KARLAN'S COURT

IN THE BEGINNING

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Since 1789, constitutions worldwide have come and gone. According to University of Chicago Law professor Tom Ginsburg, the median lifespan of a national constitution is eight years—roughly the life expectancy of a Great Dane. Why has the U.S. Constitution endured?

Not because it remains unchanged. The Constitution has been reshaped by formal amendments, Supreme Court decisions, and changing popular understandings of such broad terms as "commerce" and equal protection." Although the text largely endures, fidelity to the Constitution requires reading its words in light of the principles they express: principles embracing liberty, equality, and opportunity, as well as a government powerful enough to address pressing national issues and constrained enough to prevent tyranny. Moreover, fidelity requires bringing those principles to bear on fresh problems—interpreting the Constitution, as Justice Oliver Wendell Holmes said, in light of "what this country has become."

The framers could not have imagined the Environmental Protection Agency or the Americans with Disabilities Act. And they punished private, consensual sexual activity. But none of this settles what the Constitution now permits or prohibits. Working that out requires that we ask how the Constitution's text and animating principles should be understood *today*. While explaining earlier this year why the Eighth Amendment's prohibition on "cruel and unusual punishments" forbids imposing life sentences with no possibility of parole on juveniles, Justice John Paul Stevens powerfully observed:

> Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time.

To take a "static approach to the law," he warned, risks leading us "to abandon the moral commitment embodied in the Eighth Amendment."

This common-sense idea that constitutional interpretation demands an interplay between animating principles and changing circumstances lies at the heart of the Court's most celebrated opinion: *Brown v. Board of Education* (1954). In *Brown* a unanimous Court decided that the Fourteenth Amendment's equal-protection clause condemns racially segregated schools. But the Congress that had proposed the Fourteenth Amendment had segregated both the public galleries from which citizens watched the debate and the public schools it controlled. When the Court decided *Brown*, it refused to "turn the clock back to 1868 when the Amendment was adopted, or even to 1896" when, in *Plessy v. Ferguson*, the Court upheld segregation against constitutional attack. The Court of 1954 decisively rejected the idea that the country should be ruled by the understanding of the Fourteenth Amendment held by those who adopted it. Instead, the Court declared, the country "must consider public education in the light of its full development and its present place in American life throughout the Nation." Nearly a century's experience with de jure segregation had proved that, when it came to race, "separate but equal" violated equal protection of the laws.

Similarly, the framers may have thought that the power of Congress to "regulate Commerce" involved only trade in goods, and not their manufacture. But in the face of an integrated national economy, this understanding gave way to a more expansive idea of commerce that empowered the federal government to regulate minimum wages and occupational safety. Most profoundly, the Bill of Rights did not originally protect Americans against state or local governments. Nearly a century passed after the ratification of the Fourteenth Amendment before most of the protections we now consider fundamental—including freedom of speech and religion—were applied fully to the states.

Unfortunately, in recent years, the debate about constitutional interpretation has been dominated by a slippery and misleading "originalism" that claims to reject the concept of the Constitution as a changing document. Despite its connotations, "originalism" originated recently, in Reagan-era attacks on the Warren Court. Then-Attorney General Edwin Meese proposed "a Jurisprudence of Original Intention": what would the framers do if they were asked the question we face?

Asking what James Madison would do sounds like a good way to prevent judges from overriding democratically enacted laws. But even conservatives soon abandoned this original originalism—perhaps because it was impossible to figure out what our forebears would have done when faced with questions they could not even formulate; perhaps because the answers were unpalatable. It would, for example, require a vivid imagination to argue that the authors of the Fourteenth Amendment would have cared at all about sex discrimination, especially because they enshrined it in the Amendment itself (in the reduction-of-representation clause of section 2).

Rejecting "original intent," originalists shifted to "original public meaning." Justice Antonin Scalia, for example, says that we are bound by the Constitution's words, as they were understood by "ordinary citizens in the founding generation." This shift, however, does nothing to change the unpalatable answers: ordinary citizens in 1868 did not think that "equal protection of the laws" condemned segregated schools.

Moreover, originalists drop their

originalism when their own principles push in a different direction. In *Kyllo v. United States* (2001), for example, Justice Scalia interpreted the word "search" in the Fourth Amendment's ban on "unreasonable search and seizure" to encompass police use, while standing on public property, of a thermal-imaging device to determine that a homeowner was consuming huge amounts of energy in order to grow marijuana in the basement. In 1789 a search would have required some physical intrusion onto private property. Still, the justice relied on a general principle of privacy to conclude that the Constitution should protect what goes on inside a house.

Similarly, in *District of Columbia v. Heller* (2008), which extended the Second Amendment's "right to keep and bear arms" to handguns in Washington, D.C., Justice Scalia rejected the idea that "only those arms in existence in the eighteenth century are protected by the Second Amendment." The Amendment extends "to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." Having reached that seemingly sweeping conclusion, Justice Scalia then scaled it back to protect only handguns, not AK-47s, because handguns are "overwhelmingly chosen by American society" as a means of self-defense. But handguns were not the founding generation's weapon of choice. Why, then, is the term "arms" permitted to evolve over time, while "cruel and unusual punishment" is not?

Originalism offers the false hope of a principled constraint on judicial power. If judges stuck with their originalist guns, the Constitution would never have lasted. And when judges who profess originalism abandon it in service of constitutional principles, rather than hurling back at them the meaningless accusation of "judicial activism"—the topic of my next column—we should press the real argument: the most important constitutional principles require liberty, equality, and opportunity for all. **BR**