

## Essay

# Common Law, Common Ground, and Jefferson's Principle

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### I. INTRODUCTION

Why do we care about the Framers of the Constitution? After all, they lived long ago, in a world that was different in countless ways from ours. Why does it matter what their views were, for any reasons other than purely historical ones? And if we don't care about the Framers, why do we care about their handiwork, the Constitution itself? It was the product of the Framers' times and the Framers' sensibilities. What possible reason can we have for allowing its provisions to rule us today? Even if the Founding generation was exceptionally visionary and enlightened, we would not allow ourselves to be ruled by even the most extraordinary group of people if they lived in another country halfway across the world today. Why do we allow ourselves to be ruled by the decisions of people who lived in a time that was, in every relevant respect, much further away than that?

These might seem to be the most academic of questions. No one seriously disputes that the Constitution is supreme law, and nearly everyone acknowledges that the views of the Framers matter to some degree.

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Academic or not, though, these questions are important because throughout constitutional law, the role of text and original understandings remains uncertain. Until we have tried to answer the most fundamental skeptical question—why do we care at all about the Framers?—we will not know what role the text and the original understandings should play.

The role of the text and the original understandings may be as much in dispute today as it has ever been. In some areas—federalism, the right to keep and bear arms under the Second Amendment, the Eighth Amendment’s protection against cruel and unusual punishment, the Religion Clauses of the First Amendment—there is a concerted effort underway, by advocates and sometimes by judges and Justices, to make constitutional law conform more closely to what are said to be the dictates of the text and the original understandings.<sup>1</sup> To what extent should the original understandings govern the interpretation of those provisions, or of the Free Speech Clause of the First Amendment, or the Fourth Amendment, or the Self-Incrimination or Just Compensation Clauses of the Fifth Amendment, or the Due Process and Equal Protection Clauses of the Fourteenth Amendment, or the structural provisions of the original Constitution? Critics have powerfully attacked the notion that constitutional interpretation can rely *exclusively* on the text and the original understandings,<sup>2</sup> but as long as the text and original understandings play some role in constitutional interpretation—as essentially everyone agrees they must—these issues about the role of text and original understandings will remain with us, and we will have to address the fundamental question of why the Framers matter at all.

There is no agreed-upon answer to that question. It has been asked before: It was Thomas Jefferson’s question at the time of the Founding. “[T]he earth belongs to the living, and not to the dead,” he wrote to James Madison from Paris in 1789;<sup>3</sup> so how can any constitution purport to bind

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1. For recent general efforts to establish that the text and the Framers’ intentions should govern constitutional interpretation, see ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); and Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000). On the particular areas mentioned in the text, see, for example, *Printz v. United States*, 521 U.S. 898, 904-15 (1997); *United States v. Lopez*, 514 U.S. 549, 584-602 (1995) (Thomas, J., concurring); *Harmelin v. Michigan*, 501 U.S. 957, 961-94 (1991) (plurality opinion of Scalia, J.); *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting); and Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 106-07 (2000) (describing the near-exclusive reliance on originalism by advocates of an individual Second Amendment right to bear arms).

2. See, e.g., RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 13-25 (2001); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). On the history of attacks on originalism, see Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 20-21 (1998).

3. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 396 (Julian P. Boyd & William H. Gaines, Jr., eds., 1958) [hereinafter Letter of Sept. 6, 1789].

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later generations? Jefferson was not alone in raising the question at that time—he was not even the most extreme skeptic—but his formulation was the most memorable.

The problem is that Jeffersonian skepticism is very difficult to rebut, on one level, but wholly unpersuasive on another. It is, in fact, hard for anyone who believes in self-government to come up with an explanation for why long-ago generations should have such a decided effect on our law today, whether they are the generation of the Founding, or the Civil War, or any other. But at the same time, Jeffersonian skepticism about the Constitution seems out of touch with the reality of our political and legal culture, or even our culture more generally. Many people revere the Constitution. Many Americans consider themselves connected, in some important way, to earlier generations. American law today seems like a chapter in a multigenerational project, and its multigenerational character is part of the reason it is valued. To many people, allegiance to the Constitution and a certain kind of respect for the Founding, and for crucial episodes in our history, are central to what it means to be an American. All of those attitudes are deeply incompatible with Jefferson's kind of skepticism, and as long as those attitudes remain widespread, Jefferson's skepticism will always seem to many to be a little like a debating point—clever and hard to answer, but somehow deeply wrong.

In this Essay, I want to address these issues in a way that responds to Jefferson—that gives a reason for paying attention to the Constitution that ought to satisfy even a Jeffersonian skeptic—but that also accommodates more deeply held views about the Constitution and American traditions, rather than dismissing those views as mysticism or ancestor worship in the way that Jefferson's skepticism seems to dismiss them. The first part of the answer to Jefferson is confession and avoidance: To a large extent, American constitutional law has developed in a way that is independent of the views of the Founding generation. Much of American constitutional law consists of precedents that have evolved in a common-law-like way, with a life and a logic of their own. But it would be a mistake to say that American constitutional law consists entirely of precedents and is independent of the text and the Framers. The text, unquestionably, and the original understandings, to a lesser degree, continue to play a significant role. We cannot escape Jefferson's question by saying that we have left the Framers behind.

The central answer to Jefferson is that the text of the Constitution provides a common ground among people, and in that way it facilitates the resolution of disputes that might otherwise be intractable. Sometimes, in the familiar formulation, it is more important that things be settled than that they be settled right, and the provisions of the Constitution settle things. The Constitution tells us how long a President's term will be, how many

senators each state will have, whether there are to be jury trials in criminal cases, and many other things. Even if the rules the Constitution prescribes are not the best possible rules, they serve the very valuable function of providing an answer so that we do not have to keep reopening those issues all the time.

These justifications, as I will explain, ought to satisfy even the most iconoclastic Jeffersonian skeptic. Equally important, they fit with our current practices of constitutional interpretation. The common law and common ground justifications make sense of the way we interpret the Constitution, including aspects of our practice of constitutional interpretation that otherwise seem quite problematic. The common law and common ground justifications should therefore be acceptable to anyone who finds our current constitutional order generally acceptable, even if that person wants to reject, à la Jefferson, anything that might remotely look like ancestor worship.

But at the same time, the common law and common ground justifications do not *require* anyone to reject more reverential views of the Constitution and the Framers. People who believe, as some do, that the Framers were divinely inspired can accept the common law and common ground justifications; in fact, they have an especially strong reason for accepting those justifications. People who, less dramatically, see themselves as part of an ongoing American tradition that embraces earlier generations also have good reasons to accept those justifications. But people who want to debunk all of that—or who identify with other traditions, religious or ethnic traditions perhaps, that have nothing to do with the Framers—can also accept the common law and common ground justifications. The key idea here is Rawls's famous notion of the overlapping consensus. People who adhere to widely and fundamentally different belief systems, such as different religions, can nonetheless all embrace certain common principles, as can people who reject any religious belief system. That is the kind of justification that adherence to the Constitution and the original understandings requires, and the common law and common ground justifications can, I believe, provide it.

In Part II, I will describe Jefferson's argument, the answers that have customarily been given to it, why those answers are not fully adequate, and how the common law and common ground justifications might provide an answer. In Part III, I will elaborate on the suggestion that part of the answer to Jefferson is that constitutional law has developed in a common-law-like way that is, to a significant extent, independent of the text and the Framers' understandings. Then, in Part IV, I will describe the "common ground" justification for adhering to the text and original understandings on those limited but important occasions when we do so. In Part V, I will try to show how this "common ground" justification makes sense out of current

practices that would otherwise be problematic, and I will discuss other implications of that justification for constitutional interpretation.

## II. JEFFERSON'S PRINCIPLE

### A. "*The earth belongs . . . to the living.*"

"The earth belongs in usufruct to the living,"<sup>4</sup> Jefferson wrote to Madison in 1789. "[T]he question Whether one generation of men has a right to bind another, seems never to have been started either on this or our side of the water," even though "it is a question of such consequences as . . . [to] place . . . among the fundamental principles of every government."<sup>5</sup> Jefferson's answer to the question was no: "We seem not to have perceived that, by the law of nature, one generation is to another as one independent nation to another."<sup>6</sup> Therefore, Jefferson said, "[e]very constitution . . . and every law" should "naturally expire[] at the end of 19 years."<sup>7</sup> (Jefferson elaborately calculated, on the basis of life expectancies at the time, that a majority of people twenty-one and older would die within nineteen years and concluded that was the best measure of a generation's life span.)<sup>8</sup> If any law "be enforced longer, it is an act of force, and not of right."<sup>9</sup>

Jefferson's argument, in some form, goes back at least to Hume's essay *Of the Original Contract*.<sup>10</sup> It was a repeated refrain of Thomas Paine's.<sup>11</sup> Others besides Jefferson made similar arguments at the time of the drafting and ratification of the Constitution; Noah Webster, in particular, ridiculed Jefferson for not holding the principle more consistently.<sup>12</sup>

Jefferson's principle remains, today, the central challenge to written constitutionalism—indeed, perhaps to more than that, since much ordinary legislation is also the product of earlier generations. And to this day, it is

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4. *Id.* at 392 (emphasis omitted).

5. *Id.*

6. *Id.* at 395.

7. *Id.* at 396.

8. See Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in THOMAS JEFFERSON, WRITINGS 1395, 1402 (Merrill D. Peterson ed., 1984) [hereinafter Letter of July 12, 1816]; see also Letter of Sept. 6, 1789, *supra* note 3, at 393-94.

9. Letter of Sept. 6, 1789, *supra* note 3, at 396.

10. See DAVID HUME, *Of the Original Contract*, in POLITICAL WRITINGS 164, 168 (Stuart D. Warner & Donald W. Livingston eds., 1994).

11. See, e.g., THOMAS PAINE, *Rights of Man*, in RIGHTS OF MAN, COMMON SENSE 1, 12 (1994) [hereinafter PAINE, *Rights of Man*]; THOMAS PAINE, *Common Sense*, in THE LIFE AND MAJOR WRITINGS OF THOMAS PAINE 1, 29, 37 (Philip S. Foner ed., 1961).

12. See NOAH WEBSTER, *On Government*, in A COLLECTION OF ESSAYS AND FUGITIVE WRITINGS ON MORAL, HISTORICAL, POLITICAL, AND LITERARY SUBJECTS 67-68 (Boston, Thomas & Andrews 1790). See generally STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 137-50 (1995).

not clear how to answer Jefferson's argument. "This principle that the earth belongs to the living, and not to the dead, is of very extensive application and consequences, in every country . . .," Jefferson said.<sup>13</sup> In our own legal culture, the question is, among other things, why the generations who drafted the Constitution of 1787, or the Bill of Rights, or the post-Civil War amendments to the Constitution have a right to rule us today. Specifically, why do we care about their intentions, which are generally thought to have some importance to current constitutional controversies? And, more pressing, why do we even care about the documents they adopted, which everyone today would acknowledge to be in some sense authoritative?

### B. *Commands and Intergenerational Obligations*

In the American constitutional tradition, most of the answers that have been offered to these questions take one of two general forms. One kind of answer might be called Austinian, after John Austin's view that law is a command issued by a sovereign.<sup>14</sup> This answer to Jefferson's question asserts that the decisions of the earlier generations bind us in essentially the way that an order from a bureaucratic superior binds a subordinate.<sup>15</sup> Often this view seems to be not even asserted but assumed; people try to uncover what the Founding generation, or subsequent generations, thought about an issue without explaining why that would be significant today.

A second, more complex kind of answer relies not so much on a simple model of superior and subordinate, but rather on a conception of intergenerational identity. We owe "fidelity" to the earlier generations because we live in the same political community, extended over time, as they. Just as part of being an American is acknowledging obligations of mutuality with others who live today, so part of being an American is to maintain continuity with those earlier generations. One way we do that is to adhere, at least to some degree, to their decisions on questions of

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13. See Letter of Sept. 6, 1789, *supra* note 3.

14. See JOHN AUSTIN, *The Province of Jurisprudence Determined*, in *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 1, 36-42 (H.L.A. Hart ed., 1954).

15. For an especially clear statement of this view, although one primarily concerned with statutory interpretation, see RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 247-61 (1990). The view is also clearly expressed, although less self-consciously, in ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 5, 145, 178, 300 (1990). See also Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 363, 375 (1992); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 353-60 (1981). The idea that the objective of constitutional interpretation is to translate the statements of an authoritative group of lawgivers into terms more applicable to today's issues also reflects this Austinian view. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1182 (1993) ("Firm within our legal culture is the conviction that if judges have any duty it is a duty of fidelity to texts drafted by others, whether by Congress or the Framers . . .").

constitutional law. Many theories take this second form; some meld aspects of these two forms.<sup>16</sup>

The first kind of answer, with its simple Austinian model—the Founders were the sovereign, and their commands bind us—seems at first glance just to refuse to engage Jefferson’s argument. But this approach cannot be disregarded entirely. As Jefferson acknowledged, at least for a time a majority is entitled to rule. Any account of constitutional interpretation has to explain the undoubted binding force of a contemporaneous majoritarian decision.

The second kind of answer, asserting a conception of intergenerational identity, is deeply woven into the way many people think about the Constitution. It speaks to something important. There is undoubtedly a human need, widely if not universally felt, to understand oneself as part of an ongoing tradition and to have a connection to earlier generations.<sup>17</sup> This is often the way in which people understand themselves to be part of an ethnic group or a religious tradition. Many accounts that are implicitly offered to answer Jefferson’s objection provide conceptions of what it is to be an American, conceptions that include fidelity to earlier generations’ decisions about the Constitution.<sup>18</sup>

But the analogies to religious and ethnic identity ought to give us pause about using this kind of explanation for the binding character of the Constitution. People alive today in the United States, or any other

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16. RONALD DWORKIN, *LAW’S EMPIRE* (1986) seems to me to take this second view. Especially relevant is *id.* at 188-202. Jeremy Waldron, *Precommitment and Disagreement*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 271, 287-92 (Larry Alexander ed., 1998) is more explicit in defending the notion of an intergenerational community. Frank Michelman, *Law’s Republic*, 97 *YALE L.J.* 1493, 1515-24 (1988) contains an illuminating criticism of the Austinian aspects of Dworkin’s view, and Frank Michelman, *Constitutional Authorship*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS*, *supra*, at 64, appears to endorse an idea of intergenerational community as well. Among recent writers who endorse a view of this kind, see, for example, Friedman & Smith, *supra* note 2. See also *id.* at 80-85; Symposium, *Fidelity in Constitutional Theory*, 65 *FORDHAM L. REV.* 1247 (1997).

17. Edmund Burke’s statement of this position is classic:

[O]ne of the first and most leading principles on which the commonwealth and the laws are consecrated, is lest the temporary possessors and life-renters in it, unmindful of what they have received from their ancestors, or of what is due to their posterity, should act as if they were the entire masters . . . . By this unprincipled facility of changing the state as often, and as much, and in as many ways as there are floating fancies or fashions, the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other. Men would become little better than the flies of a summer.

EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 192-93 (Conor Cruise O’Brien ed., Penguin Books 1968) (1790). In the legal literature, the leading statement is perhaps Anthony T. Kronman, *Precedent and Tradition*, 99 *YALE L.J.* 1029 (1990).

18. I BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 154-62 (1991) seems essentially to take this view, as does JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* (2001). Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 *HARV. L. REV.* 29, 99-103 (1999) also appears sympathetic to this view.

reasonably heterogeneous community, will define the tradition to which they belong in different ways. Relatively few people alive today are even descended from the people who participated in the great constitutional decisions of the past. This is the result of both immigration and the enfranchisement of a much larger percentage of the population, changes that make Jefferson's question all the more difficult to answer.

Nearly all of us are being asked to accept decisions made not by our own ancestors, which would be troubling enough, but by someone else's ancestors. Individuals might choose to do so; they might choose to consider themselves part of an American tradition that includes the Framers or the post-Civil War generation. But it is difficult to see why people who do not feel themselves part of that tradition—who identify primarily with a different ethnic, religious, or cultural tradition, or with no tradition at all—should be told that they have to identify with this particular American tradition as well. And if we are unwilling to tell them that—as we should be—then this second kind of justification for adhering to the Constitution will not work.

To put the point another way, the justification for using a written Constitution, and following original intentions, should not be sectarian. It should not depend on a particular conception of what it is to be an American. It should be something that can appeal to any reasonable member of our society today, even to people who reject the idea of belonging to any American cultural or quasi-ethnic tradition, and even to people who—following the logic of Jefferson's skepticism—adhere to no tradition at all.

C. *Common Law, Common Ground, and the Idea of an Overlapping Consensus*

The way to try to develop such a conception, I believe, is to recognize that the decisions of earlier generations can be binding today even in the absence of any kind of obligation of obedience—either the straightforward obligation of a subordinate to a superior, or the more complex idea of “fidelity” to an earlier generation. Jefferson may be right that we do not *owe* anything, in any sense, to earlier generations. But his skeptical conclusion does not follow. There are at least two other possible reasons why we might care about what earlier generations did.

First, a decision made by an earlier generation might serve as a precedent. In a common law system, precedents from earlier eras bind to a degree. Nevertheless, the problem Jefferson identified is greatly ameliorated in a common law system, or so I shall argue shortly. And the justification for following precedent need not rely on any notion of intergenerational identity or intergenerational obligation. There are sensible

reasons why any rational person would be reluctant to depart from well-established practices that were endorsed, after due consideration, by people in the past when they were confronted with similar issues.

Second, an earlier generation's decision—especially when it is embodied in an authoritative text—can serve as readily accepted common ground among people who otherwise disagree.<sup>19</sup> A legal provision can settle things, and sometimes—when it is in fact more important that things be settled than that they be settled right—the fact of settlement alone is enough to make the provision binding. The binding force of the provision rests on its functional ability to settle disputes, and not at all on whether the entity that enacted the provision is entitled to obedience or “fidelity.”

Accepting the common law and common ground answers to Jefferson's argument does not require one to reject the other kinds of answers that have been offered. In particular, the common law and common ground arguments are not inconsistent with, or even in tension with, the notion of intergenerational identity—the idea that part of being an American is honoring the decisions of earlier generations of Americans. One can hold a particular view of the importance of the Constitution in defining American identity and also accept the common law and common ground justifications.

In fact, an intergenerational conception of the political community provides an additional reason for accepting those justifications. A conception of English identity was an important part of the early common lawyers' ideology.<sup>20</sup> To the extent one believes one has an obligation of fidelity to earlier generations of Americans, one's willingness to treat their decisions as precedents, and their enactments as common ground—as one of the things that all Americans have in common—will be strengthened. Belief in a quasi-ethnic American identity is not an adequate basis for answering Jefferson's question; but it is also important not to answer that question in a way that will require people to repudiate such beliefs, which are widely held. The common law and common ground justifications do not require people to repudiate those beliefs.

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19. The locus classicus of this idea is DAVID HUME, *A TREATISE OF HUMAN NATURE* 489-90 (L.A. Selby-Bigge ed., Oxford 2d ed. 1978) (1740). See also DAVID HUME, *AN INQUIRY CONCERNING THE PRINCIPLES OF MORALS* 125 (Charles W. Hendel ed., Bobbs-Merrill 1981) (1751). For modern discussions, see, for example, DAVID K. LEWIS, *CONVENTION* 3-4, 36-42 (1969); David Gauthier, *David Hume, Contractarian*, 88 *PHIL. REV.* 3, 22-24 (1979); Andrei Marmor, *Legal Conventionalism*, 4 *LEGAL THEORY* 509, 515-27 (1998); and Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 *J. LEGAL STUD.* 165, 182-97 (1982). Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 *SUP. CT. REV.* 231, 253-56, draws the specific connection to reliance on the language of an authoritative text.

20. See, e.g., J.G.A. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 30-55 (1967).

But the common law and common ground justifications do not *depend* on any particular conception of American identity, any more than one has to accept the common lawyers' elaborate ideas about "the ancient constitution" of England in order to accept the common law of property or contract. The common law and common ground justifications for constitutional obligation rely on arguments that should appeal to all reasonable members of the political community. This is Rawls's idea of the "overlapping consensus":<sup>21</sup> People who have different ideas about intergenerational obligation, or American identity—or who reject such notions altogether—should all be able to say that the common ground and common law justifications make sense.

The common law and common ground justifications explain why we should adhere—although only in certain ways—to the text of the Constitution and the original understandings and intentions, appropriately defined. These justifications, I think, answer Jefferson's question in a way that does not require people to accept a controversial conception of American quasi-ethnic identity. But these justifications also do not require people to be skeptical about such conceptions. People can go in different directions when they define "what it is to be an American," while all accepting the common law and common ground justifications for adhering to the Constitution.

On a more concrete level, these justifications support firmly rooted aspects of the legal culture that are otherwise difficult to explain. For example, it is a persistent feature of American constitutional law that while arguments based on a careful parsing of the text of the Constitution sometimes play a large role in resolving relatively unimportant issues, the text plays essentially no operative role in deciding the most controversial constitutional questions (about discrimination, fundamental rights, and freedom of expression, for example), which are resolved on the basis of principles derived primarily from the cases. The common ground answer to Jefferson's question accounts for—and justifies—that apparently puzzling feature of a system that purports to be based on a written Constitution.

Similarly, the common ground justification explains a kind of verbal fetishism that seems to be a fixed feature of our constitutional culture: an attachment to the specific language of the Constitution, even if the language is being used for purposes that are unquestionably at variance with those of the people who drafted the language. The common law and common ground justifications also explain why we seem to accept the widespread use, by judges and lawyers, of "law-office history": the selective use of

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21. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 144-53 (1993). For the leading treatment of a kindred idea in the legal literature, see CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 35-61 (1996).

historical sources to support a conclusion reached partly on other grounds, as opposed to a genuine effort to understand, in context, an earlier time. And those justifications explain an apparently odd disjuncture in popular attitudes to the justifications for amending the Constitution: The Constitution is not to be “cluttered up” with detail, but many important and widely supported amendments are highly detailed. Finally, the common law and common ground justifications support a version of Jefferson’s time-bound majoritarianism: the idea that a majority’s will can legitimately govern for a while, but must recede as time passes.

D. *Why Not Sunset?*

Before proceeding to those issues, though, it is worth considering the solution that Jefferson himself proposed—that there should be an automatic sunset provision applied to all laws. In fact, this proposal is no solution at all. But it does reveal two important things: Jefferson’s problem can be solved only by introducing an intertemporal element into interpretation, and that intertemporal element must be able to operate gradually, not precipitously.

The immediate difficulty with Jefferson’s sunset solution is that it is hard to see how one can specify a nonarbitrary term of years for a provision to remain in effect. The best Jefferson could do was a convoluted calculation that the magic period is nineteen years. But this difficulty is actually derivative of a deeper problem: What should the law revert to after a provision has expired? The law that existed before the provision was adopted is the product of an even earlier generation; there is, if anything, even less reason to impose that earlier law on the current generation. Ideally, after a provision expires, the law should become something that the current generation itself endorses. But how do we determine what *that* is?

Jefferson himself explained why it is so difficult to keep the law up to date, in the course of rejecting the argument that “the succeeding generation[’]s . . . power [to] repeal” a provision “leaves them as free as if the constitution or law had been expressly limited to 19 years only.”<sup>22</sup> The power to repeal a law does not protect a later generation from the impositions of an earlier generation:

[T]he power of repeal is not an equivalent [to mandatory expiration]. It might indeed be if every form of government were so perfectly contrived that the will of the majority could always be obtained fairly and without impediment. But this is true of no form. The people cannot assemble themselves. Their representation is

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22. Letter of Sept. 6, 1789, *supra* note 3, at 396.

unequal and vicious. Various checks are opposed to every legislative proposition. Factions get possession of the public councils. Bribery corrupts them. Personal interests lead them astray from the general interest of their constituents: and other impediments arise so as to prove to every practical man that a law of limited duration is much more manageable than one which needs a repeal.<sup>23</sup>

These familiar problems of legislative inertia and public choice do not just prevent laws from being repealed when they no longer reflect the majority's views; they can also prevent a majority from replacing an expired law with something reflecting their views.<sup>24</sup> Perhaps even after much more than Jefferson's nineteen years, a majority of the society—composed of some survivors of the older generation that voted on the law and some members of the new generation that did not—wants the old law to continue in effect. Or perhaps the view of the new majority is that the law should be modified, but not wiped from the books. The Civil Rights Act of 1964, for example, must be viewed today as the product of an earlier generation, and not just in a chronological sense. But simply “sunsetting” the Act—reverting to the pre-1964 status quo—would surely be less in keeping with the current generation's views than the 1964 Act is itself. Given the problems Jefferson identified with relying on repeals, we could not view the failure to reenact the old law as a reliable indication that a current majority rejects it. And, for similar reasons, there is no obvious way to ascertain how the current generation would like to modify the Act.

The failure of the sunset solution, however, has two important lessons. One is that the core of Jefferson's principle is not affected: Even if a mandatory sunset is not the solution, the problem of one generation ruling another remains. The second is that the interpretation of laws should not change abruptly. Not only do generations not change abruptly, but the work of a previous generation does not leave the scene when it does; changes that generation has brought about in the culture will remain. “[H]istoric continuity with the past is not a duty, it is only a necessity.”<sup>25</sup> Both the common law and the common ground arguments try to meet these requirements. They preserve the work of the past, but only to the extent that the past either must, unavoidably, be preserved, or should be preserved, for

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23. *Id.*

24. See, e.g., JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 81-105 (1997); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992).

25. OLIVER WENDELL HOLMES, Learning and Science, Speech at a Dinner of the Harvard Law School Association in Honor of Professor C.C. Langdell (June 25, 1895), in SPEECHES 67, 68 (1934).

good reasons. But at the same time, these approaches permit gradual adaptation.

### III. CONFESSION AND AVOIDANCE: THE COMMON LAW ANSWER TO JEFFERSON

The text and the original understandings unquestionably play a significant role in constitutional law, but it is far from a dominant role. Part of the answer to Jefferson's question about why we should adhere to the Framers' decisions is: Often, we don't. To a large extent our constitutional law has solved Jefferson's problem by becoming a common law system in which cases are decided on the basis of precedents, not the text.<sup>26</sup> The dispute in controverted cases is over the best reading of the precedents, and—consistent with the approach common law courts have historically taken—over what is fairer or more sensible policy. The common law approach is central to many of the most important areas of constitutional law: freedom of expression, race and gender discrimination, property rights, procedural due process, federalism, capital punishment, police interrogation, the limits of congressional power, implied fundamental rights, the “case or controversy” requirement in the federal courts, state power over interstate commerce, and state sovereign immunity.

The constitutional law governing freedom of expression is an illustration. Today, this law consists of an elaborate doctrinal structure. One asks whether a restriction on speech is content-based, content-neutral, or incidental; whether the speech that is restricted is high-value or low-value; whether the measure in question is a restriction or a subsidy. Depending on the answers, there are further tests to be applied. (If the speech is incitement, a version of the “clear and present danger” test; if the speech is defamatory, a version of the standard established by *New York Times Co. v. Sullivan*;<sup>27</sup> and so on.) This body of doctrine is based in precedent and developed over time. The spare text of the First Amendment of course could not, by itself, generate such an elaborate set of rules, and while it is common to impute to the Framers views about freedom of expression that

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26. This claim is defended in David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) [hereinafter Strauss, *Constitutional Interpretation*], David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 32 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) [hereinafter Strauss, *Freedom of Speech*], and David A. Strauss, *The Common Law Genius of the Warren Court* (Sept. 22, 2002) (unpublished manuscript, on file with author). On the relationship between the common-law-like development of constitutional law and textual constitutional amendments, see David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

27. 376 U.S. 254 (1964).

agree with modern conceptions, actual investigation of the Framers' views has played essentially no role in the development of the law.<sup>28</sup>

The same pattern holds in all the other areas I mentioned. A lawyer who needs to learn constitutional law in an area generally learns the cases or, in some areas, the nonjudicial precedents. In one of the most active areas in recent constitutional law—the principles governing the relationship between the states and the federal government—even some of the Supreme Court's most relentless advocates of relying on the text of the Constitution have found themselves forced to concede that their conclusions are based on something other than the text.<sup>29</sup>

Of course, the use of precedent itself might be challenged by a Jeffersonian skeptic. The common law of England was a favorite target of Tom Paine and others who made arguments like Jefferson's.<sup>30</sup> But the use of precedent is much more easily defended against such a skeptical attack than is the use of the original understandings, or even the use of the text. The practice of following precedent can be justified in fully functional terms, without relying on a controversial conception of national identity or intergenerational obligation.

To some degree, the use of precedent is simply unavoidable. Neither legal doctrine nor anything else can be created anew every day. That is a principal lesson of the failure of Jefferson's sunset solution. The work of the previous generation will, to some degree at least, inevitably be our starting point, in law and elsewhere. To that extent, we have no choice but to follow precedent. A system of constitutional law that did not build on what has been done before may be literally inconceivable and is certainly entirely impracticable.

In addition, there are well-known justifications for the use of precedent that do not require the kind of ancestor worship that Jefferson attacked and that do not appeal to sectarian conceptions of American traditions.<sup>31</sup> The most familiar justification is often (if perhaps misleadingly) called Burkean.<sup>32</sup> In modern terms, the basis of this justification is that human

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28. For an elaboration and defense of the claims made in this paragraph, see Strauss, *Freedom of Speech*, *supra* note 26.

29. See, e.g., *Alden v. Maine*, 527 U.S. 706, 713 (1999) (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, Scalia, and Thomas, JJ.); *Printz v. United States*, 521 U.S. 898, 905 (1997) (Scalia, J.); *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy, and Thomas, JJ.).

30. See, e.g., PAINE, *Rights of Man*, *supra* note 11, at 12-15, 86-92.

31. For a discussion, citing sources, see Strauss, *Constitutional Interpretation*, *supra* note 26, at 891-97 & n.41.

32. See, e.g., 1 ACKERMAN, *supra* note 18, at 17-18. The term may be a little misleading because there is much else going on in Burke. Passages in his writing certainly endorse a belief in intergenerational obligations. In addition, others before and after Burke articulated the same ideas. See *infra* note 33. For a comprehensive effort to develop an approach to constitutional interpretation that is Burkean in this sense, see Ernest Young, *Rediscovering Conservatism*:

rationality is bounded. The problems confronted by the legal system are complex and multifaceted; an individual's capacity to solve them is limited. It therefore makes sense to take seriously what has been done before, both because it may reflect an accumulation of wisdom that is not available to any one individual and because it provides a storehouse of trial-and-error information on how the problems might be solved.<sup>33</sup>

These justifications for a common law approach—which relies on precedent while gradually updating it to take account of new conditions and to embody new insights—should be enough to satisfy a Jeffersonian skeptic. The common law approach does not treat past decisions as binding commands; it adheres to those decisions only because, and to the extent that, it makes good functional sense to do so. Jefferson himself seems to have recognized that such an evolutionary system would not present the problems he identified. In one of his famous later letters, in which he again endorsed periodic revisions of the Constitution, his remarks took on a common-law-like tone, endorsing a practice of “wisely yielding to the gradual change of circumstances” and “favoring progressive accommodation to progressive improvement.”<sup>34</sup> To the very considerable extent that our constitutional law is a common law system, based on precedent rather than text, Jefferson's challenge can be met with relative ease.

#### IV. COMMON GROUND AND CONVENTIONALISM

Our constitutional system is not entirely a common law system, however. This is a fixed point of our legal culture. In particular, no one says that the text of the Constitution does not matter or is only advisory. You cannot make an argument for any constitutional principle without purporting to show, at some point, that the principle is consistent with the text of the Constitution. And no provision of the Constitution—even an indefensible one (like the requirement that a President be a natural born citizen)—can be overruled in the way a precedent can.

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*Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994). See also *id.* at 688-97.

33. The notion of bounded rationality originates in Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99, 99-101 (1955). See generally HERBERT A. SIMON, *MODELS OF MAN: SOCIAL AND RATIONAL* (1957). For more recent treatments, see generally *BOUNDED RATIONALITY: THE ADAPTIVE TOOLBOX* (Gerg Gigerenzer & Robert Selten eds., 2000).

For antecedents of Burke, in the common law tradition, who emphasized these notions, see, for example, MATTHEW HALE, *REFLECTIONS BY THE LRD. CHEIFE JUSTICE HALE ON MR. HOBBS HIS DIALOGUE OF THE LAWE* 14-15, reprinted in 5 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 500, 504 (2d ed. 1937); and Calvin's Case, 77 Eng. Rep. 377, 381 (K.B. 1608) (Coke, C.J.). See generally Young, *supra* note 32, at 642-56.

34. Letter of July 12, 1816, *supra* note 8, at 1401.

On many important issues, the text is followed exactly, even when substantial arguments can be made that the judgments reflected in the text have been superseded. No one seriously suggests that the age limits specified in the Constitution for Presidents and members of Congress should be interpreted to refer to other than chronological (earth) years because life expectancies now are longer, that a President's term should be more than four years because a more complicated world requires greater continuity in office, or that states should have different numbers of senators because they are no longer the distinct sovereign entities they once were. This seems to reintroduce Jefferson's puzzle. Why do we universally accept that the words written by earlier generations are binding?

The answer is that we accept those words, not because we acknowledge the authority of earlier generations over us, but because they serve as common ground in the way I described earlier. This matters, potentially greatly, because it affects how we interpret these words in controversial cases. For Jefferson's reason, the objective of interpretation is not—and should not be—“fidelity,” in any meaningful sense, to the people who drafted or adopted the Constitution. Their judgments, including the judgments reflected in the words they adopted, are entitled to respectful consideration as precedents, but no more; and we have overridden their judgments on a number of important issues. Rather, the objective, in interpreting the text, is to make sure that the text can continue to serve as common ground. This can be called the conventionalist justification for relying on the text. The text serves as a convention, a focal point of agreement.<sup>35</sup>

In this Part, I will explain the conventionalist, or common ground, justification for following the text and the original understandings. In Section IV.A, I will explain how conventionalism can justify adhering to the text of the Constitution, notwithstanding Jefferson's objection. In Section IV.B, I will discuss why our Constitution, in particular, is well-suited to serve as common ground in this way, and why originalism, at least in certain rigid forms, is deeply inconsistent with the genius of the Constitution. Section IV.C extends the conventionalist justification beyond the text itself to the Framers' intentions and precedent. Finally, in Section IV.D, I will try to show that the common ground account is not sectarian: It does not depend on a contested view about what it means to adhere to American traditions, but it also does not require that people accept Jeffersonian skepticism about the value of the past.

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35. For other conventionalist arguments for legal obligation, see sources cited *supra* note 19.

*A. Conventionalism and the Text*

Conventionalism, as I said earlier, is a generalization of the notion that it is more important that some things be settled than that they be settled right.<sup>36</sup> Left to their own devices, people disagree about various questions, large and small, related to how the government should be organized and operated. In some cases, such as the President's term of office or the number of senators, the Constitution provides answers. In many other cases, the text limits the set of acceptable answers. This is true, for example, of the features of the criminal justice system: Although the Bill of Rights and other provisions of the Constitution do not prescribe exactly what the criminal justice system will look like, certain essential features (juries, witnesses called by the parties, representation by counsel, trials that are not held in secret or at a place remote from the crime) must be present under any straightforward reading of the text. Even when the constitutional provisions are quite open-ended, as in the case of the Religion Clauses for example, having the text of the clauses as the shared starting point at least narrows the range of disagreement.

People who disagree about a constitutional question will often find that although few or none of them thinks the answer provided by the text of the Constitution is optimal—either the specific answer, if one is provided, or the limit on the set of acceptable answers—all of them can live with the limits that the text imposes. Moreover, not accepting the limits imposed by the text has costs—in time and energy spent on further disputation, in social division, and in the risk of a decision that (from the point of view of any given actor) will be even worse than the decision that will result from adhering to the limits imposed by the text. In these circumstances, sometimes the best course overall may be to follow the admittedly less-than-perfect judgment reflected in the text of the Constitution.

The text, in this way, provides what game theorists call a focal point. In a game that has elements of both conflict and coordination, there will be multiple equilibria, and the solution will often depend on social conventions or other psychological facts. The most common examples are deciding whether traffic should keep to the left or the right, or who should call back if a telephone call is disconnected. In such circumstances, the solution will often be the action that, simply by virtue of an accident of culture or history, seems natural or has become habitual.

Some political disputes have roughly the structure of the so-called “battle of the sexes” game: Each side would prefer its own first choice, but

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36. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right.”).

each is willing to give up its own first choice if necessary to avoid conflict.<sup>37</sup> Although you and I may have different ideas about the optimal length of the President's term of office, we agree that a quick resolution is better than the uncertainty or prolonged conflict that might result if we insisted on our respective first choices. Here, unlike the situation in which people are deciding whether to keep to the right, there is some conflict of interest between the parties, as well as some common interest. But in this situation too, the outcome of the game can be determined by social conventions that may make one solution stand out as obvious or appropriate.<sup>38</sup>

The text of the Constitution is a particularly good focal point of this kind. Because of the way it is regarded in our culture, it is a natural place to look for a solution on which we can all agree, when agreement is especially valuable. But the Constitution's cultural salience, and its usefulness in resolving disputes—not its optimality or the authority of the Framers—are the reasons for following it.<sup>39</sup>

Another analogy might be between our practice of adhering to our eighteenth- and nineteenth-century Constitution and the reception of Roman law in Europe in the late Middle Ages. Roman law, when it was rediscovered in Western Europe, was an accessible, comprehensive, and basically acceptable set of rules. Various peoples' purported ancestral ties to Rome undoubtedly helped Roman law gain acceptance—another parallel to our Constitution—but the actual promulgators of Roman law obviously had no claim to obedience. It is also not likely that the provisions of Roman law were the best that could be devised as an original matter. It was simply that Roman law was a coherent body of law that was at hand, and its adoption avoided the costly process of reinvention.<sup>40</sup>

This is what makes the text of the Constitution binding—the practical judgment that following this text, despite its drawbacks, is on balance a good thing to do because it resolves issues that have to be resolved one way or the other. Every time the text is ignored or obviously defied, its ability to serve as common ground, as a focal point, is weakened. On the other hand, every time we plausibly demonstrate that a conclusion we have reached can be reconciled with the language of the Constitution, we make it easier for

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37. In the traditional statement of the “battle of the sexes” game, *A* wants to go to the ballet, and *B* wants to go to a boxing match, but each would prefer to sacrifice his or her preference in order to be with the other. The game apparently originated in R. DUNCAN LUCE & HOWARD RAIFFA, *GAMES AND DECISIONS* 90-94 (1957).

38. For example, see the argument in DAVID M. KREPS, *GAME THEORY AND ECONOMIC MODELLING* 101-02, 143-44 (1990).

39. For this kind of use of the “battle of the sexes” game, see JEREMY WALDRON, *LAW AND DISAGREEMENT* 103-04 (1999); and Strauss, *Constitutional Interpretation*, *supra* note 26, at 910-11.

40. See, e.g., PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 61-63, 71-101 (1999).

the Constitution—either the same provision or some other provision—to serve the function of narrowing or eliminating disagreement. We will have to put up with a malapportioned Senate and with disqualifying naturalized citizens from the presidency, but we will gain by narrowing or eliminating disagreement on many other issues.

This common ground, or conventionalist, justification for treating the text as binding is based both on the interest of society as a whole and on the requirements of fairness. It will not always be in the self-interest of every individual to follow the text. Any one individual might, in theory, be better off if he can follow his own judgments where they diverge from the text but can insist that others adhere to the text where he agrees with it. But often everyone will be better off if everyone follows the text than if people generally insist on their own judgments. In these circumstances, the argument for following the text rests on a basic principle of fairness: It is unfair to take advantage of others' cooperation in a mutually beneficial scheme if one does not cooperate oneself. The argument may also be consequentialist: It may be that if one person cheats, by failing to follow the text, others are more likely to cheat too, and soon the ability of the text to coordinate behavior will be lost, to everyone's detriment.

#### B. *Conventionalism, Originalism, and the Genius of the Framers*

What makes the Constitution of the United States a good focal point, so that adhering to it might be justified on conventionalist grounds? After all, this conventionalist justification for following the text will not work for just any text. It will make sense only if certain things are true of the text. For example, if the text were entirely open-ended—if it did not prescribe anything in any case—it could not serve as common ground in the conventionalist sense. More important, if the text forced truly unacceptable outcomes on us, the drawbacks of using it as a focal point might outweigh the gains. It might still be possible for certain provisions to be focal even if others were disregarded; it is difficult to figure out, as a matter of social psychology, just what makes something an effective focal point. But surely we are much more likely to get the conventionalist benefits of, say, the provision limiting the President's term of office, if we can say that the whole Constitution is common ground than we are if we routinely disregard parts of the Constitution and try to insist that only certain clauses are binding.

Our Constitution is, in certain important ways, very well designed to serve as common ground. It is sometimes objected that the conventionalist justification is too cold-blooded: It seems to reduce the Constitution from being a quasi-sacred document, the product of the Framers' genius, to being a desiccated focal point. If this were true, then the conventionalist

justification might be another sectarian account, not something that can serve as part of an overlapping consensus among different conceptions of American citizenship. But it is by no means an implication of conventionalism that the Constitution is “merely” a focal point. On the contrary, it takes a certain kind of genius to construct a document that uses language specific enough to resolve some potential controversies entirely and to narrow the range of disagreement on others, but also uses language general enough not to force on a society outcomes that are so unacceptable that they discredit the document.

The genius of the Constitution is that it is specific where specificity is valuable, general where generality is valuable—and that it does not put us in unacceptable situations that we can’t plausibly interpret our way out of. There is reason to think the Framers were self-conscious about this, for example in their elliptical (albeit doomed) treatment of slavery in the original document. Edmund Randolph gave essentially this advice to the Committee on Detail at the Constitutional Convention: “[T]he draught of a fundamental constitution,” he said, should include “essential principles only; lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events.”<sup>41</sup>

Our political culture today seems to have internalized the requirements of conventionalism: that there is a time for specificity in the Constitution, but there is also a time for generality that will allow interpretive flexibility in the future. People seem to recognize, for example, that when constitutional amendments address large-scale problems, they should be written in general terms; it is commonly said that the Constitution should not be “cluttered up” with amendments that are too specific or that respond too narrowly to particular current controversies.<sup>42</sup> But at the same time, we are willing to add highly specific amendments to the Constitution, such as the Twenty-Fifth Amendment, providing for presidential disability, or the Twentieth Amendment, specifying the dates when the President will be inaugurated and Congress will convene.

One important implication of conventionalism is that this choice between generality and specificity is a crucial constitutional decision. That is why originalism is, despite its pretensions, inconsistent with the true genius of the Constitution. At least this is so if originalism means that whenever the text of a constitutional provision is unclear, the understandings of those who adopted the provision will govern until the provision is formally amended. That approach takes provisions that the

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41. See SUPPLEMENT TO MAX FARRAND’S *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 183 (James H. Hutson ed., 1987).

42. See, e.g., LOUIS MICHAEL SEIDMAN, “GREAT AND EXTRAORDINARY OCCASIONS”: DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE 9-25 (1999).

Framers left general and makes them specific. The drafters and ratifiers of the First Amendment may well have thought that blasphemy could be prohibited; the drafters and ratifiers of the Fourteenth Amendment thought that racial segregation and gender discrimination were acceptable. Had the amendments said those things, in terms that could not be escaped by subsequent interpreters, our Constitution would work less well today.

But the text does not express those specific judgments. As a result, instead of having to read the First or Fourteenth Amendments out of the Constitution, we are able to read our own content into them—following a common law approach—and then use those provisions, interpreted in that way, to enhance the prestige of the Constitution as a whole. That, in turn, more thoroughly entrenches the specific, focal provisions of the Constitution. The Constitution as a whole commands allegiance more readily when the Equal Protection Clause is interpreted to outlaw state-enforced segregation rather than in the way the ratifiers of that Clause understood it. Making the general provisions specific, as originalists would, undoes this ingenious project.

### C. *Conventionalism Beyond the Text*

Conventionalism therefore provides a justification for a practice—paying attention to the words of the Constitution—that Jefferson’s argument calls into question. But other things, besides the text, can serve as focal points, and the conventionalist justification need not be limited to the text. Precedents can be focal; original understandings can be focal. The use of such focal points is often almost instinctive, as one might expect; it is a characteristic of a useful focal point that adherence to it seems natural. Whatever the focal point, however, when adherence to a position rests on conventionalist grounds, the extent of adherence cannot outrun the justification. If the justification for following the original understanding on a particular point is the conventionalist justification, then following the original understanding is justified, speaking roughly, only so long as the costs of unsettlement (including the “cost” of unfairness, if one is departing from a rule while taking advantage of others’ compliance) are greater than the benefits that might come from the departure.<sup>43</sup>

There is an important connection between the conventionalist and common law justifications for our constitutional practices. Conventionalist

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43. This identifies a difference between *stare decisis* and common law constitutionalism. Following recent precedents on specific issues is conventionalist. The Burkean or bounded rationality justifications are limited to longer-standing principles. On these points, see generally Young, *supra* note 32.

ideas were a central part of classical common law ideology,<sup>44</sup> and the importance of focal points is an indispensable part of the justification for the common law approach to constitutional interpretation. If past decisions were respected only because they reflected accumulated wisdom, then there would be no obvious reason to give priority to past *American* decisions. Decisions from other countries might be equally useful, indeed more useful, if they arose from circumstances that more closely resemble current American conditions. The present-day United States obviously resembles late-twentieth-century Canada more closely than it resembles nineteenth-century America. Information on how current Canadian law resolves certain issues might play a role in American legal arguments. But Canadian law, however recent and relevant, does not have the precedential effect of even a distant American decision. That is a settled aspect of our practices, and the common law account, in itself, does not fully explain it.

If there is a justification for that aspect of our practices, that justification must rest on conventionalist ideas. American law could surely profit from a more systematic consideration of what other countries do.<sup>45</sup> But it would be very difficult for a decisionmaker to have to consider an undifferentiated collection of precedents and institutions from multiple legal cultures. It is much more manageable to deal just with the relatively coherent body of American (national) law. The potential gain from drawing on the accumulated wisdom of many societies would be outweighed by the unmanageability of the task. A relatively coherent body of law is at hand; that body of law is not obviously inferior to others; and, strictly as a matter of cultural fact, there is widespread acceptance of the use of that body of law. The conventionalist argument is that, in these circumstances, it is better to look only to that body of law.

#### D. *Conventionalism and the Overlapping Consensus*

Jefferson's argument suggests that any form of adherence to decisions made in the past is irrational or, worse, both irrational and oppressive. The common law and conventionalist justifications for paying attention to the Constitution are consistent with that skeptical approach: They provide reasons for adhering to the text of the Constitution, and (to a limited degree) original understandings, that do not depend on anything that even a skeptical Jeffersonian could fairly call ancestor worship. But it is also important that the common law and common ground justifications not require one to adopt Jefferson's form of skepticism.

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44. See, e.g., GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 110-43 (1986).

45. For a discussion of the usefulness of such comparisons, see VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 144-89 (1999).

The solidarity needed to make a functioning political society has many cultural and emotional sources. It is not reasonable to expect people to continue to adhere to political institutions without having, or developing, affective ties to those institutions. A justification for a legal practice cannot treat those affective ties as misguided, or as the product of a kind of useful delusion. The justification cannot itself have a quasi-ethnic or quasi-religious character, but it has to be able to appeal to people who, unlike Jefferson, attach moral importance to the relationship between generations.

Someone who believes that being an American means joining an ongoing tradition that began with the Framers can—indeed, should—fully embrace the common law and common ground justifications. The common law approach provides a way to understand the idea of an ongoing American tradition. The common ground approach can be understood to assert precisely that one thing Americans have in common is allegiance to the text of the Constitution. The skeptic would adhere to the text (in the way required by the common ground argument) just because it is useful and fair to do so. People with more elaborate views about the provenance of the Constitution will have other reasons for adhering to the text. But those people can also fully endorse the common ground arguments without feeling that they must regard their more elaborate views about American traditions as irrational. Those more elaborate views just give them additional, strong reasons to endorse the common ground arguments.

The common law and common ground justifications might, of course, require some people to modify views they hold about the Constitution. Someone who believed that the Framers were divinely inspired would find much to accept in the common law and common ground accounts, but—depending on exactly what it means to be divinely inspired—might have to forgo some claims, as well. The common law and common ground accounts do not justify an uncritical adherence to the original understandings, for example. But for two reasons, it is acceptable for the common law and common ground accounts to require people to modify their understandings of the Constitution, so long as those accounts allow room for a wide range of conceptions of American traditions and American identity and do not require skepticism of Jefferson's kind.

First, the common law and common ground justifications provide reasons to adhere to the Constitution that can be, and should be, accepted by everyone. To go beyond those justifications is to impose a particular quasi-ethnic (or quasi-religious) conception of American identity. That should not be the basis for governing a diverse liberal society. People are entitled to hold such a conception of American identity and not to have their views disparaged, but people cannot insist that others comply with that conception. They can insist that others go as far as the common law and common ground justifications dictate, but they cannot insist on more.

Second, the common law and common ground accounts are consistent with current practices in the way that a more thoroughgoing commitment to the original understandings, for example, is not. As I have said, much of current constitutional law conforms to the common law model. Someone who wanted to reject the common law model in favor of an original understanding approach not only would be relying on a sectarian justification but would be overturning important and thoroughly settled constitutional principles about race and gender discrimination, freedom of expression, and a number of other subjects. And, as I am about to argue, the common ground approach is consistent with the way in which the text of the Constitution operates in practice.

#### V. CONSTITUTIONAL INTERPRETATION AFTER JEFFERSON

The common law and common ground justifications provide an answer to Jefferson's question that does not require people to accept a specific, sectarian conception of American citizenship. But these justifications are important for more concrete purposes as well. They account for many aspects of our constitutional system that are well settled, but that seem, at first glance, hard to explain.

In particular, these justifications explain why the text of the Constitution seems to matter more for less important questions—seemingly an inversion of the way the Constitution should be interpreted. They also explain a kind of verbal fetishism that seems to characterize the way the text is used: The words of the text can justify a decision even when the original understandings of the words would require a different decision. And these justifications explain why arguments that do invoke original understandings are so often characterized by “law-office history”—the selective use of sources to support a position, rather than an effort truly to reconstruct the understandings of an earlier time—and why the use of law-office history is, despite the dismissive term, acceptable.

Finally, the common law and common ground justifications provide answers to some unsettled problems of constitutional interpretation. They explain what should be done when an apparently well-established line of precedent appears to be inconsistent with the ordinary meaning of the text. And they shed light on a question that is not currently salient but that may become so: whether the effect of an apparently authoritative command from the People—an amendment of the Constitution designed to secure a specific result—can change over time.

A. *Why the Text Matters More for Less Important Questions*

It appears to be a persistent feature of our constitutional practice that the text of the Constitution matters most when the least important issues are at stake. “The Court offers a formal analysis in insignificant cases . . . and formless balancing in more serious cases.”<sup>46</sup> This seems anomalous: If the text is important because of the authority of those who adopted it, or because it represents the will of an intergenerational community, then the text should be the primary source of law when the issues are most important. But instead, when the most momentous issues are on the table, the text tends to disappear. When the questions are relatively technical, the text is often the principal focus.

The so-called structural provisions of the Constitution—the provisions of the original Constitution that allocate powers among the branches and between the states and the federal government—provide the clearest examples. Many of the structural provisions of the original Constitution are relatively precise. One would expect those provisions to be applied in a way that emphasized the text and eschewed more general arguments of policy. As several commentators have noted, however, the Supreme Court’s decisions in this area seem to vacillate between the highly “formalistic” and the more “functional.” In the “formalistic” decisions, the Court’s opinion focuses closely on the language of the Constitution and pays little attention to more general policy concerns; the “functional” opinions pay little attention to the text of the Constitution and instead emphasize, for example, the policies underlying the separation of powers, or the policies that might justify legislation that seems inconsistent with the separation of powers.<sup>47</sup>

But the vacillation is not random. When the Court had to decide whether the President could seize steel mills, assert executive privilege in a criminal investigation of his associates, or conclude an agreement for the release of hostages held by a foreign power—in, respectively, *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>48</sup> *United States v. Nixon*,<sup>49</sup> and *Dames & Moore v. Regan*<sup>50</sup>—it paid little attention to specific textual provisions. Indeed, Justice Jackson’s celebrated opinion in *Youngstown Sheet & Tube Co.*, which provided the template for much of the law in the area, begins with an explicit disclaimer about the “poverty of really useful and

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46. Frank H. Easterbrook, *The State of Madison’s Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1340 (1994) (lamenting this tendency).

47. In particular, see Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—a Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987); and Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991).

48. 343 U.S. 579 (1952).

49. 418 U.S. 683 (1974).

50. 453 U.S. 654 (1981).

unambiguous authority” in the text and in other historical sources.<sup>51</sup> When the Court ruled that the President is absolutely immune from civil actions arising out of the conduct of his office, it brushed aside a substantial textual argument to the contrary and relied entirely on functional concerns.<sup>52</sup> In its opinion upholding the independent counsel statute, the Court rejected the argument that the prosecutorial function is part of the “Executive Power” vested in the President by Article II, Section 1, by asserting, in a similar functional vein, that the statute did not “unduly interfer[e] with the role of the Executive Branch.”<sup>53</sup> The opinion upholding the United States Sentencing Commission took a similar approach.<sup>54</sup>

Textual arguments become central only when the stakes are lower. Perhaps the most notoriously “formalist” opinion is *INS v. Chadha*, which declared the legislative veto unconstitutional.<sup>55</sup> The Court in *Chadha* relied on what it characterized as “[e]xplicit and unambiguous provisions of the Constitution”<sup>56</sup> and pointedly refused to consider whether the legislative veto was “efficient, convenient, [or] useful in facilitating functions of the government.”<sup>57</sup> There is a difference of opinion over how important *Chadha* was,<sup>58</sup> but it is at least clear that the legislative veto was seldom exercised,<sup>59</sup> that Congress had plausible substitutes for the legislative veto,<sup>60</sup> and that the decision in *Chadha* did not approach—in practical

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51. See 343 U.S. at 634 (Jackson, J., concurring).

52. See *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); cf. U.S. CONST. art. I, § 6 (providing an explicit immunity to senators and representatives).

53. See *Morrison v. Olson*, 487 U.S. 654, 693 (1988).

54. See *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (quoting Justice Jackson’s *Youngstown Sheet & Tube* opinion, and adopting a “pragmatic, flexible view of differentiated governmental power”).

55. 462 U.S. 919 (1983).

56. *Id.* at 945.

57. *Id.* at 944.

58. Justice White’s dissent in *Chadha* asserted that the decision was “of surpassing importance,” although he may have meant only that it invalidated a large number of legislative veto provisions, not that those provisions were themselves of great importance. See *id.* at 967 (White, J., dissenting). At least one commentator has taken the position that the approach adopted in *Chadha*, if generalized, would significantly affect the structure of the Constitution. Victoria Nourse, *Toward a New Anatomy of Constitutional Structure* (Nov. 12, 2002) (unpublished manuscript, on file with author). Eskridge and Ferejohn make a parallel argument, but note that *Chadha* is an outlier: “The Court’s results and reasoning in other constitutional cases suggest that the Court itself has not internalized its *Chadha* understanding of Article I, Section 7 . . . .” Eskridge & Ferejohn, *supra* note 24, at 558.

59. See, e.g., E. Donald Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 151 (“It is certainly true that Congress seldom actually invokes the legislative veto.”). Elliott does go on to assert that the infrequent use of the veto does not establish its unimportance. *Id.* at 152.

60. See Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1420-23 (1977); Elliott, *supra* note 59, at 156-57; Frederick M. Kaiser, *Congressional Action To Overturn Agency Rules: Alternatives to the “Legislative Veto,”* 32 ADMIN. L. REV. 667 (1980). See generally David A. Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 U. VA. L.

significance or political salience—the decisions in *Youngstown Sheet and Tube, United States v. Nixon, Dames & Moore*, or, probably, the independent counsel or sentencing commission cases. Moreover, whatever the significance of *Chadha*, the Court followed a formalistic approach similar to *Chadha*'s in relying on the text to resolve a series of relatively technical questions under the Appointments Clause, questions that were indisputably less important than many of those involved in the more “functional” decisions.<sup>61</sup>

In a sense, this pattern should not be surprising: When the Court decides cases concerning intensely controversial subjects like equality or reproductive freedom, text and original understandings are left far behind. In fact, in area after area—freedom of expression, state sovereign immunity, the Takings Clause—it is difficult to identify any case in which the language of the Constitution plays an operative role in the analysis.

According to the usual justifications for adhering to the text—the Austinian account or one that emphasizes intergenerational community—this practice is perverse. But conventionalism makes sense of it. When the stakes are high, people are less likely to accept a solution just for the sake of having the matter resolved with minimal friction. They are willing to live with controversy as the price of trying to resolve the issue in the way they think is correct. The text becomes important only when it is more important that the issue be settled than that it be settled just right. Some separation-of-powers issues are like that. It is important to have settled which acts are valid, which political actor must make which decision, and the like. The abstract correctness of those decisions often matters less than having them decided; the benefits of having the matter settled outweigh the costs of reaching what might be the wrong answer. Consequently, our practices are more formalistic.

There are certainly some exceptions to the generalization that the text matters most for the least important questions, but those exceptions tend to bear out the conventionalist justification: They occur when the costs of unsettlement are so great that even important provisions should be interpreted formalistically. The provision that each state have two senators is an example. It is unthinkable that a court would declare that provision unconstitutional as a violation of the principle of one person, one vote—even though such a result would probably be no more at odds with the original understandings than the Supreme Court's actual reapportionment decisions. But here, too, the adherence to the provision is best understood on conventionalist grounds. The provision is entirely clear (indeed, it is

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REV. 253, 288-90 (1982); Antonin Scalia, *The Legislative Veto: A False Remedy for System Overload*, REGULATION, Nov.-Dec. 1979, at 19, 24.

61. See, e.g., *Freytag v. Comm'r*, 501 U.S. 868 (1991); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Buckley v. Valeo*, 424 U.S. 1 (1976).

entrenched in the Constitution, purportedly against constitutional amendments—Article V provides that no state may be deprived of its equal representation in the Senate without its consent).<sup>62</sup> It is extremely salient, and the subject it addresses is very sensitive because it affects what counts as a validly enacted law. A constitutional decision at odds with the clear language would therefore be highly destabilizing, and the conventionalist argument for adhering to the ordinary meaning of this provision—instead of instituting a common law movement toward a state of affairs that might be more justifiable as a matter of morality—is very strong.<sup>63</sup>

### B. *Verbal Fetishism and the Incorporation Debate*

The conventionalist answer to Jefferson's argument guides the interpretation of the text in a straightforward way. It suggests that, other things equal, the text should be interpreted in the way best calculated to serve as common ground: to provide a focal point of agreement and to avoid the costs of reopening every question. In a sense there is nothing "inherent" in the text, whatever that might mean, that tells us that the President's "Term of four Years" means four years on the Gregorian calendar. Nor do we interpret the text that way because we want to maintain fidelity to long-ago generations. We break faith with them (if that is the right way to put it) over much more important issues. We interpret the text in the obvious and natural way because that is most likely to settle the issue once and for all without further controversy.

The same is true when the text only narrows the range of disagreement instead of specifying an answer. The reason we do not engage in fancy forms of interpretation that would permit us to question the length of the President's term, or the citizenship qualification, or other "textual" resolutions of issues, is that the leading function of the text—to provide a ready-made solution that is widely acceptable—would be subverted by interpretations of the text that struck most people as contrived.

There is, of course, no issue about the President's term and the Gregorian calendar. But in other contexts, this implication of conventionalism becomes quite important. In particular, it explains the aspect of our practices that might otherwise seem like verbal fetishism—attaching undue significance to the happenstance of what words are used in the text—including the role that text played in the debate over whether the Fourteenth Amendment incorporates the Bill of Rights.

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62. U.S. CONST. art. V.

63. Even so, the conventionalist justification has its limits; in times of the greatest stress, such as Reconstruction, this provision was arguably disregarded. For a discussion, see John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 385-87 (2001).

Perhaps the most vivid illustration of this approach to the text is the interpretation of the provision of the Sixth Amendment that gives a criminal defendant the right “to have the Assistance of Counsel for his defence.”<sup>64</sup> There is little doubt that the original understanding of this provision was that the government may not forbid a criminal defendant from hiring a lawyer with his own money.<sup>65</sup> Today, of course, *Gideon v. Wainwright*<sup>66</sup> and subsequent decisions have established that in serious criminal prosecutions the government must provide counsel even for defendants who cannot afford it. That rule fits comfortably with the language, and the language has been used to support it. But in fact it is just a coincidence—almost a matter of homonymy—that the modern right to counsel is supported by the language of the Sixth Amendment. The drafters of the Sixth Amendment might have used some other language to express their intentions, language that would have made it more difficult to find support for the modern right (for example, that the accused shall have the right “to retain counsel for his defense”).

At first glance, it seems odd to use the language of the Sixth Amendment to support *Gideon* when it is only a coincidence that it does so.<sup>67</sup> But on the conventionalist account, this use of the language begins to make sense: So long as a court can show that its interpretation of the Constitution can be reconciled with some plausible ordinary meaning of the text—so long as it can plausibly say that it honors the text—the text can continue to serve the conventionalist function of narrowing disagreement. Original understandings are often hard to ascertain and are therefore unlikely to become focal points in any event; a departure from them is therefore not very costly. But once a judge or other official asserts the power to act in ways inconsistent with the text, the ability of the text to serve the common ground function is weakened. That is why it makes sense to adhere to the text even while disregarding the Framers’ intentions.

Probably the most impressive example of this aspect of our practices is the application of the Bill of Rights to the states through the Fourteenth Amendment, the so-called incorporation doctrine. The Bill of Rights

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64. U.S. CONST. amend. VI.

65. See *Bute v. Illinois*, 333 U.S. 640, 660-66 (1948); WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8-33 (1955).

66. 372 U.S. 335 (1963).

67. For an argument against such an approach to the constitutional text (characterized as “nonoriginalist textualism”), see Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 689-91 (1991). See also Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 114-15 (1989) (arguing against such an approach to statutory interpretation). But see T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 59-60 (1988) (defending, although not on conventionalist grounds, such an approach to statutory interpretation). For a sustained account of the Founding generation’s view of how meaning should be assigned to the text—an account generally inconsistent with using present-day meanings—see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003).

originally applied only to the federal government. In a series of decisions, mostly in the 1960s, the Supreme Court applied to the states essentially all of the provisions of the Bill of Rights that protect criminal defendants.<sup>68</sup> The effect was to bring about a large-scale reform of the criminal justice systems of the states. These decisions were the culmination of a protracted argument, mostly between Justices Black and Frankfurter (and their respective followers outside the Court), over the appropriateness of incorporation.<sup>69</sup>

Three things seem clear about the incorporation issue. First, it went from being a subject of intense controversy—probably the most controversial issue in constitutional law between the mid-1940s and mid-1950s, and one of the most controversial for a decade or more thereafter—to being a completely settled issue. The incorporation controversy involved the most divisive matters—criminal justice, federalism, and, implicitly, race. But by the mid-1980s, even the most severe critics of the Warren Court accepted incorporation, and some of them aggressively embraced it.

Second, incorporation came to be a settled issue even though it was not widely accepted that incorporation was consistent with the intentions of the Framers of the Fourteenth Amendment. During the time that incorporation took hold in the legal culture, the received wisdom was that the Framers of the Fourteenth Amendment did not intend incorporation.<sup>70</sup> Recent historical scholarship has seriously questioned that received wisdom.<sup>71</sup> But incorporation became uncontroversial long before any new historical understanding took hold in the legal culture generally. What the incorporation controversy and its denouement reveal about our practices is that—so far as the acceptance of incorporation in the legal culture was concerned—the Framers' intentions were essentially beside the point.

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68. The series of decisions is recounted in GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 702-09 (4th ed. 2001).

69. For example, in *Adamson v. California*, 332 U.S. 46 (1947), compare the concurring opinion of Justice Frankfurter, *id.* at 59, with the dissenting opinion of Justice Black, *id.* at 68. See generally JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* 130 (1989).

70. The received view is reflected in what was perhaps the leading work of constitutional theory of the time, ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 101-02 (2d ed. 1986), in which the author observed that the “weight of opinion among disinterested observers” is that the Framers of the Fourteenth Amendment did not intend incorporation. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *STAN. L. REV.* 5 (1949), reprinted in CHARLES FAIRMAN & STANLEY MORRISON, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS: THE INCORPORATION THEORY* 85 (1970) was widely thought to have established that incorporation was inconsistent with the original understandings. See also FALLON, *supra* note 2, at 144 n.22; *id.* at 15 (“It is at best questionable whether the framers and ratifiers of any constitutional provision understood themselves as having made the Bill of Rights applicable against the states . . .”).

71. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986).

Third, and most striking, despite the fact that there are textual difficulties with incorporation that its proponents never fully worked out—under the incorporation doctrine, the Due Process Clause of the Fourteenth Amendment seems, at first glance, redundant<sup>72</sup>—the widespread acceptance of incorporation has something to do with its use of the text. It helped enormously that the Court was reforming state criminal justice systems on the basis of conceptions that had some link to the text of the Bill of Rights, rather than on the basis of principles that did not have as explicit a textual foundation. It seems unlikely that the Court’s reform project would have succeeded in the way it did if the Court—instead of invoking the text of the Bill of Rights to aid its campaign—had simply devised a new set of rules for the states to follow, however sensible those rules might have been.

Since there was no general belief that the Framers (of either the Bill of Rights or the Fourteenth Amendment) contemplated that the text would be viewed in this way, and since the text doesn’t immediately lend itself to that interpretation, why should the textual basis of incorporation matter so much? If we don’t care about what the Framers thought they were doing, why do we care so much about the words they wrote? The conventionalist answer is that by connecting reforms of state criminal justice systems to the text of the Bill of Rights, the incorporation doctrine used the Constitution as a focal point. That is, in the face of widespread disagreement about criminal justice, the Court could take advantage of the fact that everyone thinks the words of the Constitution should count for something. People who might have disagreed vigorously about the merits of various reforms of the criminal justice system could all treat the specific rights acknowledged in the Bill of Rights as common ground that would limit the scope of their disagreement. A reform program that had a plausible connection to the text of the Bill of Rights was therefore more likely to be accepted than one that did not.

It is in this sense that incorporation is “consistent with the Constitution” in a way that a nontextual program of criminal law reform would not be. The point is not that the Framers, or the people, acting in 1789 or 1868, commanded the reforms that the Court undertook. As many other examples show, those are neither necessary nor sufficient conditions of a constitutional development. The Court undertook the reforms of the incorporation era, and the reforms lasted, because they made moral and practical sense, and because, by virtue of their connection to the text, society could reach agreement (or at least narrow the range of disagreement) on a legal outcome even in the face of deep moral disagreement.

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72. For an argument that the redundancy is only apparent and does not present an obstacle to incorporation, see AMAR, *supra* note 71, at 171-74, 364 n.42.

### C. *Law-Office History*

Historians, understandably, often criticize the use of history in legal controversies; they say that lawyers' use of history seems to involve not an effort to reconstruct the climate of an earlier generation but rather a picking and choosing of sources that will support a thesis that is arrived at for other, normative reasons.<sup>73</sup> The characterization seems generally accurate; the training of lawyers and historians is quite different. And as much as legal academics do "law-office history," courts and advocates—even the most historically sophisticated among them—are far worse. The selectivity is overt, and the effort to arrive at a contextual understanding of the past is all but nonexistent.

The use of law-office history is a standing rebuke to the traditional explanations for why we care about the Framers. If the objective of constitutional interpretation were to maintain fidelity or continuity with the normative vision of earlier generations, lawyers' and judges' characteristic uses of history would be a scandal. Lawyers are constantly reworking the alleged normative vision of earlier generations to serve their own, present-day, purposes. But there is no reason to think lawyers and judges will stop using law-office history any time soon; it appears to be a persistent feature of the legal culture.<sup>74</sup>

The common law and common ground justifications—particularly the former—do explain this practice, however, and show that it is not necessarily a scandal. We treat the views of the Founding generation in the way we would treat precedents. Sometimes we accept those views, sometimes we modify them, sometimes we just reject them—just as with old precedents. A lot depends on what has happened since the time the Framers' statements were made. If subsequent developments seem to bear out the wisdom of what was said in 1787, the fact that it was said in 1787 is an additional point in its favor. But if an argument made by a prominent Framers quickly disappeared and has had no influence in the intervening years, we seldom revive it. The use of law-office history would be a scandal if it were generally determinative of constitutional issues, but it is not. Evidence of original understandings has only limited value, and then only

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73. See, e.g., WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 5 (1988); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Friedman & Smith, *supra* note 2; Leonard W. Levy, *The Fourteenth Amendment and the Bill of Rights*, in *JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 64 (Leonard W. Levy ed., 1972); Jack N. Rakove, *Two Foxes in the Forest of History*, 11 YALE J.L. & HUMAN. 191 (1999). See generally Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

74. See, e.g., CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (1969); Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87 (1997); Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573 (2000).

if it is validated by practice in the intervening years, or by normative arguments about fairness or good policy. So limited, this use of history is defensible.<sup>75</sup>

This understanding of the use of the Framers' intentions explains several things that the usual accounts cannot explain. On an Austinian view, one would try to identify some sovereign, and its, or their, intentions would be binding. But that is not how evidence of original intentions is used in our system. Original intentions or understandings are seldom decisive. On several important issues, current law is at odds with original understandings. Notoriously, the original understanding of the Fourteenth Amendment was that school segregation and gender discrimination were acceptable, at least according to a near-unanimous consensus. There are many other examples as well.<sup>76</sup>

Also, it is quite unclear whose intentions or understandings matter. If there is an Austinian sovereign behind the Constitution, it is probably the people who attended the state ratifying conventions. This appears to have been Madison's view, at least at one point.<sup>77</sup> But materials from the ratifying conventions are cited indiscriminately with many other kinds of materials; they have no special status. One can use Madison's notes of the Convention to good effect even though they were not available to the people who ratified the Constitution. *The Federalist Papers* are treated as an authoritative source, although they were advocacy pieces that one would expect not to lay bare the most controversial aspects of the Constitution. Statements of the Framers are cited indiscriminately with those of prominent non-Framers (like Jefferson) and those of participants in the state ratifying conventions. Some Framers count for more than others; a good quotation from Madison is probably worth more than evidence of the views of the members of several state ratifying conventions. On an Austinian view, the most important task would be to identify the sovereign; only its, or their, intentions matter. If the objective is to maintain our connection to the American People, defined over time, then we should be careful to try to determine what the actual earlier generations believed, not just what a few

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75. "History in the service of life can never be scientific history." Posner, *supra* note 74, at 578 n.8 (quoting Werner Dannhauser, *Introduction to History in the Service and Disservice of Life*, in FRIEDRICH NIETZSCHE, UNMODERN OBSERVATIONS 73, 79 (William Arrowsmith ed., 1990)).

76. See, e.g., FALLON, *supra* note 2, at 15-17.

77. Madison's statement was: "If we were to look therefore, for the meaning of [the Constitution], beyond the face of the instrument, we must look for it not in the general convention, which proposed, but in the state conventions, which accepted and ratified the constitution." James Madison, Jay's Treaty (Apr. 6, 1796), in 16 THE PAPERS OF JAMES MADISON 290, 296 (J.C.A. Stagg et al. eds., 1989). For an account of how Madison's views changed over time, see JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 339-65 (1996). For a modern endorsement of this view, see Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 275-79 (1988). For a sophisticated challenge to this view, see Nelson, *supra* note 67.

very prominent individuals thought. But our actual use of historical evidence seems deliberately to ignore these very issues.

Once we understand that the Framers' views are not authoritative commands but are instead akin to precedents, however, these practices become less puzzling. We don't carefully distinguish Framers from ratifiers because they all matter a little. Those whose judgments we think we have other reasons to trust, like Madison, count for more, in the same way that an opinion by Holmes or Brandeis counts for more. But we will contravene even a clear original understanding when we are convinced that it is wrong, just as we will overrule a precedent sometimes.

That is why a persuasive argument that, say, James Madison would have disapproved of the independent counsel statute will, in practice, advance the case for the unconstitutionality of the statute, even if we cannot show that Madison's understanding was widely shared; but strong evidence that the Fourteenth Amendment was widely understood not to have anything to do with voting rights has simply been cast aside. Clear evidence of the original understanding would be crucial if we were, contra Jefferson, subordinating ourselves to the decisions of an earlier generation. But instead of doing that, lawyers making constitutional arguments follow the common law model. They make selective use of the wisdom of the past, modified by normative considerations, to address current problems. That use of the past is not history, in the usual sense—but then it is also not ancestor worship. It is a use of the past that is consistent with Jeffersonian skepticism, and it illustrates another way in which the common law and common ground accounts not only answer Jefferson but fit with settled legal practices.

#### D. *Precedent Versus Text*

What should be done when a consistent and long-standing line of precedent seems squarely in conflict with the text of the Constitution? Should the Supreme Court adhere to the precedents, even after it becomes convinced that this conflict exists? Self-styled textualists and originalists answer in the negative; they assert that the precedent, which is not the “real Constitution,” must give way to the text, which is.<sup>78</sup> But this claim cannot be justified, at least not without much more argument.

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78. See, e.g., Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 408 (1988); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27-28 (1994); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1548 n.38 (2000); see also *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring).

The Fourth Amendment provides an illustration. Current Fourth Amendment law—which presumptively requires a warrant before a search may be conducted—is hard to reconcile with the plain language of the Fourth Amendment. The Fourth Amendment, read naturally, seems not to require warrants, but only to limit their availability. The original understanding, so far as we can tell, seems to bear out that reading of the text. Here again, the established gloss seems to have superseded the language; the “warrant requirement” has been read into the text, in somewhat the same way that “separation of church and state” has been read into the Establishment Clause.

It has been powerfully argued that, notwithstanding the precedents, the Fourth Amendment should be interpreted in a way that is consistent with the plain language and original understandings: Searches should be allowed, even without a warrant, if they are reasonable, and the Fourth Amendment’s limit on the availability of warrants should be viewed as a way of keeping government officials from claiming immunity against civil suits.<sup>79</sup> Good arguments can be made in support of this view. But the text is among the least important of them. If this revisionist view of the Fourth Amendment should be adopted, it should be adopted principally because it is more sensible—for example, if the warrant requirement serves no useful purpose in restraining the power to search and operates only as an arbitrary limit on law enforcement.

If that argument in support of the revisionist view of the Fourth Amendment is correct, the fact that the text supports it is significant for two purposes. First, it weakens the argument that departing from the “warrant requirement” would be destabilizing in conventionalist terms. The presence of textual support for the revisionist interpretation would help ensure that the common ground function of the text would be unimpaired; indeed, the ability of the text to serve as common ground might be enhanced by a decision that more obviously followed the text. Second, the language of the Amendment serves approximately the same role as an old precedent. The language of the Amendment strengthens the case for the revisionist interpretation of the Fourth Amendment in roughly the same way that a Marshall Court precedent would: It suggests that some people whose views we should take seriously supported the revisionist interpretation.

The one thing that should not be accepted, however, is the claim that changing Fourth Amendment doctrine to make it more consistent with the text is a matter of jettisoning “mere precedent” in favor of “the Constitution.” The priority of the text has to be justified. Sometimes

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79. This position was originally advanced in TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 38-45 (1969) and renewed in AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 31-45 (1997).

conventionalism justifies it. But in this instance more justification is needed. The text has been heavily glossed, providing another focal point, and the current law is not wholly irreconcilable with the text. There is an accumulation of precedent favoring the current view. If we insisted that the Framers' (presumably) different view about warrants is enough to overturn that accumulated precedent, we would be doing what Jefferson condemned: exalting the judgments of an earlier generation without adequate reason. The revisionist view may or may not be correct in the end. But the case for the revisionist view must rest primarily on its claim to superiority as a matter of policy, and only secondarily on the text.

E. *The Constitution and Commands*

Finally, there is an issue that is not currently controverted but that could arise, were the Constitution to be amended again. Even Jefferson did not deny that the current generation may govern itself. But the common law and common ground views do not seem to leave any room for that. Does the Austinian view—that the Constitution is, in some sense, a legitimate command that people are obligated to obey—have any remaining significance?

All the provisions of our Constitution that give rise to litigation are quite old. In recent years there appear to have been no significant cases decided under any amendment more recent than the Twenty-First, added in 1933. (There was litigation under the Twenty-Fourth Amendment, outlawing poll taxes, soon after its adoption, but such litigation seems unlikely to recur, at least on a large scale.) As a result, constitutional law today does not really illustrate the intertemporal nature of interpretation. Everything is more than a generation old, however generations are counted; the common law and common ground justifications for obedience therefore predominate.

But things do not have to remain that way. If an amendment were added to the Constitution, the Austinian justification could reassert itself, for a time. In virtually every session of Congress, for example, a constitutional amendment is proposed that would specify, in one way or another, that “voluntary prayer” is to be permitted in the public schools.<sup>80</sup> It is generally understood that the purpose of such an amendment is to overrule a series of Supreme Court decisions beginning with *School District v. Schempp*,<sup>81</sup> which held that it was unconstitutional for a public school to

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80. See, e.g., H.R.J. Res. 52, 107th Cong. (2001) (“Nothing in this Constitution shall be construed to prohibit individual prayer in public schools or to prohibit public school officials from including voluntary prayer in official school ceremonies and meetings. Neither the United States nor any State shall prescribe the content of any such prayer.”).

81. 374 U.S. 203 (1963). The development began with *Engel v. Vitale*, 370 U.S. 421 (1962).

conduct teacher-led devotional Bible reading in the classroom. Under *Schempp* and other decisions, the fact that a student could leave the classroom during the prayer was not enough to make the practice constitutional.

Suppose such a constitutional amendment were adopted, after a debate in which it was generally acknowledged that the purpose of the amendment was to overrule the Supreme Court's decisions. How should a court, or any other conscientious official (or citizen) interpret such an amendment? The answer to this question should change over time.

Immediately after the amendment was adopted, it seems clear that the correct interpretation of the amendment would be that it permits school prayer of the kind banned by *Schempp*. This is true even though the text, read in isolation, does not compel such a result. It is certainly plausible to say that school prayer of that kind is not "voluntary." Indeed, that is probably the best way to understand the basis of the Supreme Court's decisions (although it is not quite what the opinions said). But if the public debate on the amendment proceeded on the assumption, generally shared by all involved, that the issue was whether the Court's decision should be overruled, then it seems quite clear that it would be wrong for the courts or anyone else to interpret the amendment differently. In those circumstances, seizing on the term "voluntary" to produce a different result immediately after the amendment was adopted would be a kind of trickery, an action taken in bad faith.

If this is so, then one consequence is that originalism is, to a degree, rehabilitated from various attacks other than Jefferson's. Obviously there will be some problems in asserting that "everyone knows" or "everyone understood" that the purpose of the amendment was to overrule *Schempp*. Some people, somewhere, might not have understood that. In fact, during the debate some people would undoubtedly have made the argument that the amendment, as drafted, did not accomplish the effect the drafters sought, because it referred only to "voluntary" prayer. But it would still be possible for people living at the time to say, with confidence, that the provision was generally understood to overrule *Schempp*. To that extent, one of the common criticisms of originalism—that it is impossible in principle to identify an original understanding—seems mistaken.

Over time, though, the interpretation of a voluntary prayer amendment could appropriately change. For Jefferson's reason, it would be acceptable for an interpreter to say, a few decades down the road, that although teacher-led school prayer was considered "voluntary" when the amendment was adopted, we have now come to understand, in the light of experience, that such prayer is never really voluntary, and that therefore the amendment should be understood only to allow prayer that is not officially sponsored. This would be inconsistent with the original understanding of the

amendment, but consistent with its language. Such an explicit reversal and rejection of the acknowledged original intent might seem jarring. But this is, in substance, no different from the most generally accepted justification for *Brown v. Board of Education*.<sup>82</sup> At one time it was thought that school segregation was consistent with equality; now we understand otherwise. Similarly, in *Minor v. Happersett*,<sup>83</sup> the Supreme Court, citing textual and historical evidence, held that the Fourteenth Amendment did not enfranchise women because it did not apply to voting; although the specific holding in *Minor* had to be reversed by constitutional amendment, its reasoning has now been emphatically rejected, without any serious reconsideration of the historical record. The hypothetical school prayer amendment would be different to the extent that it reversed an earlier Supreme Court decision, and this would be an additional reason for caution in moving away from the original understanding of the amendment. But otherwise the cases are parallel.

The justification for such a break with original understandings would have to be, as usual, a common law one. One would have to show that, even giving due deference to the judgment of those who adopted the provision, the conclusion they reached should now be overturned. That showing would be easier to make if there were a progression of cases in which the criterion of “voluntariness,” understood to permit school prayer, became more and more difficult to apply and was gradually eroded. In any event, one could not say that the language was irrelevant; under the hypothetical amendment, if school prayer were to be banned, it would have to be on the basis of an argument that was consistent with the text in some way.

One problem, of course, would be to identify the point at which a court would be justified in abandoning the original intentions—the point comparable to Jefferson’s nineteen years. Obviously this cannot be done with precision. The problem of defining this point is less severe than it might seem—less severe than it was for Jefferson, who had to choose an expiration date—because the text continues to be honored (for conventionalist reasons), and even the original understanding has the force of a precedent. And as with many things in a common law system, the judgment will depend on factors that cannot be reduced to a rule: not just the passage of time but the extent to which circumstances have changed or new facts have emerged, the difficulty in administering the old rule in contested cases, and so on. The one thing that seems clear is that the interpretation of legal provisions cannot remain static. That is one overriding lesson of Jefferson’s principle.

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82. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 863 (1992) (plurality opinion) (discussing *Brown*).

83. 88 U.S. 162 (1874).

## CONCLUSION

In the end, the way to answer Jefferson's question—how can one generation be permitted to bind another?—is, one might say, to accommodate Jefferson's skepticism without embracing it. Do we owe obligations of fidelity to the generations that came before us? Should we see ourselves as participants in an ongoing, intergenerational community of Americans? People should be able to answer those questions in different ways. The binding force of the Constitution should not depend on an affirmative answer to them; but constitutional interpretation should also not require everyone to accept a negative answer.

In some ways, it is easy to overstate the extent to which the Constitution does bind us. Much of constitutional law is a kind of common law, developed by precedents and traditions that depart from original understandings and, in some instances, are in tension with the text. To that extent, Jefferson's question need not be answered. But Jefferson's question cannot be wholly avoided, because the text of the Constitution is, without question, still part of the law today. The text binds us because it provides a kind of common ground—a way to resolve certain disputes, or at least to narrow the range of disagreement. The most resolute Jeffersonian skeptic can understand why that is a reason to adhere to the Constitution; but so can people who reject such skepticism and believe the Constitution to be an integral part of an ongoing American tradition to which they themselves belong.

The particular genius of the text of the Constitution is not that it solves all our problems, or even that it solves the most momentous ones. Anyone who looks to the text or the original understandings for those answers not only will have to deal with Jefferson's principle but will seriously misunderstand American constitutional law. But the text of the Constitution does solve some problems, and it helps advance us toward a solution of others. Jefferson's principle does not keep us from taking advantage of the fact that those earlier generations have given us something very useful.