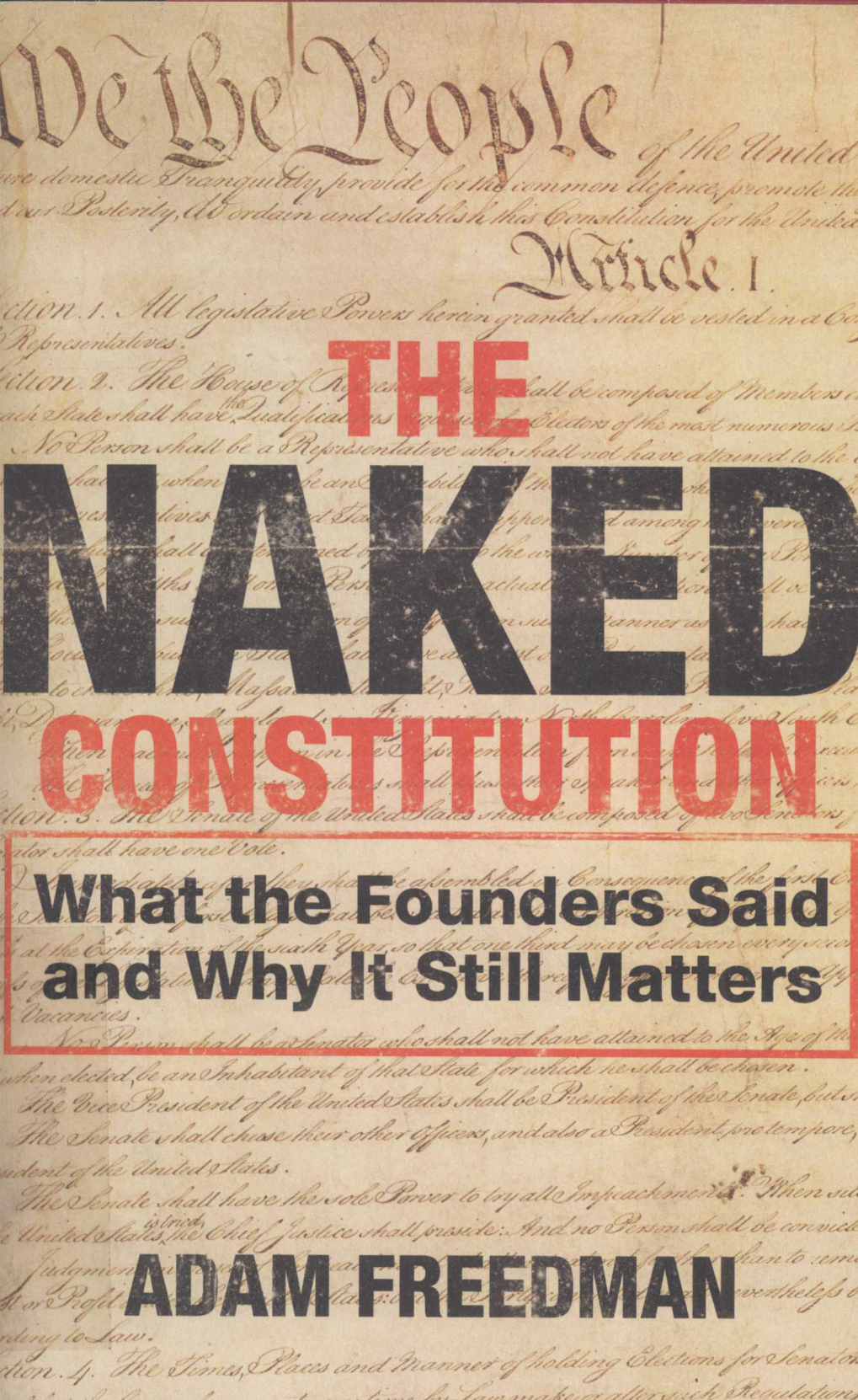

THE NAKED CONSTITUTION

What the Founders Said and Why It Still Matters

ADAM FREEDMAN

FIRST EDITION

Designed by William Ruoto

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For Cecilia and Fiona

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CHAPTER ONE

IS HOMEWORK CONSTITUTIONAL?

The Living Constitution vs. the Naked Constitution

Are you serious?

—Former House Speaker Nancy Pelosi

In the spring of 2004, a high school math teacher in Milwaukee named Aaron Bieniek gave his students three precalculus assignments that had to be completed over the summer vacation. Like students the world over, the kids in Bieniek's classroom moaned and groaned about having to do work over vacation. But this was America, and so it was perhaps inevitable that one of the students would declare the assignments to be downright unconstitutional.

Seventeen-year-old Peer Larson had a summer job lined up and couldn't squeeze homework into his busy schedule. He turned the assignments in late and, as a result, got a lower grade than he would have otherwise. Outraged by the reduction in grade, Peer and his father sued everyone in sight—Bieniek, the high school, the principal, the superintendent, and several others—for violating their constitutional rights. They argued that the math

assignments violated both the Fourth and Fourteenth Amendments to the Constitution. The father-son team pushed their claim up to the Wisconsin Court of Appeals, which tossed out the lawsuit, explaining that even under the broadest reading of the Constitution, one could not derive a "fundamental right to . . . homework-free summers." The court scolded the Larsons for making a "frivolous" argument and held them liable for court costs and attorneys' fees.

Personally, I think the court was too harsh on Peer and his dad. Who can blame ordinary citizens like the Larsons for trying to stretch the Constitution when America's elites have been playing the same game for decades? It's called the "Living Constitution"—a theory that invites judges and politicians to rewrite the Founding Fathers' words. You might think it's absurd to say that the Constitution prohibits summer homework; but then, is that any more absurd than saying that the Constitution forbids the Pledge of Allegiance, or the death penalty, or voter identification laws? Under the Living Constitution, judges have sought to prohibit all those things.

The Living Constitution requires all sorts of policies that are not mentioned anywhere in the constitutional text: abortion on demand, gay marriage, school busing, and so on. Nothing, in fact, is more common than the spectacle of courts inventing "constitutional" rights that are not in the text, while disregarding those that are. The real Constitution is passé; the Living Constitution reigns supreme.

Politicians may swear to uphold the Constitution, but most of them don't seem inclined to read it. Doing so would only remind them that the federal government was meant to be one of strictly limited powers rather than the Leviathan we've ended up with. There is virtually no aspect of our lives, no matter how

picayune, that isn't covered by some federal department, be it the Regional Fishery Management Council, the Indian Arts and Crafts Board, or the Marine Mammal Commission. Want to give a name to that creek in your backyard? Better run it past the U.S. Board on Geographic Names.

Liberals are not solely to blame for the growth of the federal machine; big-government conservatives have been willing collaborators. But with the election of Barack Obama and a strongly Democratic Congress (until 2010), the trend toward ever more centralized power went into high gear. In 2011 the federal government ran a budget deficit of about $1.3 trillion, or 8.5 percent of gross domestic product (GDP), as compared to the forty-year average of 2.8 percent. At the end of 2008, the national debt had reached an already-scandalous 40 percent of GDP. By the end of 2011, it had gone up to *67 percent* of GDP, or about $15 trillion, give or take a billion.

America's broke, but the federal government is living high on the hog. Hundreds of billions of dollars have been sucked out of the private economy and redirected to the federal government, to be doled out for purposes that are politically expedient but flatly unconstitutional. As of December 2011, the richest, fastest-growing city in the United States was Washington, DC. That city also led the nation in economic confidence. What's not to be confident about?

The 2010 health care law (the Affordable Care Act) represents the perfect storm of the Obama era, bringing together the accumulation of federal power and the degradation of individual liberty. Supporters of the law, no doubt, would argue that it fulfills the Constitution's promise to "secure the blessings of liberty to ourselves and our posterity"—it just happens to do so by threatening Americans with fines and imprisonment if they fail

to buy federally approved health insurance. When asked about the constitutionality of that mandate, former House Speaker Nancy Pelosi replied with an incredulous "Are you serious?" Well, yes, actually, we are.

Where has the Supreme Court been? For the most part, rubber-stamping the excesses of big government. To be sure, each one of the nine justices knows the Constitution backward and forward; a few of them even venerate the document. But that doesn't mean they're going to get all fanatical and Tea Partyish about it. Take Justice Stephen Breyer, who has argued that the Supreme Court should be free to ignore the Constitution's literal "text" whenever a majority of justices dislike the "consequences" of adhering to it. Justice Elena Kagan, in her confirmation hearings, made it clear that she would not vote to strike down a hypothetical law requiring Americans to eat their vegetables. In June 2012, Kagan would join the Court's majority in holding that the government can force you to buy health insurance.

IN DEFENSE OF ORIGINAL MEANING

This book is an attack on the mainstream notion that the Constitution is nothing more than a decorative parchment; a nifty relic that never gets in the way of politicians' grand designs. It is also an argument in favor of *originalism*—that is, adhering to the original meaning of the Constitution—a concept derided by establishment figures such as former Justice David Souter ("simplistic," he says), University of Chicago professor David Strauss ("wrongheaded"), and, well, virtually every opinion-maker you can shake a stick at.

Notwithstanding the barbs from the chattering classes, I

aim to keep things cheerful. Our task is not an easy one, but it is relatively straightforward. The originalist approach I advocate builds on the following premises:

1. The Constitution is the law.
2. Like any law, it should be followed in both letter and spirit.
3. If a particular provision of the Constitution is not clear, we should look to the meaning that its words would have conveyed to those who ratified it, and the people they represented. In other words, the main text of the Constitution should bear the meaning it had when it was ratified in 1789; the Bill of Rights, when it was ratified in 1791; the Fourteenth Amendment, when it was ratified in 1868, and so on.

I know what you're thinking: it can't be that simple. Alas, Americans have been badgered into thinking that fidelity to the written Constitution is a sign of mental weakness. In October 2010, for example, *Newsweek*'s Andrew Romano lashed out at "constitutional fundamentalists" in the Tea Party who "seek refuge from the complexity and confusion of modern life in the comforting embrace of an authoritarian scripture." Those poor deluded Tea Partiers. They *think* they support the Constitution because it's "the supreme law of the land" (Article VI); in reality, they're just angry because they can't figure out how to use Skype.

At America's law schools, students are taught to regard the Constitution as an enigmatic puzzle accessible only to tenured faculty and enlightened judges. Entire academic careers have been built upon the proposition that the Constitution cannot possibly mean what it says. To get a sense of the bogus mystery

surrounding the Constitution, just take a look at some of the titles at your local law school library: *Our Elusive Constitution*, *Our Unsettled Constitution*, *Our Unknown Constitution*, *The Invisible Constitution*, *The Dynamic Constitution*, and *The Unpredictable Constitution*.

Get a grip. We're not talking about the Dead Sea Scrolls or the Prophecies of Nostradamus. We're talking about a document of 4,300 words; 7,500 if you throw in all the amendments. The average *New Yorker* essayist is just getting warmed up at 7,500 words. The Constitution is not simple, but it's not that complicated, either. Moreover, most of the controversies in constitutional law revolve around four or five key passages of the document.

Why all the hocus-pocus? It's not because the Constitution is obscure, but rather because it is all too clear, and it stands for things that politicians, judges, and academics can't abide. It gives states the freedom to allow—or not—things like abortion and gay marriage. It provides for unfettered freedom of speech that doesn't leave room for politically correct "speech codes." It embraces robust property and contract rights that are anathema to politicians bent on regulating the private sector to within an inch of its life.

IT'S ALIVE!

In order to get around the written Constitution, judges, politicians, and academics routinely extol the virtues of a Living Constitution. The underlying theory is that the Constitution is literally capable of changing meaning over time, without the mess and inconvenience of formal amendments. Like an awkward teenager, the Living Constitution can wake up on any given

morning to discover that it's sprouted some new powers or had an outbreak of new rights.

It's not a new idea. The theory has its roots in the "progressive" philosophy expounded by Woodrow Wilson in the years before he became president. Wilson criticized the Founders' checks and balances as an unnecessary drag on the efficiency of government. In his landmark speech "What Is Progress?" Wilson declared the Constitution to be a "living thing," and he urged that it be interpreted according to "the Darwinian principle." That is, the Constitution must evolve.

Two decades later, the Constitution started evolving like crazy to accommodate Franklin Roosevelt's New Deal, a rash of programs that did not fit the Founders' design. In 1934 Edward Corwin, a political scientist who served in FDR's administration, declared that "the first requirement of the Constitution of a progressive society is that it keep pace with that society." The way that the Constitution "keeps pace" with society—according to Corwin and his heirs—is not by amendment but by creative interpretation. According to this view, judges can, and should, rewrite the Constitution according to the prevailing zeitgeist. And the Founders' words? They should play "at most, a ceremonial role," according to the 2010 book *The Living Constitution* by Professor David Strauss.

Cast aside any thought of finding common ground with the Living Constitution crowd. It is impossible to make even the most rudimentary statement about the Constitution without incurring their disapproval.

Is the Constitution *law*? Experts disagree. At prestigious law schools across the United States, professors have been arguing for years about whether the Constitution is actually a binding law. In 1980 Paul Brest, then the dean of Stanford Law School,

denounced the Constitution as being of "questionable authority." The Constitution does not bind us, according to Brest and others, because it's so infernally old. Professor Strauss neatly summarizes this objection when he asks: "Why should we be required to follow decisions made hundreds of years ago by people who are no longer alive?" Besides, argues Strauss, if judges stuck to original meaning, they'd have to abandon precedents like *Roe v. Wade* and *Brown v. Board of Education*—two opinions, incidentally, written by "people who are no longer alive."

If the Constitution is so badly out of date, why not amend it? The document contains an entire section, Article V, that lays out the mechanisms for amending the text. Living Constitution theorists, however, deny that formal amendments are a viable option. The Article V process is "cumbersome," argues Strauss, and "too difficult to be a realistic means of change and adaptation." So difficult, in fact, that the document has been successfully amended twenty-seven times.

In the world of the Living Constitution, change comes not by amendment, but by the brute force of federal legislation and Supreme Court diktat. As long ago as 1978, Oxford professor Lord Beloff marveled at the "widespread belief" in America that the Supreme Court "is entitled to act as a continuing constitutional convention." Yale law professor Bruce Ackerman famously described American constitutional history as a series of "constitutional moments" when one or more branches of the federal government assert the power to change the Constitution without amendment. For his academic achievement, Ackerman would go on to receive the Order of Merit—from France.

But surely, even left-wing professors must agree that original meaning is a useful tool for understanding the Constitution, right? Nope. Professor Strauss objects to originalism for the same

reason he objects to the Article V amendment process: it's just too difficult. In the first place, figuring out the original understanding of a constitutional provision is a "task of historians" that can be "brutally hard," says Strauss. And after that, there is the further task—do these labors never cease?—of "translating those understandings so that they address today's problems."

Professor Strauss is not the only academic to recoil from the hard work of originalism. Two leading Harvard scholars, Laurence Tribe and Michael Dorf, wrote that any attempt to interpret the Constitution is doomed because its words are so "malleable" that they can be twisted to support "meanings at opposite ends of virtually any legal, political, or ideological spectrum." One of their colleagues, Mark Tushnet, argues that judges should not be expected to abide by the Constitution's text because it is "opaque."

There is a particle of truth here. In some cases, it does require a little digging to get at the original meaning of a constitutional provision. But that hardly means that the truth is undiscoverable. To the contrary, an abundance of materials is freely available to anyone interested in learning what the words of the Constitution meant to the ratifying public. The Constitution did not appear out of nowhere; it grew out of institutions that Americans had been living with for generations. By 1787, written constitutions were old hat for Americans. Beginning with Virginia's first charter in 1606, Americans had been reading, writing, and debating different plans of government for two hundred years. Colonial charters, state constitutions, and various plans for united colonies or states: all of them had dealt with the same issues that confronted the delegates at Philadelphia.

As the political scientist Sydney George Fisher observed in *The Evolution of the Constitution*, "at the time the Constitution

was framed, in 1787, our people had had a vast experience in constitution-making—greater and more varied . . . than any other people in the world." Much of that experience was relatively recent. In 1775 the Continental Congress had passed a resolution calling on each colony to replace its colonial government with a constitution suited for independence. That decree set off a flurry of constitution-drafting, with the result that each new state had an opportunity—at the moment of independence—to review its traditions and take a crack at framing a government.

The "delegates came to the Convention of 1787 with all this experience in their minds," according to Fisher. Thus, when they provided for things like the regulation of commerce, or a presidential veto, or Senate advice and consent, they were echoing familiar phrases in American public life. No detailed explanations were thought necessary. Behind every word of the Constitution lie nearly two centuries of experience in self-government *before* 1787. Original meaning requires us to look for that deeper historical meaning. Yes, sometimes that involves hard work and long hours, but not always.

THE FOUNDERS AND THE LIVING CONSTITUTION

To all their arguments against originalism, liberals have added one more, and it's a howler: the Founding Fathers themselves believed in a Living Constitution. Justice Breyer, for example, "argues that the Founding Fathers did want a living Constitution," according to a September 10, 2010, report by National Public Radio's legal analyst Nina Tottenberg. Such assertions are usually based on the framers' decision to keep the notes of the Phila-

delphia convention secret, along with James Madison's statement that neither he nor the other framers should be given "oracular" authority in construing the Constitution.

Madison wasn't arguing for a Living Constitution but establishing an important principle: constitutional law is not an exercise in trying to guess at the secret intentions of the framers. Indeed, originalists should not attempt to channel the Founding Fathers. Instead, as I've noted, originalists should seek to understand what the Constitution meant to those who ratified the document, and the people they represented. With that proposition, Madison heartily agreed. In 1796 he declared—on the floor of the House of Representatives—that when searching for the meaning of the Constitution, "we must look for it . . . in the State Conventions, which accepted and ratified [it]." That's why this school of thought is sometimes referred to as "original *public* meaning." For all I know, James Madison privately thought that the Constitution was a recipe for fruitcake. It doesn't matter; it wouldn't change the public meaning of the document one iota.

Besides, if the Founding Fathers really subscribed to the Living Constitution philosophy, why did they create a new document at all? Clearly the Founders were dissatisfied with the existing charter, the Articles of Confederation. Why didn't they simply profess their belief in a "Living Articles of Confederation" and then proceed to "interpret" the document to suit their needs?

And finally, one might expect Justice Breyer and his allies to produce *some* evidence that the Founding Fathers wanted future generations to treat their document as a sort of loose framework, without getting hung up on the text. Good luck with that one. If history teaches us anything, it is that the Founders cared deeply about every word in the Constitution.

For one thing, they spent an awfully long time produc-