

January 2012

## Constitution Day Lecture: American Constitutionalism, Almost (But Not Quite) Version 2.0

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### Recommended Citation

Richard H. Fallon, Jr., *Constitution Day Lecture: American Constitutionalism, Almost (But Not Quite) Version 2.0*, 65 Me. L. Rev. 77 (2012).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol65/iss1/5>

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CONSTITUTION DAY LECTURE: AMERICAN  
CONSTITUTIONALISM, ALMOST (BUT NOT QUITE)  
VERSION 2.0

*Richard H. Fallon, Jr.*

INTRODUCTION

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## CONSTITUTION DAY LECTURE: AMERICAN CONSTITUTIONALISM, ALMOST (BUT NOT QUITE) VERSION 2.0

*Richard H. Fallon, Jr.\**

### INTRODUCTION

On February 7, 2012, a front-page article in *The New York Times* reported that the Constitution of the United States has ceased to be the leading model for constitution-writers in other countries.<sup>1</sup> According to *The Times*, and to the law review article on which *The Times* based its report,<sup>2</sup> the U.S. Constitution has fallen increasingly out of alignment with an evolving international consensus regarding the individual rights that a constitution ought to protect.<sup>3</sup> In addition, the constitutions of other countries copy the structural provisions of the U.S. Constitution—involving federalism and the separation of powers—far less frequently than they once did.<sup>4</sup>

As the editors of *The Times* undoubtedly anticipated when they put their story on the front page, the news that other countries no longer regard the Constitution of the United States as a paradigm of excellence seems likely to provoke a shock of surprise in many American minds. Questions follow. Why have other countries ceased to treat the U.S. Constitution as a prototype? By reflecting on what others might view as deficiencies in our Constitution—most of which was written in the eighteenth century—can we achieve an enhanced understanding of the respective ways in which it may serve us well and badly in the twenty-first century? And if so, how should we go forward?

My conclusions about these matters are complex. But the need for complexity may begin to emerge if I propose an intriguingly simple, and arrestingly jarring, answer to the question: “Why is the United States Constitution no longer the preeminent model for others that it once was?” That answer, which I ultimately reject but which I believe needs to be taken seriously, would go as follows: The United States served as a visionary innovator by developing the first written national constitution in the history of the world. To adopt the vocabulary of modern computer software, we might think of the prototype that the Founding Fathers developed as written constitutionalism 1.0. Thereafter, other liberal democracies began to write constitutions of their own, most of them based on the American model. We might think of these early imitators as reflecting constitutionalism 1.1—a slightly modified version of the original. We might then, similarly, characterize various constitutions that came later, still building on the

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1. Adam Liptak, *'We the People' Loses Followers*, N.Y. TIMES, Feb. 7, 2012, at A1.

2. David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012).

3. *See id.* at 767, 779–809.

4. *See id.* at 785–96.

American model and trying to learn from the earliest efforts at adapting or improving it, as embodying constitutionalism 1.2 or 1.3. Indeed, as centuries passed and innovations continued, we might imagine that more “point” releases produced constitutionalism 1.4 or 1.5 elsewhere in the world.<sup>5</sup> There is no need to get bogged down in details of the computer analogy. The more important point, emphasized by *The New York Times* article to which I referred at the outset, is that in the past twenty-five to fifty years, constitution writers elsewhere have begun to exhibit a consensus not only about how to correct some of the miscalculations of their predecessors, but also about how to add some new functions that the American Founding Fathers could never have imagined. Call the result of their efforts constitutionalism 2.0—a significant change to the most recent earlier versions of written constitutionalism and one that, as measured against constitutionalism 1.0, represents a paradigm shift. With much of the rest of the world now enjoying the sophisticated functionality of constitutionalism 2.0, the United States—according to the narrative that I propose to consider—remains still stuck with written constitutionalism 1.0. We may not mind. We have never known anything better. Nevertheless, the honest and slightly embarrassing truth is that we are living with an eighteenth-century constitution in the twenty-first century and that we should look to others, rather than expect others look to us, in considering how to go on.

In my view, this stylized narrative contains a germ of truth, but only a germ. In answering the questions that I sketched a moment ago, much of my concern will be to identify what is wrong, as well as what is right, with the hypothesis that the United State is struggling along with an anachronistic Constitution 1.0, while much of the rest of the world has advanced to constitutionalism 2.0.

To preview my conclusion: Although our current regime is so different from anything that the Founding Fathers imagined that it has achieved most if not all of the functionality of constitutionalism 2.0, we have got to where we are by a sometimes clunky and inadequately understood series of upgrades, patches, and work-arounds that now leave our system prone to instability and perennially at risk of constitutional crisis. To push the computer analogy a little further, let me ask you to imagine that we are now operating with American constitutionalism 1.8. Many of the most fundamental design elements of constitutionalism 1.0 remain unchanged. Americans cherish their Constitution and demand fidelity to it. We have not abandoned constitutionalism 1.0 in favor of constitutionalism 2.0. But we Americans also pride ourselves on pragmatic adaptability. In moments of adaptability, we have gone far beyond where an unmodified version of constitutionalism 1.0 would ever have let us go. And here is the rub: Although constitutionalism 1.8 works splendidly for us most of the time, the tension between the demands of fidelity and the felt need for pragmatic adaptability is a recurrent one in American constitutional practice, made worse by ideologically charged divisions over which adaptations are desirable and which are not. By achieving a better understanding of this chronic tension in modern American constitutional practice, we will better situate ourselves to address and manage current and

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5. Constitutions adopted in other nations since 1789 have had an average lifespan of nineteen years. See ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS 1–2* (2009).

looming challenges.

### I. WHY MIGHT OTHER NATIONS REJECT THE U.S. CONSTITUTION AS A MODEL?

Before offering a few observations about why other countries might have ceased to view the Constitution of the United States as a template, I should clarify the findings concerning the Constitution's influence that *The New York Times* reported. *The Times* based its story on an article by Professors David Law and Mila Versteeg published in the *New York University Law Review*.<sup>6</sup> According to Professors Law and Versteeg, no other nation's constitution has clearly supplanted the Constitution of the United States as a model for the world's constitution-writers.<sup>7</sup> Instead, the authors report, near consensus has emerged among liberal democracies about the appropriate contents of a "generic" constitution, defined by the kinds of provisions that constitutions for liberal democracies now characteristically include.<sup>8</sup> By their account, "[e]ach of the twenty-five most popular constitutional provisions appears in over 70% of all constitutions."<sup>9</sup> Although the generic constitution described by Law and Versteeg overlaps with the Constitution of the United States to a considerable extent, significant differences exist. The authors also see a clear trend line of divergence of other nation's constitutions from the American model:

[A]mong the world's democracies . . . constitutional similarity to the United States has clearly gone into free fall. Over the 1960s and 1970s, democratic constitutions as a whole became more similar to the U.S. Constitution, only to reverse course in the 1980s and 1990s. The turn of the twenty-first century, however, saw the beginning of a steep plunge that continues through the most recent years for which we have data, to the point that the constitutions of the world's democracies are, on average, less similar to the U.S. Constitution now than they were at the end of World War II.<sup>10</sup>

#### A. Common Divergences

Differences between the U.S. Constitution and the constitutions of other countries could undoubtedly be grouped into a multitude of categories, with a matching plethora of explanations. With apologies for oversimplification on many fronts, I would emphasize four phenomena.

First, the constitutions of other countries increasingly deviate from the U.S. Constitution with respect to matters involving federalism and the separation of powers. The U.S. Constitution's assignment to the states of a quasi-sovereign status has not proved a popular model in other nations.<sup>11</sup> Relatedly, the ambition of

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6. See Law & Versteeg, *supra* note 2.

7. See *id.* at 809–33 (reporting that the Canadian constitution may have become a model for other nations in the Anglo-American tradition, but not more broadly, and that Germany, South Africa, and India have only limited influence).

8. See *id.* at 773 (“The existence of a corpus of constitutional provisions that are shared by a wide majority of the world's constitutions can fairly be said to define a shared, or generic global practice of rights constitutionalism.”).

9. *Id.*

10. *Id.* at 801.

11. See *id.* at 785–86.

the U.S. Constitution to assign only limited powers to the federal government—largely in the expectation that the states would retain powers to legislate for the public health, safety, and welfare—has seemed to others to be an outdated residue of eighteenth century attitudes.<sup>12</sup> In a world in which government is widely expected to play roles that the American Founding Fathers could not have foreseen, it has also seemed to many that the U.S. Constitution makes it too difficult for the federal government to exercise even such powers as it possesses. Presidential veto powers make legislation more difficult here than in parliamentary systems.<sup>13</sup> The design of the Senate, which allows representatives of small states to block legislation favored by national majorities, poses another obstacle to legislating. In addition, some have blamed American-style separation of powers regimes, featuring an independent president, for the tendency of a number of South American countries to lapse repeatedly into quasi-dictatorship.<sup>14</sup>

Second, with most of our Constitution having been written more than 200 years ago, some of its preoccupations now strike others as dated and idiosyncratic.<sup>15</sup> As a result, the constitutions of many other nations omit a number of provisions that the American Founding Fathers included in the Bill of Rights. A plain example comes from the Seventh Amendment's guarantee of the right to trial by jury in any suit at common law brought in federal court in which the amount in controversy exceeds twenty dollars.<sup>16</sup> Some liberal democracies rely little, if at all, on the common law. In addition, trial by jury in suits with only small sums at stake may seem an improvident waste of scarce resources. Most constitutions also do not bother with guarantees against double jeopardy.<sup>17</sup> Perhaps more surprising to most Americans, other constitutions protect individual freedom of religion, but they do not—like the U.S. Constitution—typically include a separate prohibition against the government's supporting or respecting an establishment of religion.<sup>18</sup> To offer just one more example, only about two percent of the world's constitutions guarantee rights to bear arms or otherwise own guns.<sup>19</sup>

Third, many modern constitutions contain far more, and more specific, guarantees of rights against governmental infringement than does the American Constitution,<sup>20</sup> which squeezes most of its assurances of individual rights into the ten Amendments that constitute the Bill of Rights and the Thirteenth, Fourteenth, and Fifteenth Amendments. Reflecting a strategy of enumerating rights with relatively detailed specificity, the constitutions of most liberal democracies take

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12. See Sujit Choudhry & Nathan Hume, *Federalism, Devolution, and Secession: From Classical to Post-Conflict Federalism*, in *COMPARATIVE CONSTITUTIONAL LAW* 356, 361 (Tom Ginsburg & Rosalind Dixon eds., 2011) (describing such criticism of federalist systems).

13. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 38–49 (2006); see also Law & Versteeg, *supra* note 2, at 791–93 (discussing the decline of American-style presidentialism).

14. See, e.g., JOSE ANTONIO CHEIBUB, *PRESIDENTIALISM, PARLIAMENTARIANISM, AND DEMOCRACY* 151, 154 (2007); Scott Mainwaring, *Presidentialism in Latin America*, 25 *LATIN AM. RES. REV.* 157, 163 (1990).

15. See Law & Versteeg, *supra* note 2, at 852–53 & n.257.

16. U.S. CONST. amend. VII.

17. See Law & Versteeg, *supra* note 2, at 779 tbl.3.

18. See *id.* at 779 tbl.3, 805.

19. See *id.* at 805–06.

20. See *id.* at 804–07.

greater pains than does our Constitution to identify groups entitled to freedom from discrimination.<sup>21</sup> In writing constitutions as they have, others may have taken note that the U.S. Constitution was construed to tolerate many forms of race-based discrimination until the 1950s and 1960s,<sup>22</sup> and was read to impose no strong prohibition against gender-based discrimination until the 1970s.<sup>23</sup> To cite just one more example, most modern constitutions provide expressly that persons accused of violating the criminal law enjoy a presumption of innocence.<sup>24</sup> The Framers of the American Constitution may well have presupposed that there would be a presumption of innocence,<sup>25</sup> but they did not insert such a prescription in the Bill of Rights.

Fourth, in an age when people demand that the government do much more than eighteenth century Americans expected, many other constitutions have included guarantees of positive rights—including rights to education and welfare—in their equivalents of our Bill of Rights.<sup>26</sup> If a constitution seeks to guarantee its citizens the requisites of a dignified human life, then entitlements to housing, education, and medical care may seem as important as freedom from unreasonable searches and seizures, for example.

#### *B. Has the U.S. Been Left Behind?*

As I noted at the outset, divergences between our Constitution, which was mostly written in the eighteenth century, and more recently adopted constitutions might provoke a worry that the world has left us behind, stuck at constitutionalism 1.0, when other countries have advanced to constitutionalism 2.0 or beyond. But that hypothesis is clearly false if by constitutionalism 1.0 we mean constitutional government as it was expected to operate in the United States at the time of the Constitution's ratification. Although our written Constitution looks much as it did in 1791, following the ratification of the Bill of Rights—with only 17 further amendments having been adopted—prevailing interpretations and related practices have undergone changes that would render the constitutional regime that we occupy today nearly unrecognizable to the Founding Fathers. We have not only more government, exercising more powers, but also more rights against the government—many of them developed through judicial interpretation of formally unaltered constitutional language—than anyone could have imagined in the eighteenth century.<sup>27</sup> When the reality of American government and constitutional practice is compared with what others' constitutions expressly authorize, the gap between U.S. constitutionalism and that of other liberal democracies narrows considerably.

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21. For example, over 90 percent of constitutions now specifically guarantee women's rights. *See id.* at 773.

22. *See generally* MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

23. *See, e.g.*, BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 289–95 (2009).

24. *See* Law & Versteeg, *supra* note 2, at 775.

25. *See In re Winship*, 397 U.S. 358, 362 (1970).

26. *See* Law & Versteeg, *supra* note 2, at 806–07.

27. *See generally* CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 11–46 (1990) (describing the role of the federal government in creating the twentieth century's "rights revolution").

With regard to the powers of the federal government, the large deviations between the Framers' expectations and the realities of modern practice involve all three branches. Some measure of the increase in congressional power may come from the size of the federal government that Congress has created and funded. In 1789, the federal government had fewer than 1,000 employees.<sup>28</sup> Today the number exceeds 2.7 million.<sup>29</sup> Some of the signal events in the expansion of the federal government's role occurred during the Civil War and Reconstruction,<sup>30</sup> but the largest changes grew out of practical pressures that manifested themselves most vividly during the Great Depression and the New Deal. During that period, Americans overwhelmingly concluded that the national government had to do more. Without a word of relevant change in the written Constitution, Congress and the Supreme Court began to understand the Constitution's conferral of congressional power to regulate commerce among the several states as an authorization for the enactment of sweeping economic regulatory legislation, including laws banning child labor, mandating safe working conditions, and establishing minimum wages.<sup>31</sup> Based on a clause in the original Constitution that authorizes Congress to tax and spend for the general welfare, Congress built, and the Supreme Court upheld, a welfare state that would have been unimaginable prior to the twentieth century.<sup>32</sup> National health insurance may be controversial, but Social Security and Medicare are firmly entrenched.

At the same time that the scope of congressional authority has increased, more and more power has also flowed to the President. George Washington had no White House staff.<sup>33</sup> His four-member Cabinet oversaw no bureaucracy.<sup>34</sup> The Army and Navy were minuscule. As the United States grew from a fledgling nation to the world's greatest economic and military power, the President claimed very broad commander-in-chief powers, especially during the Cold War and its

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28. Formal statistics on total federal employment before 1816 are not available. See BUREAU OF THE CENSUS, 2 HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970 1103 (1975). One detailed review of available records puts the number of federal employees at 780 in 1792, not including deputy postmasters, who likely numbered several hundred. See LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 255 (1948). Many authors writing on the size of government in the early republic casually estimate there were around 1,000 employees. See, e.g., Bruce D. Porter, *Parkinson's Law Revisited: War and the Growth of American Government*, THE PUBLIC INTEREST, Summer 1980, at 50 (putting the number at "approximately 1,000").

29. *Federal Employment Statistics, Historical Federal Workforce Tables, Total Government Employment Since 1962*, U.S. OFFICE OF PERSONNEL MGMT., <http://www.opm.gov/feddata/HistoricalTables/TotalGovernmentSince1962.asp> (lasted visited Oct. 15, 2012).

30. See, e.g., Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297, 1329 (1994) (noting that "the Civil War and the Reconstruction Amendments radically altered the relationship between constitutional authority and state sovereignty").

31. See BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 310–11 (2000); FRIEDMAN, *supra* note 23, at 212–29.

32. See, e.g., *Helvering v. Davis*, 301 U.S. 619 (1937); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).

33. See Thomas Engeman & Raymond Tatalovich, *George Washington: The First Modern President? A Reply to Nichols*, in GEORGE WASHINGTON AND THE ORIGINS OF THE AMERICAN PRESIDENCY 37, 61 (Mark J. Rozell et al. eds., 2000).

34. *Id.*

aftermath.<sup>35</sup> In the domestic sphere, too, Congress has delegated power to the President that would have been unthinkable to the Founding generation. The clearest example involves rule-making. Today the President oversees a myriad of rule-making agencies, with the power to promulgate what are for all practical purposes laws of the United States.<sup>36</sup>

The judiciary has also grown more powerful and, in exercising its powers, has given us many of the individual rights that today we think of as most fundamental.<sup>37</sup> By nearly all accounts, we have free speech rights that far exceed the Framers' expectations. The one-person, one-vote decisions<sup>38</sup>—which now seem indispensable to fair political democracy—would have been equally unanticipated by those who wrote and ratified any provision of the Constitution. When the Constitution was written in 1787 and the Bill of Rights was added in 1791, no provision forbade discrimination on the basis of race or gender, and when the Equal Protection Clause was added in 1868, it said that no *state* shall deny anyone the equal protection of the laws, but made no reference to the federal government.<sup>39</sup> Nevertheless, the Supreme Court has held the federal government to the same equal protection norms as it has the states, with the curt explanation that any other result would be “unthinkable.”<sup>40</sup> It is easy to forget, but *Brown v. Board of Education*,<sup>41</sup> which came nearly a century after the adoption of the Fourteenth Amendment, almost certainly deviated from that provision's original understanding.<sup>42</sup> Following the Equal Protection Clause's ratification, a large number of states either continued or initiated segregation, apparently confident that the Fourteenth Amendment erected no bar.<sup>43</sup> And no one appears to have thought in 1868 that the Equal Protection Clause barred gender-based discrimination.<sup>44</sup> Yet, beginning in the 1970s, the Court has subjected sex discrimination to elevated judicial scrutiny.<sup>45</sup> It would be easy to pile up many more examples of judicially recognized constitutional rights that far exceed the Framers' expectations.

Indeed, if we ask which rights our Constitution omits that the constitutions of

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35. See, e.g., ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973).

36. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2282–84 (2001).

37. The remainder of the paragraph draws heavily on the accounts of incompatibility between current doctrine and the Framers' intent or the original understanding of constitutional language contained in DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010), and Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 727–39 (1988).

38. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

39. See U.S. CONST. amend. XIV, § 1.

40. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

41. 347 U.S. 483 (1954).

42. See, e.g., Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 252 & n.180 (1991). For a rare dissent from this consensus view, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 953 (1995).

43. See Klarman, *supra* note 42, at 252.

44. *But cf.* Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011) (distinguishing between the original meaning of the Equal Protection Clause and original expectations concerning its application and arguing that its original public meaning forbade sex-based discrimination that tended to subordinate women even if most of the public did not so apprehend in 1868).

45. See, e.g., *Craig v. Boren*, 429 U.S. 190, 204 (1976).

other liberal democracies now include, and look at the omissions that Professors Law and Versteeg identify, we find that more than half the time—in six of the eleven cases that they cite—our Supreme Court, through interpretation, has given us almost precisely the rights that Law and Versteeg say our Constitution lacks:<sup>46</sup>

- Despite the absence of a formally denominated “freedom of movement,” the Supreme Court has long upheld a constitutionally protected right to travel;<sup>47</sup>
- Even though no bit of constitutional text expressly guarantees a “presumption of innocence,” judicial decisions clearly recognize that requiring a criminal defendant to carry the burden of proof in a criminal case violates the Due Process Clause;<sup>48</sup>
- The First Amendment does not refer to the “freedom of association,” but a myriad of cases find such a right to be an implied functional entailment of the freedom of speech;<sup>49</sup>
- The term “judicial review” does not appear in the Constitution, but the federal courts have exercised that power at least since *Marbury v. Madison*;<sup>50</sup>
- Although there is no separate constitutional guarantee of “women’s rights,” the Supreme Court has held that discrimination against women triggers elevated judicial scrutiny,<sup>51</sup> and it has also recognized abortion rights;<sup>52</sup> and
- An asserted absence of “limits on property rights” needs to be qualified even in its own terms in light of the Takings Clause of the Fifth Amendment, which allows the taking of private property for public purposes as long as just compensation is paid,<sup>53</sup> and the Supreme Court has long held that the use of private property can be regulated.<sup>54</sup>

Some of the rights that the modern Supreme Court has recognized are of course fiercely controversial. Those on the political right recurrently denounce *Roe v. Wade*,<sup>55</sup> which upheld abortion rights, and *Lawrence v. Texas*,<sup>56</sup> which barred criminal prosecutions for private acts of homosexual intimacy among consenting

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46. See Law & Versteeg, *supra* note 2, at 779 (listing eleven “[p]rovisions found only in the generic bill of rights” and not in the United States Constitution: “[f]reedom of movement,” “[r]ight not to be expelled from home territory,” “[p]resumption of innocence,” “[r]ight of association,” “[e]stablishment of judicial review,” “[r]ight to work,” “[r]ight to unionize and/or strike,” “[p]hysical needs rights,” “[r]ight to education,” “[w]omen’s rights,” and “[l]imits on property rights”).

47. See, e.g., *Saenz v. Roe*, 526 U.S. 489, 498 (1999); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 48-49 (1867).

48. See *In re Winship*, 397 U.S. 358, 362-64 (1970).

49. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000); *NAACP v. Alabama*, 357 U.S. 449 (1958).

50. 5 U.S. (1 Cranch) 137 (1803).

51. See, e.g., *United States v. Virginia*, 518 U.S. 515, 532-34 (1996).

52. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Roe v. Wade*, 410 U.S. 113, 154 (1973).

53. U.S. Const. amend. V.

54. See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124-25 (1978).

55. 410 U.S. 113 (1973).

56. 539 U.S. 558, 578 (2003).

adults. From the other side of the political spectrum come protests against *Citizens United v. Federal Election Commission*,<sup>57</sup> which overturned prohibitions against corporate spending on political campaigns, and *District of Columbia v. Heller*,<sup>58</sup> which invalidated a prohibition against the possession of handguns. Nor, I should add, is controversy about the growth and exercise of governmental power under the Constitution limited to the judicial branch. There are vehement critics of the modern, quasi-imperial presidency<sup>59</sup> and, increasingly, of the regulatory authority that Congress has asserted since the New Deal.<sup>60</sup>

But these criticisms reinforce, rather than detract from, the principal point that I wish to make. As a result of evolution and occasionally startling innovation, we stand a lot closer to constitutionalism 2.0—as defined by what Professors Law and Versteeg characterize as the “generic constitution” predominantly preferred by modern liberal democracies—than anyone who just looked at the words of our written Constitution would ever guess.

### C. Constitutionalism 1.8

Proximity is not, of course, identity. Although we come close to constitutionalism 2.0 in some respects, gaps remain in others. To begin with, there are clearly some important elements of “American exceptionalism,”<sup>61</sup> marking matters with respect to which many Americans would take pride in our outlier status. Insofar as structural matters are concerned, some aspects of the American constitutional design that have worked poorly or seemed unattractive elsewhere—including our versions of federalism and the separation of powers<sup>62</sup>—have not only retained their appeal, but also functioned with tolerable success, here.

Moreover, many Americans may have exceptional views about which rights a constitution ought to protect. For example, many and even most Americans may cherish a constitutionally enshrined right to keep and bear arms, even if constitution-writers in other countries would regard such a right as anachronistic at best.<sup>63</sup> Similarly, American political majorities might respond charily to proposals to give constitutional status to “positive” rights to education, employment, welfare, or health care that many modern constitutions now incorporate. For better or for worse, the notion that individuals should be self-reliant, or that care for the disadvantaged is more a matter of local or charitable than of national responsibility, may remain stronger in the United States than in most of the rest of the world.<sup>64</sup>

57. 130 S. Ct. 876, 886, 917 (2010).

58. 554 U.S. 570, 636 (2008).

59. See, e.g., BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010).

60. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

61. See generally AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., 2005) (examining so-called “American Exceptionalism” regarding human rights).

62. Law & Versteeg, *supra* note 2, at 785–96 (discussing other nations’ increasing rejection of structural aspects of the U.S. constitutional model).

63. See *id.* at 805–06.

64. Even so, this attitude may make less practical difference than one might initially assume. As a practical matter, it is inconceivable that state and local governments would cease to fund public education, or that the federal government would abandon its promises of Social Security and Medicare to retirees and those nearing retirement age.

Perhaps more important, however, is that the American Constitution—most of which was written in the eighteenth century—has achieved much of the functionality that makes it workable for and attractive to Americans in the twenty-first century largely through a process of interpretation that has involved striking deviations from the Framers' expectations. Although I do not want to delve deeply into matters of interpretive theory, three patterns are evident.

First, in a number of cases the Supreme Court has brought the United States into relatively close alignment with other liberal democracies by giving constitutional language interpretations that are linguistically plausible in the twenty-first century, but that diverge considerably from what most members of the Founding generation would have anticipated. Examples include modern doctrine under the Commerce Clause, the Taxing and Spending Clause, and the Equal Protection Clause. Members of the Founding generation could not have foreseen modern economic and environmental legislation justified under the power “[t]o regulate Commerce ... among the several States,”<sup>65</sup> or welfare bureaucracies defended as exercises of the authority “[t]o lay and collect Taxes ... to ... provide for the ... general Welfare of the United States,”<sup>66</sup> even if the language that the Framers used permits these results. Nor did those who wrote and ratified the Equal Protection Clause contemplate its application to bar a variety of discriminations against women.

In other cases the Court has stretched constitutional language to the outer boundaries of linguistic plausibility. In the view of some, paper money furnishes an example. The relevant constitutional language authorizes Congress to “coin Money,”<sup>67</sup> yet the Supreme Court has held that Congress can print money as well.<sup>68</sup> A more widely recognized example of linguistic stretching comes from the Due Process Clause. Although the language seems to impose only a requirement that the government employ fair or regular procedures before effecting deprivations of liberty or property, the Supreme Court has construed it as protecting a number of substantive rights. These include rights to marry,<sup>69</sup> to control the upbringing of one's children,<sup>70</sup> to have access to abortions,<sup>71</sup> and to be free from unfair

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65. U.S. CONST. art. I, § 8, cl. 3.

66. *Id.* art. I, § 8, cl. 1.

67. *Id.* art. I, § 8, cl. 5.

68. See *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870), *overruling* *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1869). Given the Constitution's explicit reference to coinage and the historical context in which it was adopted, some commentators conclude that paper money exists in flat contravention of the Constitution as originally understood. See, e.g., Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367, 389 (“[I]t is difficult to escape the conclusion that the Framers intended to prohibit [the] use [of paper money].”); Claire Priest, *Currency Policies and Legal Development in Colonial New England*, 110 YALE L.J. 1303, 1398 n.358 (2001) (“It is uncontroversial that the Framers did not view the Constitution as giving Congress the power to issue paper money to be invested with the status of legal tender.”); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 475 (2006) (“There is a strong scholarly consensus that Congress was not authorized by this provision to issue paper money.”) For an argument to the contrary, see Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J. L. & PUB. POL'Y 1017 (2008).

69. See, e.g., *Turner v. Safley*, 482 U.S. 78 (1987).

70. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (plurality opinion); *id.* at 77 (Souter, J., concurring).

discrimination by the federal government on the basis of race or gender.<sup>72</sup> The Court has also identified the Due Process Clause of the Fourteenth Amendment as the provision that “incorporates” those substantive guarantees of the Bill of Rights that qualify as “fundamental” and thus makes them applicable against the states.<sup>73</sup> Perhaps needless to say, our constitutional order would be vastly different, and less attractive, if the states could violate the central guarantees of the Bill of Rights.

Once having departed from the expectations of the Founding generation in an initial case, the Court has frequently proceeded to develop and extend sometimes elaborate doctrines principally on the basis of its own accreting precedents. For example, the Court today typically decides voting rights cases brought under the Equal Protection Clause based on prior equal protection cases involving voting rights,<sup>74</sup> without regard to whether the earlier decisions accurately reflected the original constitutional understanding—as they almost surely did not.<sup>75</sup> As case builds upon case, complex rule structures sometimes take shape. These often include judge-made tests, including “strict judicial scrutiny,” that the authors and ratifiers of relevant constitutional language surely did not foresee.<sup>76</sup>

When we see how much of our currently operative constitutional regime depends on contestable (which is not to say erroneous) interpretive exercises, it becomes easy to grasp why other liberal democracies would not want to write their constitutions to look like the Constitution of the United States, even when they might approve of contemporary U.S. constitutional practice and doctrine. Where feasible, it would almost always seem more sensible to adopt constitutional language that speaks straightforwardly to modern issues, and reflects modern understandings of individual rights and the powers of government, than to copy eighteenth-century language and rely on interpretive maneuvers—some controversial, either initially or enduringly—to close the gap.

## II. WHAT LESSONS CAN WE LEARN?

Even if we can well understand why other nations would now want constitutions that look on the surface to be increasingly different from ours, it would be easy—by emphasizing the twenty-first century functionality of the Constitution of the United States—to drift, especially in a Constitution Day lecture, into a narrative of national self-congratulation. According to a familiar account, the real genius of the Founding Fathers was to give us a flexible Constitution, capable of evolution over time. What is more, a congratulatory narrative would continue, we should not reserve our praise for the Founding Fathers alone. Giving credit where credit is due, we should also celebrate the continuing, practical genius of the American people, including presidents and Justices of the Supreme Court,

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71. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

72. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

73. See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

74. See, e.g., *Tennant v. Jefferson Cnty. Comm'n*, No. 11-1184, 2012 WL 4343861 (2012) (per curiam).

75. See STRAUSS, *supra* note 37, at 15-16.

76. See generally RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 37-42 (2001) (explaining that constitutional doctrine frequently “implements” constitutional language without perfectly reflecting its “meaning”).

who have found a way to make the Constitution continue to work for us more than two centuries after it was written.

In my view, this congratulatory assessment of U.S. constitutionalism contains important elements of truth. But if we think about celebrations of constitutional adaptability in light of other nations' preference for constitutions that more directly address contemporary challenges and reflect contemporary values, we may develop a sharpened awareness of the pitfalls of the path that the United States has followed. An honest account of our current constitutional situation needs to recognize that we subsist in a state of practical, political, and legal tension that from time to time threatens to erupt into a legitimacy crisis, either for the judiciary or for the other branches of government.

To speak somewhat summarily, we have a two-part problem. First, we face a recurring conundrum in seeking to reconcile the practical imperative of constitutional adaptability with our obligations of fidelity to the Constitution as written—obligations that nearly everyone recognizes as genuine.<sup>77</sup> Although I have celebrated the dynamic flexibility of the United States Constitution as it has historically been interpreted, a familiar understanding of the ideal of the rule of law holds that law, including constitutional law, should have a fixed and determinate meaning that binds judges as well as other officials until the law has been formally changed.<sup>78</sup> I have written about interpretive theory in the past, and will say a few more things shortly. But what most bears emphasis for the moment is that reconciling fidelity with interpretive flexibility is everyone's challenge, experienced by liberals and conservatives alike.

Modern liberals obviously want adaptive understandings of governmental powers. They also defend, and call for the recognition of, many rights that the Framers would not have viewed the Constitution as protecting. But virtually no liberal would say that the Constitution's text and the original understanding of constitutional language do not matter.<sup>79</sup>

Although conservatives are more likely than liberals to declare themselves constitutional originalists, who believe as a general matter that modern constitutional interpretation should reflect the original understanding or original public meaning of constitutional language,<sup>80</sup> most are as committed as liberals to

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77. For an exploration of the concept of constitutional fidelity and diverse perspectives on its requirements, see generally *Symposium, Fidelity in Constitutional Theory*, 65 *FORDHAM L. REV.* 1335 (1997).

78. See Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 *COLUM. L. REV.* 1, 11–14 (1997) (describing a "historicist" conception of the rule of law).

79. To cite just two examples of leading liberal constitutional theorists, RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 8–9 (1996), acknowledges that constitutional interpretation must reflect both the Constitution's language and the purposes or intentions of those who enacted it, as does JACK M. BALKIN, *LIVING ORIGINALISM* 3–58 (2011), who avows the importance of fidelity to constitutional text, as read in light of moral principle, and argues in favor of "framework originalism."

80. See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 60–61, 88–89 (1999); Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997); John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of*

retaining some constitutional adaptations that have occurred in the past, such as those that have authorized Social Security, Medicare, and paper money.<sup>81</sup> Conservatives typically defend a far more expansive First Amendment doctrine than the Framers would have expected.<sup>82</sup> They want to apply equal protection norms against the federal government, despite the absence of support in the original understanding of the Fifth Amendment's Due Process Clause.<sup>83</sup> Similarly, few conservatives would wish to upset the settled understanding that the Due Process Clause of the Fourteenth Amendment incorporates most Bill of Rights guarantees and makes them applicable against the states.<sup>84</sup>

In order to permit such accommodations, even most originalists acknowledge that the Framers' expectations cannot be controlling in every case. Some would dilute their theories by affirming that obligations of adherence to precedent can sometimes prevail over originally understood meanings.<sup>85</sup> Others draw a distinction between the original "public meaning" of constitutional language and original understandings concerning how constitutional language would be applied.<sup>86</sup> With this distinction in place, they argue that those who wrote and ratified constitutional language may sometimes have failed to grasp the full import of its meaning, and may thus have misapplied it. On this view, it may become possible to say that the original public meaning of the Equal Protection Clause forbade some discriminations that the authors and ratifiers tolerated<sup>87</sup> or that the original meaning of the First Amendment's free speech guarantee extended to types of utterances that the Founding generation mistakenly deemed unprotected.

Given the need to reconcile constitutional adaptability with fidelity to the Constitution as written, we should not be surprised that there are many varieties of self-styled constitutional "originalists," just as there are of nonoriginalists.<sup>88</sup> There is no obvious, reasonably determinate answer to the question of how to bring these

*Originalism*, 24 CONST. COMMENT. 371 (2007); Randy E. Barnett, *Trumping Precedent With Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257-58 (2005).

81. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, 411-12 (2012) (acknowledging that originalist interpretive theories should make exceptions for cases governed by stare decisis and "not propose that all decision made ... in the past half century or so of unrestrained constitutional improvisation be set aside"); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 158 (1990) ("[I]t is too late to overrule not only the decision legalizing paper money but also those decisions validating certain New Deal and Great Society programs pursuant to the constitutional powers over commerce, taxation, and spending.").

82. See, e.g., STRAUSS, *supra* note 37, at 61 (noting the narrowness of the Framers' understandings of freedom of speech).

83. For example, in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), the Justices who are conventionally denominated as conservatives all joined in holding that federal affirmative action programs trigger strict judicial scrutiny under the Due Process Clause of the Fifth Amendment.

84. See, e.g., SCALIA & GARNER, *supra* note 81, at 413.

85. See, e.g., *id.* at 411-14; BORK, *supra* note 81, at 158-59.

86. See, e.g., Calabresi & Rickert, *supra*, at 4-11; Lawrence B. Solum, *We Are All Originalists Now*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* 1, 10-11 (2011).

87. See, e.g., Calabresi & Rickert, *supra* note 44, at 4-11.

88. See, e.g., Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, Or Are They Rationalizations for Conservatism?*, 34 HARV. J. L. & PUB. POL'Y 7, 14 (2011); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244-45 (2009).

two imperatives into alignment with one another. Disagreement abounds. Indeed, there may not even be agreement that I have stated the interpretive challenge precisely accurately. But we should not let points of thoroughly understandable disagreement obscure the large points that we all ought to recognize: Judges and commentators of all political stripes are struggling with what is in essence the same problem, even if they sometimes describe it differently, and the differences in the answers that they provide are much more nuanced than categorical. No one wants constitutional adaptation to the exclusion of constitutional fidelity, or fidelity to the exclusion of adaptation. Tension between the competing demands of fidelity and adaptation is endemic to the interpretation and implementation of an eighteenth century constitution in a twenty-first century world.

A second, related problem of contemporary American constitutionalism involves politically based judging. In deciding whether constitutional adaptation is necessary, warranted, justified, or desirable, judges and Justices inevitably make contestable determinations that increasingly appear ideologically tinged. Conservative Supreme Court Justices, mostly appointed by Republican presidents, tend to coalesce in important case after important case. Liberal Justices, mostly appointed by Democrats, tend to follow a similar pattern. Yes, the Court decides many cases unanimously,<sup>89</sup> but typically when the stakes are relatively low. In cases involving abortion, affirmative action, campaign finance regulation, gun control, and the outer limits of federal regulatory power, there are identifiably conservative and identifiably liberal positions, and we typically know in advance in which camp each of the Justices will line up.<sup>90</sup> It may give temporary comfort when a Supreme Court nominee describes the job to which he aspires as being closely analogous to that of an umpire calling balls and strikes.<sup>91</sup> On reflection, however, we know better.

When judging appears partisan, public confidence in the judicial branch, and its members, understandably suffers. Whenever the President nominates someone to serve on the Supreme Court, opponents charge that the nominee is a reckless ideological partisan. In light of the recurrent attacks, it is little wonder that, by early 2012, the Supreme Court's approval ratings from the American public—which once routinely ran far ahead of those for the President and Congress—had fallen to forty-four percent.<sup>92</sup>

In saying that our current constitutional framework—which I have characterized as constitutionalism 1.8—leaves us struggling with twin problems of reconciling constitutional fidelity with adaptability and of avoiding political

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89. During the 2011 Term, the Court decided 44 percent of its cases by unanimous vote. See Adam Liptak, *In Supreme Court Term, Striking Unity in Major Cases*, N.Y. TIMES (July 1, 2012), <http://www.nytimes.com/2012/07/01/us/supreme-courts-recent-term-a-new-phase.html>.

90. See, e.g., David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, THE ATLANTIC (June 29, 2012, 10:29 AM), <http://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155> (presenting statistical evidence to corroborate this intuition).

91. See Transcript: Day One of the Roberts Hearings, WASH. POST (Sept. 13, 2005), [http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300693\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300693_pf.html).

92. See Adam Liptak & Allison Kopicki, *Approval Ratings for Justices Hits Just 44% in Poll*, N.Y. TIMES (June 7, 2012), <http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html>.

judging, I do not mean to suggest that these problems would be wholly absent in any constitutional regime. Drafters of constitutions may frequently need to paper over differences in order to attain the requisite public support.<sup>93</sup> To a greater or lesser extent, this strategy, where it is used, will inevitably leave politically charged issues to be resolved by the courts. Nevertheless, I believe that the age of our Constitution, and the resulting pressure to find interpretations that are attractive and workable in the twenty-first century, exacerbate some of the problems that would exist under a more modern constitution drafted with modern problems in mind.

### III. HOW SHOULD WE GO ON FROM HERE?

If I am right in my diagnosis of two important problems that arise recurrently under constitutionalism 1.8, the question becomes how we should go on from here. In my view, we have no ideal option. A return to constitutionalism 1.0—which would mean the kind of constitutional regime that the Founding generation anticipated—should be regarded as out of the question. The consequences could be disastrous, as originalists who find ways to temper or moderate their originalism realize. As Justice Scalia has been quoted as saying, differentiating himself and I believe most originalists from those who would like to return to constitutionalism 1.0, “I am an originalist . . . but I am not a nut.”<sup>94</sup>

There is also no realistic prospect of our quickly getting a newly minted and updated Constitution, proposed by a Constitutional Convention and ratified by three-quarters of the states.<sup>95</sup> In other words, a roll-out of constitutionalism 2.0 (American style) is not in the cards. Even under the best of circumstances, the requirement that three-fourths of the states must ratify constitutional amendments makes it nearly impossible to achieve significant change in our written Constitution through the Article V process.<sup>96</sup> We do not, moreover, inhabit the best of circumstances. Our politics are too polarized.

Accordingly, if we are currently working with constitutionalism 1.8, we should think more modestly about the kind of relatively minor upgrade that would help to alleviate our most urgent current problems. On Constitution Day 2012, we should turn our thoughts to imagining an American constitutionalism 1.9 that would solve the leading problems of our current version 1.8. Even with the challenge defined in these relatively modest terms, I have no more than a sketch of a suggestion of how we might proceed. But let me offer a few tentative thoughts.

First, recognizing the practical imperative of adaptation, we should embrace an understanding of the nature of law and the obligation of fidelity to law that explains how interpretive evolution, within reasonable limits, is lawful and legitimate. In jurisprudence, or the philosophy of law, there are rival accounts. One equates law

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93. See A. E. Dick Howard, *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383 (1996).

94. JEFFREY TOOBIN, *THE NINE* 102-03 (2007).

95. *But see generally* LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011) (proposing a modern constitutional convention); SANFORD LEVINSON, *FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012) (same).

96. See U.S. CONST. art. V (providing that a constitutional amendment requires the approval of three fourths of the states); LEVINSON, *supra* note 13, at 160 (“Article V has made it next to impossible to achieve . . . adaptation where amendment is thought to be necessary.”).

with the command of the sovereign, or lawgiver, and associates fidelity to law with obeying the commands of the lawgiver.<sup>97</sup> Some versions of originalism asks us always to obey the commands of the Framers—as defined by their understandings or expectations—even when adherence to those commands as thus construed would be archaic or dysfunctional. By contrast, a different, better account of the nature of law equates law with ongoing practices of adherence to socially established and enforced norms of legality that can change over time.<sup>98</sup> The reason that the Constitution is law today is not that the Framers decreed that it should have that status. King George and the British Parliament issued similar decrees. What distinguishes the Constitution from the decrees of King George is that the Constitution is today accepted as law—by judges, officials, and the American public.<sup>99</sup> And, to state a complex claim as simply as possible, Americans have long accepted the Constitution as law subject to the proviso that it need not and should not be interpreted to reach practically intolerable results in the current age.<sup>100</sup>

Second, having acknowledged that evolution in constitutional understandings can be legitimate and desirable, not a vaguely shameful concession to grim necessity, we should also recognize that the challenge of defining our obligations of fidelity to the Constitution, and of accommodating fidelity with adaptability, is one that very understandably provokes reasonable differences of opinion.<sup>101</sup> This may seem a banal observation, but you would not necessarily know it from reading Supreme Court opinions in divided cases. Even when the Court splits five to four, the contending opinions typically read as if there could be no doubt about the result; the majority and the dissenters just differ about what the indisputably correct result is. The explanation for this phenomenon may inhere partly in traditional conventions of opinion-writing. Eagerness on the part of judges and Justices to cast themselves as disinterested oracles of the law may lead them to overstate the cases for the conclusions that they reach. Recent work in cognitive psychology provides another partial explanation for dueling majority and dissenting opinions that both portray the matter in issue as beyond all reasonable doubt. Once having settled on a conclusion, the human mind tends to suppress residual reminders of grounds for uncertainty.<sup>102</sup> Nevertheless, the Justices are men and women of extraordinary intelligence, trained professionally to engage in critical analysis of all arguments on all sides. Doing so, they could, and should, acknowledge the reasonableness of disagreement and write opinions that frankly acknowledge the

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97. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 13 (H.L.A. Hart, ed., The Noonday Press 1954) (1832).

98. The most influential practice-based account is H.L.A. HART, *THE CONCEPT OF LAW* (Penelope A. Bulloch & Joseph Raz, eds., 2d ed. 1994). For an application of Hartian concepts to the American legal system, see Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107 (2008).

99. See Fallon, *Constitutional Precedent*, *supra* note 98, at 1128–29, 1136–42.

100. See *id.* at 1122–46.

101. Issues arising from reasonable disagreement are endemic both to law, see generally, e.g., JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999), and to moral and political philosophy, see generally, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 54–58 (1993).

102. See Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 61–66 (2011).

difficulty of many of the questions that come before them.<sup>103</sup>

Third, understanding the reasonableness of disagreement, we should demand that our judges and Justices adopt a stronger presumption that any reasonable constitutional judgments made by Congress and the state legislatures in enacting statutes are constitutionally valid. The Supreme Court recurrently recites that legislative acts, and especially acts of Congress, enjoy a presumption of constitutionality.<sup>104</sup> Very often, however, the presumption appears to be little more than a tie-breaker, if that. At least in our current circumstances of sharp ideological division, the unwillingness of the Justices to display more deference or “restraint” in cases of reasonable constitutional doubt seems regrettable.<sup>105</sup> Among other drawbacks, unyielding stances by the Justices can only exacerbate our slide into a situation in which judging not only is perceived to be, but may actually become, more and more political in a troubling sense of that term.<sup>106</sup> No one should think that what is best about American constitutionalism 1.8 is that it bestows sweeping powers on narrow majorities of an ideologically divided Supreme Court to impose their views, in the name of the Constitution, in otherwise contestable cases.

In suggesting that the Supreme Court should show more restraint in invalidating legislation in cases of reasonable constitutional disagreement, I make no pretense of originality. The idea is an old one, perhaps as old as the Constitution itself.<sup>107</sup> It has had many famous champions, including James Bradley Thayer<sup>108</sup> and Justice Oliver Wendell Holmes, Jr.<sup>109</sup> But if the idea of judicial restraint is not new, it seems to me to be peculiarly well suited to current times, for it addresses both of the fundamental problems that I identified as characteristic of constitutionalism 1.8. First, an enhanced presumption of constitutionality would alleviate political judging. It would not only permit judges, but require them, to uphold the constitutionality of legislation of which they disapprove on policy grounds. Indeed, it would sometimes require them to do so even in full awareness

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103. *See id.* at 60.

104. *See, e.g.,* *Concrete Pipe & Prods. of Cal., Inc. v. Const. Laborers Pension Trust*, 508 U.S. 602, 637 (1993).

105. For a useful set of distinctions among different types or senses of judicial “restraint,” and an account of the strengths and weaknesses of the version that would invalidate legislation only in relatively clear cases of unconstitutionality, see Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519 (2012).

106. As I have written elsewhere, judging is necessarily “political” in the elevated and honorable sense that it requires moral judgment in some cases, but it need not and should not be political in ways that correlate too closely with the preferences of explicitly political partisans. *See* RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION* (2d. ed. forthcoming 2013).

107. For a summary of literature describing Founding-era expectations that the courts would invalidate legislation only in cases of clear constitutional error, see RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 70–72 (6th ed. 2009).

108. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

109. *See Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (arguing that the Constitution was made for people with differing economic philosophies and that the courts should not invalidate a legislative decision about which philosophy to embrace unless “a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law”).

that there are reasonable constitutional arguments that would let them vote to invalidate that legislation.

Second, an enhanced presumption of constitutionality would address the problem of reconciling adaptability with fidelity by acknowledging the reasonableness of disagreement about many if not most contentious issues. In cases of reasonable disagreement, the presumption of constitutionality would reflect the premise that it will ordinarily be fairer to let democratically accountable officials decide how the Constitution is appropriately applied and adapted than to have unelected judges dictate the outcome when their views are just as contestable as the judgments that they would displace. Although I have previously argued that the best philosophical justification for judicial review depends on the assumption that it is better for rights to be overenforced than underenforced, and that there should therefore be multiple “veto points” at which different institutions can thwart the enactment and enforcement of rights-threatening legislation, “[r]elatively deferential review is ... an option” consistent with that general strategy.<sup>110</sup> Whatever might be true under other circumstances, the option of an enhanced presumption of constitutionality responds to the difficulties of American constitutionalism 1.8 better than the less deferential attitudes that typically characterize contemporary practice.

In proposing that we should re-embrace the old idea of “judicial restraint” at this particular time, I have a contemporary example of reliance on the presumption of constitutionality very much in mind. An apprehension that the Supreme Court should not become too ideologically identifiable an institution, and should defer to Congress in cases of reasonable constitutional disagreement, helps to explain some of the admiring responses to Chief Justice John Roberts’s recent decision upholding the so-called Individual Mandate to purchase health insurance in the Affordable Care Act (“ACA”).<sup>111</sup> Some of the applause undoubtedly came from those who thought the ACA clearly, indisputably constitutional. But some also came from people who understood that there were powerful arguments both ways and who believed, under those circumstances, that an ideologically divided Supreme Court—with the Justices’ ideologies largely tracking those of the presidents who appointed them—should not strike down so momentous an Act of Congress.<sup>112</sup>

In the ACA case, reliance on the presumption of constitutionality produced what might be characterized as a “liberal” result. But if I am right that the current terms of our constitutional debates leave us perennially at the brink of constitutional crisis, and that the best strategy for escaping this predicament lies in more judicial deference to legislative judgments, then liberals, as well as conservatives, should relax their expectations of what they can properly achieve through the courts. In the now-prevailing state of affairs, liberals and conservatives seem roughly equally eager to see courts invalidate legislation that they dislike. The principal difference is that they dislike different kinds of legislation.

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110. Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1733 (2008).

111. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

112. See, e.g., David Brooks, *Modesty and Audacity*, N.Y. TIMES, June 29, 2012.

Conservatives oppose gun control laws, statutes authorizing affirmative action, restrictions on corporate speech, and a variety of environmental and economic regulatory laws. By contrast, liberals want courts to strike down laws imposing capital punishment, regulating abortion, and banning or withholding recognition of gay marriage. If common ground is to be found, and if the Supreme Court is to cease dividing along predictable ideological lines in a disheartening number of cases, then the presumption of constitutionality should be applied in ways that would disappoint liberals and conservatives alike, in roughly comparable numbers of instances.

Who should yield on which issues? Having endorsed an enhanced presumption of constitutionality, I must reiterate my confession that I have no full theory to offer, only a pastiche of scattered thoughts. It is not my view that the presumption of constitutionality should never yield to other considerations, even in cases of reasonable disagreement. Applied across the board, a theory demanding judicial deference in all cases would imply that the Supreme Court overstepped in many past decisions that now are acclaimed centerpieces of American constitutional jurisprudence. These include, for example, many paradigms of modern First Amendment law, the one-person, one-vote cases, the ruling establishing that impoverished criminal defendants have a right to court-appointed lawyers, and many of the leading cases—including *Brown v. Board of Education*<sup>113</sup>—that establish prohibitions against race- and gender-based discrimination.

The most historically celebrated effort to identify appropriate conditions of deference and non-deference—in Footnote Four of the *Carolene Products* case,<sup>114</sup> especially as elaborated by John Hart Ely<sup>115</sup>—offers some useful markers. In particular, deference seems inappropriate in cases involving legislation that somehow impedes the fair operation of the political process—for example, when incumbent legislators limit free speech or voting rights. If courts are to defer to the political process, they should minimally ensure that the political process operates fairly, and they should exercise substantially independent judgment in doing so.<sup>116</sup>

113. 347 U.S. 483 (1954).

114. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national . . . or racial minorities . . . : whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Id.* (citations omitted).

115. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

116. *See id.* at 105–34.

Ely also argued that the courts should withhold deference in cases in which legislation discriminates against discrete and insular minorities.<sup>117</sup> According to Ely, the possibility of prejudice against minorities renders the legislature unworthy of deference in cases involving asserted minority rights. As an intuitive matter, his proposal to withhold judicial deference in cases involving alleged infringements of minority rights sounds attractive. It would be obtuse to deny that the American past has included widespread, prejudice-driven discrimination based on race and religion that the Supreme Court has rightly sought to combat. As an analytical matter, however, it is often difficult to distinguish prejudiced enactments that courts should strike down from legislative exercises of moral judgment to which judicial deference is due.<sup>118</sup> Nothing that I have said so far pretends to resolve that difficulty.

Nor, as I have said, am I confident that courts should defer in all other cases in which constitutional disagreement falls within the category of the “reasonable.” Looking back at some of the Supreme Court’s past cases of non-deferential decisionmaking, I am inclined to believe that the Justices, in determining when the presumption of constitutionality is overcome, would be right to give weight to considerations of what they take to be practical and moral urgency, even if others might view the matter differently. Especially if I am right on this point, judgment must always come into play, and there is no avoiding its sometimes having a political component. Nevertheless, the fact that qualifications of this kind are necessary does not signal a need for retreat from my basic submission: In cases of reasonable constitutional disagreement, judges and Justices should apply a more robust presumption of constitutionality than they frequently do today.

Although I wish I were prepared to offer more determinate prescriptions, I make no apology for suggesting that we should proceed for the time being by tinkering only modestly with the Constitution, and the practices of constitutional interpretation, that we currently have in place. Once again, this does not seem to me a propitious time to propose a quantum leap into a dramatically new era of American constitutionalism. It is, however, a wholly apt time to ask: How can we design a better version of American constitutionalism—call it constitutionalism 1.9—that will more successfully combine pragmatic adaptation with fidelity to the constitutional text in an era in which judgments about what count as sound and sensible adaptations are likely to be ideologically charged?

#### IV. CONCLUSION: A LAST LOOK IN THE MIRROR

By way of conclusion, let me remind you of the road we have traveled to reach the question that I have just stated and with which I want to leave you.

I began by noting that constitution-writers in other nations have ceased to view the United States Constitution as a preeminent model and then asked whether we, as Americans, could learn any useful lessons from comparing the U.S. Constitution and surrounding interpretive practices with the “generic constitution” that represents most other liberal democracies’ current consensus about constitutional matters. In addressing this question, I briefly considered the hypothesis that the

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117. *See id.* at 136–79.

118. *See, e.g.,* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 10–11 (1985).

U.S. Constitution, most of which was written in the eighteenth century, leaves us stuck in the equivalent of constitutionalism 1.0 when most of the rest of the world has advanced to constitutionalism 2.0. But this hypothesis withers under scrutiny. We are far beyond constitutionalism 1.0, as defined by the constitutional regime of the early Republic and the set of understandings that surrounded it; we inhabit something more analogous to what I have loosely and metaphorically categorized as American constitutionalism 1.8. Through adaptive interpretation, political leaders, judges, and the American people have found ways to endow our Constitution with twenty-first century rather than eighteenth-century functionality. We have not only more extensive rights than eighteenth- and nineteenth-century Americans did, but also a more empowered national government in both its legislative and its executive aspects. But the adaptations that have been necessary to make our Constitution workable in the twenty-first century have created a tension, still not adequately resolved, about how to reconcile adaptability with fidelity to the Constitution's written text and original understanding. When Americans are broadly (even if never unanimously) united about which adaptations reason requires, American constitutionalism 1.8 works very well. But when unity breaks down, and constitutional judgments appear to be ideological and partisan, then American constitutionalism 1.8 begins to look clunky and occasionally dysfunctional. Is it any wonder that other nations would opt for twenty-first century constitutions that are more expressly designed to address twenty-first century challenges?

Reflecting on these matters on Constitution Day 2012, we have a Constitution that we can be proud of. But our operating system, which I have characterized as American constitutionalism 1.8, is tension-ridden and needful of improvement. As American citizens and constitutional loyalists, we should go forth from our Constitution Day celebrations thinking creatively about the challenges of living with a Constitution that was originally designed in the eighteenth century in a twenty-first century world.