Congress, including parts of the 1994 Violence Against Women Act, which had been passed just before the Republican

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exhibit films containing nudity, when the screen is visible from a public street or place); *Miller v. California*, 413 U.S. 15 (1973) (announcing a three-part test for obscenity); *Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that mere possession of obscene materials cannot be a crime); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (holding that a book with literary value was not legally obscene).

<sup>67</sup> See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (striking down a prohibition of distribution of contraceptives to minors); *Eisenstadt v. Baird* 405 U.S. 438 (1972) (holding that the right of reproductive privacy extended to single as well as married persons); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down a state law that prohibited the dispensing or use of birth control devices to or by married couples).

<sup>68</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding voucher scheme for private schools under the establishment clause); *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion) (upholding direct government aid in materials and equipment to religious schools); *Agostini v. Felton*, 521 U.S. 203 (1997) (holding that a federally funded program providing instruction to disadvantaged children in parochial schools did not violate the establishment clause); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (holding that the establishment clause did not prevent a school district from furnishing a student with a sign-language interpreter to facilitate his education at a sectarian school).

<sup>69</sup> See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

takeover.<sup>70</sup> People often point to *Dred Scott v. Sandford*<sup>71</sup> as a rare example of the Supreme Court holding a federal law unconstitutional in the period before the Civil War.<sup>72</sup> Not surprisingly, it invalidated an older law: the Missouri Compromise of 1820, a statute that reflected an older set of political assumptions about slavery, and that had been repealed by Congress in the Compromise of 1850.<sup>73</sup>

Fourth, federal courts cooperate with national politicians by taking responsibility—and thus the political heat—for decisions that members of the dominant coalition cannot agree on and that would potentially split the coalition.<sup>74</sup> Decisions on abortion and Internet pornography are recent examples. Moderate and conservative politicians, particularly in the Republican Party, may want to avoid casting votes that would criminalize abortion entirely; *Roe v. Wade*<sup>75</sup> takes that question off the table. Instead, they are perfectly happy to cast votes limiting abortion funding or partial-birth abortions because these policies are popular both with moderates and with conservatives. Some moderate and liberal politicians, particularly in the Democratic Party, may not want to be blamed for opposing the criminalization of Internet pornography but are happy to have the courts strike such measures down.<sup>76</sup> In this way, the Court promotes their values while taking legal responsibility for the outcome.

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<sup>70</sup> See *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>71</sup> 60 U.S. 393 (1857).

<sup>72</sup> In fact, the practice was more common than generally supposed. See Mark A. Graber, “Naked Land Transfers and American Constitutional Development,” 53 *Vand. L. Rev.* 73, 78, 116–17 (2000).

<sup>73</sup> See *Dred Scott*, 60 U.S. at 452.

<sup>74</sup> Whittington, *Political Foundations of Judicial Supremacy*, supra note 14, at 134–38; Mark A. Graber, “The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary,” supra note 44.

<sup>75</sup> 410 U.S. 113 (1973).

<sup>76</sup> See Keith Whittington, “‘Interpose Your Friendly Hand’: Political Supports for the Exercise of Judicial Review by the United States Supreme Court,” 99 *Am. Pol. Sci. Rev.* 583, 591 (2005). In order to ensure passage of the 1996 Telecommunications Act, a reform he greatly desired, President Clinton acquiesced to the addition of the Communications Decency Act (CDA), which made it a crime to make available on the Internet indecent material that minors might be able to

Fifth, the Supreme Court often takes direction about how to construct doctrine from contemporaneous expressions of constitutional values by political majorities. It does so not out of compulsion but because Supreme Court majorities happen to agree with these values and find it useful to defer to Congress or the president in order to justify their decisions. I have already noted the Roosevelt Court's legitimation of the New Deal. During the 1960s the Warren Court took direction from the national political process to further the civil rights revolution. Bruce Ackerman and Jennifer Nou have pointed out that following the ratification of the Twenty-Fourth Amendment, which banned poll taxes in federal elections, section 10 of the 1965 Voting Rights Act urged the attorney general to challenge the constitutionality of poll taxes in state elections.<sup>77</sup> Taking its cue from the political branches, the Warren Court held these taxes unconstitutional in *Harper v. Virginia Board of Elections*.<sup>78</sup>

The Supreme Court's sex equality decisions provide an even more powerful example. During the 1960s, Congress passed a series of acts promoting gender equality, including the Equal Pay Act, Title VII of the Civil Rights Act of 1964, and the 1972 Amendments to Title VII, culminating in passage of an Equal Rights Amendment (ERA) sent to the states in 1972. The Supreme Court recited this history in *Frontiero v. Richardson*, offering it as a reason why sex discrimination

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access. Although both the Justice Department and the Clinton administration argued that the measure was unconstitutional, President Clinton signed the bill anyway. As one administration official put it, "No way are you going to get yourself in a position where the President isn't willing to go as far as a Democratic Senator in restricting child pornography on the Internet in an election year." *Id.* The bill, however, also provided for expedited judicial review of the CDA, and after a three-judge district court initially struck it down, the Supreme Court declared it unconstitutional in *Reno v. ACLU*, 521 U.S. 844 (1997). This gave President Clinton and certain members of Congress who voted for the bill the best of both worlds; they got credit for getting tough with Internet pornography while letting the Court protect First Amendment values they shared.

<sup>77</sup> Ackerman and Nou, "Canonizing the Civil Rights Revolution," *supra* note 13, at 108–9

<sup>78</sup> 383 U.S. 663 (1966).

violated the equal protection clause even before the ERA was ratified.<sup>79</sup> In fact, the Court's development of sex equality doctrine under the equal protection clause made the ERA largely superfluous. Even so, these doctrines followed the judgments of Congress and the president that sex discrimination already violated constitutional values, as well as large-scale changes in public attitudes about sex equality. More recently, after Congress and the president passed a ban on partial-birth abortions, the Supreme Court upheld the Partial Birth Abortion Act of 2003, effectively reversing a seven-year-old decision striking down similar laws.<sup>80</sup> In each of these examples, judicial constructions either ratified or meshed with recent constitutional constructions offered by the president and Congress.

Critics of the federal judiciary often complain that judges are elites who are influenced by elite values.<sup>81</sup> This is certainly true. But it is also true of the political elites who operate the national political process. Both sets of elites respond to changes in national public opinion, but both sets also favor elite values to the extent that they differ from the values of non-elites.<sup>82</sup> When political elites are liberal, as they were in the mid 1960s, the work of courts will also tend to be more liberal; when political elites are more conservative, as they were in the late twentieth century, the work of courts will tend to shift to the right. Complaints

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<sup>79</sup> *Frontiero v. Richardson*, 411 U.S. 677, 687–88 (1973) (plurality opinion) (“Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration”).

<sup>80</sup> *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding federal Partial-Birth Abortion Act of 2003 and distinguishing *Stenberg v. Carhart*, 530 U.S. 914 (2000) (striking down a state law banning partial birth abortion)).

<sup>81</sup> See, e.g., Bork, *The Tempting of America*, supra note 2, at 8, 16–18; cf. John Ferejohn, “Independent Judges, Dependent Judiciary: Explaining Judicial Independence,” 72 *S. Cal. L. Rev.* 353, 369 (1999) (“[H]owever well motivated [judges] may be, they are likely to bring to their work the perceptions of an upper middle class, educated, largely male, and largely white elite”).

<sup>82</sup> See Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* 285 (Princeton University Press 2008) (affluent citizens have disproportionate impact on social policy outcomes, while “the preferences of persons in the bottom third of the income distribution have no apparent impact on the behavior of their elected officials”)(emphasis in original).

about federal judicial decisions as “elite” and antidemocratic often better express concerns about federalism—they reflect complaints by representatives of regional majorities (and regional elites) about the contrasting values of the dominant forces in the national political process. Conversely, although judicial doctrine tends to stay in sync with the views of national political elites, in some cases these political elites are actually less responsive to changes in national public opinion than the federal judiciary because of the many veto points in the political system. For instance, seniority and voting rules in the Senate prevented federal civil rights legislation for generations despite popular support for reform; *Brown v. Board of Education* responded to changing views about race following World War II in ways that Congress could not until the middle of the 1960s.<sup>83</sup>

### Constitutional Constructions and Constitutional Revolutions

A similar analysis applies to constitutional revolutions. Lawyers often associate them with famous court decisions, but in fact these transformations usually involve significant cooperation between courts and the national political branches. Twentieth-century constitutional revolutions, like the New Deal revolution of the 1930s or the civil rights revolution of the 1960s, have not primarily been led by the federal judiciary. Rather, they have mostly involved judicial responses to changes in reigning political coalitions and in the values of the dominant regime in American politics. During the early years of the New Deal, the Supreme Court mostly resisted changing political and constitutional assumptions, leading President Roosevelt to make increasingly broad and sweeping claims about federal power to regulate the economy. The New Deal “revolution” consisted

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<sup>83</sup> Klarman, *From Jim Crow to Civil Rights*, supra note 20, at 366 (noting that southern filibusters had blocked civil rights legislation between the 1920s and the 1957 Civil Rights Act); Michael J. Klarman, “The Racial Origins of Modern Criminal Procedure,” 99 *Mich. L. Rev.* 48, 93–94 (2000) (“[F]rom the 1920s through the 1950s, the Supreme Court probably was a better gauge of national opinion on race than was a United States Congress in which white supremacist southern Democrats enjoyed disproportionate power because of Senate seniority and filibuster rules”).

largely of the Supreme Court's decision to get behind the emerging political realities and cooperate with the political branches and especially with the president's program. Although Roosevelt attacked the Court when it disagreed with him, he largely stopped attacking it—and its powers of judicial review—as soon as the Court began to agree with and cooperate with his administration. Once Roosevelt had stocked the Supreme Court with friends of the New Deal, the Court responded with a series of precedents legitimating and rationalizing the new constitutional regime and constructing a new constitutional common sense about federalism and economic regulation.<sup>84</sup>

The Warren Court, by contrast, needed little prodding to act in concert with the dominant liberal political consensus of the 1960s. By the 1950s the Supreme Court had been stocked with justices who were liberal on racial issues, reflecting the dominance of racial liberals in the presidential wings of both parties.<sup>85</sup> *Brown v. Board of Education* was the result. A regional majority in the South blocked any congressional action on racial segregation, but a national majority of states favored the result in *Brown*, as did foreign policy elites and lawyers in administrations of both parties.<sup>86</sup> *Brown* was not an example of a Court striking out on its own against the wishes of a national majority; as noted previously, in *Brown* the Court that sided with key elements of the dominant national political coalition, with a wide range of national political elites—including the Justice Departments of both the Truman and Eisenhower administrations—and with a majority of state legislatures.

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<sup>84</sup> See cases cited supra note 12.

<sup>85</sup> See, e.g., Kevin J. McMahon, *Reconsidering Roosevelt on Race*, supra note 23 (arguing that Franklin Roosevelt deliberately appointed judges deferential to presidential power and receptive to civil rights claims, especially when made by the Executive).

<sup>86</sup> Balkin, "What *Brown* Teaches Us," supra note 14, at 1539; Klarman, *From Jim Crow to Civil Rights*, supra note 20, at 344–45, 445; see Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* 80–81 (Princeton University Press 2000); Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 42 (University of Chicago Press 1991).

In the 1960s a liberal Democratic president, Lyndon Johnson, led a coalition of political liberals and moderates in both parties to enact an ambitious civil rights agenda, passing the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968. The Supreme Court strove to uphold the new civil rights legislation from constitutional challenge, expanded congressional powers to protect civil rights, and struck down state poll taxes after Congress requested it do so in the 1965 Voting Rights Act.<sup>87</sup> The Warren Court's criminal procedure revolution imposed national standards of fairness on state and local law enforcement officials whose practices disproportionately burdened blacks and the poor.<sup>88</sup> As Congress and the president began the War on Poverty, the Court began constitutionalizing protections for the poor;<sup>89</sup> several years after Congress passed a revolutionary new immigration act in 1965, the Court protected resident aliens from discrimination by state governments.<sup>90</sup>

The twentieth century's constitutional revolutions have largely been revolutions in constitutional construction. They have involved alterations in constitutional common sense produced through political mobilization and judicial cooperation. Constitutional revolutions are changes in expectations about what constitutional provisions mean and how they are likely to be applied; changes in

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<sup>87</sup> *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966); see also Ackerman and Nou, "Canonizing the Civil Rights Revolution," *supra* note 13.

<sup>88</sup> Powe, *The Warren Court*, *supra* note 14, at 492 (arguing that the Warren Court's criminal procedure decisions imposed national standards on local and state police officers, prosecutors, and judges); Klarman, "Rethinking the Civil Rights and Civil Liberties Revolutions," *supra* note 16, at 60–66 (connecting the Warren Court's criminal procedure revolution to changing attitudes about poverty); cf. Corinna Barrett Lain, "Counter-majoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution," 152 *U. Pa. L. Rev.* 1361, 1451 (2004) (arguing that Warren Court decisions reflected shifts in national public opinion and changing attitudes about police misconduct, race, poverty, and perceived rates of crime).

<sup>89</sup> See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that due process requires a hearing before the termination of welfare benefits); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (striking down, on equal protection grounds, a statute that denied welfare benefits to residents who had not been in the jurisdiction for at least one year); *Harper*, 383 U.S. 663 (striking down poll tax in state elections).

<sup>90</sup> *Graham v. Richardson*, 403 U.S. 365 (1971).

what kinds of positions are thought reasonable and unreasonable, off-the-wall and on-the-wall. These changes are prompted by the contemporaneous work of the political branches and by social mobilizations.

Most of what courts do in constitutional construction is normal science, working out the consequences of previous commitments (and countercommitments) and reasoning from previous precedents. During periods of significant constitutional change, however, courts face a different task: making sense of new political realities, significant shifts in public sentiment, and new constitutional constructions created by the political branches. Courts play their supporting role by shifting what is off-the-wall and on-the-wall in constitutional doctrines and expectations about the likely application of constitutional doctrines. They do this in order to make sense of the facts on the ground created in ordinary politics. During these periods of constitutional transformation the Supreme Court and the lower federal courts must decide whether and how to legitimate changes or innovations in statecraft and whether and how to cooperate with the newly ascendant forces in national politics, particularly the presidency. How courts react often depends on their composition: who appointed their members and when they were appointed.

Courts are by nature conserving, if not conservative, institutions; their composition tends to reflect the political values of the times when their various members were appointed. For this reason, sometimes courts will resist significant changes in governing assumptions promoted by the president or Congress. They will ally themselves with those parts of the national political process that oppose change. The federal judiciary acts as a check on the political branches, just as Congress and the president check each other. This checking function occurs not because courts are wiser than the political branches but because of their institutional configuration: judges are appointed by politicians from the past, and they decide cases based on past precedents and prior conventions. Nevertheless, in successful constitutional transformations, like the New Deal, advocates of

change maintain political power and eventually stock the courts with their allies. At this point courts begin to cooperate, and they resume their standard function: they legitimate and rationalize new constitutional constructions by the political branches, and they impose norms of procedural regularity and new forms of civil liberties protections to make sense of the new regime's innovations. Courts will not uphold everything the national political process does, but they will uphold the major aspects of the new regime's program and articulate its values in judicial decisions. These doctrinal developments cannot be explained solely as the normal or ordinary working-out of the details of previous doctrines, particularly when old judges are replaced by newer judges who are more in sync with dominant political forces. These new judges reject a significant amount of previous assumptions, remaking constitutional common sense.

To respond to changes in the national political process, courts may have to discard a substantial proportion of existing doctrine. They must create new rights and powers where none existed before, overrule existing decisions, or distinguish them into irrelevance. Courts do this by ascending to the general—by going back to first principles and rearticulating those higher-order principles in a new way. In *West Coast Hotel v. Parrish*,<sup>91</sup> a key decision in the legitimation of the New Deal, the Supreme Court cast a skeptical eye on an entire generation of due process jurisprudence:

[T]he violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social

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<sup>91</sup> 300 U.S. 379 (1937).

organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.<sup>92</sup>

Here, the Court claims fidelity to basic constitutional principles stated at a high level of generality. Claiming fidelity to principles of higher generality that remain consistent with the text is the easiest way for courts to synthesize revolutionary changes in doctrine with past commitments. Constitutional construction in revolutionary times ascends to the general in order to bless the actual. Appeals to text and principle allow courts to maintain continuity with the past even as their constructions change considerably.

Basic principles often appear differently to later generations than to previous generations that articulated them. The perspective of later generations is likely to be different because they stand in a different relation to the past. And because later generations see different things in the past, they will understand themselves to be faithful to the past differently.

Although constitutional construction by courts involves the articulation, elaboration, and application of constitutional principles, my account of constitutional construction differs from Ronald Dworkin's model of the Court's principled function. Dworkin's model of constructive interpretation tries to make sense of the whole of past judicial decisions, justified by the best theory of political morality available.<sup>93</sup> My model argues that courts try to make sense of recent innovations in state building and constitutional culture, redescribing past principles and precedents in the process. The New Deal Court did not try to make

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<sup>92</sup> *Id.* at 391.

<sup>93</sup> See Ronald Dworkin, *Law's Empire* 52, 166, 227–28, 255, 265, 363–68 (Harvard University Press 1986).

sense of the entire history of federalism and due process doctrine; instead it tried to shape doctrines to fit new forms of statecraft by the political branches.

Moreover, the principles employed in constitutional construction are not limited to those available at the time of adoption. New constitutional principles (including, for example, structural principles) can emerge over time as constitutional constructions of the text. Doctrine consists of a wide variety of different principles at different levels of generality and specificity. New constitutional constructions can be inconsistent with many prior constructions and with a wide variety of principles of varying levels in existing doctrine. For example, during the period from 1934 through 1950, the Supreme Court largely abandoned an elaborate theory of the scope of state police powers that it had developed over a period of seventy years.<sup>94</sup> In its place it constructed a new theory of judicial scrutiny for cases involving economic and social legislation.<sup>95</sup>

My account of constitutional construction has much in common with Bruce Ackerman's theory of constitutional moments, particularly in light of his recent revision of the theory to account for the civil rights revolution.<sup>96</sup> Nevertheless, there are six important differences, which produce a different account both of constitutional revolutions and of living constitutionalism.

First, Ackerman's theory focuses only on the very largest changes in constitutional development that produce new constitutional regimes like Reconstruction or the New Deal. In addition, Ackerman's model of change is not gradual, but revolutionary. Regime changes must occur in a very short space of

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<sup>94</sup> See Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* 10–14, 175–93 (Duke University Press 1993).

<sup>95</sup> See *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

<sup>96</sup> Ackerman, "The Living Constitution," *supra* note 9.

time, normally within ten years.<sup>97</sup> Thus, Ackerman's model does not purport to explain midlevel or smaller changes within regimes or between great regime shifts, except to the extent that he can describe these changes as the working-out of the regime's larger commitments or as a synthesis with the commitments of previous regimes.<sup>98</sup> By contrast, my model assumes that constitutional constructions come in many different sizes, from very great to very small. Moreover, constitutional constructions have no set time limit. Some very important shifts have emerged from modest changes that culminate over time.

Second, Ackerman argues that regime changes are democratically legitimate because they enjoy the self-conscious, mobilized, and broad support of the American people.<sup>99</sup> This means that the American people, or at least the vast majority of them, must understand that the Constitution is being amended and previous constitutional commitments are being discarded, and they must actively support these changes. By contrast, I argue that the American people do not need to have—and generally do not have—a self-conscious understanding of new constitutional constructions as revolutionary constitutional amendments. Many constitutional constructions go largely unnoticed by the public. Moreover, when members of the public actively support them (which they may not), they tend to understand these changes as restorations or redemptions of constitutional text and principle rather than as displacements or amendments. Even during the height of

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<sup>97</sup> Bruce Ackerman, "Revolution on a Human Scale," 108 *Yale L.J.* 2279, 2287–89 (1999) (proposing a ten-year test for revolutionary change). This compressed time horizon helps ensure that the American people have focused self-consciously on the changes and assented to them.

<sup>98</sup> Ackerman, 1 *We the People: Foundations*, supra note 13, at 131–62 (1991) (describing intergenerational synthesis and offering *Brown v. Board of Education* and *Griswold v. Connecticut* as examples).

<sup>99</sup> Ackerman, "The Living Constitution," supra note 9, at 2283–85 (emphasizing self-consciousness of actors in moments of revolutionary change); see, e.g., Ackerman, 2 *We The People: Transformations* 358–59 (Harvard University Press 1998) (arguing that ordinary Americans understood the events of the New Deal as a constitutional revolution, confirmed by the consolidating election of 1940); Ackerman, 1 *We the People: Foundations*, supra note 13, at 290 (revolutionary agendas must seek "to gain the deep, broad and decisive support of the American people").

the controversy over the New Deal, Franklin Roosevelt insisted that his proposals for reform were fully consistent with the constitutional text; he wanted the right to appoint new justices who would read the Constitution correctly.<sup>100</sup> In any case, much constitutional construction, especially smaller and midlevel changes, occurs without self-conscious mobilization or assent by the American people. Instead it reflects the passage of new legislation and administrative regulations by the national political coalition, and the judiciary's adjustment, rationalization, and extension of these efforts.

Third, Ackerman's constitutional moments usually have some tincture of illegality that signals that a revolution is taking place. They involve "unconventional adaptations" of existing constitutional machinery that the people accept or reject.<sup>101</sup> By contrast, constitutional constructions in my model present

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<sup>100</sup> Franklin D. Roosevelt, "Address on Constitution Day, Washington, D.C. (Sept. 17, 1937)," in John Woolley and Gerhard Peters, *The American Presidency Project*, [www.presidency.ucsb.edu/ws/?pid=15459](http://www.presidency.ucsb.edu/ws/?pid=15459) ("You will find no justification in any of the language of the Constitution, for delay in the reforms which the mass of the American people now demand. . . . [N]early every attempt to meet those demands for social and economic betterment has been jeopardized or actually forbidden by those who have sought to read into the Constitution language which the framers refused to write into the Constitution").

Roosevelt's public rhetoric during this period does not match Ackerman's model of self-conscious constitutional transformation. Roosevelt did not urge the public to accept anything like an amendment outside of Article V. Instead, Roosevelt spoke and reasoned like a framework originalist, arguing that the Constitution was deliberately designed as "a charter of general principles" that used "general language capable of meeting evolution and change." *Id.*

Roosevelt used the language of constitutional redemption rather than constitutional revolution: The Supreme Court, Roosevelt insisted, had disregarded the Constitution's text and its central principles; they were "reading into the Constitution words and implications which are not there, and which were never intended to be there." Franklin D. Roosevelt, "Fireside Chat Discussing the Plan for Reorganization of the Federal Judiciary, March 9, 1937," in John Woolley and Gerhard Peters, *The American Presidency Project*, [www.presidency.ucsb.edu/ws/index.php?pid = 15381](http://www.presidency.ucsb.edu/ws/index.php?pid = 15381). Thus, he called for the restoration of the true Constitution: "We must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself." *Id.*

<sup>101</sup> Ackerman, *2 We The People: Transformations*, *supra* note 99, at 9, 22, 82, 120, 154 (discussing the role of unconventional adaptations in higher lawmaking); *id.* at 187 (unconventional adaptation by political elites allows them to test the assent of the public). Ackerman's idea of

themselves as perfectly legal articulations of text and principle; at most they discard previous constructions that advocates claim are no longer faithful to the best understandings of text and principle and have otherwise lost connection with changed social and political realities.

Fourth, in order to ensure that regime change enjoys the mobilized support of the American public, Ackerman requires that change must traverse a five-stage process: a signaling event, a proposal, a triggering election, a ratifying election, and consolidation.<sup>102</sup> If change does not correspond to this sequence of events, it is not legitimate. By contrast, I argue that constitutional constructions emerge through many different methods, and there is no necessary sequence they must follow to create valid law.

Fifth, Ackerman's model has a place for what I call constitutional construction, but he explains its democratic legitimacy differently. The commitments of a new regime, he argues, must be worked out over time and

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unconventional adaptation better fits constitutional controversies during the founding, the Jeffersonian revolution, and Reconstruction; in the case of the New Deal, he argues that lawyers' use of Supreme Court opinions as amendment analogues is an unconventional adaptation, *id.* at 270–71, although it does not fit into his five-part scheme in the same way as in the previous historical examples. These opinions appear at the last stage of consolidation rather than setting up the key moment of popular decision for or against revolutionary change. See *id.* at 187–88. Although Ackerman does not address the point directly, presumably the use of both landmark judicial decisions and landmark statutes as amendment equivalents is the characteristic unconventional adaptation of the civil rights revolution. See Ackerman, "The Living Constitution," *supra* note 9, at 1760–61, 1770–71 (arguing that the 1964 Civil Rights Act, like the Fourteenth Amendment during Reconstruction, placed the question of revolutionary change before the public).

<sup>102</sup> Ackerman, 2 *We The People: Transformations*, *supra* note 99, at 20, 26, 359 (discussing the procedural preconditions for legitimate change); *id.* at 166, 207, 211 (noting the signaling act of illegality by the Convention/Congress, resistance by conservative branches, recourse to the people through a triggering election, the unconventional threat of presidential impeachment, and eventual capitulation in the Reconstruction period); *id.* at 359 (noting the structure of New Deal revolution involving a triggering election, the unconventional threat by President Roosevelt, transformative appointments, a ratifying, consolidating election, and consolidating judicial opinions); Ackerman, "The Living Constitution," *supra* note 9, at 1762 (describing the five-stage process for civil rights revolution); Ackerman, "Revolution on a Human Scale," *supra* note 97, at 2298–99 (noting the pattern of signaling, proposing, triggering, and ratifying by the Federalists).

synthesized with the commitments of previous regimes. For example, he assumes that the sex equality jurisprudence of the 1970s is not part of the civil rights revolution, which Ackerman believes was centrally about racial equality.<sup>103</sup> Instead he argues that this jurisprudence is a judicial elaboration of the 1960s civil rights regime synthesized with the commitments of previous regimes like Reconstruction.<sup>104</sup> The democratic legitimacy of these judicial elaborations derives from the democratic legitimacy of each of the regimes whose commitments judges synthesize. The legitimacy of these decisions does not come from their contemporaneous connection to national public opinion about sex equality or to the values of national politicians and political elites. By contrast, I argue that the judicial recognition of sex equality in the 1970s emerged from significant changes in popular opinion spurred on by the second wave of American feminism, from the efforts of state legislatures and the political branches of the federal government—who began to put sex equality guarantees into legislation and administrative regulations—and from Congress’s submission of the Equal Rights Amendment to the states in 1972. The federal courts’ sex equality decisions in the 1970s recognized and rationalized these shifts in constitutional culture; the decisions gained their legitimacy from their connection to changes in constitutional culture and contemporaneous constitutional constructions by the political branches.

Sixth, Ackerman’s model argues that the central artifacts of regime changes, especially in the twentieth century, are landmark decisions and landmark statutes. One of his most controversial claims is that these decisions and statutes are full-

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<sup>103</sup> Ackerman, “The Living Constitution,” *supra* note 9, at 1741, 1790.

<sup>104</sup> Bruce Ackerman, “Interpreting the Women’s Movement,” 94 *Cal. L. Rev.* 1421, 1426 (2006) (“It was the Court’s understanding of the evolving requirements of Equal Protection which shaped its response to the women’s movement, not the other way around”); *id.* at 1434 (arguing that the Court worked out the implications of the commitment to racial equality for gender stereotyping).

fledged constitutional amendments<sup>105</sup>—that they have the same legal status as other constitutional amendments passed through Article V. Moreover, Ackerman argues that courts should reason from their text and principles in the same way that they reason from newly enacted constitutional texts.<sup>106</sup> By contrast, I do not regard either the Social Security Act of 1935 or Title VII of the Civil Rights Act of 1964 as constitutional amendments. They are acts of ordinary legislation that can be amended (and have been amended) or even repealed through the ordinary political process. If Congress does not repeal the Social Security Act or Title VII, it is not because it lacks the formal authority to do so. It is rather because these constructions are durable in practice and it would be politically difficult, if not impossible, to repeal them in our current political culture.<sup>107</sup> Even so, landmark statutes like the Social Security Act, the National Labor Relations Act, the Voting Rights Act, and the Civil Rights Act of 1964 have been repeatedly altered through ordinary legislation throughout their history, and these legislative amendments are not unconstitutional, even if they are unwise or inconsistent with the spirit of the original enactments.

In like fashion, key doctrines created by courts are not amendments to the Constitution, as Ackerman contends, but constitutional constructions that can be limited, distinguished, or even overturned by later courts in the same way that any other decisions can be limited, distinguished, or overturned. Landmark decisions

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<sup>105</sup> Ackerman, 2 *We The People: Transformations*, supra note 99, at 270 (describing *Darby* and *Wickard* as “amendment analogues”); Ackerman, “The Living Constitution,” supra note 9, at 1761 (“I will be presenting the landmark statutes of the 1960s as functionally equivalent to the constitutional amendments of the 1860s”); id. at 1788 (“The legal landmarks emerging from this moment of popular sovereignty should not be denigrated merely because they took the form of statutes rather than formal amendments”).

<sup>106</sup> Ackerman, “The Living Constitution,” supra note 9, at 1753–54 & n. 38.

<sup>107</sup> Ackerman does not disagree. See id. at 1788–89. However, he characterizes the issue differently: he argues that “an all-out assault on the Civil Rights Act, or the Voting Rights Act, could not occur without a massive effort comparable to the political exertions that created these landmarks in the first place.” Id. at 1788. Because these landmark statutes are constitutional amendments outside of Article V, it would seem to follow from his reasoning that the same five-stage process would be required *legitimately* to repeal these statutes. This is not my view.

like *United States v. Darby* and *Wickard v. Filburn* could, in theory, be significantly limited or jettisoned tomorrow, if courts found them unworkable or completely inhospitable to the needs of the national political coalition, but this is unlikely to happen because so much depends on their continuation.<sup>108</sup> Perhaps the most famous of all landmark decisions, *Brown v. Board of Education*, has been continuously reinterpreted since it was first handed down, and there is a strong argument that it has been significantly modified, if not wholly transformed, by later decisions.<sup>109</sup> This has happened, in part, because courts have reinterpreted and reshaped *Brown* in concert with the shifting values and agendas of successful countermobilizations and changes in national politics.

### Durability, Canonicity, and the Emergence of New Secondary Rules

According to the model of constitutional construction described in this book, many things cannot be changed without constitutional amendment. For example, the “hardwired” features of the Constitution are fixed; so too are those rules that follow directly from the original meaning of the text. This is the point of framework originalism.

In addition, constitutional constructions—both those created by the political branches and those created by courts—can also become *durable* or *canonical*. Durability means that constitutional constructions—whether in the form of

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<sup>108</sup> Balkin and Levinson, “The Processes of Constitutional Change,” supra note 37, at 510–13 (explaining why the Rehnquist Court’s federalism revolution did not fundamentally reshape New Deal precedents).

<sup>109</sup> See Jack M. Balkin and Reva B. Siegel, “The American Civil Rights Tradition: Anticlassification or Antisubordination?” 58 *U. Miami L. Rev.* 9, 28–32 (2003) (explaining how political countermobilizations reshaped antidiscrimination law); Balkin, “What *Brown* Teaches Us,” supra note 14, at 1563–68 (explaining how changes in American politics altered *Brown*’s practical meaning); Reva B. Siegel, “Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over *Brown*,” 117 *Harv. L. Rev.* 1470, 1547 (2004) (showing how the “anticlassification principle was not the [original] ground of the *Brown* decision, but instead emerged from struggles over the decision’s enforcement”); David A. Strauss, “Discriminatory Intent and the Taming of *Brown*,” 56 *U. Chi. L. Rev.* 935 (1989) (arguing that 1970s equal protection jurisprudence limited the transformative potential of *Brown*).

statues, practices, or decisions—are not easy to change, however easy this might appear as a formal matter. Canonicity means that constitutional constructions are important to legal understanding—and especially professional legal understanding—in the current constitutional culture.<sup>110</sup> Canonical constructions set the parameters for what is considered reasonable or unreasonable, central and peripheral, in the constitutional culture. They also set agendas for current debates about constitutional development. Legal thought is distinctive in that it has both a canon of constructions that are currently valued (or important) in constitutional culture and an anti-canon of prior, rejected constructions that legal professionals now regard as characteristic examples of how not to reason about the Constitution.<sup>111</sup> *Dred Scott v. Sandford* is a well-known example of an anti-canonical decision.

Constructions become durable in part because they are useful to everyday political life and because successive generations build on them and depend on their continuation. Constitutional constructions become durable because they are embedded in political, economic, and social practices, and people continuously build on those practices. Dependence in use not only makes these constructions durable; it also causes people to view them as correct or even obvious interpretations of the Constitution.

Constitutional constructions become canonical because their meaning is salient and important to our political regime. Canonical constructions pose agendas and problems to solve; they symbolize important commitments, values and controversies; and therefore people feel the need to rationalize and explain their positions with respect to these constructions. Conversely, people feel the

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<sup>110</sup> Sanford Levinson and I have distinguished the constitutional canon as understood by citizens from the canon as understood by legal professionals. See J.M. Balkin and Sanford Levinson, “The Canons of Constitutional Law,” 111 *Harv. L. Rev.* 963 (1998). However, these inevitably overlap and influence each other.

<sup>111</sup> *Id.* at 1018–19; see also Jamal Greene, “The Anticanon,” 125 *Harv. L. Rev.* \_\_\_ (forthcoming 2011); Richard A. Primus, “Canon, Anti-Canon, and Judicial Dissent,” 48 *Duke L.J.* 243 (1998).

need to show why their positions are inconsistent with or repudiate constructions that are anti-canonical in the current regime. Some constitutional constructions can be more canonical—in the sense of being salient and important to current understandings and debates—than parts of the constitutional text. The Social Security Act,<sup>112</sup> *Brown v. Board of Education*, and even *Roe v. Wade* are more canonical in the present constitutional regime than the import-export clause of Article I.<sup>113</sup>

Many constitutional constructions are both durable and canonical, and these characteristics often reinforce each other. *Brown v. Board of Education* is both durable and canonical. So too are the Civil Rights Act of 1964<sup>114</sup> and the Social Security Act. They are durable in the sense that people rely on them and build on them. They are canonical in the sense that people see them as articulating important values and commitments.

Constitutional constructions can be durable but not canonical. Many statutes that promote constitutional values are not central to the meaning of the existing constitutional regime, and so too are many precedents embedded in the fabric of the law that nobody pays much attention to. Constructions can be durable but not canonical if they lack cultural meaning or salience. They can become newly salient, of course, if someone challenges them.

Conversely, constitutional constructions can be canonical but not durable, if, for example, they are canonical because they are controversial, like *Brown* before 1964 or *Roe v. Wade* today, or if they become part of the anti-canon, like *Lochner v. New York*<sup>115</sup> or *Dred Scott*. (Although *Dred Scott* has a prominent place in the anti-canon, it is not currently important to everyday political practice.)

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<sup>112</sup> Social Security Act of 1935, ch. 531, Pub. L. No. 74-271, 49 Stat. 620 (codified in scattered sections of 26 U.S.C. and 42 U.S.C. (2006)).

<sup>113</sup> U.S. Const. art. I, §9, cl. 5.

<sup>114</sup> Pub. L. No. 82-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

<sup>115</sup> 198 U.S. 45 (1905).

Durability does not mean resistance to all alteration. Landmark statutes are often amended, and courts and administrative agencies put many glosses on them. Rather, durability means that people build on a construction, and by building on it, depend on its continuation. Precisely because the construction serves as a building block for future improvements, it may be altered in the process so that it better meshes with the interests, values, and understandings of the existing constitutional regime.

Likewise, canonicity does not require that social meaning remains constant. Quite the contrary: canonical constructions are often protean—they seem to mean new things as they are introduced into new political and legal contexts. For example, the meaning of cases like *Brown*, *Marbury*, *Roe*, or *Lochner* may change greatly over time as a result of political contestation or in the context of successive regimes.<sup>116</sup>

Moreover, a principle associated with a constitutional construction can be durable or canonical, but how the principle would apply to specific applications or facts can change. For example, the principle of *West Coast Hotel v. Parrish* in 1937—deference to legislative judgments in social and economic legislation—is durable. Yet the actual statute upheld in *West Coast Hotel*—a minimum wage law for women but not for men—would no longer be considered ordinary social and economic legislation. It would violate the equal protection clause under the Supreme Court’s 1970s sex equality jurisprudence.<sup>117</sup>

Conversely, certain basic applications of a canonical construction like *Brown* to its original facts might remain constant—*de jure* racial segregation is still

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<sup>116</sup> See Jack M. Balkin, “‘Wrong the Day It Was Decided’: *Lochner* and Constitutional Historicism,” 85 *B.U.L. Rev.* 677 (2005) (noting the changing meanings of *Lochner* in the constitutional canon).

<sup>117</sup> E.g., *Craig v. Boren*, 429 U.S. 190 (1976) (requiring intermediate scrutiny of all sex classifications); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion) (sex classifications are inherently invidious and subject to strict judicial scrutiny); *Reed v. Reed*, 404 U.S. 71 (1971) (statute preferring male over female executors of estates was an arbitrary choice forbidden by the equal protection clause).

illegal—but the construction’s meaning and the principles it stands for can change as people fight over its legacy and invoke it for different purposes. Later generations can also blunt its practical effects in some areas—such as school integration—while expanding it in others, such as limitations on affirmative action plans.<sup>118</sup>

How and why do constitutional constructions become durable or canonical?

There are four basic reasons: **[N.B.: keep same font size for this numbered list]**

1. Constitutional constructions become durable when people stop fighting about them and accept them in practice.<sup>119</sup>
2. Constitutional constructions become durable when they become embedded in practice and people build on them. The New Deal cases—*United States v. Darby*,<sup>120</sup> *Wickard v. Filburn*,<sup>121</sup> and *Steward Machine Company v. Davis*<sup>122</sup>—are durable in this way.
3. Constitutional constructions become canonical when people stop fighting over whether to accept them and start fighting over their meaning and legacy. This is what happened to *Brown* and the 1970s sex equality decisions.
4. Constitutional constructions become canonical when fights over their meaning become important to resolving constitutional disputes in the present. They set the agenda of constitutional reasoning and debate.

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<sup>118</sup> See Balkin and Siegel, “The American Civil Rights Tradition,” supra note 109, at 28–32 (2003); Balkin, “What *Brown* Teaches Us,” supra note 14, at 1563–68; Siegel, “Equality Talk,” supra note 109, at 1547.

<sup>119</sup> See Mark A. Graber, “Settling the West: The Annexation of Texas, the Louisiana Purchase and *Bush v. Gore*,” in *The Louisiana Purchase and American Expansionism* 83, 85 (Sanford Levinson and Bartholomew Sparrow eds., Rowman and Littlefield 2006) (noting that serious constitutional questions regarding the Louisiana Purchase and the annexation of Texas were settled not by courts, but when opponents of these measures conceded defeat in the political arena).

<sup>120</sup> 312 U.S. 100 (1941).

<sup>121</sup> 317 U.S. 111 (1942).

<sup>122</sup> 301 U.S. 548 (1937) (upholding the unemployment compensation provisions of the Social Security Act of 1935).

This is true of *Roe v. Wade* today. It will likely also be true of *Lawrence v. Texas*, which recognized gay rights, and *District of Columbia v. Heller*, which recognized an individual right to bear arms in the home for purposes of self-defense.

Both durability and canonicity are features of constitutional culture: they concern which practices and understandings become normal, expected, essential, compulsory, or simply go without saying; which issues are salient; and which fade into the background of concern. Durable and canonical constructions help shape what kinds of claims are off-the-wall and on-the-wall at a given time and what legal professionals regard as reasonable and unreasonable positions. One can characterize a constitutional culture like our own in terms of what is durable and what is canonical at a particular time in history.

Durable and canonical constructions can be limited, overthrown, repealed, or made irrelevant. But this takes sustained effort over periods of time. This is the connection between durability, canonicity, and the processes of constitutional change I identify with living constitutionalism. The process of living constitutionalism features not only durable and canonical constructions in particular eras, but also the gradual replacement or supplementation of some constructions with new ones over time. Thus, one way of understanding living constitutionalism is as the process by which some durable or canonical constructions become embedded, extended, and supplemented in constitutional culture, while others are slowly limited, expunged, or made practically irrelevant.

*Griswold v. Connecticut*<sup>123</sup> and *Eisenstadt v. Baird*<sup>124</sup> are durable and canonical constructions, in part because of the success of the sexual revolution. Likewise, the Voting Rights Act<sup>125</sup> is durable and canonical: even though parts of

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<sup>123</sup> 381 U.S. 479 (1965).

<sup>124</sup> 405 U.S. 438 (1972).

<sup>125</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §1973 (2006)).

it must be renewed by Congress, it is currently unthinkable that Congress would not renew it. (Similarly, the Supreme Court avoided a recent constitutional challenge to section 5 of the Act by reinterpreting one of its provisions.<sup>126</sup> If the Court ever does strike down the Voting Rights Act, it would mark a significant change in American politics.) Because of changes in social attitudes about homosexuality, and new social practices around which people have organized their lives, *Lawrence* is clearly canonical, as mentioned above, and is probably already durable. Like *Griswold* and *Eisenstadt*, *Lawrence* is an example of how living constitutionalism and the concepts of durability and canonicity are always in dialogue with social norms and mores. People are not actively trying to overturn *Lawrence*; no major political figure in 2011 seeks to reinstate the sort of criminal penalties for homosexual conduct that politicians might have supported in the past. Instead, the debate over gay rights has moved on to issues of same-sex marriage and employment discrimination.

Durable and canonical constitutional constructions like *Griswold* or the Voting Rights Act become part of the “constitutional catechism” that all Supreme Court justices who seek confirmation must accept as valid.<sup>127</sup> The constitutional catechism is important because it suggests that there is a series of decisions, institutions, and statutes that have become so accepted by the public and by political elites that no judicial nominee can be confirmed if he or she would threaten their continuation. Judge Robert Bork failed confirmation in 1987 in part because people could not be sure that he accepted the legitimacy of *Griswold*.<sup>128</sup>

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<sup>126</sup> *NAMUDNO v. Holder*, 129 S. Ct. 2504 (2009).

<sup>127</sup> See Jack M. Balkin, “The Constitutional Catechism,” *Balkinization*, Jan. 11, 2006, [balkin.blogspot.com/2006/01/constitutional-catechism.html](http://balkin.blogspot.com/2006/01/constitutional-catechism.html).

<sup>128</sup> See David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* 671 (MacMillan 1994); Lackland H. Bloom, “Twenty-Fifth Anniversary of *Griswold v. Connecticut* and the Right to Privacy: The Legacy of *Griswold*,” 16 *Ohio N.U.ºL. Rev.* 511, 542–43 (1989); David J. Garrow, “Abortion before and after *Roe v. Wade*: An Historical Perspective,” 62 *Alb. L. Rev.* 833, 843 (1999); Reva B. Siegel, “Constitutional Culture, Social Movement

Canonical and durable constructions shape judicial appointments, a key element of the process of living constitutionalism; their effects on judicial appointments, in turn, reinforce their canonical and durable character.

Canonical constructions that are not durable can affect judicial appointments in a different way: social and political movements press to reshape them or even overturn them. *Roe v. Wade* is clearly canonical, because it creates problems that people feel they must discuss and resolve. But it is not yet durable, because people have not given up fighting about whether to overrule it. Every Supreme Court appointment since the 1980s has occurred in the shadow of the struggle over this most canonical of contemporary constructions.

Living constitutionalism is a system of constitutional development that produces new constitutional constructions. This system of constitutional development did not emerge all at once; rather, it evolved through the interaction of the basic framework created by the Constitution and its amendments with constitutional constructions that were added at various points in time. The system of living constitutionalism not only produces new doctrines and institutions; it also creates its own set of secondary rules—that is, ways for building new constitutional constructions. Bruce Ackerman has pointed out, for example, that our methods of constitutional development have become increasingly nationalist over time.<sup>129</sup> Constitutional amendment under Article V requires the concurrence of three-quarters of state legislatures, almost all of which are bicameral, thus creating many different ways to defeat amendments. In the twentieth century, America has increasingly shifted toward nationalist forms of constitutional construction as the central method of constitutional development: judicial

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Conflict and Constitutional Change: The Case of the De Facto ERA,” 94 *Cal. L. Rev.* 1323, 1409 (2006).

<sup>129</sup> Ackerman, 2 *We the People: Transformations*, supra note 99, at 16–23; Ackerman, “The Living Constitution,” supra note 9, at 1754, 1761, 1775.

decisions by federal courts, federal framework statutes, and the creation of new federal institutions.

These emerging forms of constitutional construction developed together in response to each other. For example, the development of federal judicial doctrine greatly accelerated after the Civil War—and especially during the twentieth century—because of five key features. The first was the ratification of the Fourteenth Amendment, which required that state and local governments adhere to basic rights guarantees. The Fourteenth Amendment made it easier for the federal courts to supervise local and regional majorities and keep them in line with the values of the national political coalition. During the late nineteenth century, the federal courts promoted economic nationalism; during the middle of the twentieth century, they promoted federal civil rights.

A second and related phenomenon was the Republican Party's decision to expand the jurisdiction of the federal courts after the Civil War. This increased the number of times that federal courts would pass on constitutional issues and thus, in the long run, increased the chances for doctrinal development, elaboration, and proliferation.<sup>130</sup>

A third feature was the development during the twentieth century of new institutions of civil society that promoted constitutional litigation as a method of social change and the appointment of judges as a key goal of electoral politics. These civil society institutions, as Steven Teles has described, created new forms of ideological and partisan competition outside the electoral system that helped change constitutional culture and professional reasoning.<sup>131</sup>

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<sup>130</sup> See Howard Gillman, "How Political Parties Can Use the Courts to Advance Their Agendas," *supra* note 37, at 515–17 (showing how late nineteenth-century Republicans expanded federal court jurisdiction to promote their policy goals and entrench their party); cf. Ran Hirschl, *Towards Juristocracy*, *supra* note 37, at 39 (noting how politicians in many different countries profit "from an expansion of judicial power").

<sup>131</sup> See Steven Teles, *The Rise of the Conservative Legal Movement*, *supra* note 40, at 6–21, 265–74.

A fourth key element was the rise of the administrative and welfare state during the twentieth century. This greatly increased the amount of legislation as well as the number of administrative regulations. Statutes and administrative decisions are the building blocks of new constitutional constructions by the political branches. Rising amounts of legislation and regulation, in turn, increased the number of possible occasions for litigants to raise constitutional and administrative challenges and the number of opportunities for federal courts to develop and proliferate doctrine.

Finally, the rise of an administrative and welfare state also meant that Congress and the president increasingly created new agencies, institutions, and practices that changed the structures of government on the ground. New landmark and framework statutes created an elaborate legal and institutional infrastructure that shaped the Constitution-in-practice. Following their customary role, courts were called on to rationalize, legitimate, and regulate this burgeoning regime, not only leading to increased work for themselves but also increasing their responsibility and their power. The New Deal, for example, created a large federal bureaucracy, new social programs, and new institutional structures. Courts justified and legitimated these changes in governance, but in the process began to subject them to procedural and constitutional norms, thus proliferating judicial precedents and constitutional constructions.

Continuous interaction, cooperation, and contest between the judiciary and the political branches have created ever-new opportunities for new constitutional constructions outside the amendment process. Thus, although the twentieth century has featured no less than twelve Article V amendments, focusing only on these amendments does not offer an accurate portrait of the key changes in American constitutionalism of the past hundred years. For example, these amendments say little about the growth of the administrative and welfare state, the expansion of presidential power, the creation of a national security state, or

the civil rights revolution.<sup>132</sup> Constitutional construction has become the dominant form of constitutional development today, because previous constructions during the twentieth century have made available so many new methods of constitutional change that can be more efficient, narrowly tailored, and agile than Article V amendment.

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<sup>132</sup> See Bruce Ackerman, “The Living Constitution,” *supra* note 9, at 1738–44 (2007) (“We have lost our ability to write down our new constitutional commitments in the old-fashioned way”).

## Change and Legitimacy

In Chapter 13 I explained that the processes of constitutional change are primarily the work of constitutional construction, involving both the political branches and the courts. What we call a “living Constitution” is really the product of constitutional construction and changes in constitutional construction over time. It is a “democratic constitutionalism,” to use Post and Siegel’s expression, because constitutional doctrine is responsive, over time, to a wide variety of political and cultural forces. Constitutional change occurs (1) because of changes in constitutional culture—what ordinary citizens and legal and political elites believe the Constitution means and who they believe has authority to make claims on the Constitution; (2) because of changes in political institutions and statecraft, which federal courts eventually rationalize and legitimate; and (3) because of changes in judicial personnel (and hence their views of the Constitution). The latter changes, in turn, are caused by the judicial appointments process, which is controlled by elected officials—particularly the president and the Senate—who in turn respond to existing political pressures and incentives.

One might make two objections to this account of the processes of living constitutionalism. The first is that it is insufficiently legal—that it gives too much power to cultural and political influences, the national political process, political mobilization, and partisan entrenchment, rather than reasoned development of doctrine by courts. The second is that the account is insufficiently political. If the Supreme Court responds to changes in public opinion and political configurations, why not eliminate the middleman and dispense with judicial review entirely? These two objections push in opposite directions, and I consider each of them in turn.

Courts Are Bad at Tackling, Good at Piling On<sup>1</sup>

One might argue that courts should be, in Ronald Dworkin's words, "the forum of principle."<sup>2</sup> They should take the lead on questions of rights, justice, and constitutional structure, rather than letting constitutional development be guided or pushed by social movements and political mobilizations. But this is a false dichotomy. The locus of constitutional change occurs simultaneously in the courts, in the political branches, and in the public sphere. History teaches us that courts normally do not engage in significant changes in constitutional doctrine without lengthy prodding from a sustained campaign by political parties, social movements, and interest groups.<sup>3</sup> Such campaigns generally employ not only litigation but also political mobilization and cultural and social persuasion. The long march of progressivism that led to the New Deal revolution, and the even longer march that led to the civil rights revolution, are two obvious examples, but the same could be said of almost every important transformation in constitutional doctrine in the country's history. If one admires these achievements of living constitutionalism, one must pay proper respects to the social and political mobilizations that preceded them.

*Brown v. Board of Education* did not arise full-blown from the head of Earl Warren; it was the result of a decades-long campaign, well documented by historians, in which the Supreme Court made only sporadic and not always helpful appearances.<sup>4</sup> As noted in Chapter 13, World War II and the Truman administration's support for civil rights were crucial factors, and President

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<sup>1</sup> Jack M. Balkin, "What *Brown* Teaches Us about Constitutional Theory," 90 *Va. L. Rev.* 1537, 1546 (2004).

<sup>2</sup> Ronald Dworkin, *The Forum of Principle*, 56 *N.Y.U.°L. Rev.* 469 (1981).

<sup>3</sup> For general discussions of this point, see Balkin, "What *Brown* Teaches Us," supra note 1; Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford University Press 2004).

<sup>4</sup> The story is told in Klarman, *From Jim Crow to Civil Rights*, supra note 3.

Truman asked the Court to overrule *Plessy v. Ferguson*<sup>5</sup> four years before it actually got around to doing so.<sup>6</sup> State courts and state legislatures, especially in the North, were also particularly important in the lengthy process of changing American constitutional culture in the years before *Brown*.<sup>7</sup> Constitutional innovations in state and local law usually precede the U.S. Supreme Court's entrance into a new area.

One might worry that social movements, political parties, and interest group advocates will shape constitutional culture poorly without the careful and regular guidance of wiser courts. But whether one likes it or not, courts generally do not pay much attention to constitutional claims until social and political mobilizations get behind them; this is true of claims that are now the foundation of many of today's constitutional doctrines. The work of social and political mobilizations in making claims, taking positions, and trying to persuade others that their views are correct is crucial to constitutional development. That is because courts generally will not engage in constitutional innovation until political success changes the composition of the judiciary or alters the political and constitutional culture in which courts make their decisions.

Courts usually do not get involved in developing new constitutional doctrines—whether about gun rights or gay rights—until political forces are strong enough to make them sit up and take notice. The famous *Carolene Products*<sup>8</sup> case argued that the proper role of courts is to look out for the interests of “discrete and insular minorities.” But the irony of *Carolene Products* is that no group gets recognized as “discrete and insular,” and therefore deserving of

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<sup>5</sup> 163 U.S. 537 (1896).

<sup>6</sup> See Klarman, *From Jim Crow to Civil Rights*, supra note 3, at 210.

<sup>7</sup> See, e.g., *Perez v. Lippold*, 198 P. 2d 17 (Cal. 1948) (holding that an antimiscegenation law violated the federal equal protection clause).

<sup>8</sup> *United States v. Carolene Prods. Corp.*, 304 U.S. 144, 152 n. 4 (1938).

judicial protection, until it has gained the attention of political majorities.<sup>9</sup> Until it gains some political clout, a minority group is usually simply ignored. Blacks got increasing attention from the courts after black migration to the North and to urban areas made them swing voters who could influence elections,<sup>10</sup> and after Jim Crow became an embarrassment to the American foreign policy establishment during the Cold War.<sup>11</sup> Blacks made progress in the courts, in other words, because they made political progress through a halting and agonizingly slow process. (Of course, the one place blacks made little or no progress was in the South, and the civil rights revolution essentially imposed a national majority's views about race on the entire country, displacing those of a regional majority in the South.)

The Court's sex discrimination decisions of the 1970s followed an enormous groundswell of support for sex equality in popular culture and social movement mobilization (not to mention passage of the ERA by overwhelming margins in both houses of Congress in 1972).<sup>12</sup> From 1921 in *Adkins v. Children's Hospital*<sup>13</sup> until the 1970s, the U.S. Supreme Court pretty much stayed out of the gender equality business (there are two cases, *Goesaert v. Cleary*<sup>14</sup> in 1948 and *Hoyt v. Florida*<sup>15</sup> in 1961, both treating sex equality claims dismissively).

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<sup>9</sup> See Balkin, "What *Brown* Teaches Us," supra note 1, at 1551–58; Klarman, *From Jim Crow to Civil Rights*, supra note 3, at 450.

<sup>10</sup> Klarman, *From Jim Crow to Civil Rights*, supra note 3, at 100–103.

<sup>11</sup> Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* 80–81 (Princeton University Press 2000).

<sup>12</sup> Congress sent the ERA to the states in 1972 by a vote of 354–24 in the House and a vote of 84–8 in the Senate. 117 *Cong. Rec.* 35815 (1971) (House); 118 *Cong. Rec.* 9598 (1972) (Senate).

<sup>13</sup> 261 U.S. 525, 553 (1923) (striking down a minimum wage law for women under the due process clause, while noting "the great—not to say revolutionary—changes which have taken place .°. in the contractual, political and civil status of women, culminating in the Nineteenth Amendment").

<sup>14</sup> 335 U.S. 464 (1948) (upholding prohibition on female bartenders).

<sup>15</sup> 368 U.S. 57 (1961) (upholding the automatic exclusion of women from juries).

Finally, the Supreme Court's 2008 decision in *District of Columbia v. Heller*,<sup>16</sup> although written in the language of originalism, is actually a classic example of the processes of living constitutionalism in operation. Doctrinal recognition of an individual right to own guns for self-defense arose only after both political culture and political elites supported the right. For many years the conventional wisdom following the passage of the 1934 National Firearms Act<sup>17</sup> during the New Deal was that the Second Amendment did not guarantee an individual right to use guns for self-defense. In 1991, for example, retired chief justice Warren Burger, a conservative establishment Republican, insisted that the individual rights view of the Second Amendment was “one of the greatest pieces of fraud—I repeat the word ‘fraud’—on the American public by special interest groups that I have ever seen in my lifetime.”<sup>18</sup> Burger cast particular scorn on the efforts of the National Rifle Association (NRA) and other groups—which he pejoratively labeled “special interest groups”—to convince Americans otherwise.<sup>19</sup>

The modern movement for gun rights arose in reaction to increased political mobilization for stricter gun control laws, particularly after passage of the 1968 Crime Control and Safe Streets Act,<sup>20</sup> which Congress enacted following the assassinations of Martin Luther King Jr. and Robert F. Kennedy.<sup>21</sup> Beginning in the 1970s the NRA, which had previously acquiesced in some gun control legislation and formed alliances with hunters and conservation groups, changed its leadership. It began aggressive national lobbying efforts to oppose gun control

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<sup>16</sup> 554 U.S. 570 (2008).

<sup>17</sup> 48 Stat. 1236 (1934) (codified at 26 U.S.C. §§ 5801–22 (2006)).

<sup>18</sup> “MacNeil/Lehrer NewsHour: Interview by Charlayne Hunter-Gault with Warren Burger” (PBS television broadcast, Dec. 16, 1991) (Monday transcript #4226), available in LEXIS, News Library, NewsHour with Jim Lehrer File.

<sup>19</sup> *Id.*

<sup>20</sup> The Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351 (codified at 42 U.S.C. §3711 (2006)).

<sup>21</sup> The paragraphs that follow draw on the excellent discussion in Reva B. Siegel, “Dead or Alive: Originalism as Popular Constitutionalism in *Heller*,” 122 *Harv. L. Rev.* 191 (2008).

legislation. It negotiated the tension between gun rights and conservative demands for “law and order” by distinguishing between law-abiding citizens who had rights to guns for self-defense and criminals who had no rights.<sup>22</sup>

The NRA’s new position on gun rights quickly gained influence within the Republican Party, as New Right leaders like Richard Viguerie recognized that gun rights could play a key role in the emerging culture wars over abortion, women’s rights, homosexuality, affirmative action, and pornography.<sup>23</sup> Movement conservatives who had previously used originalism to attack liberal judicial decisions now turned to originalism to defend Second Amendment rights.<sup>24</sup> As conservatives gained increasing political influence during the last decades of the twentieth century, the NRA’s constitutional position gained increasing public support and convinced members of a newer generation of conservative legal elites. In 1994 the Republicans took control of both houses of Congress by making their opposition to recent gun control laws passed by a Democratic-controlled Congress a key campaign issue.<sup>25</sup>

In her study of the contemporary constitutional movement for gun rights, Reva Siegel has pointed out that during the 1980s the NRA emphasized a republican or insurrectionist theory of the Second Amendment—that protected the right of citizens to resist a tyrannical government—and had flirted with the radical militia movement.<sup>26</sup> Following the Oklahoma City terrorist bombings in 1995, however, the militia movement came under strong public criticism.<sup>27</sup> The NRA quickly distanced itself from the militia movement; it promoted gun rights as an element of the culture wars and increasingly emphasized that law-abiding citizens

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<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> See, e.g., Staff of Subcomm. on the Constitution of the S. Comm. on the Judiciary, 97th Cong., *The Right to Keep and Bear Arms* (Comm. Print 1982).

<sup>25</sup> See Nicholas J. Johnson, “A Second Amendment Moment: The Constitutional Politics of Gun Control,” 71 *Brook. L. Rev.* 715, 779–83 (2005).

<sup>26</sup> Siegel, “Dead or Alive,” *supra* note 21, at 228–29.

<sup>27</sup> Id. at 230–31.

had the right to have weapons for self-defense in the home to protect themselves against criminals.<sup>28</sup> This also became the view of the conservative movement in the Republican Party. In May 2002 Attorney General John Ashcroft announced the Bush Justice Department's official position that the Second Amendment protected an individual right to use arms in self-defense.<sup>29</sup>

Justice Scalia's majority opinion in *Heller* largely followed the emerging public vision of gun rights, the NRA's shift away from the insurrectionist theory, and the NRA's emphasis on the distinction between law-abiding citizens and criminals.<sup>30</sup> Thus, his opinion effectively elevated the self-defense theory over the insurrectionist theory of the Second Amendment, although the latter theory has far more historical support in the period leading up to ratification.<sup>31</sup> The evidence for a constitutional right of self-defense becomes stronger during the nineteenth century.<sup>32</sup> In fact, as Chapter 10 explained, perhaps the strongest originalist argument comes not from the original understanding of the Second Amendment

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<sup>28</sup> *Id.* at 231–32.

<sup>29</sup> See, e.g., Linda Greenhouse, "U.S., in a Shift, Tells Justices Citizens Have a Right to Guns," *N.Y. Times*, May 8, 2002, at A1. Meanwhile an outpouring of new legal and historical scholarship began debating the individual rights interpretation in the 1990s and 2000s, and the third edition of Professor Laurence Tribe's treatise, *American Constitutional Law*, published in 2000, argued—in contrast to the two previous editions—that the Second Amendment protected an individual right. Laurence H. Tribe, *American Constitutional Law* §5–11, at 901–2 n. 221 (3d ed., Foundation Press 2000).

<sup>30</sup> *District of Columbia v. Heller*, 554 U.S. 570, 625, 635 (2008) (restricting the right to "law-abiding" citizens).

<sup>31</sup> See, e.g., Mark Tushnet, *Out of Range: Why the Constitution Can't End the Battle over Guns* 25–26 (Oxford University Press 2007) (noting that evidence at the founding for a "pure" individual right of self-defense unconnected to citizen militias is equivocal but evidence of some form of republican or citizen-militia theory is far stronger); Akhil Reed Amar, "*Heller*, *HLR*, and Holistic Legal Reasoning," 122 *Harv. L. Rev.* 145 (2008) (noting evidence for republican or citizen-militia theory at the founding and only indirect evidence for incorporation of common law right of self-defense).

<sup>32</sup> See *Heller*, 554 U.S. at 605–619 (describing nineteenth-century evidence); David B. Kopel, "The Second Amendment in the Nineteenth Century," 1998 *BYU L. Rev.* 1359. Both Kopel and Justice Scalia, it should be noted, believe that this evidence helps prove the case for the founding as well.

but from its subsequent incorporation in the privileges or immunities clause of the Fourteenth Amendment.<sup>33</sup>

Scalia's majority opinion in *Heller* emphasized the right of law-abiding citizens to keep guns in their homes and strongly suggested that felons will have no Second Amendment rights.<sup>34</sup> In fact, near the end of his opinion he acknowledged that modern developments in weaponry may have made the Second Amendment's original purpose of allowing citizen militias to overthrow a tyrannical government completely irrelevant.<sup>35</sup> Nevertheless, he insisted that the Second Amendment remains necessary to protect the right of self-defense in the home.<sup>36</sup> This conclusion perfectly reflects the transformation of the NRA's arguments following the Oklahoma City terrorist attack.

In this respect the result in *Heller* was not entirely surprising. As in *Brown v. Board of Education*, the 1970s sex equality cases, and *Lawrence v. Texas*, the Supreme Court has kept its interpretation of the Constitution in line with changing public values. Another name for this phenomenon is living constitutionalism.

There is no plausible account of living constitutionalism that does not involve the federal court system responding to popular culture, social movement mobilization, and electoral politics. Popular constitutionalism and partisan entrenchment drive doctrinal development. Doctrinal development, in turn, shapes the direction of social movements and political activism. It does this sometimes

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<sup>33</sup> See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 52, 145–62, 257–68 (Yale University Press 1998) (noting an increasingly individualist interpretation of the Second Amendment in the years leading up to Reconstruction); Amar, “*Heller*, *HLR*, and Holistic Legal Reasoning,” supra note 31 (arguing for constitutional right to self-defense under the Fourteenth Amendment's privileges or immunities clause).

<sup>34</sup> *Heller*, 554 U.S. at 626 (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.”)

<sup>35</sup> *Id.* at 627–28. (“It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.”)

<sup>36</sup> *Id.*

by changing facts on the ground, sometimes by shaping popular consciousness, sometimes by opening up new channels and opportunities for constitutional claims, and sometimes by spawning backlash and countermobilizations that attempt to discipline the courts and change their direction. Constitutional politics influences constitutional courts; and in turn constitutional courts influence constitutional politics—both by what courts do and by what they refrain from doing.

Not all of the action occurs in the political arena. Courts have plenty to do in shaping constitutional culture. They have to hear cases and decide them, creating new doctrinal distinctions that become the basis for later litigation and contestation. Through their opinions, courts influence public opinion, but not always as they intend. They may provoke reaction as much as they educate or enlighten. By declaring what is legal and illegal, which claims are plausible and which are off-the-wall, court decisions reshape the terrain of politics and political meanings; they create new opportunities for political entrepreneurs, both those who support judicial decisions and those who oppose them.

Above all, courts translate constitutional politics into constitutional law. They really cannot help themselves, or more correctly, the work of a collection of justices on a multimember court like the U.S. Supreme Court cannot help but produce this effect. The justices do this not because they are more intelligent, more noble, more farsighted, more principled, or more sober than the rest of us. Rather, they translate constitutional politics into constitutional law because of how they get their jobs and because they inhabit professional roles in which they must continually hear claims and articulate their answers in terms of the forms, practices, and arguments of professional legal culture.

### Eliminate the Middleman?

The democratic legitimacy of living constitutionalism rests on the fact that, in the long run, it is democratically responsive. In this way the process of constitutional

construction, mediated through the three branches of the federal government and the states, respects popular sovereignty. Nevertheless, this raises a second objection: If constitutional change responds to political mobilizations, social movement activism, interest group advocacy, new forms of governance, presidential appointments strategies, and shifts in popular opinion, what is the purpose of having constitutional courts in the first place? Why not just get courts out of the business of holding anything unconstitutional and exercise judicial restraint in almost every case?<sup>37</sup> If the system of living constitutionalism gains its legitimacy from its democratic responsiveness, why not eliminate the middleman? Why not leave all constitutional development to the majoritarian political process?

To answer this question, consider some key features of the system of living constitutionalism. First, its effects tend to be conservative (in a prudential rather than ideological sense) because justices tend to reflect the views of political coalitions that put them in office when they were appointed. On a multimember court, that means that its members represent a variety of different positions, strewn across time. Partisan entrenchment in the judiciary tends to prevent quick and drastic changes in governance, because it requires that political majorities win for sustained periods of time before they can change the legal culture and appoint new judges who will go along with their innovations.

Second, these features add an additional supermajoritarian requirement to already supermajoritarian features of American democracy. They create an additional veto point in the system: laws must pass not only Congress and the president (or the state legislature and the governor) but also the scrutiny of a court whose members were appointed by people at different times with very different political views.

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<sup>37</sup> For an argument along these lines, see Richard A. Posner, “The Supreme Court, 2004 Term—Foreword: A Political Court,” 119 *Harv. L. Rev.* 31 (2005).

Due to these conserving and supermajoritarian features, living constitutionalism creates a bias toward preserving the constitutional values of the political status quo. If the vector sum of political forces changes swiftly on a constitutional issue, the courts will tend to hold back and resist the views of the day until the change in constitutional culture proves lasting, in part because it will take time for new judges to replace older ones.

These features of living constitutionalism share something in common. They are basic features of constitutionalism generally. Constitutionalism channels and disciplines present-day majorities through supermajoritarian rules that they cannot easily change overnight (but can change eventually); this prevents drastic changes in governance and keeps temporary majorities from altering or subverting the constitutional values of more temporally extended supermajorities. The system of living constitutionalism—like all constitutionalism—channels and disciplines ordinary politics by restraining simple majoritarianism.<sup>38</sup>

Living constitutionalism sits squarely between two extremes: It incorporates significant aspects of democratic politics in producing constitutional constructions over time, yet it also maintains the benefits of supermajoritarian constitutionalism. First, it requires fidelity to the hardwired features of the Constitution absent an Article V amendment. Second, it requires political victories sustained over a long period of time to change existing understandings of the Constitution's text and structure that have been filled out through past constitutional construction.

Living constitutionalism allows social and political mobilizations gradually to shift the interpretation and application of abstract clauses and open-ended

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<sup>38</sup> One additional feature concerns federalism. To the extent that the federal courts tend to impose the values of national politicians and the dominant national political coalition on regional majorities, the federal courts and the Supreme Court in particular are not so much countermajoritarian as they are nationalist. See Balkin, "What *Brown* Teaches Us," supra note 1, at 1538–46. However, the values of a national political majority, as James Madison argued, may often be more moderate and better protect the rights of minorities than those of a smaller, more homogeneous political community. *The Federalist* No. 10 (James Madison).

features of the Constitution. It allows new constructions to make sense of vagueness and ambiguity in the text, and it allows for building new institutions to carry out constitutional functions. But for the most part, living constitutionalism has not altered the hardwired features of the constitutional text. (To the extent that this has happened, it is really quite exceptional, and, I think, quite wrong.)<sup>39</sup> This approach is consistent with what I have called framework originalism: It is faithful to the Constitution's original meaning but not necessarily the original expected application of the text. Long-term changes in constitutional culture can move us from *Plessy v. Ferguson* to *Brown v. Board of Education*, but they won't allow a thirty-four-year-old president, or three houses of Congress, or a simple majority of one house to overturn a presidential veto. While Article V amendment is necessary for changing these hardwired features of the Constitution, the interpretation, implementation, and application of vague and abstract terms like "equal protection" can and do change through sustained political mobilization.

Under this model of living constitutionalism, successive generations may not reject the Constitution's text and principles, but they may decide how best to honor, implement, and apply them through constitutional constructions and doctrinal implementations. We can reject *Plessy v. Ferguson*, which is simply one

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<sup>39</sup> For example, the Supreme Court's Eleventh Amendment jurisprudence beginning with *Hans v. Louisiana*, 134 US 1 (1890), seems to be inconsistent with the constitutional text: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state." U.S. Const. amend. XI. See *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms"). Current doctrine reads "citizens of another State" to include citizens of the same state, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996), and also allows suits in equity through the fiction of suits against the state's attorney general, *Ex parte Young*, 209 U.S. 123 (1908). Perhaps the best defense of some kind of state immunity is a structural argument for protection of state sovereignty under the Tenth Amendment, see *Alden v. Maine*, 527 U.S. 706, 713–15 (1999), but it is not at all clear why structural considerations should produce the doctrine we currently have.

generation's attempt at implementing the Constitution, but not the words of the equal protection clause.

This model produces a system of judicial interpretation that is responsive to democratic politics in the long run but not directly controlled by it in the short run. It preserves constitutional law's relative autonomy from everyday politics while making it ultimately responsive to constitutional politics.

The system of living constitutionalism thus maintains the benefits of constitutionalism while allowing adjustments in interpretation over time in the face of sustained democratic mobilization. It features a system of judicial review but not a system of judicial supremacy. This distinction is crucial: Courts act as a stabilizing force, and hold officials—and especially executive officials—accountable to law, but they never have the last word. The purpose of judicial review in this model is to represent and protect, in as legally principled a way as possible, the constitutional values of temporally extended majorities, and to prevent drastic changes in those constitutional values unless there has been extended and sustained support for change that is reflected in long-term changes in constitutional culture.

Judges do not have to do anything special or out of the ordinary to participate in the processes of living constitutionalism. They do not have to be politicians or moral theorists or divinities like Ronald Dworkin's Hercules.<sup>40</sup> They do not have to be Platonic guardians<sup>41</sup> or philosopher kings. They don't have to be smarter, wiser, more moral, or more farsighted than anyone else. All they have to do, once they get appointed, is to try to decide the cases according to law, in the best way they can. If they just go about doing their jobs, they will, in spite of themselves, participate in the gradual translation of constitutional politics into constitutional

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<sup>40</sup> See Ronald Dworkin, *Law's Empire* 239–40 (Harvard University Press 1986); Ronald Dworkin, *Taking Rights Seriously* 105–30 (Harvard University Press 1977).

<sup>41</sup> Learned Hand, *The Bill of Rights* 73 (Harvard University Press 1958) (“For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not”).

law. Meanwhile the job of members of the political community is to criticize how judges interpret the law and to try to persuade judges and other citizens that their interpretations of the Constitution are the best ones.

### Individuals and Systems

This account of living constitutionalism is neither merely descriptive nor purely external. To the contrary, it is normative and takes an internal perspective on the constitutional system, treating its norms as legally binding. It focuses on the entire system of constitutional development, of which courts are only one part, and considers that system's role in promoting democratic legitimacy.

In evaluating a constitutional and political system, we can focus our normative judgments on what individuals in a system should do within the system or on how the system operates as a whole. Sometimes we should focus on improving individual behavior, but sometimes the system is the proper focus. Suppose, for example, that we want to solve a problem of social coordination by designing an efficient market. We ask how its design and incentives produce certain types of results, and if they do not, we redesign the market and reshape the incentives. We do not spend very much time giving advice to people in the market about how to behave so as to produce efficiency; rather, we assume that efficiency arises from the sum of their interactions and not from each of them following our advice about how to behave. In fact, it may be a mistake to focus primarily on advising individual people about how to behave in the market, although educating people about costs and benefits might be a good idea; so too might be educational campaigns to shape people's values and preferences.

Another example of a focus on systems is our Constitution's separation of powers. The Constitution tries to preserve republican government by balancing contrasting interests, under the assumption, as Madison put it, that enlightened statesmen (that is, the sort who would respond to good advice) will not always be

at the helm.<sup>42</sup> My account is of the same sort: it asks whether and how the structural features of the system of constitutional change—many of which developed over time—promote or detract from democratic legitimacy and popular sovereignty. It asks whether the system works, regardless of whether judges, lawyers, or political actors are wise or foolish, noble or base.

### Advice to Judges or Theory of Legitimacy?

To be sure, most people have assumed that a theory of living constitutionalism must be a theory that tells judges, “Here’s how to decide cases that come before you. Do this and don’t do that.” Why do people think this? Possibly it is because they think that originalism is just such a theory, and so they assume that living constitutionalism must be of the same kind, its mirror image. They are wrong about living constitutionalism. They are also wrong about originalism.

Originalism offers directives to judges about how to decide cases because it is a theory of what makes the constitutional system—and the institution of judicial review—legitimate. It argues that fidelity to the Constitution is necessary for democratic legitimacy. There are several different theories for why that is so, but perhaps the most familiar version is that the Constitution was created through an act of popular sovereignty and therefore we must preserve the meaning of the Constitution over time in order to respect the rule of law and preserve the democratic legitimacy of the initial act of lawmaking. If judges must adhere to original meaning, they will do their part to maintain the system’s legitimacy.<sup>43</sup>

Skyscraper originalism closely connects what makes the constitutional system legitimate with instructions to individual judges about how to decide particular cases. But living constitutionalism may not work in the same way.

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<sup>42</sup> *The Federalist* No. 10 (James Madison).

<sup>43</sup> See, e.g., Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 111 (University Press of Kansas 1999) (arguing from popular sovereignty and noting that “[t]raditional defenses of originalism often employ some version of a popular sovereignty argument”).

Indeed, precisely because it is compatible with (and supplements) framework originalism, living constitutionalism may not offer much additional advice to the judiciary beyond what framework originalism requires.

It certainly does not offer contradictory advice: judges in a system of living constitutionalism should, at a minimum, respect the original meaning of the Constitution and try to apply its underlying principles to present-day conditions. Nevertheless, the focus of living constitutionalism lies elsewhere. It concerns how the system as a whole works over long periods of time—why the cumulative processes that produce changing interpretations of the Constitution promote democratic legitimacy.

I emphasize how the constitutional system actually changes because we cannot expect actors to do what is not possible for them to do. A causal and structural account of the constitutional system is a necessary precursor to any normative account of constitutional legitimacy.<sup>44</sup> Sadly, much normative constitutional theory seems to ignore this crucial question. It assumes that if we just give judges the correct advice, and they follow this advice, the system as a whole will produce legitimate results. Conversely, any problems of legitimacy come from judges not following the theorists' advice. This approach does not always stop to ask whether individual judges on a multimember court could or would actually take the advice being offered, or, if they took it, whether the constitutional system as a whole would respond in the right way.

The work of a multimember court will not correspond to any coherent theory of advice directed at one individual. The cases will go all over the place: they will not correspond to any consistent methodology. To be sure, they may be consistent

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<sup>44</sup> For arguments emphasizing the importance of positive constitutional theory to understanding the legitimacy of judicial review, see Balkin, "What *Brown* Teaches Us," supra note 1, at 1537, 1574–77; Barry Friedman, "The Importance of Being Positive: The Nature and Function of Judicial Review," 72 *U. Cin. L. Rev.* 1257, 1257–58, 1270–83, 1290 (2004); Mark A. Graber, "Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship," 27 *Law & Soc. Inquiry* 309, 312, 317–29 (2002).

with the relatively modest requirements of framework originalism. But that version of originalism does not dictate the results of constitutional construction, and for a very large number of disputed cases, construction is the name of the game.

This does not mean that normative criticisms of judges and their decisions are useless or irrelevant to constitutional legitimacy. Quite the contrary: criticizing courts and pushing for different constitutional constructions is crucial to the legitimacy of the system. My point, rather, is that normative arguments about good judging and correct constitutional construction are not external to the system of constitutional change. They are part of the process through which change occurs, and they help secure its democratic responsiveness. In a constitutional democracy like our own, citizens, judges, lawyers, and government officials continually make constitutional claims, continually contend for their preferred vision of the Constitution, and continually argue about how judges should behave. The clash of opposed views about what the Constitution means, and the clash of opposed positions about the authority of different actors in the system, drives the system forward.

When people argue with each other and try to persuade each other, they are helping to shape the constitutional culture in which citizens live and in which judges hear and decide cases. When people make arguments about judges' authority to interpret the Constitution, they are trying to influence their fellow citizens as well as judges. They are shaping the boundaries of the reasonable, the notion of what sorts of claims are off-the-wall and on-the-wall in the constitutional culture in which they live. Similarly, when political officials make legal arguments in public life, or when lawyers argue before courts, they are trying to persuade judges to rule their way, thus reshaping professional judgments and the constitutional culture of legal professionals. Indeed, we can define a constitutional culture to a significant extent by what claims ordinary citizens and professionals regard as reasonable and unreasonable, off-the-wall and on-the-wall.

Citizens and professionals may differ in these judgments from time to time, but this is also an important aspect of constitutional culture, because it means that popular opinion and popular mobilizations may, over time, alter professional judgments.

Thus, in my account of living constitutionalism, normative argument about the Constitution is hardly futile. It is a central element of what makes a living Constitution live. Arguments about what the Constitution means and who has the authority to say what it means are important because they can persuade the actors in the system to think differently. They influence public opinion, the work of litigators and social movements, and the positions of politicians and political parties. These forms of influence—together with regular elections—produce new judicial appointments and can shape the views of judges who are already on the bench. Normative arguments about what the Constitution means occur in mobilization, political disputes, electoral politics, debates about judicial selection, and litigation campaigns. They are the stuff of constitutional culture and the drivers of constitutional change.

### The Translation of Constitutional Politics into Constitutional Law: On Horizontal and Vertical Translation

In our constitutional system, lawyers and judges translate constitutional politics into constitutional law through their everyday professional tasks of litigating and deciding cases. This concept of translation is somewhat different from Lawrence Lessig's famous comparison between originalist judging and translating.<sup>45</sup> Lessig argued that the right way for judges to be originalists was to analogize interpretation to the translation of an ancient text in a foreign language. Given changed circumstances, we should try to enter into the world of the past and

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<sup>45</sup> Lawrence Lessig, "Fidelity in Translation," 71 *Tex. L. Rev.* 1165 (1996).

translate the expectations of the framers into our present-day concerns.<sup>46</sup> Because I don't think we are bound by original expected applications, I don't accept Lessig's thesis on precisely the terms he offered it. Nevertheless, I think the metaphor of translation is powerful and evocative.

Lessig's model of translation was *vertical*, moving from past to present: we translate the thick set of beliefs and expectations surrounding an ancient text into today's meanings and applications. My account of translation is *horizontal*: judges respond to the political and constitutional culture of their day and recognize it in their work, whether consciously or unconsciously. In Lessig's model, translation was something that judges *should do*; in my model, it is something that judges *actually do*, whether they intend to or not. Judges engage in horizontal translation because of the way they are selected and the way that democratic politics shapes professional legal culture, legal argument, and legal decisionmaking. An originalist like Justice Scalia may insist that he is only following the commands of long-dead framers, but, willy-nilly, he is channeling the values of the contemporary conservative movement. He has done so overtly in his many dissents, making direct appeals to the public and decrying the values of liberal elites, who, he believes, are out of touch with the contemporary sensibilities of ordinary Americans.<sup>47</sup>

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<sup>46</sup> Id. at 1184–85; see also Lawrence Lessig, “Fidelity in Translation: Fidelity and Constraint,” 65 *Fordham L. Rev.* 1365, 1376 (1997) (“Our aim has, for the most part, been to extract normative significance from an ancient constitutional text and preserve that significance as much as possible”); Goodwin Liu, Pamela S. Karlan, and Christopher H. Schroeder, *Keeping Faith With the Constitution* (Oxford University Press 2010)(offering an interpretive theory that draws on Lessig's model of translation and the method of text and principle).

<sup>47</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 602, 604–5 (2003) (Scalia, J., dissenting) (arguing that the Court, dominated by elite culture, “has largely signed on to the so-called homosexual agenda” and “that the Court has taken sides in the culture war”); see also Robert C. Post and Reva B. Siegel, “Originalism as a Political Practice: The Right's Living Constitution,” 75 *Fordham L. Rev.* 545, 566–68 (2006) (noting that Scalia in particular has “mobilized conservative constituencies to bring political pressure to bear on the development of constitutional law”). Scalia's constitutional theory holds that judges should not decide constitutional questions based on contemporary social values. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833,

The word *translate* means “to carry across,” and lawyers’ arguments and judges’ decisions carry ideas, values, and commitments from the realm of politics to the realm of law. The work of judges and lawyers perpetually traverses the membrane that separates law from politics while simultaneously preserving that boundary by operating through professional rhetoric and norms. Judges and lawyers reconceptualize the claims of constitutional politics in the materials of the law, transforming, professionalizing, and rationalizing them in the process. This process is horizontal translation, the translation of constitutional politics into constitutional law.

I emphasize the contributions of lawyers as well as judges because lawyers shape the claims of litigants and members of interest groups, political mobilizations, and social movements and present them before the judiciary. Litigation—and the resources devoted to litigation—shape the direction of constitutional construction, for judges cannot hear cases that are not brought to them.<sup>48</sup> Lawyers are the great translators of our political life, collecting the stories, claims, and grievances of Americans and spinning them into the discourse of power that we call legal reason.

The past—and the meaning of the past—matters greatly in horizontal translation. Judges, lawyers, and their fellow citizens often reason with each other by invoking the past—not only the values, concerns, and hopes of the framers, but also those of those of succeeding generations, like the generations of the New

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1000 (1992) (Scalia, J., dissenting) (“How upsetting it is, that so many of our citizens .°. think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus”). Nevertheless, his arguments often mesh with the values of conservative elites; indeed, he owes his Supreme Court appointment to the success of movement conservatism.

<sup>48</sup> See Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998) (emphasizing the role of resources devoted to litigation and directed litigation campaigns in producing constitutional change); Steven Teles, *The Rise of the Conservative Legal Movement* (Princeton University Press 2007) (emphasizing the role of nonelectoral competition by elites and institutions of civil society in reshaping constitutional culture).

Deal, World War II, or the civil rights revolution. In fact, it often seems that between precedent and history, constitutional argument appears to be about nothing other than the past, albeit the nation's entire past, not just the moment of the founding. But people invoke the memory of the past in order to face each other in the present, and to reason about how to apply the Constitution in their own time. In a democracy like ours, moral and political disagreement is a fact of life. The past serves a crucial function: it provides a common stock of intellectual resources, values, and commitments that people with very different views can draw upon to reason with each other in a political community so that they can decide what to do and how to go forward.<sup>49</sup> People preserve democratic community and democratic legitimacy by using the past to decide what to do in the present. Constitutional doctrine translates these arguments and counterarguments into constitutional law.

Courts must think and act in terms of legal forms and practices; they must make legal arguments and write legal opinions. Their job is not to do politics but to do law. Nothing in what I have said suggests that judges should do anything but interpret and construct law. They should be faithful to text and principle and use the various modalities of argument—text, structure, history, precedent, prudence, and national ethos—to decide the cases before them. The work of translation and change will take care of itself without much effort on their part. They will disagree among themselves, often heatedly, about the direction in which doctrine should travel, but that by itself does not make the process of change illegitimate. To the contrary: this process of disagreement about the law over time—and the mutual recognition of opposing positions—is itself part of the process of horizontal translation that helps secure the democratic legitimacy of constitutional change through constitutional construction.

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<sup>49</sup> Jack Balkin and Reva B. Siegel, introduction to *The Constitution in 2020* (Jack M. Balkin and Reva B. Siegel eds., Oxford University Press, 2009).

Through doing law (not politics) and working in tandem and in opposition with each other, successive generations of lawyers and judges inevitably translate changes in constitutional politics into constitutional law. They do so because new judges replace older ones, and because the judges who hear cases and decide them are influenced and shaped by the constitutional culture in which they live. This culture includes not only professional norms of what is off-the-wall and on-the-wall legally, but also popular notions of constitutional values that influence professional judgments. In this way living constitutionalism produces change that preserves legitimacy in a democratic society while allowing judges to continue being judges.

### The Role of Dissent in a System of Living Constitutionalism

Individuals within the constitutional system will not always like how judges or the political branches engage in constitutional construction, because the system will often produce constitutional changes that they do not agree with. Many people, perhaps most, instinctively associate “living constitutionalism” with whatever is liberal or progressive and therefore support or oppose it. But this characterization is incorrect. As noted previously, a Constitution that grows and changes in response to social and political mobilizations is as likely to move to the right as to the left. Indeed, it has moved in many different directions over the course of our nation’s history. Moreover, what we call “left” and “right” today are the products of coalition building—a configuration of contingent forces and events. The content of these ideas has been different and will be different again. Someday they may be replaced by other ideas and labels that will better describe the political disputes of the future.

The conservative dominance of the last forty years is an important example of the process of living constitutionalism at work, even though many of its proponents have fought under the banner of originalism. There is no contradiction here. Appeals to the values of the framers or founders are a pretty standard way

that people call for restoration or redemption. Appeals to origins are a familiar way that people justify constitutional change outside of Article V (and change within it, too). Like many revolutionary movements before it, the conservative movement of the late twentieth century has been predicated on a return to an imagined origin, a restoration of proper principles it claims that later generations have abandoned. Of course, revolutions often use the tropes of return and restoration to promote what is actually change. The conservative originalism of the past several decades has been an attempt to replace a more liberal constitutionalism with a more conservative one. In many ways it has succeeded. Whether liberal critics like it or not, this change is also an example of the living Constitution. In a conservative era, the positive constitutional law of a living constitution will become more conservative in many respects. That is how the Constitution “keeps up with the times” and “reflects changing values.”

Why should citizens recognize the legitimacy of this process, if it generates constitutional constructions that citizens disagree with? They should recognize and respect it because it is the same process that produced constitutional constructions they also respect and admire. Each of us will find some decisions of the courts to disagree with, and others that we truly despise. But we must accept these decisions as law while working to change them over time through the processes of legal persuasion in the courts and political mobilization outside the courts. I can argue that these decisions are bad interpretations of the law and work to distinguish or overrule them, just as people who disagree with me can work to limit or overturn decisions that they do not like. The ability of citizens to talk back to courts—their ability to redraw the boundaries of what is reasonable and unreasonable through persuasion, protest, and political action—is crucial to democratic legitimacy. Faced with a deeply unjust decision, *Dred Scott v. Sandford*, Abraham Lincoln once said that *Dred Scott* was law and should be respected until it was altered or overturned, but “we mean to do what we can to

have the Court decide the other way.”<sup>50</sup> Here Lincoln articulated the basic premise of a living Constitution as a process: the Supreme Court’s decisions deserve respect as positive law, but not respect as proper interpretations of the Constitution, unless, in fact, they are the right interpretations. People can and should work to overturn decisions that, in their opinion, are contrary to the Constitution’s spirit, and to its text and principles, through political mobilizations, through the appointments process, and through legal arguments directed at judges and legal officials.

People who disagree with particular decisions must accept them as positive law, but need not accept them as correct. A system of living constitutionalism means that I can always dissent during “dark times” when my views are in the minority. I can try to persuade other people that my views are correct and work for the restoration or the redemption of important constitutional values. Through this agonistic process of mobilizations and countermobilizations of groups who seek the restoration and redemption of constitutional values, the Constitution maintains its public acceptability.

Moreover, this process provides its own constraints on runaway construction by the courts and the political branches. As Reva Siegel has pointed out, both sides of a constitutional controversy must appeal to common values and common political goods in order to persuade the public that their views are correct. They must modify their positions to appeal to the values of the (imagined) center, and in the process they often acknowledge and incorporate aspects of each others’ views.<sup>51</sup> The clash of mobilization and countermobilization, the necessities of everyday politics, and the need to compromise and make positions palatable provide yet another checking function in our constitutional system, like the

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<sup>50</sup> Abraham Lincoln, “Speech in Reply to Senator Douglas (July 10, 1858),” in 1 *Abraham Lincoln: Complete Works* 247, 255 (John G. Nicolay and John Hay eds., The Century Co. 1902) (1894).

<sup>51</sup> Reva B. Siegel, “Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA,” 94 *Cal. L. Rev.* 1403–19 (2006).

separation of powers itself. This does not make constitutional politics either principled or unprincipled; the point, rather, is that the content, scope, and effect of the constitutional principles that the political process produces are continually being reconceptualized and reconfigured in the crucible of democratic politics. We can see the reshaping of constitutional claims in the context of debates over racial equality, sex equality, free speech, and even the right to bear arms.<sup>52</sup> Contemporary liberal claims about the Constitution have been shaped by the conservative constitutional culture of our era, just as today's conservative constitutionalism reacted to and absorbed important features of the more liberal constitutional culture that preceded it.

### The Problem of Constitutional Evil<sup>53</sup>

One might accept that I have accurately described how constitutional change occurs in the United States but object on a different ground. The objection is not that my theory of constitutional development is false but that it is morally unsatisfactory or even dangerous, because the process I describe might lead to very bad and unjust results. The process of constitutional change may possess

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<sup>52</sup> See Balkin, "What *Brown* Teaches Us," supra note 1, at 1563–68 (describing the refashioning of constitutional claims through politics); Jack M. Balkin and Reva B. Siegel, "Principles, Practices, and Social Movements," 154 *U. Pa. L. Rev.* 927 (2006) (describing the role of social movements in shaping and reconfiguring constitutional claims in new factual contexts); Siegel, "Dead or Alive," supra note 21 (describing changing social movement conceptions of the right to bear arms); Reva B. Siegel, "The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument," 57 *Duke L.J.* 1641 (2008) (describing changing forms of anti-abortion argumentation); Siegel, "Constitutional Culture, Social Movement Conflict and Constitutional Change," supra note 51 (describing the effects of 1970s mobilizations and countermobilizations on sex equality claims); Reva B. Siegel, "Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over *Brown*," 117 *Harv. L. Rev.* 1470 (2004) (describing the effects of political struggle on the meaning of *Brown v. Board of Education*).

<sup>53</sup> See Mark Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge University Press 2006) (arguing that in interpreting constitutions justice must be sacrificed to secure a stable democratic politics); Jack M. Balkin, "Agreements with Hell and Other Objects of Our Faith," 65 *Fordham L. Rev.* 1703 (1997) (describing the problem of constitutional evil as how to be faithful to a constitution that might permit or require great evils).

sociological legitimacy because it roughly follows public opinion and is supported by it. It may possess procedural legitimacy because constitutional construction employs standard forms of legal argument and because it is democratically responsive in the long run. Yet it may lack moral legitimacy because constitutional constructions can be very unjust; they can oppress minority groups and individual citizens, and undermine or even destroy democratic values.

A system of framework originalism and living constitutionalism may be democratically legitimate and still produce or countenance very unjust results that well-trained lawyers can defend using plausible legal arguments. This well describes most of American constitutional history. Throughout our history minorities have been badly treated and individual rights denied in ways that we would find completely unacceptable in a constitutional democracy today. This is not to assume that we inhabit a privileged position: no doubt future generations may think the same of some practices in our current political order.

As an example of what the processes of constitutional change might lead to, consider an example from our recent history: the Bush administration's claim—most often associated with Vice-President Dick Cheney, David Addington, and John Yoo—that when the president acts in his capacity as commander in chief, he cannot be bound by congressional enactments that seek to limit his powers. This includes, among other things, laws against domestic surveillance and even laws against torture and cruel and inhumane treatment.<sup>54</sup>

The famous “torture memos” produced by the Bush administration's Office of Legal Counsel articulate this theory; they sound quite lawyerly, and they make

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<sup>54</sup> Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., U.S. Dep’t of Justice Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, U.S. Dep’t of Defense (Mar. 14, 2003), available at [www.aclu.org/pdfs/safefree/yoo\\_army\\_torture\\_memo.pdf](http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf) (arguing that statutes or treaties limiting interrogation and detention practices, including torture, would violate the president's authority as commander in chief); Memorandum from the U.S. Dep’t of Justice Office of Legal Counsel to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at [www.washingtonpost.com/wpsrv/nation/documents/dojinterrogationmemo20020801.pdf](http://www.washingtonpost.com/wpsrv/nation/documents/dojinterrogationmemo20020801.pdf) (same).

coherent legal arguments, even if they are not very good arguments. They exemplify an important fact about legal discourse—that well-trained lawyers can make truly bad legal arguments that argue for very unjust things in perfectly legal-sounding language. No one should be surprised by this fact. Today lawyers make arguments defending the legality of torture and, indeed, claiming that laws that would prevent the president from torturing people are unconstitutional.<sup>55</sup> In the past lawyers have used legal-sounding arguments to defend the legality of slavery,<sup>56</sup> Jim Crow,<sup>57</sup> and compulsory sterilization.<sup>58</sup>

Elsewhere I have asserted that the Cheney/Addington/Yoo theory of presidential power, taken to its logical conclusions, allows presidents to rule by decree (or indeed without decree) and in this sense is tantamount to presidential dictatorship.<sup>59</sup> If the president cannot be limited by congressional statutes when he acts as commander in chief, he is not very limited at all, especially when the United States is engaged in a war on terror with no geographical boundaries and no foreseeable conclusion. Such a theory has little basis in the original understanding of the founding period, which feared the rise of a new Caesar or Cromwell; it is a product of the modern era.<sup>60</sup> But even if we stipulate that it is a bad interpretation of the Constitution, could the courts adopt such a theory through the processes of living constitutionalism described in this book? It is certainly possible that they could, for President Bush and his lawyers pushed it vigorously on several occasions.

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<sup>55</sup> *Id.*

<sup>56</sup> *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

<sup>57</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>58</sup> *Buck v. Bell*, 274 U.S. 200 (1927).

<sup>59</sup> See Jack M. Balkin, “Reductio Ad Dictatorem,” *Balkinization*, Apr. 7, 2006, [balkin.blogspot.com/2006/04/reductio-ad-dictatorem.html](http://balkin.blogspot.com/2006/04/reductio-ad-dictatorem.html).

<sup>60</sup> See David J. Barron and Martin S. Lederman, “The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding,” 121 *Harv. L. Rev.* 689, 695–97, 800–804 (2008); David J. Barron and Martin S. Lederman, “The Commander in Chief at the Lowest Ebb—A Constitutional History,” 121 *Harv. L. Rev.* 941, 947–51, 1057–59, 1100 (2008); David Luban, “On the Commander in Chief Power,” 81 *S. Cal. L. Rev.* 477 (2008).

Suppose that President Bush had been a far more successful president than he actually was, that his adventures in Iraq had gone much better than they actually did, that the economy did not implode in his second term, and that the public rewarded his party by repeatedly returning his political allies to office. A few more Supreme Court appointments who saw things President Bush's way, and we might be well on our way to a conception of presidential power that would have been unimaginable only ten years before. As noted above, courts have made many bad and unwise decisions in our nation's history. Nobody should underestimate what lawyers in high places can do armed with legal language. But the more important question is whether the constitutional system as a whole can correct the excesses of such lawyers.

Ultimately it is a question of design and faith in that design: whether a system of living constitutionalism such as we have can set ambition against ambition, mobilization against countermobilization, and judicial conservation against political zeal in a way that preserves a decent society or at least helps us move haltingly toward a more decent one. The question is whether the system of living constitutionalism we have generated through years of construction is a worthy successor to the framers' idea of separation of powers and checks and balances—a system that moderates, tests, and checks; and one that makes politics both possible and accountable to prudence and reason. This is a question of reason and faith; of practical knowledge and of moral commitment to preserving just institutions and working for better ones.

It is possible, but very unlikely, that five justices of the Supreme Court would adopt reasoning like that of the torture memos. Unlikely, because it would require the justices to overturn a lot of precedent and disregard basic principles of the constitutional system. Possible, because the history of our country shows that constitutional culture can change greatly, given enough time. But the fact that courts make bad decisions, and even evil decisions, does not mean that the constitutional system as a whole becomes illegitimate. It just means that a

particular decision is very wrong. The more important question is whether our constitutional system offers opportunities to correct bad judicial decisionmaking—through sustained criticism and protest, through changing people’s minds about what our Constitution requires, through political responses, mobilizations and workarounds, and through the judicial appointments process. These features of political practice are part of the checks and balances of our constitutional system. We recognize them easily when the president and Congress are in conflict, but perhaps less easily when the courts are involved—perhaps because we think incorrectly that they have the last word on the meaning of the Constitution.

The system of living constitutionalism we have created has produced new checks and balances to buttress the ones provided in our original Constitution. It is a good thing, too. National power has increased, and with the blessing and support of the political branches the courts have become more important and more powerful. Institutions have grown, politics has become more complex, and power can be asserted through ever-new means. We are always in need of new ways for power to check power, and hold off the destruction of free government.

These same features of our political system offer us the means to prevent bad decisions from occurring in the first place. Today nobody can be appointed to the Supreme Court who thinks that Jim Crow policies are constitutional. But that was not true through most of our country’s history. It became true only because of years of political and legal struggle.

If the Supreme Court adopted a theory of presidential dictatorship, it might send us spiraling down toward the end of our two-centuries-old constitutional experiment with democracy—a possibility that the framers imagined but tried to forestall. Or it might not. The next administration might come along, take very different positions, and appoint new justices who would distinguish the bad decision, or even overrule it. But in any case, it would not simply be a question of us waiting passively for the Supreme Court to decide our fates. There are always

things we can do to promote the redemption of constitutional government. The fact that the Constitution is in all of our hands, and not simply the hands of the justices, is the reason why our Constitution still lives.