THE FUTURE OF THE CONSTITUTION

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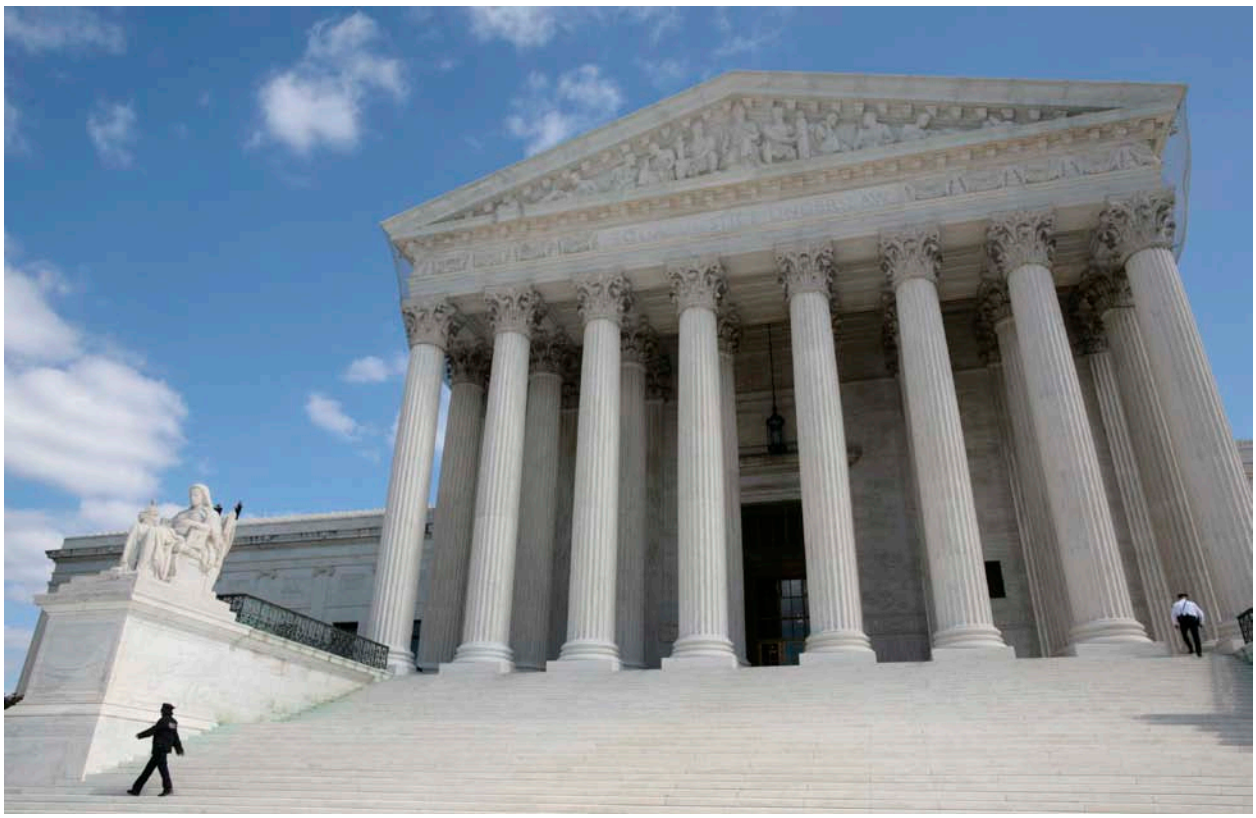

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Translating and Transforming the Future

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Governance Studies at BROOKINGS

INTRODUCTION

There's a way that we academics talk about constitutional interpretation that suggests it to be more than it turns out to be. We speak of it as if the Court decides cases through elaborate (sometimes more, sometimes less) chains of reasoning. As if it were a Socratic dialog, with the author inviting the reader to the seven steps necessary to see why the conclusion follows.

But constitutional interpretation is much more pedestrian and much more contingent. Whether the justices are reaching for particular results or not, opinions rarely move far beyond what the context of the decision offers up. There's a set of views taken-for-granted, at least by the majority, in a particular context; the opinion leverages those views to move the law one or two steps from where it starts. These taken-for-granted views include of course views about other parts of the law. But importantly for the purposes of this book, they include views of much more than the law. In particular, they include views about what's technologically feasible, or morally acceptable, or culturally done.

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Think of constitutional interpretation as a game of Frogger—the old video game in which the player has to jump a frog across the road and avoid getting run over by passing cars. In particular, think of the level where the frog also has to cross a river by stepping onto logs as they pass by. The frog can't simply pick up and move to the other side of the river. Instead, the frog moves one step at a time, as the opportunity for a move presents itself. The player doesn't create the opportunity for a move. He simply finds himself with it, and he takes it, and waits for the next.

In this picture of constitutional interpretation, the critical bits are these opportunities for a move, a single move, provided by an interpretive context that the interpreter only slightly, if at all, can affect. (Of course in Frogger, he can't affect them at all.) These moves get presented to the interpreter; they get constituted by the parts of an interpretive context that at least five justices treat as taken-for-granted, as obvious, as the stuff no one, or at least no one like them, needs to argue about. And it is in light of changes in this class of taken-for-granteds that change in constitutional law can happen.

This dynamic helps show why predicting the future in constitutional law is so difficult. The challenge is not that we can't describe all the elements the future will or could have. The difficulty is that we can't know which elements will be obvious. For the critical, yet wholly under-theorized, bit to constitutional interpretation is not what the interpreters might argue about. It is the things that they take for granted. Constitutional meaning comes just as much from what everyone knows is true (both then and now) as from what the Framers actually wrote. Yet "what everyone knows is true" changes over time, and in ways that it is impossible to predict, even if quite possible to affect.

Take an obvious example: The Constitution says: "The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years."

It is unquestioned that "he" in this clause does not just mean "he" — unquestioned, at least, for us. For us, "he" means "he" or "she." For the Framers, it would have been unquestioned that "he" just means "he." It would have been unthinkable that Dolly Madison could have been President of the United States, or any other woman for that matter. Part of that unthinkability was tied to specific legal disabilities. But much more important was a broad and general understanding within the framing context — stuff that they took for granted, and the opposite of the stuff that we take for granted. And not just in the framing context. Opponents of the 14th Amendment argued that by its terms the amendment would radically remake the rights of women. Supporters of the 14th Amendment called the claim absurd. And maybe it was, until the Supreme Court actually did apply the Amendment to claims made by women, again because it was unthinkable that it would not.

The practice of constitutional interpretation, or at least, any practice aiming at fidelity, must include an understanding of the sort of issues, or matters, that the authors took-for-granted. These elements must be understood because they mark the things the authors didn't think it necessary to express: these were the things that everyone knows to be true — for example, the place of women in society, the salience of "certain unalienable rights," the role of the law of nations, and so forth. To read what they wrote, and understand its meaning, thus requires understanding what they didn't write, and how that also helps constitute their meaning.

We know how to identify these taken-for-granteds about the past, if imperfectly and incompletely. History teaches some methods. They include accounts of the interpretive contexts, descriptions of the sort of issues that no one debated, and actions that reveal at least what no one was embarrassed to reveal. If someone had said to Hamilton, "Why aren't there any women in Washington's Cabinet?" he wouldn't have been embarrassed by the question. He wouldn't have understood it. That marks the disability attached to women as a fact of a certain kind. It went unmentioned, since it was not necessary to mention, since no one (among the authors at least) would have thought to dispute it.

But we don't know how to identify these taken-for-granteds with the future. We can talk about what sort of things will be obvious in 2030. I'm confident the equal status of women is not about to be drawn into doubt. And I'm also confident that the right of people to worship whatever god, or no god at all, will also remain as bedrock within our tradition. But a whole host of other issues and questions and beliefs will also be taken-for-granted then. And it would take a novelist with the skill of Tolstoy or Borges to fill out the details necessary for us to even glimpse that universe of uncontested truth, let alone to convince us of it.

Even then, it wouldn't feel uncontested to us. If a complete description of the world in 2030 would include the fact that most everyone accepted cloning as a necessary means to health (as many science fiction stories depict, for organ banking, for example), we would still experience that "fact" as something to be challenged, or at least, questioned. I'm not even sure how to describe the mental

state we would have to be able to adopt to be able to relate to the uncontested of the future the way the uncontested of the future would be experienced. It would be a possibility, or a scenario. But it wouldn't have the force necessary to bend, or alter, the law the way it will, when it is in fact taken-for-granted by those who read.

Until we could come to reckon these different taken-for-granteds, I want to argue, we can't predict how constitutional interpretation in the future will proceed. It will follow the logs offered to the frog, but we can't know which logs will present themselves when.

Take as an example the recent decision by the Supreme Court in Citizens United v. FEC,[1] upholding a constitutional right for corporations to spend an unlimited amount in independent campaign expenditures. While most criticize that decision for treating corporations as persons, in fact, the Court never invokes that long standing doctrine to support its judgment. Instead, the holding hangs upon a limit in government power, not the vitality of the personhood of corporations.

But there is something about the status of corporations in today's society that is essential to understanding how the Court decided as it did. If one imagined asking the Framers about the "unalienable rights," as the Declaration of Independence puts it, that the Constitution intended to secure to corporations, it is perfectly clear they would have been puzzled by the question. Rights were the sort of things that "men" are "endowed" with, not legal entities. And while legal entities may well enjoy rights derivatively, as proxies for real human beings, that's only when the thing they're defending is something that, if taken away, a real human being would also necessarily lose. So a corporation should have the right to defend against the taking of its property, because the taking of its property necessarily involves the taking of the property of a real human being. Beyond that derivative, however, it would have been hard for them to understand the sense of this state granted privilege (which of course a limited liability corporation is) also enjoying "rights." And impossible, I want to argue, for them to understand how this idea would lead to the morphing of the First Amendment to embrace a political speech right for this legal entity.

For us, today, the idea of a corporation's possessing these rights is an easier idea to comprehend. Corporations are common, and democratically created (in the sense that anyone can create them). And though they are radically different in wealth and power, we all see them as essential to important aspects of our life. They are familiar, pedestrian. It doesn't seem weird to imagine them as constitutionally protected, even beyond the derivative protection for things like property.

The familiarity of corporations, their ubiquity, and their importance all helped cover up a logical gap in the Supreme Court's reasoning in Citizens United. In addressing the obvious (and in my view, conclusive) argument that these state

[1] 558 U.S. 50 (2010).

created entities couldn't possess any powers the state didn't grant them, Justice Kennedy, quoting Justice Scalia, wrote "[i]t is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights."[2]

But obviously, there were no "First Amendment rights" of humans that would be forfeited by saying that a legal entity created by the state doesn't include among its powers the right to engage in political speech. To say something is "forfeited" is to say it existed and then was removed. But no rights of any humans are forfeited by a law that restricts a corporation. Humans would have all the rights they had to speak after such a law as before it. The only loser is the corporation. Yet so obviously familiar and native have corporations become, that Citizens United becomes a Bladerunner-like moment in Supreme Court history, where a human-created entity gets endowed with "unalienable rights."

I don't mean (obviously) that everyone agrees with the conclusion or the protection recognized. Indeed, the decision has sparked an anti-corporate rage that may in the end defeat its premise. Instead, my point is that it wasn't weird to recognize the rights the Court recognized, just as it wasn't weird for the Plessy Court to treat segregation as "reasonable,"[3] or weird for Justice Bradley to write in *Bradwell v. The State*:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.[4]

To the contrary, these claims are only weird in light of a radically different baseline of taken-for-granteds. And while it is relatively easy in hindsight to see these differences, and remark on them, it is incredibly difficult to see them in the future, and believe them. Again, the Framers could not have predicted what the Supreme Court did, even if we had told them that corporations would be as common as clay.

Consider one more try to make the very same point: Everyone (almost) recognizes in their parents views that are dated, or weird. Those might be views about race, or sexual orientation, or music. Whatever they are, they mark the distance between our parents and us. We can't imagine ourselves holding such views, or viewing the world in light of them.

But what are the views that we hold that our kids will react to similarly? What is the equivalent of racism, or homophobia, for them? And even if you could identify what those views are — maybe the idea that some of us still eat meat, or that we permit an industry to slaughter dolphins so that we can eat maguro — it is

[2] Citizens United, slip op. at 35.
[3] Plessy v. Furguson, 163 U.S. 537 (1896).
[4] Bradwell v. The State, 83 U.S. 130, 141 (1872).

almost impossible for us to gin up the outrage or disgust about ourselves that they will certainly feel about us. Of course, they will love us, as we love our parents. But they will be distant from us, as we are from our parents, for reasons we couldn't begin to feel as we feel the reasons that distance us from the generation before.

Put most directly: The past is interpretively more accessible than the future. We can imagine it more fully, and feel the differences more completely. And that asymmetry affects fundamentally the ability to write an essay about what the Constitution in the future will hold.

Making What the Court Will Find

To say we can't know how the Constitution will be read in the future, however, because we can't know what will be taken-for-granted in the future is not to say that we can't affect what will be taken-for-granted in the future. And herein is the rub. If what will be taken-for-granted is a function of how we lead our ordinary lives, then there are obvious ways in which we could affect what will seem obvious, or taken-for-granted, by altering the environment within which we lead our ordinary life. That change, in turn, will affect how the Constitution will be read, even if we can't see or imagine precisely how.

Take cyber-security as an obvious example. There is much I agree with in both Jack Goldsmith's and Orin Kerr's essays. I too have argued that we need to shift our focus in privacy away from controlling access to data and more towards regulating its use. And I too believe like Goldsmith that cyber-security issues will force a rethinking of how we protect basic civil rights.[5]

But whether and how we respond to their obviously correct concerns will depend upon how most of us experience the cyber-environment, or how its "nature" gets reported by us. And here we can sketch two very different futures.

The first is the one I believe we're likely to have. It is an unhappy story, about how certain freedoms, or characteristics, of the current network get lost as a completely predictable reaction to an obvious threat.

I have described this story before as a consequence of Z-Theory (where Z stands for Zittrain).[6] Z-Theory describes the mechanism by which political actors have sufficient motivation to intervene to change the basic architecture or freedoms of the net. That mechanism is grounded in fear. On this account, the currently insecure Internet putters along as it has. At some point, it suffers a catastrophic failure. We could call this an i9/11 event, not to suggest that Al Qaeda would be behind it, but to mark the significance of the event to the nation or nations that suffer it: A massive attack on infrastructure facilitated by zombie bots or the like which continue today to spread across the network, controlled in ways no one quite understands.

[5] I describe both in Code v2 ch. 11 (2006).
[6] Id., at 74-77.

This i9/11 event will evoke a certain political response, just as 9/11 evoked a political response. The response to 9/11 was the USA Patriot Act — which, whether you agree with it or not, was a radical change in the scope and reach of policing and counter-terrorism authority, justified, or so it was claimed, by the then-plainly manifested threat.

The response to my hypothetical i9/11 event will be similar: a radical change in the control of the Internet, or of privacy on the Internet, justified, so it will be claimed, by the now plainly manifested threat. That response will importantly change the Internet. It will render it a much less open, or generative space. But that loss will be seen to be unavoidable, given the threat now made manifest. (As one former government official responded when I asked whether there was the equivalent of an iPatriot Act already prepared for such an attack, "Sure there is. And [Internet founder] Vint Cerf is not going to like it very much.")

In both cases, the justification hangs upon the apparently limited range of options. What else are we going to do? The threat is real. It has manifested itself in a dramatic and tragic way. There is an irresistible push to respond. In both cases, it is taken-for-granted that we can and will respond. But the scope and nature of the response is determined by the range of technical options that seem available or open to us. That depends upon the technologies actually deployed.

The second future begins before the i9/11 event. Indeed, if successful, it could well avoid any i9/11 event.

This future includes a policy intervention designed to change the character of the Internet, but not in ways that would undermine the good, or generative character, of the Internet. Or put more simply, it is an intervention that Vint Cerf *would* like. And while it is beyond this essay to describe the change fully, a sketch should suffice to make the contrast with the first story clear.

This intervention would be designed to add to the Internet an "identity layer."[7] The purpose of this identity layer would be to make it feasible to identify who or what was responsible for any particular act on the Internet. But the layer would be designed in a way that preserved and protected legitimate privacy. In this sense, it would give both sides in the debate something the current Internet denies them: for the government, a secure way to hold people responsible for acts that they should properly be held accountable for; for users, a better more secure way to protect identity and privacy on the net.

To see how this might work, start with a crude real world analog — a license plate on a car. The license plate makes the owner of a car identifiable, but it doesn't identify them except to people with access to the proper database. It makes events involving the car traceable back to an owner (of course, not necessarily the driver but likely a person with knowledge about who the driver was), without enabling others to make the trace. I may see that you're driving PA Z546TY, but I can't tell from that who you are, or who owns the car you're driving. The police can, but I

[7] Code v2 at 50-52.

can't. And to enable all the legitimate functions that the police have with respect to cars on a highway, we mandate that cars driving on the highway carry with them just this sort of identification.

An identity layer on the Internet would do something similar. It would build into the architecture a standard and automatic way to link back to an entity that could authenticate — if the proper or legally sufficient demands were made — the identity of the actor responsible for the Internet event. But if no proper demand were made, the identity of the actor would be as transparent as the actor wants.

For example, an email gets sent which includes content constituting fraud. In the network with a proper identity layer, that email gets transmitted or relayed only if it carries with it an identification token (like a license plate). That token, or signature, need not reveal to everyone who the sender is. To the contrary: "A_Friend@something.com" would still be a perfectly permissible email address. But somewhere in the chain of trust into which this identity layer would be built, it would be required that with the proper legal authority presented, we could discover who "A_Friend" was.

Again, how the technology of this works is beyond this essay. There have been plenty of examples developed, and some currently being developed and deployed by the very best technology shops in the world. And obviously, how well or how effectively privacy or pseudonymity (for absolute anonymity is removed by this system) is protected would depend upon the details of implementation.

For now, the only essential point is to see that we could imagine this layer providing a critical bridge between two strongly prized values — one, privacy, and two, security. The identity layer would protect privacy more effectively than the current Internet would; but by securing traceability, it would also promote security. You could mask yourself however you want as you go about your legal activities; but like fingerprints on a gun, the system would assure that when we have good reason, properly established to the proper authorities, we can trace back who did what.

So imagine now an i9/11 event happening in this world: What would the reasonable or legitimate responses be? Unlike the world we live in now, in the alternative I am describing, there is a mitigating technology that could well be adjusted in light of the catastrophic event. Maybe certain authorities that had been presumed legitimate in providing identities now need to be removed from the list of trusted sources. But there would be no justification for a radical removal of privacy on the Internet. Authorities, in democracies at least, have a legitimate interest in identification. But this technology could balance that interest, by preserving as much as possible a right of individuals to privacy.

Thus, simply by having that alternative deployed, present and recognizable to policymakers, including judges, we could constrain the power of government relative to the power the government will get when the i9/11 event happens in the first scenario. And the difference — the key to the argument here — is simply the product of a background range of available technologies.

Again, compare the license plate. Imagine there's an outbreak of car theft. The government responds by demanding that license plates be changed to include people's names and addresses rather than a code that the police could decipher. It would be extremely difficult for the government to justify that demand. The alternatives — a more efficient code, a RF-ID, etc. — would be compelling and obvious to anyone, and certainly to judges. It would be a small step forward to imagine how the license plate system could be improved, and a large step backwards to imagine it replaced by true names, addresses. And thus a conservative (with a small "c") instinct would protect the privacy protected by the architecture of traceability that now defines license plates. Having this traceability architecture deployed thus limits the possibility of a more extreme privacy reducing response.

Thus two futures, with the difference between them resting solely upon a technical infrastructure strategically inserted. That infrastructure wouldn't necessarily promote the immediate commercial interests, or other interests, of currently dominant actors. But we can see how it provides a long-term interest protecting values that we currently hold dear. The challenge is to imagine the mechanism that could guide us to embrace and implement this alternative — well, and with efficiency or intelligence.

And this, unfortunately, leads to our Constitution's most depressing reality, a point I consider in the last part of this essay.

Gaming What the Court Will Find

So if we can't know how the future will feel, but we can intervene to change the way it is likely to feel, what should we think about this kind of intervention? Is there a reason to have confidence in it? If the application of a constitution is going to turn on how the world seems, or how we make the world seem, how confident can we feel about preserving a constitution's meaning over time?

I'll confess this fact about the nature of constitutional interpretation — its contingency upon these taken-for-granteds, themselves, it turns out, plastic — gives me the most anxiety. For it highlights a public choice problem that we don't often remark upon, in interpreting a written constitution.

Usually, a public choice problem is contemporary. It is usually decision makers, usually legislators, who must make a public policy decision, but are tempted or drawn to favor private interests over the public good. Legislators, for example, responding to campaign contributors rather than constituents. Or a President, responding to a powerful labor union rather than the nation as a whole.

But in the dynamic that I am describing here, the effect is delayed. We intervene today to affect the interpretive context tomorrow, believing that that intervention will make more likely one outcome rather than another. So again, drawing on the cyber-security example, if we intervene to enable an identity layer, we make judicial decisions respecting privacy more likely. If we do not, we make

them less likely. The choice whether to intervene today thus affects how the constitution gets interpreted tomorrow.

This possibility creates its own public choice problem. Let's say you're a government that doesn't much like the freedom that the Internet has enabled. You have to accept it, given constitutional norms, but you'd much prefer a more controllable infrastructure. In light of the story I've told above, the interpretive contingency of the constitution now gives you an interesting (or troubling choice): If you do nothing, and Z-Theory is correct, at some point in the future, the constitutional constraints on the government's ability to monitor or control the Internet get relaxed. If you do something — namely, intervene to better enable privacy by encouraging or deploying an effective identity layer — the constraints on the government will not be relaxed.

Doing nothing is thus a way to effectively amend the constitution's protections. Yet there is little within current doctrine that would even recognize this dynamic, or hold any government actor responsible for letting it play out one way rather than another. The contexts within which constitutional decisions are made are constructed in advance; how they are constructed affects the scope or meaning of the constitution; yet we have no way to hold anyone accountable for one construction over another.

Of course the feasibility of this dynamic depends upon the issue. Whatever contextual shift is plausible in the context of cyber-security, it might be less feasible to imagine the same in the context of genetic engineering. But whether a general phenomenon or not, the dynamic does raise what we could call a second order problem of interpretation. For the question of fidelity — understood broadly as the challenge to preserve the Constitution's meaning across time — is now not only the question of how to read the Constitution in context, but also, how to affect the choice of contexts so as to better protect original values.

At least, if it is original values that we want to protect. For the last point raises one more final point: who is the "we" who should concerned here?

In the beginning of his book on aging, Judge Posner writes this about his mother:

> Once when my mother was a vigorous woman of 65 or so she noticed a very frail old woman in a wheelchair and said to my wife, 'If I ever become like that, shoot me.' Two decades later she had become just like that but she did not express any desire to die.[8]

The point is more general than the example suggests. What we want from the perspective of an author will often be different from what we want from the perspective of the reader, since the context of the reader, the taken-for-granteds, the facts we now know, etc., will be different. The author, recognizing this, might well take steps to staunch the changes that will produce these changes in "what we want." But we, today, need not necessarily like those steps. From the perspective of

[8] Richard Posner, Aging and Old Age 87 (1995).

today, we can talk about how we should intervene to protect our values today tomorrow. But from the perspective of tomorrow, that intervention may well seem foreign, or imperialistic.

The challenge of fidelity in constitutional interpretation is how broadly we allow that past to constrain us, or who we will become. Constitutional traditions can't sensibly intend either of two extremes — either that the tradition is intended to take whatever steps necessary to assure that we don't change, or that the tradition is intended to permit whatever change might suggest itself. But the sensible line between these two extremes is not obvious. Or stable. Or protectable from manipulation — especially in the future.

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