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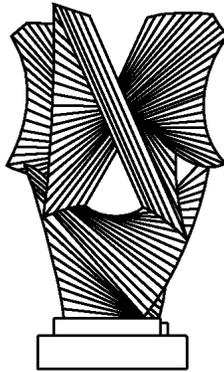
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## Common Law, Common Ground, and Jefferson's Principle

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

**David A. Strauss\***

*"The earth belongs to the living"*

"The earth belongs in usufruct to the living," Thomas Jefferson famously wrote from Paris in 1789, in a letter to James Madison. "The question [w]hether one generation of men has a right to bind another, seems never to have been started [sic] 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 any government." Jefferson's answer to the question, of course, was no. "We seem not to have perceived that, by the law of nature, one generation is to another as one independent nation is to another."<sup>1</sup>

Therefore, Jefferson said, "[e]very constitution . . . and every law," should "naturally expire[] at the end of 19 years." (Jefferson elaborately calculated, on the basis of life expectancies at the time, that a majority of people 21 and older would die within 19 years, and concluded that that was

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<sup>1</sup>Letter of Sept. 6, 1789, to James Madison, reprinted in xxx.

the best measure of a generation's life span.<sup>2</sup>) If any law "be enforced longer, it is an act of force, and not of right."<sup>3</sup>

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

Jefferson's principle remains, today, the central challenge to written constitutionalism—indeed perhaps to more than that, since much ordinary legislation is the product of earlier generations too. Jefferson's argument is the starting point for many discussions about the nature of constitutionalism.<sup>4</sup> But to this day it is 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. In our own legal culture, the questions are, 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?

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<sup>2</sup>See Letter of July 12, 1816, to Samuel Kercheval, reprinted in xxx; see also Letter of Sept. 6, 1789.

<sup>3</sup>Letter of Sept. 6, 1789.

<sup>4</sup>Eg most of the essays in Larry Alexander, ed., *Constitutionalism*

## *Commands and Intergenerational Obligations*

In the American constitutional tradition, most the answers that have been offered to these question take one of two general forms. One kind of answer 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>5</sup> Often this view seems to be not even asserted but assumed; people try to uncover what the Founding generations, 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 generations. One way we do that is to adhere, at least to some degree, to their decisions on questions of constitutional law. Many theories take this second form; some meld aspects of these two forms.<sup>6</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

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<sup>5</sup>E.g. Bork; Easterbrook; cf Posner. Also “translation?”

<sup>6</sup>Ackerman; Dworkin; Rubinfeld?; see Waldron on community extended over time. Melding?: Amar. Tushnet Foreword.

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. 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.

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 reasonably heterogeneous community, will define the tradition to which they belong in different ways. Especially in view of the changes that have occurred over time, both immigration and the enfranchisement of a larger percentage of the population—changes that greatly exacerbate Jefferson's problem and that his account did not anticipate—relatively few people alive today are even descended from the people who participated in the great constitutional decisions of the past. Nearly all of us are being asked to accept decisions made by someone else's ancestors. We might choose to do so, but it is difficult to see why people should be required to identify with a tradition in that particular way.

To put the point another way, the justification for using a written Constitution, and original intentions, should not be sectarian. It should—if possible—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 (if they have reasons for doing so) the moral vision of earlier generations. The way to try to develop such a conception, I believe, is to recognize that the intuitive appeal of Jefferson’s principle—that no generation has a right to bind another—rests, implicitly, on too narrow a view of the role of law. Specifically, it overlooks important ways in which 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. There are at least two other possible reasons why one 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>7</sup> Sometimes, in the familiar formulation, it is more important that things be settled than that they be settled right. A legal provision can settle things, and sometimes the importance 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 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>8</sup>

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

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<sup>7</sup>See, e.g., Michelman in Alexander, ed.

<sup>8</sup>See, e.g., Pocock, *The Ancient Law and the Constitution*.

constitutional obligation rely on arguments that should appeal to all reasonably members of the political community. The idea here is, of course, Rawls's notion of the "overlapping consensus": people who have different ideas about intergenerational obligation, or American identity—or who reject such notions altogether—should still be able to say that the common ground and common law justifications make sense.

In this paper I will try to develop the common law and common ground justifications for adhering to the decisions of earlier generations. 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. That is the aspiration, in any event.

On a more concrete level, I will reach a few specific conclusions that might seem odd at first glance but that in fact are both plausible and fully in accord with our established practices. In fact, it is a strength of the common law and common ground justifications that it supports aspects of the legal culture that seem firmly rooted but that are very difficult to explain. For example, I will defend what might be seen as a kind of verbal fetishism: 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. I will also defend what is commonly called law-office history: the selective use of historical sources to support a conclusion reached on other grounds, as

opposed to historians' history—a genuine effort to understand, in context, an earlier time. I will also suggest that, in interpreting the Constitution, the text of the document matters most for the questions that are least important. Finally, I will defend a version of Jefferson's view of majoritarianism: the idea is that a majority's decision governs for a while, but recedes as time passes.

### *Why Not Sunset?*

Before doing so, it is worth considering Jefferson's own solution—that there should be an automatic sunset provision applied to all laws. In fact this solution only makes things worse. But at the same time it reveals two important things about the structure of the problem that Jefferson posed: it can be solved only by introducing an intertemporal element into interpretation, and that intertemporal element must be able to operate gradually over time.

The immediate difficulty with Jefferson's sunset solution is that it is hard to see how one can specify a non-arbitrary term of years for a provision to remain in effect. Jefferson's calculation that the magic period is 19 years is quite strange. But this difficulty is 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.” 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 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.

These familiar problems of legislative inertia and public choice will plague efforts to replace an expired law with something reflecting the current generation’s views. Perhaps even after much more than Jefferson’s 19 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—want 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. 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 has two important lessons, however. 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 to 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. "Historic continuity with the past is not a duty; it is merely a necessity."<sup>9</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 it either must, unavoidably, or should be preserved, and while permitting gradual adaptation.

### *Common law*

The common law method, roughly speaking, justifies legal decisions by relying on previous decisions. Those decisions can be judicial decisions, but they need not be. Many important constitutional issues, such as those arising between the President and Congress, are seldom litigated in court. In disputes over the scope of the President's power to commit troops abroad or to withhold documents from Congress—disputes that arise frequently but have never been finally decided by the Supreme Court—past practice

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<sup>9</sup>Holmes?

plays a crucial role. The use of the Watergate precedent in the recent impeachment debate is another example.

Of course it is not obvious in theory, and often not clear in practice, what it means to follow a precedent. Just as important, a central feature of the common law method is that rules derived from precedents need not always be followed. They can be modified or even overruled in order to make them better as a matter of morality or policy. This is a familiar aspect of the common law: precedent controls in a general way, but in determining what precedents require, or how far they are to be extended or cut back, or whether they are to be overruled entirely, inevitably requires one to make judgments of morality or social policy. Cardozo gave this description, in the twentieth century's best account of the common law method:

The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. . . . I do not mean, of course, that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance.<sup>10</sup>

Because it is based on precedent, the common law approach might be thought to be beholden to the past, and therefore, at first glance, might seem especially subject to Jefferson's objection. Paine's principal target was not written constitutions but the kind of traditionalism that has an affinity to the common law approach; his bete noir was Burke, who borrowed extensively from the common lawyers. But in fact the common law approach is, if anything, relatively well-suited to resist Jefferson's argument.

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<sup>10</sup>Benjamin N. Cardozo, *The Nature of the Judicial Process* 66-67 (Yale Univ. Press 1921).

For one thing, the practice of following precedent can be justified in fully functional terms, without relying on a controversial conception of national identity or intergenerational obligation. The most familiar justification is derived from Burke (although there is much else going on in Burke as well). In modern terms, the basis of this justification is that human rationality is bounded. The problems confronted by the legal system are complex and multi-faceted; 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.

It would be a mistake, though, to think of the common law approach as necessarily relying on a particular, Burkean, ideology. The core of the common law approach is that one builds on what has been done before, discarding it when reflection suggests that it is wrong but only after according it a presumption of correctness. This approach has deep epistemic roots, and one need not be a Burkean conservative, in any form, to accept it. William James, for example, offered an account that even echoes Burke's metaphors:

The individual has a stock of old opinions already, but he meets a new experience that puts them to a strain. Somebody contradicts them; or in a reflective moment he discovers that they contradict each other; or he hears of facts with which they are incompatible; or desires arise in him which they cease to satisfy. The result is an inward trouble to which his mind till then had been a stranger, and from which he seeks to escape by modifying his previous mass of opinions. He saves as much of it as he can, for in this matter of belief we are all extreme conservatives. So he tries to change first this opinion, and then that (for they resist change very variously), until at

last some new idea comes up which he can graft upon the ancient stock with a minimum of disturbance to the latter. . .<sup>11</sup>

The same idea is found in Quine's "maxim of minimum mutilation."<sup>12</sup>

The common law approach—starting with "old opinions," and building on them when, and to the extent that, they seem wrong—may reflect not just a familiar feature of our legal culture but something deep in human reason.

In any event, in the common law, every precedent can be reexamined and modified. Nothing from the past is automatically binding. In addition, unlike Jefferson's sunset solution, which supposes that generations end abruptly, the common law approach parallels the gradual succession of generations.<sup>13</sup> This is obviously not a foolproof way of solving Jefferson's problem; like any ideal theory of how law should be made or a society governed, it has to grapple with institutional issues. Perhaps, if the objective is to keep in the law in touch with popular sentiment, the principal responsibility for applying common law principles under an enacted provision should rest with officials who are more accountable to the electorate than judges usually are. This may be the way to understand various doctrines of deference to administrative agencies in statutory interpretation. In general, it will be very difficult to get a reliable empirical answer to the question of how much power unelected officials should have to enforce a constitution. Perhaps the most we can say is that in the American system, it seems settled that judges will play a prominent role,

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<sup>11</sup>"What Pragmatism Means"

<sup>12</sup>Web of Belief? See Lisa vanAlstyne, Aristotle's Alleged Ethical Obscurantism, 73 *Philosophy* 429 (1998), to which I am indebted, on these points.

<sup>13</sup>In one of Jefferson's famous later letters, in which he again endorsed periodic revisions of the Constitution, his remarks even took on a common-law like tone, calling for "wisely yielding to the gradual change of circumstances" and "favoring progressive accommodation to progressive improvement." Letter of July 12, 1816.

and that that it is not obvious that that apparently settled practice should be overthrown.

The common law approach might be challenged on a different ground: it might be said that judges or any other officials who purport to follow a common law approach will be more likely to act out of self-interested or other improper motives than officials who simply try to follow the will of earlier generations. Perhaps the consequences of such self-interested action are so severe that we are better off having officials believe that they should allow the earlier generation to rule us.<sup>14</sup> But that argument does not seem especially plausible. In principle the common law approach, unlike an approach that treats the decisions of earlier generations as permanently binding, provides at least a partial answer to Jefferson's objection. Moreover, to the extent we are committed to having judges play a central role in enforcing the Constitution, it is a virtue of the common law approach that common law—unlike detailed historical investigation—is one thing that judges are trained to do.

### *Constitutional law as a common law system*

For the most part our constitutional law has solved Jefferson's problem by becoming a common law system. In area after area, the law is determined by precedents.<sup>15</sup> The dispute in controverted cases is over the

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<sup>14</sup>Scalia, Originalism.

<sup>15</sup>In what follows I will discuss mostly constitutional law, although Jefferson's principle obviously applies to statutes too. I believe many of the things I say about the Constitution can also be said about statutory interpretation. The principal differences are that many statutes are more recent, and therefore the Austinian justification for obedience applies, with its implications for interpretation; and that much of the common law-like updating of statutes is done by administrators, not just by courts.

best reading of the precedents, and over what is fairer or more sensible policy. This is true, for example, of the constitutional law governing 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, state sovereign immunity—the great bulk of current constitutional litigation.

In all of these areas, there is almost never a contested case in which the text of the Constitution actually plays a role in the arguments or the decision.<sup>16</sup> The language of the provision often plays the ceremonial role of being quoted, followed by words to effect of “this Court has interpreted this provision to mean . . .” Then the real advocacy or opinion-writing, focusing on the precedents, begins. One could conduct a thought experiment: suppose the text of the Constitution were to be declared off-limits to advocates and judges, in the way that courts’ local rules often forbid the citation of unpublished orders. In all of the important areas of constitutional law that I have mentioned, very little, if anything, would change.

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

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<sup>16</sup>These claims are defended in David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996).

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 v. Sullivan*; and so on.) This entire body of doctrine is based in precedent, and it has developed in a textbook common law fashion. The principles have been worked out from case to case, modified and occasionally overruled, elaborated as new cases presented new problems. The sole textual referent is the famous clause of the First Amendment, which itself plays no operative role in the decision.

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 non-judicial precedents. Occasionally the historical background—the Federalist papers, for example—is relevant; as I will suggest below, that is not inconsistent with the common law approach. The text of the Constitution seldom matters at all. 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>17</sup> Of course in a wide range of cases those same advocates of textualism, like everyone else, rely on the precedents without mentioning or using the text, and without acknowledging—or, probably, even being aware, most of the time—that they are treating the precedents, not the text, as the real Constitution.

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<sup>17</sup>Printz, *Seminole Tribe*, Alden.

*The common law and original understandings*

Jefferson's problem arises, of course, not just for the use of the text but also for the use, in current controversies, of the original understandings of provisions adopted long ago. Original understandings do play a role in constitutional law. In fact, arguments based on evidence about original understandings probably play an operative role in actual constitutional arguments to a substantially greater extent than the text does. If you can show that, say, James Madison would have disapproved of the independent counsel statute, you have significantly advanced the case for the unconstitutionality of the statute. One might think that that is just the kind of ancestor-worship that Jefferson would have deplored. But on closer examination, the use of original understandings in our current practice conforms reasonably well to a common law approach.

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 (more on the ambiguity shortly) are sometimes, but rather 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 was acceptable, at least according to a near-unanimous consensus; and there is extremely strong evidence, reflected in the text, that the Fourteenth Amendment was never understood to outlaw gender discrimination or to affect voting rights—all contrary to settled interpretations. There are many other examples as well.

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. So, at least, some serious originalists have concluded.<sup>18</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 worth a dozen statements from unknown members of 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 thought, not just what a few very prominent individuals thought. But our actual use of historical evidence seems deliberately insouciant about these very points.

The best way to understand this practice is again according to the common law model. The views of members of the earlier generations are being treated like precedents. We don't carefully distinguish Framers and

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<sup>18</sup>See, e.g., Richard S. Kay, Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses, 82 Nw. U. L. Rev. 226, xxx (1988).

ratifiers because they all matter a little; those whose judgment we think we have other reasons to trust, like Madison, count for more, in the way an opinion by Holmes or Brandeis counts for more. Sometimes we accept these views, sometimes we modify them, sometimes we just reject them—just as with old precedents. Once the use of historical evidence is seen as an aspect of a common law approach, rather than as a search for the will of a sovereign, our current practices make much more sense.

Historians, understandably, often criticize the use of history in legal controversies, saying that the legal use of history seems not to involve 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>19</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 past times is all but nonexistent.

This is a persistent feature of the legal culture; there is no reason to think lawyers and judges will stop using law-office history any time soon. If the objective were to maintain fidelity or continuity with the normative vision of earlier generations, it would be a scandal. Lawyers are constantly reworking the alleged normative vision of earlier generations to serve their own, present-day, purposes. The reason this is not a scandal is that legal arguments don’t depend on a reconstruction of what earlier generations

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<sup>19</sup>Eg Rakove in Yale J L & Hum

thought—essentially for Jefferson’s reason.<sup>20</sup> They depend on making selective use of the wisdom of the past, modified by normative considerations, to address current problems. That is how lawyers use history, and it is, for lawyers, an appropriate use.

*Common ground and conventionalism*

So far as the Constitution is concerned, then, it appears as though we could say that, in our current practices, we are not truly bound by what Jefferson’s contemporaries or any other previous generation did. We are finding our own way. We pay attention to what has been decided before, but we feel free to modify those decisions, especially if we do so incrementally. Jefferson’s problem, if not completely solved, has been greatly ameliorated because we never treat the decisions of the past as anything more than advisory.

But one of the absolute fixed points of our legal culture is that no one goes that far. In particular, no one says that the text of the Constitution doesn’t 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, or disregarded in the way original understandings can.

On many important issues, the text is followed exactly, even when substantial arguments can be made that the judgments reflected in the text

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<sup>20</sup>See also Michelman.

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 distinctive 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>21</sup>

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<sup>21</sup>Many others have advanced a conventionalist justification for legal obligation. Hume the locus classicus. See also Gauthier, Holmes, Raz, Schauer (who links it to 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>22</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 a 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—either the specific answer or the limit on the set of acceptable answers—is optimal, all of them can live with that answer. Moreover, not accepting that answer 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 reflected in the text of the Constitution. In these circumstances, sometimes

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<sup>22</sup>See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (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.”).

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, is “focal” in the game theorists’ sense. In a cooperative game with multiple equilibria, 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. These are games of pure cooperation, but even when there is some conflict of interest, a focal point—a solution that, for cultural or psychological reasons, is more salient and therefore seems more natural—might be decisive.

In particular, 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 each is willing to give up its own first choice if necessary to avoid conflict.<sup>23</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 and obvious resolution is better than uncertainty or prolonged conflict, which could be highly destabilizing. The outcome of such a game can be determined by social conventions that may make one solution stand out as more natural or appropriate.<sup>24</sup> The text of the Constitution is a particularly good focal point of this kind: our culture has given it a salience that makes it the natural choice when cooperation is valuable. But its salience and general

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<sup>23</sup>In the traditional statement of the “battle of the sexes” game, A wants to go to the ballet; 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 and Howard Raiffa, *Games and Decisions: introduction and critical survey* 90-94 (Wiley 1967).

<sup>24</sup>See, for example, the argument in David M. Kreps, *Game Theory and Economic Modelling* 102, 143-44 (Clarendon 1990).

acceptability, rather than its authority or optimality, are the most important reasons for accepting it.

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 that dealt in a reasonable way with the issues faced by those societies; and its adoption avoided the costly process of reinvention.

This is what makes the text of the Constitution binding—the practical judgment that today following this text, despite its drawbacks, is on balance a good thing to do. 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've reached can be reconciled with the language of the Constitution, we make it easier for the Constitution—either the same provision or some other provision—to serve the conventionalist 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 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 best off if he can follow his own judgments where they diverge from the text but insist that others adhere to the text where he agrees with it. But, on the conventionalist account, 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.

The conventionalist justification for following the text will only make sense if certain things are true of the text. Of course 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 binding than we are if

we routinely disregard parts of the Constitution and try to insist that only certain clauses are binding.

The conventionalist justification is sometimes challenged on the ground that it is somehow 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—many of which revere the Constitution, and some of which view it as divinely inspired. 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. Today, we see the same outlook in many of the widely-held views about constitutional amendments. It is commonly said, for example, that the Constitution should not be “cluttered up” with amendments that are too specific or that respond too narrowly to particular

current controversies.<sup>25</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. Our political culture, perhaps unself-consciously, seems to have internalized the requirements of conventionalism: that there is a time for specificity, but there is also a time for generality that will allow for interpretive flexibility in the future.

This is why originalism is, despite its pretensions, inconsistent with the true genius of the Constitution. At least this is so if originalism is taken to require that the specific understandings of those who adopted a provision continue to govern until the provision is formally amended. 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 school 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 be worth less 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 them to enhance the prestige of the Constitution as a whole. That, in turn, more thoroughly entrenches the specific, focal provisions of the Constitution. Making the general provisions specific, as originalists would, undoes this ingenious project.

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<sup>25</sup>Eg Seidman guidelines.

### *Conventionalism and interpretation*

The conventionalist answer to Jefferson's argument has particular implications for how the Constitution is interpreted. Specifically, if the conventionalist argument is the reason for paying attention to the text of the Constitution, even though it was written by generations long gone, then the guiding principle of interpretation is to preserve the ability of the text to serve as common ground, to serve as a focal point that will narrow disagreement. The guiding principles are not obedience or "fidelity" to the Framers, "translating" the Framers' wishes, or carrying out the deeply-held views of the previous generations. These all presuppose either an Austinian justification or a particular, sectarian conception of American national identity and American citizenship. Or, to be more precise, and more in keeping with the idea of a overlapping consensus, the way in which we express our adherence or fidelity to earlier generations is to interpret the Constitution in a way that will allow it to serve as a focal point.

It may seem that this account of conventionalism assumes that the uninterpreted "text alone" provides answers to a significant range of constitutional issues. In fact the opposite is more nearly true. A conventionalist account not only accepts the need to interpret the text but gives relatively specific guidance about how to interpret the text. In any event, of course, the claim is not about the "text alone" at all, if that means the text read in isolation from any background understandings or presuppositions. Whatever guidance the text of the Constitution (or any other text) gives, it gives because of a complicated set of background understandings shared in the culture (both the legal culture and the popular culture). The premise of conventionalism is only that the text,

combined with a set of generally accepted background assumptions (that are difficult to specify but need not be specified for current purposes), occasionally provides answers and more often limits the set of acceptable answers.

Conventionalism 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 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, what ever that might mean, that tells us that the President's “Term of four Years” means four years on the Gregorian calendar. But interpreting it that way 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.

Usually this will mean that conventionalism calls for giving the words of the Constitution their ordinary, current meaning. That meaning will be more salient, and therefore more suitable as a focal point, than the meaning the Framers understood. This explains the aspect of our practices that might otherwise seem like verbal fetishism.

One dramatic but revealing illustration is the interpretation of the right to counsel in the Sixth Amendment. The Sixth Amendment gives a criminal defendant the right “to have the assistance of counsel for his defence.” There is little doubt that the original understanding of this provision was that the government may not forbid a defendant from having the assistance of retained counsel.<sup>26</sup> Today, of course, *Gideon v Wainwright* 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. 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

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<sup>26</sup>See William M. Beaney, *The Right to Counsel in American Courts* 8-33 (Greenwood 1955); *Bute v Illinois*, 333 US 640, 660-66 (1948).

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.

Perhaps 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 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. 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.

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>27</sup> Recent, extraordinary historical scholarship has thoroughly demolished that received wisdom.<sup>28</sup> But incorporation became uncontroversial long before the new historical understandings 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 is concerned—the Framers’ intentions were essentially beside the point.

Third, and most striking, despite the fact that there are textual difficulties with incorporation that its proponents never worked out—under the incorporation doctrine, the Due Process Clause of the Fourteenth Amendment seems, at first glance, redundant<sup>29</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

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<sup>27</sup>Fairman, Bickel

<sup>28</sup>Amar, Bill of Rights; Michael Kent Curtis.

<sup>29</sup>See Amar for an ingenious argument that it is not redundant. Again, however, the point is the understandings at the time incorporation became settled.

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 itself 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 tying reforms of state criminal justice systems to the text of the Bill of Rights, the incorporation doctrine could operate within the range of agreement in society. 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.

Conventionalism leads to at least one other possibly surprising interpretive practice: by and large, the text matters most for the least important questions.<sup>30</sup> This is another way in which the conventionalist justification for following the words of earlier generations departs from the Austinian justification. If the text is important because of the authority of those who adopted it, then it should be more important when the issues are more important. But here, too, conventionalism not only makes more sense in the abstract—for Jefferson’s reason—but conforms to settled practices.

The most striking example is the separation of powers. In the last two decades there has been much litigation about the allocation of power between the executive and Congress. Much of the resulting law—but not all—is notoriously formalistic, in the sense that the courts (as well as the broader legal and even popular cultures) heavily emphasize the text and the original understandings. This is true, for example, of cases involving relatively technical questions about the Appointments Clause, and of the legislative veto decision.<sup>31</sup> But in separation of powers cases where the stakes are higher—such as in determining the constitutionality of the independent counsel statute or of non-Article III courts—the law is not

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<sup>30</sup>Easterbrook, *Harv L Rev*, lamenting this.

<sup>31</sup>See, for example, *Freytag v Commissioner of Internal Revenue*, 501 US 868 (1991); *Bowsher v Synar*, 478 US 714 (1986); *INS v Chadha*, 462 US 919 (1983); *Buckley v Valeo*, 424 US 1 (1976). This point has been made by Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 *U Pa L Rev* 1513 (1991), and Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 *Cornell L Rev* 488 (1987).

particularly formalistic. And, of course, in high-stakes decisions concerning other subjects, like equality or reproductive freedom, text and original understandings are left far behind.

This apparent feature of our practices—the less important the issue, the more important the text—is consistent with a conventionalist approach to interpretation. When the moral 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 right. But in dealing with many separation of powers issues it is more important that the issue be settled than that it be settled just right—so that we know which acts are valid, which political actor must make which decision, and so on. Consequently our practices are more formalistic.

Sometimes, though, the costs of unsettlement can be so great that even important provisions are 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 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). 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. Even so, in times of the greatest stress, such as Reconstruction, this provision was arguably disregarded.

*Precedent versus text*

The conventionalist justification for following the text can also shed some light on the question of what should be done when an apparently well-established line of precedent appears to be inconsistent with the ordinary meaning of the text. Self-styled textualists and originalists, including some on the Supreme Court, seem to take it for granted that the precedent, which is not the real Constitution, must give way to the text, which is. But this claim cannot be justified, at least not without much more argument.

The Fourth Amendment provides an illustration. Current Fourth Amendment law—which presumptively requires a warrant—is hard to reconcile with the plain language of the Fourth Amendment, which does not require a warrant but limits their availability. 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 the Fourth Amendment should be interpreted in a way that seems more consistent with the plain language and original understandings: searches should be allowed, even without a warrant, if they are reasonable; the Fourth Amendment’s limit on the

availability of warrants is intended to keep government officials from claiming immunity against civil suits.<sup>32</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. 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 conventionalist function would be unimpaired. Second, the language of the amendment serves roughly 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,” at least if the invocation of the Constitution is meant to have any normative significance. The priority of the text has to be justified. Sometimes conventionalism justifies it, but when, as in this instance, the text has been heavily glossed, another justification is needed.

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<sup>32</sup>Amar, Taylor.

*The Constitution and commands*

Finally, there is the question whether the Austinian view that underlies Jefferson's claim has any remaining significance for constitutional law. 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 it 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. It is generally understood that the purpose of such an amendment is to overrule a series of Supreme Court decisions beginning with *Abington School District v. Schempp*,<sup>33</sup> which held that it was unconstitutional for a public school to conduct teacher-led devotional Bible reading in the classroom. Under *Schempp* and other decisions, the fact that a student

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<sup>33</sup>374 U.S. 203 (1963).

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, some of the common criticisms of originalism—that it is impossible in principle to identify an original understanding—seem 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>34</sup> At one time it was thought that school segregation was consistent with equality; now we understand otherwise. Similarly, in *Minor v. Happersett*,<sup>35</sup> the Supreme Court, citing textual and historical evidence, held that the Fourteenth Amendment did not enfranchise women because it neither forbade gender

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<sup>34</sup>See, e.g., the discussion of *Brown* in the plurality opinion in *Casey* (and in Souter’s confirmation hearing testimony).

<sup>35</sup>88 U.S. 162 (1874).

discrimination nor applied to voting; although the specific holding in *Minor* had to be reversed by constitutional amendment, both aspects of its reasoning have 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. The one thing that could not be done would be to say that the language did not matter; under the hypothetical amendment, if school prayer were to be banned, it would have to be on the basis of an argument that claimed to be anchored in the text.

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 19 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, 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, not without confronting Jefferson's problem.