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CONSTITUTIONAL INTERPRETATION AND CHANGE IN THE UNITED STATES: THE OFFICIAL AND THE UNOFFICIAL

I would like to extend my thanks to Olivier Beaud, Denis Baranger, and Quentin Épron for inviting me to Paris II, and to the Institut Villey for offering me the great honor of delivering this lecture today.

My talk will be in three parts. First, I will describe my theory of constitutional interpretation, which appears in my recent book, *Living Originalism*[1].

Second, I will discuss a very different question: How does American Constitutional law actually change in practice? This is not a question of normative jurisprudence, but rather a question of political and social mechanisms. The most important players in this story are not only courts; they also include non-judicial actors such as politicians, political parties, interest groups, and social movements. My theory of constitutional interpretation is designed to be consistent with a proper understanding of how change actually occurs in the American constitutional tradition. This is, I believe, the right way to approach questions of constitutional interpretation. Throughout this lecture I will emphasize the way that constitutional change actually happens, as opposed to the way that it is often imagined in professional schools of law – which, by their nature, tend to focus on explicating judicial doctrine. Indeed, a central theme of this lecture will be the importance of two kinds of contributions to constitutional development. The first are the *official* contributions of laws and judicial doctrines. The second are the *unofficial* contributions of civil society, expressed through social influence, political organization, and cultural change.

Third, many of you may have heard of an exotic American idea called « originalism, » which is sometimes opposed to the idea of a « living constitution. » The title of my book, *Living Originalism*, combines these two ideas. Contrary to the conventional wisdom, my book argues that originalism and living constitutionalism are not opposed at all. The best versions of each are not only compatible; they are two sides of a single coin. Both calls for a return to original meaning and assertions that we Americans have a living constitution are responses to the same phenomenon – Americans' experience of what I call constitutional modernity. In the third part of this talk, I shall explain what originalism is, why Americans seem so attracted to it, and its relationship to a « living » constitution. As we shall see throughout this talk, debates about the interpretation of the American

[1] Jack M. BALKIN, *Living Originalism*, Cambridge, Belknap Press 2011.

Constitution are heavily influenced by features of American society and American cultural memory.

Part One: Framework Originalism

So let us begin, then, with my own account of constitutional interpretation. It is called framework originalism, or the method of text and principle. Start with a very basic question: what is the purpose of a constitution? Many people say that constitutions are pre-commitment devices – they are designed to prevent future generations from doing unwise things in politics. I believe that many individual constitutional provisions have this purpose, but not constitutions as a whole. The point of constitutions is not to prevent politics, but to facilitate politics. We want people to address their political goals and their disagreements through politics, rather than through armed struggle or civil war. If a constitution fails at its central purpose of making politics possible, you no longer have politics – you have war. Even when people struggle over the meaning and scope of the constitution, the goal should be to ensure that this struggle, too, also occurs peaceably, through constitutional politics.

Constitutions, in short, are frameworks for making politics possible. The text of a written constitution contains different kinds of legal norms that create the basic framework. These norms include rules, standards and principles. Rules and standards exist along a continuum. Rules are norms that don't require very much practical reasoning to apply. For example, « the President shall serve a term of four years. » Standards often use vague terms, and therefore require more practical judgment to apply. The American Fourth Amendment is an example: « The people shall have a right against unreasonable searches and seizures. » The term « reasonable » is vague; and the terms « search » and « seizure » may also be unclear, especially as technology changes.

Like standards, principles may also have abstract and vague terms; the difference is that when principles apply to a situation, they do not always apply conclusively, but may be balanced against other considerations. For example, « the state shall not abridge the freedom of speech » states a principle that must be balanced against other considerations.

A constitution contains a mixture of these different kinds of norms. They serve different functions. For some purposes, rules are better than standards or principles. For example, in a presidential system, we probably need to define the president's term by a rule (say a term of four years) rather than a standard (« for a reasonable length of time »); otherwise presidents would tempted to try to stay in power forever, and this might undermine democracy. But some constitutional goals cannot easily be achieved through rules. That is why human rights provisions in constitutions are usually expressed in terms of standards and principles. These are open-ended, abstract, or vague terms that necessarily require construction and implementation by later participants in the system.

Constitutions use rules, standards, and principles and to channel and police government action, to establish rules of succession to power, to create institutions that perform government functions, to divide powers among different actors and branches, and to set institutions in competition with each other in order to diffuse and check concentrations of power. Because constitutions not only use rules but also standards and principles – and because they are sometimes silent on certain questions – they are elaborate systems of constraint and delegation to the future.

This last idea is quite important to my theory. I treat constitutions as frameworks for politics, not completed projects. Constitutions are never completed. They are like Heraclitus's river – they are always changing, and just as you can never step into the same river twice, you can never step into the same constitution twice. That may seem a little odd if you identify a constitution with just its written text. After all, the text of a constitution may not change for many years. How then can we say that the constitution is always changing?

To answer this question, we must distinguish between the written text of the constitution and what I call the « constitution-in-practice. » The constitution-in-practice is how the constitution actually operates in practice – it is the set of doctrines, practices, institutions and conventions that implement the constitution and allow it to operate. The constitution-in-practice is the constitution considered as an ongoing operation or project. So when I say that the constitution is always unfinished and that you can't step into the same constitution twice, I don't mean that the text of the constitution is always changing. I mean that the constitution-in-practice is always changing.

Earlier I said that my theory is called « framework originalism. » We can now see why I use the term *framework.* But why do I call it originalism? In *Living Originalism*, I argue that we should interpret the American Constitution according to the original meaning of its words. This requirement is not so important in the French context, because the constitution of the Fifth Republic was written only a half-century ago. It is far more important in the American context, because the U.S. Constitution has lots of language that was written in 1787.

What is the point of insisting on original meaning? Some words in English have changed their meanings over time, and when we interpret a constitution we do not want to accidentally engage in a play on words. To give only one example, in Article I, section 8, the American Constitution gives Congress the power to erect magazines. The word « magazine » does not mean what it generally means today – a periodical publication like *Vogue*, *The New Yorker*, or *National Geographic*. In 1787 the term « magazine » primarily referred to a place for storing ammunition, as it does in military parlance today. It is related to the French word *magasin*, which means « store. »

I believe that we must be faithful to the original meaning in the sense of the original semantic and communicative content of the words. But it does not follow that we must apply the constitution's words in the same way that they would have been applied by the people who wrote them. Thus, the

Fourteenth Amendment to the U.S. Constitution guarantees equal protection of the laws. These words have pretty much the same semantic meaning as they did in 1868. But the people who wrote them did not expect that the words would require modern notions of sex equality. In applying the Equal Protection Clause today, we are bound only by the original meanings of the words – which in this case is the same as the contemporary meaning – and not the original expected application.

Because a constitution is a framework, it must be built out over time, and different generations must participate in that project. As each generation gets involved, change inevitably occurs. Moreover, many different people and groups in society participate in the construction of the constitution-- not only judges and lawyers, or politicians, but also members of civil society and ordinary individuals.

These groups participate in *official* ways: for example, by creating laws and judicial doctrines. They also participate in *unofficial* ways: for example, through social influence, political organization, and cultural change. To understand constitutional development, we must take account of both the official and the unofficial contributions to constitutional construction.

How various groups and individuals within a society participate in the development of a constitution depends very much on the history of that particular society and its cultural memory. In this lecture I am concerned with the distinctive features of American constitutional culture. Although it is not true in most countries, it happens to be the case that the American public deeply reveres the constitution and expresses a proprietary interest in it. Americans think of the constitution as *their* constitution. They feel that they have the authority or the right to tell political officials – and especially judges – what the constitution really means. Many reform projects in the United States organize themselves around restoring or redeeming the « true » constitution; they organize in response to politicians, judges, and other actors, whom, they claim, have misinterpreted the constitution.

This degree of cultural investment in a nation's constitution does not occur in all countries. In some countries, the existing constitution is a holdover from a previous discredited regime to which some new amendments have been added. Or the constitution is treated as a legal document that one studies in law school, but not as a national symbol. In these situations, a constitution may not be strongly venerated, or an object of popular focus. The constitution will be treated as a technical legal document for lawyers and judges, but not something that the general public treats as its own, continually makes arguments about, and asserts a right to interpret. How a constitution inheres in the political life of a country depends on that country's particular history and the stories it tells about the genesis and operations of its constitution. As I shall explain in the third part of this lecture, the American constitution has special cultural significance because of America's national narrative: Americans identify their constitution with the formation of an American state and the emergence of an American nation and people.

Part Two: The Processes of Constitutional Change and the Dialectic of Legitimation

I now turn to the second part of my lecture, which concerns how the American Constitution actually changes over time.

If you have ever read the American Constitution, you know that it is a very brief document. Article V of the Constitution provides the method for its amendment. Before the amendment becomes part of the Constitution, it must be passed by two-thirds of both Houses of Congress, and then three quarters of the fifty state legislatures (forty-nine of which also have two houses) must agree.

Article V has not been used very often in American history. There were twelve amendments to the Constitution at the very beginning of the republic (ten in 1791, one in 1795 and one in 1804. Three more were passed in the wake of the Civil War in 1865, 1868, and 1870. After that there have been only eleven or twelve, depending on how you count. Some people, for example, doubt that the latest amendment, the twenty-seventh, was properly ratified in 1992, but people have stopped complaining about it, so we may presume that there are twenty-seven.

It turns out, in fact, that the American Constitution is one of the most difficult in the world to amend. It is also much more difficult to amend than most of the constitutions of the fifty American states.

This is not surprising. The 1787 Constitution was an early version of a federal constitution, highly experimental in its conception. The American framers had to guess about how their innovations would actually work in practice. Not surprisingly, they didn't get everything right. In particular, they chose an extremely difficult method of amendment, and the degree of difficulty has increased over the years as the number of states increased. That is because each state that joins the Union adds two potential veto points – one for each house of its legislature (except for Nebraska, whose legislature has only one house.) One reason why the framers chose such a difficult rule was the anchoring effect of previous experience. The reference point for the framers was the amendment provision in the Articles of Confederation – which required unanimous consent of all of the states. Compared to *that* requirement, Article V amendment is easy. But compared to modern constitutions, it is quite difficult.

Because Article V is so onerous, Americans do not usually use it to alter their constitution. Instead of changing the constitutional text, they simply change the constitution-in-practice. Let us examine how that is done.

I begin by introducing a very important idea in constitutional jurisprudence, at least in the United States – I don't know how important it would be in the context of French constitutional law. It is the idea of *constitutional construction*. Consider the First Amendment to the United States Constitution: it says that « Congress shall make no law […] abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. » Now let us assume that Congress passes a law that makes it a crime to defame a public official, provided that the defendant may prove the truth of

the accusation in court. This is the gist of the Sedition Act of 1798, passed during the administration of the second president, John Adams. Does this law violate the freedom of speech or press? The text offers several possible answers to that question; but it does not conclusively resolve it[2]. Indeed, during the Adams Administration, the two major political parties disagreed over the constitutionality of the Act.

In order to resolve any concrete controversy about the Constitution, one must not only decide what the individual words of the text mean, but one must also build a doctrinal structure that allows government officials to apply the words of the text to particular controversies. In the United States, and in many other countries, the term « interpretation » involves both of these tasks: figuring out the meaning of the words in the text, and constructing and applying judicial doctrines and tests.

For the purposes of this talk, I want to focus on the second activity, which is called constitutional construction. Constitutional construction is the task of implementing the constitution-in-practice. It involves coming up with doctrines and tests to solve problems created by the text, or to apply the text to new problems. Constitutional construction also involves, recursively, applying these existing doctrines, tests, and solutions to new problems that arise – in the context of new laws, evolving government practices, and ever-changing circumstances. The central idea behind constitutional construction as a species of interpretation is that to make a constitution work, it is not enough to focus on the meaning of a text; the text must also be *implemented*, it must be performed and applied in practice and often tools must be created, adapted and applied for this purpose.

Now the notion that application is central to interpretation is a very old idea that goes back to Aristotle. But constitutional construction also involves the creation of legal doctrines that others in a tradition may use later on; in addition, later interpreters may expand, narrow, supplement, or replace those constructions with newer constructions as time goes on. Construction is cumulative: later actors use, build on, modify, or replace what other people have done before them.

Most constitutional change in America occurs through construction. That is not surprising when you think about it. When I teach the basic course in American Constitutional law, I ask my students to read the text carefully; but I do not pretend that the answers to most of the questions presented in the course can be derived solely from the text. We spend most

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[2] For example, supporters of the Act argued that according to English common law, freedom of speech was only a guarantee against prior restraints on publication, but not a guarantee against subsequent punishment for defamation, especially defamation of government officials. Opponents offered textual and structural reasons why the Act was unconstitutional. For example, the Speech and Debate Clause of Article I, section 6, immunizes members of Congress from arrest or punishment for what they say in official debates. In America, the people, and not Congress is the sovereign. If the people's representatives are protected from criticism of the government, it follows that the people of the United States – who must debate and vote on who will represent them in government – should be equally protected.

of our time focusing on the history of constructions of the text – decisions by the Supreme Court of the United States, famous speeches about the Constitution by American politicians and leaders of social movements, famous statutes, and so on. All of this is the work of constitutional construction.

Now perhaps you will see why I emphasize that a constitution is a framework for politics on which later participants must build. Constitutional construction is part of that building.

In fact, there are really two different kinds of construction. The first is construction by judges; the second is construction by the political branches. Let me discuss them in turn.

Judicial construction is the kind that is most obvious to lawyers. It occurs whenever a judge decides a case and applies doctrine, elaborates doctrine, or modifies doctrine. The famous case of *Brown v. Board of Education*[3] was decided 60 years ago. The case holds that the state governments cannot segregate children and place them in different public schools based on their race. This famous decision is often called an interpretation of the Fourteenth Amendment, but in fact it is technically a construction of the Fourteenth Amendment. The result in *Brown* does not follow ineluctably from the text of the Fourteenth Amendment. We know this because *Brown* was not the law for the first hundred years or so of the history of the Fourteenth Amendment. In fact, if, during the debates over ratification of the Fourteenth Amendment, people had understood that the consequence of ratification was desegregation of the public schools, it is very unlikely that the amendment would have been adopted. In 1868, integration of public schools was a very controversial proposition; although some racial radicals believed in it, most of the public did not, especially in the states that were crucial to ratification. Nevertheless, this view of the Fourteenth Amendment later became widely accepted as the correct one, and now is thought so correct that it is almost identified with the idea of equality in American political thought.

The doctrine of *Brown* developed in the course of trying to make sense of and apply the Fourteenth Amendment to a particular problem – and a very difficult problem, too, in the context of American politics. It was not the generally accepted original construction of the Fourteenth Amendment, although some people in 1868 did believe that the amendment should be interpreted this way. *Brown* reversed older constructions of the Fourteenth Amendment, and, in the process, it became a symbol of American equality and civil rights.

The example of *Brown*, by the way, demonstrates a very important feature of American constitutional interpretation. It is that the *original meaning* of a constitutional text is not the same as the *original expected application* of the text. As I mentioned earlier, I believe that later interpreters should always try to follow the original meaning of the text – in this case, the words that guarantee the « equal protection of the laws. » That

[3] 347 U.S. 483 (1954).

is not very difficult, because the meaning of these words in contemporary English is much the same as it was in 1868 when the words were adopted. But we are not bound by the original expected application of those words – that is, how the people living at the time assumed or expected that they would be applied to particular circumstances, or the subprinciples or subdoctrines that they expected judges would use to decide cases. The Equal Protection Clause is a principle, and, as I noted before, principles, like standards, are constitutional norms that require practical judgment and therefore leave much of their implementation to later generations. The distinction between original meaning and original expected applications follows more or less directly from the idea of a constitution as a framework that uses various open-ended kinds of norms, like standards and principles.

Brown is an example of a *judicial* construction of the U.S. Constitution. The second kind of construction is produced by the political branches and by members of civil society. These non-judicial constructions are among the most important, and, as we shall see, they actually drive the process of creating and modifying judicial constructions.

Following the Civil War the country adopted three important amendments designed to end slavery and guarantee basic rights of equality and liberty. But the same Congresses that proposed these amendments also passed a set of important civil rights acts. During the same period Congress also created a Department of Justice and a new bureaucracy with new officials designed to enforce federal law, especially in the South. Congress also expanded the jurisdiction of the federal courts in order to enforce its new laws and promote national values.

As the nineteenth century proceeds, Congress begins to regulate the railroads, then, at the turn of the century it adds new competition and anti-trust laws. Later it creates the Federal Reserve System of central banking, and passes still more legislation regulating health and safety. The political branches are building out an American state, creating new capacities for the exercise of state power. New institutions, new laws, and new practices change what the state does and what it is expected to do. Each of these acts of state-building is implicitly – and often explicitly – based on claims about what the constitution permits government to do. These *state-building constructions*, as we might call them, are constructions in two senses. They rely on constructions of the constitution. And they also construct new state capacities, often fulfilling constitutional purposes and obligations. Thus, we can rightly say that the history of the development of the American state is also the history of the series of constitutional constructions produced by political actors.

Now although I call these *state-building* constructions, one should not assume that a government can only get larger as it develops its capacities. Sometimes the state changes its capacities through subtraction. One of the most important aspects of state activity in the past thirty years has been privatization. Even as the United States has been expanding its military and surveillance capacities, it has been delegating more and more of state functions to private actors and contractors. Techniques of privatization raise a host of important constitutional questions, some of which the courts may

pass on, and some of which will never be considered by any court, and therefore simply become part of the constitution-in-practice.

One must also not confuse the idea of state-building constructions with the notion that a new constitution requires the complete rebuilding of an entire state. France offers a perfect example of why that is not so. When a new constitution is adopted, state functions and a host of laws are still in place. Many of the most important constitutional questions involve making sense of existing state functions and laws in the context of a new constitutional regime.

Nevertheless, the history of state-building constructions in the United States does, more or less, track the growth of the American state. When the United States is born in the 1780s, the state is very small. There are custom houses, and there is the post office. There is very little else. Almost everything we think of as part of a functioning modern state is constructed later on. And as the American state develops, the question naturally arises, whether these new constructions are within the power of the government – whether they impinge on important individual rights, or structural values like the separation of powers or federalism. One of the first great constitutional debates in the early republic, for example, concerned whether the federal government could create a national bank controlled by public and private investors to hold federal treasury funds. This issue concerned both the nature of what the new federal state could do and what the new constitution meant in practice.

Two hundred years later, the United States, like many other nations, is in the process of building an elaborate set of surveillance capacities, with elaborate bureaucracies and huge investments in technological infrastructure. The same question presents itself as it did in the case of the national bank in the 1790s. The political branches claim that this expansion of state capacity is consistent with the constitution. Is it? If it is, it will change the way that government works and what the constitution means in practice going forward.

First I discussed judicial constructions. Then I discussed state-building constructions. Now I want to tie these two ideas together. Showing their connection brings us to one of the major functions of the courts in the American constitutional system. The American courts examine the constructions produced by the political branches as they build out the state, and the courts decide whether these construction are legitimate, partially legitimate, or illegitimate. As they decide these questions, they create new judicial doctrines, which are new judicial constructions of the constitution.

So we have a dialectical process – a constant interaction between the constructions created by state officials in the political branches of the government premised on their claims about what the constitution permits or does not permit, and judicial constructions that legitimate or partially legitimate or hold unconstitutional these state-building constructions. In this way the American Constitution-in-practice is built. And this too, is the how the American Constitution changes.

This dialectical interaction is what we might call a *dialectic of legitimation*: Work by the political branches spurs constitutional

controversies that generate judicial doctrine that legitimates or holds illegitimate what political actors have done.

This account of two kinds of constructions and their dialectical relationship helps explain the point of judicial review in the American model. Forty years ago, there was a debate between two of my predecessors at Yale Law School. One of them, the great Alex Bickel, argued that judicial review was a deviant institution in American democracy. He was worried that courts had the power to declare the work of majorities invalid[4]. His friend and colleague, the great Charles Black, argued that judges could not legitimate the products of democratic self-government if they could not, on occasion, strike them down as well[5]. Bickel's concern about the « counter-majoritarian difficulty » has become justly famous. But Black's view, although less well-known, is perhaps even more important. The idea of constitutional construction helps us restate the point.

One of the most important functions of judicial review by American courts is to legitimate the constitutional constructions that are produced by the other branches. The idea of legitimation is Janus-faced. Courts explain what political actors can do by explaining what they cannot do. Through this process courts simultaneously create limitations and avenues of power; they both bound and bless the exercise of power.

It is crucial to see that judicial review does not simply impose limitations on state power; rather courts are institutions that legitimate power, describing and reshaping government action through judicial review. Judicial review should not be understood in isolation as a deviant institution in American democracy; it should be understood as part of a dialectical process of legitimation.

One of the great episodes of constitutional change in the United States is the New Deal, which occurred during the presidency of Franklin Delano Roosevelt; it was in part a response to the world wide depression of the 1930s. The New Deal began as a series of experiments by the federal government, experiments that created all sorts of new state capacities. The government regulated the financial markets. It built electrical power systems in rural areas. It created expansive new public works projects. It developed nation-wide social insurance. Each of these experiments assumed new government responsibilities, and each required a more powerful national government.

Not surprisingly, these exercises of state expansion led to an important constitutional struggle – an extended dispute over the meaning of the Constitution – which was ultimately resolved in the late 1930s, when the Supreme Court upheld the vast majority of these innovations. In doing so it ushered in a new constitutional era and a new constitutional order.

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[4] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, New York, Bobbs-Merrill 1962.

[5] Charles Black, *The People and the Court: Judicial Review in a Democracy*, New York, Macmillan 1960.

A few years before the final resolution, however, the Supreme Court struck down several of the Roosevelt Administration's innovations. The most important of these was the National Recovery Act. The NRA adopted a corporatist model of public-private cooperation: business and government worked together to set codes of competition, prices and wages. The Supreme Court's invalidation of the NRA and other laws in the first wave of the New Deal set the stage for a second set of New Deal laws that moved the American state in a different direction. It was this second set of laws about labor regulation and social insurance – sometimes called the Second New Deal – that became fixed in American political life.

The judicial invalidation of laws in the First New Deal led government actors to improvise and create other kinds of laws that the courts subsequently legitimated. In the process, courts transformed constitutional doctrine in multiple ways, acknowledging the authority of the federal government to assume new responsibilities and create new kinds of institutions, programs and regulations. These changes – both in doctrines and in state capacities – became part of the foundations of modern American constitutionalism.

This is an example of the dialectic of legitimation. Even when courts strike down important laws, their decisions may lead to other pathways for achieving the state's goals that will later be declared legitimate. Some scholars call this process a conversation or a dialogue, but I think that these metaphors are too polite; they understate the degree of political conflict that often occurs in practice.

The form of interaction between courts and the political branches is not foreordained. Much of it rests on contingency and path-dependence. In the case of the first and second New Deals, much turned on the order in which the courts heard constitutional challenges to New Deal legislation, as well as the composition of the courts during this process. The addition of new Justices beginning in the late 1930s significantly shaped the legitimation of the Second New Deal. The dialectic I am speaking about is not a Hegelian dialectic in which the outcome is foreordained. Rather, constitutional development occurs through the sometimes unpredictable collision of political will, moral principle, legal reasoning, institutional ordering and contingent circumstance.

Now let me add some additional complications. The United States is not a unitary state like France. It is a federal state. It contains both national and state governments. State politicians and state judges have their own ideas about how government should operate and what the federal constitution means. An important function of federal judges is policing the work of the states and local governments. Often if a particular state or local government decides to adopt a policy that is contrary to national law or to national constitutional values, the federal courts will bring it into line.

Again, consider the famous case of *Brown v. Board of Education*, which I mentioned previously. This decision was actually a collection of four different cases from four different states, each of which had segregated school children on the basis of race. *Brown* imposed national constitutional values on states with different views about the question of racial equality. In

particular, it imposed the views of Northern elites and members of the foreign policy establishment, who found segregation to be a major embarrassment to the nation as it was locked in a cold war with the Soviet Union. Americans wanted to say to the world that they, and not the Soviets, believed in freedom and the dignity of mankind; the Soviets responded by pointing to American racism, especially in the South[6].

We thus see two different functions of judicial review in the American system, which stem from its organization as a federal rather than a unitary republic. First, federal courts legitimate and police the constructions and actions of the national political branches. Second, they legitimate diverse approaches to governance among the states or they enforce national constitutional commitments at the state and local level.

Deciding whether or not to create and enforce national standards with respect to equality, religion, or other important interests is also an important way of building out the constitution in a federal republic like the United States. By considering constitutional challenges to state and local actions, courts simultaneously allocate power among the various levels of government. Courts may legitimate decisions by individual states to go their own way on particular policy questions, or, conversely, they may hold them to a unitary standard. Once again, the practice of judicial review fosters and shapes power even as it claims to limit it.

Now let us add a third layer of complexity to the story. There is yet another group of actors, and their contributions to constitutional change may be the most important of all. I am speaking of the various actors and organizations in civil society, including political parties, interest groups, and social movements. They do not participate in constitutional construction in the same way that legal officials do, but their unofficial participation in constitutional development is crucial. Almost every important change in the American constitution-in-practice has involved the influence of political parties, interest groups, or social movements – and often a combination of all three. Let me give you two recent examples.

One example is the current struggle in the United States for the right of marriage between same-sex couples. As you know, a law securing this right has been passed in France; however, because marriage has traditionally been regulated at the state level in the United States, the debate has proceeded differently in the United States. In America, the gay rights movement has worked on many fronts – in cities, in state legislatures and in state courts interpreting state constitutions; in congressional legislation, in executive orders, and in the federal courts interpreting the federal Constitution. The story of gay rights in the United States is ongoing, and we do not yet know how the story will end. The point, however, is that if you approached the question of gay rights merely as a question of federal judicial interpretation of constitutional precedents, you would completely misunderstand the actual processes of constitutional change. Rather, events in the states – both in

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[6] Mary L. DUDZIAK, *Cold War Civil Rights: Race and the Image of American Democracy*, Princeton, Princeton University Press, 2000.

state legislatures and courts – have interacted with events in the federal executive and legislative branches, and both have interacted with the work of the federal courts. And throughout this process the unofficial operations of civil society have shaped the constructions of political and legal officials.

The movement for equal rights for homosexuals goes back at least to the 1960s, and it has suffered many setbacks along the way. In the past two decades, however, the movement has gained strength and it has transformed Americans' attitudes about sexuality and sexual orientation. The movement for gay rights has proceeded simultaneously in culture, in politics and in law. It has influenced public opinion, politicians and political parties who respond to public opinion, as well as members of the judiciary who are appointed by politicians and who live within a larger culture. We are now seeing the fruits of years of sustained social mobilization in the decisions of the Supreme Court.

It may look as if the Supreme Court is now descending from the clouds and declaring equal rights. But the Supreme Court is a latecomer to this constitutional controversy. I like to say of the federal courts that they are like the husband in a sex farce; they are always last to know what is going on. To be sure, the participation of the federal courts is very important. After all, they state the official legal interpretation of the Constitution. But often they confirm officially changes in federal constitutional understandings that have already been taking place unofficially. They play an important role in the story of constitutional development, but in this story they usually have neither the first word nor the last word.

When courts speak on a controversial issue, they may not end the controversy. The decisions of courts may set the stage for further rounds of mobilization and counter-mobilization. Political and moral entrepreneurs can support what the courts are doing and build on them. In the alternative, these entrepreneurs can use the courts as a convenient foil for political mobilization, decrying the courts as smug elites who have betrayed the Constitution, and who are out of touch with society and with the values of « real Americans. »

Civil society is as important to constitutional change as the political branches and the judiciary. The work of civil society actors forms an important part of the dialectic of legitimation. After all, judges are not the only people with views about what is just and what is unjust, what rights Americans have, or what are government's appropriate powers and limits. These ideas develop in civil society, sometimes informally, sometimes through explicitly legal discourse. Through social movements, interest groups, and political parties; through cultural trends and media discussions, these ideas form and develop. The courts eventually catch these ideas as people catch a virus or an influenza. Then the courts, in their majesty, confidently pronounce these ideas – or restate them in official legal discourse – as if they sprang magically from the constitutional text or from the inherent logic of the law.

To be sure, the courts play a very important role in confirming and legitimating changes in constitutional understandings – no one should dispute this – but they are simply one element in a much larger process of

change. To understand how American Constitutional law changes, it is not enough to consider the decisions of the courts, and the constitutional constructions of the political branches. One must also consider the work of civil society organization, political movements, and interest groups. Together, these actors shape and alter ideas of what is reasonable and unreasonable in legal argument.

Social movements, political actors and interest groups develop new ideas and alter existing ones. They help reshape social norms and expectations about government. They move certain views about the constitution from being considered « off-the-wall » – that is, crazy – to being « on-the-wall » – that is, plausible or reasonable. The history of constitutional thought in the United States, is, to a very large extent, the movement of ideas about the constitution that were previously thought « off-the-wall » to « on-the-wall. » In some cases, these groups are so successful that views previously regarded as crazy and unreasonable become widely accepted and even orthodox; and the contrary views previously thought reasonable become regarded as « off-the-wall », so that only a person outside the mainstream would continue to hold them publicly.

This reevaluation does not occur with all ideas about the constitution that circulate in civil society; most off-the-wall ideas remain off the wall. Moreover, this movement is not random. Ideas about the constitution do not move by themselves from unreasonable to reasonable. They need champions in civil society, in politics, and in the legal profession who are willing to place their own reputations at risk by advocating for these ideas and attempting to persuade others of their correctness.

Courts also play a role in this process – after all, an idea can no longer be regarded as off-the-wall if a substantial number of judges – even in dissent – accept it. But judges are not the only actors, and indeed, in some cases, they may not even be the central actors. Take the example of same-sex marriage mentioned earlier. In 1972, in a case called *Baker v. Nelson*[7], plaintiffs argued that the Constitution guaranteed same-sex marriage. They claimed that when the state of Minnesota recognized only opposite-sex marriages it discriminated against people on the basis of the sex of their partner. In 1972, the Supreme Court was only beginning to consider the possibility that sex discrimination (outside of the right to vote) could violate the Constitution. By challenging traditional understandings of marriage, the plaintiffs in *Baker* were making a far more controversial claim.

In 1972, the Supreme Court thought that this claim was so off-the-wall that it did not even bother to write an opinion; the Justices simply summarily affirmed the decision of the Minnesota Supreme Court which had rejected the argument. Yet forty years later, what was once off-the-wall has become on-the-wall, and in 2015 the U.S. Supreme Court held that same-sex couples have a constitutional right to marry.

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[7] 291 Minn. 310, 191 N.W.2d 185 (1971), aff'd, 409 U.S. 810 (1972) (dismissed for want of a substantial federal question).

How did this happen? Was there some change in the constitutional text? No. Indeed, in an oral argument in 2013, Justice Scalia – a conservative originalist who has often opposed the recognition of constitutional rights for gays – asked precisely this question. At what point, he asked, did it become constitutionally required for same-sex couples to have the right to marry[8]? He offered his question as a *reductio ad absurdum*. He believed that same-sex couples did not have the right to marry at the time the Fifth Amendment was adopted in 1791 or the Fourteenth Amendment was adopted in 1868. There was no new amendment adopted through Article V of the Constitution that bestowed this right. Therefore, Scalia believed, if this was the understanding at the time of adoption, and one could not identify a precise moment of change, the change did not occur.

This argument is a bit like Zeno's famous paradox, in which Zeno attempts to show us that motion is impossible, or that an arrow never reaches its target. In putting matters this way, Scalia was being a bit too clever. He understood that the same argument could be made about many doctrines that are now central to American constitutional law. Put in terms of this lecture, the argument fails to distinguish between the constitution as understood by its adopters and the constitution-in-practice today.

What had happened in the past four decades was that the American constitution-in-practice changed. Through avenues of cultural change and political mobilization, people made claims about what they thought was reasonable and unreasonable, just and unjust; in the process, they shaped the conception of reasonableness and of reasonable legal arguments among legal professionals.

Professional conceptions of what the law requires are distinct from the untrained views of the general public. That is what makes professionals professional, after all. Nevertheless, professional judgments are nourished by the larger public culture – and subcultures – in which legal professionals live.

In contrast to the untutored public, professionals understand themselves to be reasonable people. They regard themselves as exponents of a learned tradition and defenders of reasoned argument. But reason shifts beneath their feet. Their judgments of *professional* reasonableness – that is, what is a good or bad argument about the interpretation of legal materials – are inevitably affected by what non-professionals think is reasonable and unreasonable, just and unjust. Because conceptions of reasonableness are produced through culture and politics, they affect professional judgments about legal materials and legal arguments. It was because cultural mores changed about homosexuality that it became reasonable for legal professionals to make certain types of *legal claims*; namely that the Fourteenth Amendment's Equal Protection Clause protected gays and lesbians from discrimination, that the Due Process Clause prohibited criminalization of homosexual sodomy, and that the constitutional right to

[8] Transcript of Oral Argument at 38, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) No. 12-144) (quoting Justice Scalia).

marry included same-sex couples as well as opposite sex couples. Although these legal judgments are premised on readings of constitutional text, precedent, history and structure, professional judgments within these modes of legal argument are shaped by the culture in which legal professionals live.

I certainly do not mean to suggest that legal professionals simply take orders from public opinion; the influence of popular opinion on professional legal judgment is far more complicated and subtle. My point, rather, is that judgments of legal professionals about whether an argument is good or bad, plausible or implausible, are shaped by the culture (and subcultures) in which legal professionals live, whether this influence is direct or indirect, conscious or unconscious. Lawyers and judges soak up conceptions of what is just and reasonable from their society, and from the subcultures they inhabit, as a tree soaks up water through its roots. Conversely, they also influence non-professionals through their work in shaping official law.

This process of mutual cultural influence shapes how legal professionals understand the professional legal materials that they work with, as well as the history and the significance of these materials. Legal professionals come to see certain legal claims as reasonable and plausible, even clearly correct, that they had not before. It seems to them that these claims are now the best interpretation of the constitutional text, and that the text, the precedents and the constitutional tradition all seem to point in a clear direction. And then judges and other legal professionals pronounce it so and assert that it is so, not on the basis of public opinion – which is untrained – but on the basis of their professional judgments about the law.

If this is the way that constitutional change occurs in the United States, why do American law professors spend so much time worrying about theories of interpretation? That is a very good question! Theories of interpretation are perhaps most useful in *critiquing* or *legitimating* the actions of constitutional courts. But these theories do not do very much work in *constraining* what judges do. If we want to understand what actually shapes and constrains judicial decisionmaking in the American system, we must look at institutional, cultural and political mechanisms. Some of these mechanisms will also apply in other constitutional cultures, although, of course, not in precisely the same way that they operate in the United States.

One of the most important constraints on the behavior of the judiciary as a whole is judicial selection: who gets to become a judge, how judges are selected, and who selects them. Systems of judicial selection filter out people with certain backgrounds and views; they also create behavioral and intellectual incentives for people who want to become judges. The social and professional classes from which judges are selected affect which people and groups are likely to have the most influence on judges; it also affects how judges absorb and interpret ideas from the larger culture in which they live.

The United States relies heavily on the separation of powers and the party system to select federal judges; Sanford Levinson and I have called this a system of partisan entrenchment[9]. The President of the United States nominates federal judges and they are confirmed by the Senate of the United States. In many countries judges are chosen by groups of experts who represent the judiciary or the legal profession; or they are selected by some combination of politicians and members of the judiciary or representatives of the legal profession. Such a selection method helps to give judges professional legitimation and signals that they are above politics.

In the United States, judges are also supposed to be above politics; nevertheless politicians appoint them, often to further particular political and ideological agendas. This makes them somewhat more connected to the ideology of the political parties responsible for their appointment. Yet even in countries with different selection methods, politicians and political parties often have indirect influence on judicial selection.

A second important constraint on judicial behavior is the length of the judicial term, especially on constitutional courts. In the United States, federal judges, once confirmed by the Senate, serve for life. (State judges are often elected.) These features are very unusual among countries with written constitutions. Most judges on constitutional courts are appointed for fixed terms, and not for life.

A third set of institutional constraints concern the structure of the court system. The United States has a hierarchical system with the Supreme Court at the top; its decisions are binding on the lower appellate and trial courts. All federal courts – and indeed, all state courts – can and must consider federal constitutional claims. In some countries, only a constitutional court hears constitutional claims. In America even the lowest court can hear a constitutional claim; this shapes how constitutional claims are developed because it offers multiple pathways to test out new theories and move ideas from off-the-wall to on-the-wall.

The number of judges on a court – whether individual judges or multi-judge panels decide cases – also affects judicial decision-making. The United States Supreme Court has nine members. This means that most controversial decisions depend on the votes of the judges in the middle. The more judges sit on a panel, all other things being equal, the more likely it is that the decision will reflect the views of judges in the middle, and this will tend to have a moderating influence on the work of the court. The fact that controversial and important decisions depend on the judges in the middle does not guarantee that these decisions have majority support – although that is often the case – but it helps ensure that the court's work has a significant degree of public support and is connected to the views of the general public.

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[9] Jack M. BALKIN and Sanford LEVINSON, « The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State », *Fordham Law Review* 75, 2006, p. 489 ; Jack M. BALKIN and Sanford LEVINSON, « Understanding the Constitutional Revolution », 87 *Va. Law Review*, 2001, p. 1045.

The background legal culture of a country also channels and constrains judicial decision-making. We can recognize these influences by considering specific features of a country's legal practices: What are the generally accepted forms of argument used in constitutional interpretation? Is the legal culture common law or civil law? What are the rules of jurisdiction, standing and justiciability? Does the court require concrete controversies to hear a case or does it engage in abstract judicial review? Are judicial decisions written out as reasoned opinions? Are they very short and conclusory or are they long and detailed? Do judges sign opinions or are they anonymous? Are dissenting opinions permitted? Are dissenting opinions customary or rare? What are the traditions of oral argument? Does the court accept amicus briefs from non-parties?

Finally, one of the most important constraints on judicial behavior is its audience. By « audience » I mean the people that judges understand themselves to be speaking to, and the people whose good opinion they regard as important. The audience for judges is not necessarily the people sitting in the courtroom when an opinion is announced, although it may include those people. Rather, the audience for judges is the group of people whose opinion and whose approval judges care about, and whose views they regard as the most important, sensible and reasonable.

In his book *Judges and their Audiences*[10], legal sociologist Lawrence Baum argues that judges work before multiple audiences: colleagues, legal professionals, journalists and mass media, policy groups, political allies, civil society groups like the Federalist Society (for conservative judges), family, and friends. Each of these audiences shapes what judges consider reasonable and unreasonable; they also act as conduits of ideas in the general culture and the particular subcultures to which judges belong. A son or daughter, a former law partner, a friendly journalist, a newspaper columnist, all might shape the experiences of the judge and their sense of whether they are acting in an appropriate, professional, reasonable, or principled manner.

One might object – don't all of these social and political influences cause judges to be unconstrained? Don't they distract judges from paying attention to the law? Quite the contrary: these influences often help judges make sense of the law. They shape judges' notions of what a reasonable legal position is. This social conception of professional reasonableness is not freedom from ideology and influence – rather, what people regard as reasonable is produced by their continual interaction with others. Ideology and influence are constraints on judges – often quite powerful constraints – rather than sources of judicial freedom.

The effect of audiences on judging helps us understand one of the most remarkable developments in constitutional jurisprudence in the United States – the increasing polarization of views about American constitutional law. For much of the 20th century, most federal judges – especially at the

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[10] Lawrence BAUM, *Judges and Their Audiences: A Perspective on Judicial Behavior*, Princeton, Princeton University Press, 2006.

Supreme Court level – were drawn from the same ranks of political and legal elites. Not all were educated in elite institutions, but they usually did not get appointed unless they were fairly well-connected in political and legal circles. When lawyers joined the federal bench, and especially when they came to Washington, D.C., they mingled in a common elite culture.

The rise of the modern conservative movement in the 1980s changed all of that. The conservative movement was very concerned about the influence of elite culture on judges and Justices. They felt that this culture made conservative judges moderate and even liberal. More generally, they worried that conservative intellectuals had a disadvantage in a society dominated by liberal elites.

In response to these concerns, the conservative movement created a counter-establishment. It created conservative think tanks to counter the legal academy and establishment think tanks. It promoted conservative journalists and created conservative media. It created conservative professional groups like the Federalist Society to promote conservative legal positions. It fostered and helped grow a generation of conservative intellectuals who produced a steady stream of conservative ideas in law and social science. As a result, conservative judges today live in a very different world from moderate and liberal judges. They read different papers and different websites, go to different conferences, have different reference groups, and read different legal literatures. In Professor Baum's terms, they face a different audience.

In a recent interview Justice Antonin Scalia was asked what media he consumed. He remarked that he had gotten tired of the liberal *Washington Post* (which is actually not so liberal these days). Instead he reads the conservative *Washington Times* and listens to conservative talk radio[11]. Justice Scalia is hardly unique. Elite cultural and legal institutions – which help construct notions of reasonableness in legal thought, have now been severed in two in the United States. There is a liberal mainstream set of institutions and there is a conservative mainstream set of institutions. Liberal and conservative judges increasingly inhabit different cultural universes, and their decisions tend to reflect these differences[12]. What has happened to judges, in turn, is part of an increasingly polarized system of politics in the United States, which produces very different conceptions of what is reasonable and unreasonable among liberals and conservatives. The polarization of judicial opinion is powerful evidence of the role played by civil society, media and institutions in generating, discussing and arbitrating among ideas about the constitution.

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[11] Jennifer SENIOR, « In Conversation: Antonin Scalia », *New York Magazine*, October 6, 2013, at http://nymag.com/news/features/antonin-scalia-2013-10/.

[12] Mark GRABER, « The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making », *Howard Law Journal* 56, 2013. p. 661

Part Three: America's Cultural Narratives of Constitutional Change

So far, I have discussed the idea that constitutions are frameworks for politics, and I've discussed the system of constitutional change in the United States. In the third and final part of this lecture, I discuss the most important debate over constitutional interpretation in the United States, the debate between originalism and a living constitution. After describing this debate, I show how it is related to the first two parts of my lecture. I will also offer a cultural explanation of the dispute between originalists and living constitutionalists. The two sides of this dispute represent two aspects of a single phenomenon: how Americans deal with the problem of constant change in the context of an ancient constitution.

Some of you may have heard of American « originalism, » and you may also know that many conservative judges and lawyers claim to be originalists. What is originalism? It is actually not a single theory, but a family of theories. Originalist theories hold that constitutional interpretation should be based on something that is fixed at the time of adoption of a constitution or amendment of a constitution[13]. Different originalists have different views of what is fixed at the time of adoption or amendment: it might be the original meaning of the text, the original intentions of the framers, or the original understandings of the ratifiers.

Thus, originalists believe that the U.S. Constitution should be interpreted according to the meanings, purposes, intentions, or understandings of those who framed or adopted the Constitution, or who lived at the time of its framing and adoption. It is necessary to offer these different alternatives because originalists disagree among themselves about which version of originalism is the correct one. In fact, there are as many versions of originalism as there are different versions of Protestantism, and I use the analogy between originalism and Protestantism advisedly, because, as I discuss at the end of this lecture, there is actually a cultural connection between them.

What is the idea of a living constitution? Again, there are many different versions. Essentially, it is the view that we must interpret the Constitution in accordance with changing times and circumstances; as the nation grows and changes, so too does the constitution, even if its text does not change. As new events overtake older ones, and as people's values evolve in response to these changes, we must interpret the Constitution to take all of these changes into account. The metaphor of a « living » constitution suggests an organic process of evolution, and the idea that life involves change and therefore requires adaptation to change.

You can see why people regard these two approaches as opposed. One is about what does not change. The other is about what does and must change.

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[13] Lawrence B. SOLUM, « Originalism and Constitutional Construction », *Fordham Law Review* 82, 2013, p. 453, 459.

You might ask: what my position is on this debate? Which side am I on? Well, I am on both sides, as you can see from the title of my book, *Living Originalism*. I am an originalist because I believe that the framework does not change without amendment. The framework is the rules, standards, and principles in the text. As noted before, I also believe that we must adhere to the original semantic meaning of the text, so that we do not engage in plays on words. This makes me an original meaning originalist.

On the other hand, I also believe that the framework delegates to each generation the task of deciding how best to construct the Constitution. The choice of rules, standards, principles and silences in a constitution creates an economy of delegation and constraint, which leaves many issues for future generations to work out through constitutional construction. The very idea of constitutional construction presupposes that there is much work to do to build out a constitution over time. So although with respect to the constitutional text I am an originalist – a framework originalist, that is, – with respect to the constitution-in-practice, I am a living constitutionalist. The constitution-in-practice not only can change over time, it is always changing.

My adherence to framework originalism and my belief in a living constitution are simply two sides of the same coin. Of course, my version of originalism, framework originalism, is not a particularly controversial position in the United States. Nor would it be a particularly controversial position to take about most constitutions in most countries around the world. I often meet judges and legal scholars from other countries, and when I mention to them that I am originalist, they are horrified! Then I explain my views in more detail and they say, well, that's not so unreasonable. Why did you frighten me by saying that you were an originalist?

In fact, when people think of originalism, they usually think of a thicker, more restrictive conception than my theory of framework originalism. Often they have in mind the idea that today's judges must interpret the constitution the way that people at the time of its adoption would have understood it, or that judges must apply the open-ended provisions of the constitution in the same way that people at the time of adoption would have applied them.

This thicker conception of originalism is very puzzling to most judges and legal scholars in Europe; indeed it is puzzling to people in most other parts of the world. In almost no other country do judges of the constitutional court employ this kind of originalism as their dominant theory of constitutional interpretation. To be sure, in many legal cultures you will find individual examples of what we might call « originalist arguments » – that is, arguments that refer to the purposes, intentions, or understandings of people who drafted a constitution. Australia is a good example. And you will occasionally find statements of respect for the perspicacity and wisdom of constitutional framers. But offered as a general approach to or philosophy of interpretation, originalism is very rare outside the United States. Thus, when I meet judges and legal scholars from other countries, they often ask in genuine puzzlement: what is it about you crazy Americans? We see that you have very prominent judges and legal scholars going around saying that

we should interpret the constitution according to the original meaning or the original intent or the original understanding. Why do they say such things?

Judges from other countries should not be so alarmed. First, it is true that Americans like to talk a lot about the wisdom of their framers and of the founding generation generally. But this does not mean that they accept the thicker version of originalism that I described above. Most Americans do not actually believe that we should always adhere to the original understandings of the adopting generation or apply the constitution in precisely the same way that founding-era lawyers would.

When it comes to following the framers' understandings, most Americans are what I would call « cafeteria originalists. » This expression is taken from the equally American phenomenon of « cafeteria Catholics ». A cafeteria Catholic in the United States is a Catholic who maintains adherence to the church but who doesn't agree with the Church's position on various issues – for example, divorce, homosexuality, or contraception – and simply disregards what the church says about these issues. It is like going to a cafeteria – I will have this dish and this dish but not that one, and I don't like that one at all.

In the same way, Americans are cafeteria originalists. They revere their founders, and like to quote them as sources of wisdom. They like many things that the founders did or stood for, or that they *believe* the framers did or stood for – especially when you describe these things at a sufficient level of abstractness or generality. At the same time, Americans don't like many other things that the founders did or stood for. For example, many of the founders owned slaves, and denied women equal rights, but contemporary Americans believe in sex equality and don't approve of slavery. In fact, most Americans know very little about what the founders actually did or said – other than that they were in favor of liberty and self-government. But even when they learn more, they still revere the framers of the Constitution and regard the Constitution as a great achievement that we should be faithful to even to this day.

Thus, although Americans often have idealized conceptions of their framers, they are also very pragmatic. To the extent that they can identify the framers' values (as they imagine them) with their own values, they endorse the framers' views, and they insist that their fellow citizens do likewise. But to the extent that Americans find the framers' values unjust, strange, alien, or irrelevant to their lives, they simply ignore the framers, or, equally likely, they reinterpret or re-characterize what the framers said and did so that they can identify with it. This should hardly be surprising. It is what every tradition does with the hallowed symbols of its past.

There is a second reason that judges from other countries should not be so concerned about American originalism. Most American judges are not actually originalists, although they occasionally make originalist arguments and often quote the framers with reverence. The practice in American state courts interpreting state constitutions is even more instructive. You will occasionally find arguments about the original purpose, intention, or understanding of a state constitutional provision. But state constitutional law employs originalist arguments even less than federal law does. And you will

rarely see the framers of *state* constitutions treated with the same respect as the framers of the American Constitution.

This is an important fact, and it tells us a great deal about originalism as a cultural phenomenon and why Americans are so fond of invoking the Founding Fathers and making originalist-style arguments. It suggests that originalism is primarily a feature about the interpretation of the *national* constitution and that reverence for the views of the founders is an aspect of national culture and national political identity. To be sure, as originalism became more or less the official interpretive stance of the conservative movement in the 1980s, some conservatives began to export originalist theory to state constitutions as well.

American conservatives have sometimes argued that a fairly thick conception of originalism – *i.e.*, one that adheres to the framers' understandings – follows directly from the rule of law, or from democracy, or from the very fact of a written constitution. But since this approach to interpretation is not used in most other countries, much less in the interpretation of most American state constitutions, this can't be the case. Instead, the American attraction to originalism and quoting the founders likely flows from distinctive features of American *political culture*[14].

Perhaps you have seen pictures of Tea Party protests in the United States. The Tea Party is a conservative political movement named after the famous 1773 protest and destruction of tea in Boston Harbor. Some members of the contemporary Tea Party like to dress up in 18th century clothing and tri-corner hats; they identify themselves with the framers by imitating what they imagine the founding generation looked like. Moreover, it is very common for American politicians and ordinary citizens to speak of the wisdom of the framers of the Constitution. From these two examples alone, one could gather that American originalism has something less to do with the nature of law and more to do with American political culture and cultural memory. In the last part of my lecture, I will try to explain why this is so.

My argument will proceed in two steps. First, I will explain why the constitution and its framers have become such a powerful feature of national identity. Second, given these features of American culture, I will explain why a particular approach to constitutional interpretation – originalism – arose at a particular moment in history – the twentieth century.

The points I make about the United States can be generalized to other legal cultures. The cultural memory of a nation affects how people argue about its laws. But we should not expect that the influence will operate in the same way for every country, because every country has a different history and a different cultural memory. Thus, in most countries the framers of the current constitution are not particularly revered by the general public. But they are revered in America. The reason, I think, concerns the story

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[14] Jack M. BALKIN, « Why Are Americans Originalist? », in David SCHIFF & Richard NOBLES (eds.), *Law, Society And Community: Socio-Legal Essays In Honour Of Roger Cotterrell*, Surrey, England, Ashgate Publishing, 2014, p. 309-326.

Americans tell about their creation as a distinct nation and people. This national narrative, I shall argue, explains why the Constitution's framers have a special power over the political imagination of Americans.

Consider the first question I posed – the special status of the framers of the Constitution in American politics and law. Compare the United States with France for a moment. Both countries have a revolutionary tradition. And in both countries the revolution is strongly tied to national self-identity and to national ideals. But there are also important differences. There was a French state before the French Revolution. There were French people before the French Revolution. There was a French nation before the French Revolution. The French Revolution did not create the French state; it did not create the French people, and it did not create the French nation. Moreover, although the French Revolution led to a constitution, it is not the constitution under which the French people now live. The ideas of state, nation, and people, are distinct, both historically and logically, from the current French Constitution.

Now contrast the United States. Before the American Revolution, there were colonies, but no American state, and no American nation. Indeed, there was not even an American people. (In fact, I would argue that the notion of Americans as a single people takes even longer, and perhaps is not fully established until after the Civil War.)

According to the story that Americans tell themselves, the American Constitution, the American state, the American nation and the American people come into being at almost the same time, and are the work of a single generation. For this reason, the American nation and indeed, the American people themselves, are strongly identified with the national constitution. Indeed, the Constitution begins with the words « We the People of the United States […] do ordain and establish this constitution for the United States of America. » Americans pronounce the Constitution as theirs by announcing themselves as the people of a nation, the United States of America. There is something magical at work in this phrase – the people and the Constitution seem to call each other into being. Therefore the constitution symbolizes the country, and the generation that creates it stands for Americans as a whole.

Of course, this story – that the constitution, state, nation and people – all came into being at the same time – is misleading, if not false. The revolution occurs in 1776, the war ends in 1781; the Continental Congress organizes the alliance of rebellious colonies until the war is over, and the country is governed by the Articles of Confederation from 1781 to 1787. The Articles, which were first drafted in 1777 and finally ratified four years later, turn out to be a failure; their inability to produce a workable politics is precisely what leads to the 1787 Constitution, which is adopted in 1788.

The Articles, in fact, are the real first American Constitution. They, and not the Constitution, state that there shall be a « perpetual union » between the former colonies, which in 1776 had declared themselves to be « free and independent states. »

But of course, most Americans have never heard of the Articles, and if they have heard of them, they treat the Articles as just the warm-up act for

the real constitution, the Constitution of 1787. Instead, Americans tell themselves that the Constitution was created by the same people who created the Revolution, and that they created the American state and the American nation at the same time.

When Americans speak of the framers, or the founding fathers, in fact, they tend to run together the generation that fought the revolution with the generation that ratified the Constitution. These people overlap, but they are not quite the same. Take, for example, the six people who are most honored as founding fathers. I call them the « Big Six »: George Washington, Thomas Jefferson, James Madison, Benjamin Franklin, John Adams, and Alexander Hamilton. These people stand for the entire generation that produced the Constitution even though they were of different ages, and played very different roles. Jefferson, for example, was not even present in the country when the Constitution was debated and adopted; he was serving as minister to France. Recently the national archives began a project on the collected papers of the Founding Fathers – and not surprisingly, the papers they collected are of these six men.

These six are examples of what the study of mythology calls *culture heroes*. A culture hero is a person from the past, often a legendary figure, who symbolizes the nation, its ideals, hopes, and achievements. Their great deeds symbolize the nation and its achievements. Jeanne d'Arc is a culture hero in France, although, of course, she did not write the French Constitution. The Big Six are among America's most famous culture heroes, along with Abraham Lincoln, who symbolizes the victory against slavery in the Civil War.

Now every country identifies with what it regards as the great heroes of its past, and with the great events of its past, whether they are victories or defeats, achievements or fateful decisions. What is interesting about America is that several of its most important culture heroes are also the framers of its constitution. Culture heroes, of course, do great things. The creation of the constitution – which is identified with the creation of the American, nation, state, and people – is, for Americans at any rate, among the greatest of achievements. These features of American cultural memory help explain why both the American Constitution and its framers remain powerful symbols of national identity.

Now consider the second question that I posed: Given Americans' reverence for the founding generation as culture heroes, why did originalism arise as a *general theory of interpretation* when it did – not shortly after the founding, but during the twentieth century?

Originalism is a systematic and distinctive approach to constitutional interpretation. It is not the same thing as reverence for the framers, although, to be sure, reverence for the framers helped motivate the development of the theory, and still underwrites much of its rhetorical power in the United States. In addition, originalism is a general theory of interpretation, not simply one kind of legal argument that coexists with other kinds. There are many examples of legal arguments about the Constitution that invoke the beliefs, intentions, or purposes of the framers from the 1790s forward. They occur alongside many other kinds of arguments – about structure, about

precedent, about consequences, and so on. We might call these arguments « originalist, » but doing so is anachronistic, because there was no general or systematic theory of interpretation called originalism until the twentieth century. Indeed, the very term « originalism » was coined by Paul Brest, a critic, in 1980.

In fact, as academics began to make theoretical arguments, originalism mutated, creating many different versions. Some of these versions do not technically depend on reverence for the framers at all. For example, some kinds of original meaning originalism ask what a reasonable person at the time of adoption would have understood the text to mean. So an eighteenth century dictionary or a letter from a tradesperson might be evidence of original meaning that is just as good as an essay written by James Madison. In practice, however, originalist lawyers, judges, and academics prefer to cite the framers, especially *The Federalist* and the writings of the Big Six. This shows that reverence for culture heroes continues to underwrite originalism politically and culturally even when particular academic theories formally depend on other considerations.

In sum, the constitutional theory of originalism builds on American's reverence for the culture heroes of the Founding and leverages that cultural authority to produce and legitimate a particular approach to constitutional interpretation. Let me explain how this happened.

Americans live under a very old constitution. Around the world, written constitutions last for a median age of approximately 18 years; by that point, half of them have been replaced by a new constitution[15]. The American Constitution is an outlier; it dates back to the 1780s.

A very old constitution has benefits but also disadvantages. Its benefits are the degree of reverence that it is likely to generate over time. Because, as I have explained, the purpose of a constitution is to foster a stable politics, incentives to work for change within a constitutional order can sometimes be a very good thing, at least if the constitution is not too inflexible. It turns out that the American constitution – or at least the constitution-in-practice – is quite flexible, although people sometimes like to pretend otherwise. This has encouraged Americans to domesticate their repeated impulses for revolutionary political change and to work them out peacefully within the confines of their ancient constitution. (The major exception, of course, is the constitutional failure that led to the American Civil War, which was followed by new constitutional amendments and a constitutional reconstruction.) The constitution-in-practice, as I have said, has changed many times, often quite radically, but the written constitution remains in place. (Of course, if you think that domesticating revolution prevents valuable political change, this is a bad thing, not a good thing. But that is a topic for another lecture.)

Americans have constructed a modern state – which does all of the things that modern states do – atop their ancient constitution. For the most

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[15] Zachary ELKINS, Tom GINSBURG and James MELTON, *The Endurance of National Constitutions*, Cambridge, Cambridge University Press, 2009.

part this was necessary, and perhaps even inevitable. But eventually it produced a crisis of modernity. By a crisis of modernity I mean the recognition that one is losing – or has already lost – crucial connections to the stabilizing and legitimating authority of the past and the institutions and traditions of the past. Modernity is the sense that these forms of authority are outdated, slipping away, or can no longer perform their customary function.

The 1787 Constitution was designed for a different world and a different country than the American democracy of the twentieth century. It was not designed to accommodate a global superpower that was also a modern regulatory and welfare state. During the twentieth century people repeatedly recognized that the world that produced the old constitution was long gone, and that they were living in a different age.

There are two standard responses to modernity, in culture and in politics. The first response is to accept that we are modern and embrace our separation from the past and from tradition. We deliberately reject the past, exaggerate our distance from it, and define ourselves against it. The second response is precisely the opposite. We deny that we are separated, or we attempt to prevent any further separation. We cleave to the past, and attempt to regain it. To the extent that the past seems lost to us, or its loss is threatened, we cling to its concrete manifestations, practices, and rituals and we pledge faith in them and through them. That is why fundamentalism is a recurrent feature of modernity and crises of modernity. People often think of fundamentalisms as the very opposite of modernity, but this is an illusion, viewed from the perspective of people who have adopted the first response. Modernity is the sense of separation from the past, and fundamentalism is one possible – and frequent – response to this separation.

The American federal government is transformed during the twentieth century. It becomes strong and powerful, and it seems increasingly loosened from its moorings in the eighteenth century. With the New Deal and the creation of the National Security state, it is no longer possible to pretend that the constitution-in-practice bears much resemblance to the constitution of 1787, or even the post-Civil War constitution of 1868. This recognition creates a crisis of *constitutional modernity*. Like other crises of modernity, this recognition produces two equal and opposite reactions. Both of them feature in American constitutional culture and in the views of American liberals and conservatives alike.

One reaction is the embrace of a living constitution. The idea of a living constitution argues that the constitution must adapt to changing times. It is a version of the first response to modernity. We must accept change, even if this means throwing away the past. The framers' world is not our world, and we cannot return to it. The other reaction is originalism. It is a version of the second response to modernity. We have lost – or are in danger of losing – our connection to the constitution that sustains us. Therefore we must regain the past. We must pledge faith in the wisdom of the framers, and we must go back and restore what we have lost. We must return to the place from which we strayed and restore the constitution which has been lost.

These reactions to constitutional modernity describe two basic features of American constitutionalism today. They are cultural as much as they are political or legal. Americans have repeatedly employed these cultural approaches to deal with constitutional change, especially in the twentieth century. Perhaps equally important, these approaches do not map neatly onto political liberals versus political conservatives. *Both* liberals and conservatives have used both tropes – the need to adapt to a changed world and the need to return to the wisdom of the framers – at different times with respect to different subject matters.

It is therefore no accident that judges and Justices – including *liberal* judges and Justices – began to cite the framers with increasing frequency beginning in the middle of the twentieth century. Liberal Justices used appeals to the framers to justify new protections for civil liberties in the post-New Deal era. By appealing to the founders, liberals sought to justify overruling long-standing precedents by appealing to an even deeper and more authoritative continuity with the past.

It is also not surprising that the conservative political movements of the late twentieth century adopted originalism as their official theory of interpretation. They used originalism to criticize liberal legal decisions of the recent past and to justify a return to conservative principles.

These examples show that originalism in its various forms has not simply been a way of preventing or forestalling change. It is also a means of justifying change, often radical change. Originalism and appeals to the values of the framers are among the most familiar tropes of American movements for political change. They are standard ways that Americans advocate and accommodate themselves to change under the sign of permanence, continuity and tradition.

Earlier I mentioned that there was a cultural connection between originalism and Protestantism. In one of my other books, *Constitutional Redemption*[16], I emphasized that Americans have a protestant constitutional culture in two respects. The first is the idea of *sola scriptura* – the idea that we should appeal to the text, and to not learned intermediaries like the Church, to decide what God wants of us. In the same way, the text of the Constitution and the Declaration of Independence become the scripture, symbol and language of American civic faith. Learned intermediaries – that is, federal judges – may sometimes get it wrong, so the people must correct them.

A second « protestant » idea is the rejection of the established Church in order to return to, restore and renew the true faith. This, too, is a feature of American Constitutionalism – the repeated attempt to renew, restore and redeem the true constitution in the face of political leaders – especially judges – who have caused the constitution-in-practice to stray from the true path.

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[16] Jack M. BALKIN, *Constitutional Redemption: Political Faith in an Unjust World*, Cambridge, Harvard University Press 2011.

America's protestant constitutional culture is not necessarily conservative. Indeed, it is often quite radical. Calls for return and renewal are arguments for change, not stasis. That is because the past that we hope to return to is often a product of our own dreams and aspirations. We hope to return to the purity of an imagined past. As the historian Sir Lewis Namier once put it, we imagine the past so that we can remember the future[17].

I do not mean to suggest that this feature is unique to American originalism; indeed, I came to these observations by thinking about how change operates in other social formations, like language, custom, and religion. What is interesting is that, because of America's national narrative, Americans identify these tropes of return and restoration so strongly with the Constitution and its framers.

The three parts of this lecture have sought to convey a single lesson. When we try to understand the interpretation of a constitution, we must try to understand the relationship between the official forms of interpretation and the unofficial processes that nourish them. That means, among other things, that we must understand the interaction between the official pronouncements of courts, the work of the political branches, and the efforts of civil society. We must understand how conceptions of professional reasonableness rise and fall, change and evolve. We must understand how ideas move from off-the-wall to on-the-wall, and how the orthodox becomes ridiculous and the outrageous becomes obvious over time. Perhaps most of all, we must try to understand the deep cultural narratives that live within a nation, and that allow its people to negotiate change and make the constitution their own.

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[17] Sir Lewis NAMIER, *Conflicts: Studies in Contemporary History*, London, MacMillan & Co. Ltd, 1942, p. 70.