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LECTURE

TIME, INSTITUTIONS, AND INTERPRETATION

MICHAEL W. MCCONNELL*

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INTRODUCTION

Questions of constitutional theory have dominated scholarly writing about constitutional law for the last thirty years. Specifically: what methodology should courts, and especially the Supreme Court, employ when interpreting the constitutional text in disputed cases? Should the Justices strive to base their decisions on original meaning? Precedent? Some form of substantive moral theory? Popular opinion? Elite opinion? Longstanding custom and tradition?¹

Most scholarly forays into constitutional theory fall into one of two camps. One camp advocates for (or against) a particular approach to constitutional interpretation, such as originalism or living constitutionalism, on the assumption that these approaches are mutually inconsistent and that the task is to determine which is best—meaning most faithful to the Constitution, most consistent with our actual practices, or most likely to reach attractive results.

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¹ Because the literature is so vast, I will not attempt in this lecture—or even the footnotes to this lecture—to canvass it all, or even a small proportion. I apologize in advance to scholars whose pertinent work I have not cited.

The other camp treats the various common approaches as mere tools in the lawyerly toolbox, each one useful to reach a particular result—all are legitimate; all are flawed. This is not to say that every conceivable approach would be legitimate. We can all agree that judges should not decide cases by flipping a coin or consulting bird entrails. But this camp regards the range of legitimacy as determined by convention, not by any intrinsic logic or principle. Thus, by definition, any approach in common practice—any approach actually employed by Supreme Court Justices in deciding cases, for example—is at least legitimate. This camp denies that there are any overarching normative reasons to use one approach rather than another. This is sometimes called “pragmatism”; Mark Tushnet calls it, less admiringly, “bricolage.”²

In this Lecture I put forward a different idea. I try to show how the major methodological approaches³ fit together—how they interrelate both in theory and in practice. The first section of the lecture is primarily explanatory and descriptive. My thesis is that the five principal approaches to constitutional interpretation—originalism, precedent, longstanding practice, judicial restraint, and living constitutionalism (here called the normative approach)—all derive, logically, from the interplay between two considerations: time and institutions. There are three dimensions to time: the beginning, the present, and the in-between (meaning the 226-plus years between the beginning and the present). There are two primary classes of institutions: democratically accountable institutions (legislatures, executives, and common law courts) and the life-

² See, e.g., Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998) (arguing for a “pragmatic” approach to interpretation that does not disguise the interpreter’s normative standpoint); Mark Tushnet, *The Bricoleur at the Center*, 60 U. CHI. L. REV. 1071, 1114 (1993) (reviewing CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993)); see also Marc O. DeGirolami & Kevin Walsh, *Judge Posner, Judge Wilkinson, and Judicial Critique of Constitutional Theory*, 90 NOTRE DAME L. REV. 633 (2015).

³ In his work on the subject, one of the best that has been written, Philip Bobbitt calls these methodological approaches the “modalities” of constitutional argument. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7-8 (1982) (identifying the modalities of constitutional arguments as: historical argument, textual argument, structural argument, prudential argument, and doctrinal argument). I do not employ that term because it will not be familiar to most readers, and is not intelligible without explanation. I believe that the more familiar terms I use—“methodology” or “methodological approach”—are synonymous with Bobbitt’s “modality.”

My taxonomy is similar but not identical to Bobbitt’s. Originalism in my model is roughly the same as Bobbitt’s “historical method,” precedent is roughly the same as his “doctrinal argument,” and the normative approach is some combination of his “ethical argument” and his “prudential argument,” except to the extent that his “prudential argument” contains elements of longstanding practice. He includes “textual argument” as a separate modality, which is unhelpful because every methodology offers a way to read the text. Nor do I regard his “structural argument” as a separate methodology, because it is a form of textualism. Bobbitt leaves out longstanding practice and judicial restraint, which I regard as important modes of interpretation.

tenured judiciary. Put these together, and the five principal interpretive methodologies emerge.

	Beginning	In-between	Present
Politics	Originalism	Longstanding Practice	Judicial Restraint
Courts		Precedent	Living Constitutionalism (Normative Approach)

Almost all interpreters, whatever their school of thought, agree that the constitutional text (including inferences from structure) is the place to begin, and that when the text is clear it is binding. The canonical example is that Presidents must be at least thirty-five years of age.⁴ In fact, the text settles a lot, and no one even tries to evade its clear commands. We have elections for President every four years, even during wartime.⁵ In many parts of the world, regular elections would be an amazing achievement. The Vice President succeeds to office when the President dies, even if he is from an entirely different persuasion and will do grave damage to the cause for which voters had elected the ticket (think of John Tyler and Andrew Johnson).⁶ Delaware has as many seats in the Senate as California, and no one has tried to claim that this is a violation of equal protection, even though many think it is a serious injustice.⁷ The federal government cannot tax or spend or borrow without express authorization from Congress—even when this requirement leads to a government shutdown, and might lead to a default.⁸ We do not require religious tests for federal office.⁹

⁴ U.S. CONST. art. II, § 1, cl. 5 (“No Person . . . shall be eligible to the Office of President . . . who shall not have attained to the Age of thirty five Years.”).

⁵ *Id.* art. II, § 1, cl. 1 (stating that the President of the United States of America “shall hold his Office during the Term of four Years . . .”).

⁶ *Id.* art. II, § 1, cl. 6 (“In Case of . . . his Death . . . the Same shall devolve on the Vice President . . .”).

⁷ *Id.* art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State . . .”).

⁸ *Id.* art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”).

⁹ *Id.* art. VI, cl. 3 (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to

When the text is clear there is no need for interpretation. Some scholars refer to constitutional interpretation based on the text as “textualism,” as if this were a separate methodology. There is nothing harmful in that characterization, but all of the mainstream methodologies—originalism, longstanding practice, precedent, judicial restraint, and even living constitutionalism—begin with text and, in my opinion, there is no reason to identify textualism as a separate approach.

Originalism looks to the understandings of democratically accountable institutions (i.e., the Philadelphia Convention, the ratifying conventions, and public debate) when the constitutional provision was adopted. Longstanding practice looks to the understandings of democratically accountable institutions (legislatures, executives, and common law courts) over time. Judicial restraint, by which I mean the disposition to defer to the decisions of elected bodies when constitutional principles are not clearly to the contrary, looks to the understandings of politically accountable institutions in the present. Precedent looks to the understandings of life-tenured courts over time. The normative approach looks to the understandings of life-tenured courts in the present. Part I of the Lecture will describe these five principal methodologies in terms of their rationales, their relation to time and institutions, and their drawbacks.

If we wish to be even more comprehensive, we could add methodologies that do not hinge on either democratic institutions or courts. Popular Constitutionalism is a currently faddish view that bases constitutional interpretation either on current popular opinion or on popular opinion over a stretch of time as expressed through the medium of social movements. That would entail an expansion of our matrix as follows:

	Beginning	In-between	Present
Politics	Originalism	Longstanding Practice	Judicial Restraint
Courts		Precedent	Living Constitutionalism (Normative Approach)
Popular Opinion		Popular Constitutionalism	

support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.”).

Another view, which might be termed “globalism,” looks to practices in other countries on issues such as capital punishment, and seeks to bring our constitutional law into conformity with perceived international norms.¹⁰ That would expand our matrix yet again:

	Beginning	In-between	Present
Politics	Originalism	Longstanding Practice	Judicial Restraint
Courts		Precedent	Living Constitutionalism (Normative Approach)
Popular Opinion		Popular Constitutionalism	
Global Norms			Globalism

For purposes of this lecture, I shall not delve into these possibilities in any detail because they have not (yet) affected constitutional interpretation except in a few idiosyncratic areas. Some think that the Second Amendment decision in *District of Columbia v. Heller*¹¹ is justified by the broad public influence of the gun rights movement, but the Justices who wrote *Heller* did not reason along those lines.¹² *Obergefell v. Hodges*¹³ likewise seemed to be driven by the recent rapid changes in popular opinion regarding same-sex marriage, but again, the reasoning in the opinion was not based on popular opinion, and it would be very strange for so recent a development (and one that did not yet command a large supermajority) to be enough under popular constitutionalist theory to dictate the outcome.¹⁴ As to globalism, there have been references to

¹⁰ See STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 236-46 (2015).

¹¹ 554 U.S. 570 (2008).

¹² *Id.* at 570-72 (showing that the majority primarily relied on historical evidence of purpose in reaching its conclusions); see also Jeffrey S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1174 (2009).

¹³ 135 S. Ct. 2584 (2015).

¹⁴ See *id.* at 2588-91.

the law of other nations and other courts in a handful of opinions,¹⁵ but those references appear to be little more than window dressing. With respect to both popular constitutionalism and globalism, there do not (yet) seem to be any cases where a judge adopts a construction of the Constitution on the basis of those methodologies that he or she did not already espouse on normative grounds. However jaundiced a view one might take of judicial consistency, there undoubtedly are cases where originalism, precedent, longstanding practice, and judicial restraint have produced outcomes the judge would not likely have reached otherwise.

In the second part of the Lecture I suggest, more tentatively, a plausible (and to me attractive) understanding of how these methodologies should work together, in what order, and with what priority.

I. TIME, INSTITUTIONS, AND THE FIVE APPROACHES TO CONSTITUTIONAL METHODOLOGY

As just stated, my descriptive thesis is that each of the major interpretive methodologies derives from just two considerations: time and institutions. Each methodology resolves uncertainties in the meaning of constitutional principles by looking to how a particular institution or set of institutions (non-democratic courts or democratic bodies) at a particular time period (the beginning, the present, or in-between) understands or has understood that constitutional principle. The combination of these two institutional considerations and three temporal dimensions produces all of the principal methodologies used in modern American constitutional interpretation. This can be illustrated with the following matrix:

		TIME	
INSTITUTIONS			

¹⁵ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 577 (2005) (citing foreign law relating to the execution of juvenile offenders).

The importance of the temporal dimension is well recognized. One of the purposes of constitutional law is to ensure that Americans and their governments keep faith with the historic principles of the Republic, both at the Founding and at successive stages of development, such as the Civil War, the New Deal, or the civil rights era. Indeed, disagreements about time are at the heart of the most prominent arguments in constitutional theory. Originalists trumpet the importance of the moment at which the Constitution was adopted; living constitutionalists insist on interpretations based on today's values. Less conspicuous in public disputes, but no less important within the legal profession, are the various schools of "Burkean" interpretation, which emphasize continuity and change over time through reliance on gradual evolution, precedent, and longstanding practice.¹⁶

The institutional dimension presupposes that the federal judiciary is not the only institution with rightful authority to declare what the Constitution means (although the judiciary is the final decision-maker in any particular *case* that is brought within its jurisdiction). This might come as a surprise to those whose civics understanding derives from a "Schoolhouse Rock"-style division of functions where "Congress makes law, the Executive enforces law, and the Judiciary interprets law."¹⁷ Virtually all constitutional theorists—whatever their other disagreements—recognize that the idea of judicial *exclusivity* in constitutional interpretation is mistaken. Other bodies interpret the Constitution on a regular basis, and often are the final interpreters.¹⁸

In our system, there are two primary types of institutions that exercise some kind of authority to determine what the law is. Most obvious are courts. It was Chief Justice John Marshall who proclaimed that "[i]t is emphatically the province and duty of the judicial department to say what the law is."¹⁹ But political bodies, including legislatures, executives, constitutional conventions, and common law courts²⁰ also *make* law and sometimes *declare* or *interpret*

¹⁶ See generally Stephen G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635 (2006); Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509 (1995); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

¹⁷ See, e.g., *Schoolhouse Rock!: Three Ring Government* (ABC Television Broadcast 1979).

¹⁸ For just a smattering of the scholarly discussion of nonjudicial interpretation, see Michael J. Gerhardt, *The Constitution Outside the Courts*, 51 WM. & MARY L. REV. 775 (2003); Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105 (2004); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996); and Mark V. Tushnet, *The Constitution Outside the Courts: A Preliminary Inquiry*, 26 VAL. U. L. REV. 437 (1992).

¹⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

²⁰ Common law courts are politically accountable because most of them are popularly elected and, more importantly, because their constructions of the common law are subject to revision by the legislative branch. To the extent that we are looking to common law

law, or infuse legal text with a particular meaning. Congress sometimes enacts statutes that are declaratory of its understanding of constitutional meaning, or reflect a substantive view of constitutional meaning that is not always congruent with the Supreme Court's.²¹ Important examples are the Religious Freedom Restoration Act of 1993,²² the War Powers Resolution,²³ the Impoundment Control Act,²⁴ and the Civil Rights Acts of 1871²⁵ and 1875.²⁶ The Office of Legal Counsel routinely issues opinions, which are authoritative within the executive branch, interpreting the Constitution. Common law courts and state legislatures often decide in the first instance what rights Americans enjoy, before courts decide whether to incorporate those rights into constitutional law under the rubric of due process "liberty" or "privileges or immunities of citizens."

Chief Justice Marshall wrote that courts "emphatically" have the province to declare legal meaning; he did not say courts have that power *exclusively*. In probably his most important constitutional case, Marshall began his opinion with the observation that the constitutionality of the Bank of the United States had already been settled by the prior acts of Congresses and Presidents.²⁷ A recent example of the Court treating past interpretations by the political branches as authoritative involved the Recess Appointments Clause. For almost 200 years, the meaning of this Clause was hotly debated by Congresses and Presidents without judicial involvement. When the case of *NLRB v. Noel Canning*²⁸ finally came before the Supreme Court in the 2013 Term, the Court had to decide whether to interpret the Clause in the way the words of the text naturally read, or whether to give weight to the decades of interpretation by executives with seeming acquiescence from the Senate.²⁹ The Supreme Court

interpretations for guidance about such questions as the content of "liberty" under the Due Process Clause, I regard them as essentially democratic in nature. Of course, to the extent that state courts are interpreting the Constitution itself, their decisions are a species of lower court precedent.

²¹ See generally 1 DAVID CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801 (1996); 2 DAVID CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829 (2001); 3 DAVID CURRIE, THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829-1861 (2005); 4 DAVID CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829-1861 (2005).

²² Pub. L. No. 103-141, 107 Stat 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)).

²³ Pub. L. No. 93-148, 87 Stat 555 (1972) (codified at 50 U.S.C. §§1541-1548 (2012)).

²⁴ Pub L. No. 93-344, 88 Stat 297 (1974) (codified as amended at 2 U.S.C. §§ 601-688 (2012)).

²⁵ Ch. 22, 17 Stat. 13 (1871).

²⁶ Ch. 114, 18 Stat. 335-37 (1875).

²⁷ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401-02 (1819).

²⁸ 134 S. Ct. 2550 (2014).

²⁹ See *id.* at 2559-60.

took the second path, effectively allowing the longstanding practice of democratically accountable institutions to define constitutional meaning.³⁰ Similarly and more frequently, the Court has long given deference to longstanding practices of the various states in determining which “liberties” are enjoyed by Americans under the Due Process Clause.³¹

The permutations of three temporal and two institutional dimensions produce five methodologies:

	Beginning	In-between	Present
Politics	Originalism	Longstanding Practice	Judicial Restraint
Courts		Precedent	Living Constitutionalism (Normative Approach)

There are five, not six, methodologies for the simple reason that there were no courts engaging in constitutional interpretation at the founding. To be sure, judicial decisions prior to the Constitution are an important source of information about original meaning, especially of the technical legal language of the Constitution, but their importance comes as evidence of what the founding generation meant when it used the words, not as any form of precedent. Blackstone’s *Commentaries*,³² for example, are more likely to be cited than any particular case, because the framers derived much of their knowledge of the common law from Blackstone.

It is sometimes said that, in addition to consulting text, structure, history, and precedent, a judge will look to “consequences.”³³ This general statement

³⁰ *Id.* (“We have not previously interpreted the Clause, and, when doing so for the first time in more than 200 years, we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.”).

³¹ See *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (basing its conclusion that there is no due process right to physician-assisted suicide on longstanding state practice); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 695-96 (explaining that a traditionalist interpretation of the Constitution “allows diversity among state law rights when there exists no stable national consensus, and requires uniformity with respect to rights after a national consensus has emerged and persisted”).

³² See generally WILLIAM BLACKSTONE, COMMENTARIES.

³³ See, e.g., STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 18 (2005) (“Since law is connected to life, judges, in applying a text in light of its purpose, should look to *consequences*, including ‘contemporary conditions, social, industrial, and political, of the community to be affected.’”); Larry Kramer, *Judicial*

must not be confused with what I have termed the normative approach. All judges look to consequences when the text does not impose a clear rule. It is an unexceptionable form of textual analysis to ask whether a particular reading will promote or undermine the evident purposes of the provision. Consequentialism, as an interpretive technique, becomes controversial when the supposed consequences of a reading are used to go beyond any possible meaning of the text: to expand or restrict the text.

The more difficult question, when judges look to consequences, is what they are looking for. If they are asking whether a particular interpretation will lead to consequences compatible with the best evidence of the original purpose, that is a species of originalism.³⁴ For example, in *Noel Canning*, one reason to accept the view that the Recess Appointments Clause applies to vacancies that exist, but did not originate, during a recess, is that this reading makes sense of the original purpose of the Clause. If an office becomes vacant on the last day of the session, all the same considerations apply as if it became vacant a day later.³⁵ If judges are looking at the effects of their interpretations “on such systemic values as continuity, predictability, and stability of legal rules and decisions,”³⁶ this is just a variant on longstanding practice and precedent. But if consequentialists are asking which interpretation is most compatible with their own independently derived preferences this is a species of the normative approach. To use the example of *Noel Canning* again, the Solicitor General argued that one construction of the Recess Appointments Clause would weaken its usefulness as a tool to “reduce institutional friction”; when the Senate resists confirmation of the President’s nominees, the President is able to make a temporary appointment.³⁷ That may well be desirable from the point of view of maximizing executive authority and avoiding gridlock, but it has nothing to do with the original purpose of the Clause. The majority, which was otherwise sympathetic to the Solicitor General’s arguments, rejected this consequentialist plea on the ground that it did not reflect the problem the

Supremacy and the End of Judicial Restraint, 100 CALIF. L. REV. 621, 624 (2012) (“Everyone [at the Founding] essentially believed that the Constitution could and should be interpreted using the same, open-ended process of forensic argument that was employed across legal domains—marshalling . . . arguments from text, structure, history, precedent, and consequences to reach the most persuasive overall conclusion.”).

³⁴ There are some concerns about interpretation based on purposes, even within an originalism framework, but I will not get into them here. For more on this topic, see Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387 (2006).

³⁵ *NLRB. v. Noel Canning*, 134 S. Ct. 2550, 2568–69 (2014).

³⁶ Richard Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 522 (2012).

³⁷ *Noel Canning*, 134 S. Ct. at 2577 (“[T]he Recess Appointments Clause is not designed to overcome serious institutional friction. It simply provides a subsidiary method for appointing officials when the Senate is away during a recess.”).

Clause was “designed to overcome.”³⁸ Consequentialism, then, should not be seen as a separate methodology, but rather as a form of argument within each methodology.

A. *Originalism*

Originalism is the idea that the Constitution should be interpreted as it was understood at the time it was written by those with authority to enact it.³⁹ In terms of our matrix, originalism looks to the beginning, and to democratic institutions—the Constitutional Convention, the ratifying conventions, and the engaged public during the debate over ratification. Our reading of these sources must be informed by such background materials as the common law, state constitutions, British constitutional history and thought, dictionaries and other works that elucidate the meaning of words at the time. Readings are also informed by the events that propelled certain constitutional ideas to public attention—such as the trials of William Penn, Sir Walter Raleigh, and John Wilkes; the seizure of property such as horses, food, and blankets without compensation during the Revolutionary War; the Virginia Assessment Controversy; and the inability of the Articles of Confederation government to pay its debts.

Originalism is a historical enterprise, not a normative one. The question is not what we wish or hope the Constitution means, but what it actually meant to “the People” of 1787-1788, who wrote and adopted it (or to later generations, with respect to the later amendments). Originalism is a species of intellectual history which seeks to understand ideas as they were understood at the time. And of course, originalist analysis is often done poorly and sometimes disingenuously.⁴⁰

What “the beginning” is depends on what portion of the Constitution we are expounding. For purposes of interpreting the Fourteenth Amendment, “the beginning” is the period of framing and ratification between 1866 and 1868, perhaps informed by the series of Reconstruction Acts passed under the authority of the new Amendments.⁴¹ The experience of slavery, the Civil War,

³⁸ *Id.* at 2577.

³⁹ KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 1-17 (1999); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 851-52 (1989).

⁴⁰ See, e.g., Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995) (giving examples of bad originalism); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119; H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 677 (1987) (“Justices Hugo Black and William Rehnquist, perhaps the two most consistent originalists in the Supreme Court’s history, have been equally consistent in their claims that the founders’ views coincided with their own, despite historical evidence to the contrary.”).

⁴¹ See Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 981 (2012).

and the immediate aftermath of the War provide the most pertinent necessary context, along with then-current interpretations of such legal language as “due process of law,” “equal protection of the laws,” and “privileges or immunities of citizens.” Other Amendments have their own beginnings and their own contexts, but the originalist method is the same in principle.

Originalism is sometimes misunderstood—or caricatured—as an attempt to discover what the founders would have thought about various modern issues, like same-sex marriage, thermal imaging devices, or medical marijuana. During oral argument in *Brown v. Entertainment Merchants Ass’n*,⁴² Justice Samuel Alito quipped, “I think what Justice Scalia wants to know is what James Madison thought about video games.”⁴³ The courtroom understandably erupted in laughter. Such questions are transparently silly. Originalism, instead, is an attempt to discover the *meaning of the Constitution*, and to apply that meaning to modern problems understood in a modern way. Thus, to take a currently contentious example, originalists do not care what the framers and ratifiers of the Fourteenth Amendment thought, or would have thought, about same-sex marriage. The question is what equal protection and due process mean, and especially what weight should be given to long-standing moral judgments in determining the content of rights under those provisions.

Perhaps the most prominent example of an originalist opinion in an important recent case is *Heller*, in which the five-Justice majority sparred with the four-Justice dissent over the meaning of the Second Amendment, all of them relying on evidence from the framing era history.⁴⁴ A less well-known, but equally important, example is *Crawford v. Washington*,⁴⁵ in which the Court overturned a line of cases interpreting the Confrontation Clause in favor of an interpretation consistent with the original understanding.⁴⁶ The Establishment Clause has also been a fertile area for originalist opinion-writing, though much of the Court’s historical analysis has been mistaken or misinformed.⁴⁷ The Seventh Amendment and the Habeas Corpus Clause have

⁴² 131 S. Ct. 2729 (2011).

⁴³ Transcript of Oral Argument at 17, *Schwarzenegger v. Entm’t Merchs. Ass’n*, *decided sub nom. Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011) (No. 08-1448).

⁴⁴ See *District of Columbia v. Heller*, 554 U.S. 570 (2008); see also Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009); Sutton, *supra* note 12, at 1174 (2009).

⁴⁵ 541 U.S. 36 (2004).

⁴⁶ *Id.* at 53 (“[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”).

⁴⁷ See John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001) (“Whatever the modern decisions may be thought to represent, whether for good or ill, they cannot persuasively be attributed to original understanding, except perhaps at a level of generality devoid of meaning. . . . In terms of the conventional sources of ‘legitimacy’ in constitutional interpretation, the Supreme Court’s Establishment Clause decisions are at least very venturesome, if not completely rootless.”);

consistently been interpreted in light of the common law as of 1791.⁴⁸ Conspicuous for their lack of originalist analysis have been cases about affirmative action, free exercise of religion, freedom of speech, and substantive due process—despite a wealth of historical materials that could have guided the Court through those difficult shoals.

There are two primary arguments for originalism as the most legitimate methodology for constitutional interpretation: semantic theory and democratic theory. Other reasons have been propounded as to why the original meaning is the best or most legitimate basis for interpretation, but these two are the most common. Semantic theory teaches that words have meaning only in light of the linguistic conventions under which they are uttered. Without those conventions, words are mere scratches on paper or disturbances in the air waves. It simply makes no sense to say that a text has a “meaning” other than that meaning its authors assumed it would communicate to the relevant audience. If teenage boys call each other “dude,” there is no point in insisting that the word means an amateur paying for the privilege of riding horses at a western ranch resort. If we want to understand what Shakespeare meant by “discover” we must find out the meaning of the term in his day; it does not matter that we use the word today to mean almost the opposite.⁴⁹ Maybe today, “due process” leads some of us to think in terms of “dignity,”⁵⁰ but that is not what the term meant to the framers and ratifiers. To them, it meant adherence to established law.⁵¹

To treat a word as meaning something other than what it meant to those responsible for its presence in the text of the Constitution is a form of semantic confusion, like a pun. For example, Article II limits the presidency to “natural born” citizens.⁵² If someone wished to argue that this excludes persons born by caesarian section, which is not a form of “natural” childbirth, we would laugh them out of court. Being born “naturally” might be one meaning of the phrase “natural born,” but it is not what those who adopted the Constitution meant. We know that from history and context. Originalists would say the same of the claim that it is an establishment of religion to exempt religious minorities from general laws that would impinge on their conscience; that claim might make

Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 140 (2005) (finding that original meaning analysis resolves “difficulties and inconsistencies that have bedeviled courts and commentators for years” with respect to the Establishment Clause).

⁴⁸ See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 746-52 (2008); *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990).

⁴⁹ In Shakespeare’s day, “discover” principally meant to reveal or make known; today it also means to find out. See, e.g., WILLIAM SHAKESPEARE, *MUCH ADO ABOUT NOTHING* act 1, sc. 2 (“[T]he prince discovered to Claudio that he loved my niece your daughter . . .”).

⁵⁰ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597-98 (2015).

⁵¹ See generally Nathan Chapman & Michael W. McConnell, *Due Process As Separation of Powers*, 121 YALE L.J. 1672 (2011).

⁵² U.S. CONST. art. II, § 1, cl. 5.

sense to us, but it bears no resemblance to what an “establishment of religion” meant at the time of the framing and adoption of the First Amendment.⁵³

Of course, semantic theory is more complicated than this, and so is originalism. Some semantic theories focus on authorial intent; some focus on perceived meaning to the audience; some speak of a community of understanding that includes both. These variations have their counterparts in originalism based on the understanding of the framers, or of the ratifiers, or—in the most democratic version of originalism—of the engaged public. For our purposes now, these details are of little significance. For all of the attention given to the difference between “original public meaning” originalism, and originalism based on the understandings of the framers and ratifiers, no one has identified nontrivial examples of actual constitutional interpretation that turn on the distinction.

The same can be said of the much-vaunted distinction between “original meaning” and “original intent.” To the extent that originalism is based on a theory of semantic meaning, the correct view is that meanings, not intentions, control. Members of the Reconstruction Congress might or might not have “intended” the Fourteenth Amendment to require “mixed schools.” What matters is not what they wanted, but what they meant.⁵⁴ It is not unusual for laws, including constitutional provisions, to have unintended consequences. But when the function of a text is to direct and constrain future action, the meaning of the text *is* what the authors of the text “intend” to direct or constrain, rendering the distinction purely abstract. The important point is that the Constitution’s meaning is not a mere summation of the private intentions of the dozens, hundreds, or thousands of people who participated in the process of constitutional formation, but rather a general meaning accessible to ordinary speakers of the English language acquainted with legal terminology and context.

The second principal rationale for the originalist approach is based on democratic (or perhaps republican) theory. In our system, the Constitution is legitimate only because it was adopted by the People—or rather, by delegates specially selected by the People to debate and ratify it. As Chief Justice Marshall explained in *Marbury v. Madison*⁵⁵: “That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.”⁵⁶ Under this theory, the Constitution is *not* an external limit on the power of the people to enact laws that more

⁵³ See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1511-12 (1990).

⁵⁴ Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1099 (1995) (presenting evidence that substantial majorities of Congress believed that the Amendment forbade de jure segregation of public schools and public transportation).

⁵⁵ 5 U.S. (1 Cranch) 137 (1803).

⁵⁶ *Id.* at 176.

elevated minds might regard as unjust or irrational, but instead a set of principles adopted by *the people themselves* to limit their agents. It follows that the Constitution must be interpreted to mean what the People meant when they adopted and ratified it. To interpret the document to mean *something else*—something they did not mean—would usurp the authority of the People and thus violate the fundamental constitutional premise of popular sovereignty.

It is not a proper objection to the democratic theory of originalism that we will be governed by the “dead hand” of the past, for that argument is equally applicable to any and every system based on law. The very enterprise of law in all its forms is based on applying past decisions to present actions. Every law was enacted in the past, and to that extent is a product of a dead hand. By the same token, laws are enacted today to govern the future. This is never thought undemocratic in other contexts, and constitutional interpretation is not different in principle.

In the more democratic version of the democratic theory for originalism, the Constitution was adopted by agents of the citizenry as a whole.⁵⁷ It follows that the controlling meaning is that of the citizenry as a whole, which goes by the label “original public meaning.”⁵⁸

In the more republican version of the theory, the citizens elected delegates to decide on the fate of the Constitution, and these delegates were expected to deliberate with other delegates and to make their ultimate judgment based on the public good, rather than the desires of their constituents. In Virginia, for example, counties with Anti-Federalist majorities sometimes elected delegates known for their good judgment (such as John Marshall and Edmund Pendleton) despite the fact that these men were favorably disposed toward ratification.⁵⁹ Ratification by these delegates—not popular acceptance by the populace—gave the Constitution its legal force. This is consistent with the generally republican political theory of our system, which holds that representative and deliberative government, accountable to the people through elections but not immediately answerable to the instructions of the people, is preferable to pure democracy.

⁵⁷ To be sure, not all citizens could vote, and persons held in slavery were not citizens. For the most part, only adult white male citizens were represented at the ratifying conventions (though most states waived property qualifications on the theory that constitution-making, unlike ordinary governance, required consent of the whole people). Some people argue that this limited suffrage makes the Constitution an illegitimate source of authority for the United States today. This lecture is not the occasion to engage that argument, except to say that the argument goes to *whether* the Constitution should be treated as law, not to how it should be interpreted.

⁵⁸ See WHITTINGTON, *supra* note 39, at 60 (“In ratifying the [Constitution], the people appropriated it, giving its text the meaning that was publicly understood.”); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 712 (2009).

⁵⁹ See JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 112 (1996).

It would seem to follow from this more republican version of the theory for originalism that the controlling meaning is the meaning understood by the delegates, not that of the general public. This was James Madison's view: "If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it . . . in the State Conventions, which accepted and ratified the Constitution."⁶⁰ But it bears mention that at some of the ratifying conventions, delegates consulted members who had participated in the Philadelphia Convention for an explanation of the constitutional text. This suggests that it is best for interpreters to consult a broad and inclusive set of materials that cast light on constitutional meaning, and not to exclude, for example, the "secret drafting history" of the Constitution (i.e., the Records of the Federal Convention) when figuring it out.⁶¹

Just as there are two prominent rationales for the originalist approach, there are two prominent problems: unworkability and undesirable results.⁶² Originalism is said to be unworkable because it is often difficult to discern with any degree of reliability what the original meaning of a constitutional provision may be, and even more difficult to apply that meaning to the often quite different legal questions that arise today.

I believe that the unworkability problem is largely a product of expecting originalism to accomplish too much. David Strauss, for example, claims that originalists "insist[] that the original understandings of constitutional provisions provide answers to every dispute about what the Constitution requires."⁶³ Perhaps some do, though I have not met them. History can only take us so far. It is not good history, and therefore not good originalism, to attempt to wrest a greater precision from history than the history can furnish. Constitutional historian Bernadette Meyler makes the point that the common law of the founding era—which provides the linguistic vocabulary and legal context for much of the Constitution—did not have a "a fixed, stable, and unified eighteenth-century content," but instead "partook of a number of disparate strands, with the colonies, and subsequently the several states,

⁶⁰ James Madison, Speech on the Jay Treaty in the Fourth Congress (Apr. 6, 1796), in 6 THE WRITINGS OF JAMES MADISON 263, 272 (Gaillard Hunt ed., 1906).

⁶¹ See Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1118 (2003) (arguing that it is not "cheating" to "use the secret drafting history of the Constitution as another extratextual source of constitutional meaning").

⁶² See DAVID A. STRAUSS, THE LIVING CONSTITUTION 12-18 (2010) (arguing that originalism is flawed because it is "often impossible to uncover what the original understandings were," and because other original understandings would permit "implausible results," such as legal racial segregation and "grotesquely malapportioned" state legislatures).

⁶³ *Id.* at 25.

diverging from the British heritage.”⁶⁴ This does not mean the common law is unknowable, just that in many cases it will present a range of possibilities.

The point may be generalized. In doing originalist research on such disparate subjects as free exercise and establishment of religion, due process of law, the Contracts Clause, Section Five of the Fourteenth Amendment, recess appointments, war powers, federalism, and racial segregation, I have found that history sometimes provides clear answers, more often excludes certain possibilities, and generally establishes at least a range of plausible interpretations. When history runs out, we have to use other methods of interpretation. The unworkability objection—the fact that many questions of constitutional meaning have no single definitive historical answer—does not provide a reason for disregarding the historical answer when it is discernible, or for going outside what we know to be the reasonable range of historical meaning.

A common version of the unworkability objection, particularly popular among academic historians, is to point out that a great deal of what marches under the banner of originalist interpretation is based on bad history.⁶⁵ This, unfortunately, is all too true. Part of the problem is that justices and judges, lawyers, and even law professors often lack the training to evaluate historical evidence. The bigger part of the problem, however, is that they lack the incentive to be bound by historical meaning, and find it convenient to twist the evidence in the direction they would prefer it to go. However depressingly accurate this critique may be, it is not logically an argument against originalism. Every methodology can be abused. Precedents can be twisted as easily as historical evidence, and frequently have been. That is not an argument against following precedent. As to the normative approach, no one who is well informed would claim that justices and judges, lawyers, or even law professors are particularly adept at normative theory. If you entertain any suspicion that the Court has a reliable moral compass, read *Dred Scott v. Sandford*,⁶⁶ *Plessy v. Ferguson*,⁶⁷ *Buck v. Bell*,⁶⁸ and—dare I say it?—*Roe v. Wade*.⁶⁹ All methodologies can be executed well or poorly. Poor execution is not a reason for dispensing with them, which would be impossible in any event.

⁶⁴ Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 554, 556 (2007).

⁶⁵ For examples of this genre (without necessarily endorsing their historical conclusions), see generally Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625 (2008); Flaherty, *supra* note 40, at 554; Steven K. Green, “Bad History”: *The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717 (2006); and A. Raymond Randolph, *Originalism and History: The Case of Boumediene v. Bush*, 34 HARV. J.L. & PUB. POL’Y 89 (2011).

⁶⁶ 60 U.S. 393 (1856).

⁶⁷ 163 U.S. 537 (1896).

⁶⁸ 274 U.S. 200 (1927).

⁶⁹ 410 U.S. 113 (1973).

The second argument often raised in opposition to originalism is that it leads to undesirable results. That is impossible to deny. Any consistent and principled mode of interpretation will lead to some undesirable results. Indeed, the more objective a methodology is—the less prone to manipulation based on the subjective opinions of modern interpreters—the more likely it is that it will produce undesirable results (from the point of view of modern observers), precisely because it would not allow the interpreter to substitute desirable results for what the Constitution objectively means. Pure subjectivity is the only method that guarantees results perfectly congruent with the interpreter's notion of desirable results.⁷⁰

Actually, even pure subjectivity would not always yield desirable results, because Americans disagree about what is "desirable." Those who favor abortion rights or judicially-mandated same-sex marriage may not be so pleased about prohibitions of affirmative action or gun control. It would be interesting to know how many scholars would favor open-ended interpretation if those with whom they disagree felt as free to employ it as those with whom they agree, and were as likely to be named as judges.

Presumably, then, those who complain that originalism produces *undesirable* results must actually mean something like *widely unpopular* results. But if popularity of results is the criterion for evaluating a constitutional methodology, we should simply abandon judicial review and allow democracy to take its course. Why would we think that the federal judiciary is good at bringing us popular results? Whatever else they may have in common, persons appointed and confirmed to the Supreme Court come from the upper echelons of our highly educated legal elite. Every member of the current Court attended either Harvard or Yale Law School. It may, therefore, be that those who complain about "undesirable results" actually are thinking about results that tend to be disfavored by the legally educated elite—like most of the people reading this Lecture. The more open-ended the methodology, the more likely it is that the Court will act in the interest of aristocratic tastes.

In any event, it is odd to complain about unpopular results and simultaneously to favor an active discretionary role for the Court in public life. The federal courts were designed to be as independent as possible of popular will; they certainly are the most elite institution in American government. The Supreme Court may not usually behave as a counter-majoritarian institution,⁷¹ but the more discretion the Justices wield, the more elite opinion will dominate over popular opinion, where they conflict.

In my view, to ask if the Court's decisions are popular or unpopular, majoritarian or counter-majoritarian, is to ask the wrong question. I believe the

⁷⁰ For the classic statement against the view that the Constitution can be made to reach desirable results in all cases, see Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 363 (1981).

⁷¹ See Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 336-37 (1998).

Constitution contains a small but important set of principles to which this nation agreed to be bound. The job of the Court is to enforce those principles even when the politics of the moment may be uncongenial: to protect freedom of speech even for unpopular thoughts, to maintain the separation of powers even when that will slow down the forces of change, to give protection to minority religions even when their views conflict with societal norms, to require due process even from arrogant bureaucracies, and so forth. Judges should not ask which way the winds of popular opinion are blowing, but what the Constitution *means*.

B. *Precedent*

Our second methodology—"stare decisis" or "precedent"—is the practice of resolving cases according to the interpretation that previous courts adopted when faced with the same or a closely analogous question. There are three different types of precedent, which must be distinguished: vertical precedent, cross-jurisdictional precedent, and same-court precedent. Vertical precedent is the strongest form. Courts in a hierarchical system are strictly required to follow the precedents of courts superior to them. This follows not from the nature of law, but from the nature of hierarchy. The Constitution designates the Supreme Court as "supreme" and the lower federal courts as "inferior."⁷² This suggests that inferior courts must follow the lead of their superiors.⁷³ Cross-jurisdictional precedent is the weakest form of precedent. Courts will give some weight to the past decisions of courts in other jurisdictions—that is, to courts that are neither superior nor inferior, but in a parallel system, such as one state supreme court to another, one circuit court to another, or one nation's courts to another's. But this is purely a matter of persuasiveness; the decisions of these parallel courts are not "binding precedent." Same-court precedent is the most important for theories of constitutional interpretation, and it is the most contested. The idea is that a court, such as the Supreme Court, is required to give weight to its own past decisions, "whether or not mistaken,"⁷⁴ though how much weight is hard to say. Same-court precedent is the subject of this Section of the Lecture.

In terms of our matrix, precedent looks to what courts have said about the meaning of the Constitution in the past—not at the beginning, because at the

⁷² See U.S. CONST. art. III, § 1.

⁷³ Interestingly, lower courts do sometimes refuse to follow Supreme Court precedent, and sometimes are affirmed for doing so. See, e.g., *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); see also Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 J.L. & RELIG. 33, 82-88 (1989) (arguing that lower courts should "underrule" Supreme Court decisions that are both wrong as a legal matter and wrong as a normative matter). The Supreme Court says that lower courts should continue to follow Supreme Court precedent even if it has been undermined by subsequent events. See *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

⁷⁴ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 857 (1992).

beginning there were no judicial interpretations of the document, but over the expanse of time from ratification to the present. The longer a precedent has been in force and the larger the number of judges who have embraced it, the more binding force it has.

	Beginning	In-between	Present
Politics			
Courts		Precedent	

In the everyday practice of constitutional interpretation, precedent controls the vast majority of cases, and in many cases it is the only methodology in play. Even in the Supreme Court, which presumably is faced with many more constitutional cases of first impression than any other court, precedent is supreme. One study found that eighty percent of the arguments in Supreme Court opinions are based on precedent.⁷⁵ Yet the role that *stare decisis* *should* play is greatly contested. Some theorists and politicians (especially when commenting on the obligations of Supreme Court Justices whose political views they expect to find uncongenial) contend that adherence to precedent is essential to the rule of law, and thus that precedents should be overruled only under narrow circumstances⁷⁶ and only upon the showing of “special justification.”⁷⁷ Other theorists contend that it is actually *unconstitutional* for courts to decide cases on the basis of prior decisions if other interpretive principles would otherwise lead to the contrary decision.⁷⁸ As will be explained in a moment, I regard both of these claims as overstated.

⁷⁵ See Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 272 (2005) (citing Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV. 567 (1991)). The study is old and it focused on only two (albeit important) Justices, but the conclusion of the study is likely to be in the ballpark.

⁷⁶ *Casey*, 505 U.S. at 854-61 (laying out four factors that should be considered in overruling a case: unworkable precedent, reliance, doctrinal anachronism, and change of fact); see also, Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1210 (2008) (providing a devastating critique of three of those circumstances).

⁷⁷ *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

⁷⁸ See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 24 (1994) (arguing that “the authority of precedent” is unconstitutional “in some of its most familiar applications”); Michael Stokes Paulsen, *Abrogating Stare Decisis by*

Much of the heat of the debate has to do with abortion jurisprudence, where a plurality of the Court claimed to perpetuate the abortion-rights regime of *Roe v. Wade* out of respect for stare decisis in spite of substantial doubts about the correctness of that decision. Because of the ideological valence of that controversy, an insistence on adhering to precedent is most often today heard on the left. More generally, whenever the current composition of the Supreme Court is more conservative than the court in the past, one would predict liberals to be advocates of precedent, and vice versa. In actuality, precedent cuts both ways. Capital punishment, for example, presents the same conflict between precedent and principle that we see in the abortion cases, with the opposite ideological valence. Two Justices from the liberal wing of the Court have voiced their intent to declare capital punishment categorically unconstitutional despite dozens of precedents to the contrary,⁷⁹ and the Court has recently overruled two precedents that permitted capital punishment in circumstances a current five-Justice majority now disapproves of.⁸⁰

Justices on both the right and the left offend against the principle of stare decisis with some frequency, which does not stop some of those same Justices from waxing indignant when the other side so offends. There is not a single Justice on the Supreme Court who predictably follows precedent when he or she disagrees with the precedent and has the votes to go the other way. Justice Samuel Alito is quoted as having told an audience that stare decisis is “a Latin phrase. It means, ‘to leave things decided when it suits our purposes.’”⁸¹ Arguments about stare decisis are thus fraught with hypocrisy and should be heard with a degree of cynicism.

I nonetheless believe that stare decisis, at least in its moderate form, is essential to any system of fair adjudication, including constitutional law. Before getting into details, I invite you to consider how a responsible adjudicator behaves. Suppose you are appointed to the committee in charge of enforcing student conduct rules, and suppose a student has been found to have plagiarized one paragraph in a forty-page research paper. There is no doubt

Statute: May Congress Remove the Precedential Effect of Roe and Casey?, 109 YALE L.J. 1535, 1601 (2000) (“Congress may in good faith adopt a policy with respect to the doctrine of stare decisis that requires the Court to decide cases like *Casey* based on the Justices’ good faith interpretation of the Constitution—and the Constitution alone.”). Professor Lawson has somewhat softened his position regarding the constitutionality of following precedent. See Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 1 (2007).

⁷⁹ See generally *Glossip v. Gross*, 135 S. Ct. 2726, 2755-81 (2015) (Breyer, J., dissenting).

⁸⁰ *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989)); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

⁸¹ *Justice Alito Reflects on His Tenth Anniversary on #SCOTUS*, JOSH BLACKMAN’S BLOG (Sept. 21, 2015), <http://joshblackman.com/blog/2015/09/21/justice-alito-reflects-on-his-tenth-anniversary-on-scotus/> [<http://perma.cc/5VV4-NUE9>].

about guilt and no doubt that some punishment is deserved. What should that punishment be? The irate professor suggests expelling the student. The student suggests his grade on the paper should be knocked from an A to an A-. Countless intermediate possibilities suggest themselves. The student handbook says only that the punishment should be commensurate with the offense. What should you do? I suggest that the first thing a responsible adjudicator will do is to obtain the record of past infractions and past punishments. The proper punishment in your case will more or less resemble what has been meted out in the past for similar offenses. But what if one or more of the past cases seems out of whack? The responsible adjudicator will give little or no weight to past decisions that are manifestly too draconian or too lenient. This just about describes the proper weight that precedent should receive in the legal system. It should be followed, but not when it is clearly wrong.

One might argue that this analogy is not apt, however: the Supreme Court is not determining questions of degree, like punishments, which are inherently relative to one another, and thus to past practice. Instead, the Court is determining what rules are imposed by the Constitution. This is a question of meaning, not of degree. The analogy is not so inapt. Suppose that the student misconduct case involves an alleged violation of sexual assault rules. The student failed to obtain unequivocal verbal assent from the person denominated as "the victim" before proceeding to have sex; but in his defense, he says that she accompanied him to his room, voluntarily disrobed, and never said anything that might reasonably be interpreted as a "no." I suggest, again, that a responsible adjudicator will consult past cases to find out whether nonverbal conduct can constitute consent, and if so, what kind will suffice. This is important lest different cases be judged by different substantive rules. But again, if one or more past cases seem dreadfully wrong, the responsible adjudicator will not do injustice in this case merely because injustice was done in a previous one. And societal opinion about what is wrong may shift. Precedent will delay the process of social change through litigation, but it will not stop it in its tracks.

If these analogies hold water, they suggest that neither of the extreme positions above is correct. Past decisions do matter. Responsible adjudicators or judges may well decide today's case differently, on the basis of precedent, than they would have based solely on other criteria. But they will not allow manifestly incorrect or unjust past decisions to distort justice today.⁸²

There are four principal arguments in favor of following precedent. First and most importantly, *stare decisis* is necessary for the rule-of-law values of equality, stability, and predictability. If every judge felt free to adopt the interpretation he or she regarded as best, without regard for what other judges are doing (and indeed, without regard to what the judge's own court had done in the past), litigants would face a mass of inconsistent, changing, and

⁸² For a more systematic argument for this position, see Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedent*, 87 VA. L. REV. 1 (2001).

unpredictable decisions. Worse, citizens would not know what the law demands of them.

Second, *stare decisis* is a defining feature of our legal system. It is the way we do things. As Professor Henry Monaghan put it: “Precedent is, of course, part of our understanding of what law is.”⁸³ In this sense, *stare decisis* is supported by originalist evidence that when the people established a judicial branch through Article III, they understood that following precedent is one of the practices that is constitutive of being a “court.”⁸⁴ Alexander Hamilton famously wrote in *The Federalist* No. 78, that “[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them”⁸⁵

Third, *stare decisis* might tend toward better substantive results. Judges, being human, are fallible, but an interpretation reached by many judges over a long period of time is more likely to be correct than the best effort of any particular judge. Professor David Strauss, the leading academic theorist of what he calls “common law constitutionalism,” argues that precedent-based constitutional interpretation develops “over time, not at a single moment; it can be the evolutionary product of many people, in many generations.”⁸⁶ Its legitimacy stems from its “evolutionary origins and its general acceptability to successive generations.”⁸⁷

Finally, sometimes precedents become embedded in the way our society conducts itself; they gain a democratic (or republican) warrant when legislatures and executives embrace them and act on the supposition that they are true.

These are good reasons, but they support only a moderate view of precedent. It is true that the rule of law requires that courts enforce the same interpretation of the Constitution in like cases. Those rule of law concerns strongly support vertical *stare decisis*, but they provide little support for the idea that the Supreme Court should have a heavy presumption against overruling its own past decisions. An explicit overruling provides as clear and uniform a rule as a reaffirmation. Indeed, the Court’s reluctance to overrule cases may create precisely the disuniformity that *stare decisis* is supposed to promote. When faced with precedent that seems wrong, but when unwilling (or unable to get the votes) to overrule, the Justices typically distinguish the precedent, often on

⁸³ Monaghan, *supra* note 70, at 748.

⁸⁴ See Charles Fried, *Reply to Lawson*, 17 HARV. J.L. & PUB. POL’Y 35, 36 (1994).

⁸⁵ THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961).

⁸⁶ STRAUSS, *supra* note 62, at 37.

⁸⁷ *Id.* at 38. See also Thomas W. Merrill, *supra* note 16, at 519 (“[P]recedent is followed because it reflects the established, conventional understanding of the meaning of a contested provision.”).

lame or spurious grounds.⁸⁸ This leaves in place two essentially inconsistent lines of precedent, effectively empowering lower court judges to choose the line they prefer. That is precisely what the doctrine of vertical stare decisis was intended to prevent. For example, in *Washington v. Glucksberg*,⁸⁹ the Court held that substantive due process claims of unenumerated rights must be “objectively, deeply rooted in this Nation’s history and tradition.”⁹⁰ But in *Lawrence v. Texas*,⁹¹ the Court ignored that holding (without overruling, indeed without even mentioning, *Glucksberg*), which meant that lower courts could decide substantive due process claims on the basis of history and tradition, or not, as they wished. If the Court is not willing actually to follow an applicable precedent, it would be better to overrule it than to pretend to comply with stare decisis and merely distinguish it.

The other rationales for stare decisis are likewise valid, but likewise support only a moderate stance. It is true that following precedent is a constitutive feature of our system of adjudication, one that is blessed by the authority of *The Federalist* as well as dozens of cases, but this can carry us only as far as past practice establishes. If, through our history, precedent has often been ignored or overruled, then “our practice” is one of only presumptive stare decisis. “Our practice” cannot support a strict version of the doctrine.⁹²

The theory that stare decisis helps to weed out the incorrect from correct interpretations by the process of evolutionary development by many judges over time makes a great deal of sense, but many precedents are not of that type. The modern doctrine of stare decisis makes a single decision of the Supreme Court—even if reached by a 5-4 majority and even if contrary to past interpretations—binding the day it is handed down. This modern doctrine is not Darwinian or Burkean, but positivist. It assumes that the Constitution is what a current majority of the Supreme Court says it is. There is no test of time. Professor David Strauss’s theory of common law constitutionalism, based on the idea of incremental change over long periods of time, bears no resemblance to this positivist conception.⁹³ If we wanted a genuinely evolutionary system of stare decisis, we would allow judges to make up their own minds about the wisdom of decisions, until enough time had passed and enough judges had concurred to establish a consensus.

Finally, it is also true that some precedents have gained democratic warrant by virtue of becoming embedded over time in legislation and executive action. An expansive view of Congress’s Commerce Power would seem to fall within

⁸⁸ See KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 65-66 (1951).

⁸⁹ 521 U.S. 702 (1997).

⁹⁰ *Id.* at 720-21 (internal quotations omitted); see McConnell, *supra* note 31, at 665.

⁹¹ 539 U.S. 558 (2003) (holding that a Texas statute banning same-sex sodomy violates the Due Process Clause, without mentioning the Court’s decision in *Glucksberg*).

⁹² See Fried, *supra* note 84, at 36-38.

⁹³ See STRAUSS, *supra* note 62, at 37.

that description. But if precedents gain democratic warrant by legislative acceptance, it would seem equally true that precedents lose democratic warrant by legislative resistance. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁹⁴ however, the plurality opinion attempted to tell us that when the Court's decisions encounter resistance, that is all the more reason for it to dig in its heels.⁹⁵ That makes little sense.

Nonetheless, the basic intuition remains that courts should use the benchmark of prior decisions as their presumptive starting point. Many issues of constitutional interpretation are genuinely difficult; the relevant evidence often points different ways. That past courts have resolved those conflicting sources in one way should mean something, perhaps quite a lot. Let me suggest, then, an understanding of precedent that is modest, but compelling.

1. *Proposition 1*: The existence of precedent always counts as a good reason in support of the conclusion that flows from that precedent.

If this proposition is true, then the claim of Professors Paulsen and Lawson that following precedent is unconstitutional is not correct.⁹⁶ Because we can imagine a case in which the reasons other than precedent, on balance, point in one direction, but when precedent is added as a reason, the balance tips the other way, it follows that at least sometimes it is legitimate to treat precedent as the decisive factor. This does not mean that the Court should follow precedents even though they are *wrong*—as the Court in *Casey* suggested—but that precedent is one of the sources of legal authority regarding the meaning of the constitutional text, in addition to history, structure, and longstanding practice, which courts should take into account. From this proposition, it also seems to follow that because the existence of precedent always counts as a good reason, judges always act legitimately when they decide cases on the basis of precedent (except perhaps in the rare instance when other considerations, such as text and original meaning, overwhelmingly support the other side). There is nothing blameworthy about deciding cases on the basis of “doctrine”—meaning the distillation of past precedent—without necessarily rehashing issues of first principle.

2. *Proposition 2*: If a particular outcome of the case follows from precedent, judges are obliged either to follow the precedent or to explain why not—and if the latter, to establish a new, contrary precedent.

It is pointless to say that Justices always have to follow precedent; there is no precedent for that. But it is not too much to ask them to be transparent about their treatment of precedent. The Court has said that departures from precedent

⁹⁴ 505 U.S. 833 (1992).

⁹⁵ *Id.* at 866-67.

⁹⁶ See Lawson, *supra* note 78, at 24; Paulsen, *supra* note 78, at 1601.

require “special justification.”⁹⁷ That implies that, at a minimum, departures from precedent require justification, which means acknowledgment and explanation. The most serious offense to the principle of stare decisis is not to overrule a case; it is to ignore a relevant case or to distinguish it on spurious grounds.

3. *Proposition 3*: The weight to be given questionable precedents is a matter of comity within the Court.

To say that precedent always counts as a good reason to decide a case does not say how powerful a reason it is. There is, alas, no metric for that. But within a court, which is to say within a particular group of judges, there can arise conventions and understandings making stare decisis more or less powerful a consideration. On the courts of appeals, there is a practical system that ensures a uniform standard: same-court precedents may be overruled, but only after argument and decision by the full en banc court.⁹⁸ Holding en banc proceedings is time-consuming and inconvenient; consequently, they are not held lightly. A survey of data from 2001-2009 found that an average of just 0.10% of all cases before the courts of appeals were heard en banc.⁹⁹ There is no need for a jurisprudence of stare decisis when there is a practical cost to departing from precedent.

Unfortunately, the Supreme Court has no mechanism to make departures from precedent costly; every Supreme Court case is heard en banc. So the Court has to substitute something else. For the first time in its history, in *Casey*, a plurality of the Court attempted to lay down rules to govern when the Court should overrule a precedent that a current majority thinks was wrongly decided. It set forth four factors.¹⁰⁰ Alas, in *Lawrence v. Texas*,¹⁰¹ written by a

⁹⁷ See, e.g., *Dickerson v. United States*, 530 U.S. 428, 443 (2000); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). (“Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification.”).

⁹⁸ Cf. FED. R. APP. P. 35(a)(1) (“An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: en banc consideration is necessary to secure or maintain uniformity of the court’s decisions.”).

⁹⁹ Ryan Vacca, *Acting Like an Administrative Agency: The Federal Circuit En Banc*, 76 MO. L. REV. 733, 7338 (2011).

¹⁰⁰ *Casey*, 505 U.S. at 854-55 (“[W]e may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.” (internal citations omitted)). The year before *Casey*, in an opinion by Chief Justice Rehnquist, the Court put forward “general principles” for deciding when to overrule a precedent. See *Payne v. Tennessee*, 501 U.S. 808, 829 (1991). That the Court modified these the following year has a somewhat comic aspect.

member of the plurality who wrote *Casey*, the Court overruled a precedent without satisfying those factors.¹⁰² The attempt to regulate by doctrine was a failure. This does not mean *Lawrence* was wrong; more likely, the *Casey* criteria were too strict.

In a similar two-step, Justice Blackmun famously demanded fealty to his most important decision, *Roe v. Wade*, only to supply, in *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁰³ the necessary fifth vote to overrule Chief Justice Rehnquist's most treasured decision, *National League of Cities v. Usery*.¹⁰⁴ The angry tone of Rehnquist's dissent not so subtly suggested that any force that *stare decisis* might have held with him in the matter of *Roe* had just been poisoned.¹⁰⁵ The point is that beyond the bare minimum of *Proposition 1*, the weight that precedent gets is entirely a product of mutuality. And in an environment where some members of the Court feel free to overrule precedents solely because they disagree with them, other members of the Court are not likely to feel constrained. If the goose gets no sauce, neither will the gander. One suspects that references to the force of *stare decisis* in the modern Court, however routine, are largely opportunistic.

C. Longstanding Practice

Longstanding practice is the idea that when democratically accountable institutions, state as well as federal, act for many years on the basis of a particular understanding of constitutional principle, that interpretation becomes authoritative.¹⁰⁶ Like originalism, this approach is historical rather than normative; but instead of viewing the relevant history as a snapshot of a particular moment (the beginning), it views as authoritative the gradually evolving moral and political principles of the nation, as expressed in actual laws, decisions, or practices. It is a more democratic counterpart to following longstanding judicial precedent. In terms of our matrix, longstanding practice refers to interpretations by democratic institutions—Congress, the executive, state legislatures, common law courts,¹⁰⁷ and maybe even juries—over the many decades between the founding and today.

¹⁰¹ 539 U.S. 558 (2003).

¹⁰² *See id.* at 587 (Scalia, J., dissenting).

¹⁰³ 469 U.S. 528, 557 (1985).

¹⁰⁴ 426 U.S. 833 (1976).

¹⁰⁵ *Id.* at 579-80.

¹⁰⁶ I wrote of this methodology years ago under the name of "traditionalism." *See* Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 174. That name did not catch on. In this lecture, I use the terminology the Court uses in *NLRB v. Noel Canning*, 134 U.S. 2550, 2553 (2014).

¹⁰⁷ As already noted, common law falls on the democratic side of the divide primarily because it can be altered by legislation, and secondarily because state courts are often elected or otherwise responsive to popular will.

	Beginning	In-between	Present
Politics		Longstanding Practice	
Courts			

The most salient difference is that there is no single institution, like the Supreme Court, at the apex of these institutions; consequently, the evolutionary, or Burkean, version of this methodology is the only one. Longstanding practice gains its authority from multiple institutions independently reaching the same conclusion over a long period of time. There is no positivist version, akin to the idea that Supreme Court opinions are binding forever as soon as they are announced, because there is no single authoritative institution at the apex of this system.

To modern ears, shaped by our Supreme Court-centric understanding of constitutional law, it may seem odd or surprising that constitutional questions might be decided by Congress, let alone state legislatures. As an antidote to this modern view, I recommend reading the four volumes of *The Constitution in Congress*, written by the late Professor David Currie.¹⁰⁸ In those volumes we see serious constitutional deliberation by congresses and presidents on a wide range of issues, undertaken on the undoubted assumption that Congress was the first and most logical forum for such deliberations. It is striking that the most important constitutional case of the Marshall Court, *McCulloch v. Maryland*,¹⁰⁹ on the constitutionality of the Bank of the United States, begins by stating that the constitutionality of the Bank is not an “open question,” because it had effectively been resolved by governmental practice.¹¹⁰

Longstanding practice can govern constitutional disputes in two different ways. First, many constitutional questions never get to court, perhaps because no one has standing to sue. In these instances, a nonjudicial institution will have the final word on constitutional meaning. A good example is the meaning of the “Declare War Clause.”¹¹¹ The Supreme Court has never opined on its meaning, but there are many Opinions of the Office of Legal Counsel (“OLC”) of the Department of Justice, an arm of the executive, duly framed in legal and constitutional terms, addressing the Clause. The most recent is its opinion on

¹⁰⁸ See generally *supra* note 21.

¹⁰⁹ 17 U.S. (4 Wheat.) 316 (1819).

¹¹⁰ *Id.* at 401.

¹¹¹ U.S. CONST. art. I, § 8, cl. 11 (“The Congress shall have Power . . . To declare War . . .”).

the legality of the air war against Libya, which was authorized by the U.N. Security Council, but not by the Congress of the United States.¹¹² OLC Opinions rely heavily on past executive branch actions, including past OLC Opinions, treating these actions and opinions functionally as precedents. Many separation of powers questions are like this: they never get to court.

Second, some constitutional questions eventually make it to the courts after long gestation in political forums—and the Supreme Court has held, on many occasions, that it owes deference to any longstanding consensus that may have emerged during this time. The most recent example is *NLRB v. Noel Canning*, which concerned the meaning of the Recess Appointments Clause.¹¹³ Despite a powerful argument based on text, with substantial originalist support, that the President cannot make a recess appointment to fill a vacancy that occurred while Congress was in session, a 5-4 majority held otherwise—expressly in reliance on what it saw as a nearly 200 year-old practice by the executive branch, to which the Senate had acquiesced for much of that time.¹¹⁴

There is substantial evidence that the Founders expected that the Constitution would be interpreted in this fashion.¹¹⁵ In *The Federalist* No. 37, one of Madison's most interesting contributions, Publius notes that "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."¹¹⁶ Madison wrote to his friend Spencer Roane that "[i]t could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases . . . and that it might require a regular course of practice to liquidate and settle the meaning of some of them."¹¹⁷ "Decisions" and "adjudications" most plausibly refer *both* to adjudications in court (precedent) and also to "decisions" in other forums. True to form, during the First Congress's debate over where the authority to dismiss the high

¹¹² Authority to Use Military Force in Libya, 2011 WL 1459998, at *7 (O.L.C. Apr. 1, 2011) (comparing the constitutional authority of Congress to "declare War" with "the historical gloss on the 'executive Power' vested in Article II").

¹¹³ *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2575 (2014) ("[W]e conclude that we must give great weight to the Senate's own determination of when it is and when it is not in session.").

¹¹⁴ *Id.* at 2570 ("Historical practice over the past 200 years strongly favors the broader interpretation.").

¹¹⁵ Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 521, 547 (2003) ("[T]o the extent that the Constitution was indeterminate, [members of the founding generation] expected subsequent practice to liquidate the indeterminacy and to produce a fixed meaning for the future.").

¹¹⁶ THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961).

¹¹⁷ James Madison, Letter to Judge Spencer Roane (Sept. 2, 1819), *reprinted in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 143, 145 (Philadelphia, J.B. Lippincott 1867).

officers of the government is vested, Madison reminded his colleagues that their debate would serve as a “permanent exposition of the constitution.”¹¹⁸

So powerful was the force of this “liquidation” to Madison that, as President, he signed the bill creating a Second Bank of the United States in spite of having maintained in 1791 that the Bank was unconstitutional. He explained in a letter to Lafayette that the issue had been settled by “the reiterated sanctions given to the power by the exercise of it, thro’ a long period of time, in every variety of form, . . . under every administration preceding mine, with the general concurrence of the State authorities, and acquiescence of the people at large . . .”¹¹⁹ “[A]ll this,” he wrote, “I regarded as a construction put on the Constitution by the Nation . . .”¹²⁰

Madison did not suggest that every congressional decision is automatically entitled to deference. He maintained that liquidation requires more than a single decision, but a “course of practice.”¹²¹ And he believed that “legislative precedents” are “entitled to little respect” when they were passed without serious deliberation.¹²² But then, Madison thought the same of judicial precedents.¹²³

It is important to recognize the difference between this idea of “liquidation” and the notion of continually evolving meaning (“living constitutionalism”). There is a similarity. Both of them provide a means by which social change can be reflected in constitutional meaning. But the object of liquidation is to “fix” the meaning of the Constitution through a course of deliberative decisions.¹²⁴ Presumably, this “fixing” is not irrevocable, but, as in the case of precedent, departures require substantial justification and a similar process of deliberation and widespread acceptance. Under a “living constitution” constitutional meaning is never fixed. Moreover, liquidation is necessary only when the meaning of the Constitution is not clear from text in light of original meaning. As Madison said, liquidation is a form of “construction”—it is not a backdoor means of constitutional amendment.

In *Noel Canning*, the Court described the principle that “the longstanding ‘practice of the government,’ can inform our determination of ‘what the law

¹¹⁸ 1 ANNALS OF CONG. 514 (1789) (Joseph Gales ed., 1834).

¹¹⁹ James Madison, Letter to the Marquis de Lafayette (Nov. 1826), *reprinted in* MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 67, 68 (2d ed. 2013).

¹²⁰ *Id.*

¹²¹ *See supra* text accompanying note 117.

¹²² James Madison, Letter to Judge Spencer Roane (May 6, 1821), *reprinted in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 217, 221 (1867).

¹²³ James Madison, Letter to Charles J. Ingersoll (June 25, 1831), *reprinted in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 183, 184-86 (1865) (“There is, in fact and in common understanding, a necessity of regarding a course of practice . . . in the light of a legal rule of interpreting a law, and there is a like necessity of considering it a constitutional rule of interpreting a Constitution.”).

¹²⁴ Nelson, *supra* note 115, at 547.

is,” as “neither new nor controversial.”¹²⁵ It cited no fewer than nine earlier cases where the Court deferred to longstanding practice in the context of executive-legislative disputes over the separation of powers.¹²⁶ It also implied, though it did not hold, that longstanding practice is controlling only in cases that “concern the allocation of power between two elected branches of Government.”¹²⁷ *McCulloch*, similarly, had said that the “practice of the government” could settle cases “in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted.”¹²⁸ In another important early circuit case, *Corfield v. Coryell*,¹²⁹ however, Justice Bushrod Washington held that even individual liberties under the Privileges and Immunities Clause are defined by longstanding practice—specifically, that privileges and immunities are limited to those rights “which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.”¹³⁰

The modern Court has not limited its reliance on longstanding practice to separation of powers cases. The most prominent field of constitutional law in which the Court consults—and gives dispositive weight to—the practices of state governments involves individual liberties. In *Glucksberg*, following the lead of the second Justice Harlan in *Griswold v. Connecticut*,¹³¹ the Court held that in determining what unenumerated rights would be accorded protection as a matter of substantive due process, it would not follow the Justices’ own moral intuitions, but would protect only those rights that are “objectively, deeply rooted in this Nation’s history and tradition,”¹³² by reference to the actual law in the states. To satisfy this test, the practice need not have been recognized as a right by the framers; even a relatively recent recognition may suffice so long as it has been widely recognized among the states for a long enough time to be, objectively, “deeply rooted.”¹³³ In the capital punishment

¹²⁵ *Noel Canning*, 134 S. Ct. at 2560 (citations omitted) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) & *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

¹²⁶ *Id.* (citing *Mistretta v. United States*, 488 U.S. 361 (1989); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring); *The Pocket Veto Case*, 279 U.S. 655 (1929); *Ex Parte Grossman*, 267 U.S. 87 (1925); *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), *McPherson v. Blacker*, 146 U.S. 1 (1892), *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); & *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803)).

¹²⁷ *Id.* at 2559.

¹²⁸ *McCulloch*, 17 U.S. (4 Wheat.) at 401.

¹²⁹ 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

¹³⁰ *Id.* at 551.

¹³¹ 381 U.S. 479 (1965).

¹³² *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotations omitted).

¹³³ *Id.* at 721.

context, the Court generally decides what punishments are “unusual” by counting heads among the states to determine the prevalence of various practices.¹³⁴ Again, recent practice counts. The Court does not demand unanimity, but it does look for supermajority consensus before it will constitutionalize a practice under this method.

The rationale for liquidation by longstanding practice of democratically accountable bodies is mostly the same as—but more democratic than—the rationale for liquidation by judicial precedent. Madison referred to both forms of liquidation in the same breath. Both allow for change, but only slowly. The evolutionary character of the process offers much the same tendency toward wisdom as does longstanding judicial precedent. And the “fixing” aspect of liquidation promotes the rule of law values of stability, equality, and predictability. As the Court commented in *Noel Canning*: “We have not previously interpreted the Clause, and, when doing so for the first time in more than 200 years, we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.”¹³⁵ Moreover, as with *stare decisis*, the longstanding practice approach reduces the degree to which decisions are based on the predilections of a majority of the current Justices.

D. *Judicial Restraint and the Normative Approach*

Once a judge has examined the constitutional text (including inferences from constitutional structure), any historical materials bearing on its meaning, and applicable precedents both judicial and democratic, the legal aspect of the job of constitutional interpretation is finished. This is the part of constitutional interpretation that the late Professor Ronald Dworkin called “fit.”¹³⁶ It is not easy and it is not mechanical; it requires judgment and often produces disagreement among reasonable minds. But the task of reading text faithfully, in light of history, precedent, and practice, is, *in theory*, objective in nature. Judges of different ideologies, putting aside their own preferences as to outcome, should, *in theory*, come to the same answer, because these inquiries relate to facts about the world, rather than normative judgments about what best promotes fairness, equality, liberty, justice, or efficiency—or even which of these values our Constitution seeks to promote.

The big question is what to do when “fit” runs out. With rare exceptions, constitutional theorists all say that if text (including inferences from structure), history, practice, and precedent are clear, the matter is at an end, and the clear answer must be enforced. But what if text, history, practice, and precedent are unclear? What if these legal sources are in conflict, or are ambiguous, or do not speak clearly to the question at hand? What then?

¹³⁴ See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2745 (2015).

¹³⁵ *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014).

¹³⁶ RONALD DWORKIN, *LAW'S EMPIRE* 66, 230, 338-39, 380 (1986).

There are two principal schools of thought, which in this Lecture I call “judicial restraint” and the “normative approach.” According to judicial restraint as I define it, if an examination of the legal sources is inconclusive, that means the government action under challenge has not been shown to be unconstitutional. According to the normative approach, at this point the judge should decide how the “abstract moral principle[s]” of the Constitution are “best understood”—best, that is, from the moral standpoint of the particular judge.¹³⁷ Or, as Judge Posner puts it, when “orthodox materials . . . run out” there is an “open area” where judges have no choice but to legislate.¹³⁸ The effect of the restrained view is to accept as authoritative the current view of the political institutions with authority over the matter. States may adopt capital punishment, or not. Congress may decide about health care policy. States could—until the *Obergefell* decision last Term—permit same-sex couples to marry, or not. The effect of the normative approach is to adopt the current view of the judiciary as binding on the nation. The Justices of the Supreme Court—often just five of them—have the last word. In terms of our matrix, judicial restraint empowers today’s political institutions and the normative approach empowers today’s judiciary.

	Beginning	In-between	Present
Politics			Judicial Restraint
Courts			Normative Approach

I will not disguise my opinion that, of the five principal methodologies, the normative approach is the most problematic. It presents the greatest tension with representative government, and it confuses the role of judge and legislator, which ideally should be kept distinct. It is at odds with the argument under which constitutional judicial review was justified in *Marbury v. Madison* and *The Federalist*—that judges are merely applying restrictions on government adopted by the people themselves. The normative approach turns the judiciary, and especially the Supreme Court, into something like a House of Lords: an elite body using its own opinions and judgment as a basis for countermanding decisions made by popular institutions. Arguments can be

¹³⁷ RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996) (“[W]hen some novel or controversial constitutional issue arises . . . people who form an opinion must decide how an abstract moral principle is best understood.”).

¹³⁸ RICHARD POSNER, REFLECTIONS ON JUDGING 168, 102 (2013).

made for a House of Lords, but the function of the House of Lords should not be confused with the function of a court of law.

Human nature being what it is, judges will always be tempted to advance their personal opinions—which of course they think are right. Thus, the normative approach will never go away. But this should be viewed as a temptation to be resisted rather than a legitimate approach to be praised when we like the results. Judges performing the constitutional duty of judicial review should attempt, to the maximum degree possible, to put their personal opinions aside. I fear that we have almost lost sight of this ideal. Popular commentary on the Court is all about results and not about the judicial role. Advocates of same-sex marriage valorize Justice Kennedy, whether or not the legal reasoning of *Obergefell* was persuasive; advocates of gun rights do the same for Justice Scalia. I worry that all too many law schools now teach constitutional law as a means of achieving one's social objectives, rather than as the application of law or liquidation of its meaning.

There have been great champions of judicial restraint in the history of the Supreme Court. Justices Holmes, Brandeis, Frankfurter, and the second Harlan come to mind. But their ilk is passing from the stage. Perhaps there is a political explanation for this. Judge Posner has noted that the attitudes of modern Supreme Court Justices were shaped by the experience of the Warren Court, “in which liberal Justices depart[ed] from precedent in order to expand the constitutional rights favored by liberals and their conservative successors ‘conserve[d]’ those liberal decisions because of a commitment to stare decisis.”¹³⁹ The “conservative successors” to the Warren Court Justices, Posner plausibly says, have refused to accept this one-way “ratchet.”¹⁴⁰ And indeed, in the last twenty years, we have seen a more assertive conservatism in areas such as freedom of speech, gun control, affirmative action, and federalism. Justice Kennedy has particularly contributed to the trend, with his unusual mix of conservative positions on some issues (freedom of speech, federalism, usually race, sometimes religion) and progressive positions on others (abortion, gay rights, sometimes religion), usually contrary to laws adopted by the representative branches.

No Justice today is consistently restrained, but Chief Justice John Roberts comes the closest. In *National Federation of Independent Business v. Sebelius*,¹⁴¹ he famously adopted what even he recognized was not “[t]he most straightforward reading” of the Affordable Care Act in order to uphold the

¹³⁹ Posner, *supra* note 36, at 522.

¹⁴⁰ *Id.* For an elaboration of this hypothesis, see Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 CALIF. L. REV. 579, 597 (2012) (“Judge Posner identifies the ‘exuberant’ Warren Court as a turning point in the historical ascension of judicial activism and also as the beginning of a ratchet effect on judicial incentives to engage in some freewheeling kind of activism.”).

¹⁴¹ 132 S. Ct. 2566 (2012).

individual mandate under the taxing power.¹⁴² The most telling sentence in his opinion is near the beginning: “Resolving this controversy requires us to examine both the limits of the Government’s power, and our own limited role in policing those boundaries.”¹⁴³ He repeated the performance three years later, in a statutory challenge to the authority of the Administration to provide subsidies in states that had not set up health care exchanges.¹⁴⁴ The text of the statute seemed to deny that power, but enforcing it would upend administration of the Act.¹⁴⁵ The Chief Justice swallowed hard, and went with the interpretation that would permit continued operation of Obamacare rather than the interpretation that was most faithful to the words of the statute.¹⁴⁶

Outside of the most conspicuous cases, I suspect judicial restraint is more common and more powerful than it appears. There surely are scores of decisions in recent years where the Court has upheld government action even though five Justices probably thought a good case could be made against it. There is some evidence that the liberal Justices are a bit more reluctant to strike down federal legislation and that the conservative Justices are a bit more reluctant to invalidate state legislation.¹⁴⁷ Restraint is not completely dead.

The vocabulary here may require brief comment. “Judicial restraint,” like its opposite “judicial activism,” is a term of many colors. Sometimes it is used to mean following precedent; sometimes it is used to mean deciding cases on the narrowest possible grounds. Often it seems to mean deciding the case the way the commentator wishes, which is not very helpful. Judicial restraint is praised when it upholds laws the observer likes; it is ignored when the observer hopes for social change. In this Lecture, I use the term judicial restraint to mean the disposition of the courts to uphold the constitutionality of acts of the political branches when there is no clear basis in constitutional text, history, or practice to the contrary.

By the “normative approach,” I mean the idea that courts should overturn laws or other government actions on the basis of their own moral intuitions or policy preferences, so long as this is not blatantly inconsistent with the

¹⁴² *Id.* at 2593 (“The most straightforward reading of the mandate is that it commands individuals to purchase insurance.”).

¹⁴³ *Id.* at 2577.

¹⁴⁴ *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015).

¹⁴⁵ *Id.* at 2489-90 (recognizing “the problem” that giving “the phrase ‘the State that established the Exchange’ its most natural meaning” upsets the Act which “clearly contemplates that there will be qualified individuals on every Exchange”).

¹⁴⁶ *Id.* at 2496 (“Section 36B can fairly be read consistent with what we see as Congress’s plan, and that is the reading we adopt.”).

¹⁴⁷ See Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43, 49, 58 (2007) (“[T]he conservative justices on the Rehnquist Court were much more likely than their liberal counterparts to vote to declare federal statutes unconstitutional. . . . Unlike in the federal invalidation cases, in [state statute] cases it is the liberal justices who most actively used their power.”).

language of the Constitution. Often this is termed “judicial activism,” but that has become a term of invective more than of description. Professor Dworkin called this the “Moral Approach” with a capital “M.” Justice Brennan is said to have originated the term the “Living Constitution,” although the term was used even before Brennan. I favor the terminology of the “normative” approach because it seems more neutral, and is not identified with any particular ideology. The normative approach could include progressives, race-sex-gender theorists, libertarians, or even law-and-economics scholars.

The rationales for the two positions are relatively clear. Judicial restraint presumes that the Constitution is not designed to produce the one “best answer” to all questions, but to establish a framework for representative government and to set forth a few important substantive principles, commanding supermajority support, which legislatures are required to respect. The job of the judge is to ensure that representative institutions conform to the commitments made by the people in the past, and embodied in text, history, tradition, and precedent. Beyond those few but important limits, the representatives of the people are entitled to govern. They, rather than judges, are entitled to resolve the difficult moral, economic, and practical questions that divide us. This is the theory that undergirded judicial review in *The Federalist* No. 78 and *Marbury v. Madison*. It treats the Constitution as positive law, emanating from the will of the sovereign People. It is always possible that the will of the people will be wrong, or incomplete, or that representative institutions will do a poor job of effectuating the popular will. Judicial restraint does not strive to perfect our constitutional system, but to enforce its established norms, leaving the rest to democratic choice.

The normative approach has higher aspirations for law, hoping that it can nudge the nation toward a regime of greater fairness, equality, liberty, or (in the case of the law-and-economics brigade) efficiency. It regards the abstract terms used in the Constitution, such as “liberty,” “due process of law,” and “equal protection,” as invitations to those in charge of interpreting the document to infuse it with content that will bring about a better world. And it believes that judges, precisely because of their dispassionate position and independence from the nasty world of politics—and, frankly, because of their superior education and standing—are more likely to make the kind of normative judgments we hope for, than the elected representatives of the people. Let Professor Dworkin explain the position:

Our legal culture insists that judges—and finally the justices of the Supreme Court—have the last word about the proper interpretation of the Constitution. Since the great clauses command simply that government show equal concern and respect for the basic liberties—without specifying in further detail what that means and requires—it falls to judges to declare what equal concern really does require and what the basic liberties really are. But that means that judges must answer intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many

centuries, with no prospect of agreement. It means that the rest of us must accept the deliverances of a majority of the justices¹⁴⁸

Judge Posner put it this way: “In cases in which the orthodox materials do not yield an answer to the legal question presented, or in which the answer they yield is unsatisfactory, the judge’s role is legislative: to create new law that decides this case and governs similar future ones.”¹⁴⁹

Dworkin and Posner are unusually candid. More often, the normative approach is dressed up as mere gap-filling common sense. David Strauss, for example, says that in novel cases “the judge will decide the case before her on the basis of her views about which decision will be more fair or is more in keeping with good social policy.”¹⁵⁰ That sounds modest and unthreatening—until we realize that “fairness” and “good social policy” often are euphemisms for what Dworkin called “intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries, with no prospect of agreement.”¹⁵¹ By and large, in a democratic republic, the people and their representatives are entitled to decide what is “in keeping with good social policy.” It is one thing to decide a novel case in accordance with *democratically established* social policy, but it is quite another to upend existing social policy and to substitute its opposite.

Sometimes—often, in fact, if we look to the most culturally salient and controversial cases—the normative approach ventures beyond the Dworkinian method of resolving cases when “fit” runs out. Normativity swamps “fit,” and the conventional legal analyses of text, history, practice, and precedent are brushed aside in the service of the judges’ own view of what *should be* the constitutional constraint. *Roe v. Wade* is the most consequential decision of the modern Court that cannot plausibly be defended on the basis of anything other than the normative—and highly contested—judgment of the Court’s majority.¹⁵² From the other side of the Court’s ideological spectrum, some of the opinions opposing the constitutionality of affirmative action have been based primarily on the writers’ opinions about racial justice, with no serious

¹⁴⁸ Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381, 383 (1992).

¹⁴⁹ Posner, *supra* note 139, at 540. In quoting Dworkin and Posner in tandem, I do not mean to imply that their jurisprudence is similar. Posner, the economist, is much more empirical and hard-headed than Dworkin, the philosopher, who is more abstract and aspirational. But they share(d) a certain dismissive attitude toward the results of democratic politics.

¹⁵⁰ STRAUSS, *supra* note 62, at 38.

¹⁵¹ Dworkin, *supra* note 148, at 383.

¹⁵² For academic attempts to justify *Roe*, see WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION (Jack Balkin ed., 2007). Readers may judge for themselves whether any of these efforts is successful.

engagement with the history of the Fourteenth Amendment.¹⁵³ Commentators who are skeptical of the validity of the historical analysis in *Heller* say that *Heller* was the conservatives' *Roe*, maybe even the conservatives' payback for *Roe*.¹⁵⁴ And whatever one might think of the legal arguments in some of the briefs in *Obergefell*, the majority's statement that "rights come not from ancient sources alone" but instead "rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era"¹⁵⁵ seems to open the door to whatever new rights might appeal to the sensibilities of five Justices. This statement certainly suggests, contrary to *The Federalist* No. 78 and *Marbury v. Madison*, that at least some constitutional principles "arise" from something other than the sovereign will of the People as embodied in a written constitution. After all, the "better informed understanding" to which the Court referred had not—yet—been manifested in anything approaching a national consensus; instead, it was the "better informed understanding" of the democratic branches of eleven states and a bare majority of the Court.

The normative approach also appears in a self-consciously moderate guise, in the form of tests of "reasonableness" and inquiries into the "substantiality" of "governmental purposes." These "tests"—which are not "tests" in any real sense, but, rather, invitations to judicial second-guessing of essentially legislative judgments—are often regarded as either the essence of restraint (the "rational basis test") or as middle-ground positions ("intermediate scrutiny"). The difficulty is that these doctrines require the judge to make precisely the same species of judgment that the legislature already made. There is nothing "judicial" about determining the reasonableness of laws. Whether a governmental interest is sufficiently important to warrant the costs is the quintessence of a legislative question. Many nebulous tests, such as the balancing test of *Mathews v. Eldridge*¹⁵⁶ for due process, or the endorsement

¹⁵³ See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) (arguing that affirmative action policies have invidious effects on racial minorities).

¹⁵⁴ See J. Harvie Wilkinson, III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 256 (2009). For a historical defense of *Heller*, but not of the Court's opinion in its entirety, see Nelson Lund, *supra* note 44. For present purposes, I take no position on the historical arguments in *Heller*.

¹⁵⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

¹⁵⁶ 424 U.S. 319, 319 (1976) ("[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

test under the Establishment Clause,¹⁵⁷ are so indeterminate that legislatures cannot be confident of what is constitutional until the courts tell them what they think. Justice Sotomayor has recently reminded us that clever lawyers can almost always come up with a less restrictive alternative.¹⁵⁸ That used to be a conservative lament.

The point here is not that these approaches produce extreme results. They do not. Nor that they are necessarily unpredictable, though they certainly can be. The point is that they blur the role of judge with that of legislator. Take the example of freedom of speech. Until recently, there were a variety of doctrines that identified types of speech restriction without regard to politics or policy, for example, whether the regulation was content-based. If a speech regulation was content-based, it was subjected to strict scrutiny, which was essentially fatal to its constitutionality.¹⁵⁹ This standard made free speech law unusually objective, such that large majorities on the Court could agree even about highly controversial cases¹⁶⁰ and divisions on the Court were often not along the standard left-right lines.¹⁶¹ In the last few years, however, the Court twice (in opinions by Chief Justice Roberts) sustained government speech restrictions even under strict scrutiny, essentially because the Court agreed with the purposes of the restrictions.¹⁶² These decisions may appear “restrained” because they upheld government action. But they did so only because the Justices agreed with the policy of the government. Even more ominously, more and more free speech cases have moved into intermediate scrutiny, where their outcome hinges on the judiciary’s assessment of the wisdom or necessity of the government’s policy.¹⁶³ We are shifting from a jurisprudence where the outcome of free speech cases hinged almost entirely on an analysis of the nature of the speech (whether it falls within an unprotected category like

¹⁵⁷ See, e.g., *City of Allegheny v. ACLU*, 492 U.S. 573 (1989) (upholding the use of the endorsement test in Establishment Clause cases).

¹⁵⁸ *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Sotomayor, J., concurring).

¹⁵⁹ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Texas v. Johnson*, 491 U.S. 397 (1989). Cf. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 815 (2006) (“Strict scrutiny was most fatal in free speech cases, where only 22 percent of challenged laws survived. [Yet] [n]one of the constitutional rights triggers a truly fatal-in-fact form of strict scrutiny, and the survival rate in every right is in excess of 20 percent.”).

¹⁶⁰ See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47 (2006); *Texas v. Johnson*, 491 U.S. 397, 398 (1989); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

¹⁶¹ See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2732 (2011); *Johnson*, 491 U.S. at 398.

¹⁶² *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015) (upholding speech restrictions on fundraising by state judicial candidates); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010) (upholding speech restrictions on provision of material support to international terrorist organizations).

¹⁶³ See, e.g., *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 661-62 (1994).

threats, incitements, libel, or obscenity) or the nature of the speech restriction (whether it is content-based) to a jurisprudence where the outcome depends on the judiciary's independent analysis of the public policy underlying the restriction.

The classic understanding of judicial restraint is the "clear inconsistency" rule. Historians tell us that the founding generation had no desire to empower judges to indulge in questionable interpretations of the Constitution, and that most Americans either opposed judicial review or wanted judges to disregard only statutes that were *plainly* unconstitutional.¹⁶⁴ James Bradley Thayer famously wrote that, as of the final decade of the nineteenth century, the defining feature of American constitutional law was that courts would not invalidate legislation unless its inconsistency with the Constitution was "so clear that it is not open to rational question."¹⁶⁵ Many nineteenth century constitutional cases used a similar formulation.¹⁶⁶

Judge Posner has argued that the clear inconsistency rule is essentially incoherent, or at least inconsistent, with other, more central aspects of restraint.¹⁶⁷ The implication of Thayer's position is that judges should *not* decide cases by a dispassionate analysis of the orthodox legal materials—text, history, practice, and precedent—rather, "Thayer wanted judges to place a thumb on the scale" in favor of upholding government action.¹⁶⁸ This puts Thayerian restraint in tension with the judicial duty to define and enforce the law as it is, not as the judge wishes it to be. On this point Justice Scalia is in agreement with Judge Posner: "I am not a strict constructionist, and no one ought to be A text should not be construed strictly, and it should not be

¹⁶⁴ See, e.g., SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 34–38 (1990) ("[T]he judicial power contemplated by both sides [in the debates surrounding the Founding] was confined to the concededly unconstitutional act, to circumstances where it was agreed that the legislature had 'in fact' violated the constitution."); Larry D. Kramer, *The Supreme Court 2000 Term – Foreword: We the Court*, 115 HARV. L. REV. 5, 74 (2001) (asserting that while "most of the Framers and Founders were not thinking about judicial review" one way or the other, those who had given early thought to its details generally believed that it would come into play "only when the unconstitutionality of a law was clear beyond dispute").

¹⁶⁵ James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

¹⁶⁶ See *id.* at 140–49 (discussing early cases in which courts applied the standard of only striking down legislation that was plainly unconstitutional).

¹⁶⁷ See Posner, *supra* note 139, at 537 ("No originalist, or any other judge committed to a constitutional theory . . . would be likely to embrace such a position. No such judge would say 'I think the original meaning of the Second Amendment is that people have a right to own guns for self-defense, and the challenged statute or ordinance doesn't permit that, but reasonable persons might disagree with my reading of history, so I'll vote to uphold the enactment.'").

¹⁶⁸ *Id.*

construed leniently; it should be construed reasonably, to contain all that it fairly means."¹⁶⁹

A better version of restraint begins with straight interpretation of legal materials, followed by the conclusion that if the challenged government action is within the plausible range of meaning by reference to those materials, it is not unconstitutional. In other words, the legal part of the analysis—what Dworkin called “fit”—should be conducted without any thumb on the scales in favor of upholding government action. It is just as inconsistent with the rule of law to read the Constitution to accord the political branches authority to do that which the People forbade as to read into the Constitution restrictions on the legislature that are not there. Judicial restraint comes in the second stage: if nothing in the constitutional text, as interpreted through original meaning, precedent, or longstanding practice precludes the challenged government action, the judicial task is over. Whether the action is reasonable, whether it serves a substantial governmental purpose, or whether it is consistent with contemporary values are the concerns of the legislature.

Judge Posner has argued that this position is not genuinely available.

[W]hen faced with a case that is indeterminate from the standpoint of conventional legal reasoning [judges] cannot throw up their hands and say, ‘I can’t decide this case because I don’t know what the right answer to the question presented by it is.’ They have to decide it, using whatever tools are at hand.¹⁷⁰

Posner gives as his exemplar former California Supreme Court Justice Roger Traynor, whose “innovative” decisions drew heavily from policy analysis.¹⁷¹ But Traynor’s decisions were common law decisions. In common law cases, Posner is correct that the courts have to decide the question one way or the other, using whatever tools are at hand. Constitutional cases are different. Constitutional cases always begin with a governmental act—a statute, an executive action, or a common law decision. If the judge doesn’t “know what the right answer” is, there is no need to grab inapt tools to form an answer. The judge can always say: “[T]here is no legal basis for finding the government action unconstitutional, whatever I might think of it as a matter of policy.” For that reason, I think Posner is wrong to assume that the normative approach is inescapable in constitutional cases.

¹⁶⁹ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23 (1997).

¹⁷⁰ Posner, *supra* note 36, at 539.

¹⁷¹ *Id.* at 540 (“Traynor’s landmark decisions diverged from legal convention not only in their results, but in their method. Unlike earlier judicial activists who couched their innovations in conventional language, Traynor announced explicitly that he was making public policy.” (quoting BEN FIELD, *ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR* (2003))).

II. HOW THE METHODOLOGIES FIT TOGETHER

In my opinion, the most important and neglected task of constitutional theory is to prioritize the methodologies in a way that can be consistently applied in the real work of constitutional adjudication. To show that this task has largely been neglected, let me give three examples.¹⁷² Justice Antonin Scalia once famously described himself as a “faint-hearted originalist,” meaning that he leavens his originalist approach with a certain degree of acceptance of *stare decisis*.¹⁷³ But *when* Scalia yields to precedent and *when* he sticks to originalism is largely unpredictable, giving such decisions the impression of being arbitrary. At the opposite pole, Professor Dworkin, the foremost advocate of the normative approach (my label, not his), claimed to respect what he called “fit”—meaning traditional legal materials such as text, history, and precedent—and to apply normative philosophy, which he called “justification,” only when “fit” was inconclusive.¹⁷⁴ But in Dworkin’s writings about actual, litigated issues that he cared about there appears to be no instance where “fit” ever constrained “justification.”¹⁷⁵ Finally, although the opinions in most cases rely on precedent as if precedent were controlling, the Court overrules a number of precedents every year; yet there is no descriptively powerful way to determine when precedent will control.¹⁷⁶ The rule appears to be that precedent is controlling except when it is not.

We thus see that in actual constitutional interpretation, methodological approaches are often—maybe always—blended. Methodologies apply only sometimes, with no consistent and predictable rule for when they apply and when they do not. Whether the purpose of constitutional theory is to constrain judges or to render the rationale for judicial decisions transparent, this practice of inconsistently blending methodologies is problematic. No theory can have

¹⁷² It has not been entirely neglected. See, e.g., William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. (forthcoming 2015); Richard Fallon, *A Constructivist Coherence Theory of Constitutional Law*, 100 HARV. L. REV. 1189 (1987). There is also a lively literature on the relation between originalism and *stare decisis*. See, e.g., Merrill, *supra* note 75.

¹⁷³ Scalia, *supra* note 39, at 864. Justice Scalia has more recently described himself as “an honest originalist” who takes “the bitter with the sweet.” See Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/> [<http://perma.cc/NEV9-VMTF>].

¹⁷⁴ See DWORKIN, *supra* note 136, at 65-68; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 148-49 (1977).

¹⁷⁵ See Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s Moral Reading of the Constitution*, 65 FORDHAM L. REV. 1269, 1277 (1997) (“In a case where the democratically accountable branches have prescribed the death penalty, therefore, the only conceivable ground for Dworkin’s legal conclusion is that the interpreter’s own opinion of what is ‘cruel and unusual’ is entitled to prevail. ‘Fit’ counts for nothing.”).

¹⁷⁶ See Paulsen, *supra* note 76, at 1165.

either explanatory value or constraining effect if a judge can turn the theory on or off at will.

Contrary to the impression created by much of the discussion, it is unlikely in theory—and impossible in practice—to employ only one methodology. Although I am primarily an originalist, I have come to believe that, with the possible exception of the normative approach, all of the five methodologies necessarily have a legitimate place in constitutional interpretation. But it is equally wrong to regard the methodologies merely as interchangeable tools. A system in which judges feel no need to justify why they use one methodology in Case One and another methodology in Case Two does not bear any resemblance to what we might call the rule of law. In such a system, the real explanation for a judicial decision will be the reason one or another methodology was selected—but the written opinion will likely not explain the choice of methodology, and there may be no rationale for that choice save that it leads to the judge's preferred outcome.

The fundamental conceptual error with respect to all of the methodologies, but especially originalism, is the belief that they will necessarily produce a single right answer to the disputed legal question. Sometimes the methodologies will produce a single answer, but more often they will produce a range of plausible answers. In other words, the methodologies can exclude certain interpretations as wrong or unsupported without identifying any one answer as definitive. For example, while a great deal of evidence suggests that the Free Exercise Clause was originally understood to contemplate the crafting of accommodations to generally applicable laws,¹⁷⁷ the evidence is sparse and equivocal enough to leave both sides of the question open to further development. On the other hand, there is no evidence to support the view that the Establishment Clause affirmatively forbids such accommodations. That issue was settled as of the founding.¹⁷⁸

The process of interpretation should therefore be seen as a series of successive filters. The text of the Constitution alone answers some questions and excludes some possibilities, but for many provisions there is a plausible range of answers consistent with the text. Evidence of original meaning will further narrow the range of interpretive choice, again answering some questions and excluding some possibilities. But still there will be a range of plausible interpretations for many provisions. We then move to liquidation—to discussions and adjudications in both courts and political bodies. In principle, neither form of liquidation takes priority over the other. In practice, some issues tend to be determined solely through the give and take of politics. The allocation of power over initiation of war is an example. Other issues are likely

¹⁷⁷ McConnell, *supra* note 53, at 1410 (discussing the conflicting historical evidence surrounding the issue of exceptions under the Free Exercise Clause).

¹⁷⁸ *Id.* at 1511-12 (“There is no substantial evidence that [religious] exemptions were considered constitutionally questionable, whether as a form of establishment or as an invasion of liberty of conscience. Even opponents of exemptions did not make that claim.”).

to proceed immediately to court. Still others will be debated in the political realm for a period of time and then, eventually, arrive in court, where—if the theory of liquidation is honored—the court will give those prior deliberations due weight.

Even then—after text, history, practice, and precedent all have been consulted, in their proper order—in some cases there will remain a range of possible answers. In such situations, the Court faces a sharp choice. Either the Court will follow the logic of judicial restraint, and will hold that the action under review is constitutional, or it will follow the normative approach and choose the interpretation that seems best for the nation.

The important point here is the sequencing. If the text is clear, there is no need to look beyond it. Where the original meaning of the text is clear, there is no need to consult practice and precedent, let alone judicial restraint or normativity. If the original meaning of the text is not clear, but practice and precedent have produced an answer, that is the answer the court should follow. It is wrong to jump from any ambiguity in the text immediately to normativity, because this short-circuits the democratic process built into practice and precedent. As the Court explained over a hundred years ago:

The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction are entitled to the greatest weight.¹⁷⁹

Just over a year ago, in *Noel Canning*, the Court reaffirmed this traditional understanding of proper sequencing of the interpretive methodologies. As already discussed, the Court's holding with respect to the major issues in the case was controlled by longstanding practice of the executive branch.¹⁸⁰ Significantly, however, the Court turned to longstanding practice only after concluding that the constitutional text—together with evidence of original meaning—was ambiguous.¹⁸¹ This sequencing harkens back to Chief Justice Marshall's statement in *McCulloch* that it is in the case of a "doubtful question" that the "practice of the government" should be consulted.¹⁸²

¹⁷⁹ *McPherson v. Blacker*, 146 U.S. 1, 27 (1892).

¹⁸⁰ *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2573 (2014) ("[W]e are reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long.").

¹⁸¹ *Id.* at 2561.

¹⁸² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) ("But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice.").

While it is not essential that in every case a court begin from first principles—as discussed above, it is legitimate for a court to look to precedent alone—there can be good reasons for a court to go back and reexamine whether it was proper to adopt certain doctrines in the first instance. The meaning of the Constitution may be permanent, but the doctrines used by the courts to effectuate that meaning are not.

One of the concerns about stare decisis is that the evolution of constitutional meaning can get increasingly remote from the original meaning and purpose of the constitutional provision. Stare decisis can be like the children's game of "telephone," where the first player whispers a message to the next who whispers it to the next, and so forth, until by the end the message "the moon is full" is repeated as "Mary is bashful." That happens, sometimes, in constitutional law. For example, multiple precedents under the Confrontation Clause muddled the doctrine of when criminal defendants are entitled to cross-examine accusers in court—leading the Court to look back at the original meaning and start again on a path more consistent with the Clause's historical origins.¹⁸³ The Court's school aid cases under the Establishment Clause were similarly bogged down in a series of inconsistent and inexplicable distinctions, leading the Court to go back and reexamine its premises as well.¹⁸⁴ The Court's cases involving the Removal Power have evolved into a doctrine about Congress's lack of power to remove executive officers, to the neglect of the original idea that President needs the power of removal to carry out his duty to "take Care" that the law be faithfully executed. One of the virtues of originalism is that it can provide a legitimate standpoint for correcting a line of precedent that has ceased to make much sense.

Unless there is remaining uncertainty about constitutional meaning based on text, history, practice, and precedent, there is no warrant for proceeding to the final step, whether that be use of judicial restraint or the normative approach. If a law or government action violates the Constitution under text, history, practice, or precedent, the court has a duty to invalidate the law.

Is a court ever justified in holding an action "unconstitutional" that comports with the text, squares with the original meaning of the constitutional provision, has been repeatedly upheld by relevant courts or other bodies, and enjoys the support of current-day representative institutions? I would say not.

A test case would be capital punishment. The moral and practical arguments for abolishing the death penalty are many and powerful (though there are arguments on the other side, too).¹⁸⁵ But the legal argument that capital

¹⁸³ See *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

¹⁸⁴ See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding a law providing tuition aid to students enrolled in certain public and private schools including religious schools); *Mitchell v. Helms*, 530 U.S. 793 (2000) (upholding a law funding educational institutions including religious institutions).

¹⁸⁵ See, e.g., Dawinder S. Sidhu, *On Appeal: Reviewing the Case Against the Death Penalty*, 111 W. VA. L. REV. 453 (2009).

punishment is categorically unconstitutional is extremely weak. The text of the Cruel and Unusual Punishment Clause leaves the question open, while the text of the Due Process Clause, through which the Eighth Amendment is applicable to the States, is unequivocal. If no person may be deprived of life without due process of law, it follows that persons *may* be deprived of life *with* due process of law. There is no substantial evidence that any significant portion of the population at the time of the adoption of the Eighth or Fourteenth Amendment understood the Constitution to prohibit capital punishment.¹⁸⁶ Nor has the longstanding practice of the nation rejected it—though it is possible that that could change. Even when the capital punishment statutes of every state were invalidated in *Furman v. Georgia*,¹⁸⁷ a large majority of the states reenacted capital punishment statutes under the new standards.¹⁸⁸ And the precedents of the Supreme Court have repeatedly rejected the claim that the Constitution categorically forbids all capital punishment.¹⁸⁹ It is plain beyond question that, under all standard legal authorities, capital punishment is constitutionally permissible—unless the normative views of the current Justices trump everything. I maintain that such normative jurisprudence crosses the line into usurpation of the legislative function.

CONCLUSION

The various approaches to constitutional interpretation are typically presented in isolation as if the approaches are disconnected rivals. I have attempted to show that the principal methodologies logically arise from the intersections of two considerations: time and institutions. Each of the principal methodologies reflects a focus on how a particular set of institutions interpreted the constitutional principle within a particular time frame. I have further attempted to show that constitutional interpretation requires reference to all of the principal methodologies—with the possible exception of the normative approach, which threatens to erase the distinction between judge and legislator. The modes of interpretation can be seen as a series of successive filters. If the text does not resolve the question, we turn to evidence of

¹⁸⁶ See, e.g., Michael J. Perry, *Is Capital Punishment Unconstitutional? And Even If We Think It Is, Should We Want the Supreme Court to So Rule?*, 41 GA. L. REV. 867, 883-84 (2007).

¹⁸⁷ 408 U.S. 238, 239-40 (1972).

¹⁸⁸ See Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 48 (2007) (“By May 1973, thirteen states had new death penalty statutes, including New Mexico, which had abolished the death penalty on its own in 1969. By *Furman*’s one-year anniversary, twenty states had restored the death penalty—and by 1976, that number had grown to thirty-five.”).

¹⁸⁹ See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the Eighth Amendment bars capital punishment of persons under the age of 18 at the time of their offense); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the Eighth Amendment bars capital punishment of severely intellectually impaired individuals).

historical meaning. If that does not resolve the question, we look to how courts and other bodies have interpreted the provision over time. If, at the end of the process, the government action under challenge is within the range of plausible remaining interpretations, judicial restraint counsels that the case is over because there is no legitimate basis for holding the action unconstitutional.

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