THE LIVING CONSTITUTION

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Do we have a living Constitution? Do we want to have a living Constitution? A living Constitution is one that evolves, changes over time, and adapts to new circumstances, without being formally amended. On the one hand, the answer has to be yes: there’s no realistic alternative to a living Constitution. Our written Constitution, the document under glass in the National Archives, was adopted 220 years ago. It can be amended, but the amendment process is very difficult. The most important amendments were added to the Constitution almost a century and a half ago, in the wake of the Civil War, and since that time many of the amendments have dealt with relatively minor matters.

Meanwhile, the world has changed in incalculable ways. The nation has grown in territory and its population has multiplied several times over. Technology has changed, the international situation has changed, the economy has changed, social mores have changed, all in ways that no one could have foreseen when the Constitution was drafted. And it is just not realistic to expect the cumbersome amendment process to keep up with these changes.

So it seems inevitable that the Constitution will change, too. It is also a good thing, because an unchanging Constitution would fit our society very badly. Either it would be ignored or, worse, it would be a hindrance, a relic that keeps us from making progress and prevents our society from working in the way it should.

On the other hand, there seem to be many reasons to insist that the answer to that question—do we have a living Constitution that changes over time?—cannot be yes. In fact, the critics of the idea of a living constitution have pressed their arguments so forcefully that, among people who write about constitutional law, the term “the living constitution” is hardly ever used, except derisively. The Constitution is supposed to be a rock-solid foundation, the embodiment of our most fundamental principles—that’s the whole idea of having a constitution. Public opinion may blow this way and that, but our basic principles—our constitutional principles—must remain constant. Otherwise, why have a Constitution at all?

Even worse, a living Constitution is, surely, a manipulable Constitution. If the Constitution is not constant—if it changes from time to time—then someone is changing it, and doing so according to his or her own ideas about what the Constitution should look like. The “someone,” it’s usually thought, is some group of judges. So a living Constitution becomes not the Constitution at all; in fact it is not even law any more. It is just some gauzy ideas that appeal to the judges who happen to be in power at a particular time and that they impose on the rest of us.

So it seems we want to have a Constitution that is both living, adapting, and changing and, simultaneously, invincibly stable and impervious to human manipulation. How can we escape this predicament?

The good news is that we have mostly escaped it, albeit unselfconsciously. Our constitutional system, without our fully realizing it, has tapped into an ancient source of law, one that antedates the Constitution itself by several centuries. That ancient kind of law is the common law. The common law is a system built not on an authoritative, foundational, quasi-sacred text like the Constitution. Rather, the common law is built out of precedents and traditions that accumulate over time. Those precedents allow room for adaptation and change, but only within certain limits and only in ways that are rooted in the past.

Our constitutional system has become a common law system, one in which precedent and past practices are, in their own way, as important as the written Constitution itself. A common law Constitution is a “living” Constitution, but it is also one that can protect fundamental principles against transient public opinion, and it is not one that judges (or anyone else) can simply manipulate to fit their own ideas.

The bad news is that, perhaps because we do not realize what a good job we have done in solving the problem of how to have a living Constitution, inadequate and wrongheaded theories about the Constitution persist. One theory in particular—what is usually called “originalism”—is an especially hardy perennial. Originalism is the antithesis of the idea that we have a living Constitution. It is the view that constitutional provisions mean what the people who adopted them—in the 1790s or 1860s or whenever—understood them to mean. (There are different forms of originalism, but this characterization roughly captures all of them.) In the hands of its most aggressive proponents,
originalism simply denies that there is any dilemma about the living Constitution. The Constitution requires today what it required when it was adopted, and there is no need for the Constitution to adapt or change, other than by means of formal amendments.

There is something undeniably natural about originalism. If we’re trying to figure out what a document means, what better place to start than with what the authors understood it to mean? Also, as a matter of rhetoric, everyone is an originalist sometimes: when we think something is unconstitutional—say, widespread electronic surveillance of American citizens—it is almost a reflex to say something to the effect that “the Founding Fathers” would not have tolerated it. And there are times, although few of them in my view, when originalism is the right way to approach a constitutional issue. But when it comes to difficult, controversial constitutional issues, originalism is a totally inadequate approach. It is worse than inadequate: it hides the ball by concealing the real basis of the decision.

But if the idea of a living Constitution is to be defended, it is not enough to show that the competing theory—originalism—is badly flawed. You can’t beat somebody with nobody. So I will describe the approach that really is at the core of our living constitutional tradition, an approach derived from the common law and based on precedent and tradition.

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The Common Law

Pick up a Supreme Court opinion, in a constitutional case, at random. Look at how the Justices justify the result they reach. Here is a prediction: the text of the Constitution will play, at most, a ceremonial role. Most of the real work will be done by the Court’s analysis of its previous decisions. The opinion may begin with a quotation from the text. “The Fourth Amendment provides . . . .” the opinion might say. Then, having been dutifully acknowledged, the text bows out. The next line is “We”—meaning the Supreme Court—“have interpreted the Amendment to require . . . .” And there follows a detailed, careful account of the Court’s precedents.

Where the precedents leave off, or are unclear or ambiguous, the opinion will make arguments about fairness or good policy: why one result makes more sense than another, why a different ruling would be harmful to some important interest. The original understandings play a role only occasionally, and usually they are makeweights or the Court admits that they are inconclusive. There are exceptions, like Heller, the recent decision about the Second Amendment right to bear arms, where the original understandings take center stage. But cases like that are very rare.

Advocates know what actually moves the Court. Briefs are filled with analysis of the precedents and arguments about which result makes sense as a matter of policy or fairness. Oral argument in the Court works the same way. The text of the Constitution hardly ever gets mentioned. It is the unusual case in which the original understandings get much attention. In constitutional cases, the discussion at oral argument will be about the Court’s previous decisions and, often, hypothetical questions designed to test whether a particular interpretation will lead to results that are implausible as a matter of common sense.

On a day-to-day basis, American constitutional law is about precedents, and when the precedents leave off it is about common sense notions of fairness and good policy.

The contrast between constitutional law and the interpretation of statutes is particularly revealing. When a case concerns the interpretation of a statute, the briefs, the oral argument, and the opinions will usually focus on the precise words of the statute. But when a case involves the Constitution, the text routinely gets no attention. On a day-to-day basis, American constitutional law is about precedents, and when the precedents leave off it is about common sense notions of fairness and good policy.

What’s going on here? Don’t we have a Constitution? We do, but if you think the Constitution is just the document that is under glass in the National Archives, you will not begin to understand American constitutional law. Our nation has over two centuries of experience grappling with the fundamental issues—constitutional issues—that arise in a large, complex, diverse, changing society. The lessons we have learned in grappling with those issues only sometimes make their way into the text of the Constitution by way of amendments, and even then the amendments often occur only after the law has already changed.

But those lessons are routinely embodied in the cases that the Supreme Court decides, and also, importantly, in traditions and understandings that have developed outside
those precedents, traditions, and understandings form an indispensable part of what might be called our small-c constitution: the constitution as it actually operates, in practice. That small-c constitution—along with the written Constitution in the Archives—is our living Constitution.

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The Two Traditions

There are, broadly speaking, two competing accounts of how something gets to be law. One account—probably the one that comes most easily to mind—sees law as, essentially, an order from a boss. The “boss” need not be a dictator; it can be a democratically-elected legislature. According to this theory, the law is binding on us because the person or entity who commanded it had the authority to issue a binding command, either, say, because of the divine right of kings, or—the modern version—because of the legitimacy of democratic rule. So if you want to determine what the law is, you examine what the boss, the sovereign, did—the words the sovereign used, evidence of the sovereign’s intentions, and so on.

Originalism is a version of this approach. As originalists see it, the Constitution is law because it was ratified by the People, either in the late 1700s or when the various amendments were adopted. Anything the People did not ratify isn’t the law. If we want to determine what the Constitution requires, we have to examine what the People did: what words did they adopt, and what did they understand themselves to be doing when they adopted those provisions. And we have to stop there. Once we look beyond the text and the original understandings, we’re no longer looking for law; we’re doing something else, like reading our own values into the law.

The command theory, though, isn’t the only way to think about law. The common law approach is the great competitor of the command theory, in a competition that has gone on for centuries. The early common lawyers saw the common law as a species of custom. It would make no sense to ask who the sovereign was who commanded that a certain custom prevail, or when, precisely, a particular custom became established. Legal systems are now too complex and esoteric to be regarded as society-wide customs. But still, on the common law view, the law can be like a custom in important ways. It can develop over time, not at a single moment; it can be the evolutionary product of many people, in many generations.

Similarly, according to the common law view, the authority of the law comes not from the fact that some entity has the right, democratic or otherwise, to rule. It comes instead from the law’s evolutionary origins and its general acceptability to successive generations. For the same reason, according to the common law approach, you cannot determine the content of the law by examining a single authoritative text or the intentions of a single entity. The content of the law is determined by the evolutionary process that produced it. Present-day interpreters may contribute to the evolution—but only by continuing the evolution, not by ignoring what exists and starting anew.

Characteristically the law emerges from this evolutionary process through the development of a body of precedent. A judge who is faced with a difficult issue looks to see how earlier courts decided that issue, or similar issues. The judge starts by assuming that she will do the same thing in the case before her that the earlier court did in similar cases. Sometimes—almost always, in fact—the precedents will be clear, and there will be no room for reasonable disagreement about what the precedents dictate. But sometimes the earlier cases will not dictate a result. The earlier cases may not resemble the present case closely enough. Or there may be earlier cases that point in different directions, suggesting opposite outcomes in the case before the judge. Then the judge has to decide what to do.

At that point—when the precedents are not clear—a variety of technical issues can enter into the picture. But often, when the precedents are not clear, the judge will decide the case before her on the basis of her views about which decision will be more fair or is more in keeping with good social policy. This is a well-established aspect of the common law: there is a legitimate role for judgments about things like fairness and social policy.

It is important not to exaggerate (nor to understate) how large a role these kinds of judgments play in a common law system. In any well-functioning legal system, most potential cases do not even get to court, because the law is so clear that people do not dispute it, and that is true of common law systems, too. Even in the small minority of
afraid to put men to live and trade each on his own stock of reason,” Burke said, “because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations.” The accumulated precedents are “the general bank and capital.” It is an act of intellectual hubris to think that you know better than that accumulated wisdom.

The second attitude is an inclination to ask “what’s worked,” instead of “what makes sense in theory.” It is a distrust of abstractions when those abstractions call for casting aside arrangements that have been satisfactory in practice, even if the arrangements cannot be fully justified in abstract terms. If a practice or an institution has survived and seems to work well, that is a good reason to preserve it; that practice probably embodies a kind of rough common sense, based in experience, that cannot be captured in theoretical abstractions. To quote Burke again: “The science of government being . . . so practical in itself, and intended for such practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life, . . . it is with infinite caution that any man ought to venture upon pulling down an edifice, which has answered in any tolerable degree for ages the common purposes of society.”

Originalism, the common law, and candor

Originalism’s trump card—the principal reason it is taken seriously, despite its manifold and repeatedly-identified weaknesses—is the seeming lack of a plausible opponent. “Living constitutionalism” is too vague, too manipulable.

But if the living Constitution is a common law Constitution, then originalism can no longer claim to be the only game in town. The common law has been around for centuries. In non-constitutional areas like torts, contracts, and property, the common law has limited judges’ discretion and guided the behavior of individuals. And while the common law does not always provide crystal-clear answers, it is false to say that a common law system, based on precedent, is endlessly manipulable.

A common law approach is superior to originalism in at least four ways.

• The common law approach is more workable. Originalism requires judges and lawyers to be historians. The common law approach requires judges and lawyers to be—judges and lawyers. Reasoning from precedent, with occasional resort to basic notions of fairness and policy, is what judges and lawyers do. They have done it for a long time in the non-constitutional areas that are governed by the common law.
The common law approach explicitly envisions that judges will be influenced by their own views about fairness and social policy. Common law judges have operated that way for centuries. This doesn’t mean that judges can do what they want. Judgments of that kind can operate only in a limited area—the area left open by precedent, or in the circumstances in which it is appropriate to overrule a precedent. But because it is legitimate to make judgments of fairness and policy, in a common law system those judgments can be openly avowed and defended, and therefore can be openly criticized.

Originalism is different. An originalist claims to be following orders. An originalist cannot be influenced by his or her own judgments about fairness or social policy—to allow that kind of influence is, for an originalist, a lawless act of usurpation. An originalist has to insist that she is just enforcing the original understanding of the Second Amendment, or the Free Exercise Clause of the First Amendment, and that her own views about gun control or religious liberty have nothing whatever to do with her decision.

That is an invitation to be disingenuous. Originalism, as applied to the controversial provisions of our Constitution, is shot through with indeterminacy—resulting from, among other things, the problems of ascertaining the original understandings and of applying those understandings to the modern world once they’ve been ascertained. In the face of that indeterminacy, it will be difficult for any judge to sideline his or her strongly held views about the underlying issue. But originalism forbids the judge from putting those views on the table and openly defending them. Instead, the judge’s views have to be attributed to the Framers, and the debate has to proceed in pretend-historical terms, instead of in terms of what is, more than likely, actually determining the outcome.

Having said all that, though, the proof is in the pudding, and the common law constitution cannot be effectively defended until we see it in operation. But for that, you’ll have to read the book.

David Strauss’s book, The Living Constitution, was published in 2010 by Oxford University Press, and this excerpt has been printed with their permission.

• The common law approach is more justifiable. The common law ideology gives a plausible explanation for why we should follow precedent. One might disagree, to a greater or lesser extent, with that ideology. Perhaps abstract reason is better than Burke allows; perhaps we should be more willing to make changes based on our theoretical constructions. Sometimes the past is not a storehouse of wisdom; it might be the product of sheer happenstance, or, worse, accumulated injustice. But there is unquestionably something to the Burkean arguments. And to the extent those arguments are exaggerated, the common law approach has enough flexibility to allow a greater role for abstract ideas of fairness and policy and a smaller role for precedent.

Originalists, by contrast, do not have an answer to Thomas Jefferson’s famous question: why should we allow people who lived long ago, in a different world, to decide fundamental questions about our government and society today? Originalists do not draw on the accumulated wisdom of previous generations in the way that the common law does. For an originalist, the command was issued when a provision became part of the Constitution, and our unequivocal obligation is to follow that command. But why? It is one thing to be commanded by a legislature we elected last year. It is quite another to be commanded by people who assembled in the late eighteenth century.

• The common law approach is what we actually do. Originalists’ America—in which states can segregate schools, the federal government can discriminate against anybody, any government can discriminate against women, state legislatures can be malapportioned, states needn’t comply with most of the Bill of Rights, and Social Security is unconstitutional—doesn’t look much like the country we inhabit. In controversial areas at least, the governing principles of constitutional law are the product of precedents, not of the text or the original understandings. And in the actual practice of constitutional law, precedents and arguments about fairness and policy are dominant.

• The common law approach is more candid. This is an important and easily underrated virtue of the common law approach, especially compared to originalism.