

Abstract:

As the Rehnquist Court is summed up, commentators are noting one of its unusual and defining characteristics. Even though, from the 1968 election on, those disappointed with the “liberal” tendencies of the Warren Court called for justices to forswear judicial “activism” and to engage in judicial “restraint” in interpreting the Constitution, and even though successive nominees to the Court in the late twentieth century identified themselves as advocates of “restraint,” the Court, through Rehnquist’s tenure, continued to make decisions that expanded the institutional boundaries of the judiciary and formulated new interpretive glosses of constitutional language. Moreover, even though conventional wisdom anticipated that a succession of Republican presidents would nominate more “conservative” judges to the Court who might “roll back” some of the Warren Court’s decisions, by the time of Rehnquist’s death in 2005 the Court had become prominently identified with lines of decisions, such as those calling for aggressive scrutiny of gender discrimination, those constitutionalizing a right to engage in intimate homosexual conduct, and those upholding racially based affirmative action programs in higher education, which appeared “liberal” in their thrust. Finally, in two lines of decision identified as particularly troublesome for “conservative” critics of the Court, lines that had carved out constitutional protection for criminal defendants and for abortion rights, the Rehnquist Court reaffirmed the two pivotal decisions in those lines, *Miranda v. Arizona* and *Roe v. Wade*.

Given the culture of judicial appointments in the late twentieth century, the fact that all of the above decisions were perceived as “liberal” and “activist” was surprising, since most of the nominating presidents of Rehnquist’s tenure had appointed justices with the expectation that they would be conservative and restrained in their approach. But no one could claim that the decisions met that expectation. And in addition to vindicating such “liberal” policies as support for remedies against discrimination based on race, gender, or sexual preference, or solicitude for the rights of criminal defendants and women exercising a choice to have an abortion, some of the decisions appeared to stray from the traditional canons of “restrained” constitutional interpretation by judges, such as fidelity to the constitutional text or respect for established precedent.

By the turn of the twenty-first century it was standard practice for some commentators to claim that the Court had transformed judicial review into “judicial sovereignty,” and to urge the American public, apparently by promoting reform policies at the local level, to “take the Constitution away from the Courts.” The appearance of this commentary was somewhat ironic, since although commentators stressed the Rehnquist Court’s super-activist stance, which they feared might result in its judicializing the presidential election process, dismantling the edifice of federal regulatory power, or reviving a constitutionally protected status for property or economic rights threatened by state regulation, the structure of governance they were concerned to protect against the Court’s prospective assault had largely been given constitutional sanction by Warren Court decisions criticized as inappropriately activist.

Thus the chief puzzle of the Rehnquist Court is how to characterize what appears, from the perspective of political ideology, to be the unexpected tendency of some of its major lines of constitutional cases. This essay seeks to explore that puzzle by putting ideological considerations temporarily to one side, and focusing instead on the Court’s distinctive, and hitherto understudied, constitutional jurisprudence.

The Jurisprudence of the Rehnquist Court

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As the Rehnquist Court is summed up, commentators are noting one of its unusual and defining characteristics. Even though, from the 1968 election on, those disappointed with the “liberal” tendencies of the Warren Court called for justices to forswear judicial “activism” and to engage in judicial “restraint” in interpreting the Constitution, and even though successive nominees to the Court in the late twentieth century consistently identified themselves as advocates of “restraint,”¹ the Court, through Rehnquist’s tenure, continued to make decisions that expanded the institutional boundaries of the judiciary and formulated new interpretive glosses of constitutional language. Moreover, even though conventional wisdom anticipated that a succession of Republican presidents would nominate more “conservative” judges to the Court who might “roll back” some of the Warren Court’s decisions,² by the time of Rehnquist’s death in 2005 the Court had become prominently identified with lines of decisions, such as those

¹ See, e.g., *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. On the Judiciary*, 100th Cong. (1987) (then-Judge Kennedy stated, “I think judicial restraint is important in any era. It is especially important when the political branches for some reason think that they can delegate or have delegated the power to make constitutional decisions entirely to the courts”); *Hearings Before the Senate Comm. on the Judiciary on the Nomination of Judge Sandra Day O’Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States*, 97th Cong., 1st Sess. 1-414, 60 (1981) (then-Judge O’Connor stated, “In carrying out the judicial function, I believe in the exercise of judicial restraint. For example, cases should be decided on grounds other than constitutional grounds where that is possible”).

² See Bruce H. Kalk, *The Carswell Affair: the Politics of a Supreme Court Nomination in the Nixon Administration*, 42 AM. J. LEGAL HIST. 261, 262 (1998) George D. Brown, *The Ideologies of Forum Shopping—Why Doesn’t a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 676 (1993).

calling for aggressive scrutiny of gender discrimination,³ those constitutionalizing a right to engage in intimate homosexual conduct,⁴ and those upholding racially based affirmative action programs in higher education,⁵ which appeared “liberal” in their thrust. Finally, in two lines of decision identified as particularly troublesome for “conservative” critics of the Court, lines that had carved out constitutional protection for criminal defendants and for abortion rights, the Rehnquist Court reaffirmed the two pivotal decisions in those lines, *Miranda v. Arizona* and *Roe v. Wade*.⁶

Most of the nominating presidents of Rehnquist’s tenure had appointed justices with the expectation that they would be conservative and restrained in their approach.⁷ But no one could claim that the above decisions met that expectation. In addition to vindicating such “liberal” policies as support for remedies against discrimination based on race, gender, or sexual preference, or solicitude for the rights of criminal defendants and women exercising a choice to have an abortion, some of the decisions appeared to stray from the traditional canons of “restrained” constitutional interpretation by judges, such as fidelity to the constitutional text or

³ *United States v. Virginia*, 518 U.S. 515 (1996).

⁴ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁵ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁶ *Dickerson v. U.S.*, 530 U.S. 428 (2000); *Lewis v. Casey*, 518 U.S. 343 (1996).

⁷ For example, Ronald Reagan stated that he nominated Judge Robert Bork to the Supreme Court because Bork was America’s “most prominent and intellectually powerful advocate of judicial restraint.” See Linda Greenhouse, *Washington Talk; The Confirmation Process; No Grass is Growing Under Judge Bork’s Feet*, N.Y. TIMES, Aug. 4, 1988, at A18. Similarly, George H. W. Bush’s Chief of Staff, John H. Sununu, indicated that then-Judge Souter was nominated because he was “a strict constructionalist, consistent with basic conservative attitudes.” R. W. Apple Jr., *Bush’s Court Choice: Sununu Tells How and Why He Pushed Souter for Court*, N.Y. TIMES, July 25, 1990, at A12.

respect for established precedent.

Nothing in the history or language of the Equal Protection Clause of the Fourteenth Amendment, for example, indicated that it was intended to apply to discriminations based on gender, and as late as 1961 the Warren Court had unanimously dismissed a challenge to a Florida statute excluding women from jury service on the ground that the destiny of the female sex lay in homemaking rather than civic pursuits.⁸ It was the Court's own interpretations that had equated gender discrimination with negative stereotyping,⁹ and it was the Court that eventually concluded, contrary to precedent, that classifications resting on gender required an "exceedingly persuasive" justification.¹⁰

Similarly, nothing in the history of the Equal Protection or Due Process Clauses suggested that they mandated preferential treatment for racial minorities in the process of university admissions,¹¹ or elevated consensual homosexual sodomy to the status of a constitutionally

⁸ *Hoyt v. Florida*, 368 U.S. 57 (1961).

⁹ *See Frontiero v. Richardson*, 411 U.S. 677, 685-86 (1973).

¹⁰ *United States v. Virginia*, 518 U.S. at 524. This was a more stringent standard than in previous cases evaluating gender-based classifications, which required merely that the government's interest be "important" or "legitimate." *Cf. Craig v. Boren*, 429 U.S. 190, 198 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"); *Frontiero*, 411 U.S. at 683 ("a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest")

¹¹ Stephen A. Siegel, in *The Federal Government's Power to Enact Color-Conscious Laws: an Originalist Inquiry*, 92 NW. U. L. REV. 477, 482, 548 (year) suggests that the framers of the Fourteenth Amendment may have had affirmative action remedies in mind, but that there is no evidence that higher education was a target.

protected “liberty.”¹² Racial quotas in higher education had been outlawed by the Court in a 1978 decision,¹³ and a challenge to sodomy legislation by homosexuals was perfunctorily dismissed by the Court in 1986.¹⁴ By 2005, however, the Rehnquist Court had concluded that the achievement of racial “diversity” in institutions of higher learning was a “compelling interest” that supported affirmative action programs (so long as they did not explicitly impose racial quotas),¹⁵ and that sodomy legislation unconstitutionally restricted the intimate sexual choices of homosexuals as well as heterosexuals.¹⁶ Those interpretations of the Fourteenth Amendment amounted to new judicial glosses on a provision whose language had not changed over time.

By the turn of the twenty-first century it was standard practice for some commentators to claim that the Court had transformed judicial review into “judicial sovereignty,” and to urge the American public, apparently by promoting reform policies at the local level, to “take the Constitution away from the Courts.”¹⁷ The appearance of this commentary was somewhat ironic, since although commentators stressed the Rehnquist Court’s super-activist stance, which they feared might result in its judicializing the presidential election process, dismantling the edifice of

¹² Sodomy statutes have remained in place after the Fourteenth Amendment’s passage. WILLIAM N. ESKERIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET*, app. A-1 at 328-37 (1999), provides a state-by-state history of sodomy statutes.

¹³ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

¹⁴ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹⁵ *Grutter v. Bollinger*, 539 U.S. 306, 328, 334 (2003).

¹⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁷ See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 227-53 (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

federal regulatory power, or reviving a constitutionally protected status for property or economic rights threatened by state regulation, the structure of governance they were concerned to protect against the Court's prospective assault had largely been given constitutional sanction by Warren Court decisions criticized as inappropriately activist.

A surface explanation for the transition from the Warren to the Rehnquist Courts is that activism, on both bodies, has functioned as a surrogate for political ideology, with a majority of liberals being replaced, over time, by a majority of conservatives.¹⁸ The difficulty with that explanation is not simply that it ignores some of the Rehnquist Court's most defining decisions. It is that in assuming that the terms judicial "activism," "restraint," "liberalism," and "conservatism" are monolithic labels, it misses the salient features of the transformation in the Court's posture from the tenure of Warren to that of Rehnquist. Those features can best be understood as a product of jurisprudential rather than political developments.

I

The origins of Rehnquist Court jurisprudence stretch back to the first three decades of the twentieth century. In that time period, American legal thought underwent a transformation that affected two of its core concerns. One concern was with the nature of judging. The traditional description of judging by eighteenth- and nineteenth-century judges and legal commentators had portrayed the judicial role as that of discerning preexisting principles of law

¹⁸ See, e.g., Peter Gabel, *What it Really Means to Say "Law is Politics": Political History and Legal Argument in Bush v. Gore*, 67 BROOK. L. REV. 1141, 1149-53 (2002) (discussing the shift from liberal to conservative values that occurred on the Court from the 1970s through the Rehnquist era); Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337, 1342 (2002) ("conservatives outraged at the perceived excesses of the Warren Court hammered away at that Court for being activist, and liberals distressed at the current resurgence of federalism, are giving the Rehnquist Court the same rough treatment")

and applying them to cases. Legal principles could be found in a variety of sources, ranging from common law decisions to the writings of jurists to the law of nations, and judges had widespread discretion to consult those sources. But the principles they extracted were independent of the judge's attitudes and convictions: they represented the "will of the law," not the "will of the judge." In discovering principles and applying them to cases, judges were not thought to be "making law" in the fashion of legislators.¹⁹

By the latter half of the nineteenth century, a distinction between the judicial role in common law cases and that in constitutional cases had surfaced. In the former set of cases, judges looked to prior common law decisions (precedents) as the primary source of legal principles; in the latter, they were expected to confine their investigations to constitutional provisions and the prior judicial interpretation of them. That distinction, however, was comparatively slow to evolve. Just as judges in common law cases were free to consult a variety of sources, including the decisions of courts in other jurisdictions and treatise writers, in their search for governing legal principles, Supreme Court justices, in the early nineteenth century, were treated as free to ground their decisions, in cases where constitutional issues had been raised, on extratextual sources.²⁰ Thus, in *Fletcher v. Peck*, where a legislature's decision to rescind a sale of land made by its predecessor was challenged as a violation of the Contracts Clause of the Constitution, Marshall's opinion, invalidating the rescinding statute, was grounded not only on that clause but on "general principles which are common to our free institutions,"

¹⁹ G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE* 111-16, 198 (1988); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 218-19 (2000)

²⁰ *See* WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE*, 112-13.

including the principle that “the property of an individual, fairly and honestly acquired,” could not be “seized without compensation.”²¹

Even after arguments from natural law and other extratextual sources had begun to disappear in nineteenth-century constitutional cases,²² judges continued to exercise considerable interpretive freedom to gloss constitutional provisions. A prominent example was the Due Process Clause of the Fourteenth Amendment, which was initially interpreted by a majority of the Court as providing protection only for the civil rights of former African-American slaves,²³ and was subsequently found to protect the economic rights of corporations and industrial laborers.²⁴ Although some of those interpretations were controversial and provoked dissenting opinions, not until the early twentieth century was the process by which judges supplied content to broadly drafted constitutional provisions attacked as an illegitimate, ideological exercise.²⁵ For the past hundred years judicial interpretation of the Constitution had been seen as of a piece with

²¹ 10 U.S. 87, 139, 135 (1810).

²² See Robert Cover, *Justice Accused: Antislavery and the Judicial Process* 34 (1997) (arguing that “[t]hroughout the sixty year period following the Revolution...the courts uniformly recognized a hierarchy of sources of law for application in which ‘natural law’ was subordinate to constitutions, statutes, and well-settled precedents”). But see White, *The Marshall Court and Cultural Change*, 129-30.

²³ *Slaughter House Cases*, 83 U.S. 36 (1872).

²⁴ Corporations have been considered “persons” within the meaning of the Due Process Clause almost since the clause’s inception. See *Covington & L. Turnpike Road Co. v. Stanford*, 164 U.S. 578, 592 (year) See also *Lochner v. New York*, 198 U.S. 45, 56 (1905) (“Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.”)

²⁵ The first judicial manifestation of this argument was made by Justice Holmes: “a constitution is not meant to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*.” *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

common law adjudication: a search for the previously existing legal principles that governed new cases.

In the first three decades of the twentieth century, those views of judging and constitutional interpretation were challenged and ultimately displaced from a position of orthodoxy. The challenges were embodied in the emergence of two early twentieth-century jurisprudential perspectives, Realism in common law adjudication and the “living Constitution” theory of constitutional interpretation. The central starting assumptions of both of those perspectives were that judging was a purposive human activity that should be understood as a species of lawmaking, and that history was a process of human-directed qualitative change rather than the product of inexorable external forces.²⁶

Legal Realists argued that the “principles” that judges allegedly extracted from authoritative legal sources were actually created by judges themselves. The crucial step in common law adjudication was not the identification of principles, which jurists had previously emphasized, but the application of principles to cases. In the process of application, principles were reformulated in order to promote outcomes with contemporary policy implications. It was fruitless to think of common law rules as “concepts” with an immanent character; the coherence of rules came from their particularized applications. And those applications were invariably made by judges on the basis of policy. The common law was thus continually in a state of flux because society was itself constantly changing, and legal policies sought to reflect social changes. The only difference between common law adjudication and legislation, Realists felt,

²⁶ For more detail on these assumptions, see WHITE, *THE CONSTITUTION AND THE NEW DEAL*, 167-236.

was that legislators openly grounded their decisions on social policy, whereas judges continued to engage in the fiction that they were following, rather than modifying, preexisting common law rules. Realists urged judges to candidly declare the policy considerations affecting their decisions.²⁷

The “living Constitution” approach to constitutional interpretation can be seen as an effort to apply the epistemological canons of Realism to the judicial analysis of constitutional issues. Scholars identified with the “living Constitution” approach assumed, as one put it, that “laws are man-made, man-executed, man-interpreted,” and that “judges are men.” Since “[l]aws live...only to the extent that men will to have them live,” the Constitution was “handed down...by human means.”²⁸ Constitutional interpretation resembled the Realists’s characterization of common law adjudication, a process in which the “meaning” of constitutional provisions was supplied by judges when they applied those provisions to cases.

This meant, contrary to the orthodox view of constitutional adaptivity, that the meaning of the Constitution did change with time. Advocates of a “living Constitution” approach to constitutional interpretation believed that since the meaning of constitutional provisions was changed by judges regardless of whether judicial opinions acknowledged that fact, Supreme Court justices should admit that on occasion new social conditions mandated new policies which

²⁷ See Karl Llewellyn, *A Realistic Jurisprudence – The Next Step*, 30 COLUM. L. REV. 431, 464-65. For overviews of the arguments of Llewellyn and other realists, see NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 72-79 (1995); G. EDWARD WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* 121-25 (1978)

²⁸ HOWARD LEE MCBAIN, *THE LIVING CONSTITUTION* 2-3, 272 (1927)). For more on “living Constitution” jurisprudence, see White, *The Constitution and the New Deal*, 208-29, 221, 225-26.

required that the Constitution should mean something different.²⁹ By the 1930s justices were occasionally doing just that. In *Home Building & Loan Association v. Blaisdell*,³⁰ the question was whether “emergency” legislation by Minnesota establishing a two-year moratorium on foreclosures for the nonpayment of debts violated the Contracts Clause of the Constitution. The legislation was designed to give debtors, primarily farmers, relief against the prospect of losing their property because the downturn in economic conditions had left them suddenly vulnerable. On its face, the legislation appeared to be in direct contradiction with the Contracts Clause, which had been understood by previous decisions of the Court to be a safeguard of the rights of creditors against the imagined tendencies of legislatures to favor the interests of debtors. Periods of downturn in the economy were not unknown to the framers. But the depression of the 1930s had been unprecedented in its magnitude, and the consequences of enforcing foreclosures would have been very grave.

The Court divided 5-4 on the constitutionality of the Minnesota statute, and it became clear from the majority and dissenting opinions that the division rested on two opposing views of constitutional adaptivity. Three dissenters joined an opinion by Justice George Sutherland which began by stating that “[a] provision of the Constitution...does not mean one thing at one time and an entirely different thing at another time.”³¹ The “*meaning*” of constitutional

²⁹ See MCBAIN, *THE LIVING CONSTITUTION*, 33:

[T]he court has the last word upon the subject.... It is because of this nature of their records and this finality of their adjudications that we think and speak of the courts, and especially of the United States Supreme Court, as being the principal agency by which our written constitution has been and is being developed.... Under the magic of judicial interpretation the constitution is neither an Ethiopian nor yet a leopard.

³⁰ 290 U.S. 398 (1934).

³¹ *Id.*, 449.

provisions, Sutherland maintained, “is changeless: it is only their *application* which is extensible.”³² This was a succinct statement of the orthodox view of adaptivity. To understand the meaning of a provision, “we should place ourselves in the condition of those who framed and adopted it.” A “candid consideration of the history and circumstances which led up to and accompanied the framing of [the Contracts Clause]...demonstrate[d] conclusively that it was framed and adopted with the specific and studied purpose of preventing legislation designed to relieve debtors *especially* in times of financial distress.”³³ Sutherland noted that “the present exigency is nothing new. From the beginning of our nation, periods of depression...have alternated with years of plenty.”³⁴

Sutherland was clearly correct that if one started with the proposition that the meaning of constitutional provisions did not change, and discerned that meaning by placing oneself “in the condition of those who framed and adopted” them, the Contracts Clause stood in the way of the Minnesota legislation. Chief Justice Hughes’s opinion for the majority needed to reject that view of constitutional adaptivity, and it did. After asserting that “[t]he settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population,” and “the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity,”³⁵ Hughes announced:

³² *Id.*, 451. Emphasis in original.

³³ *Id.*, 453-54.

³⁴ *Id.*, 471.

³⁵ *Id.*, 442.

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation...³⁶

When Hughes claimed that it was erroneous “to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, placed upon them,”³⁷ he was concealing two levels of constitutional meaning in the term “interpretation.” One level was the application of a provision to a particular set of circumstances. The “outlook and conditions” of the framers of the Contracts Clause might have inclined them to think of its being applied to situations in which debtor interests had found favor in a particular legislature who sought to prefer them over creditor interests and accordingly passed legislation relieving some debtor obligations. The framers might not have been thinking about a more vast, arguably unprecedented, economic “emergency” such as the depression of the 1930s. The circumstances in which the Contracts Clause was to be interpreted had arguably changed.

But that was not the only level of constitutional interpretation anticipated by the orthodox theory of adaptivity. Another level involved the principles embodied in constitutional provisions: why they were “intended to endure” as they were adapted over time. Here the meaning of the Contracts Clause was clear. It was intended to establish the principle of protection for the

³⁶ *Id.*, 442-44 (citations omitted).

³⁷ *Blaisdell*, 290 U.S. at 443.

security of classes of property holders, which included creditors, against encroachments by legislatures. If that principle was to be reasserted in new circumstances over time, then the interpretation of the Contracts Clause called for in *Blaisdell* was clear. Legislatures, regardless of the circumstances, could not abrogate contractual obligations. The security of propertyholders was to be preserved. By sustaining the legislation in *Blaisdell*, the majority had “interpreted” the Contracts Clause to mean something different: legislatures may abrogate contractual obligations, and thereby undermine the security of propertyholders, if circumstances require them to do so to facilitate the public welfare. Under that interpretation, Contracts Clause cases would be treated like police power/due process cases: the Court would decide when the public welfare, as embodied in police power legislation, trumped private “liberties.”

That interpretation enabled legislatures to infringe on the rights of creditors when they believed that economic circumstances required them to do so. It legitimated some temporary relief for hard-pressed farmers confronting an economic depression. But it clearly meant that the Contracts Clause meant something different in the 1930s than it had meant for the early 150 years of its history. Instead of meaning that legislatures could not interfere with contractual obligations, it meant that sometimes, on a sufficient showing of benefits to the public welfare, legislatures could.

The collapse of the view of judicial interpretation in which judges “establish[ed] no policy” and never enter[ed] the domain of public action” because their role was “limited to seeing that popular action does not trespass upon right and justice as it exists in written

constitutions and natural law”³⁸ began when the idea of law as an immanent force transcending partisanship and the contingencies of time came to be thought as problematic. It was no accident that Holmes, one of the pioneers of the view that the idea of law as a “brooding omnipresence in the sky” was a fiction,³⁹ was the first Supreme Court justice to abandon the traditional methodology of due process cases, asserting that judicial glosses on the term “liberty” in the Due Process Clauses were simply exercises in filling the term with substantive ideological content.

In the course of denying the intelligibility of law as a meaningful constraint on judges, at least in the realm of constitutional interpretation, Holmes began to formulate an alternative constraint. His formulation was cryptic, and his application of it, over the course of his own judicial career, somewhat incomplete, but his devotees would subsequently refine it. The constraint was grounded in American democratic theory as embodied in the principle of majoritarianism. Holmes became attracted to a perspective on judicial review set forth by his friend and former colleague James Bradley Thayer in an 1893 article.⁴⁰ Thayer argued that when reviewing the actions of “co-equal” branches of government (federal judges reviewing Congressional legislation or state judges reviewing acts of the state legislature), judges should not overturn legislation unless they had an overwhelming constitutional mandate to do so.⁴¹ Thayer based his theory of limited judicial review on three grounds: that legislatures should be

³⁸ David P. Brewer, Justice of the United States Supreme Court, *The Nation's Safeguard* (Jan, 17, 1893) in 13 PROC. N.Y. ST. B. A. 37, 46 (1893).

³⁹ *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J, dissenting)

⁴⁰ James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

⁴¹ [Need page cite: phrase “overwhelming constitutional mandate” may not be in article]

thought of as nascent constitutional interpreters, signaling by their legislation that they believed it passed constitutional muster; that if judges adopted a more hands-off approach to legislation, legislators would take their role as constitutional interpreters more seriously; and that judicial deference to legislative solutions to issues of public policy was more consistent with democratic theory.⁴²

Holmes, probably because of his skeptical attitude toward the utility of most legislation, emphasized only the last of Thayer's grounds. Moreover, his deference to legislatures was not uniform. Although he consistently declined to upset legislation that allegedly infringed on the judicially created "liberty" to buy and sell one's services in the economic marketplace, he was not uniformly deferential to state regulations that amounted to a taking of property without compensation, suggesting in one case that if a regulation "goes too far," the "contract and due process clauses are gone."⁴³ And in free speech cases, after initially concluding that the scope of state power to regulate forms of expression as inimical to public safety or morals was quite extensive,⁴⁴ he began to argue for a more searching judicial inquiry into legislative restrictions on speech. In order to reach this position Holmes had to abandon some of his earlier views in the free speech area, such as the idea that the First Amendment only applied to prior restraints on expression, had to accept the doctrinal proposition that the First Amendment was "incorporated" against the states in the Fourteenth Amendment's Due Process Clause, and had to associate

⁴² *Id.* at 133-36. . For more on Thayer and *The Origin and Scope of the American Doctrine of Constitutional Law*, see *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 48 (1993).

⁴³ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

⁴⁴ See *Fox v. Washington*, 236 U.S. 273 (1915); *Patterson v. Colorado*, 205 U.S. 454 (1907).

heightened protection for free speech with democratic theory. By the end of his career he had made all those moves,⁴⁵ and his successors were to advance, largely on the grounds of democratic theory, an approach in which the Court largely deferred to legislation affecting social and economic transactions but placed a heavier burden of justification on legislation affecting free speech or the free exercise of religion.⁴⁶ With those developments, American constitutional jurisprudence entered a new phase.

II

The collapse of orthodox theories of the nature of judging and constitutional interpretation, and the relocation of constraints on judges from the jurisprudential constraints of orthodoxy to the structural constraints of democratic theory, was the first step in the eventual emergence of Rehnquist Court jurisprudence. In the sea-change in attitudes toward judging and constitutional interpretation that took place in the first three decades of the twentieth century, one approach became entrenched and another virtually disappeared from the landscape of cases and commentary. Between the 1940s and the 1970s, almost no judge or commentator was urging, as Sutherland had, that “the whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it.”⁴⁷ Practically no one was urging that the text of constitutional

⁴⁵ See, e.g., *Adkins v. Children’s Hospital of the District of Columbia*, 261 U.S. 525, 567-71 (1923) (Holmes, J., dissenting); *Schenck v. U.S.*, 249 U.S. 47 (1919). See also *Gitlow v. New York*, 268 U.S. 652, 672-73 (Holmes, J., dissenting).

⁴⁶ For a discussion of free speech jurisprudence from Holmes’ retirement in 1932 through the Second World War, see G. Edward White, *The First Amendment Comes of Age*, 95 MICH. L. REV. 299, 332-42 (1996).

⁴⁷ *Blaisdell*, 290 U.S. at 452 (Sutherland, J., dissenting).

provisions, in their “original” meaning, was a constraint on judges. The triumph of a “living Constitution” theory of interpretation, in fact, assumed that the original meaning of provisions *could not be* a constraint because that meaning changed over time and was supplied by judges.

In relocating the locus of constraints on judges from the nature of legal principles to the structure of American democratic constitutionalism, twentieth-century courts and commentators were assuming that when judges acted as constitutional interpreters, they functioned as a species of lawmakers. That assumption stood the orthodox theory of the nature of judging on its head. Contrary to the canons of that theory, judges did “make laws,” “establish...policy,” and “enter into the domain of public action.” Like other branch officials, they governed. So the central concern for modern American jurisprudence was not with maintaining the distinction between the will of the judge and the will of the law; it was with assuring that when judges made law in the guise of constitutional interpretation, their performance of that lawmaking function reinforced democratic theory.

From this relocated set of constraints on judges as constitutional interpreters would emerge, between the 1940s and the 1960s, the two principal perspectives on constitutional interpretation that would compete for primacy on the Warren Court. Both perspectives started from the assumptions that judges were a species of lawmakers and the “living Constitution” approach to interpretation preferable to any alternative. Both perspectives agreed that the most significant constraint on judges as constitutional interpreters should be democratic theory. The debate between the perspectives that would occupy commentators for three decades, beginning in the early 1940s, was about what constituted democratic constraints on judges as constitutional interpreters.

In a recent book,⁴⁸ Cass Sunstein has supplied two felicitous terms to characterize the opposing perspectives that surfaced in mid twentieth-century constitutional jurisprudence. The first is “majoritarianism.”⁴⁹ The “majoritarian” perspective, illustrated most conspicuously with the decisions of Holmes and Felix Frankfurter and with several commentators who have come to be called “process” theorists, had its origins in Thayer’s “overwhelming constitutional mandate” limitation on judicial review. It refined Thayer’s model to take into account the perceived “competence” of the institutions of American government to perform lawmaking tasks.⁵⁰ Although second- and third-generation majoritarians continued to believe that judicial deference to the decisions of other branches should be the norm, they developed a series of exceptions, following from the proposition that on some occasions the “countermajoritarian” status of the judiciary actually facilitated the goals of democratic theory.⁵¹

The first line of cases in which majoritarians departed from a posture of deference were First Amendment cases,⁵² several of them being challenges by Jehovah’s Witnesses to the efforts of municipalities to keep them from distributing literature or speaking in public places.⁵³

⁴⁸ CASS R. SUNSTEIN, *RADICALS WITHOUT ROBES* (2005).

⁴⁹ *See id.*, 44-50 for a definition and discussion of “majoritarianism”.

⁵⁰ *Id.*, 45. For a discussion of process theory, see DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE*, 205-99.

⁵¹ *See* ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16-17 (1962) (discussing “the countermajoritarian difficulty”).

⁵² *See* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 89-91 (1948); *see also* WHITE, *THE FIRST AMENDMENT COMES OF AGE*, 384-87.

⁵³ *See, e.g., West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Jones v. Opelika*, 315 U.S. 584 (1942); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Minersville School District v. Gobitis* 310 U.S. 586 (1940).

Witness families objected to their children being required to participate in public school ceremonies requiring students to “pledge allegiance” to the flag of the United States,⁵⁴ and some justices on the Supreme Court who had been attracted to majoritarianism, Stone, Frankfurter, Black, and Douglas, fell out with one another on the appropriate treatment of compulsory flag salute legislation. The flag salute cases illustrated that majoritarianism could cut both ways, by reinforcing a legislature’s effort to inculcate children with the value of support for a democratic nation threatened by totalitarian rivals, and by stifling a minority group’s religious conviction that its members should not worship a “graven image,” even if it were the flag of the United States.

As the Court reversed itself on the constitutionality of flag salute legislation between 1940 and 1943,⁵⁵ the seeds of an alternative judicial perspective allegedly compatible with democratic constitutionalism were sewn. The perspective had been foreshadowed by a tentatively phrased footnote in *United States v. Carolene Products Co.*⁵⁶ The *Carolene Products* footnote was clearly intended to open up the potential limits of majoritarianism as a judicial perspective. In all of the examples Stone offered, a majoritarian stance was arguably incompatible with democratic theory, either because it suppressed freedom of expression, because it blocked the processes of political change, or because it sanctioned racial, ethnic, or religious exclusivity. If democratic theory was about full representation in the political process, a commitment to the free exchange

⁵⁴ *Goblitis*, *supra* note 61; *Barnette*, *supra* note 61.

⁵⁵ For a history of the flag salute cases, see Richard Danzig, *Justice Frankfurter’s Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 STAN. L. REV. 675 (1984).

⁵⁶ 304 U.S. 144 (1938).

of views, and concern and respect for the beliefs of all citizens, the legislation was undemocratic. By invalidating it, in contrast, the Court was being faithful to democratic principles.

After struggling, for the remainder of the Stone and Vinson Courts, to identify the areas in which judicially mandated departures from majoritarianism were appropriate,⁵⁷ the Court, galvanized by its patently anti-majoritarian decision in *Brown v. Board of Education*,⁵⁸ began to embark, during Earl Warren's tenure, on what appeared to be a distinctly countermajoritarian agenda. Not only did it invalidate scores of state and local statutes and ordinances enforcing racial segregation in public facilities,⁵⁹ it eliminated any legislative apportionment of voting districts done on a basis other than population.⁶⁰ It outlawed prayers in the public schools.⁶¹ It

⁵⁷ Two lines of cases were illustrative. Between 1936 and 1949 the Court experimented with the idea that free speech rights occupied a constitutionally "preferred position," making legislation restricting them presumptively suspect. And in roughly the same time period it struggled with the issue of whether the Equal Protection Clause required searching scrutiny of legislation providing "separate but equal" institutions of higher education for white and black students. On the "preferred position" cases, see G. Edward White, "Free Speech and the Bifurcated Review Project: The 'Preferred Position' Cases," in Sandra F. VanBurkelo, ed., *Constitutionalism and American Culture* 99-122 (2002). On the cases involving racial discrimination in higher education, see Mark Tushnet, *Segregated Schools and Legal Strategy* (1987).

⁵⁸ 347 U.S. 483 (1954). When *Brown* was decided, many southern states had passed segregation legislation, and neither Congress nor the Executive had taken any action. *See id.* at 488.

⁵⁹ *See, e.g., New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958); *Gayle v. Browder*, 350 U.S. 903 (1956); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955); *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955); *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954). Each of these was a per curiam decision relying on *Brown* to invalidate a racial classification.

⁶⁰ *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

⁶¹ *Engel v. Vitale*, 370 U.S. 421 (1962).

eliminated any “poll taxes,” however small, as a condition of voting in state elections.⁶² And it changed the criminal procedure laws of several states by mandating a series of constitutionally required police procedures.⁶³ All of those actions supplanted policies initiated by governing bodies that were ostensibly enacting the will of majorities.

Some years later a scholar looked back at the Warren Court’s corpus of decisions and concluded that it had been “a *Carolene Products* Court.”⁶⁴ By that statement he meant that the Warren Court had abandoned a majoritarian stance in the very types of cases sketched out in the *Carolene Products* footnote. Examples were cases where legislation appeared to facially conflict with a provision of the Constitution (the Court had found that a fair amount of obscenity legislation⁶⁵ and some of the common law of defamation clashed with the First Amendment⁶⁶), where it appeared to be blocking the channels of political change (reapportionment was the classic example, because legislators in malapportioned legislatures often profited from the status quo⁶⁷), or where it was directed at discrete and insular minorities (African-Americans were the

⁶² *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

⁶³ *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁶⁴ John Hart Ely, *The Supreme Court, 1977 Term – Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 5-6 (1978).

⁶⁵ See, e.g., *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Roth v. United States*, 354 U.S. 476 (1957).

⁶⁶ *Curtis Publishing Co. v. Butts* 388 U.S. 130 (1967); *Associated Press v. Walker*, 388 U.S. 130 (1967); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

⁶⁷ See, e.g., *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964); *Roman v. Sincock*, 377 U.S. 695 (1964).

prime example,⁶⁸ but atheists⁶⁹ and distributors of pornography⁷⁰ were others).

The developments suggested that American constitutional jurisprudence had not fully embraced majoritarianism even though the logic of the collapse of orthodox theories of judging and constitutional interpretation had seemed to lead to that posture. If judges were not constrained by a transcendent entity called “law,” and the meaning of the Constitution changed with time as different generations of Supreme Court justices interpreted it differently, it would seem that those justices, appointed for life and not subject to any direct political checks, should pay very close heed to the antidemocratic implications of their role as lawmakers. Deference to other branches seemed the interpretive stance most consistent with that awareness, and judges who regarded themselves as majoritarians, most conspicuously Frankfurter, repeatedly stated that “judicial self-restraint” required them to defer to other branch policies which, had they been members of those branches, they would have opposed.⁷¹

But the logic of majoritarianism had not captured Warren Court justices in several areas.

⁶⁸ See, e.g., *Brown*, 347 U.S. 483.

⁶⁹ The parents objecting to mandatory school prayers in *Engel v. Vitale*, 370 U.S. 421 (1962) and *School District of Abington Township v. Schempp*, 374 US. 203 (1963) were atheists.

⁷⁰ The Court’s definition of obscenity, announced in *Roth* and clarified in *Memoirs*, 383 U.S. at 418 seemed to prohibit prosecution of almost all pornography. But in *Ginzburg v. United States*, 383 U.S. 463 (1966), the Court June 20, 2006 allowed a prosecution of a child pornographer to stand.

⁷¹ In his best-known expression of this idea, Frankfurter wrote, “As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard The admonition that judicial self-restraint alone limits arbitrary exercise of our authority is relevant every time we are asked to nullify legislation.” *Barnette*, 319 U.S. at 647-48 (Frankfurter, J., dissenting).

And when one reviews the decisions in which the Warren Court acted as a “*Carolene Products* Court,” it was clear that in those lines of cases the Warren Court had altered the existing meaning of constitutional provisions. The *Brown* line of cases concluded, contrary to precedent⁷² and almost surely contrary to the original understanding of the framers of the Fourteenth Amendment’s Equal Protection Clause,⁷³ that even impeccably comparable racially segregated public facilities violated the equal protection of the laws. The reapportionment cases overruled an earlier decision which had concluded that the apportionment of state legislatures was a nonjusticiable “political” question,⁷⁴ and derived a hitherto undiscovered constitutional right to “cast an equally weighted vote.”⁷⁵ The obscenity and defamation cases invalidated legislation and modified common law decisions that had been in place since the founding of the American Republic. The criminal procedure cases overruled numerous state and federal decisions, including some by the Court.⁷⁶

The jurisprudential posture that linked those lines of decisions had been foreshadowed in an Establishment Clause case that was decided by the Vinson Court, *Everson v. Board of Education*.⁷⁷ That case involved an Establishment Clause challenge to a New Jersey statute

⁷² *Gong Lum v. Rice*, 275 U.S. 78 (1927); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁷³ See Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 434 (2005).

⁷⁴ *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

⁷⁵ *Lucas*, 377 U.S. at 736.

⁷⁶ For instance, *Mapp*, 367 U.S. at 654-55, explicitly overruled in *Wolf v. Colorado*, 338 U.S. 25 (1949).

⁷⁷ 330 U.S. 1 (1947).

which reimbursed parents for the costs of transporting their children to private schools. Most of New Jersey private schools at the time were parochial schools. A 5-4 majority of the Court upheld the statute on the ground that it was “part of a general program” under which the state “[paid] the fares of pupils attending public and other schools,” and thus satisfied the Establishment Clause’s requirement that the government adopt a neutral posture towards religious believers and non-believers.⁷⁸

Despite the divided outcome, all the justices agreed with Justice Black’s elucidation of the principles animating the Establishment Clause. Black wrote that

[The Establishment Clause] means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another....No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause was intended to erect “a wall of separation between Church and State.”⁷⁹

Black’s statement cannot be understood as an accurate historical description of what the framers of the Establishment Clause meant in stating that “Congress shall make no law respecting an establishment of religion.” Apart from the obvious difficulty that the states were not mentioned in the clause, there is very little evidence that the framers had in mind most of the examples of impermissible practices Black listed.⁸⁰ States continued to have established churches after the First Amendment’s passage. The federal government hired a chaplain to introduce Congressional

⁷⁸ *Id.* at 17.

⁷⁹ *Id.*, 15-16.

⁸⁰ See Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 124 (2005)

sessions with a prayer. States supported institutions of higher education, such as the University of Virginia, in which church services were held and courses in religion were offered. The only practice mentioned by Black that the Establishment Clause clearly seemed to outlaw was a national church.⁸¹

Black's statement should be understood less as an effort to discern the "original meaning" of the Establishment Clause than as an attempt, in a jurisprudential universe in which the Constitution was taken to be a "living" document, to "perfect" an understanding of the clause by associating it with what might be called a metaprinciple, the forging of a "wall between Church and State." It was an illustration of what Sunstein has called a "perfectionist" approach to constitutional interpretation.⁸² Perfectionism, as a methodology, can be thought of as a version of Marshall's conception of constitutional interpretation as the frequent reassertion of the first principles of the Constitution to new "crises." But it was a version designed for a "living Constitution" world. It was apparent to Black that the framers of the Establishment Clause did not anticipate its applying to the states: a decision by the Marshall Court had made that clear.⁸³ Nonetheless the exigencies of modern life, in which state governments increasingly exercised police powers, required that some of the provisions of the Bill of Rights that were designed to safeguard citizens against undue restrictions on their liberties by the federal government should

⁸¹ *See id.* ("[I]t is unlikely the First Amendment's ban on a national "establishment" was a ban on nonpreferentialism. On the contrary, when people referred to an 'establishment of religion,' they generally referred either to a single state church or to some other mechanism whereby one denomination or group of denominations was favored over others").

⁸² RADICALS IN ROBES, 31-34.

⁸³ *Barron v. Baltimore*, 37 U.S. 243, 247 ("The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states").

also be “incorporated” in Fourteenth Amendment due process rights against the states.⁸⁴

So the question for Black and other “living Constitution” jurists was how the Court should be guided in applying eighteenth-century constitutional provisions to modern conditions. Majoritarians tended to interpret the reach of open-ended constitutional language such as “due process of law” and “equal protection of the laws” narrowly, reasoning that a modern society required a more affirmative role for government as a regulatory and redistributive force, and that most of the Constitution had been written at a time when a more limited conception of government prevailed.⁸⁵ Black’s approach was different. He sought to ascertain what might be called the “best possible reading” of the Establishment Clause: the reading which most clearly identified the foundational principle of American constitutional government it embodied. He concluded that that foundational principle was the erection of a wall between church and state. Religion, whether in the form of religious beliefs, practices, or institutions, was to play no role in American government.

This “perfected” reading of the Establishment Clause was not, of course, the meaning ascribed to the clause by those who drafted and ratified it. But a perfected reading of constitutional provisions had the virtue of providing a rationale by which they could continually be applied to new cases over time. Perfectionism, as a constitutional methodology, was not

⁸⁴ Black favored total incorporation of the Bill of Rights in the Fourteenth Amendment’s Due Process Clause. *See Adamson v. California*, 332 U.S. 46, 71-72 (1947). He would have denied that this was because of a “living Constitution” philosophy, attributing it rather to his belief that the Constitution needed to be interpreted “literally” but also “liberally,” so that its words needed to be given their fullest possible scope. *See* G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 331-36 (2d ed., 1988)

⁸⁵ *See*, e.g., Holmes’s approach to due process issues in *Lochner v. New York*, *supra* note 28 and to equal protection issues in *Buck v. Bell*, 274 U.S. 200 (1927).

unlike the approach taken by Marshall in Contracts Clause cases, where he “packed” the Contracts Clause with the “general” foundational principle that a legislature could not take property from A and give it to B.⁸⁶ But it differed in that the new applications were sometimes clear deviations from existing law, accommodations to new features of American society.

Brown can serve as an illustration. The “perfected” reading of the Equal Protection Clause that the Court made in *Brown* emphasized that the best possible interpretation of “equal protection of the laws” was that race or skin color could never be made the basis by which states forcibly segregated groups of persons. Racial segregation in any form, the Court declared, amounted to unequal treatment. But in the same opinion the Court announced that in considering the application of that principle to public education, it could not “turn the clock back” to the 1860s, when the Equal Protection Clause of the Fourteenth Amendment came into being. It needed to consider public education in its state in American life in the 1950s, namely as an enterprise in which all children were expected to participate until at least their teens.⁸⁷

Part of the Court’s insistence that racial segregation in public education be considered as a contemporary problem, rather than how it may have appeared to the framers of the Fourteenth Amendment, was strategic, because racially segregated schools continued in existence after that Amendment’s passage. But another part was to emphasize that the meaning of the Constitution was affected by the context in which it was interpreted. Public education was an insignificant

⁸⁶ See, e.g., *Dartmouth College v. Woodward*, 17 U.S. 518, 573 (1819) (“no lawyer would or could say, that the legislature might divest the trustees, constituted by deed or will, seize upon the property, and give it to other persons, for other purposes”). On Marshall’s methodology of “packing” constitutional provisions with natural law principles, see WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE*, *supra* note ___, at 112-19.

⁸⁷ *Brown*, 347 U.S. at 492-93.

part of American life in the 1860s; by the 1950s it had become a pervasive feature. The consequences of segregating school children on the basis of race were, accordingly, much more significant in the latter decade. This was especially true if one concluded, as the Court did, that segregating black from white children had deleterious effects on the self-esteem of the African-Americans.

But if a perfectionist methodology seemed well suited to cases such as *Brown*, where prejudiced majorities were discriminating against discrete and insular minorities, it also seemed boundless in its applications. *Brown* had overruled the Court's longstanding interpretation of the Equal Protection Clause as not prohibiting "separate but equal" racially segregated facilities, ignored historical evidence suggesting that the Equal Protection Clause was not designed to apply to racially segregated public schools, and substituted the views of nine unelected judges for those of several state legislatures on a contentious issue of policy. It was, after all, the Court that had decided for itself what the best possible reading of the Equal Protection Clause should be.

Despite those difficulties with the Court's perfectionist methodology in *Brown*--difficulties which critics of the decision pointed out at the time it was handed down⁸⁸--Warren and his colleagues seemed inspired by perfectionism, notably in *Carolene Products*-type cases. One can see perfectionist readings of constitutional provisions in all of the Warren Court's visible cases where it declared that constitutional imperatives trumped the policies of other branches. In the reapportionment cases, where the Court found the apportionment rules of some

⁸⁸ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 21-23 (1959)..

state legislatures unconstitutional, when based on grounds other than population, even though a majority of the state's voters had approved them, the Court's metaprinciple was, as one case put it, a "conception of political equality from the Declaration of Independence to...the Fifteenth, Seventeenth, and Nineteenth Amendments...one person, one vote."⁸⁹ In the school prayer cases, the metaprinciple was Jefferson's "wall of separation" between church and state. In *Miranda v. Arizona*, the most noteworthy and controversial of the Court's criminal procedure decisions, the metaprinciple was the right of any person taken into police custody in connection with a criminal offense to the "unfettered exercise of his own will."⁹⁰ And in *New York Times v. Sullivan*, the first of the Court's cases constitutionalizing the law of defamation, the metaprinciple was the right of citizens to freely criticize the government and its officials.⁹¹

Perfectionism was not an effort to return to the original foundations of constitutional provisions. The best possible readings of the Constitution the Court made in those cases were not based on a understanding of what the framers of the First, Fourteenth, Fifteenth, and Fifth Amendments believed those provisions embodied. They were based, instead, on subsequent judicial glosses of the provisions informed by an awareness of some contemporary consequences of their application. In *Everson* the Court took into account the growth of parochial education, in *Brown* the increased importance of public education in twentieth-century American society, in *Baker v. Carr* the tendency of state legislators to use districting plans as a

⁸⁹ *Grey v. Sanders*, 372 U.S. 368, 381 (1963).

⁹⁰ *Miranda*, 384 U.S. at 460.

⁹¹ 376 U.S. at 270 ("[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

means of preserving their incumbency or the dominance of their political parties, in *Miranda* the psychological pressures placed on detainees by the setting of police custody, and in *N.Y. Times v. Sullivan* the opportunities of litigants and courts to use defamation awards as a means of punishing unpopular speech. Despite its appeal to constitutional metaprinciples, perfectionism was a “living Constitution” methodology.

As perfectionism became entrenched on the Warren, and subsequently the Burger, Courts,⁹² jurisprudential controversy in the realm of constitutional interpretation took the form of a debate between perfectionists and majoritarians. Critics of the Warren Court’s desegregation, reapportionment, school prayer, and criminal procedure decisions often took pains to note that they did not disagree with the results of the cases as a matter of policy, but that the decisions represented a judicial usurpation of the powers of more democratically elected branches.⁹³ Initially, critical reaction to the more controversial decisions of the Burger Court made similar arguments. *Roe v. Wade*, for example, was criticized in the early 1970s as a hasty judicial effort to intervene on the issue of abortion rights at a time when legislatures were beginning to consider

⁹² *Roe v. Wade*, 410 U.S. 113 (1973), perhaps the most noteworthy decision of the Burger Court, employed a perfectionist methodology. In finding that women had a constitutional right to make abortion decisions in the early stages of pregnancy, *Roe* drew on a line of cases, originating in *Griswold v. Connecticut*, 381 U.S. 479 (1965), that interpreted several amendments to the Constitution as containing “penumbras” which yielded a foundational right of “privacy” encompassing intimate sexual or procreational choices. *See id.* at 484. No previous decisions of the Court had established a constitutional right of privacy. In *Roe*, the Court intimated that it was better understood as another “liberty” in the Due Process Clauses, 410 U.S. at 152, as if the “best possible” reading of those clauses was that they protected the autonomy and dignity of individual citizens.

⁹³ The most conspicuous example was Herbert Wechsler, “Toward Neutral Principles of Constitutional Law,” 73 Harv. L. Rev. 1, 32-33 (1959).

repealing their nineteenth-century statutes restricting abortion decisions.⁹⁴ The Burger Court's early efforts to carve out enhanced constitutional protection against gender discrimination were said to be premature because of the potential passage of a constitutional Equal Rights Amendment.⁹⁵ But by the close of the 1970s, the influence of majoritarian constitutional theory seemed to have waned, at least to the extent that the countermajoritarian exceptions to judicial deference outlined in *Carolene Products* seemed to have come to be regarded as entrenched.⁹⁶

By the time of Sandra Day O'Connor's appointment to the Court in 1981, commentators had concluded that the categories of "activism" and "restraint" no longer captured the Court's jurisprudential climate because all the justices were "activists" of one stripe or another, none were majoritarians, and the debates within the Court were about values.⁹⁷ In the place of the perfectionist-majoritarian debates of the Warren Court years had emerged an atmosphere in which a group of activist justices sought to position themselves on an ideological continuum that stretched from Brennan and Marshall on the left to Burger and Rehnquist on the right. Since the remaining justices—described as "centrists" by commentators—could control the outcome of

⁹⁴ See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 90 YALE L. J. 920, 946-47, (1973).

⁹⁵ Justice Powell made this point in his dissent in *Frontiero*. 411 U.S. at 692.

⁹⁶ The transformation in the theoretical viewpoint of John Hart Ely is a case in point. Ely's early criticism of *Roe* was based on "process theory" grounds, see *The Wages of Crying Wolf*, but, by 1980, Ely argued that judicial interference with other branches of the government is justifiable if it is based on "a participation-oriented, representation-reinforcing approach to judicial review"; that is, if it permits or encourages full participation in government by all citizens. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 87 (1980).

⁹⁷ See Vincent Blasi, *The Rootless Activism of the Burger Court*, in *THE BURGER COURT* 198, 198-99 (Vincent Blasi ed., 1983).

decisions, this positioning became the focus of Supreme Court decisionmaking.⁹⁸ The agenda of those justices, one commentator suggested, was not to advance perfectionist or majoritarian theories of constitutional interpretation; it was to preserve their own power and flexibility as decisionmakers by mediating between liberal and conservative outcomes in cases.⁹⁹

The most influential commentary on the Court in the late 1970s and early 1980s pictured it in similar terms. Although Ronald Dworkin's *Taking Rights Seriously* (1977) advanced a perfectionist perspective, and John Hart Ely's *Democracy and Distrust* (1980) was influenced by majoritarianism, both described constitutional interpretation by judges as essentially an exercise in making value choices. Both Dworkin and Ely sought to ground their theories on values---“equal concern or respect”¹⁰⁰ or “representation-reinforcement”¹⁰¹---which they argued were sufficiently foundational to American culture to transcend immediate ideological concerns, but for both value choices lay at the heart of constitutional adjudication.¹⁰² A third influential work, a collection of essays edited by Vincent Blasi that appeared in 1983, was even more explicit. “By virtually every meaningful measure,” Blasi suggested in one of the essays, “the Burger Court has been an activist court.”¹⁰³ Its activism “has been inspired not by a commitment to fundamental

⁹⁸ *Id.*, 210-17.

⁹⁹ *See id.*, 211.

¹⁰⁰ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 180-83 (1979).

¹⁰¹ ELY, *DEMOCRACY AND DISTRUST*, 87.

¹⁰² Dworkin was more open about this, see *TAKING RIGHTS SERIOUSLY*, 147-49, but see ELY, *DEMOCRACY AND DISTRUST*, 74-75, discussing the “participational” goals driving many of the decisions of the Warren Court.

¹⁰³ BLASI, *The Burger Court*, 208.

constitutional principles or noble political ideals, but rather by the belief that modest injections of logic and compassion by disinterested, sensible judges can serve as a counterforce to some of the excesses and irrationalities of contemporary governmental decision-making.”¹⁰⁴

Blasi’s portrait of the Burger Court stressed that although its stance revealed that the activism-restraint debate of the Warren years was over (all the Burger Court justices were activists), it also revealed that the dominant activists on the Burger Court were neither perfectionists or majoritarians. They were not inspired to derive “fundamental constitutional principles,” but at the same time they were comfortable serving as a “counterforce” to “excesses” perpetrated by other governmental branches. Their goal, Blasi believed, was to “fashion tenuous doctrines that offer both sides of a social controversy something important.” When faced with contested issues, the preferred response of Burger Court majorities took the form of “[a]d hoc accommodations” and short-term solutions.¹⁰⁵

Lost in those developments seemed to be any common understanding of what constrained Supreme Court justices as constitutional interpreters. The majoritarians of the Warren Court years had derived their techniques of judicial constraint from democratic theory and the countermajoritarian difficulty. An awareness of the comparative competence of lawmaking institutions, and a corresponding judicial attention to the limits of the judiciary as a governing branch, followed from the twin recognitions that judges made law and thus necessarily changed the meaning of the Constitution, but that judges were unelected officials in a democratic society. Once the activism of the Warren Court became entrenched, and institutional competence

¹⁰⁴ *Id.*, 211.

¹⁰⁵ *Id.* at 216-17.

questions seemed reduced to trivial quibbles, commentators seemed far more interested in how the Court could get things “right” in its pursuit of constitutional values than in whether freewheeling judicial activism was consistent with American constitutional democracy. On the other hand, the justices on the Burger Court seemed at least instinctively aware of constraints on their interpretive role. Faced with no apparent obligation, as constitutional interpreters, other than to get decisions “right,” Burger Court justices appeared to be shying away from the sort of perfectionist interpretations that characterized the Warren Court. Their mode of decisionmaking was at once more cautious and more open-ended than those of their immediate predecessors.

III

The apparent lack of interest in countermajoritarian constraints on the Court, coupled with the Burger Court’s jurisprudentially “rootless” activism, would set the stage for what, at the time, appeared to be the odd revival of a constitutional methodology that resembled that of John Marshall and his contemporaries. The methodology came to be known as originalism, and it was to emerge as the starting point for discussions of constitutional jurisprudence on the Rehnquist Court. But originalism entered the literature of constitutional commentary as a distinctly marginal force, and in order to understand its subsequent prominence it is necessary to understand its initially marginal status.

In 1977, Raoul Berger, who had retired from law practice and had an affiliation with Harvard Law School, published a book on the history of the Fourteenth Amendment.¹⁰⁶ The book, entitled *Government By Judiciary*, sought to show that “the original intention” of the framers of the Fourteenth Amendment had not been to outlaw segregation in the public

¹⁰⁶ RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977).

schools.¹⁰⁷ Berger argued that interpretation of constitutional provisions should be governed by a search for the “original intention” of their framers, which could be discerned, he felt, by a canvassing of the legislative history of the provisions and other statements made by the persons involved in drafting them.¹⁰⁸ *Government By Judiciary* consisted of a series of excerpts from statements made in the late 1860s by members of Congress and others who might have influenced the Fourteenth Amendment’s passage. None of those statements, Berger argued, exhibited a clear “intention” to apply the Amendment’s Equal Protection Clause to racially segregated public schools.¹⁰⁹

The title of Berger’s book made clear his purpose in associating interpretation of constitutional provisions with a search for the original intention of their framers. It was to substitute history for judicial glosses in constitutional interpretation. He wanted, as he put it, to confine the scope of judicial power “to revise the Constitution.”¹¹⁰ By going beyond the accumulated legacy of judicial exposition of constitutional provisions to discern how they were actually understood by those who wrote them, Berger was attempting to create a corpus of constitutional jurisprudence in which judges would need to defer to an original set of legislators. The methodology of originalism was offered, from its first rendition, as a means of constraining judges as constitutional interpreters.

Although some constitutional commentators in the 1970s had begun to consider turning to

¹⁰⁷ *See id.*, 117-33.

¹⁰⁸ *Id.*, 363-72.

¹⁰⁹ *Id.*, 122, 125, 127.

¹¹⁰ *Id.*, 407-08.

history as a means of escaping what they thought to be the tired and largely fruitless issues of interpretation associated with the countermajoritarian difficulty,¹¹¹ Berger's *Government By Judiciary* was not, on the whole, well received when it first appeared.¹¹² Reviewers pointed to three difficulties with Berger's methodology. The first was determining, and accurately recovering, the appropriate sources of the "original intention" of a constitutional provision's framers. Who was to be included, and excluded, in that search? And how were views, once deemed relevant, to be recovered? In the case of a constitutional provision, there were members of a drafting committee, other members of Congress who voted on the provision, and members of state conventions who ratified the Constitution. Some of those persons had recorded their views on features of the provision; some had not; there were other contemporaries who had publicly addressed the provision or issues connected with it. And some of the views of contemporaries had not been available to their peers at the time of a provision's ratification. Madison's notes summarizing the views of members of the Congress who drafted the Constitution, for example, were not available to any of the persons who ratified it.¹¹³

So the idea of getting beyond judicial glossing to a straightforward understanding of what the drafters or ratifiers of constitutional provisions "intended" was not as easily accomplished as

¹¹¹ See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

¹¹² See, e.g., Stanley I. Kutler, *Raoul Berger's Fourteenth Amendment: A History or Ahistorical?* 6 HASTINGS CONST. L.Q. 511 (1979); Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979); Walter F. Murphy, *Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?* 87 YALE L.J. 1752 (1978).

¹¹³ See, e.g., Soifer, *Protecting Civil Rights*, 656-57; Murphy, *Constitutional Interpretation*, at 1754-56.

Berger made it seem. The problem was confounded, some reviewers of *Government By Judiciary* felt, by Berger's approach to his sources. When reproducing the views of framers or their contemporaries, he made frequent use of ellipses, raising the question whether the language he chose to quote was an accurate reflection of a source's entire position. He selectively interspersed language from persons commenting during various stages in the history of a constitutional provision without invariably specifying the stage, so that it was difficult to tell the context of a source's remarks. He even included comments from persons made after a provision had been part of the body of the Constitution for many years, interweaving such comments with the language of framers as if he was quoting from successive precedents in a legal brief. In short, for a scholar proposing that constitutional interpretation should largely be a historical exercise, Berger raised doubts about his capacities as an historian.¹¹⁴

Thus the initial reaction among legal academics to Berger's originalist methodology was to treat it as distinctly marginal. That reaction was not just a product of the difficulties inherent in retrieving and evaluating the salience of necessarily incomplete historical sources, or of the deficiencies in Berger's presentation of those sources. It was also in the apparent incompatibility of an originalist methodology, as Berger outlined it, with the dominant conceptions of interpretation in history and in constitutional jurisprudence in the late twentieth-century. The dominant view of historical interpretation was captured in a comment Paul Brest made about originalism in 1980. Brest maintained that because "we can never understand the past in its own terms, free from our prejudices or preconceptions," historical knowledge would inevitably be

¹¹⁴ See Kutler, *Raoul Berger's Fourteenth Amendment*, 515-18; Soifer, *Protecting Civil Rights*, at 681-82.

“indeterminate and contingent.” The originalist’s search for a definitive “intention” was thus bound to fail.¹¹⁵

In the same time period the “living Constitution” approach to constitutional adaptivity had achieved the status of orthodoxy. William Brennan asserted, in a 1986 article, that he and his fellow Justices read the Constitution “the only way that we can as twentieth-century Americans.” The “ultimate question” in constitutional interpretation, Brennan maintained, must be: What do the words of the Constitution mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world long dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be the measure to the vision of our time.¹¹⁶

That view of constitutional adaptivity could not be reconciled with a search of a determinate “original intention.” The “constitutional fundamentals” of “a world long dead and gone” had no connection to “the vision of our time.” Constitutional provisions “meant” what contemporary interpreters believed they should mean.

Thus, the first stirrings of originalism as a methodology for constitutional interpretation revealed that it ran distinctly against the current of dominant late twentieth-century theories of interpretation. But originalism had one feature that would rebound to its advantage in the next decade. In a universe of constitutional discourse in which scholars were increasingly estranged from the countermajoritarian difficulty framework for interpretation, and in which “living Constitution” jurisprudence seemed to impose no limits on the interpretive power of

¹¹⁵ Brest, “The Misconceived Quest For the Original Understanding,” 221-22; *see also* Murphy, *Constitutional Interpretation*, 1754-56.

¹¹⁶ William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986).

judges, originalism purportedly offered an intelligible constraint on judges as constitutional interpreters. Alongside majoritarianism, which rested, according to its critics, on the mistaken assumption that the legislative process consistently reached “democratic” outcomes,¹¹⁷ and living Constitution theory, which seemingly placed no limits on judges except a capacity to discern the “vision” of contemporary Americans, originalism *required* judges to find and to follow the meaning of constitutional provisions as they were understood by their framers. As Edwin Meese, the Attorney General in the Reagan administration, put it in a 1985 address, “where there was a demonstrable consensus among the Framers and ratifiers as to a principle stated or implied in the Constitution, it should be followed.”¹¹⁸

Meese’s canon assumed that historical research could determine the “consensus” among “Framers and ratifiers” about “principle[s] stated or implied in” constitutional provisions. In many instances, a paucity of historical sources, the difficulty of determining whose views counted, and the contingency of historical interpretation might make that determination problematic. But in some prominent examples, a “consensus” on the original meaning of constitutional provisions seemed capable of being discerned. In the *Blaisdell* case, for example, there was overwhelming evidence that the framers of the Contracts Clause wanted it to embody the principle that legislatures could not undermine the security of debts.¹¹⁹ Meese’s canon required twentieth-century judges to follow that principle regardless of whether doing so was

¹¹⁷ For one example, see Lawrence H. Tribe, “The Puzzling Persistence of Process-Based Constitutional Theories,” 89 Yale L. J. 1063 (1980).

¹¹⁸ Edwin Meese III, *Construing the Constitution*, Address before the D.C. Chapter of the Federalist Society Lawyer’s Division (Nov. 15, 1985), in 19 U.C. DAVIS L. REV. 22, 26 (1985).

¹¹⁹ See BENJAMIN WRIGHT, *THE CONTRACT CLAUSE OF THE CONSTITUTION* 3-26 (1938).

socially or politically inconvenient. To do otherwise, the canon suggested, would be to give judges license to change the meaning of the Constitution whenever “current problems and current needs” seemed to require it.

Originalists were suggesting that although the “living Constitution” interpretations of provisions made in *Blaisdell* and *Brown* may have been resonant, their methodology was boundless. They made that suggestion at the very time when other interpretive theories designed to confine judges had fallen out of favor. Once majoritarianism and its “process” refinements ceased to be influential, once constitutional interpretation came to be treated as an exercise in value inculcation, constitutional commentators seemed to be confronted with two alternatives: *Carolene Products* perfectionism, illustrated by Brennan’s living Constitution approach, and a jurisprudence of historically derived constraints. Originalism began to emerge as a respectable interpretive methodology when other methodologies designed to constrain judges lost their resonance.

IV

The momentum of originalism was accentuated by personnel changes that took place on the Court in the late 1980s and early 1990s. The retirement of Burger in 1986 enabled the Reagan administration to appoint Rehnquist to the Chief Justiceship and to fill his spot with Antonin Scalia, a former law professor who subsequently would endorse a version of originalism. In 1987 Powell retired, and the Reagan administration responded by nominating perhaps the most visible exponent of originalism in the judiciary, Robert Bork. After Bork declared in his confirmation hearings that his approach to constitutional interpretation made it impossible for him to recognize a constitutional “right of privacy,” his nomination was defeated,

but the episode signaled that originalism had become attractive in some political circles. Then in the early 1990s the two remaining perfectionists on the Court, Brennan and Thurgood Marshall, retired, and the opportunity to replace them fell to President George H.W. Bush, who appointed David Souter to replace Brennan and Clarence Thomas to replace Marshall. Souter was a virtual unknown, but Thomas was perceived as holding a “new right” ideological perspective on constitutional issues.

Over time, as Ruth Bader Ginsburg and Stephen Breyer replaced Harry Blackmun and Byron White, a distinctive jurisprudential dialogue emerged on the Court, one that was a product of the simultaneous disappearance of perfectionism and the attraction of some justices to originalism. The dialogue focused on two interrelated issues. One was the extent to which the first principles of the Constitution, as embodied in its provisions, should control constitutional interpretation, as opposed to the accumulated judicial glosses on a provision, embodied in previous decisions of the Court. That issue amounted to a debate on the proper level of abstraction which should be accorded to the Court’s constitutional decisions. Originalists believed that “original understandings” of provisions should control, and amounted to core propositions of constitutional law, as if the Constitution resembled an authoritative code of laws.¹²⁰ If successive Court decisions had failed adequately to discern the original understanding of a provision, they had no authoritative value and should be openly abandoned. Originalist constitutional jurisprudence was thus constantly interested in getting beyond the Court’s glosses of provisions to find the foundational principles they embodied. Once found, those principles were controlling, apparently for all time.

¹²⁰See ANTONIN SCALIA, A MATTER OF INTERPRETATION 44-47 (1997).

This meant that an originalist interpretive stance could be deeply revisionist of established constitutional doctrine. An arresting example of revisionism came in a sequence of federalism decisions from 1995 to 2000, in which Court majorities concluded that Congress did not, after all, have virtually unlimited powers to impose federal regulations on state governments, to “commandeer” state officials to enforce federal law, or to pass an unlimited amount of legislation, grounded in the Commerce Clause, that regulated “local” activities.¹²¹

The federalism decisions revived two constitutional principles which had animated decisions for much of the Court’s early history but had apparently been abandoned in the twentieth century. One was that the Tenth Amendment, which declared that powers “not delegated to the United States by the Constitution...are reserved to the States respectively, or to the people,” was an affirmative limitation on federal power.¹²² The other was that the Commerce Clause should be read against this backdrop of reserved state power, so that it only authorized the federal government to regulate activity that had a “direct” effect on interstate commerce.¹²³

Both of those principles had been departed from in a line of early twentieth-century Commerce Clause cases. In the 1941 case of *United States v. Darby*¹²⁴, a Georgia lumberyard owner who declined to pay his employees the minimum wage rates required by the Fair Labor Standards Act of 1936 argued that his employers were engaged in “manufacture,” not

¹²¹ See *United States v. Morrison*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

¹²² See *Morrison*, 529 U.S. at 607 (“Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. ‘The powers of the legislature are defined and limited’”) (quoting *Marbury v. Madison*, 1 Cranch 137, 176 (1803)); *Printz*, 521 U.S. at 919.

¹²³ See *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 568.

¹²⁴ 312 U.S. 100 (1941).

“commerce,” and that their activity had only “indirect effects” on interstate commerce. He also argued that the Tenth Amendment placed limits on the power of the federal government to regulate manufacturing. The Court, overruling its previous decisions, abandoned the distinction between “direct” and “indirect” effects, and announced that the Tenth Amendment merely “states but a truism that all [state power] is retained which has not been surrendered.”¹²⁵

Then in *Wickard v. Filburn*¹²⁶, one year later, the Court indicated that it would tolerate federal regulation of private activity whenever Congress believed that the activity had a “substantial effect” on interstate commerce. Even though an Ohio farmer, accused of violating the wheat production quotas imposed by the Agricultural Adjustment Act of 1938, had used the excess wheat exclusively to feed his livestock and to produce flour for his family’s use, the Court held that Congress could regulate its production.¹²⁷ After *Darby* and *Filburn*, commentators believed that neither the Tenth Amendment nor the principle of reserved powers had any effect on Congress’s ability to pass legislation under the Commerce Clause.¹²⁸

The Court’s late twentieth-century federalism decisions, in light of those precedents, appeared to represent an attempt to get beyond judicial glosses on a constitutional provision to

¹²⁵ *Id.*,t 124.

¹²⁶ 317 U.S. 111 (1942).

¹²⁷ *Id.* at 124-25 (“[E]ven if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce”).

¹²⁸ See, e.g., Robert Stern, “The Problems of Yesteryear--Commerce and Due Process,” 4 *Vand. L. Rev.* 446 (1951); Stern, “The Scope of the Phrase ‘Interstate Commerce,’” 41 *A.B.A. J.* 823 (1955); Edward S. Corwin, *The Commerce Power versus States Rights* (1959).

discern something like its original meaning. If the Tenth Amendment had no substantive content, it could hardly serve as a limitation on powers being exercised by the federal government, because those powers, assuming that they were constitutionally authorized, had been “surrendered.” And if the commerce power of the federal government extended to any activity that Congress believed had a substantial effect on interstate commerce, that power seemed to have been surrendered in its entirety once Congress acted. The Rehnquist Court’s federalism decisions suggested that these conclusions had been hastily reached. They intimated that at the framing of the Constitution a comparatively limited conception of federal power, and a robust conception of reserved state power, prevailed. This was clearly correct: as late as 1819, the constitutionality of federal legislation creating a national bank was challenged.¹²⁹ But by restoring this older conception of the relationship between federal and state powers, the federal decisions were undermining early twentieth-century judicial glosses that had clearly been inspired by the living Constitution interpretive model. The rationale for abandoning distinctions between “direct” and “indirect” effects, and between “national” and “local” activities in *Darby* and *Filburn*, had been the perceived necessity for conforming interpretations of the Commerce Clause and Tenth Amendment to a world in which, as one commentator put, it, “an integrated national economy is predominantly interstate or related to interstate commerce, and must be subjected to governmental control on a national basis.”¹³⁰

Thus doctrinal revisionism, in the hands of some Rehnquist Court justices, seemed to

¹²⁹ *McCulloch v. Maryland*, 4 Wheat. 316 (1819). See also White, *The Marshall Court and Cultural Change*, 544-548.

¹³⁰ Robert L. Stern, “The Commerce Clause,” in Leonard Levy et al eds., *Encyclopedia of the American Constitution* 1, 328 (4vols., 1986).

amount to a replacement of a living Constitution methodology with one based on the tenets of originalism. A few members of the Rehnquist Court, notably Scalia¹³¹ and Thomas,¹³² indicated that they were perfectly comfortable with abandoning whole lines of established Court doctrine if they believed that those lines advanced an interpretation of a constitutional provision that ran contrary to the original understanding of its framers.

The late years of the Rehnquist Court were marked by the appearance of books by Scalia¹³³ and Breyer¹³⁴ on constitutional interpretation, with Scalia endorsing a version of originalism¹³⁵ and Breyer rejecting it. Although Breyer also made an effort to set forth an interpretive approach that bore some resemblance to perfectionism in that it identified the Constitution with two foundational principles, protection for “negative liberty” (freedom from governmental constraints on individual self-expression) and protection for “active liberty” (freedom to participate in public affairs), he repeatedly emphasized that in construing the Constitution in accordance with those principles, judges should be mindful of the practical consequences of their decisions.¹³⁶ Indeed, his focus on consequences seemed to override his

¹³¹ See Ralph A. Rossum, “Text and Tradition: The Originalist Jurisprudence of Antonin Scalia,” in Earl M. Maltz, ed., *Rehnquist Jurisprudence* 46-49 (2000).

¹³² See Mark A. Graber, “Clarence Thomas and the Perils of Amateur History,” in Maltz, ed., *Rehnquist Jurisprudence*, 83-87.

¹³³ SCALIA, A MATTER OF INTERPRETATION, *supra* note 139..

¹³⁴ STEPHEN G. BREYER, ACTIVE LIBERTY (2005).

¹³⁵ Scalia has described his brand of originalism as qualified in some respects: “I hasten to confess that in a crunch I may prove to be a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes a punishment of flogging.” Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

¹³⁶ Breyer, *Active Liberty*, 9, 12, 118-120.

perfectionism: he referred to his approach as one of “perspective” and “emphasis” rather than an overarching theory of interpretation.¹³⁷

Although Breyer’s book appeared at the very end of Rehnquist’s tenure, Breyer and Scalia were colleagues on the Rehnquist Court for over a decade, and the pattern of Breyer’s decisions, and his critical reaction to originalism, was apparent soon after his appointment in 1994.¹³⁸ One might have expected that the very different approaches to constitutional interpretation adopted by Scalia and Breyer might have engaged other justices, resulting in debates about those approaches becoming a regular feature of the Court’s decisions.

Those debates did not, on the whole, occur. Thomas endorsed originalism, and several other Rehnquist Court justices appeared to agree with Breyer that the consequences of Court decisions should be factored into constitutional interpretation, but stark methodological disagreements were not a common feature of the Court’s opinions. As Breyer pointed out, justices, whatever their perspective, tend to look at a common set of sources in constitutional interpretation: the language of a provision, the original understandings of its framers, the particular legal meaning its words have acquired over time, the Court’s prior interpretations of the provision, the purposes or values embodied in it, and the consequences of interpreting it in one fashion or another.¹³⁹ Scalia would not quarrel with that list of sources, although he would assign different weight to them than Breyer did. And their colleagues did not seem preoccupied

¹³⁷ *Id.*, 7.

¹³⁸ *See, e.g., Lopez*, 514 U.S. at 624-25 (Breyer, J., dissenting). Breyer argued that upholding the law would allow Congress “to act in terms of economic...realities,” *id.*; to Breyer, the ability to adapt to current “realities” was so important as to render irrelevant the question of original intent.

¹³⁹ Breyer, *Active Liberty*, t 7-8

with prioritizing the sources or debating their weight. Instead they seemed preoccupied with another offshoot of the originalism/living Constitution debate.

Because the Constitution's text contains several open-ended provisions ("due process of law," "equal protection of the laws," "commerce," "freedom of speech"), and those provisions, which have been regularly interpreted over time, have been the source of the Court's most significant decisions, one could argue that constitutional interpretation should be understood as comparable to judicial interpretations of the common law, in which a body of legal principles is given meaning through their application to cases in the form of judicial precedents..¹⁴⁰

Accumulated precedents, once in place, amount to statements of "the law" of various common law subjects. At the same time precedents are not the equivalent of statutes, being understood as evidence of the application of legal principles to cases rather than the equivalent of the principles themselves. It is always open to a common law court to conclude that a principle that precedents suggest would govern a new case is not applicable to it; distinguishing precedents is as recognized a judicial technique in common law cases as following them.

The idea of a "living Constitution" would seem to reinforce the view that constitutional interpretation should be treated as comparable to common law adjudication, at least where open-ended constitutional provisions are involved. Accumulated judicial glosses on an open-ended provision may create constitutional doctrines that produce unfortunate consequences as social conditions change. The use of the Due Process Clauses to invalidate hours and wages legislation as infringements on "liberty of contract," or of the Commerce Clause to prevent the federal

¹⁴⁰ See David Strauss, "Common Law Constitutional Interpretation," 63 U. Chi. L. Rev. 877 (1996).

government from regulating manufacturing, was eventually thought to be inappropriate, and the glosses were disapproved. But the episodes are thought by originalists to reveal the boundless nature of living Constitution judging. If the Court's precedents can be jettisoned simply because its current justices believe they produce inconvenient results, constitutional interpretation becomes reduced to an exercise in policymaking by largely unaccountable judges.¹⁴¹

For this reason, some originalists, such as Scalia, have endorsed the principle of *stare decisis* in some areas, even where the Court's prior decisions may not have accurately derived the original understanding of constitutional provisions. Respect for the Court's precedents, Scalia suggests, sometimes provides a jurisprudential stability that would be lacking if established constitutional doctrines could be abandoned whenever they seemed inconvenient.¹⁴² But the logic of originalism actually points in another direction, that of regarding judicial glosses on open-ended constitutional provisions as not possessing any authoritative weight unless they can be tied to original understandings. By this reasoning, the "liberty of contract" doctrine, despite being

¹⁴¹ Scalia criticizes the living Constitution theory as both directionless and boundless: [T]he difficulties and uncertainties of determining original meaning . . . are negligible compared with the difficulties and uncertainties of the philosophy which says that the Constitution *changes*; that the very act which it once prohibited it now permits, and which it once permitted it now forbids; and that the key to that change is unknown and unknowable. . . . For the evolutionist . . . every question is an open question, every day a new day.

SCALIA, A MATTER OF INTERPRETATION, at 47.

¹⁴² Scalia has written that:

The demand that originalists alone 'be true to their lights' and forswear *stare decisis* is essentially a demand that they alone render their methodology so disruptive of the established state of things that it will be useful only as an academic exercise and not as a workable prescription for judicial governance.

SCALIA, RESPONSE, A MATTER OF INTERPRETATION, 129, 139.

promulgated in Court decisions over a thirty-year span, would have no presumptive authority if it could not be linked to the original understanding of “due process of law” in the Fifth and Fourteenth Amendments.¹⁴³

One can readily see that both the originalist and living Constitution perspectives create an awkwardness for the judicial interpretation of open-ended constitutional provisions. Living Constitution jurisprudence raises the possibility that established lines of doctrinal glosses on such provisions may suddenly be abandoned simply because a majority of justices concludes that they are producing inconvenient consequences. Originalist jurisprudence raises the possibility that those lines may suddenly be abandoned because they are found to be historically unsound. In both instances, the Court’s creation of lines of decisions interpreting open-ended constitutional provisions—arguably the heart of its activity in constitutional law—is taken as an exceptionally fragile enterprise. Most of the “law” Courts have built over time is seen as capable of being swept away.

One would not expect that judges whose decisionmaking regularly makes use of a particular interpretive exercise would find much satisfaction in regarding it as being in a fragile state. This may be why there have been few debates among Rehnquist Court justices about the full implications of a living Constitution or an originalist perspective. But it is nonetheless possible to identify something like a tacit recognition by members of the Rehnquist Court of the potentially fragile nature of the Court’s doctrinal lines in constitutional law. One can see that tacit

¹⁴³ For a suggestion that the “original meaning” of “due process of law” in the Fourteenth Amendment was confined to “the right to have one’s person free from physical restraint,” see Charles Warren, “The New ‘Liberty’ under the Fourteenth Amendment,” 39 Harv. L. Rev. 431, 440 (1926).

recognition in the attraction of many Rehnquist Court justices to an interpretive stance identified by Sunstein as “minimalism.”

As developed by Sunstein over a decade,¹⁴⁴ the label “minimalist” has evolved from a characterization of what he called “incompletely theorized” decisions to something resembling a theory of constitutional interpretation. In Sunstein’s most recent formulation, published in the last year of the Rehnquist Court, he contrasted a minimalist perspective with majoritarianism, “fundamentalism” (a synonym for originalism) and perfectionism.¹⁴⁵ A minimalist perspective is one that self-consciously “avoid[s] broad rules and abstract theories,” and “attempt[s] to focus...attention only on what is necessary to resolve particular disputes.”¹⁴⁶ Minimalist decisions are “narrow” in the sense of only governing the case at hand and “shallow” in the sense of being “incompletely theorized,” devoid of ambitious arguments in support of their outcomes.¹⁴⁷

Despite Sunstein’s efforts to characterize minimalism as comparable to originalism, majoritarianism, or perfectionism, it does not seem to be a perspective on constitutional interpretation that operates on the same level as the others he identifies. All of those represent attempts to articulate a general theory of constitutional interpretation by judges: deference to other institutional branches of government except where there is an “overwhelming constitutional mandate”; fidelity to the “original understanding” of framers of constitutional provisions; or a

¹⁴⁴ Sunstein’s most recent definition of minimalism is in *Radicals in Robes*, 27-31. For an earlier version, see CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 5 (1999). His initial formulation of the idea of minimalism, without the label, was Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

¹⁴⁵ See SUNSTEIN, *RADICALS IN ROBES*, 23-52.

¹⁴⁶ SUNSTEIN, *ONE CASE AT A TIME*, 9.

¹⁴⁷ *Id.*, 10-11.

search for the “best possible reading” of those provisions, based on an extraction of the foundational principles embodied in them. All the perspectives advance an approach to constitutional interpretation designed to operate in all cases. In contrast, a minimalist approach eschews “broad rules and abstract theories” altogether. It does not endorse deference in all cases, and certainly does not seek to ground decisions on originalist or perfectionist readings of the Constitution. It might be said to be an anti-theory of constitutional interpretation.

This is not to say that Sunstein ascribes to minimalist justices an anarchic view of their function. He argues that adopting a minimalist stance is a considered response to some difficulties endemic in Supreme Court judging. One is that the Court makes collective decisions, and although judges may be able to agree on the outcome of a case, they may disagree about the reasons for reaching that outcome. The “incompletely theorized agreements” consistent with a minimalist stance have the virtue of reducing the necessity for justices to engage too deeply about their reasoning.¹⁴⁸ Another is that minimalist decisions, since they do not commit the Court to laying down broad propositions of law, give justices flexibility to reach outcomes in subsequent cases that might not seem consistent with those decisions.¹⁴⁹ Finally, Sunstein suggests that a minimalist Court decision leaves a large space for other branch actors to address issues at stake in the decision, and thus reinforces democratic theory.¹⁵⁰ Minimalists might thus be said to be a species of majoritarians, except that their approach seems designed, at least as Sunstein describes it, to give Supreme Court justices maximum flexibility to decide cases, because they are not

¹⁴⁸ *See Id.*, 249.

¹⁴⁹ *Id.*, t 28-32.

¹⁵⁰ *Id.*, 24-43.

constrained very much by their (minimalist) precedents.

In Sunstein’s successive presentations, the late twentieth-century and twenty-first century Court appears to have made an increasing number of minimalist decisions. In a 1999 book, Sunstein identified several important Rehnquist Court decisions as minimalist, including *Romer v. Evans*,¹⁵¹ invalidating an amendment to the Colorado state constitution repealing local ordinances prohibiting discrimination on the basis of sexual orientation, *United States v. Lopez*,¹⁵² holding that the Gun-Free School Zones Act of 1990, making it a federal crime to have a gun within 1000 feet of a school, exceeded Congress’s commerce power, and *United States v. Virginia*¹⁵³, concluding that a state could not operate a single-sex college even if it created a “parallel” institution for women. Only the first of those decisions appeared to have narrow implications. *Lopez* represented the first decision in sixty years concluding that there were federalism limits on the federal government’s commerce power, and *Virginia* apparently heightened the standard of judicial review in gender discrimination cases. And by 2005 Sunstein was arguing that *Brown v. Board of Education*, considered by many to be a prototypically “maximalist” decision in that it invalidated hundreds of state and local laws enforcing racial segregation, could “be defended on minimalist grounds” because it “was the culmination of a long line of cases” chipping away at the “separate but equal” principle in education.¹⁵⁴

In contrast, Sunstein believes that the number of minimalist justices on the Court has been

¹⁵¹ 517 U.S. 620 (1996); SUNSTEIN, ONE CASE AT A TIME, 138-43.

¹⁵² 514 U.S. 549 (1995) ; SUNSTEIN, ONE CASE AT A TIME, 16-17.

¹⁵³ 518 U.S. 515 (1996); SUNSTEIN, ONE CASE AT A TIME, 18-19.

¹⁵⁴ SUNSTEIN, RADICALS IN ROBES, 248..

shrinking. In 1999 he identified “the analytical heart of the current Court” as composed of Ginsburg, Souter, O’Connor, Breyer, and Kennedy, justices who “have adopted no unitary ‘theory’ of constitutional interpretation.”¹⁵⁵ At the same time, he described a minimalist majority of O’Connor, Souter, Ginsburg, Breyer, and Stevens as having surfaced in the Court’s 1997 “right to die” case, *Washington v. Glucksberg*.¹⁵⁶ But by 2005, the only justices he was prepared to describe as minimalists were O’Connor and Ginsburg.¹⁵⁷

As Sunstein presents it, minimalism appears to be a theory of judicial decisionmaking, not one of constitutional interpretation. It is just as applicable to common law cases or to cases involving the interpretation of statutes as to constitutional cases. None of the reasons Sunstein offers in support of a minimalist stance is based on an approach to the constitutional text. The reasons have to do with the interplay of legal rules and the judicial application of them to cases, and with choices between the judiciary and other branches of government as policymakers. A judge could decide to decide a case on “incompletely theorized” grounds and hold an originalist, perfectionist, or majoritarian perspective on constitutional interpretation.

In fact, minimalism does represent an approach toward constitutional interpretation, although Sunstein does not identify that approach. Minimalist judging is premised on a “living Constitution” theory of interpreting the Constitution. One can recognize this by emphasizing Sunstein’s equation of minimalist constitutional judging with the gradualist process by which judges decide common law cases. Although judges treat prior common law decisions as

¹⁵⁵ SUNSTEIN, *ONE CASE AT A TIME*, 9.

¹⁵⁶ 521 U.S. 702 (1997); SUNSTEIN, *ONE CASE AT A TIME*, 83.

¹⁵⁷ SUNSTEIN, *RADICALS IN ROBES*, 29-30.

presumptively laying down rules that are binding in future cases, they do not invariably apply those decisions, as precedents, to new cases. Sometimes they distinguish a precedent away, treating it as inapposite; sometimes they confine it to its facts; sometimes they overrule it. All those techniques are considered permissible in common law judging. Minimalism, as a constitutional methodology, appears to be using techniques equivalent to those used in the common law regime.

The power of common law judges to modify prior decisions has, since the early twentieth century, rested on the jurisprudential assumption that precedents can be seen as being a product of outmoded conditions or values and are hence susceptible to being revised as conditions and values change.¹⁵⁸ When the sources of common law principles are judicial decisions themselves, and when decisions can be shown to be grounded in archaic attitudes, judicial modification seems a less radical phenomenon.

So the idea of proceeding through the process of constitutional interpretation “one case at time”—advancing incompletely theorized judgments that can be modified or abandoned in later cases if found to be inconvenient—would seem to equate the Court’s prior interpretations of constitutional provisions with common law precedents. But if judges have the comparable leeway, in constitutional interpretation, to ignore, modify, or abrogate prior interpretations that they have in common law adjudication, it must be because they are adopting a “living Constitution” approach to constitutional interpretation. The decision to “incompletely theorize” an application of a constitutional provision to a case may be a narrow decision in terms of its outcome, but it assumes that a Supreme Court justice has comparable interpretive freedom, in

¹⁵⁸ See Llewellyn, *A Realistic Jurisprudence*, 449-50.

constitutional cases, as a judge has in common law cases. Alongside that freedom comes a freedom to change the meaning of the Constitution over time.¹⁵⁹

If Sunstein is thus correct in claiming that the Rehnquist Court, in its last decade, was composed of two originalists, no perfectionists or majoritarians, and seven justices who, “instead of adopting theories...of constitutional interpretation...decide cases,”¹⁶⁰ it would seem to have been composed of a distinct majority of “living Constitution” judges. And if this is the case, it would seem that the jurisprudential dynamic of the Court may have taken on a different character from what has commonly been thought.

V

At this point, let us return to the observations with which this essay began. Once American jurisprudence, over the first three decades of the twentieth century, discarded the idea that judges were constrained by the transcendent entity of “the law,” and the corresponding idea that the meaning of the Constitution did not change with time, the problem of unconstrained “lawmaking” judges in a democracy became central to discussions of constitutional interpretation. The *Carolene Products* regime of constitutional review, with its presumption that legislation affecting ordinary commercial transactions was constitutional and its potential exceptions to that presumption for other classes of legislation, was grounded in democratic theory, but it also proceeded from the background assumption that judges were a species of lawmakers.

By the 1970s, however, both the Court and commentators seemed to have lost interest in

¹⁵⁹ See MCBAIN, *The Living Constitution*, 33.

¹⁶⁰ SUNSTEIN, *ONE CASE AT A TIME*, 9.

the intricacies of *Carolene Products* review as refined by institutional competence theory.¹⁶¹ One reason for this development was the increased number of decisions in which the Court used its mandate to scrutinize legislation severely in the areas identified by *Carolene Products* as a basis for developing a corpus of doctrine glossing the Equal Protection Clause, the First Amendment, and the Due Process Clause.¹⁶² Indeed, most of the Burger Court's major decisions were in those areas of constitutional law that the *Carolene Products* regime had suggested might be governed by heightened judicial scrutiny. The level of scrutiny afforded a particular category of legislation had become one of the major issues of late twentieth-century constitutional jurisprudence.¹⁶³

The increased involvement by the Court in areas where the *Carolene Products* presumption of constitutionality was departed from seemed to underscore the role of Supreme Court justices in interpreting a "living" Constitution. The doctrinal corpus developed by the Burger Court in those areas appeared to reflect the changing social landscape of late twentieth-century America. Connections between the women's rights movement and gender discrimination cases, between the increased importance of commercial advertising and commercial speech cases, and between more permissive attitudes toward sexual activity and expression and the "privacy" and obscenity cases were noted.¹⁶⁴ As the corpus of constitutional doctrine in those areas developed, the Court's new

¹⁶¹ See Martin Shapiro, "Fathers and Sons," 218-238.

¹⁶² See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (commercial speech); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (gender discrimination); *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁶³ See G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 2 (2005).

¹⁶⁴ See Norman Dorsen and Joel Gora, "The Burger Court and the Freedom of Speech," and Ruth Bader Ginsburg, "The Burger Court's Grapplings With Sex Discrimination," in Blasi, *The Burger Court*, 28-45, 132-151.

lines of cases appeared to be “living Constitution” cases, ones in which judges were changing the meaning of the Equal Protection Clause, First Amendment, or Due Process Clause to respond to altered cultural conditions.

It was at this point in the history of twentieth-century constitutional jurisprudence that historical analysis was revived as a constraint on judges as constitutional interpreters. And as history as constraint emerged in the form of originalism on the Court between the early 1980s and the mid 1990s, the two competing stances of the Warren Court era, perfectionism and majoritarianism, gradually disappeared. Perfectionists and majoritarians still exist in the world of twenty-first century constitutional commentary,¹⁶⁵ but not on the Supreme Court. Thus the constitutional jurisprudence of the Rehnquist Court came to center itself in a tension between the methodology of originalism, with its emphasis on the constraints of history and the constitutional text, and the mainstream methodology associated with the Burger Court, a “living Constitution” approach to constitutional interpretation featuring ad hoc value judgments in areas governed by the exceptions to *Carolene Products* deference.

Sunstein is anxious to distinguish minimalism from the “rootless,” ad hoc, living Constitution-style methodology commentators identified with the Burger Court. In the course of defending minimalism, he contrasts it with originalism, stating that the principal issue distinguishing the two perspectives is how broad and ambitious constitutional judgments should

¹⁶⁵ Ronald Dworkin is a perfectionist; see Dworkin, *Taking Rights Seriously*, 106-07. Lino Graglia is a majoritarian. See Lino A. Graglia, *Lawrence v. Texas: Our Philosopher Kings Adopt Libertarianism as Our Official National Philosophy and Reject Traditional Morality as a Basis for Law*, 65 OHIO ST. L. J. 1139, 1142 (2004).

be.¹⁶⁶ He gives very little attention to the “living Constitution” dimensions of minimalism,¹⁶⁷ and claims that the Rehnquist Court is “sharply distinguishable” from the Burger Court, which he characterizes as “a heterogeneous Court, with a variety of shifting coalitions” that “showed no general preference for minimalism.”¹⁶⁸

One can understand why Sunstein might not want to emphasize the extent to which a minimalist approach to the interpretation of constitutional provisions is bottomed on a living Constitution perspective. The decision to “incompletely theorize” a judgment in a constitutional case presupposes that a judge has discretion to read a provision of the Constitution narrowly or broadly. This assumption runs counter to the views of originalists, who maintain that if an original understanding of a provision reveals it to be a categorical command, judges are required to follow that command. Although critics of originalist judges, including Sunstein, have claimed that they do not invariably adhere to that rule,¹⁶⁹ the rule is clearly intended to minimize the amount of discretion a judge has in applying constitutional principles to cases, and thus to serve as a constraint on judges as interpreters. It is not clear that a minimalist stance imposes comparable constraints, and Sunstein does not discuss that issue. He repeatedly suggests that narrow, cautious, incompletely theorized decisions are prudent when constitutional issues are

¹⁶⁶ ONE CASE AT A TIME, x.

¹⁶⁷ At one point Sunstein maintains that minimalists do not believe that the Constitution is “frozen in the past.” RADICALS IN ROBES, xiii. But he does not contrast minimalism with originalism on the basis of competing theories of constitutional adaptivity. The contrast is between “broad” or “ambitious” and “narrow” or “cautious” rationales for constitutional decisions. *See id.*, 27, 29.

¹⁶⁸ *Id.*, xiii.

¹⁶⁹ *See* SUNSTEIN, RADICALS IN ROBES, 133-42

deeply contested, and that the stance furthers “democratic deliberation.”¹⁷⁰ But he does not respond to an argument originalists might make, which is that minimalism is just another way of allowing judges to apply the Constitution as broadly or narrowly as they choose.

Sunstein’s claim that the Rehnquist Court, in having several minimalist justices, represented a sharp contrast with the Burger Court seems somewhat puzzling. Although some of the Burger Court’s more prominent decisions, such as *Roe v. Wade*,¹⁷¹ *Virginia State Board of Pharmacy v. Virginia Citizens Council*,¹⁷² constitutionalizing commercial speech, or *Gertz v. Robert Welch, Inc.*,¹⁷³ creating a new constitutional category of defamation cases with its unique rules, were clearly intended to be broad and deep in their impact, others, such as the affirmative action decision, *Regents of the University of California v. Bakke*,¹⁷⁴ or two Establishment Clause decisions, *Lemon v. Kurtzman*¹⁷⁵ and *Lynch v. Donnelly*,¹⁷⁶ would seem to meet Sunstein’s “incompletely theorized” criterion.

One might even suggest that a minimalist stance has not been peculiar to the Rehnquist Court because its characteristics—a case-by-case approach to the interpretation of constitutional provisions, a reluctance to advance justifications for constitutional decisions that extend beyond

¹⁷⁰ SUNSTEIN, ONE CASE AT A TIME, at 4-5.

¹⁷¹ 410 U.S. 113 (1973).

¹⁷² 425 U.S. 748 (1976).

¹⁷³ 418 U.S. 323 (1974).

¹⁷⁴ 438 U.S. 265 (1978).

¹⁷⁵ 411 U.S. 192 (1973).

¹⁷⁶ 465 U.S. 668 (1984).

the case at hand, and an attraction to doctrinal rationales, such as multi-faceted interpretive tests and standards, that maximize the flexibility of judges to decide cases within a particular doctrinal framework--have been employed by justices over the course of the Court's history. At one point, Sunstein notes that "[i]n its enthusiasm for minimalism, the Court is not exactly unique, for American constitutional law is rooted in the common law, and the common law process of judgment typically proceeds case by case, offering broad rulings only on rare occasions."¹⁷⁷ But that statement seems at odds with his characterization of both the Warren and Burger Courts as far more "enthusiastic about broad rulings" than the Rehnquist Court.

One might suspect that Sunstein's interest in seeing minimalism as a unique perspective identified with the Rehnquist Court rather than as a more ubiquitous approach, perhaps endemic to the Court's role as a constitutional interpreter, stems from two concerns. One is to capture something distinctive about the Court during Rehnquist's tenure. If minimalism has been a habitual posture in Supreme Court justices because incompletely theorized justifications give members of the Court greater flexibility to decide later cases, discovering its existence on the Rehnquist Court becomes less significant.

The other potential concern is more revealing. By positing the existence of several Rehnquist Court justices who adopt a minimalist posture, and by juxtaposing that stance against the professed interest among judicial originalists in "broad" and "deep" interpretations of constitutional provisions, Sunstein sets up a battle, on the Rehnquist Court, between doctrinal revisionists and justices resisting revisionism. Since Sunstein believes that the thrust of originalist- inspired doctrinal revisionism is, given the "liberal" direction of the Court's

¹⁷⁷ Sunstein, *One Case at a Time*, xiii.

constitutional jurisprudence since the 1940s, in a politically conservative direction,¹⁷⁸ justices who resist broad, originalist-inspired constitutional justifications are resisting that tendency. When he refers to “radicals in robes” on the current Court, he does not mean the minimalists.

In the end, the jurisprudential dialogue between originalists and minimalists that Sunstein describes does encapsulate the constitutional jurisprudence of the Rehnquist Court, but not in the way Sunstein characterizes that dialogue. The significance of the debate between originalists and minimalists does not lie in the distinctive emergence of minimalism. The stance Sunstein portrays—that of cautious, case-by-case, incompletely theorized decisionmaking—is not a new one for justices. What is new, at least since the early twentieth century, is the juxtaposition of that stance against one which identifies broad and enduring constitutional principles as external *constraints* on judicial interpretation. The unique feature of the Rehnquist Court’s jurisprudence is a shift in the locus of debates about the proper limits on judges as constitutional interpreters. The locus has shifted from institutional considerations, the center of debates in the *Carolene Products* regime of interpretation, to considerations resembling those which were prominent in much of the Court’s earlier history. Those considerations centered on the extent to which judges, in interpreting the Constitution, were merely discerning and applying established principles—the “will of the law”—and to what extent they were making the meaning of constitutional provisions

¹⁷⁸ At various points in *Radicals in Robes* Sunstein lists some outcomes that he associates with a full-blown originalist interpretations of the Constitution. Originalists, he maintains, would allow the federal government to discriminate on the basis of race, and both it and the states to enforce racial segregation. They would allow states to ban the use of contraceptives and to sterilize criminals. Most environmental regulations would be invalid, as would virtually any effort to regulate the use or sale of guns. States could establish official churches. And the First Amendment would afford only modest protection against restrictions on speech. *See id.* , 1-3, 18-19, 63-65.

synonymous with their “will” as partisan human actors.

The logic of originalism points in the direction of minimizing the impact of accumulated judicial precedent in constitutional law. If a doctrinal line of cases, each of them representing judicial glosses on constitutional provisions, turns out to be inconsistent with the principles revealed by an extraction of the original understanding of those provisions, the line of cases has the same jurisprudential status accorded to “demonstrably erroneous” precedents in nineteenth-century jurisprudence.¹⁷⁹ It is not law at all; it has no binding effect. In its place is installed the original understanding. Under such an approach, the accumulated precedents that constitute the doctrinal baggage of a constitutional provision are always susceptible of being discarded, root and branch. The weakest level of constitutional jurisprudence is thus the level at which most constitutional decisions take place, the set of judicial interpretations of a particular provision. The activity in which justices most commonly engage in constitutional law cases—developing the doctrinal frameworks in which provisions are interpreted—is always vulnerable to being deemed irrelevant.

In contrast, the logic of minimalism makes doctrinal exegesis the core function of judges as constitutional interpreters. For the minimalist, the most important task in judging is articulating an intermediate level of doctrinal generality that justifies the application of a constitutional provision to a case but says little about future applications. Successive judicial glosses of a constitutional provision, far from being tentative formulations capable of being swept away once the truth of originalist meanings is discovered, are the very heart of the exercise of constitutional

¹⁷⁹ Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001).

adjudication, because they represent what a current majority of justices regards as the current meaning of the Constitution.

If one thinks of the debate between originalists and minimalists as one centering on the appropriate weight to be given to current judicial glosses on the Constitution, it becomes clear that the debate is about the nature of constraints on judges as constitutional interpreters. Originalists would revive an older set of constraints, emanating from older understandings of the nature of law and the process by which judges interpret the Constitution. Minimalists appear to be primarily concerned with the constraints of prudence. The former interpretation bears the burden of convincing those who have internalized modern conceptions of law and judging that it makes any sense to think of legal principles as independent of the views of officials given power to make authoritative interpretations of them. The latter interpretation bears the burden of demonstrating that constraints of prudence are actually constraints, so that minimalist judicial interpretations are something distinct from unbounded interpretations.

Thinking of the Rehnquist Court as a collection of originalists and minimalists also helps explain the inclination of some commentators to associate it with a highly activist theory of the judicial function, amounting to judicial sovereignty.¹⁸⁰ Originalists and minimalists can be regarded as two species of activists. The activism of the first group takes the form of sweeping doctrinal revisionism, in which a Court that suddenly discerns the original understanding of a constitutional provision discards accumulated precedent that does not comport with that understanding. The activism of the second group takes the form of incompletely theorized justifications for outcomes which, by virtue of their lack of doctrinal breadth and depth, give

¹⁸⁰ See KRAMER, *The People Themselves*, 225-26.

judges more opportunities to revise them in the future. And in neither case, despite Sunstein's association of minimalism with democratic theory, does deference to the judgments of other branches of government seem to be weighing heavily. The originalist finds such deference beside the point once the meaning of a constitutional provision is fully grasped, and the minimalist is primarily interested in preserving his or her interpretive power.

Finally, the originalist-minimalist debate may help explain some of the tendencies of the Rehnquist Court that commentators found unexpected. The Court's surprising rediscovery that the Tenth Amendment and other embodiments of the reserved powers of the states could actually set limits on the scope of the federal government's regulatory power might be traced to a greater attention to the historical context in which federal powers were initially enumerated. And the Court's reaffirmation of some of its more conspicuously "liberal" decisions, and willingness to create new ones, might be seen as a reflection of the fact that a majority of its justices were minimalists. If the principal distinction between originalists and minimalists lies in how much weight should be given to judicial glosses of a constitutional provision, a minimalist majority might be inclined to preserve its earlier glosses and feel comfortable about creating new ones. It might be fearful of the alternatives, sweeping doctrinal revisionism or the cessation of its own power to control the course of constitutional law.

So it may be that the Rehnquist Court will be remembered, above all, as the period in American constitutional history when jurisprudential debates shifted from a focus on institutional constraints centering on the countermajoritarian difficulty to other sorts of constraints centering on history, the text of the Constitution, and the role of judges as creators and developers of constitutional doctrine. If that should prove to be the case, the Warren and Burger Courts might

be seen as having more in common, jurisprudentially, with the Stone and Vinson Courts that preceded them than with the Rehnquist Court. A sea-change in American constitutional jurisprudence may have taken place during Rehnquist's tenure, although its nature may only be recognized later in the twenty-first century.

