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ARTICLES

THE SEDIMENTARY CONSTITUTION

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INTRODUCTION.....	2
I. ORIGINALISM, LIVING CONSTITUTIONALISM, AND THE PROBLEM OF FIDELITY	9

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A. 1787-1870: <i>Originalism, Civil War, and the Origins of the Living Constitution</i>	11
B. 1870-1938: <i>Originalism and Living Constitutionalism in Competition</i>	15
C. 1954-1973: <i>Embracing Both Living Constitutionalism and Originalism</i>	21
D. 1973-1997: <i>The Court and the Academy at the Extremes—Fidelity, Antifidelity, and Strained Reconciliation</i>	25
II. SEDIMENTARY CONSTITUTIONALISM.....	33
A. <i>The Metaphor of the Sedimentary Constitution</i>	36
B. <i>The Inevitability of Sedimentary Interpretation</i>	44
1. The Problem of the Written Constitution.....	44
2. Originalism's Failure: Anachronistic History	47
3. Living Constitutionalism's Failure: The Inevitability of History	51
4. Solving the Puzzle of Article V	55
C. <i>The Methodology of Sedimentary Interpretation</i>	57
1. <i>Brown v. Board of Education: Ignoring History</i>	67
2. Privacy Cases: Right History, Wrong Theory.....	71
3. <i>Washington v. Glucksberg: Sedimentary Interpretation</i>	75
III. HARD QUESTIONS: RECONCILIATION, CONTESTABILITY, AND COMPETENCE	77
A. <i>The Problem of Reconciliation</i>	78
B. <i>The Contestability of History</i>	80
C. <i>The Role of Judges</i>	85
CONCLUSION	90

INTRODUCTION

The function of the Justices . . . is to immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and in the sediment of history which is law. . . . The Justices will then be fit to extract "fundamental presuppositions" from their deepest selves, . . . in fact from the evolving morality of our tradition.

—Alexander Bickel¹

Sir Charles Lyell's *Principles of Geology*² forever altered the western world's understanding of the interrelation between past and present. As revolutionary in its time as Charles Darwin's *On the Origin of Species*,³ Ly-

¹ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 236 (1962).

² 1 CHARLES LYELL, *PRINCIPLES OF GEOLOGY* (Univ. of Chicago Press 1990) (1830).

³ CHARLES DARWIN, *THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION OR THE PRESERVATION OF FAVORED RACES IN THE STRUGGLE FOR LIFE*. (D. Appleton & Co. 1923) (1859).

ell's treatise stretched the Earth's history from biblical millennia into geologic eons.⁴ Answering those who claimed that geologic formations were shaped primarily by unusually violent, catastrophic events of the past, Lyell demonstrated that the present shape of the earth was largely the result of many powerful forces operating very slowly over time.⁵ The planet's topography, Lyell explained, was the result of the daily operation of wind, rain, erosion, and sedimentation, as well as the usually imperceptible movement of land masses over millions of years.⁶ To understand the present, therefore, one must trace the evolution of the past, including not only its wrenching, transformative events, but also the slow process of gradual change.

As it is with geology, so it is with nations. Each is "the result of a long succession of events," "of many antecedent changes, some extremely remote and others recent, some gradual, others sudden and violent."⁷ These events, gradual and sudden, remote and recent, comprise the history that shapes a nation. Those who want a deeper understanding of what constitutes a nation in the present must therefore study that nation's entire past.

There has been a great deal of talk lately in the circles of constitutional law and theory about "fidelity" to the Constitution.⁸ The question seems to be whether it is sensible, or even possible, to remain faithful to a constitu-

⁴ See ALEC R. VIDLER, *THE CHURCH IN AN AGE OF REVOLUTION* 114 (1990) ("[T]he 1830s books by Sir Charles Lyell . . . established the geological succession of rocks and fossils, and showed the world to be much older than the accepted date for the Garden of Eden."); see also JOYCE APPLEBY ET AL., *TELLING THE TRUTH ABOUT HISTORY* 53 (1994) ("When the process of creating modern history was completed, Biblical time lay in ruins and the dreams of millenarians came to be seen as grand self-delusions.").

⁵ See 1 LYELL, *supra* note 2, at 79-80.

⁶ See RICHARD D. ALTICK, *VICTORIAN PEOPLE AND IDEAS* 223 (1973) (describing Lyell's theory on the causes of geological change).

⁷ 1 LYELL, *supra* note 2, at 1.

⁸ See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* vii-xiii (1997) [hereinafter *MATTER OF INTERPRETATION*] (describing Scalia's method of looking for the original meaning of the Constitution); Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 383 (1997) (providing a critical analysis of "scholarly strategies that seek intermediary solutions—that is, ameliorating the dead-hand problem while maintaining fidelity to the Constitution"); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1171 (1993) [hereinafter Lessig, *Fidelity in Translation*] (suggesting that "we rethink our ideas of fidelity and change with what is by now quite an old trope: translation"); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 395 (1995) [hereinafter Lessig, *Fidelity and Theory*] (proposing "a theory to explain how new readings of the Constitution may maintain fidelity with past understandings of the document's meaning and purpose"); Symposium, *Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247 (1997) (presenting various articles and commentary on fidelity to the Constitution). See generally Symposium, *Originalism, Democracy, and the Constitution*, 19 HARV. J.L. & PUB. POL'Y 237-531 (1996).

tion written more than 200 years ago and amended only sporadically thereafter.⁹ This question is not unique to our age. Until the latter half of the nineteenth century, constitutional theory and practice sought a relative continuity with the Founders' design. Since that time, however, as the nation has experienced constant change, a different strain of thought—the idea of a “living Constitution,” one that is interpreted as evolving to keep pace with current events—has competed with originalism. The question, raised persistently as we move further and further from the time of the Founding, is whether we realistically can, or should, continue to remain faithful to the Founders' written Constitution.

The very discussion of fidelity reveals an odd mindset about American constitutionalism, one that is discontinuous when it comes to constitutional history. To listen to discussions of fidelity, one cannot help but conjure up an image of the United States poised at the turn of another century, yet tethered directly to the world of the 1780s. It is a weary fact of constitutional interpretation and constitutional theory that when lawyers, judges, and legal academics discuss our *historical* Constitution, they usually are referring to a Constitution written in 1787 and amended formally on occasions thereafter.¹⁰ As Larry Kramer recently wrote: “What . . . scholars all share in

⁹ See J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703, 1703 (1997) (suggesting that the most important question about fidelity, “whether the Constitution deserves our fidelity,” is often overlooked); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 *GEO. L.J.* 1765, 1796 (1997) (“The question of *why* the Constitution, largely written by generations long dead, should bind us today, is a hotly contested question of political theory.”); Richard H. Fallon, Jr., *The Political Function of Originalist Ambiguity*, 19 *HARV. J.L. & PUB. POL'Y* 487, 490-91 (1996) (arguing that it would be “political or intellectual hubris” to ignore how the Constitution has changed “with the passage of time, the entrenchment of nonoriginalist practice, and the accretion of precedent”); Michael J. Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 *FORDHAM L. REV.* 1739, 1752-56 (1997) (contending we neither can, nor should be, faithful to the Constitution); Michael S. Moore, *The Dead Hand of Constitutional Tradition*, 19 *HARV. J.L. & PUB. POL'Y* 263, 263-73 (1996) (attempting, and failing, to find a satisfactory answer to why “those who preceded us [should] dictate the ideals by which our generation lives”).

¹⁰ Originalism is much mooted, and mostly discounted. See discussion *infra* Part I. Yet, despite widespread criticism of originalism, much of constitutional scholarship continues to be of this genre. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 57 (1991) (referring to original documents to conclude that the Founders intended a dualist democracy); PHILLIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 9-24 (1982) (referring exclusively to originalist history when discussing “historical argument”); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* at xv (1996) (seeking to present a contextually grounded account of the adoption of the Constitution to provide a basis for those seeking to find its original meaning); Akhil Reed Amar, *Sixth Amendment First Principles*, 84 *GEO. L.J.* 641 (1996) (offering an originalist framework for understanding the Sixth Amendment); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 *HARV. L. REV.* 757 (1994) [hereinafter Amar, *Fourth*

common, . . . is a belief that when we ask about the role of history in constitutional interpretation we are asking about the Founding. . . . [C]onstitutional theory can fairly be described as 'Founding obsessed' in its use of history."¹¹

The obsession with original meaning, as Kramer pointed out,¹² almost entirely ignores the intervening 200 years of constitutional history. By the same token, it is precisely because our historical understanding of the Constitution is so predominantly originalist that when the tension between founding intentions and present needs becomes too sharp, the very same lawyers, judges, and academics flee history in favor of the "living Constitution." Time and again, judges have jettisoned history when founding intentions seemed inconsistent with present needs and understandings. Scholars have done the same, urging—particularly in times of rapid change or pressing need—that we abandon original views and interpret the Constitution to address the problems of the present day world.¹³

This Article challenges common thinking about the use of history in constitutional interpretation.¹⁴ It seeks to replace the apparent choice between anachronistic originalism or non-historical living constitutionalism with an approach that takes *all* of our constitutional history into account. This Article makes a simple claim: history is essential to interpretation of

Amendment] (offering an originalist framework for understanding the Fourth Amendment); Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995) (offering an originalist framework for understanding the Fifth Amendment); Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1352-55 (1996) (describing the original motivations for having senators elected by state legislators at the time of the Founding and describing the change to direct election under the 17th Amendment); Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1555-1632 (1995) (discussing the Founders' understanding of the First Amendment and the implications of that understanding for the Fourteenth Amendment that was framed by the Reconstructionist Congress as well as the Religious Freedom Restoration Act); Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 505 (1997) (discussing the debates surrounding the passage of the 17th Amendment and the consequences thereof).

¹¹ Larry Kramer, *Fidelity to History—And Through It*, 65 FORDHAM L. REV. 1627, 1628 (1997). Professor Kramer's excellent essay shares much in common with the concerns that this Article expresses about the anachronistic nature of originalism.

¹² See *id.* at 1628, 1638-39 (stating the importance of studying more than just the Founding, which is contrary to the practice of many constitutional scholars).

¹³ See *infra* Part I for a historiography of these developments.

¹⁴ Writing in this area, scholars often refer without sharp delineation to "history," "tradition," "custom," "convention," and the like, even though all of these terms could be understood more specifically. See Eric Hobsbawm, *Introduction to THE INVENTION OF TRADITION*, 1, 1-5 (Eric Hobsbawm & Terence Ranger eds., 1995) (drawing distinctions between these terms). In this Article, the term "history" is intended to be all encompassing.

the Constitution, but the relevant history is not just that of the Founding, it is that of *all* American constitutional history.¹⁵ Only by taking all of that history into account is it possible to arrive at an understanding of today's constitutional commitments.

This claim about historical interpretation of the Constitution rests on a very different notion of fidelity, one of fidelity to the Constitution itself, rather than to its Framers. The United States Constitution is not the Constitution of 1787. It is always new, and yet always old, endlessly worked and reworked since the time of the Founding.¹⁶ The Founders' Constitution has been layered over constantly with popular understandings—some consistent with Founding-era notions and some that deviate in substantial ways. Some of these practices are inscribed in text; many are not. They are found, rather, in the decisions of the Supreme Court, in statutory law, in the actions of our governmental bodies, in the works of our forebearers, and the common practices of our people—in all of the sources that reveal the deeper commitments that we share. As time has passed, these decisions, these laws, these practices, these commitments have all turned to rock beneath us, hardened by the passage of time. This sedimentary rock on which we stand is *our* Constitution.

Although few might quibble with this description of constitutional evolution, common reliance on history to interpret the Constitution is seriously inconsistent with it. Time and again, we mine the events of 1787 as though they are determinative. At the same time, we pay (or profess to pay) little, if any, attention to the intervening 200 years of constitutional history. We look regularly for answers at the base of our mountain, when they are there in the soil and silt at our feet. Our understanding of the Constitution is anachronistic, cheating the trials and successes of our many constitutional ancestors. It is only because of this (mis)understanding that we can even ask the question of fidelity.

True fidelity to the Constitution requires that we be faithful to what history reveals as *this* generation's deepest, most enduring commitments,

¹⁵ See Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1050 (1981) ("In making [constitutional] decisions . . . the past to which we turn is the sum of our history, not merely the choices made by those who drafted and ratified the Constitution."); see also *id.* at 1071 ("The relevant past for purposes of constitutional law . . . is to be found not only in the intentions of those who drafted and ratified the document but in the entirety of our history.").

¹⁶ See STEPHEN HOLMES, *PASSIONS AND CONSTRAINT* 161 (1995) ("The process of framing a constitution, . . . continues long after a constituent assembly has been dissolved. Indeed, it never stops. . . . Freed from the enormous task of launching and legitimating a new regime in a time of troubles, latecomers can devote themselves to achieving particular political goals.").

not just those of the founding generation. To be sure, there often may be no sharp separation between the two. It is the very nature of history that the Founders' commitments have been passed along to us through the generations. It is also true, however, that those commitments have been slowly, but perceptibly, altered in some critical ways. If fidelity is our goal, then it is to all of our constitutional history—and not just the Founding—that we must be faithful. The role of the constitutional interpreter is to reconcile our deepest constitutional commitments, revealed by all of our constitutional history, with today's preferences.

Similarly, for the very reason that constitutional values are both passed from generation to generation and gradually altered as they are passed, the true nature of *our* constitutional commitments will be found far closer to the surface of our constitutional history than might be imagined. Each generation's constitutionalism is an act of both fidelity and creation. The Constitution that is passed on by each generation is the product of both that generation's fidelity to past commitments and its application of those commitments to new problems. Because deeply held constitutional commitments are passed from generation to generation (albeit slowly altered while they are passed), today's constitutional interpreter is, in most cases, not going to have to mine far below the surface to identify enduring commitments. It is only in unsettled times, times of rapid change, or when our commitments have become uncertain, that we may have to return to earlier eras to find our way.

This Article offers an interpretive methodology to resolve the tension between originalism and living constitutionalism. It argues for grounding constitutional interpretation in all of our constitutional history, rather than in the history of the Founding alone. Part I is a historiography of the use of history in constitutional interpretation, exploring the shifting of views between originalism and living constitutionalism. When constitutional interpreters turn to history, they often turn to originalist history, seeking answers to constitutional questions in the Founders' intentions. As time has passed since the Founding, however, it has become more difficult to bring Founding-era solutions to bear on modern problems. Thus, at other times, interpreters eschew history altogether, focusing instead on the "living Constitution." Part I also explains that when lawyers, judges, and legal academics turn to originalist history, scholars of history regularly rise up to criticize the law's use of history as "law office history" or history by "judicial fiat." This Part concludes by observing how, in recent times, the twin problems of fidelity and history have become acute. While the Supreme Court continues to resolve very modern constitutional problems with justifications purportedly drawn from increasingly remote and distant founding moments, con-

stitutional scholars advance theories of interpretation that—although extremely clever—can hardly be called faithful to the Constitution or good historical practice.

Part II then presents a methodology of constitutional interpretation that is both better history and more faithful constitutionalism. Two ideas about the relationship between history and constitutionalism are fundamental to this Part. The first is that when interpreting the Constitution we must, and necessarily do, take *all* of our history into account, not just the history of the Founding era. The second is an understanding that because all of our accumulated history is immanent in us, our constitutional commitments may be found in more recent, rather than more ancient, history.

Although the methodology of constitutional interpretation suggested here is quite simple, the process of interpretation it demands is fraught with difficult questions. No method of constitutional interpretation will yield easy or certain answers; it is proper for us to be wary of any theory that purports to suggest otherwise. What is important in choosing any constitutional interpretive methodology is not whether it provides easy answers, but whether it focuses our attention on the correct, hard questions. Part III takes up some of the difficult questions posed by the idea of sedimentary interpretation.

Part III.A addresses the problem of “reconciliation.” The task of separating out present preferences from deeper commitments will not be an easy one, especially considering that our enduring commitments rest far closer to the surface of our history than is commonly thought. It is human nature to seek to reconcile the two in favor of present preferences, and it takes an act of unusual discernment and will to separate the two.

Part III.B takes up the problem of “contestability.” The American people are not a monolith, so the history that reveals our deepest commitments will be told differently by different interpreters. Thus, the commitments revealed by history necessarily will be contested; the societal process of interpretation will not yield certain or unequivocal answers. This difficulty is a virtue, not a vice, however. Constitutional interpretation is the process by which we, as a people, identify our generation’s understanding of its deepest commitments. It is from the struggle over a consensual historical narrative that those commitments emerge.

Finally, Part III.C discusses the problem of “competence.” In our legal culture, judges play an important role in identifying constitutional commitments. This raises the question of judicial competency to ask historically biased questions about America’s constitutional commitments, and how appropriate it is to vest in judges the authority to answer such questions. This last Part makes the crucial point that, although judicial decisions provide a

focal point for telling the history of our constitutional commitments, this task does not fall solely, or even finally, on the shoulders of judges. Rather, all of society engages the judges in a dialogue concerning this historical narrative.

I. ORIGINALISM, LIVING CONSTITUTIONALISM, AND THE PROBLEM OF FIDELITY

Temporary delusions, prejudices, excitements, and objects have irresistible influence in mere questions of policy. . . . The constitution is not to be subject to such fluctuations. It is to have a fixed, uniform, permanent construction.

—Joseph Story¹⁷

History is more or less bunk. . . . We want to live in the present and the only history that is worth a tinker's damn is the history we make today.

—Henry Ford¹⁸

History has played a vital, albeit contentious, role in constitutional interpretation throughout the 200-plus years since the Founding. This Part is a historiography. It examines, from the Founding-era to the present, how judges, lawyers, and legal academics have alternated between originalist understandings and living constitutionalism, depending upon whether the pressing need was to maintain “fidelity” to the Constitution as written or to keep the Constitution current with the times.¹⁹ Contemporary scholars try to resolve these twin concerns of history and fidelity, but their theories, while creative and helpful, fall short of “demonstrating why and how historical materials are relevant to the present resolution of present constitutional problems.”²⁰

As “originalism” is used here, it refers to the practice of explicitly returning to Founding-era understandings and intentions to reach conclusions

¹⁷ 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 426, at 410 (Fred B. Rothman & Co. 1991) (1833).

¹⁸ CAROL GELDERMAN, HENRY FORD: THE WAYWARD CAPITALIST 177 (1981) (quoting an interview by Charles Wheeler with Henry Ford, CHI. TRIB. (May 25, 1916)).

¹⁹ See Sandalow, *supra* note 15, at 1033 (juxtaposing those who believe the “boundaries of permissible constitutional interpretation” are “set by the intentions of those who drafted and ratified the [Constitution]” with those who believe they are “subject to continuous adjustment”).

²⁰ John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 502 (1964); see also Rebecca Brown, *Tradition and Insight*, 103 YALE L.J. 177, 203 (1993) (noting the absence of “a theory explaining why tradition is relevant in the first place”); Kramer, *supra* note 11, at 1630 (arguing that one cannot answer the problems of originalism “without first articulating a theory about why historical evidence should matter”).

about what the Constitution means today.²¹ “Living constitutionalism,” by contrast, is the practice of interpreting the Constitution, usually in a non-historical way, to meet the needs of the present.²² This is not to say that

²¹ There are many varieties of originalism. Richard Kay describes four types of originalists: those who emphasize (1) original text, (2) original intentions, (3) original understandings, or (4) original values. See Richard S. Kay, “Originalist” Values and Constitutional Interpretation, 19 HARV. J.L. & PUB. POL’Y 335, 336-40 (1996); see also MICHAEL PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 54 (1994) (using interpretive discretion to distinguish his version of originalism (weak) from judicial minimalism (strong)); Paul Brest, *The Misconcerned Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204-05 (1980) (distinguishing strict from moderate originalism); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1746 (1996) (distinguishing among right originalists, left originalists, historicists, and those who privilege original intent); David Couzens Hoy, *A Hermeneutic Critique of the Originalism/Nonoriginalism Distinction*, 15 N. KY. L. REV. 479, 484-85 (1988) (distinguishing between strong, moderate, and weak originalism, using interpretive discretion as the salient characteristic); Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL’Y 311, 312-13 (1996) (describing hard and soft originalism). From the historical perspective of this Article, these intra-originalist varieties are irrelevant. Every originalist agrees that the history surrounding the Constitution’s enactment is of exclusive importance; an originalist is an originalist, no matter what his or her stripe.

Whose understandings govern is another intra-originalist debate. The issue is whether the intentions of the Framers, ratifiers, or the average Founding-era citizen controls. See, e.g., ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990) (using an amalgamation of ratifier and average citizen understanding); RAKOVE, *supra* note 10, at 11-22 (explaining the salient differences between Framers and ratifiers as interpretive sources); ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts*, in MATTER OF INTERPRETATION, *supra* note 8, at 3, 23-25 (arguing for a textualist originalism that focuses on the original meaning as perceived by the average citizen); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 512 (1988) (“When we talk popularly about the Framers’ intent, we really should be more precise and refer to the Ratifiers’ intent . . .”). Once again, these distinctions are immaterial for present purposes. Regardless of whose understandings are relevant, the controlling historical period remains the same.

²² The provenance of the idea of a “living” Constitution is unclear. Oliver Wendell Holmes’s statement from *Gompers v. United States*, 233 U.S. 604 (1914), that “provisions of the Constitution . . . are organic, living institutions,” is one of the earliest references to this idea. *Id.* at 610. But, Edward Corwin provided the most vivid early description in 1925:

The proper point of view from which to approach the task of interpreting the [C]onstitution is that of regarding it as a living statute, palpitating with the purpose of the hour, reenacted with every waking breath of the American people, whose primitive right to determine their institutions is its sole claim to validity as a law and as a matrix of laws under our system.

EDWARD S. CORWIN, AMERICAN CONSTITUTIONAL HISTORY 108 (Alpheus Mason & Gerald Garvey eds., 1964). Howard Lee McBain’s was the first book-length study of what he called the “living” body of the law, “borrowed from the life of man.” HOWARD LEE MCBAIN, THE LIVING CONSTITUTION 3 (1927). Corwin’s and McBain’s image of a living, breathing Constitution must also be viewed against Christopher Tiedeman’s nineteenth-century description of an “unwritten” Constitution. See CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 16 (Putnam 1978) (1890). Following Corwin and McBain, Karl Llewellyn gave depth to the idea by describing our “working” Constitution “as

originalism cannot account for present-day values or that living constitutionalism is free from historical influences. But, as gross generalizations, these practices account for much of the 200-year-old debate regarding the use of history in constitutional interpretation.

A. *1787-1870: Originalism, Civil War, and the Origins of the Living Constitution*

In the beginning was the Constitution; and the Constitution was with the founding Fathers; and the Constitution was the founding Fathers.

—Charles A. Miller²³

From its first term in the late eighteenth century through much of the nineteenth century, the Supreme Court often interpreted the Constitution in a manner consistent with the original intent of the Founders, a practice that apparently caused little notice or concern.²⁴ The Court's very early constitutional opinions reflected an intimate knowledge of the Framers' design because the Justices' own memories bridged the temporal distance between the Founding and the case at hand.²⁵

being in essence not a document, but a living institution built (historically, genetically) in the first instance *around* a particular Document." Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 3 (1934).

²³ CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 181 (1969).

²⁴ See PAUL W. KAHN, *LEGITIMACY AND HISTORY: SELF GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 32-65 (1992) (describing this practice as "maintenance"); Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191, 192 (1997) (claiming that the most notable, early assumption about American constitutionalism was "that the Constitution was like a fixed statute or an agreed-upon contract in the sense that it represented a discrete act of lawmaking by discernible lawmakers and thus should be interpreted with their intentions in mind").

²⁵ Chief Justice John Marshall provides the best example of such an instinctive originalist jurist. For Marshall, the Constitution "was the distillation of a history that [he] knew well; and his opinions on the Court, which contain abundant evidence of his historical interests, firmly established the validity of history as a principle of adjudication in constitutional law." MILLER, *supra* note 23, at 26 n.54; see also Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 123-24 (describing Marshall as a "walking historical 'primary source'"). But see Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 WIS. L. REV. 301, 302 (suggesting that Marshall synthesized and manipulated historical precedent to expand the scope of judicial review); Christopher L. Eisgruber, *John Marshall's Judicial Rhetoric*, 1996 SUP. CT. REV. 438, 447-48 (describing Marshall's use of argument, not precedent, to demonstrate the workability of the national government).

Ironically, Marshall also provided the seeds for nonoriginalist interpretation. In *McCulloch v. Maryland*, he wrote,

Even after the founding generation passed, the Justices continued to rely upon original intent to maintain the Constitution that the Founders had created.²⁶ In *Scott v. Sanford*,²⁷ the Supreme Court's most incendiary decision of the century, both the majority opinion and the primary dissenting opinion claimed an originalist justification for the conclusions which would divide the Nation. Chief Justice Taney's opinion for the *Dred Scott* majority interpreted the Constitution's meaning as synonymous with the original intent of its Founders. In his words, "as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its Framers."²⁸ If the Constitution was a white man's document in 1789,²⁹ then it was still one in 1857.³⁰ Even Justice McClean's dissenting opinion,

[W]e must never forget that it is a *constitution* we are expounding

. . . .

. . . [one] intended to endure for ages to come, and, consequently, [one that must] be adapted to the various *crises* of human affairs. . . . It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.

17 U.S. 159, 200, 203-04, 4 Wheat. 316, 407, 415 (1819). Marshall, of course, was speaking not of all constitutional interpretation, but of the expansive interpretation of Congress's enumerated power. See Frank H. Easterbrook, *Alternatives to Originalism*, 19 HARV. J.L. & PUB. POL'Y 479, 482-83 (1996). Nonetheless, these words from *McCulloch* gave living constitutionalism its mantra. See, e.g., Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1256-57 (1984) (claiming that Justice Marshall's view of a living constitution is widely accepted); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 710 (1975) (noting that proponents of living constitutionalism endorse Justice Marshall's view of an enduring and adaptable Constitution).

²⁶ See KAHN, *supra* note 24, at 9-64 (discussing the shift from "Constitution making" to "constitutional maintenance," once the founding generation passed); Gillman, *supra* note 24, at 192 ("From the time of the founding throughout the nineteenth century, there was a consensus in court opinions and legal treatises that judges were obligated to interpret the Constitution on the basis of . . . original meaning.").

²⁷ 60 U.S. (19 How.) 393 (1857).

²⁸ *Id.* at 426.

²⁹ See *id.* at 406-12 (arguing at length that the Constitution did not apply to black Americans).

³⁰ See *id.* at 426 ("No one . . . supposes that any change in public opinion or feeling in relation to this unfortunate race . . . should induce the court to give the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted."). Despite the blatantly originalist tone of Taney's opinion, several contemporary originalists characterize *Dred Scott* as the first incarnation of judicial activism. They must do so in order to distinguish their preference for originalist methodology from its unsavory results. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 998-1002 (1992) (Scalia, J., concurring in part and dissenting in part) (suggesting that *Dred Scott* initiated a pattern of judicial activism which led to the current Court's belief in an evolving Constitution); BORK, *supra* note 21, at 28-34 (arguing that Taney distorted the original meaning of the Constitution to further his view of the politics and morality of slavery); William H. Rehnquist,

which constructed an exhaustive argument to the contrary, drew primarily from the intentions of the same Founders.³¹

Following the turmoil of the Civil War, however, originalism became more difficult to justify: the temporal distance from the Founding widened, and the havoc of nationwide conflict emphasized that distance. In the words of Karl Llewellyn, while the Constitution was young “‘intent’ contribute[d] to its stability,” but, as the Constitution grew older, “the less the need for such treatment, and the greater the need for departing from it.”³² In the wake of the Civil War, some prominent constitutional theorists like Sidney George Fisher and Christopher Tiedeman began to rebel against originalism and the destruction it wrought, insisting instead that the Constitution was an evolving document, whose meaning developed apace with society. In Fisher’s words, “The Constitution has failed to protect us from the calamity of a bloody and destructive Civil War. . . . [I]ts defects must be corrected.”³³ “No people are ruled by dead men, or by the utterances of dead

The Notion of a Living Constitution, 54 TEX. L. REV. 693, 700-01 (1976) (“The apogee of the living Constitution doctrine during the nineteenth century was the Supreme Court’s decision in *Dred Scott v. Sandford* [sic.]”); cf. Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 273 (1997) (arguing that *Dred Scott* can be manipulated to discredit any contemporary constitutional theory).

³¹ For Justice McClean, slavery was “emphatically a state institution,” which the Founders themselves expected would expire in twenty years. See *Dred Scott*, 60 U.S. (19 How.) at 536 (McClean, J., dissenting). McClean preferred “the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution,” rather than following the majority’s fealty to “a traffic which is now declared to be piracy, and punished with death.” *Id.* at 537.

³² Llewellyn, *supra* note 22, at 13; see also MILLER, *supra* note 23, at 26-27 (“[W]hen memory could no longer serve to explicate the original understanding of the Constitution and when ongoing history—the political, economic, and social changes since 1789—pressed increasingly for recognition in constitutional law, the two types of history diverged permanently.”); RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 43 (2d ed. 1996) (“[The expansion of judicial power was] bound to be magnified by time. With every passing year, the Constitution receded further into history. This recession made the reconstruction of the intended meaning of the constitutional text more difficult and thus progressively freed the judges to imbue the Constitution with their own values.”); Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 45 (1997) (observing that “as the temporal gap between law-making and law-application widens, the normative consensus that once endorsed the originally understood meaning of a constitutional provision may weaken or even dissipate completely, and the factual or normative predicates may be altered”).

³³ SIDNEY GEORGE FISHER, *THE TRIAL OF THE CONSTITUTION* 55 (1862). For a more complete discussion of Fisher’s constitutional theory, including his notion of constitutional change outside of Article V, see KAHN, *supra* note 24, at 70-73. See also Gillman, *supra* note 24, at 214 (“The Constitution belongs to the people, and to the people of 1862, not to those of 1787.” (quoting FISHER, *supra*, at 96)).

men,³⁴ Tiedeman likewise argued. Living constitutionalism thus emerged from the destruction of the Civil War, as these scholars urged the Court to “recognize the present will of the people as the living source of law” and, “in construing the law, to follow, and give effect to, the present intentions and meaning of the people.”³⁵

Yet, the Supreme Court was not quick to adopt this idea of a living Constitution. In *Hepburn v. Griswold*,³⁶ for example, the Court explicitly rejected the evolutionary constitutional theories of Fisher and Tiedeman, whose “different views, never before entertained by American statesmen or jurists,” were developed “amid the tumult of the late civil war, and under the influence of apprehensions for the safety of the Republic.”³⁷ Instead, the Court adhered to “what was intended . . . in the minds of the people who ordained”³⁸ the Constitution.

³⁴ TIEDEMAN, *supra* note 22, at 150; *see also* KAHN, *supra* note 24, at 77-84 (showing the influence of nineteenth-century social evolution upon Tiedeman’s scholarship); Gillman, *supra* note 24, at 217-18 (“[Tiedeman’s] point . . . [was] to distinguish the written Constitution from the Constitution that ‘embodies the living rules of conduct,’ which for him was the ‘real constitution.’” (quoting TIEDEMAN, *supra* note 22, at 36)).

³⁵ TIEDEMAN, *supra* note 22, at 154. These sentiments were expressed as an explicit counterargument to the prevailing constitutional theory of Thomas M. Cooley, who believed that “[t]he object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it. In the case of all written laws, it is the intent of the law-giver that is to be enforced.” THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 55 (Da Capo Press 1972) (1868). Although Paul Kahn has attempted to portray Cooley’s constitutional theory as more evolutionary than originalist, *see* KAHN, *supra* note 24, at 73-77, Howard Gillman argues that Fisher’s and Tiedeman’s theories were more accurately a reaction against, rather than consistent with, that of Cooley. *See* Gillman, *supra* note 24, at 214-18.

³⁶ 75 U.S. (8 Wall.) 603 (1869).

³⁷ *Id.* at 625. Justice Miller responded to the majority’s vision of the Constitution by citing Chief Justice Marshall’s notion of a living Constitution from *McCulloch v. Maryland*. *See id.* at 629-31 (Miller, J., dissenting). This was the only time a Justice cited these words in support of living constitutionalism in the nineteenth century. *See* Morton J. Horwitz, *The Constitutionality of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 41 & n.48 (1993) (noting with astonishment that the Court only cited Marshall’s statement once during the nineteenth century).

³⁸ *Hepburn*, 75 U.S. (8 Wall.) at 622. This practice of reading the document in terms of its origins initially and paradoxically obscured even the most revolutionary changes to the Founders’ Constitution made by the Reconstruction Amendments. For example, rather than read those Amendments as fundamentally altering the original plan, the Court in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), failed to find in them “any purpose to destroy the main features of the [federalist] system,” *id.* at 82, as it was established at the Founding. Traditional, pre-Civil War deference to the states remained unchanged, notwithstanding the reconstructed Constitution. “[W]hatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery,” *id.* at 68, not state sovereignty. *See also* Plessy v. Ferguson, 163 U.S. 537, 544 (1896) (declaring that

B. 1870-1938: *Originalism and Living Constitutionalism in Competition*

Nonetheless, almost as soon as the Supreme Court rejected living constitutionalism, it began to embrace the practice. A mere year after *Hepburn* had dismissed Fisher and Tiedeman as radicals (and following some change in membership), the Supreme Court reversed *Hepburn* in the *Legal Tender Cases*.³⁹ Just one year after the *Civil Rights Cases*⁴⁰ had narrowly construed Congress's power under the Reconstruction Amendments as consistent with the "provisions of the original constitution,"⁴¹ the Court itself began the revolutionary practice of reviewing state legislation under the Constitution's new Due Process Clause. Thus, in *Hurtado v. California*,⁴² the Justices turned their backs on originalism to ensure the "progress [and] improvement" of the Constitution "in this quick and active age."⁴³ To hold otherwise "would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."⁴⁴

Then, in 1905, the Court delivered the decision that epitomized the era's replacement of originalism with a more timeless approach to constitutional interpretation: *Lochner v. New York*.⁴⁵ Today, there is considerable scholarly debate over whether the *Lochner*-era Court's methodology in cases involving economic legislation was consistent or not with Founding-era intentions.⁴⁶ But, what is beyond contest is that the opinions actually

the Fourteenth Amendment could "not have been intended to abolish distinctions based upon color").

³⁹ 79 U.S. (12 Wall.) 457, 553 (1870). Justice Strong's opinion for the majority drew strength from Chief Justice Marshall's statement in *Cohens v. Bank of Virginia*, "A constitution is framed for ages to come, and is designed to approach immortality as near as mortality can approach it . . . [I]ts framers must be unwise statesmen indeed, if they have not provided it . . . with the means of self-preservation from the perils it is sure to encounter." *Id.* at 533 (quoting *Cohens v. Virginia*, 19 U.S. 120, 174, 6 Wheat. 264, 387 (1821)).

⁴⁰ 109 U.S. 3 (1883).

⁴¹ *Id.* at 22. As in the *Slaughter-House Cases*, the Court in the *Civil Rights Cases* used its restrictive reading of the Thirteenth and Fourteenth Amendments to defer to state authority. Because the Civil Rights Act of 1875 had "nothing to do with slavery or involuntary servitude," *id.* at 31, Congress had no authority to outlaw public discrimination in the absence of state law or state action.

⁴² 110 U.S. 516 (1884).

⁴³ *Id.* at 529.

⁴⁴ *Id.*

⁴⁵ 198 U.S. 45 (1905).

⁴⁶ See generally Barry Friedman, *The Lesson of Lochner* (The History of the Counter-majoritarian Difficulty, Part II.B) (Jan. 1999) (unpublished manuscript, on file with authors) (detailing and addressing traditional and revisionist perspectives on the *Lochner* era). Several contemporary scholars believe that originalist views dominated the Court until the constitutional crisis of 1937, while others argue that the Justices used an evolutionary, living constitutional method during this period. Compare 1 ACKERMAN, *supra* note 10, at 81-104 (origi-

written by the Justices during this period were, for the most part, devoid of any serious attention to history or mention of the Founders. In *Lochner*, for example, Justice Peckham's majority opinion simply balanced New York's police power against the private liberty of contract.⁴⁷ In the Court's judgment, New York exceeded the health-related bounds of its police power when it limited the working hours of bakers to ten hours a day or sixty hours a week; ipso facto, New York had deprived the bakers and their employers of liberty without due process of law.⁴⁸ It could be, as some argue, that originalist principles were so ingrained at this time that the Justices simply did not feel compelled to talk explicitly about the Constitution's original meaning.⁴⁹ Or, it could be that the Justices paid little attention to history in their economic rights opinions until they got into trouble with a resistant public.⁵⁰ Whichever the case, the Supreme Court's economic due process opinions after *Lochner* are striking for their lack of explicit reliance on constitutional history or Founding-era intentions.⁵¹ The same was also true of Commerce Clause cases in which the issue was "the natural development of interstate commerce under modern conditions."⁵² Though there are rare ex-

nalist views), Gillman, *supra* note 24, at 224-40 (originalist views), Morton J. Horwitz, *Republicanisim and Liberalism in American Constitutional Thought*, 29 WM. & M. L. REV. 57, 57 (1987-88) (originalist views), and Horwitz, *supra* note 37, at 51-57 (originalist views), with KAHN, *supra* note 24, at 97-113 (living constitutional method), MILLER, *supra* note 23, at 30 (living constitutional method), Kelly, *supra* note 25, at 128 & n.25 (living constitutional method), and William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in the Nineteenth Century America*, 87 HARV. L. REV. 513, 560-66 (1974) (living constitutional method).

⁴⁷ See *Lochner*, 198 U.S. at 56.

⁴⁸ See *id.* at 64.

⁴⁹ See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 199-205* (1993).

⁵⁰ See MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 255-81* (1986) (discussing the public uproar and the attendant interest in constitutional history surrounding the Supreme Court's resistance to progressive economic legislation).

⁵¹ Instead, the "reasonableness" of challenged legislation under the circumstances was the Court's almost exclusive concern. For instance, in *Adair v. United States*, 208 U.S. 161 (1908), Justice Harlan, who dissented in *Lochner*, relied upon the Fifth Amendment to invalidate a federal statute protecting railroad unions as "an arbitrary interference with the liberty of contract," without any reference to originalist principles. *Id.* at 175. In *Coppage v. Kansas*, 236 U.S. 1 (1915), the Court, using almost identical reasoning, struck down a similar state statute as an unconstitutional exercise of police power under the Fourteenth Amendment. See *id.* at 11 (finding *Adair* to be "controlling upon the present controversy"); see also *Nebbia v. New York*, 291 U.S. 502, 525 (1934) (holding a New York statute that prevented price-cutting of milk by storekeepers to be constitutional, finding that "the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious"). See generally Friedman, *supra* note 46 (discussing the controversy over the use of "reasonableness" to assess the constitutionality of laws).

ceptions,⁵³ original intentions and historical discussions are noticeably absent from the Supreme Court's early twentieth-century decisions.

The paucity of historical discussion in the era's constitutional opinions changed conspicuously, however, with the onset of the New Deal. In the midst of the Great Depression, a contest between living constitutionalism and originalism suddenly erupted in *Home Building & Loan Ass'n v. Blaisdell*.⁵⁴ The Minnesota statute at issue in *Blaisdell* was politically significant because it enabled home owners to postpone the mortgage foreclosures that were then rampant. In upholding the statute against a Contracts Clause challenge, Chief Justice Hughes's image of a living Constitution was striking in its candor:

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a *constitution* we are expounding"—"a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."⁵⁵

⁵² *Stafford v. Wallace*, 258 U.S. 495, 518 (1922); see also *Hammer v. Dagenhart*, 247 U.S. 251, 275 (1918) (determining the constitutionality of a federal law prohibiting the shipment of goods produced by child labor by examining the "natural and reasonable effect" of the statute). Although the Justices split five to four, neither the majority nor the dissent in *Hammer* discussed the original meaning of the Commerce Clause. See also *Texas & New Orleans R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 570-71 (1930) (placing emphasis on Congress's ability "to take cognizance of actual conditions and to address itself to practicable measures," rather than to heed original constitutional intentions).

⁵³ One notable exception is Justice Sutherland's opinion in *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), in which he read the Nineteenth Amendment as originalist evidence that women's inferiority had reached the "vanishing point." *Id.* at 553. Justice Holmes, in dissent, stated it would take "more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account." *Id.* at 570 (Holmes, J., dissenting).

⁵⁴ 290 U.S. 398 (1934). With the exception of Justice Brandeis, the Justices in the *Blaisdell* majority were recent appointees. Justice Stone was appointed in 1925 by President Coolidge, and Justices Hughes, Roberts, and Cardozo were appointed by President Hoover between 1930 and 1932. See HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 194-208* (1992).

⁵⁵ 290 U.S. at 443 (emphasis added) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819)). Horwitz points out that this was only the fifth time, and the first since *Lochner*, that the Supreme Court invoked Marshall's famous phrase to promote the idea of a living Constitution. See Horwitz, *supra* note 37, at 56. Chief Justice Hughes in-

Such blatant anti-originalism provoked strong rebuke from Justice Sutherland, the most originalist Justice on the Court during this period. According to Justice Sutherland, “[a] provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time.”⁵⁶

Despite *Blaisdell*, the Court’s resistance to progressive economic reform in the face of national economic calamity eventually drove its majority back to the old habits of originalism. No longer could the Justices strike down legislation as unconstitutional without more substantial reasons than that it was “unreasonable.”⁵⁷ They had to explain to an ever-angrier public the reason that the Constitution mandated such a result, and the reason given was fidelity to original understandings. Thus, in 1936, Justice Butler delivered the era’s first originalist argument for finding economic legislation unconstitutional in *United States v. Butler*.⁵⁸ *Butler* was followed four months later by Justice Sutherland’s even stronger historical defense of the Court’s stand against the New Deal in *Carter v. Carter Coal*.⁵⁹ Finding the Bitumi-

cluded the language quoted above after Justice Cardozo agreed to withdraw the following concurrence:

To hold [the law constitutional] may be inconsistent with things that men said in 1787 when expounding to compatriots the newly written constitution. They did not see the changes in the relation between states and nation or in the play of social forces that lay hidden in the womb of time. . . . It is not in my judgment inconsistent with what they would say today, nor with what today they would believe, if they were called upon to interpret “in the light of our whole experience” the constitution that they framed for the needs of an expanding future.

Id. at 55 (quoting Justice Cardozo’s withdrawn concurrence).

⁵⁶ *Blaisdell*, 290 U.S. at 448-49 (Sutherland, J., dissenting). If, when framed and adopted, the Contracts Clause prohibited a state from postponing payment of a debt because of an economic emergency, to Sutherland, “it [was] but to state the obvious to say that it means the same now.” *Id.* at 449.

⁵⁷ The reasoning used in the first cases in which the Court struck down pieces of President Roosevelt’s New Deal agenda as unconstitutional bear little resemblance to the *Blaisdell* dissent. For example, in 1935, the Court, speaking through Justice Roberts, struck down the Railroad Retirement Act of 1934 as unconstitutional under both the Fifth Amendment’s Due Process Clause and the Commerce Clause without making any reference to original intent. See *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330, 374 (1935); see also *Morehead v. New York ex rel. Tiplido*, 298 U.S. 587, 618 (1936) (striking down New York’s minimum wage law as unconstitutional without reference to the original intent of the Fourteenth Amendment); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935) (finding the penal provision of the National Industrial Recovery Act of 1933 unconstitutional); *Panama Refinery Co. v. Ryan*, 293 U.S. 388, 432 (1935) (striking down the presidential invalidation provision of the National Industrial Recovery Act of 1933).

⁵⁸ 297 U.S. 1, 68 (1936) (holding that the Agricultural Adjustment Act of 1933 violated the Tenth Amendment and noting that the Tenth Amendment was intended to make clear that powers not explicitly granted to Congress were reserved for the states).

⁵⁹ 298 U.S. 238, 297 (1936).

nous Coal Conservation Act unconstitutional, Sutherland employed the understanding of the Constitutional Convention to limit Congress's plenary authority over the nation's welfare.⁶⁰

Originalist resistance to the New Deal was short-lived, however, and living constitutionalism soon regained the upper hand.⁶¹ After *Butler* and *Carter Coal*, President Roosevelt went on the offensive "to save the Constitution from the Court and the Court from itself."⁶² The entire tenor of the New Deal's criticism of the judiciary was that the judges' interpretations of the Constitution were behind the times.⁶³ During the "Court-packing" crisis of 1937, living constitutionalism regained prominence. In *West Coast Hotel v. Parrish*,⁶⁴ Chief Justice Hughes, echoing the nonhistorical, contextual themes he had articulated in *Blaisdell*, acknowledged that "the economic conditions which ha[d] supervened" since the Great Depression as well as "recent economic experience" had brought into "strong light" the need to uphold progressive legislation.⁶⁵ Responding to Hughes, the Court's conservative resistance offered their last, but most vehemently originalist, defense of a timeless, static Constitution that "does not change with the ebb

⁶⁰ See *id.* at 292-98 ("[The convention] made no grant of authority to Congress to legislate substantively for the general welfare . . .").

⁶¹ In some clear cases involving the structure of governing institutions, the Court continued, however, to return to founding principles to solve present controversies. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (presidential prerogative); *Myers v. United States*, 272 U.S. 52 (1926) (presidential removal power); *Massachusetts v. Mellon*, 262 U.S. 447 (1923) (grants-in-aid). For example, in the same term as that in which *Lochner* was decided, the Court in *South Carolina v. United States*, 199 U.S. 437 (1905), upheld Congress's power to tax a state agency on the basis of the Founders' intent. According to Justice Brewer's opinion for the majority:

The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now . . . "Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.

Id. at 448-49 (quoting *Scott v. Sandford*, 60 U.S. (19 How.) 393, 426 (1857)).

⁶² *President Franklin D. Roosevelt's Radio Address* (March 9, 1937), in GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 184 (13th ed. 1997).

⁶³ Hence, President Roosevelt, responding to the decision in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), objected to the Nation being "relegated to the horse-and-buggy definition of interstate commerce." President Franklin D. Roosevelt, *The 209th Press Conference*, 4 PUB. PAPERS 221 (May 31, 1935), quoted in WILLIAM E. LEUCHTENBERG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 90 (1995). Also, note the constant reference to the Justices as the "Nine Old Men." DREW PEARSON & ROBERT S. ALLEN, *THE NINE OLD MEN* (1974) (offering an anecdotal history of the Justices of the Supreme Court). See generally Barry Friedman, *The New Deal, and the Separation of Law and Politics* (Oct. 2, 1998) (unpublished manuscript, on file with authors) (explaining that the most frequent criticism of the New Deal Supreme Court was its failure to keep the Constitution current with the times).

⁶⁴ 300 U.S. 379 (1937).

⁶⁵ *Id.* at 390, 399.

and flow of economic events.”⁶⁶ The economic needs of the day proved otherwise, however. After the dissent in *West Coast Hotel*, originalism and historical analysis found little expression in the Court’s opinions undermining the constitutional status of economic rights.⁶⁷

The Supreme Court’s ambivalent use of originalism between *Lochner* and *West Coast Hotel* prompted the first extended complaint against originalism as bad, instrumentalist history. Coinciding with the Constitution’s sesquicentennial, and in response to what he saw as the manipulation of history in cases such as *Butler* and *Carter Coal* and the dissents in *Blaisdell* and *West Coast Hotel*, Jacobus tenBroek published a series of five articles intended to discredit originalism once and for all.⁶⁸ His was the first comprehensive critique of the Court’s affinity for originalism in its constitutional decisions.⁶⁹ Formulating arguments still in vogue today, tenBroek’s goal was to attack the quality and very possibility of the originalist history used by the Supreme Court in 150 years of precedent. He did so by arguing that an original intent was “manifestly indeterminable.”⁷⁰ Even assuming a

⁶⁶ *Id.* at 402 (Sutherland, J., dissenting).

⁶⁷ *See, e.g.,* *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (holding that legislation prohibiting the shipment of filled milk is presumptively within congressional Commerce Clause power and consistent with due process); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (holding that employees in industry have a fundamental right to organize and select representatives for collective bargaining).

⁶⁸ *See* Jacobus tenBroek, *Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CAL. L. REV. 287 (1938) [hereinafter tenBroek, pt.1]; Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: Debates and Proceedings of the Constitutional and Ratifying Conventions*, 26 CAL. L. REV. 437 (1938) [hereinafter tenBroek pt.2]; Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: The History of the Times of the Convention*, 26 CAL. L. REV. 664 (1938) [hereinafter tenBroek, pt.3]; Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: Contemporary Exposition*, 27 CAL. L. REV. 157 (1939) [hereinafter tenBroek, pt.4]; Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: The Intent Theory of Constitutional Construction*, 27 CAL. L. REV. 399 (1939) [hereinafter tenBroek, pt.5].

⁶⁹ For an earlier critique of originalism as an orthodox theory of constitutionalism, see Llewellyn, *supra* note 22. Perhaps the award for originalist and living constitutionalist spelunking goes to Eric Segall, who recently unearthed an almost one hundred year old law review article, which included many of the themes of today’s originalism debate and argued for a much more flexible interpretive methodology. *See* Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMMENT. 411 (1998). The article Segall discovered is Parts I and II of Arthur W. Macher, *The Elasticity of the Constitution*, 14 HARV. L. REV. 200, 200 (1900), and it inquires “to what extent the decision of a question of federal constitutional law may properly be affected by the many changes . . . which have taken place since the adoption of our fundamental law.” Evidently, the article has been cited only once in a law review. *See* Segall, *supra*, at n.3 (“A Westlaw search performed on March 21, 1998, revealed only one citation to this article . . .”).

⁷⁰ tenBroek, pt.2, *supra* note 68, at 453.

single, unambiguous intent could be discovered, he insisted it would be impossible to think such an intent could be “communicated from one group of men to another across the boundaries of different ages and different factual worlds”⁷¹ and unreliable to believe that twentieth-century Justices could, or would, reach the same constitutional conclusions that eighteenth-century intentions would require.⁷² All of this led tenBroek ultimately to conclude that originalism, “with its dogma of organic immutability and its retrogressive aspects, with its misapprehension of the facts of judicial operation and with its weakness of theory, [is] one of the fundamental doctrinal fallacies of the Supreme Court of the United States.”⁷³

C. 1954-1973: Embracing Both Living Constitutionalism and Originalism

By the 1950s, the Supreme Court began to embrace both living constitutionalism and originalism as each suited the needs of the times. A fair amount of the Supreme Court’s path-breaking jurisprudence during the Warren era reflected the idea of a living Constitution free from the constraints of the past. For example, *Brown v. Board of Education*,⁷⁴ the Warren Court’s most historic decision, was also its least historical. Although the original intent of the Fourteenth Amendment as it applied to segregation was at the center of the *Brown* controversy, Chief Justice Warren declared that the Founders’ original intent on the question was “inconclusive.”⁷⁵ He

⁷¹ tenBroek, pt.3, *supra* note 68, at 665.

⁷² *See id.* at 678.

⁷³ tenBroek, pt.5, *supra* note 68, at 421. A more popular study of the same criticism was journalist Irving Brant’s 1936 book, *Storm over the Constitution*, which reportedly spurred President Roosevelt to seek to “reform” the Supreme Court, rather than amend the Constitution at the height of the New Deal crisis. *See* KAMMEN, *supra* note 50, at 484 n.76 (discussing journalists’ responses to Court decisions and their impact upon President Roosevelt).

⁷⁴ 347 U.S. 483 (1954).

⁷⁵ *Id.* at 489. After the initial oral argument in *Brown*, the Court issued an order in June 1953 instructing counsel for both sides to submit briefs and reargue the historical issue: “What evidence is there that the Congress which submitted and the state legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?” *Brown v. Board of Educ.*, 345 U.S. 972 (1953). Despite the historical arguments provided by the parties on this issue, Warren relied on other grounds. *See* LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 311-12 (1988) (“Having lost its historical foundation and having bumbled on the principle of racial equality, the Court played with sociological notions that properly exposed it to an avalanche of criticism.”); *see also* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 1-6 (1955) (recounting the Supreme Court’s request for supplemental briefing in *Brown* and its ultimate failure to address the difficult, yet in many ways central, historical question). Nonetheless, the historical question remains contested, perhaps due, in part, to renewed interest in originalism. For a sampling of this debate, *see* BORK, *supra* note 21, at 75-76. *See also* Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor*

then built *Brown's* landmark holding exclusively upon the changed circumstances surrounding 1950s public education and sociological evidence showing segregation's detrimental effects on black children.⁷⁶ In many cases expanding the rights of criminal defendants, the Court likewise made little or no reference to history.⁷⁷

However, the Warren Court returned to originalism when it suited the Court's needs, especially in cases likely to arouse public opinion.⁷⁸ For example, the Court relied almost exclusively on eighteenth-century evidence to erect a constitutional "wall of separation between church and State."⁷⁹

McConnell, 81 VA. L. REV. 1881 (1995); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL'Y 457 (1996).

⁷⁶ See *Brown*, 347 U.S. at 493-94 & n.11.

⁷⁷ For instance, the Court in *Mapp v. Ohio*, 367 U.S. 643 (1961), used "factual considerations" and "common sense" as grounds for overruling *Wolf v. Colorado*, 338 U.S. 25 (1949), and applying the exclusionary rule to the states. See *Mapp*, 367 U.S. at 653, 657. "[R]eason" and "reflection" similarly provided the Court enough cause to overrule *Betts v. Brady*, 316 U.S. 455 (1942), and require the states to appoint counsel for indigent defendants in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Likewise, in *Malloy v. Hogan*, 378 U.S. 1 (1964), Justice Brennan used *Mapp* and *Gideon* to show how the Court "has not hesitated to re-examine past decisions" in light of new developments. See *Malloy*, 378 U.S. at 5.

⁷⁸ Paul Murphy speculated that after *Brown*, the Court returned to history in part because of the public castigation it received for resolving such a historically divisive issue as segregation with the "modern authority" of sociological and psychological texts. Paul L. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64, 76 n.53 (1963).

Starting in the 1940s, a new coalition of liberal, reform-minded Justices, led by Justice Black, interpreted the Fourteenth Amendment to incorporate the specific guarantees in the Bill of Rights. Yet, wholesale incorporation was met by resistance from conservative Justices like Felix Frankfurter, who fought fire with fire, using history to beat back attempts to expand constitutional doctrine. *Adamson v. California*, 332 U.S. 46 (1947), is the best example of the historical sparring of this period, with Justice Black supporting his theory of total incorporation with a 31-page historical appendix and Justice Frankfurter calling Black's version of history "eccentric," "extraordinarily strange," "improvised," and "idiosyncratic." See also *United States v. Lovett*, 328 U.S. 303, 327 (1946) (Frankfurter, J., concurring) (presenting an extensive historical essay to show that Justice Black's description of bills of attainder for the majority was, at best, a "gloss of history"). Compare *id.* at 92-123 (Black, J., dissenting), with *id.* at 62, 63, 67, 68 (Frankfurter, J., concurring). For a discussion regarding the historical support for incorporation, see AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998) and Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against the States?*, 19 HARV. J.L. & PUB. POL'Y 443, 443 (1996), favoring the use of the Fourteenth Amendment to extend the Bill of Rights to the states on originalist grounds.

⁷⁹ *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)); see also *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (holding that state officials may not require the recitation of an official state prayer in public schools). For a discussion of the historical pedigree of the "wall of separation," see Kelly, *supra* note 25, at 137-42. The Rehnquist Court only recently has begun to dismantle this wall, and interestingly, it has done so with little or no reference to original intentions or Founding-era history.

Originalism also played an important part in several other landmark cases of the Warren era in the areas of criminal rights,⁸⁰ racial discrimination,⁸¹ and voting rights.⁸²

The Warren Court's inconsistent, but frequent, resort to originalist history to expand constitutional rights prompted an outcry from professional historians who revisited the themes tenBroek had developed years earlier. Historians leveled three major complaints against the historical methodology of the Warren era. First, historians described the Supreme Court's historical methodology as "law-office history,"⁸³ meaning the Justices searched through the past for any shred of evidence that they could use to support their arguments. In Alfred Kelly's words: "The object of this process is not objective truth, historical or otherwise, but advocacy."⁸⁴

Even more troubling to academic historians was the Supreme Court's power to declare history by judicial fiat. Given the extraordinary power of the Supreme Court's pronouncements, historians recognized that the Jus-

See, e.g., *Agostini v. Felton*, 521 U.S. 203 (1997) (upholding a program to send public school teachers into parochial schools as not violative of the Establishment Clause); *Employment Div. v. Smith*, 494 U.S. 872, 888-90 (1990) (holding that the Free Exercise Clause permits the state to prohibit sacramental peyote use by members of a Native American Church).

⁸⁰ *See, e.g.,* *Benton v. Maryland*, 395 U.S. 784, 795-96 (1969) (reviewing the historical development of the guarantee against double jeopardy); *Duncan v. Louisiana*, 391 U.S. 145, 151-54 (1968) (charting the history of trial by jury in criminal cases); *id.* at 163-71 (Black, J., concurring) (discussing the historical development of criminal jury trials); *id.* at 172-93 (Harlan, J., dissenting) (refuting the majority's assertion that the drafters of the Fourteenth Amendment intended to make the first eight Amendments apply to the states); *Miranda v. Arizona*, 384 U.S. 436, 458-66 (1966) (explaining the historical justification for the right against self-incrimination); *id.* at 506-14 (Harlan, J., dissenting) (surveying the historical limits on the admissibility of confessions); *id.* at 526-27 (White, J., dissenting) (arguing that the privilege against self-incrimination historically has been against compelled confessions only).

⁸¹ *See, e.g.,* *Bell v. Maryland*, 378 U.S. 226, 286-318 (1964) (Goldberg, J., concurring) (amassing historical evidence to show that the Fourteenth Amendment and the Civil Rights Act of 1866 prohibited racial discrimination between private persons).

⁸² For example, *Baker v. Carr*, 369 U.S. 186 (1962), prompted Justice Frankfurter to issue what Alfred Kelly called his "historical tour de force," Kelly, *supra* note 25, at 135, as a counterpoint to the majority's nonhistorical holding. *See Baker*, 369 U.S. at 268 (Frankfurter, J., dissenting). *Compare* *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (relying upon evidence from the Founding in an attempt to show that Article I, Section 2 contained the one person, one vote principle), *with id.* at 20-49 (Harlan, J., dissenting) (presenting the historical counterargument).

⁸³ Murphy, *supra* note 78, at 77 (attributing the phrase, originally, to law professor Howard J. Graham). Alfred Kelly defined law-office history as "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered." Kelly, *supra* note 25, at 122 n.13.

⁸⁴ Kelly, *supra* note 25, at 156.

tices literally could create American history from the bench.⁸⁵ Thus, the Supreme Court often acted as the oracle of the Constitution's original meaning by issuing "a simple declarative statement of a revelatory kind of what the original intent actually had been . . . without any supporting historical inquiry into the question at hand."⁸⁶

Finally, and perhaps most interesting in light of present-day complaints regarding the conservative force of history, historians decried the Warren Court's use of history as an activist tool to break precedent while maintaining the appearance of constitutional continuity. Many of the Justices' "extended essay[s] in constitutional history," Alfred Kelly observed, were employed "as an instrument of extreme political activism."⁸⁷ Originalist history provided the perfect rationale for such activism. "After all, if the Fathers proclaimed the truth and the Court merely 'rediscovers' it, who can gainsay the new revelation?"⁸⁸

In response to these criticisms, a unique voice entered the debate to defend the Supreme Court's use of history. In 1969, Charles Miller was the first to argue that the Court's institutional role actually justified the rhetorical employment of history. In his extensive study of history and constitutionalism, *The Supreme Court and the Uses of History*, Miller saw significant differences between the roles of lawyers, historians, and judges.⁸⁹ According to Miller, lawyers use history pragmatically to win their cases, while historians search the past to discover the scholarly truth.⁹⁰ What Miller felt his scholarly contemporaries failed to recognize was that history performs a distinct function in the judicial system. Miller claimed that the "most satisfying justification of the use of history"⁹¹ is that the Founders intended it to assist constitutional development, and he defended the Court's

⁸⁵ See MILLER, *supra* note 23, at 25 ("When the Supreme Court has the chance to tell us what American history is, history becomes more than a tool of decision. It affirms or denies the significance of past events for the activities of the present.")

⁸⁶ Kelly, *supra* note 25, at 123. Charles Miller put matters less delicately when he observed that history, as far as constitutionalism is concerned, is what the Justices of the Supreme Court say it is. See MILLER, *supra* note 23, at 20.

⁸⁷ Kelly, *supra* note 25, at 125.

⁸⁸ *Id.* at 132. Indeed, this was the position Justice Black took in a 1968 television interview. When asked about certain unpopular constitutional decisions, Justice Black responded, "the Court didn't do it . . . The Constitution did it." *Justice Black and The Bill of Rights* (CBS television broadcast, Dec. 3, 1968), quoted in Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 226 (1988); see also *American Trucking Ass'n v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring) ("To hold a governmental Act to be unconstitutional is not to announce that we forbid it, but that the *Constitution* forbids it . . .").

⁸⁹ See MILLER, *supra* note 23, at 192-93.

⁹⁰ See *id.* at 192.

⁹¹ *Id.* at 190.

use of the past to tell a coherent national story.⁹² Thus, historians' criticism that the Supreme Court should either "write only accurate history or give up the practice entirely" was misguided.⁹³ According to Miller, "the world of the judge in a constitutional case is that of neither advocacy nor scholarship. It is, in the highest sense of the word, politics."⁹⁴

D. 1973-1997: *The Court and the Academy at the Extremes—Fidelity, Antifidelity, and Strained Reconciliation*

Charles Miller's words proved prophetic as the Supreme Court entered the late twentieth century, when the combination of history and politics transformed both the Supreme Court and constitutional theory. The Supreme Court's decision in *Roe v. Wade*⁹⁵ opened the political (and interpretive) fissure. Strong public sentiments on both sides of the abortion question highlighted the difficulty with finding a right in the Constitution that was unsupported by clear text or Founding-era intentions. Challengers to the *Roe* decision were quick to make this point.⁹⁶ Prior to *Roe*, the Warren Court had used originalism as a liberal weapon to expand constitutional rights; after *Roe*, many conservative theorists turned to originalism to limit judicial discretion.⁹⁷ Thus, in *Roe*'s aftermath

⁹² See *id.* at 190-91.

⁹³ See *id.* at 192.

⁹⁴ *Id.*; see also PERRY, *supra* note 21, at 204 (concluding that constitutional adjudication is both law and politics); Bickel, *supra* note 75, at 5 ("Happily, finding the original understanding, like applying the Constitution itself, is, at best, 'not a mechanical exercise but a function of statecraft' and of historical insight." (quoting FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 76 (1938))).

⁹⁵ 410 U.S. 113 (1973).

⁹⁶ See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 927-28 (1973); Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 180.

⁹⁷ See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 132-36 (1996) (describing the conservative turn to originalism in the wake of *Roe*); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809, 884 (1997) (explaining that, since the Warren era, conservatives have used originalism to prove that history is no longer "the activist tool of legal liberalism").

Constitutional textualism also has experienced a revival. See, generally, Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 S. CAL. L. REV. 551 (1985); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

originalism became as much a political movement as an interpretive methodology.⁹⁸

Robert Bork was one of the first legal scholars to yoke originalism to political conservatism.⁹⁹ In time, originalism became the official interpretive methodology of American conservatives, and the Reagan administration promoted originalism in a public relations campaign to transform the federal judiciary.¹⁰⁰ Cleverly, conservative originalist judges and scholars thus turned the written Constitution against the idea of constitutional change.¹⁰¹

Conservative reliance on originalism in response to cases like *Roe* forced liberal scholars into a position that would prove unfortunate. Academics like Thomas Grey and Paul Brest questioned why constitutional rights necessarily must find their bases in Founding-era intentions, or even in clear text. "Do we have an unwritten Constitution?" Grey asked, and for him the answer was a vehement "yes."¹⁰² But, in the political climate of the

⁹⁸ See LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 9-10 (1996) (discussing Judge Bork's originalism and observing "that it is no more than a lucky coincidence that the theory produces politically desirable outcomes"); Brown, *supra* note 20, at 202 (recognizing that originalism's use of tradition "is but a thinly-veiled effort to cut off all possibility of progressive interpretation of the past," which uses tradition as a ratchet to turn "constitutional interpretation . . . backward but not forward"); Fallon, *supra* note 9, at 492-93 (arguing that originalism is "a political or rhetorical stalking horse for a set of substantive positions with respect to a relatively narrow set of constitutional issues," a justification used to "obfuscate substantive discussion of what is at stake"); Jack N. Rakove, *Fidelity Through History (Or To It)*, 65 FORDHAM L. REV. 1587, 1593 (1997) ("[O]riginalism is more a theory of law than an agenda for research, and as such its objectives may well diverge from those of historians.").

⁹⁹ See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) ("Where constitutional materials do not clearly specify the value to be preferred, . . . [t]he judge must stick close to the text and the history, and their fair implications, and not construct new rights."). Bork was soon joined by others. See, e.g., RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 363-72 (1977); Epstein, *supra* note 96, at 179-80; Monaghan, *supra* note 97, at 375; Rehnquist, *supra* note 30, at 697-98.

¹⁰⁰ For a retelling of these developments and legal liberals' somewhat ineffective response, see KALMAN, *supra* note 97, at 132-39.

¹⁰¹ See BERGER, *supra* note 99, at 363-64 ("The sole and exclusive vehicle of change the Framers provided was the amendment process."); BORK, *supra* note 21, at 143 ("The Constitution may be changed by amendment pursuant to the procedures set out in article V. It is a necessary implication . . . that neither statute nor Constitution should be changed by judges."); Monaghan, *supra* note 97, at 375-76 ("[T]he supreme court, like other branches of government, is constrained by the written constitution."); Rehnquist, *supra* note 30, at 696-97 ("A mere change in public opinion since the adoption of the Constitution, unaccompanied by a constitutional amendment, should not change the meaning of the Constitution.").

¹⁰² Grey, *supra* note 25, at 709, 718; see also Brest, *supra* note 21, at 225-26, 234-38 (endorsing the application of normative values, even when they cannot be found in the "four corners of our founding document").

times, it did not matter whether the arguments of scholars such as Grey and Brest made logical sense. From a rhetorical perspective, their arguments that constitutional values need be found neither in explicit text nor originalist history appeared to give unelected judges free rein with the country's fundamental charter.¹⁰³

The debate over originalism revealed a growing tension between interpretive methodology and acceptable results. As Laura Kalman has pointed out, constitutional judges, lawyers, and scholars all "wanted to have it both ways": they wanted modern constitutional results justified in originalist terms.¹⁰⁴ This became clear in Bork's confirmation hearings for a seat on the Supreme Court at the end of President Reagan's second term. Bork was defeated because his views were outside the "mainstream."¹⁰⁵ His methodology, which was wholeheartedly originalist, obviously included a number of constitutional results that the people did not, or would not, support.

The debate over history's role in constitutional interpretation has intensified in recent years, even as it echoes debates from the past. Historians such as Laura Kalman and Jack Rakove criticize law's originalism on

¹⁰³ See Lino A. Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARV. J.L. & PUB. POL'Y 293, 294-95 (1996) (characterizing the Supreme Court as nine, life-tenured lawyers whose elite outlook trumps the majority's favor for "capital punishment, restrictions on abortion, prayer in the schools, and the removal of vagrants from public places"); see also BORK, *supra* note 21, at 171-76 (critiquing the argument that "the Constitution is not law"); Robert H. Bork, Speech Before the University of San Diego Law School (Nov. 18, 1985), in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 43, 45 (The Federalist Society ed., 1986) (stating that if judges were not subject to some limitations "then there would be no law other than the will of the judge," and "that any defensible theory of constitutional interpretation must demonstrate that it has the capacity to control judges"); Edwin Meese III, *Interpreting the Constitution*, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 13, 18 (Jack N. Rakove ed., 1990) (vilifying those academics who "suggest □ that constitutional interpretation appropriately be guided by such standards as whether a public policy 'personifies justice,' or 'comports with the notion of moral evolution,' or confers 'an identity' upon our society"); Monaghan, *supra* note 97, at 359-60 (introducing his critique of Brest and others who seek to "marr[y] . . . the Constitution with external concepts of political morality").

¹⁰⁴ See KALMAN, *supra* note 97, at 138 (claiming that legal scholars wanted "to declare it impossible to determine original intent and they wanted to preserve originalism"); see also POSNER, *supra* note 32, at 309 (describing this desire as a "judicial defense mechanism—a way of shifting responsibility for unpopular decisions to other people, preferably dead people such as the framers of the Constitution, whose grave provides a convenient place for the buck to stop").

¹⁰⁵ Linda Greenhouse, *Senate, 97 to 0, Confirms Kennedy to High Court*, N.Y. TIMES, Feb. 4, 1988, at A18; see also Sarah Fritz & Karen Tumulty, *Bork's Battle Tone Viewed As Pattern for Rest of 1987*, L.A. TIMES, Oct. 11, 1987, at 1, 7 (calling Bork an "unorthodox candidate for the Supreme Court").

grounds similar to those advanced by tenBroek and Kelly.¹⁰⁶ Meanwhile, legal academics like Martin Flaherty maintain originalism is still possible, if only we would write better history.¹⁰⁷ Living constitutionalism likewise retains its champions among those who fear that “the Court’s understanding of the role of law may be growing dangerously out of touch with American society.”¹⁰⁸ And, Charles Kelly’s defense of “law office history” now finds advocates in Cass Sunstein¹⁰⁹ and John Phillip Reid,¹¹⁰ who champion the search for a “useable past,”¹¹¹ “to find, argue, or *invent* some history . . . and use it as authority similar to a judicial precedent, rather than as evidence to explain the past.”¹¹²

¹⁰⁶ See KALMAN, *supra* note 97, at 132-39 (describing how the Reagan administration relied on originalism to advance its agenda); Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 89 (1997) (suggesting how historians “should” react to the legal community’s use of their work for originalist purposes); Rakove, *supra* note 98, at 1593 (“Ideally, [historians] should strive to get the story right for its own sake, let the chips fall where they may.”); see also David A.J. Richards, *Interpretation and Historiography*, 58 S. CAL. L. REV. 490, 512 (1985) (arguing that the originalists ask “the wrong questions in ways that disable the historian from assisting the legal interpreter in understanding the meaning of his legal tradition”). Eric Segall argues that few new arguments have been made about originalism since 1900 and that we should acknowledge originalism’s failures and abandon the debate. See generally Segall, *supra* note 69.

For arguments on grounds similar to tenBroek’s and Kelly’s, see Brest, *supra* note 21, at 218-22 (explaining the difficulty that originalism entails); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1211-14 (1987) (summarizing the reasons why originalism is impossible); Sandalow, *supra* note 15, at 1067 (arguing that the sources of originalism are unreliable guides to founding intentions).

¹⁰⁷ See Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 526 (1995) (encouraging interpreters to get the facts straight and to understand historical questions in context); Flaherty, *supra* note 21, at 1750 (urging the use of primary and secondary sources to achieve “evidentiary depth” and “temporal breadth”).

¹⁰⁸ Horwitz, *supra* note 37, at 98; see also LEONARD W. LEVY, JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 17 (1972) (arguing that the principles expounded by the Framers, not their particular understanding of them, were meant to endure); Brest, *supra* note 21, at 222-28 (arguing that the aims of constitutionalism are best served by nonoriginalist adjudication); Brown, *supra* note 20, at 178 (formulating her view of tradition as an insight to contextualize specific constitutional issues, not as an authoritative device); Grey, *supra* note 25, at 704-06 (embracing the Court’s role as “expounder of basic national ideals of individual liberty and fair treatment”); cf. RICHARD A. POSNER, OVERCOMING LAW 229-55 (1995) (refusing to become the judicial “potted plant” required by originalism).

¹⁰⁹ See Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 603-04 (1995) (urging constitutional lawyers and judges to “try to identify those features of the constitutional past that are, in their view, especially suited for present constitutional use”).

¹¹⁰ John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 203-05 (1993) (describing what he calls “forensic history,” a method of searching for proof or evidence in history).

¹¹¹ Sunstein, *supra* note 109, at 603.

¹¹² Reid, *supra* note 110, at 217. Reid’s point is not that constitutional historians are free to cast away the canons of sound history. He is far too accomplished a historian to argue against historical accuracy. His point is that constitutional interpreters are not historians

What distinguishes today's debate from that of the past, however, are those contemporary scholars who struggle creatively to reconcile the desire for originalist fidelity with the pragmatic need for a living Constitution.¹¹³ Even as some critics such as Michael Klarman are ready to abandon historical fidelity altogether,¹¹⁴ these scholars search for a way to unite their desire for fidelity with an equally essential understanding that the Constitution, to survive, must stay current with the times. The problem is that their solutions, while creative, attempt the unachievable. Their fine work only serves to demonstrate that it is impossible to maintain true fidelity to the Founding, and yet ensure the Constitution's applicability to present-day questions.

Playing upon the inherent attraction of originalism, scholars such as Jefferson Powell and Suzanna Sherry have turned to the cause of living constitutionalism. Powell, Sherry, and others, argue that originalism itself was not the interpretive methodology intended by the Founders, or, that originalism refutes originalism.¹¹⁵ Although their point is well taken, the diffi-

strictly speaking, that centuries of use have legitimated another "species of history" to be used in constructing constitutional meaning that "does not meet the canons of historians' history." *Id.* at 205. For a similar discussion of the circumstances wrought by three decades of historical debate in the legal academy, see Richards, *supra* note 106, at 513-16.

¹¹³ See Lawrence Lessig, *Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365, 1367 (1997) ("Readings of the Constitution have changed. A theory of fidelity must explain at least this. It must explain, that is, why readings change, whether such changes are changes of fidelity, and more generally, how we could know whether such changes are changes of fidelity."). James Fleming has identified two strategies that the neo-originalists have adopted to counter what he calls "narrow" originalism's monopolization of fidelity:

Dworkin takes the first: Turn the tables on the narrow originalists. He argues that commitment to fidelity entails the very approach that they are at pains to insist it forbids, and prohibits the very approach that they imperiously maintain it mandates. The second is taken by Bruce Ackerman and Lawrence Lessig . . . : Beat the narrow originalists at their own game. Ackerman [and] Lessig . . . advance fidelity as synthesis and fidelity as translation as "broad" or "soft" forms of originalism that are superior, as conceptions of originalism, to narrow originalism.

James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 *FORDHAM L. REV.* 1335, 1336-37 (1997) (citations omitted). For a discussion of how fidelity enters the neo-originalism of both Ackerman and Lessig, see Dorf, *supra* note 9, at 1773-87.

¹¹⁴ See generally Michael J. Klarman, *Antifidelity*, 70 *S. CAL. L. REV.* 381 (1997); Michael J. Klarman, *What's So Great About Constitutionalism*, 93 *NW. U. L. REV.* 145 (1998).

¹¹⁵ See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *HARV. L. REV.* 885, 885 (1985) (discussing what the Framers thought others should do with the Constitution and distinguishing it from what the Framers actually did in construing the Constitution); Suzanna Sherry, *Natural Law in the States*, 61 *U. CIN. L. REV.* 171, 171 (1992) (arguing that to the Framers, the Constitution was "only one source among many"); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 *U. CHI. L. REV.* 1127, 1127 (1987) (suggesting that "the founding generation did not intend their new Constitution to be the sole source of paramount or higher law, but instead envisioned multiple sources of fundamental law"). Leonard Levy and Jack Rakove are two more scholars who have joined Sherry and Powell in attacking the historical validity of originalism. See LEVY, *supra* note 108, *passim* (presenting an exten-

culty with this scholarship is that it tells us what fidelity is not; it does not describe what fidelity is, or should be.

Bruce Ackerman has developed an elaborate theory which is designed to achieve both fidelity and acceptable constitutional outcomes for present-day problems; yet his theory—although insightful and creative—is ultimately too elaborate and nuanced to be helpful. He describes an intricate process of popular mobilization by which the people have amended, and may continue to amend, the Constitution in ways judges should respect, even if that mobilization did not result in textual amendment.¹¹⁶ Ackerman believes that the role of judges is to synthesize these “constitutional moments” to produce constitutional meaning that will check present-day preferences.¹¹⁷ The problem is that even if Ackerman’s theory was truly consistent with original intentions—a dubious proposition in and of itself¹¹⁸—history does not move exclusively in the earth-shaking jolts and volcanic eruptions of Ackerman’s constitutional moments. Ackerman restricts judges to “synthesizing” only those “constitutional moments” of higher lawmaking,¹¹⁹ rather than paying attention to the gradual accumulation of history.¹²⁰ As Sir Charles Lyell taught us, however, often the most dramatic

sive, book-length attack on the historical, ideological, and judicial foundations of originalism); RAKOVE, *supra* note 10, at xv & n.*, 339-65 (reconstructing the Constitution’s founding to show how the Framers would have wanted constitutional meaning to develop with the nation’s experience); Rakove, *supra* note 98 (deconstructing the originalist endeavor point by point). *But see* Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77 (1988) (offering a contrary reading of the historical support for this argument).

¹¹⁶ See 1 ACKERMAN, *supra* note 10, at 34-57.

¹¹⁷ Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519, 1519 (1997).

¹¹⁸ See Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 787-92 (1992) (reviewing 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991)) (stating that “Ackerman’s narrative distorts American constitutional history more than does the traditional narrative he deplors”); Eben Moglen, *The Incomplete Burkean: Bruce Ackerman’s Foundation for Constitutional History*, 5 YALE J.L. & HUMAN. 531, 542-43, 547 (1993) (criticizing the history on which Ackerman bases his conclusions as “too polar—too committed to the conceptual purity of the first great constitutional moment”); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 924 (1992) (reviewing 1 ACKERMAN, *supra* note 10) (criticizing Ackerman for failing to acknowledge the momentous constitutional changes of other eras).

¹¹⁹ 1 ACKERMAN, *supra* note 10, at 116-19.

¹²⁰ This element of Ackerman’s theory arises out of the need to constrain judges, to tie them to their preservationist task, while still allowing for constitutional change that does not take the form of written amendments. His constitutional moments are dramatic enough that judges (and those who look over judges’ shoulders) can readily identify that *something* important has changed.

changes occur very gradually over time.¹²¹ The U.S. Constitution has changed slowly and incrementally in many ways that are not captured at all by Ackerman's constitutional moments.¹²²

Of all the recent creative attempts to reconcile fidelity and constitutional change, it is Lawrence Lessig's scholarship that best demonstrates the difficulty of the venture. Lessig has developed an extremely stylized method of "translating" founding intentions to modern-day circumstances, which allows judges to account for changed circumstances while remaining faithful to a timeless Constitution.¹²³ In his more recent work, Lessig goes beyond "easy" cases of translation—those that merely require interpretation in light of changed facts or changed constitutional text¹²⁴—to focus on harder cases that he labels "structural translation."¹²⁵ Structural translation involves judges taking into account not only the "foreground" changes of factual circumstance, but also changes in the "background" assumptions against which the Constitution is interpreted.¹²⁶

The problem with Lessig's theory is that, in order to label a responsiveness to background structural changes as "faithful" to the Founding, one must adopt an impossibly strained understanding of the concept of "fidelity." How is it possible to take seriously the idea of fidelity to original understandings, when essentially every part of those understandings is constantly up for grabs? Lessig would have judges account not only for changes in the facts as applied to original understandings, but to changes in the understandings themselves. By taking account not only of changed facts, but changed understandings as well, it becomes difficult for Lessig to maintain seriously that we are remaining faithful at all to the Founding.¹²⁷

¹²¹ See *supra* Introduction (discussing Lyell's view that geological formations are the product of slowly operating forces, rather than catastrophic events).

¹²² See Klarman, *supra* note 118, at 764-66 (arguing that Ackerman's theory fails to account for more subtle constitutional change); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 884 (1996) (tracing "the great revolutions in American constitutionalism [that] have taken place without any authorizing or triggering constitutional amendment").

¹²³ See Lessig, *Fidelity and Theory*, *supra* note 8, at 401-07, 410-14; Lessig, *Fidelity in Translation*, *supra* note 8, at 1189-1214, 1263.

¹²⁴ See Lessig, *Fidelity and Theory*, *supra* note 8, at 404-05 (discussing, for example, the effect of constitutional amendment).

¹²⁵ *Id.* at 406.

¹²⁶ See *id.* at 438-43.

¹²⁷ See Dorf, *supra* note 9, at 1787 ("The most that Lessig can do is show that some modern constitutional decisions do not contradict a suitably translated version of the Framers' intentions. He cannot show, however, that the decisions derive from those intentions."); Richard A. Epstein, *Fidelity Without Translation*, 1 GREEN BAG 2d 21, 24 (1997) (using the example of the Commerce Clause to argue that Lessig's translation transforms the Clause into

As the academy struggles to resolve the tension between fidelity and present needs, Supreme Court decisions emphasize that this tension remains within us. In *Washington v. Glucksberg*,¹²⁸ the Rehnquist Court unanimously recognized the need to employ living constitutionalism to address modern constitutional problems like euthanasia. Yet, equally often the Supreme Court has chosen to dress present-day constitutional results in originalist garb. In cases like *United States Term Limits, Inc. v. Thornton*¹²⁹ and *Printz v. United States*,¹³⁰ the Court employed strictly originalist methods to solve constitutional problems that are the unmistakable result of late-twentieth-century concerns.

What is most troubling about decisions like *Term Limits* and *Printz* is that our world has changed significantly since the Founding in ways that not only ought to have affected the decisions, but likely gave rise to the very problems before the Court.¹³¹ The term limits movement, for example, was

an "Orwellian grant of power" which "repudiate[s] the attitude of cautious necessity that the Founders brought to the creation of the national government under the Constitution").

¹²⁸ 117 S. Ct. 2258 (1997).

¹²⁹ 514 U.S. 779 (1995). *Term Limits* invalidated as unconstitutional Arkansas' state-imposed term limits on federal legislators. Both the majority and the dissent addressed this question in exclusively originalist terms. See *id.* at 800-01 ("[W]e conclude that the Framers intended the Constitution to be the exclusive source of qualifications for the Members of Congress, and that the Framers thereby 'divested' States of any power to add qualifications."); *id.* at 823-27 & nn.33-41 (collecting numerous originalist sources to prove states cannot alter the requirements of the Qualifications Clause); *id.* at 845-926 (Thomas, J., dissenting) (using originalist evidence to show that the Founders meant to reserve to the states the ability to control their representatives' qualifications).

¹³⁰ 117 S. Ct. 2365 (1997). In *Printz*, the majority and the principal dissent focused almost entirely upon the Founders' Constitution to decide whether Congress could require state executive officials to check the backgrounds of gun purchasers, as required under federal law. See *id.* at 2370-79; see also *id.* at 2387-94 (Stevens, J., dissenting) ("Absent even a modicum of textual foundation for its judicially crafted constitutional rule, there should be a presumption that if the Framers had actually intended such a rule, at least one of them would have mentioned it.").

Nothing better highlights the remote abstraction of today's originalism than Justice Souter's dissenting opinion, with its reliance on language in one political pamphlet written by Alexander Hamilton, which Justice Souter concluded had decided this constitutional question for us long ago:

In deciding these cases, which I have found closer than I had anticipated, *it is The Federalist that finally determines my position*. I believe that the most straightforward reading of No. 27 is authority for the Government's position here, and that this reading is both supported by No. 44 and consistent with Nos. 36 and 45.

Id. at 2402 (Souter, J., dissenting) (emphasis added).

¹³¹ History, in this way, both determines the timing and shapes the constitutional problems of the day. The issues involved in *Term Limits* and *Printz* would not have arisen in the 1950s and 1960s, when the centralization of government in Washington, D.C., went unquestioned. Had the cases arisen then, the results certainly would have been opposite and the analysis less contentious (if not downright easy). See generally Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1032 (1997) ("[T]he

born out of frustration with the perceived lack of accountability and responsiveness of a Congress beholden to special interests. The Founders' thinking may provide rough guidance, but it can hardly be determinative in a world dramatically different from 1787—not only in terms of communications technology, campaign fundraising, and electoral strategy, but even in constitutional formalities such as the direct election of senators following adoption of the Seventeenth Amendment.¹³² Yet, these changes since the Founding find almost no mention in the originalist methodology of the opinions, although they no doubt influenced the Justices' thinking on the problem and the outcome of the case.

Like the theories of Ackerman and Lessig, the Rehnquist Court's most recent decisions expose the impossibility of originalism—the more the Court struggles to pretend that past intentions actually solve present-day constitutional problems, the less successful originalism becomes. Today's strained attempts at reconciliation, while creative, ultimately fail to bridge the gap between the world of the original, written Constitution and the cumulative changes that have shaped the Constitution as it exists today. If fidelity is the goal, and history the guide, a new understanding of constitutional interpretation is necessary to reconcile historical fidelity with constitutionalism.

II. SEDIMENTARY CONSTITUTIONALISM

[I]n every complex written tradition, any particular “present” is a slice through a continuously changing diachronic quarry of deposits made by generations of people with different, often inconsistent and competing values, beliefs and views of the world.

—Martin Krygier¹³³

Originalism seeks to keep faith with our Founders, while living constitutionalism seeks to keep pace with the times. There often appears to be an irreconcilable tension between these two methods of interpretation, a ten-

supposed lessons of the past are not only constantly invoked to justify decisions and policies, but they also shape the ideologies and perspectives from which these decisions emerge.”).

Constitutional values are not born of the moment; they have a history that must be understood Our circumstances are perceived in part through the lens of earlier valuations and our aspirations are in part shaped by them. Ultimately . . . the values to which constitutional law gives expression are more nearly those of the present than those of the past.

Sandalow, *supra* note 15, at 1039.

¹³² For a similar critique of *Term Limits*, see Dorf, *supra* note 9, at 1813. “Moreover, in ignoring most post-enactment history, the majority squandered an opportunity to strengthen its argument considerably.” *Id.*

¹³³ Martin Krygier, *Law as Tradition*, 5 *LAW & PHIL.* 237, 242 (1986).

sion that only increases as we move forward in time.¹³⁴ Yet, because faithful constitutionalism is innate in us, we manage to resolve the tension daily. The fidelity we display is not necessarily fidelity to the Founders. Rather, it is fidelity to the Constitution itself, a document embodying *our* deepest and most enduring values, the ones that have been passed from generation to generation, changing form even as they remain with us.¹³⁵ Because fidelity is owed to the Constitution rather than to the Framers, faithful constitutional interpretation requires that we take all of our constitutional history into account, rather than defining the Constitution only with reference to the Founding. In Justice Holmes's words, constitutional decisions "must be considered in the light of our whole experience and not merely in that of what was said a hundred," or even two hundred, "years ago."¹³⁶

This Part presents a theory of sedimentary interpretation:¹³⁷ the task is to show that constitutional interpreters regularly examine our deeper con-

¹³⁴ Stephen Holmes reminds us that just as we struggle today with the question of fidelity to the Framers' plan, the Framers themselves worried about the moral propriety of binding future generations to their Constitution. See Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *PASSIONS AND CONSTRAINTS* 134, 137 (1995).

¹³⁵ In the words of Robert Cover, our reading of the Constitution must stand or fall not . . . upon the intentions of 1787 or 1866 framers. It constitutes a judgment about our own political present and future. . . . The ultimate and only justification for the constitutional government we have is that it will secure to *us* and our posterity the blessings of liberty—not that it was intended by the framers to bind us.

Robert M. Cover, Book Review, *NEW REPUBLIC*, Jan. 14, 1978, at 26, 27.

¹³⁶ *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

¹³⁷ Tom Merrill describes a very similar method of interpretation, which he calls "conventionalism," and which he contrasts with originalism. Conventionalism involves judges interpreting the Constitution in light of "conventional meaning—the consensus view about the meaning in the legal community of today." Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 511 (1996). Despite using the phrase "legal community," it is not clear Merrill means to restrict interpretation only to the views of that narrow community. Merrill also claims conventionalism is "conservative," but that would only seem to be the case because it necessarily takes time for new commitments to become embedded in the culture. Obviously, Merrill's theory recognizes that the Constitution will change over time. Thus, he may be wrong to assert that judges "would always exhibit a bias *in favor of* the status quo." *Id.* at 513. For example, to the extent that existing legislation is contrary to the commitments of the people, even fairly recently developed, that legislation will fall. That is what the practice of judicial review is all about.

Bill Nelson also has advanced a theory of interpretation that bears close affinity to sedimentary interpretation, a theory he calls "neutral judging." William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1268 (1986).

The best way to appreciate how a neutral judge uses history is to examine how his use differs from that of an interpretivist. A neutral judge examines not the history of a constitutional text's *adoption*, but the history of the *concepts* in that text, as they have been understood since its adoption.

stitutional commitments with regard to all of our constitutional history, particularly the more recent history, and to explain why they do so. Normatively, the hope is to convince constitutional interpreters to do self-consciously what is innate but frequently misplaced because of the felt tension between fidelity to the Founding and the necessities of the time.¹³⁸

The roots of sedimentary constitutional interpretation are found at least as far back as the *Dred Scott* decision.¹³⁹ Recall that it was around that time that scholars first suggested abandoning originalism for living constitutionalism. The place to look, however, is neither to Chief Justice Taney's strictly originalist understanding in *Dred Scott* that the Constitution was the Founders' "white man's document," nor to the post-Civil War scholars who refused to be ruled by "dead men." Rather, the place to look is to Justice Curtis's dissenting opinion in *Dred Scott*. Justice Curtis understood that true historical constitutionalism meant not only looking to the founding, but taking into account the "long series of acts of the gravest importance" since that time, which he felt properly should have been brought to bear upon the issues before the Court.¹⁴⁰ In other words, Justice Curtis would have resolved *Dred Scott* relying not only on Founding-era intentions, but also in light of subsequent historical developments. As Charles Miller has observed,

Id. at 1268. Although Nelson emphasizes the telling of a historical narrative that relies on all of constitutional history, he has somewhat more faith in the social consensus that will emerge from that history regarding the consensus that can be reached as to what history reveals.

A number of others have also employed the concept of sedimentation to describe the gradual process of legal development. Foremost among them is Steven Winter. See Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1487-91 (1990) (quoting M. MERLEAU-PONTY, IN PRAISE OF PHILOSOPHY AND OTHER ESSAYS 108-09 (J. Wild et al. trans., 1963)); Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881, 1883-88 (1991) [hereinafter Winter, *Upside/Down View*]; see also Krygier, *supra* note 133, at 256 ("Law . . . rests upon mountains of inherited tradition."); Lessig, *Fidelity and Theory*, *supra* note 8, at 409 n.53 ("There are originalists who treat each alteration in our Constitution as hermetically sealed. But are there not many others prepared to interpret the document in light of its layered history, its sedimentary quality?") (quoting Justice Ginsburg's comments on originalism)).

¹³⁸ Cf. JAROSLAV PELIKAN, THE VINDICATION OF TRADITION 53-54 (1984) (arguing that once understood, traditions can be recovered or rejected, but "to base recovery on ignorance and implicit faith, as some previous generations have done, or to base rejection on ignorance and bigotry, as many in our own generation have done, is not worthy of a free and rational person").

¹³⁹ *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), discussed *supra* notes 27-31 and accompanying text.

¹⁴⁰ *Id.* at 619 (Curtis, J., dissenting).

Chief Justice Taney may have had the better history, but Justice Curtis was the better historian, for he agreed to follow intent not only as contemporaneous meaning but also as potential for growth. He saw history as process, not only as event. He studied the stream and the flow, not merely the source.¹⁴¹

A. *The Metaphor of the Sedimentary Constitution*

The contours of today's Constitution necessarily reflect all of constitutional history. To "see" why this is so, engage in a mental exercise. Picture the Constitution scattered on a tabletop, the clauses strewn all about. The Third Amendment is here, the Twenty-First Amendment over there, at the far edge might sit the congressional bicameralism provisions and the executive power, and nearby rests the Equal Protection Clause, and so on. Now, lay atop each clause its history, its interpretive development. Instantly the picture moves from two dimensions to three; the tabletop becomes a topography.¹⁴² Some clauses of the Constitution—like the Due Process Clause or the Fourth Amendment—are mountains of historical development, layered high with interpretive meaning.¹⁴³ Other clauses—such as the Third Amendment or the requirement that the President be thirty-five years old—are deep valleys, barely touched in the intervening two hundred plus years since the founding.¹⁴⁴ Between these are plains and hills, such as the Appointments Clause, the Eighth Amendment, and struggles over the exercise of the War Power.¹⁴⁵

¹⁴¹ MILLER, *supra* note 23, at 27-28.

¹⁴² *Cf.* Tribe, *supra* note 97, at 1239 (emphasizing the three-dimensional nature of the constitutional map).

¹⁴³ The accumulation of history atop each part of the Constitution is illustrated by examining the case annotations in the United States Code for each clause. For example, the Due Process Clause of the Fourteenth Amendment has two entire volumes of annotations, with equally lengthy supplements, stretching over 3500 pages. *See* U.S. CONST. amend. XIV, § 1, *in* U.S.C.A. Const. Amend. XIV § 1, 8-1098, 1-1083 (West 1987 & Supp. 1998) ("Due Process in General"); U.S. CONST. amend. XIV, § 1, *in* U.S.C.A. Const. Amend. XIV § 1, 8-912, 1-455 (West 1987 & Supp. 1998) ("Due Process as to Specific Subjects"). The annotations for the Due Process Clause of the Fifth Amendment span over 600 pages. *See* U.S. CONST. amend. V, *in* U.S.C.A. Const. Amend. V, 516-902, 732-973 (West 1987 & Supp. 1998). The Fourth Amendment also has its own volume, with over 2000 pages of annotations. *See* U.S. CONST. amend. IV, *in* U.S.C.A. Const. Amend. IV, 6-1045, 1-1144 (West 1987 & Supp. 1998).

¹⁴⁴ Annotations for these clauses are sparse. The Third Amendment has five annotations, *see* U.S. CONST. amend. III, *in* U.S.C.A. Const. Amends. I-III, 956-57 (West 1987), while the presidential qualifications clause has only four, *see* U.S. CONST. art. II, § 1, *in* U.S.C.A. Const. Art. II-Art. VII, 20 (West 1987 & Supp. 1998).

¹⁴⁵ These clauses fall somewhere in the middle. The annotations for the Appointments Clauses cover 18 pages, *see* U.S. CONST. art. II, § 2, *in* U.S.C.A. Const. Art. II-Art. VII, 50-63, 6-11 (West 1987 & Supp. 1998), those for the Eighth Amendment cover over 400 pages, *see* U.S. CONST. amend. VIII, *in* U.S.C.A. Const. Amends. VII-XIV, 88-266, 35-260 (West

Constitutional interpretation necessarily must take into account the complete sedimentary development of each clause that is our constitutional history.¹⁴⁶ Suppose, for example, that a question should arise as to the meaning of the Third Amendment. Although peaks may tower around it, because we have not had cause to consider this question much in our history, inevitably we find ourselves returning to, and curious about, original understandings of this particular amendment.¹⁴⁷ Contrast this with an interpretive question regarding the Due Process Clause. This clause has been the subject of a mountain of previous interpretation; the understandings of the Founders as to its meaning have been layered over countless times. Would it not strike most of us as odd, if not impossible, to maintain that fidelity to the Due Process Clause requires returning to original understandings, ignoring all that has intervened?¹⁴⁸

1987 & Supp. 1998), and those for the War Power cover barely 14 pages, see U.S. CONST. art. I, § 8, in U.S.C.A. Const. Art. I, 689-702, 120-21 (West 1987 & Supp. 1998).

¹⁴⁶ See Kramer, *supra* note 11, at 1639 (“[W]hatever answers the original design holds may be inappropriate today. We need to study subsequent developments, to get a sense of the inevitable growth, if we want a confident picture of how things are likely to work in our world.”).

¹⁴⁷ Of course, it is not insignificant that 200 years have passed without presenting many questions about the quartering of troops. See *Engblom v. Carey*, 677 F.2d 957, 962 (2d Cir. 1982) (recognizing the lack of precedent surrounding the Third Amendment in a case challenging the presence of troops in prison guard residences). The absence of interpretation and conflict is also history. In Professor Merrill’s words:

Suppose there is a vague or ambiguous provision that has no evolved and settled meaning for today’s legal community. In these circumstances, the conventional interpreter would no doubt look to the same type of evidence . . . about the meaning to the legal community that existed at the time of enactment. When there is no settled contemporary understanding of meaning, in other words, the conventional meaning is the original meaning.

Merrill, *supra* note 137, at 512; see also Balkin, *supra* note 9, at 1718 (characterizing the Third Amendment as “innocuous” and “of limited relevance”).

¹⁴⁸ See *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (discussing the evolutionary nature of due process: “[t]hat tradition is a living thing”). Reflecting on Justice Harlan’s dissent in *Poe v. Ullman*, Justice Souter recently commented: “Common-law method tends to pay respect . . . to detail, seeking to understand old principles afresh by new examples and new counterexamples. The ‘tradition is a living thing’ . . . albeit one that moves by moderate steps carefully taken.” *Washington v. Glucksburg*, 117 S. Ct. 2258, 2284 (1997) (Souter, J., concurring) (citation omitted); see also *id.* at 2262 (Rehnquist, C.J.) (“We begin, as we do in all due-process cases, by examining our Nation’s history, legal traditions, and practices.”); *id.* at 2267 (detailing the number of rights found to exist in the Due Process Clause since its Founding); *Rochin v. California*, 342 U.S. 165, 170 (1952) (“[T]he concept of due process of law is not final and fixed . . .”).

A particularly provocative question arises regarding the application of the sedimentary methodology to the meaning of the Second Amendment. In recent years there has been a raging academic and popular debate regarding the right to bear arms. Professor Levinson highlighted the need for academic attention to the question when he pointed out that typical advocates of constitutional liberty, such as the American Civil Liberties Union, would just as

Although it is easy to visualize why today's Constitution is shaped by all of our history, it is necessary to think more about history itself to realize that when we search for an understanding of constitutional commitments, our search ordinarily ought to begin much closer to the top of the sedimentary topography. In particular, it is important to distinguish the "doing" of history from history itself.¹⁴⁹ When we think of history, we often think of the historian's task, that of describing as accurately as possible the events of a distant past.¹⁵⁰ This is the task urged on us repeatedly by historians, most recently by Martin Flaherty—to interpret the Constitution, they argue, we must do a better job of investigating history, working harder to understand Founding-era commitments.¹⁵¹

soon sweep the Second Amendment under the rug. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989). Recent entries to the burgeoning literature that set out clearly the terms of debate include Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1 (1996) and Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1994). An advocate of the right to bear arms might pose the problem thus: If sedimentary interpretation requires taking all of a clause's constitutional history into account (albeit focusing on the topmost layers), and if 200 years of constitutional history seems to have recognized an interpretation of the Second Amendment that recognizes a personal right to bear arms, is that accumulated history not an absolute bar to recent legislative gun control efforts? Without purporting to resolve the question, it may be apt to recognize that, as will often be the case, there may be at least two ways of describing that history. See *infra* Part III.B (explaining how historical accounts often will be contested and contestable). For example, it may well be that the right to bear arms has not so much been accepted as it has not been challenged. It is also possible that changed conditions will alter the terms of the Amendment's original meaning, a methodology of interpretation accepted even by originalists. See Lessig, *Fidelity in Translation*, *supra* note 8, at 1175 ("[M]eaning depends on context . . . the same text written in two different contexts can mean quite different things.").

¹⁴⁹ Collingwood draws sharply the distinction discussed in the text, although his terminology differs. First, he separates out the object and methodology of history, that is, the collection of facts about the past, from what history is *for*, that being to obtain human self-knowledge. R.G. COLLINGWOOD, *THE IDEA OF HISTORY* 10 (1946). Later, he distinguishes learning about the "outside" of an event—the "what happened"—from its inside, or meaning. See *id.* at 213-14.

¹⁵⁰ See APPLEBY ET AL., *supra* note 4, at 261 (discussing the ability to discriminate between "false and faithful representations of past reality"); KEITH WINDSCHUTTLE, *THE KILLING OF HISTORY* 177 (1996) ("The job of the historian is not to search for some theory that will reveal all, nor some teleology that will explain the purpose of things. Rather, it is to reconstruct the events of the past in their own terms."). The commitment to accuracy is reflected in DAVID HACKETT FISCHER, *HISTORIAN'S FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* (1970) (providing an elaborate logic of historical analysis).

¹⁵¹ Martin S. Flaherty, *The Practice of Faith*, 65 FORDHAM L. REV. 1565, 1572-79 (1997). This is not to say the task is simple, or even possible. As in other disciplines, there has been enormous debate among historians of late about "objectivity," whether there is one history that can be described with accuracy. But even as historians argue this point, there seems to be no serious disagreement that the role of the historian is to do the best job possible of describing this historical past. For a strident argument in favor of objectivity, and a criticism of postmodern theories that would undermine it, see WINDSCHUTTLE, *supra* note 150, at

For constitutional purposes, history is not simply something that we do, but something that we are.¹⁵² Our history is immanent in us, in our present, just as our present (and all its cumulative history) will be immanent in our future.¹⁵³ History is something that is passed down from generation to generation. Each new generation is the accumulation of the history that came before.¹⁵⁴ As each generation passes, its history becomes part of the sediment that is left behind, the silt that forms our terrain, the topographical constitution atop which we stand.¹⁵⁵

The very reason that we “do” history is to come to an understanding of precisely what has been passed on to us through the generations.¹⁵⁶ We

173-83. Equally insistent that the search for truth is essential, APPLEBY ET AL., *supra* note 4, at 243-47, nonetheless understand that different groups will have different understandings of the factual events that constitute history. PETER NOVICK, *THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION* (1988) is a magisterial historiography of the objectivity question. The central conclusion of Novick’s work is that the ideal of objectivity is itself historically contingent. See *id.* at 1-17; see also *infra* Part III.B (discussing the problem of the contestability of the historical narrative).

¹⁵² See WILLIAM H. MCNEILL, *MYTHISTORY AND OTHER ESSAYS* 11 (1986) (“Consciousness of a common past, after all, is a powerful supplement to other ways of defining who ‘we’ are.”); cf. APPLEBY ET AL., *supra* note 4, at 9 (stating that historians often dismiss the “role of history in shaping national identity . . . as irrelevant to their work, which they define as researching in archives and writing scholarly books and articles”); *id.* at 6 (contrasting the popular sense of history as “successions of names, dates, and events” with history’s present image as a hothouse “of debate about ethnic and national identity”). For an extended discussion of the role of history in shaping collective identity, see *infra* Part III.

¹⁵³ See HANS GEORG GADAMER, *TRUTH AND METHOD* 282 (2d rev. ed. 1994) (“[W]e are always situated within traditions, and this is no objectifying process—i.e., we do not conceive of what tradition says as something other, something alien. It is always part of us . . .”); ALFRED NORTH WHITEHEAD, *ADVENTURES OF IDEAS* 280 (1933) (“The individual, real facts of the past lie at the base of our immediate experience in the present. They are the reality from which the occasion springs . . .”).

¹⁵⁴ See APPLEBY ET AL., *supra* note 4, at 92 (describing a French school text drawing of a timeline of French men and boys each dressed in period dress, essentially depicting “an unbroken chain of French fathers who had lived long in the land and propagated”). The drawing itself characterizes the passing of values and history from generation to generation. See also GADAMER, *supra* note 153, at 297 (“In fact the important thing is to recognize temporal distance as a positive and productive condition enabling understanding. It is not a yawning abyss but is filled with the continuity of custom and tradition, in the light of which everything handed down presents itself to us.”).

¹⁵⁵ See EDWARD SHILS, *TRADITION* 167 (1981) (“Memory is more than the act of recollection by recollecting persons. Memory leaves an objective deposit in tradition. The past does not have to be remembered by all who reenact it; the deposit is carried forward by a continuing chain of transmissions and receptions.”). According to Martin Krygier, “[t]he traditionality of law is reflected not merely in the pastness of its present, the extent to which current law is the presently visible residue of generations of deposits,” but “[i]t is equally reflected in the presence of the past, the extent to which only the presently authoritative past is treated as significant.” Krygier, *supra* note 133, at 248.

¹⁵⁶ See APPLEBY ET AL., *supra* note 4, at 10 (“What historians do best is to make connections with the past in order to illuminate the problems of the present and the potential of the

study the sedimentary development of the topography because it situates us in the present.¹⁵⁷ Even though we are, quite naturally and unavoidably, the embodiment of our history, we nonetheless study our accumulated history to get a better sense of who we are.¹⁵⁸ Without our history we would float untethered in the universe, without context for our lives. "We study history," Collingwood observed famously, "in order to attain self-knowledge."¹⁵⁹

In studying history, we seek to establish continuity between what has come before and contemporary circumstances.¹⁶⁰ Development of the historical narrative is a constant mediation between the "us" of the past and the "us" of the present.¹⁶¹ History is not merely the academic historian's task of data collection and description. It is a hermeneutic process of reconciling our understanding of the past with our view of the present, what Hans Geörg Gadamer described as the merging of horizons.¹⁶² Because the historical

future."); GADAMER, *supra* note 153, at 284 ("Modern historical research itself is not only research, but the handing down of tradition."); SHELDON S. WOLIN, *THE PRESENCE OF THE PAST: ESSAYS ON THE STATE AND THE CONSTITUTION 2* (1989) ("Societies try to express what they are about . . . by appealing to or constructing their pasts and connecting that past with present arrangements of power.");

¹⁵⁷ See Bruce Ackerman, *Rooted Cosmopolitanism*, 104 *ETHICS* 516, 527 (1994) ("Even though the 'earth belongs to the living,' each generation begins with a historically given baseline.");

¹⁵⁸ See EDWARD HALLETT CARR, *WHAT IS HISTORY?* 69 (1961) ("[W]e can fully understand the present only in the light of the past. To enable man to understand the society of the past and to increase his mastery over the society of the present is the dual function of history."); ARTHUR C. DANTO, *NARRATION AND KNOWLEDGE*, at xv (1985) ("It is impossible to overestimate the extent to which our common ways of thinking about the world are historical."); cf. Rakove, *supra* note 131, at 1032 ("Most of our reasoning about the present is in fact deeply historical in nature.");

¹⁵⁹ Collingwood, *supra* note 149, at 315.

¹⁶⁰ See GADAMER, *supra* note 153, at 327 ("Historical knowledge can be gained only by seeing the past in its continuity with the present—which is exactly what the jurist does in his practical, normative work of 'ensuring the unbroken continuance of law and preserving the tradition of the legal idea.'" (citation omitted)); Katherine T. Bartlett, *Tradition, Change, and the Idea of Progress in Feminist Legal Thought*, 1995 *WIS. L. REV.* 303, 312 ("Tradition . . . connects past and present and gives each meaning in terms of the other. It is old, yet in its timelessness acts as a source of new recognitions."); Sandalow, *supra* note 15, at 1064 ("[H]istory does not reside merely in the past, but in the interaction of the past with the present.");

¹⁶¹ See APPLEBY ET AL., *supra* note 4, at 231 (describing the relationship between narrative and history). On the narrative structure of histories, see DANTO, *supra* note 158, at 143-81.

¹⁶² GADAMER, *supra* note 153, at 306; see also CARR, *supra* note 158, at 35 ("[H]istory . . . is a continuous process of interaction between the historian and his facts, an unending dialogue between the present and the past."); Brown, *supra* note 20, at 218 (describing her cognitive method of constitutional interpretation as "learn[ing] what we can and bring[ing] our new perspective—a product of our own traditions—. . . to produce an answer to specific problems that is neither the Framers' nor the interpreter's alone. It is a compromise . . . of past and present"). For a cogent explanation of Gadamer's theory that the conver-

narrative is hermeneutic, the story that we tell about ourselves necessarily changes as our history accumulates beneath us and we gain perspective on it.¹⁶³ Although specific events in the past might not change, our understanding of them does.¹⁶⁴ Our historical consciousness changes, not only because of the remove, but because we inevitably reinterpret past events in light of present occurrences.¹⁶⁵ The telling of history is often one of causation, of trying to piece together a coherent story recounting how we got from where we were to where we are.¹⁶⁶ As we tell and retell that story, our perspective changes and so does the story we tell.¹⁶⁷

sation between past and present, mediated by history, is epistemologically and ontologically intrinsic to interpretation and thus understanding, see William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 619-24 (1990).

¹⁶³ See D.J. Boorstin, *Tradition and Method in Legal History*, 54 HARV. L. REV. 424, 433 (1941) ("Legal history, like other history, must always be rewritten."); Sandalow, *supra* note 15, at 1069-70 (discussing the changes in technology as well as the worldview that have occurred since the Founding and the Reconstruction Congress to change our perception of constitutional issues). In his presidential address to the American Historical Association, the eminent historian Frederick Jackson Turner said: "A comprehension of the United States today, an understanding of the rise and progress of the forces which made it what it is, demands that we should *rework our history from the new points of view afforded by the present.*" TOWARDS A NEW PAST: DISSIDENTING ESSAYS IN AMERICAN HISTORY, at v (Barton J. Bernstein ed., 1968) (emphasis added) (quoting this statement by Turner, and pointing out that it was chosen by "a young American historian," Arthur Schlesinger, as the title page for his *New Viewpoints in American History*).

¹⁶⁴ See Bartlett, *supra* note 160, at 330 ("[T]he past, like the present, is always in flux and part of the process of negotiation about who we are, what matters, and what constitutes improvement."). Carr makes the point that for this very reason a history often will tell more about the author and the author's times than it will about the period being studied. See CARR, *supra* note 158, at 44.

¹⁶⁵ This is a central theme in Arthur Danto's brilliant analytical philosophy of history. Danto argues repeatedly that the past takes on its meaning from what follows; because we cannot be certain what follows, we cannot understand the significance of the present. What historians do is create for us the significance of the past by telling the narrative of history in light of the present. See, e.g., DANTO, *supra* note 158, at 158 (explaining that one could have visited Newton's house at the time of his birth, but the building did not take on significance until much later)

[B]y the time it is clear what we have done, it is too late to do anything about it. 'The owl of Minerva takes flight only with the falling of the dusk.' . . . We capture the future only when it is too late to do anything about the relevant present, for it is then past and beyond our control. We can find out what its significance was, and this is the work of historians: history is made by them.

Id. at 284; see also *id.* at 341 ("The present is cleared of indeterminacy only when history has had its say; but then, as we have seen, history never completely has its say. So life is open to constant re-interpretation and assessment."); cf. CARR, *supra* note 158, at 28 ("[W]e can view the past, and achieve our understanding of the past, only through the eyes of the present.").

¹⁶⁶ See APPLEBY ET AL., *supra* note 4, at 302-05 (describing the explanatory role of history in terms of cause and effect); MCNEILL, *supra* note 152, at 5-7 (discussing patterns of causation in history); Sandalow, *supra* note 15, at 1070 (explaining that to better understand

What is most important is that as we mediate between our past and our present, we simultaneously carry constitutional values with us and transform them.¹⁶⁸ This account explains why the more recent tellings of our history should be, and often are, privileged in constitutional law. On this understanding of history, it becomes evident that our constitutional values largely will be found in the upper layers of our sedimentary constitution.¹⁶⁹ In the words of Dean Sandalow, "the values to which constitutional law gives expression are more nearly those of the present than those of the past."¹⁷⁰

To see this somewhat theoretical point more clearly, consider an extremely current and tangible problem of constitutional interpretation, that of the federalist "revival."¹⁷¹ Mirroring developments in the broader political arena¹⁷² in a series of recent decisions, the Supreme Court has turned away from the broad deference to national authority of the post-New Deal years to a certain solicitude for state sovereignty. Among the decisions that have

the present "we search out from the past those elements of experience and strains of thought that appear most relevant to our own time").

¹⁶⁷ Philip Bobbitt describes this phenomenon with an analogy to poetry:

As both the interstitial and the reviewed methods of change operate from the past, they also operate on the past. It has been remarked that every artist creates his own precursors. I must have read Keats differently having read Yeats and perhaps read both differently having read Auden. So I must read *Pierce* and *Meyer* differently having read *Griswold* and must read them all differently having read *Roe*.

BOBBITT, *supra* note 10, at 224-25 (footnote omitted).

¹⁶⁸ Edward Shils may be the most eloquent on this score:

The identity of a society through time to its members and to external observers is a consensus between living generations and generations of the dead. The living forward into the present of beliefs and patterns of institutions which existed in an earlier time is a consensus between the dead and the living in which the latter accept what the former have presented to them. The content of the consensus changes through interpretation; the consensus is maintained through reinterpretation of what the earlier generations believed.

SHILS, *supra* note 155, at 168; *see also* GADAMER, *supra* note 153, at 293 ("Tradition is not simply a permanent precondition; rather, we produce it ourselves inasmuch as we understand, participate in the evolution of tradition, and hence further determine it[s content] ourselves."); PELIKAN, *supra* note 138, at 58-59 (asserting that the Supreme Court "must subordinate itself to the ancient authority even as it proceeds to decide what the authority means now").

¹⁶⁹ *Cf.* GADAMER, *supra* note 153, at 290 ("What we call 'classical' does not first require the overcoming of historical distance, for in its own constant mediation it overcomes this distance by itself.").

¹⁷⁰ Sandalow, *supra* note 15, at 1039.

¹⁷¹ *See* Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 *FORDHAM L. REV.* 1435, 1439 (1997).

¹⁷² *See* Cass R. Sunstein, *Legislative Foreword: Congress, Constitutional Moments, and the Cost-Benefit State*, 48 *STAN. L. REV.* 247, 247 (1996) (arguing that although it has not yet jelled, the regulatory agenda of the 104th Congress may represent a coming 'constitutional moment' revising the New Deal agenda).

captured so much notice are *United States v. Lopez*,¹⁷³ limiting the scope of Congress's enumerated powers, as well as *New York v. United States*¹⁷⁴ and *Printz v. United States*,¹⁷⁵ preserving sovereign state functions from national commandeering.¹⁷⁶

In a recent article, Professor Steven Calabresi suggests that these Supreme Court decisions about federalism indicate that "we can . . . go back to the days of limited national power."¹⁷⁷ Although Calabresi does an admirable job of discussing the forces motivating these decisions, neither the descriptive word "revival" nor Calabresi's observation is correct. We *cannot* "go back." We cannot erase New Deal understandings any more than we can pretend that the very advances in transportation, telecommunications, and market technology that influence the federalist balance of power never occurred.¹⁷⁸ What we *can* do is construct a new federalist understanding atop old ones. That is what we are doing.

Notice, however, that even as we construct this "new" federalism, both the Supreme Court and numerous commentators inevitably retell our federal story in a way that seems to make it coherent and consistent with all of our past.¹⁷⁹ That is the very reason there has been so much focus on the New Deal in recent scholarship. The New Deal itself was a seeming rupture from past commitments, and today's "revival" is yet another turn—this time shifting away from New Deal commitments. The story about American federalism told at the turn of the last century was very different from that

¹⁷³ 514 U.S. 549, 567 (1995).

¹⁷⁴ 505 U.S. 144, 187 (1992).

¹⁷⁵ 117 S. Ct. 2365, 2384 (1997).

¹⁷⁶ See also *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 261 (1997) (holding that suit brought by Indian tribe members against the State of Idaho was barred by the Eleventh Amendment); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996) (holding that the Eleventh Amendment prevents Congress from authorizing suits by Indian tribes against states to enforce legislation enacted pursuant to the Indian Commerce Clause).

¹⁷⁷ Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 752 (1995).

¹⁷⁸ See Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 368-69 (1997) (discussing how advances in technology have affected the Supreme Court's jurisprudence, and arguing that "doctrinal changes mirror what is happening in the nation and the world at large").

¹⁷⁹ For examples of Justices and commentators retelling the federalism story, see *Printz*, 117 S. Ct. at 2376-79; *id.* at 2387-94 (Stevens, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 568-83 (1995) (Kennedy, J., concurring); *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 825-38 (1995); *id.* at 845-918 (Thomas, J., dissenting); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547-56 (1985); *id.* at 568-77 (Powell, J., dissenting); *id.* at 580-89 (O'Connor, J., dissenting); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1496-1503, 1515-20 (1994); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125.

told in 1940,¹⁸⁰ and the same is true again at the turn of this next century. It is different not only because of intervening events, but also because those intervening events have required us to see and to make sense of the older history in a way that brings us coherently from then to now, in a way that maintains continuity with our past. Thus, we forge our values out of our past—often our most recent past—and leave those values in the topmost soil as we move on.

B. *The Inevitability of Sedimentary Interpretation*

By now it ought to be apparent why it is that we should rely on all of our history in identifying our more deeply held commitments, and also why those commitments—*our* commitments—often rest quite close to the surface. We must rely on all of our history, because over time our commitments have been altered by the passage of history. And for this same reason, we have carried our commitments, albeit in their constantly shifting form, on our generational shoulders into the present.

However, an odd sort of contradiction remains. On the one hand, much of our interpretive methodology actually is consistent with sedimentary interpretation, in that we quite naturally accept more recent understandings as embodying our deepest constitutional commitments.¹⁸¹ On the other hand, as Part I made clear, much of our rhetoric still shifts between the poles of originalism and living constitutionalism as we continue to debate whether we must adhere to Founding-era commitments. There is a disjunction between what we say, and what we often do. This Subpart explores why this disjunction exists and explains that despite their inconsistent rhetoric, even originalists and living constitutionalists necessarily engage in the methodology of sedimentary interpretation.

1. The Problem of the Written Constitution

A good part of the reason for the disjunction between the rhetoric of constitutional theory and the reality of constitutional practice is that we have a written Constitution, one that also contains an explicit set of directives as

¹⁸⁰ See William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355, 1380-92 (1994) (detailing different understandings of federalism as seen through the lens of the *Lochner* and New Deal Courts); Sunstein, *supra* note 172, at 254 (“As a result of the New Deal, state autonomy was very different in 1940 from what it had been in 1920.”).

¹⁸¹ See Ruti Teitel, *Original Intent, History and Levy’s Establishment Clause*, 15 L. & SOC. INQUIRY 591, 604-06 (discussing Establishment Clause jurisprudence and stating, “History for the Court was not confined to original history but rather spanned our entire national history”).

to how it is to be amended. It is the very "written-ness" of our Constitution that has made it difficult for theorists to account for the otherwise quite natural, gradual process of constitutional change, a point made clear by the enormous attention that has been directed to the Article V amendment process.¹⁸² Article V provides a means to "rewrite" the written Constitution, but as an exclusive methodology, the Article V process has proven inadequate in both theory and practice.¹⁸³ It is inadequate in practice because it takes a remarkable act of supermajoritarian will to change the Constitution. It is inadequate in theory because, as almost anyone can recognize, the Constitution has been altered over time in ways not recorded by formal amendment.¹⁸⁴ In the inimitable words of Karl Llewellyn: "Surely there are few superstitions with less substance than the belief that the sole, or even the chief process of amending our Constitution consists of the machinery of Amendment."¹⁸⁵

The struggle over the question of when and whether the Constitution may be "amended" outside Article V¹⁸⁶ betrays the great force that the "written-ness" of our Constitution has upon our interpretation of it. The written text of the U.S. Constitution is law in a way that obviously could not be true in a country such as Great Britain, which has a great constitutional tradition but no written constitution. In some sense, the interpretive debates

¹⁸² See generally RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995) (collecting papers dealing with this problem).

¹⁸³ See Fallon, *supra* note 32, at 45-46 (arguing that the "cumbersome" process of constitutional amendment is outweighed by the need for constitutional law to reflect "changes in social, technological, and economic context"); Sandalow, *supra* note 15, at 1046 ("The amendment process established by article V simply will not sustain the entire burden of adaptation that must be borne if the Constitution is to remain a vital instrument of government.").

¹⁸⁴ This point is made stunningly by Sanford Levinson in a paper aptly entitled *Accounting for Constitutional Change (Or, How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) >26; (D) All of the Above)*, in which Levinson convincingly demonstrates that "any answer is more sophisticated theoretically than '(b).'" 8 CONST. COMMENT. 409, 428 (1991); see also Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. (forthcoming 1999) (manuscript at 38) ("A significant amount of constitutional change has happened outside of Article V."); Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, in RESPONDING TO IMPERFECTION, *supra* note 182, at 37-38 ("[Constitutional] change has occurred primarily through non-Article V means . . .").

¹⁸⁵ Llewellyn, *supra* note 22, at 21.

¹⁸⁶ See Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1051-70 (1984) (arguing that constitutional amendment has occurred not merely through the process established by Article V, but through structural amendment as well); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044 (1988) (considering the possibility of "constitutional amendment by direct appeal to, and ratification by, We the People of the United States").

we have here in this country would make no sense in the absence of such a written text. Rather than focus on the intentions of those who wrote the text, we would quite naturally ask questions about constitutional tradition.¹⁸⁷ Yet, the written text makes us insecure of constitutional change not reflected in the text itself. The written text somehow directs us to the intentions of the law-giving Founders, its supposed authors.¹⁸⁸ It is this fixation on the Founders that gives rise to the question of fidelity.

The problem of fidelity that confronts us whenever we face sharp constitutional change nonetheless largely escapes our notice with regard to the vast alterations that occur quite gradually. For example, although the doctrine of federalism requires reconciling major changes in direction, a large part of our constitutional law developed in much smaller, almost imperceptible steps. Consider, for example, constitutional understandings regarding the Cruel and Unusual Punishment Clause,¹⁸⁹ the nature of presidential power,¹⁹⁰ the Sixth Amendment right to counsel,¹⁹¹ the operation of the jury system,¹⁹² and the election of Senators.¹⁹³ To be sure, there were moments of sharper change in all of these. For the most part, however, our under-

¹⁸⁷ See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 5-7 (8th ed. 1927) (contrasting the British constitutional interpreter's modern method to the American interpreter's more staid approach).

¹⁸⁸ See 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 7-8 (1998) (criticizing the "professional narrative" that focuses on founding moments as impeding our ability to understand the process of constitutional change).

¹⁸⁹ See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (stating that the Eighth Amendment's prohibition on cruel and unusual punishment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"); *Weems v. United States*, 217 U.S. 349, 378 (1910) (noting that the Eighth Amendment is "progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice"). But see *Scalia*, *supra* note 21, at 45-46 (using the Cruel and Unusual Punishment Clause as an example of the impracticability of evolutionary constitutional philosophy).

¹⁹⁰ See *Flaherty*, *supra* note 21, at 1732-38 (tracing the development of separation of powers in the Supreme Court).

¹⁹¹ See RONALD J. ALLEN ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE 141-75 (3d ed. 1995) (chronicling the evolution of a right to counsel from the "right to be heard" to the right to appointed counsel in certain cases).

¹⁹² See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 592-600 (1993) (detailing major decisions in the development of the right to a jury trial and examining how textual original intention had little to do with this development). Compare, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (invalidating a provision of the state constitution excluding any woman from jury service unless she filed a declaration of her desire to serve), with *Hoyt v. Florida*, 368 U.S. 57, 65 (1961) (upholding a similar statutory provision). The *Taylor* Court conceded that its holding diverged from founding-era intentions. See 419 U.S. at 536.

¹⁹³ See Vikram David Amar, *supra* note 10, at 1352-55 (showing how the states, prior to the adoption of the Seventeenth Amendment, devised a number of ways to limit state legislators' discretion in choosing Senators).

standings of these aspects of American constitutionalism have evolved slowly over time, involving incremental generational change that has been quite comfortable and often uncontested.¹⁹⁴ In each of these areas our present-day understanding is very different from that of the Founding era. Despite this, in all these areas there is no serious movement to return to the Founding to define what our commitments should be today.

Evidently, when we try to understand or interpret most of our Constitution, we often do not return to Founding-era understandings. Instead, we quite naturally treat this sedimentary development for what it is, the gradual evolution of our constitutional ideals. For the vast majority of our constitutional commitments, we accept the present-day state of affairs for what it is.

The short Sections that follow demonstrate that the rhetoric of originalism and living constitutionalism regularly give way in practice to sedimentary interpretation. Because of the nature of our written Constitution and the problem of fidelity it engenders, we have endured a long-running debate between originalists and living constitutionalists. Yet, because our Constitution is in fact sedimentary, what we do by necessity is far more instructive than what we say.

2. Originalism's Failure: Anachronistic History

Originalism, the most widely accepted and established use of history in constitutional interpretation, is anachronistic. Originalism is a huge historical non sequitur. The rhetoric of originalism suggests that we can ignore the accumulated history atop our Constitution. But people today do not think in 1787 terms and could not if they wanted to.¹⁹⁵ Unlike the Founders' Constitution, today's Constitution privileges liberty over property rights,¹⁹⁶ accepts the utility and prevalence of administrative agencies,¹⁹⁷ and acknowl-

¹⁹⁴ See HOLMES, *supra* note 16, at 161 (using "the strength of the Union, the broad legislative responsibilities of the President, and especially judicial review" to illustrate how "[m]any of the basic features of the American Constitution . . . were innovations introduced without any formal amendment procedure having been invoked").

¹⁹⁵ See SHILS, *supra* note 155, at 1 ("Very few persons argue for the revival of the beliefs and institutions of the remoter past which have been obliterated in the more recent past. Even if they desire their revival, they do not that think there is any reasonable chance that what they desire will be realized.").

¹⁹⁶ Compare, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 499-503 (1977) (applying heightened scrutiny to invalidate a law interfering with family living arrangements), with *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955) (applying rational-basis scrutiny to uphold a law prohibiting opticians from fitting eyeglass lenses without a prescription).

¹⁹⁷ See, e.g., *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984) (establishing a rule of judicial deference to agency determinations); cf. Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 550-57 (1997)

edges enhanced power in the President of the United States vis à vis the other political branches.¹⁹⁸ All of these features have become embedded in modern constitutional life.

Consider, for example, a question much mooted today concerning whether the Fourth Amendment expresses a preference for warrants.¹⁹⁹ Scholars, such as Telford Taylor and Akhil Amar, have made historical claims that the Framers of the Fourth Amendment did not intend the Warrant Clause to be tied to the Search and Seizure Clause because the Framers feared general warrants and would not have preferred them, as does present doctrine.²⁰⁰ Yet, suppose this is true. What sense does it make to return to the question of whether James Madison, John Wilkes, or even Lord Camden believed warrants were essential, in light of all the historical development since?²⁰¹ We have lived under the warrant model for at least one third of a

(reviewing SCALIA, *A MATTER OF INTERPRETATION*, *supra* note 8) (arguing that Scalia's originalist formalism is incompatible with the administrative state).

¹⁹⁸ See Flaherty, *supra* note 21, at 1728 (describing the "historic growth of presidential power").

¹⁹⁹ The warrant question is only one of many Fourth Amendment issues around which there has been significant historical development. The Amendment was once construed in tandem with the Fifth Amendment to protect private papers, an interpretation since abandoned. See *Boyd v. United States*, 116 U.S. 616, 630 (1886) ("[A]ny forcible and compulsory extortion of a man's . . . private papers to be used as evidence to convict him of a crime . . . is within the condemnation . . . [of the] Fourth and Fifth Amendments."). Later, the exclusionary rule came to be an integral part of the Amendment. See *Weeks v. United States*, 232 U.S. 383, 398 (1914) (holding that the use of unconstitutionally seized letters at a trial involved "a denial of the constitutional rights of the accused"). Even later, the Amendment was applied to police practices of state officers. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court"). Perhaps most importantly, intrusions on privacy came to matter far more than physical invasions of property. See *Katz v. United States*, 389 U.S. 347, 351-53 (1967) ("For the Fourth Amendment protects people, not places."); *id.* at 360-62 (Harlan, J., concurring) ("[T]he rule that has emerged from prior cases is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"). See generally *Tennessee v. Garner*, 471 U.S. 1, 13 (1985) (arguing that the Court has not relied on original understandings of the Fourth Amendment in light of "sweeping change in the legal and technological context").

²⁰⁰ See TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 23-29 (1969); Amar, *Fourth Amendment*, *supra* note 10, at 762-81. For a recent skeptical look at some Fourth Amendment originalist histories, emphasizing yet again the divergence between law-office history and historian's history, see Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707 (1996).

²⁰¹ See SEIDMAN & TUSHNET, *supra* note 98, at 5-6 (describing as "good rhetoric" but "not persuasive argument" a liberal newspaper commentary that challenged congressional discussion of a "good faith" exception to the exclusionary rule based on "the behavior of British troops under King George III two hundred years ago"); Eisgruber, *supra* note 25, at 473 ("It would be fruitless, and next to impossible, for the Justices to return to first principles

century. Countless cases have been decided by applying and adhering to that interpretation; generations of police officers and lawyers have been trained in that understanding; the public undoubtedly understands that police need warrants; and changes in technology, such as the ready accessibility of wiretapping equipment, have had a real impact on our sense of whether warrants are required. None of this is to say that we could not again depart from a generalized preference for warrants. The point is that such a change would have to be understood as one of historical development, not as a return to the Founders' intentions.

To be fair to originalists, their preference for returning to Founding-era commitments has more to do with their theoretical understanding of what the Constitution is, and of the proper role of judges in interpreting that Constitution, than with their understanding of history. Originalists are positivists: they view the Constitution as law that must be interpreted as it was understood by the lawgivers.²⁰² They also take a majoritarian view of politics that ill-accommodates judicial discretion.²⁰³ Thus, originalism is seen as a way to constrain judges and remain faithful to the lawgivers' intentions all at once.²⁰⁴

each time they determined whether police officers failed to honor a suspect's request for counsel or whether a state had created a public forum.").

²⁰² See RAKOVE, *supra* note 10, at 9 (stating that originalists believe that "original meaning should prevail . . . because the authority of the Constitution as supreme law rests on its ratification by the special, popularly elected conventions of 1787-88"); Michael C. Dorf, *A Nonoriginalist Perspective on the Lessons of History*, 19 HARV. J.L. & PUB. POL'Y 351, 352 (1996) (noting that originalism "is fundamentally rooted in a positivist conception of democracy, which asserts that law is binding because it expresses the view of the sovereign"); James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 8 (1991) (explaining how originalists believe that judges "are powerless to deviate from the terms of the 'popular consent' expressed in the Constitution"). The positivism of modern-day originalism is criticized in Stephen B. Presser, Book Review, 14 CONST. COMMENT. 229, 233 (1997) (reviewing SCOTT DOUGLAS GERBER, *THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* (1995)) (applauding Gerber for chastising modern-day originalists such as Meese and Bork, who "have failed to appreciate that the Constitution was about more than popular sovereignty, and that instead it was to incorporate a jurisprudence of natural rights").

²⁰³ See BORK, *supra* note 21, at 145 (arguing that judicial discretion is to "impose the values of an elite" in ways that "are not correctable democratically").

²⁰⁴ See Nelson, *supra* note 137, at 1261 (discussing originalism's support in positivism and judicial neutrality). William Eskridge comments on the paradox that some notable originalists such as Justices Scalia and Thomas rely on sources such as *The Federalist Papers* and pre-ratification debates to interpret the Constitution, but disdain the use of similar legislative history to interpret statutes. See William N. Eskridge, Jr., *Should the Supreme Court Read the Federalist Papers but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1301 (1998). Eskridge argues that the distinction can be justified because of the easy strategic use of legislative history and the cheap cost of producing it (as opposed to pre-ratification constitutional history). See *id.* at 3. Eskridge correctly observes Scalia's and Thomas's use of pre-ratification history to provide "context" in order to understand the meaning of a constitutional

Yet, we have enough difficulty pretending we can really discern the Founders' understandings; we are not likely to make sense of them in our world, except when they are writ very large. No doubt, the Founders' vision of the Fourth Amendment is instructive at some basic level. Their concern, however, was about the protection of property, not privacy. And their world bore little relation to our world, where people live stacked atop one another in slums and skyscrapers, regular police forces roam the streets, telecommunications are pervasive, and high-tech equipment allows police to listen in at will.²⁰⁵ For reasons such as these, constitutional understanding evolved to require warrants and focus on privacy, not property.²⁰⁶ Implementing an originalist vision of the Fourth Amendment—or any other constitutional clause, for that matter—in any coherent way would require sweeping all the accumulated sediment off our topography, returning the Constitution to its essentially two-dimensional tabletop form. History, however, cannot be swept away so casually.

Therefore it should come as little surprise that originalist judges themselves regularly interpret the Constitution by relying not only on the history of the Founding but also upon pre-constitutional understandings and post-ratification practices: in short, on all of our history. In *Michael H. v. Gerald D.*,²⁰⁷ for example, Justice Scalia purported to be relying upon originalist methodology to determine the right of a biological parent to maintain a relationship with his adulterously fathered child. Despite the claim to originalism, however, Justice Scalia explored the nature of the right from the common law preceding constitutional history through to the present.²⁰⁸

provision, see *id.* at 2, but the same use can and should be made of legislative history. For an expression of this latter view from a scholar who otherwise is skeptical of the use of legislative history, see John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997).

²⁰⁵ See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 401 (1974) (cataloguing the “wonder[s] of our lives that the framers did not know”).

²⁰⁶ See *Katz v. United States*, 389 U.S. 347, 357 (1967) (holding that searches without warrants are “*per se* unreasonable” and shifting attention from concepts of property law to expectations of privacy).

²⁰⁷ 491 U.S. 110 (1989).

²⁰⁸ See *id.* at 124-27 (concluding that the “marital family” has traditionally been protected against claims from outsiders trying to secure parental rights over a child). There is some evidence that Justice Scalia will use post-ratification history only as a one-way ratchet to deny the existence of a constitutional right. In *McIntyre v. Ohio Elections Comm’n*, the Supreme Court struck down a state law prohibiting the distribution of anonymous campaign information, finding in the First Amendment a right to publish anonymously in the political arena. 514 U.S. 334, 357 (1995). Justice Thomas concurred, specifically declining to address the question of “whether ‘an honorable tradition’ of anonymous speech has existed throughout American history” and instead finding such a right as a matter of how the Constitution was “originally understood.” *Id.* at 359.

As Rebecca Brown has pointed out, such reliance on pre- and post-ratification practice is inconsistent with originalism's understanding of constitutionalism, which purports only to adhere to what the Founders intended.²⁰⁹ Nonetheless, originalists rely upon these extra-originalist sources because they cannot *help* but rely upon them. The only way even originalists can understand (or "interpret") the Constitution sensibly is in light of its long history.²¹⁰

Understanding what our Constitution means requires reversing originalism's anachronistic priority of the Founders' intentions over historical interpretations. The views of the Founders are not without importance, as explained below. Their thinking inevitably affects our own; in some instances it may even be determinative. But because the Constitution is sedimentary, there is a limited utility in drilling clear through to the base every time a question of constitutional interpretation arises. Better interpretations rest far closer to the surface.

3. Living Constitutionalism's Failure: The Inevitability of History

Because originalism theoretically would impose anachronistic values on us, living constitutionalists flee history to keep the Constitution current with the times. They cannot, however, escape the fact that today's deeply held constitutional commitments have been shaped by history. Thus, history inevitably holds the key to our constitutional values. To the extent living constitutionalism purports to reject history, it makes no sense.²¹¹ Constitution-

Justice Scalia, joined by the Chief Justice, dissented. Scalia purported to be applying an originalist methodology, *see id.* at 371-72, but nonetheless relied extensively on post-ratification practice, *see id.* at 371-78. He focused his attention on the "universal and long-established American legislative practice" of banning such speech, *id.* at 377 (citation omitted), paying scant attention to any history of engaging in anonymous political speech. There is room to question whether, in Justice Scalia's view, subsequent practice can establish a right that was not clearly recognized at the time of ratification or can only defeat such a claim.

²⁰⁹ *See* Brown, *supra* note 20, at 191 ("Does evidence of *pre*-Constitutional tradition bear on the intent of the Framers, who clearly set out to make drastic changes in the political traditions of their nation? Is evidence of *post*-Constitutional tradition at all relevant to what the document originally meant?").

²¹⁰ *See* Fallon, *supra* note 32, at 27 & n.133 (describing how Bork, Monaghan, Scalia, and Thomas all "accept at least some non-originalist principles and decisions as binding law").

²¹¹ David Richards, for one, has said that living constitutionalists

alism without history is not constitutionalism at all, largely because history has shaped our deeper values.²¹²

History's inevitability is best seen by acknowledging its central role even in the most nonhistorical methodological approach to constitutional interpretation, moral philosophy. History, for example, is essential to Ronald Dworkin's notion of "law as integrity."²¹³ Dworkin sees interpretation as the identification of our past practices, the development of a justification for those practices, and then the altering of those practices in order to make them fit with that justification.²¹⁴ Notice where Dworkin begins: our

are dead wrong on the interpretive grounds of failing to understand and apply the abstract principles of government implicit in original historical understandings, the settled and often brilliantly articulated case law, and other authoritative constructions of how these principles should be construed.

....

... [T]he interpretation of constitutional law cannot be identified with positivistic conventions of the living constitution. It must instead engage in a complex historical reconstruction of our constitutional traditions

Richards, *supra* note 106, at 518-19; *cf. id.* at 499-500 (discussing the importance of history in interpreting law).

²¹² Christopher Eisgruber stands in the curious position of recognizing the inevitability of history and wanting to deny it at the same time. Eisgruber recognizes that "[o]ur obligation to respect the past is born of its inevitable presence within our politics," yet despite its inevitability, he would not extend it much of a role if it conflicted with broader notions of "justice." Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 *FORDHAM L. REV.* 1611, 1621 (1997). Although a central point of this Article is that history cannot and should not define all of our choices, Eisgruber's view conflicts with the deep, formative role history plays in constitutional development. At a certain level, history shapes our conceptions of justice in the present. Accordingly, history is a fundamental force that formulates the very constitutional questions we ask today; it is not a secondary effect that should be viewed as an aid to, but not as a constraint upon, constitutional interpretation.

²¹³ RONALD DWORKIN, *LAW'S EMPIRE* 95-96, 225-28, 254-58 (1986). History in the sense described here is prominent in many places in Dworkin's work. At the outset, Dworkin describes interpretation as identifying practices and developing justifications for them, only then to adjust the practices to make them the best they can be in light of the justification. *See id.* at 65-67. These "practices," however, do not come out of nowhere, but develop over time. Dworkin recognizes this when he discusses "law as integrity." Law as integrity is both backward and forward looking. *See id.* at 225-38; *see also* Richards, *supra* note 97, at 502-03 (disclosing the historical aspects of Dworkin's thought).

²¹⁴ *See* DWORKIN, *supra* note 213, at 65-66. There are those who are skeptical that Dworkin's purported methodology is what leads him to resolve cases in the fashion that he does. In particular, these critics believe that to some extent Dworkin's "backward-looking" concern for the fit between practice and justification may be camouflaging what at bottom is nothing but reliance on a moral theory. *See, e.g.,* Kramer, *supra* note 11, at 1628 n.1 (characterizing Dworkin's thought as "ahistorically historicist" in that "[p]ast events are merely present data to be used in flushing out the moral theory that provides the real motivating force behind interpretation"); Richard A. Posner, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 *U. CHI. L. REV.* 433, 435 (1992) (arguing that Dworkin is not so interested in the text, structure, or extended body of case law, rather "[h]is implicit legal universe consists of a handful of general principles

practices are and must be historically developed, whether that history is recent or distant.²¹⁵ Law as integrity “insists that legal claims are interpretive judgments and therefore combine backward—and forward—looking elements; they interpret contemporary legal practice as seen as an unfolding political narrative.”²¹⁶ Indeed, sedimentary interpretation bears a close affinity to a metaphor of Dworkin’s own. Dworkin likens the development of constitutional law to the writing of a chain novel.²¹⁷ Obviously, in the writing of that novel, each author has considerable leeway in what to make of what has come before. Similarly, although our history limits our choices, it does not constrain us entirely.²¹⁸ We make choices in telling our history,

embodied in a handful of exemplary, often rather bodiless, cases”). In a recent review, Ed McCaffery comes to Dworkin’s defense, insisting that Dworkin does in fact rely on “past cases” as well as “past practices beyond legal cases alone” to resolve present controversies. Edward J. McCaffery, *Ronald Dworkin, Inside-Out*, 85 CAL. L. REV. 1043, 1045-46 (1997) (reviewing RONALD DWORIN, *FREEDOM’S LAW* (1996)). McCaffery argues that Dworkin’s “method is powerful, yet deeply commonsensical; indeed, it is far from clear that there is anything else to do.” *Id.* at 1045.

²¹⁵ To this end, Dworkin argues that:

[A]ny strategy of constitutional argument that aims at overall constitutional integrity must search for answers that mesh well enough with our practices and traditions—that find enough foothold in our continuing history as well as in the Constitution’s text—so that those answers can plausibly be taken to describe our commitments as a nation.

Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORDHAM L. REV.* 1249, 1254 (1997).

²¹⁶ DWORIN, *supra* note 213, at 225. Similarly, even when hiding behind a Rawlsian “veil of ignorance” one necessarily must take into account present understandings of the world shaped by the past we have lived. Rawls makes this explicit when discussing the concept of “reflective equilibrium,” which is achieved when moral judgments from the original position match those in our prior experience. According to Rawls, the “best account of a person’s sense of justice” is that which finds equilibrium between judgments reached after considering a conception of justice and the “class of facts” that represent prior experience. JOHN RAWLS, *A THEORY OF JUSTICE* 48, 51 (1971).

²¹⁷ See DWORIN, *supra* note 213, at 228-32 (comparing law to “an artificial genre of literature,” the chain novel, in which each author adds a chapter to a novel after interpreting the chapters that have already been written).

²¹⁸ See McCaffery, *supra* note 214, at 1051 (explaining that “[f]it and fidelity to the past, while constraining, are under-determinative,” in defending Dworkin’s “forward-looking” jurisprudence); Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 *CHI.-KENT L. REV.* 1001, 1013 (1988) (claiming that judging “simultaneously acknowledges our debt to the past and denies that the past should control the present”). A different expression of this idea is found in the concept of path dependency. Path dependency explains why our choices are somewhat constrained, and yet why we remain free within the bounds of that constraint. See Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship* (Oct. 6, 1998) (unpublished manuscript, on file with authors) (describing the path dependency of history and its influence on interpretation); see also Kramer, *supra* note 11, at 1640 (describing how economists and game theorists use history to support the concept of path dependency); William E. Nelson, *New Directions in American Legal History*, 4 *BENCHMARK* 283, 291 (1990) (noting that past decisions dictate

and we make choices in light of that history—choices that will determine not only our lives, but those of future generations.²¹⁹ By the same token, however, the chain novelist *is* constrained by the chapters that have come before.

There are some scholars who see constitutionalism as “aspirational,” as holding the key to what we might be or should become, and who seem to reject historical interpretation for a sort of “timeless” understanding of constitutional values. But again, those aspirations themselves are shaped inevitably against our history, and are path dependent upon it. This point can be illustrated by considering the views of scholars like Lawrence Sager²²⁰ or Christopher Eisgruber,²²¹ who favor a “justice-seeking” Constitution, one that embodies timeless values. In *The Incurable Constitution*, for example, Sager identifies two of these timeless values, arguing that “slavery and torture must be prohibited because they are wrong.”²²² Although Sager has picked what must seem the easiest of examples, history quite obviously belies his claim. It is simply impossible to look history in the eye and nonetheless argue that slavery has always been “wrong.” Slavery itself was enshrined in the Constitution. It was not abolished in this country until the end of our first century, and it took a devastating war to accomplish that.²²³ As for torture, the Supreme Court did not even cast an eye on what may well be called torturous practices in police interrogation until well into our

what is presently possible by creating question in an intellectual framework). On path dependency, see generally W. Brian Arthur, *Positive Feedbacks in the Economy*, SCI. AM., Feb. 1990, at 92 (using physics and evolutionary theory to explain positive feedback economics and the collection of small events that determine a greater path).

²¹⁹ David Richards makes this point, responding to the argument that “[h]istory or convention [is] often substantively unjust, and interpretive theories of law resting on history or convention . . . improperly trammel the task of law in doing justice.” Richards, *supra* note 106, at 491. Richards observes two fundamental mistakes underlying this argument. “First, it assumes that a theory of legal interpretation can plausibly disengage meaning in law from history and convention. Second, it assumes that a theory of law that takes seriously the place of history and convention in legal interpretation must blind lawyers . . . in doing the work of justice.” *Id.*

²²⁰ [T]he liberty-bearing provisions of the

Constitution . . . may present themselves as positive law because of their adoption by ratifying social majorities, but their *raison d'être*, their substantive claim to incorporation among those principles that govern us at the deep and enduring level of constitutional law, is their stature in an appropriate account of political justice.

Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. REV. 893, 936 (1990).

²²¹ See Eisgruber, *supra* note 212, at 1614 (“The purpose of constitutionalism . . . is to discipline the present in order to enable future people to govern in the interests of justice . . .”).

²²² Sager, *supra* note 220, at 938.

²²³ Sager himself recognizes this. See *id.* at 936 (describing the “appallingly belated abolition of slavery”).

second century.²²⁴ One would hope that courts will continue to condemn these practices, but the essential point is that our views on them necessarily are historically contingent. As Cass Sunstein has argued, all theories of justice necessarily are historically and culturally situated.²²⁵

Considering that, try as we might, we simply cannot avoid interpreting the Constitution historically, there is a peculiarity to some discussions of the "living" Constitution, which seem at times to deny the need to build upon our history.²²⁶ No matter what else is true, it is simply impossible to interpret the Constitution without reference to history. Even a "break" from tradition is just that, an acknowledgment of our past and a decision to reject its practice or lessons in light of current circumstances.²²⁷ Even a "break" from the past is continuous with our past in a certain, important sense.²²⁸ Constitutional interpretation is inherently historical.

4. Solving the Puzzle of Article V

There remains the puzzle of Article V. Sedimentary interpretation requires the judge (or the interpreter) to be alert to the process of very gradual constitutional change.²²⁹ This is something that common-law judges seem

²²⁴ A LEXIS search of Supreme Court decisions containing the terms "torture" and "interrogation" yields forty-one cases. The earliest is *Bram v. United States*, 168 U.S. 532 (1897). The bulk of the cases, beginning with the third oldest, are found in the 1940s through the 1960s.

²²⁵ See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 903-10 (1987).

²²⁶ Although we cannot abandon our history, there is something dangerous in suggesting that we can. This is a point made poignantly by Katharine T. Bartlett in her piece *Tradition, Change, and the Idea of Progress in Feminist Legal Thought*, *supra* note 160. Professor Bartlett's subject is the feminist rejection of tradition and the past. Although the reasons of feminist scholars for rejecting past tradition are understandable, Bartlett argues that such a rejection is ill-advised, even if it were actually possible. As Bartlett explains, "[a]n approach to progress built on distance from, rather than identification with, the past creates dissonance and conflict." *Id.* at 305. Bartlett's point is not that interpretation of the past in general, and tradition in particular, needs to be static, but that whatever we do in the present must be constructed upon the framework of the past. See *id.* at 305-06.

²²⁷ See *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) ("Due Process has represented the balance . . . between . . . liberty and the demands of organized society . . . having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke."); Bartlett, *supra* note 160, at 336 ("[A] tradition consists of those aspects of the past from which a society has broken, as well as those a society has endorsed and made its own.").

²²⁸ See GADAMER, *supra* note 153, at 281 ("Even where life changes violently, as in ages of revolution, far more of the old is preserved in the supposed transformation of everything than anyone knows, and it combines with the new to create a new value.").

²²⁹ See Sandalow, *supra* note 15, at 1063 ("Changes in constitutional law, and the altered circumstances, knowledge, and valuations that underlie them, occur incrementally."). Gradual change is apparently as frustrating as it is imperceptible. For example, Steven Calabresi recently asked: "If the meaning of the Constitution really results from the courts reading a text

to do quite naturally, although many theories of constitutional interpretation seem to lack a sufficient place for this incremental common-law methodology.²³⁰ Yet, how is it possible to reconcile this process of gradual change with an explicit device in the written Constitution that describes how change to that document is to be brought about? Is Article V without meaning?

The short answer to this puzzle rests in the realization that Article V, like the rest of the Constitution, is subject to sedimentary development. Like all other parts of the Constitution, the Article V amendment process has become imbued with popular understandings both as to when it must be employed, and when it legitimately may be ignored.²³¹ It is, for example, widely recognized that the Reconstruction amendment process occurred in ways that, to say the least, are problematic under the written strictures of Article V.²³² No one, however, seriously argues that those amendments are not “valid” amendments to the Constitution. What happened is either that Article V itself was “amended” during Reconstruction, or that the amendments received widespread acceptance over time, itself a modification of the Article V process. Similarly, the question of when we must resort to Article V clearly has undergone a gradual interpretation.²³³ It may not be entirely certain what that understanding is, in part because understandings emerge in response to specific cases, and in part because the question still cries out for study. But some understanding is possible. For example, one important

in a new context and translating it, then why do old readings persist for so long after the context has changed? Why did we have to wait so long for *Erie* or *Darby* or *Brown* or *Lopez*?” Calabresi, *supra* note 171, at 1451.

²³⁰ *But see* Strauss, *supra* note 122, at 885 (arguing that common law provides the best explanation of American constitutionalism despite theoretical reluctance to accept it in the face of a written charter).

²³¹ Professor Levinson makes a similar point:

The most significant alternative, from the perspective of the traditional lawyer, concerns the relative displacement of Article V as the mechanism by which amendments occur. Not only have Americans been inventive in their use of Article V; more significant, their inventiveness has been manifested in the very process of invention itself. Just as the “scientific method” itself has been transformed in the process of conducting the operations of “science” itself, so has the method of constitutional governance been transformed in the process of actually governing ourselves over the past two centuries.

Levinson, *supra* note 184, at 429-30; *cf.* 2 ACKERMAN, *supra* note 188, at 10 (describing how “both Reconstruction Republicans and New Deal Democrats refus[ed] to follow the path for constitutional amendment set out by their predecessors”).

²³² *See, e.g.*, 1 ACKERMAN, *supra* note 10, at 44-47 (summarizing the intentional departures from the Article V amendment process by the Reconstruction Republicans); 2 ACKERMAN, *supra* note 188, at 160-206 (analyzing the political battles over the process by which the Fourteenth Amendment was passed outside the process laid down in Article V).

²³³ *Cf.* 2 ACKERMAN, *supra* note 188, at 15 (arguing that the text of Article V “makes its procedures sufficient, but not necessary, for the enactment of a valid amendment”).

role for Article V is as a means to change judicial decisions, and it has been employed several times to this end.²³⁴ There is much good work to be done here, but the central point is that like the rest of the Constitution, Article V has undergone change. Like the rest of the Constitution, its meaning is sedimentary as well.

C. *The Methodology of Sedimentary Interpretation*

Because we regularly engage in sedimentary interpretation, it should come as little surprise that its methodology is familiar. Sedimentary interpretation is based upon intuitions and practices we already share; it simply reconciles accepted interpretive practice with interpretive rhetoric.²³⁵ This section discusses the tools of sedimentary interpretation, and how they should be employed in order to decide constitutional cases.

The Supreme Court's understanding of substantive due process provides a rough formula for all of constitutional interpretation. The Supreme Court has gradually come to employ a formulation (developed initially by

²³⁴ Article V has been used to overrule the Supreme Court four times. The Eleventh Amendment was enacted and ratified to overrule *Chisolm v. Georgia*, 2 U.S. 419, 2 Dall. 363 (1793); the Fourteenth to overrule *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856); the Sixteenth to overrule *Pollock v. Farmers' Loan and Trust Co.*, 158 U.S. 601 (1895); and the Twenty-Sixth to overrule *Oregon v. Mitchell*, 400 U.S. 112 (1970). See JOHN R. VILE, CONSTITUTIONAL CHANGE IN THE UNITED STATES 20-24 (1994) (explaining how amendments were used to overrule unpopular Supreme Court decisions).

²³⁵ That the sedimentary approach to interpretation "fits" current practice is made clear by Philip Bobbitt's discussion of "ethical" arguments. Bobbitt's work identifies the modalities of constitutional argumentation, and suggests that commitment to the use of these arguments itself legitimates judicial review. See BOBBITT, *supra* note 10, at 5; PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION, at xv (1991). Many of the modalities are quite common, such as textual or originalist (what Bobbitt calls "historical") arguments. See BOBBITT, *supra* note 10, at 7.

Bobbitt suggests the following exercise: take a Supreme Court opinion and underline all the passages with different colors reflecting the various types of constitutional arguments. There will remain a barren "patch of uncolored text." BOBBITT, *supra* note 10, at 93-94. That remaining patch is the discussion in the case that results from sedimentary interpretation, what Bobbitt calls "ethical" argument. See *id.* at 94.

Although it is not easy to fix precisely what Bobbitt means by ethical argument, its affinity with the sedimentary approach is made clear by his own summary description: "Ethical constitutional arguments" ensure that the solutions to constitutional questions "comport[] with the sort of people we are and the means we have chosen to solve political and customary constitutional problems." *Id.* at 94-95. Bobbitt has a method of developing ethical arguments that is complex and a little difficult to fathom, one that looks to the limits on federal power to define the nature of rights. But again, the sedimentary character of his approach is summed up as he explains, "[T]his rule works better in a society like ours, that is no longer young and that has both a good many statutes and a well-developed constitutional sense." *Id.* at 156.

Justices Holmes and Cardozo,²³⁶ and seized upon readily by other Justices, including Justices Frankfurter, Harlan, and Goldberg in particular²³⁷) which seeks to identify those values “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”²³⁸ This formula recently was adopted by the entire Supreme Court in *Washington v. Glucksberg*.²³⁹

The search for the “history” and “traditions” of the people is precisely the right one for constitutional interpreters.²⁴⁰ The goal is always to identify in our history a set of commitments more enduring and less transient than immediate popular preference.²⁴¹ This is the single most important function of a constitution—to limit present preferences in light of deeper commitments.²⁴² The Supreme Court’s regular use of history is, however, unself-

²³⁶ See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (Cardozo, J.); *Missouri v. Holland*, 252 U.S. 416, 434 (1920) (Holmes, J.).

²³⁷ See *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring); *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); *Adamson v. California*, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring).

²³⁸ *Snyder*, 291 U.S. at 105; see also William W. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227, 247-54 (1988) (tracing the history of this formulation).

²³⁹ 117 S. Ct. 2258, 2268 (1997); *id.* at 2281-83 (Souter, J., concurring). Even before *Glucksberg*, Sylvia Law wrote that “[e]very justice of recent decades has affirmed that these indeterminate provisions [of the Constitution] must be interpreted in light of ‘our history and traditions.’” Sylvia A. Law, *Conversations Between Historians and the Constitution*, 12 THE PUB. HISTORIAN 11, 12 (1990). Law thus sees a role for historians in assisting with the development of constitutional meaning, see *id.* at 13, a sentiment Laura Kalman echoes, see Kalman, *supra* note 97, at 202-08. Cf. Jane E. Larson & Clyde Spillenger, “That’s Not History”: *The Boundaries of Advocacy and Scholarship*, 12 THE PUB. HISTORIAN 33, 35 (1990) (arguing for the role of historians as providing the Court with historical background material under the “history and traditions” test).

²⁴⁰ See James C. Mohr, *Historically Based Legal Briefs: Observations of a Participant in the Webster Process*, 12 PUB. HISTORIAN 19, 24 (1990) (“The ‘history and traditions’ doctrine may be thought of as one of the most important bridges upon which lawyers and historians meet . . .”).

²⁴¹ Rebecca Brown makes the interesting point that as originally employed, the formulation may have been a search for the Framers’ values, and thus inappropriately intentionalist. Brown criticizes the test as often too conservative and backward looking. See Brown, *supra* note 20, at 200-05. Although this may have been so, at least as presently employed the test looks far beyond the Founders. See also Teitel, *supra* note 181, at 609 (“To the extent that the Court’s tradition inquiry simply legitimates longstanding practices, it becomes a virtual proxy for the endorsement of majoritarian understandings and raises serious questions about the role of judicial review in the religion area.”).

²⁴² See *infra* Part III.A (discussing this function of constitutionalism). The accumulated sediment atop the Constitution makes historical interpretation not only inevitable, but possible. Contrast today’s 200-year-old constitutional culture with Christopher Eisgruber’s description of the problem the Founders faced in establishing the new U.S. Constitution:

If Publius was right that a national government is essential, then Americans had no choice but to establish a government from reflection and choice. The apparent alter-

conscious, and often overly selective, a process Morton Horwitz rightfully condemns as “roaming through history looking for one’s friends.”²⁴³ Constitutional interpreters should be open to considering all of our constitutional history in order to understand present-day commitments.

It likewise is important to recognize that in identifying our deepest traditions, not all history is likely to count equally. Because our deepest values have been passed on through the generations,²⁴⁴ constitutional meaning often will be evident by examining the more recent layers of history.²⁴⁵

What judges should do in interpreting the Constitution is what they often already do. They should turn to the usual sources of interpretation. But in utilizing those sources, the theory of sedimentary interpretation establishes their relevance and explains why we often privilege more contemporary evidence of our deeper constitutional commitments over the intentions of our forebearers.

An obvious beginning is the text of the Constitution, the priority of which is often overstated. As explained above, we put much stock in our written Constitution, yet at the same time, we regularly accept the fact that many readings conflict with the precise words that the Constitution employs. “No” in the First Amendment and “all” in the Sixth Amendment do not mean “no”²⁴⁶ and “all,”²⁴⁷ while the Eleventh Amendment means little

native to a chosen constitution—a constitution founded upon custom and tradition—was inapplicable to the American situation. The country’s great size, and the disparate histories of the groups who settled it, left the new nation without a homogenous culture. And much of what was shared among its diverse citizens was inherited from the English political tradition and thus rendered subject to challenge by the recent revolution. The founding generation put its faith in reason and choice because it had no other choice.

Eisgruber, *supra* note 25, at 442.

²⁴³ Morton J. Horwitz, *Republican Origins of Constitutionalism*, in TOWARD A USEABLE PAST 148 (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

²⁴⁴ See *supra* text accompanying notes 160-70 (discussing how the present shapes the past).

²⁴⁵ See *infra* Part III.A (exploring the difficult problem of reconciliation this poses).

²⁴⁶ See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 744 (1978) (limiting the scope of the First Amendment by permitting the FCC to regulate the content of a radio broadcast that is indecent, but not obscene).

²⁴⁷ See, e.g., *Scott v. Illinois*, 440 U.S. 367, 370-74 (1979) (limiting the scope of the Sixth Amendment by holding that the indigent are not entitled to counsel provided by state in cases punishable by fine or prison sentence, if a prison sentence is not actually imposed). Of course the Sixth Amendment might have been interpreted only to permit defendants to be represented by counsel, not as imposing an affirmative obligation on the state to provide counsel to indigents, but this has not been the Supreme Court’s direction. See *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (holding that an indigent defendant facing a prison sentence in a felony prosecution has the right to counsel provided by the state).

of what it says.²⁴⁸ Deviation from the text is as common as it was inevitable: the Framers could not hope to see the future perfectly. The written Constitution often serves as a guide, and undoubtedly its written-ness has proven extremely important to its durability. But in many of its most controversial aspects, we have written over the text with history. In a perceptive article, David Strauss tackles certain puzzles in constitutional interpretation, noting for example that although we claim to privilege the text of the constitution and the intent of the Framers, in reality recent precedents often trump both of these sources.²⁴⁹ Strauss correctly concludes that the distinction between a written and unwritten constitution is not nearly as significant as the distinction between “societies with mature, well established constitutional traditions and those with insecure traditions.”²⁵⁰

For this very reason, pre-constitutional history and traditions also are important interpretive tools, particularly at a high level of generality. Even originalists rely heavily on pre-constitutional understandings.²⁵¹ What originalists intuitively seem to understand is that our Constitution is part of a broader tradition, and that in making the move to a written constitution, we did not turn our back on all that had come before.²⁵² We properly care very little about precisely which punishments were acceptable in England in 1750.²⁵³ On the other hand, we frequently—and appropriately—refer to the writings of Locke and Montesquieu and even to more ancient thoughts

²⁴⁸ The Supreme Court has been quite explicit on this point. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (“[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.”) (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)).

²⁴⁹ See Strauss, *supra* note 122, at 879. In arguing for the priority of common law constitutionalism, Strauss notes many oddities of our present interpretation of the Constitution. To cite but one example, Strauss observes that we have adhered to literal textual meaning far more often for the less important matters. See *id.* at 916. Strauss makes the useful point that it is more important for some questions to be settled relatively permanently than necessarily correctly. See *id.* at 912-13. For more contested matters, however, it is more important that constitutional meaning evolve along with present-day concerns and circumstances. See *id.* at 925-34. In this Strauss is surely correct, just as he is correct that in reality most difficult constitutional questions are matters resolved by subsequent interpretation, not by text. See *id.* at 877, 916-23.

²⁵⁰ *Id.* at 890.

²⁵¹ See Brown, *supra* note 20, at 190-91 (discussing the Supreme Court’s awkward use of pre- and post-ratification practice in its originalist decisions).

²⁵² See RAKOVE, *supra* note 10, at 18 (stating that learning from experience for citizens of the founding generation meant learning from history, from antiquity to the present, not just their generation).

²⁵³ See sources cited *supra* note 189 (explaining the evolving nature of analysis under the discussion of the Eighth Amendment’s “cruel and unusual punishment” clause).

about popular democracy.²⁵⁴ Because the Framers relied on older understandings for some of the most basic aspects of our constitutionalism, these understandings naturally continue to carry weight with us.

Similarly, we frequently rely on the views of the Founders, although their relevance ought to depend upon the particular type of question presented. As Larry Kramer suggests, “[t]he Founding is a starting place, not a fixed reference point.”²⁵⁵ Even the concept of a starting place requires probing, as Kramer recognizes.²⁵⁶ In some instances, a particular clause of the Constitution may have such a developed sedimentary understanding that there will be little occasion to return to ground zero.²⁵⁷ In other instances, the question presented may be so novel that it is extremely useful to return to first principles. In still other instances, we may have lost our way and need to return to the Founding to resituate ourselves. When periods of rapid change have unsettled our views, interpreters gain perspective by returning to first principles and tracing growth forward.²⁵⁸

When returning to the Founding era, however, it is important to understand why we look there. The impetus should be to locate the most general

²⁵⁴ See RAKOVE, *supra* note 98, at 1598 (describing the Founders’ familiarity with the works of Hobbes, Locke, Montesquieu, Hume, and Blackstone, in addition to being well versed in the current science, jurisprudence, philosophy, and literature, and how these all influenced the original language of the Constitution).

²⁵⁵ Kramer, *supra* note 11, at 1639; see also Sandalow, *supra* note 15, at 1069-70 (arguing that neither the language of the Constitution nor the intent of the Framers controls meaning subsequently given to the Constitution, although both may be relevant to some degree). Saying that we should examine the Framers’ intent does not state precisely why this is the case. As noted previously, originalist arguments are unconvincing. From a sedimentary perspective, the Framers’ views obviously are part of the history that must be taken into account. See also Dorf, *supra* note 9, at 1801-03 (describing this use of originalism as “ancestral originalism”). Michael Dorf and Randy Barnett recently offered additional arguments for taking account of the Framers’ intent that have to do with our undeniable respect for the individuals that fashioned our system of government. See Randy E. Barnett, *The Relevance of the Framers’ Intent*, 19 HARV. J.L. & PUB. POL. 403, 406 (1996) (referring to Framers as “wardens”); Dorf, *supra* note 9, at 1803-05 (referring to this as “heroic originalism”). The Dorf and Barnett arguments seem to be far more persuasive accounts of why constitutional interpretation focuses so frequently on the words and opinions of specific Framers.

²⁵⁶ See Kramer, *supra* note 11, at 1640 (asserting that “[t]o assume that values articulated at the Founding should apply unchanged is to overlook the ways in which those values . . . may themselves have changed”).

²⁵⁷ Many of the doctrines of the Fourth Amendment—such as the automobile exception to the warrant requirement—are highly particularized and afford little reason to resort to original understanding. See, e.g., *California v. Acevedo*, 500 U.S. 565, 580 (1991) (holding that police may search a closed container in an automobile without a warrant if they have probable cause to suspect that it contains contraband).

²⁵⁸ This may well have justified the *Term Limits* opinions that began with examinations of founding first principles; it was the failure to take those first principles and apply them to the present that make the opinions so disappointing. See *supra* notes 129-32 and accompanying text (discussing the *Term Limits* opinions).

of constitutive ideas, not to embark on an acontextual hunt for an answer to a particular contemporary problem.²⁵⁹ The latter is precisely the endeavor that earns the justifiable scorn of historians. The proper focus of a return to times long past is to locate some germinal idea—"a decision, idea, value, belief, whatever"²⁶⁰—that we can use as a starting point to cabin the search for later, more specific understandings and commitments.

Likewise, post-ratification practice is valuable, although it is important to keep in mind why this is so. Judges, legislators, executive officials, scholars, and lay citizens argue about what the Constitution means in terms of what our past practice has been.²⁶¹ Post-ratification is misused, however, to the extent it is asked to serve solely as proof of Founding-era intentions that necessarily bind us. Rebecca Brown makes the powerful point that it is incoherent to rely on ex post actions to explain ex ante intentions.²⁶² On this point she is to an extent correct, but only to an extent. We often do what we intended to do, so post-ratification actions may shed light on pre-ratification intentions. We do not, however, always do what we intended. We equally often deviate from past commitments, sometimes for good reason, sometimes for no reason at all.

Widespread reliance on post-ratification practice may be the best recognition that what we intuitively are trying to do is identify present, not past, commitments.²⁶³ Long-standing actions and practices often reveal deeper commitments to a certain way of being. In a sense, post-ratification

²⁵⁹ See 2 ACKERMAN, *supra* note 188, at 32-33. Ackerman states:

I aim to push the Fathers off the pedestal without dropping them into the dustbin of history. . . . If we are to grasp their enduring importance, we cannot look upon them as demigods with final answers. . . . If we are to grasp 1787's enduring importance, we must approach it with different expectations. We must search for the deeper ways that the Founding language, institutions, and ideals have shaped the very process through which later generations have revised the substantive commitments of the Eighteenth century.

Id.

²⁶⁰ Kramer, *supra* note 11, at 1651.

²⁶¹ One might argue that reasoning from precedents reflects nothing more than an application of the moral principle that like cases must be treated alike. Be that as it may, the principle standing alone is of no value. The meaning that the Constitution takes on is the accumulated understanding of those "like" cases.

²⁶² See Brown, *supra* note 20, at 190-91 (asking rhetorically whether "post-Constitutional tradition [is] at all relevant to what the document originally meant").

²⁶³ Professor Brown is correct to observe that we should not "discount the force of present tradition in rigid deference to past tradition. . . . [T]hat is the greatest evil of traditionalism" *Id.* at 216. The proper focus is situated in the present, looking toward the past, rather than vice versa. Thus, the proper role of the interpreter is, as she suggests, "to gauge and evaluate the lessons of present tradition." *Id.* at 221.

practice is just a shorthand for the notion of tracing our commitments through the sediment.

The constitutional decisions of the courts themselves reflect the evolution of constitutional meaning.²⁶⁴ Thus, they are, as David Strauss reminds us, an extremely important resource for constitutional interpretation.²⁶⁵ If one wants to get a quick understanding of what the Constitution means today, the best resource may well be Supreme Court decisions, or even a treatise collecting those decisions into a black-letter statement of present understandings.²⁶⁶ The Supreme Court has been a consistent chronicler of constitutional practices, understandings, and commitments.²⁶⁷ As many have observed, including Oliver Wendell Holmes, Jr., Benjamin Cardozo, David Strauss, and Edward Levi, common law methodology is the process whereby we keep the law current with popular understandings.²⁶⁸ There is a certain magic to the common law in this regard.

Yet, common law constitutional precedents are only one of many means of tracing the evolution of fundamental commitments.²⁶⁹ When mining our history, we need to look to the actions and positions of constitutional actors

²⁶⁴ See Hoy, *supra* note 21, at 497 ("Precedent is . . . a crucial part of what the law means to us, and our understanding will be conditioned by the history of the reception of the legal text in the decisions of prior judges.").

²⁶⁵ See Strauss, *supra* note 122, at 877 ("[I]n the day-to-day practice of constitutional interpretation, in the courts and in general public discourse, the specific words of the text play at most a small role, compared to evolving understandings of what the Constitution requires.").

²⁶⁶ See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* (1997).

²⁶⁷ This reveals that constitutional precedent is often as important, if not more so, than either the constitutional text or the Founders' intent. See Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 724 (1988) ("[O]riginal understanding must give way in the face of transformative or longstanding precedent, a conclusion that in turn may make inevitable the unsettling acknowledgment that originalism and stare decisis themselves are but two among several means of maintaining political stability and continuity in society."); see also BORK, *supra* note 21, at 155-60 (recognizing the importance of accumulated Supreme Court precedent to the nation's self-understanding).

²⁶⁸ See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 152 (Colonial Press Inc. 1960) (1921) ("If judges have wofully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie . . . the hands of their successors."); OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (1963) ("The substance of the [common] law at any given time pretty nearly corresponds . . . with what is then understood to be convenient . . ."); EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 127 (1949) ("[The mechanism of legal reasoning] provides for the participation of the community in resolving the ambiguity [of legal rules] by providing a forum for the discussion of policy . . ."); Strauss, *supra* note 122, at 888 ("The common law approach makes sense of our current practices in their broad outlines . . .").

²⁶⁹ For this reason, although Strauss's instinct is correct, his application of his own intuition is far too limited. Cf. Strauss, *supra* note 122, at 932-34 (using only judicial doctrine to illustrate common law constitutional development).

ranging well beyond the courts.²⁷⁰ There is a relatively new and vibrant literature stressing that actors other than the Supreme Court regularly “make” constitutional law.²⁷¹ Other scholars emphasize that legal outcomes, including those that give meaning to the Constitution, are the result of a policy contest among the political branches.²⁷² The intuitions of these authors are correct. If we want to know how the Constitution is interpreted, it is best to look at all of those who have an official role in interpreting it, or in displaying our popular understanding of the document, not just the Constitution’s self-appointed “ultimate arbiter.”²⁷³

A moment’s thought highlights the extent to which the Constitution takes on meaning outside the pronouncements of constitutional courts. The

²⁷⁰ Bruce Ackerman highlights this point when, in the course of describing an approach to understanding constitutional change, he states:

While decisions of the Supreme Court play a role, a larger role will be played by Presidents and Congresses—and their efforts to gain the support of the American People at general elections. We will be studying Congressional Committee reports, Presidential proclamations, and party campaign platforms with the same care that lawyers usually reserve for Supreme Court opinions.

2 ACKERMAN, *supra* note 188, at 17.

²⁷¹ See, e.g., NEAL DEVINS, *SHAPING CONSTITUTIONAL VALUES* 233-70 (1996) (discussing the roles of the executive and legislative branches in making and interpreting the law); LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* 23-40 (1988) (discussing the roles that the executive branch, governmental agencies, and the states play in interpreting the Constitution); STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 68-87 (1996) (discussing the history of the relationship between the Constitution and the development of all three branches of government).

²⁷² See, e.g., William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994); Rafael Gely & Pablo T. Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt’s Court-Packing Plan*, 12 INT’L REV. L. & ECON. 45 (1992).

²⁷³ See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[T]he federal judiciary is supreme in the exposition of the law of the Constitution . . .”). The question of whether the Supreme Court’s decisions ought to bind other branches has been much mooted of late. See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1359-62 (1997) (arguing that such decisions should be binding, despite admitting that “most scholars, most officials, and . . . many ordinary citizens” disagree); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1270 (1996) (“[T]he President . . . is not bound by, or legally required to give deference to the constitutional determinations of . . . the courts.”); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994) (arguing that the President is not bound with respect to those powers entrusted to him). See generally Symposium, *Perspectives on the Authoritativeness of Supreme Court Decisions*, 61 TUL. L. REV. 977, 978 (1987) (providing various views of the role of the Supreme Court in creating binding constitutional law). For a history of the growth of judicial supremacy, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998), which examines the origins of the countermajoritarian difficulty and its historical relationship to judicial supremacy.

meaning of the Commerce Clause has been developed far more by numerous congressional enactments than by a handful of Supreme Court decisions, yet too often we focus just upon those decisions. The balance of the War Power has been beaten out in hard-fought confrontations between the Executive and Congress; what the courts have had to say is of relatively little significance. Our understanding of the role of the states in foreign relations purports to come from judicial decisions, but those decisions—which accord primacy to the national government—fail to take into account the extremely active role that some states actually play in relations with neighboring and even non-contiguous countries.²⁷⁴ Constitutional judges themselves not only rely upon recent judicial decisions, they often turn to other historical interpretations as well, such as significant congressional decisions, common approaches among the states, and widespread practices among the populace over time.²⁷⁵

Indeed, the Supreme Court apparently recognizes the shortcoming of its own precedents as the divining rod of deeper commitments, regularly consulting other sources as to those commitments. For example, interpreting the meaning of due process, a concept itself widely accepted as having an evolutionary character, the Supreme Court often looks to the statutory approaches of the fifty states. Steven Winter recognized this some time ago, when he observed the Court essentially “polling” state practices to determine whether it violated due process for police officers to use deadly force in apprehending fleeing felons.²⁷⁶

Without drawing what could be an endless list, the point is that a large variety of sources remain available to the courts to test and measure long-standing commitments. In an article dealing with statutory interpretation, Nicholas Zeppos painstakingly collected data on a wide variety of sources utilized by the Supreme Court to find the meaning of statutes, some of them quite inapt to traditional interpretive methodologies such as intentionalism.²⁷⁷ Among the sources he chronicled were canons of interpretation, executive agency interpretations, legal briefs, views of private groups and fa-

²⁷⁴ See Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1637-39 (1997) (describing the federalism implications of state foreign relations activities).

²⁷⁵ See Steven L. Winter, *Tennessee v. Garner and the Democratic Practice of Judicial Review*, 14 N.Y.U. REV. L. & SOC. CHANGE 679, 683 (1986) (noting the Supreme Court’s “open effort to divine a natural trend or consensus concerning the common law rule” at issue in *Tennessee v. Garner*, 471 U.S. 1 (1985)); see also Friedman, *supra* note 192, at 597 (“The Court turns time and again to a head count of states to discern the majority practice.”).

²⁷⁶ Winter, *supra* note 275, at 683-85 (1986) (analyzing the Court’s use of prevailing rules for determining reasonableness).

²⁷⁷ Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073 (1992).

mous jurists, sources of international law, law review articles, and books both legal and otherwise.²⁷⁸ As might be expected, the list is at least this long in constitutional cases, as the Supreme Court has relied on a wide variety of materials encapsulating our history.

Although the Court has not always been self-conscious about what it is doing, the cases that employ these rich sources are all evidence of the fundamental task before the Court—to identify long-standing values that constrain us in the face of present-day, popular desires. What the Court does when it turns to this panoply of sources is consult *all* that rests deeply within us.²⁷⁹ Turning to history, the Court pieces together a story that seeks to determine and persuade us why it is that a popularly chosen course would deviate too much from what, at a more fundamental level, we believe. That is what we all instinctively do when we think about the Constitution.

The decisions of the Supreme Court are rife with historical references, confirming the intuition that history is essential to the enterprise of constitutional law. Nonetheless, the Court often fails to take a systematic approach to history, doing an incomplete job at some times, neglecting history altogether at others.²⁸⁰ This failure to attend to history is not costless. Under the best of circumstances, nonhistorical, insufficiently historical, or incorrectly historical decisions may nonetheless reach correct results. Often, however, the Supreme Court actually will reach premature, poor, or wrong decisions because it neglects the historical examination that should have informed the decision-making process.

The role of sedimentary interpretation perhaps is illustrated best by examining some of the Supreme Court's most controversial decisions. First, *Brown v. Board of Education*²⁸¹ serves as an example of a case in which

²⁷⁸ See *id.* at 1091-98.

²⁷⁹ See BOBBITT, *supra* note 10, at 221 (stating that “[i]t is a notable feature of ethical argument that it may incorporate an address like Lincoln’s even though it was delivered from no bench and ratified by no legislature,” referring to the invocation of “The Gettysburg Address” in *Reynolds v. Sims*, 377 U.S. 533 (1964)).

²⁸⁰ This is less than surprising when one recognizes that even those who watch the Supreme Court most carefully themselves fail to appreciate the centrality of history. To see the truth in this, open a casebook on constitutional law. Although the cases discussed here are certain to be included, it is more than a little startling that usually the casebook authors have edited out the most critical portion of the decisions, that is, the discussions of, and references to, history. For example, as explained below, historical evolution was essential to the resolution of *Roe v. Wade*, 410 U.S. 113 (1973). Justice Blackmun’s extensive historical discussion in that opinion, however, is often eliminated by casebook editors in favor of what is in essence the brief formalist reasoning of the opinion regarding the right to privacy. See, e.g., GUNTHER & SULLIVAN, *supra* note 62, at 531 (omitting Blackmun’s historical review); cf. BOBBITT, *supra* note 10, at 157-58 (discussing how the *Roe* opinion “may be parsed,” yet omitting entirely any mention of the historical discussion).

²⁸¹ 347 U.S. 483 (1954).

history was inappropriately cast aside. Second, in two due process cases—*Roe v. Wade*²⁸² and *Bowers v. Hardwick*²⁸³—the Court properly relied on all of our constitutional history, but did so with the incorrect methodology, casting doubt on the results. Finally, one recent decision, *Washington v. Glucksberg*,²⁸⁴ demonstrates what sedimentary interpretation requires.

1. *Brown v. Board of Education*: Ignoring History

Brown is an example of a decision that likely was correct the day it was decided, but failed to make a proper historical case. On its face, *Brown* was very much a decision in the model of living constitutionalism,²⁸⁵ and somewhat of a disingenuous one at that. Trying to distinguish *Plessy v. Ferguson*²⁸⁶ without overruling it explicitly, the *Brown* decision claimed to be about education (which it was not) rather than about race (which it was).²⁸⁷ This became evident in the aftermath of *Brown*, as the Court struck down one Jim Crow law after another, desegregating golf courses, parks, and swimming pools through per curiam decisions, citing only *Brown*.²⁸⁸ If *Brown* were an education case, such citation and per curiam decisions just would not do, a fact commented upon by many who attacked the Court in the aftermath of *Brown*.²⁸⁹

²⁸² 410 U.S. 113 (1973).

²⁸³ 478 U.S. 186 (1986).

²⁸⁴ 117 S. Ct. 2258 (1997).

²⁸⁵ See 347 U.S. at 492-93 (“In approaching this problem, we cannot turn the clock back to 1868. . . . We must consider public education in light of its full development and its present place in American life throughout the Nation.”).

²⁸⁶ 163 U.S. 537 (1896).

²⁸⁷ See 347 U.S. at 489-90, 492-93. In focusing on education, the Court went on at some length about how education had become central to citizenship, citing highly controversial sociological evidence regarding the impact of racial discrimination on the education of African-American children. See *id.* at 493-94 & n.11. Ipso facto, racial discrimination in education was out. See *id.* at 495 (“Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs . . . [have been] deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”).

²⁸⁸ See, e.g., *Turner v. City of Memphis*, 369 U.S. 350 (1962) (airport restaurants and rest rooms); *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54 (1958) (city parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (buses); *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956) (public law school); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (public beaches, bathhouses, and swimming pools); *Muir v. Louisville Park Theatrical Ass’n*, 347 U.S. 971 (1954) (golf courses and fishing lakes); *Tureaud v. Board of Supervisors*, 347 U.S. 971 (1954) (public university).

²⁸⁹ See, e.g., Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 430 & n.25 (1960) (arguing that the *Brown* Court should have emphasized the broader evils of segregation rather than just those apparent in the context of education); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-35

Where the *Brown* Court went wrong was in abandoning its obligation to examine history to determine if racial segregation was consistent with the deeper values of 1950s America. As a case about race in which society's historical commitments were examined, there is a very strong argument that *Brown* was decided correctly.²⁹⁰ At the time of *Plessy v. Ferguson*, the country may have been content to accept Jim Crow, or at least content to overlook those who practiced it. At the time of *Brown*, however, this was no longer the case. Views on the acceptability of state-enforced racial segregation had shifted.²⁹¹ World War II had taught the country the horrors of racism, and the Cold War had, in Mary Dudziak's perceptive words, made it "imperative" that America keep faith with its democratic rhetoric.²⁹² In this context, Jim Crow stood as one huge, gaping embarrassment, a weapon often turned against the United States in foreign relations as well as a source of discomfort at home.²⁹³ The change in views about segregation was evident in the vast positive public commentary in the aftermath of *Brown* that focused not on the Court's education rationale,²⁹⁴ but upon the inconsistency of de jure segregation with the country's rhetoric of equality.²⁹⁵ Of

(1959) (arguing that the *Brown* decision's narrow basis did not adequately explain *Brown* itself or subsequent decisions based on *Brown*).

²⁹⁰ See Nelson, *supra* note 137, at 1270-73 (developing an argument supporting *Brown* based upon changing historical commitments); cf. POSNER, *supra* note 108, at 62 (discussing the "evil" motivations of segregation).

²⁹¹ See Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 8 (1996) (documenting that, in 1954, opinion polls reflected that "roughly half of the country supported racial integration in public schools").

²⁹² Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62 (1988). For a detailed examination of the social, political, and economic forces that served as *Brown*'s background, see also Klarman, *supra* note 291, at 13-71.

²⁹³ See Klarman, *supra* note 291, at 34 (discussing the "ideological forces" which shaped the "changing racial norms").

²⁹⁴ Ironically, *Brown* today receives some of its fiercest resistance from African-American scholars. See, e.g., Derrick Bell, *Xerxes and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595, 1604-5 (1989); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1750-54 (1993). That scholarship seems to reflect disappointment that *Brown* failed to achieve its promise, causing those scholars to turn on the decision itself. As this Article's analysis makes clear, however, *Brown*'s very failure to rely upon history may have both undercut its subsequent impact, and from the start misled as to precisely what it could promise.

²⁹⁵ See, e.g., Annual Southern Baptist Convention, 1954, at 56 (stating that *Brown* is "in harmony with the constitutional guarantee of equal freedom to all citizens, and with the Christian principles of equal justice and love for all men"); Charles Fairman, *The Supreme Court, 1955 Term—Foreword: The Attack on the Segregation Cases*, 70 HARV. L. REV. 83, 91 (1956) (noting that the Supreme Court's desegregation decisions reflected "a quickened national conscience"); Howard W. Odum, *An Approach to Diagnosis and Direction of the Problem of Negro Segregation in the Public Schools of the South*, 3 J. PUB. L. 8, 13 (1954) ("[T]he pressure upon the South to reform its undemocratic actions must also be identified with the nation's mid-century high motivation for the reaffirmation of its basic democracy.");

course, *Brown* also met with widespread resistance, but the tenor of that resistance—phrased often in terms of the minority status of the southern states²⁹⁶—only reinforced the fact that the decision found support in the deeper views of society at large.²⁹⁷ The entire country—save the Supreme Court—seemed to view *Brown* for what it was, a case resting on a fundamental national commitment to ending formal barriers to racial equality. Many applauded, some spat, but this is what *Brown* was about.

Although one can only speculate as to why the *Brown* Court did not justify its decision in a manner more attentive to the American people's changing commitments,²⁹⁸ this error came with costs. Perhaps least significant among these costs was the stunning critical academic commentary that began with Learned Hand's and Herbert Wechsler's Holmes Lectures.²⁹⁹

Editorial Excerpts from the Nation's Press on Segregation Ruling, N.Y. TIMES, May 18, 1954, at 19 [hereinafter *Editorial Excerpts*] (“The ruling . . . is one of the hardest blows dealt against communistic propaganda in many years. Unpleasant as it is to many Southerners, we are on the road to making the democratic principles embodied in our Constitution a fact.”) (quoting the University of Kentucky's student newspaper, *The Kernel*); *id.* (“Had the decision gone the other way the loss to the free world in its struggle against Communist encroachment would have been incalculable. Nine men in Washington have given us a victory that no number of divisions, arms and bombs could ever have won.” (internal quotations omitted)); *The Supreme Court: Historic Decision*, NEWSWEEK, May 24, 1954, at 26 (noting that segregation, the symbol of inequality, once a “weapon of world [c]ommunism” had been “shattered” by *Brown*).

²⁹⁶ See *Text of 96 Congressmen's Declaration on Integration*, N.Y. TIMES, Mar. 12, 1956, at 19 (reporting the text of “Declaration of Constitutional Principles” issued by Southern representatives).

Even though we constitute a minority in the present Congress, we have full faith that a majority of the American people believe in the dual system of government . . . and will in time demand that the reserved rights of the states and of the people be made secure against judicial usurpation.

Id.

²⁹⁷ Some of the support came from the South. See, e.g., *Editorial Excerpts, supra* note 295, at 19 (“[T]he court is entirely right in its statement that segregation, however ‘equal’ the physical facilities, does put the brand of inferiority on Negro pupils in the schools.” (quoting *The Baltimore Sun*)); *Reaction to High Court Decision: Hailed as Triumph for Democracy by Some, Tragic by Others, in South*, NASHVILLE, TENNESSEAN, May 18, 1954, at 2 (“[T]he ruling was the only one it could make.”).

²⁹⁸ The best candidate may be the explanation that many on the Court—egged on in particular by Felix Frankfurter—felt that tackling the issue head on might have generated hostility in the South. See Mark Tushnet with Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1921-29 (1991) (recounting Frankfurter's and the Court's general fear of Southern resistance and the consequent maneuvering over the appropriate remedy). History suggests the Court might have saved itself the bother of trying to be politic (or political) about the South, and stuck to its assigned task of probing deeply-held commitments and justifying its decisions on those grounds.

²⁹⁹ See generally LEARNED HAND, *THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES*, 1958, at 54-55 (1964) (criticizing *The Segregation Cases* as an illegiti-

This commentary prompted other academics to complain about the candor and craft of the Court, and to vaunt the search for neutral principles.³⁰⁰ It is worth wondering what would have happened if the Supreme Court had put Hand and Wechsler to the test by squarely confronting race as an issue. In the public at large, however, the costs were greater still. Rather than being forced to argue in favor of segregation in the face of a well-reasoned argument against it, some Southern politicians and newspapers were able to attack the *Brown* Court's use of sociological evidence, and to raise questions about public education.³⁰¹ This allowed the South to avoid directly confronting public approbation of its racial practices.³⁰²

Most importantly, *Brown*'s failure to rely upon and develop the case for the country's commitment to racial equality permitted the country to avoid the discussion of precisely what that commitment would entail. Had the Court met its historical obligations, the decision likely would have come out the same way, but it would have been better grounded and would have provided a more focused and substantial basis for the inevitable discussion that was to follow. As it has turned out over the long haul, public commitments to racial equality seem stronger in support of eliminating formal government barriers to equality than they do in support of affirmative government actions to ensure equality.³⁰³ It is too much to blame *Brown* for either the contentious nature of this debate, or to suggest the nature of the decision

mate "*coup de main*"); Wechsler, *supra* note 289, at 31-35 (criticizing the principled, rather than the doctrinal, reasoning underlying *Brown*).

³⁰⁰ The debate over neutral principles is rehearsed in Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503 (1997).

³⁰¹ See, e.g., *Cook Rips Segregation Ruling as 'Hot Potato,'* ATLANTA CONST., June 2, 1955, at 1 (quoting Georgia Attorney General Eugene Cook's criticism that "the court is trying to apply psychology and sociology to the U.S. Constitution"); *Dixie Rejoins the United States*, THE ECONOMIST, Sept. 24, 1955, at 15 (quoting Southern reaction: "These nine men repudiated the Constitution, spat upon the tenth amendment, and rewrote the fundamental law of this land to suit their own gauzy concepts of sociology"); James Reston, *A Sociological Decision: Court Founded Its Segregation Ruling on Hearts and Minds Rather Than Laws*, N.Y. TIMES, May 18, 1954, at 14 ("Relying more on the social scientists than on legal precedents . . . [t]he [C]ourt's opinion read more like an expert paper on sociology than a Supreme Court opinion."); *Segregation Was Doomed Before the Court Acted*, SAT. EVENING POST, June 19, 1954, at 10 (reminding the Supreme Court "that even social progress will be better safeguarded if Congress reads the sociology textbooks" and suggesting that the Justices stick to the "[d]ull reading" of legal precedent).

³⁰² See Nelson, *supra* note 137, at 1272 (noting that Southerners "were not prepared to translate their emotional [preference for segregation] into a rational argument in support of that practice").

³⁰³ See Friedman, *supra* note 300, at 532-34 ("[T]he public seems to see some justice in the principle that those who have been wronged ought to be made whole . . . [but] there is the question of whether reliance on race-conscious remedies impedes the ultimate goal of race equality.").

necessarily affected the subsequent outcome. Yet, if the Court justified its decision in historical terms, we may well have seen the debate about racial equality evolve differently.

2. Privacy Cases: Right History, Wrong Theory

Unlike *Brown*, in privacy cases such as *Roe v. Wade*³⁰⁴ and *Bowers v. Hardwick*,³⁰⁵ the Supreme Court has attended to historical developments since the Founding era, but it has done so without properly considering the reason why. In *Roe* and *Bowers*, fundamental commitments were in flux and highly contested. It is difficult to say that proper historical consideration would have changed the result in either case, but it might have. In any event, a concern for present commitments was the correct one, and with this perspective the Court's historical narratives might have been seen in a very different light.

Despite widespread criticism of the direction taken by the Court in *Roe*, as a matter of sedimentary interpretation its decision is one of the Supreme Court's better-reasoned historical decisions. Even those who favor the outcome in *Roe* have been reluctant to support the Court's reasoning,³⁰⁶ but careful attention to Justice Blackmun's opinion—to all of it, not just the formalist reasoning about privacy—suggests that he at least went about his task in the correct way. When push came to shove, however, he failed to connect his study of history to the proper reasons for examining it.

Whether there is a basis for finding a right to choose abortion in the Constitution should depend upon whether laws banning abortion are consistent with what history reveals to be the deeply held commitments of the

³⁰⁴ 410 U.S. 113 (1973).

³⁰⁵ 478 U.S. 186 (1986).

³⁰⁶ See, e.g., BOBBITT, *supra* note 10, at 158-59 (suggesting that a rule stipulating that the government may not "coerce intimate acts" would be more persuasive than the justification provided in *Roe*); Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1569-71 (1979) (equating a law that forbids abortions to one which requires a woman to be a good samaritan to carry the fetus to term—thereby imposing on the woman an obligation which violates deeply rooted principles of American law). *Roe* is justified by arguments such as equal protection, see, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 386 (1985) (suggesting that the Court's opinion would have been strengthened by utilizing a sex-equality based justification rather than focusing on reproductive autonomy), or the theory that forcing a woman to carry a fetus to term kidnaps her body in an unconstitutional way. See Judith Jarvis, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 48-62 (1971) (noting that while it may be unjust for a mother to refuse to allow an unborn baby to "use" her body to develop, it does not follow that the baby has a "right" to such use).

people today. Commentators attacking the *Roe* decision have focused on almost everything but this question.³⁰⁷

Contrary to the bulk of scholarly commentary, Justice Blackmun's opinion in *Roe v. Wade* took *precisely* the correct approach to answering the question in that case, which was whether, as a historical matter, laws banning abortion were consistent with deeply held commitments.³⁰⁸ Justice Blackmun's decision was a deliberate endeavor to trace the history of public sentiment about abortion and procreative autonomy, tackled in Blackmun's characteristically thorough way. Blackmun's opinion takes the reader from ancient Greece, through the eighteenth and nineteenth centuries, up to present debates about the abortion controversy.³⁰⁹

Justice Blackmun failed, however, to appreciate that what ultimately mattered was whether the history he surveyed demonstrated a widely held commitment to procreative autonomy *at the present time*, one that would justify Supreme Court intervention. On this score the evidence was decidedly mixed, and the Court's decision may well have been premature. As Justice Blackmun acknowledged, "the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage."³¹⁰ Moreover, Blackmun correctly looked to the trend of public sentiment by examining state lawmaking, concluding "a trend toward liberalization of abortion statutes has resulted in adoption, *by about one-third of the States*, of less stringent laws."³¹¹ This, too, was significant; but one-third of the states does not a consensus make, let alone a deep or long-standing one. Similarly, Justice Blackmun showed that contemporary debates among medical professionals were beginning to tip in favor of wider availability of abortion.³¹² This trend, however, was just beginning, and those professionals may well have been at the cusp of public opinion. Thus, Justice Blackmun may have engaged in the correct study but also may have led the Court

³⁰⁷ See BORK, *supra* note 21, at 113-15 (questioning the relevance and persuasiveness of the cases relied upon by the *Roe* Court to expand the right of privacy); Ely, *supra* note 96, at 926-30 (concluding that the Court's analysis is not based upon inference of the Framers' intent or the system of government "contemplated by the Constitution"); Epstein, *supra* note 96, at 178-85 (criticizing the Court for defining and balancing timely social and political interests under the guise of a Due Process analysis).

³⁰⁸ But see Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S. CAL. L. REV. 47, 95-98 (1995) (arguing that Blackmun's historical discussion was irrelevant to the constitutional question at hand).

³⁰⁹ See 410 U.S. at 129-47 (explaining that laws proscribing abortions arise from late nineteenth century statutory changes and are not of ancient or common law origin).

³¹⁰ *Id.* at 129.

³¹¹ *Id.* at 140 (emphasis added).

³¹² See *id.* at 141-47 (detailing recent developments in abortion legislation which have resulted from a more liberal medical community response).

to a premature conclusion by failing to understand the significance of what the study showed.

In light of this discussion of *Roe*, it becomes plain that the Court in *Bowers* made precisely the same error as that of the *Roe* Court, but one tending in the opposite direction. In *Bowers*, the Supreme Court purported to rely on history to find that there was no right to engage in homosexual sodomy in the Constitution.³¹³ Among academics the decision has been widely reviled.³¹⁴ Among the public, the evidence is perhaps less certain, and surely the issue of gay rights is a controversial one. What is stunning, however, is how the *Bowers* Court's purported use of history failed in the same way as did the *Roe* Court's, yet with the opposite result.

Justice White, writing for the Court in *Bowers*, presented evidence that the trend in society was moving speedily away from the result the Court reached, yet he ignored this evidence and ridiculed the notion that the Constitution might offer any protection for homosexual practices. Justice White reviewed the history of criminal sodomy laws regulating homosexual conduct,³¹⁵ although in a much less careful way than did Justice Blackmun in *Roe*, leaving White's decision open to challenge.³¹⁶ Importantly, however, White's historical review concluded that "until 1961, all 50 states outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults."³¹⁷ Then, the Court concluded that "to claim that a right to

³¹³ See *Bowers v. Hardwick*, 478 U.S. 186, 192-94 & nn.5-7 (1986) (noting that sodomy was prohibited by the original thirteen states and was a criminal common law offense).

³¹⁴ See, e.g., Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1721-26 (1993) (identifying the fundamental error in *Bowers* as the equation of homosexual identity with the act of sodomy); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1494-99, 1532-37 (1988) (reviling and then rewriting *Bowers* relying on civic republicanism); Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 648-56 (1987) (criticizing the logic, or lack thereof, supporting the Court's opinion).

³¹⁵ See *Bowers*, 478 U.S. at 191-94.

³¹⁶ See Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1081-89 (1988) (challenging the historical assertion relied upon by the *Bowers* majority). As Bill Eskridge argues, the Court's opinion is flawed in terms of historical precedent, by overlooking the Court's rejection of natural law as a valid justification of sex regulation in the *Skinner/Griswold/Roe* line of cases, as well as historiography, by failing to recognize that the traditional protections against coercive sex and sex with minors did not support the Court's result. See William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. (forthcoming May 1999).

³¹⁷ *Bowers*, 478 U.S. at 193-94.

engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."³¹⁸

Although the weighing of historically based commitments is not an exact science, there is good reason to suggest that Justice White underestimated some important evidence. Justice White's historical examination revealed that during the twenty-some years between 1961 and 1985, more than half the states had eliminated their criminal sodomy laws, and perhaps (in the face of what looks to be intentional ambiguity in Justice White's opinion) other states had lessened the severity of the offense.³¹⁹ Particularly in light of an understanding that repealing a law may be every bit as difficult as enacting one, Justice White told us something very significant about changing public perceptions.³²⁰ One might argue that the trend was still a bit premature for the *Bowers* Court to come out the other way, especially given that the trends in public sentiment were quite recent. There were, however, other options, such as a holding that a state must enforce its sodomy laws equally or not at all, or even a holding that the case was moot, or that Hardwick did not have standing, thus avoiding the question for the time being.³²¹ But Justice White's somewhat sarcastic opinion, asserting that any historical claim to sexual autonomy on the part of gays was "facetious,"³²² is hardly a fair summary of what the evidence suggested were the commitments of his national audience. It is little wonder that since *Bowers*, gay rights have found much broader public acceptance, as well as greater acceptance by the Court.

The point of this discussion of *Roe* and *Bowers* is emphatically *not* that constitutional meaning should be determined on the basis of opinion polls. That approach confuses present preferences for deeper commitments, decidedly not the task of sedimentary interpretation.³²³ Rather, the goal of con-

³¹⁸ *Id.* at 194; *see also id.* at 196-97 (Burger, C.J., concurring) (tracing the "ancient roots" of antisodomy laws).

³¹⁹ *See* Bartlett, *supra* note 160, at 315 ("[E]ven by Justice White's own account, over half the states since 1961 had . . . repealed their sodomy laws . . . [or] did not enforce them.").

³²⁰ In fairness, this movement may have been influenced by the Model Penal Code's recommendation that states repeal those laws, as much as by a clear shift in public opinion. *See* Halley, *supra* note 314, at 1774-76 (tracing the changing degrees over time to which state courts have been willing to judicially repeal sodomy statutes).

³²¹ *See* Donald A. Dripps, *Bowers v. Hardwick and the Law of Standing: Noncases Make Bad Law*, 44 EMORY L.J. 1417, 1418 (1995) (arguing that Hardwick did not have standing and, if he had, that "the result of the litigation would have been different"); Cass R. Sunstein, *The Supreme Court 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 68 n.309 (1996) (claiming that a "thoroughgoing [judicial] minimalist would . . . have dismissed th[e] case as moot").

³²² *Bowers*, 478 U.S. at 194.

³²³ *See infra* Part III.C (discussing the role of judges in sedimentary interpretation as identifying deeper commitments).

stitutional decision makers (or advocates) is to fashion a historical narrative that identifies deeper commitments and justifies the enduring nature of those commitments. The evolution of statutes, changes in common understandings, and patterns of non-enforcement of certain laws are all tools in developing the narrative. These privacy cases emphasize that deeper values may well be found in the topmost sedimentary layer. Nonetheless, it is sediment that is sought, not sand.

3. *Washington v. Glucksberg*: Sedimentary Interpretation

In sharp contrast to the decisions discussed above stands one recent decision, *Washington v. Glucksberg*,³²⁴ in which the Court self-consciously recognized its obligation to consider all of our history, not just that of the Founding, and to use that history to determine what it said about our present commitments. This methodology was apparent to a greater or lesser degree in most of the opinions in the case, but was most prominent in the majority decision and in Justice Souter's concurrence. *Glucksberg* presented the question of whether state laws prohibiting physician-assisted suicide were unconstitutional as applied to the terminally ill.³²⁵

In modern-day terms, the case presented a contest between competing sets of contested commitments. The first is society's concern about the value of human life and the gravity of letting it slip away. The second is the still developing right to bodily autonomy, a right reflected in cases such as *Planned Parenthood v. Casey*³²⁶ and *Cruzan v. Director, Missouri Department of Health*,³²⁷ as well as in our long history of individual liberty. Both of these commitments were aired forcefully in *Glucksberg*, and both were considered in a way that took the historical evolution of values into account.

Although they came at the issue in somewhat different ways, Chief Justice Rehnquist's majority opinion and Justice Souter's concurring opinion both devoted substantial effort to examining the historical development of the competing sets of values. Both decisions attended to the long history of regulation in the area.³²⁸ Both took into account numerous sources of constitutional history, including statutes, state and federal court decisions, executive actions, activity by mobilized citizens, professional task forces, and

³²⁴ 117 S. Ct. 2365 (1997).

³²⁵ See *id.* at 2261 (considering the constitutionality of state statutes prohibiting physician-assisted suicide).

³²⁶ 505 U.S. 833 (1993).

³²⁷ 497 U.S. 261 (1990).

³²⁸ See *Glucksberg*, 117 S. Ct. at 2262-67; *id.* at 2286-89 (Souter, J., concurring).

the like.³²⁹ Both decisions worked hard to contextualize the controversy. The opinions differed somewhat as to which set of competing values were emphasized,³³⁰ but that is precisely as it should be. Comparative narratives about deeply held commitments are inevitable and help to produce thoughtful sedimentary interpretation.

Indeed, there is yet another, perhaps more remarkable, way in which *Glucksberg* was faithful to sedimentary interpretation, that is, regarding the construction of the (substantive) Due Process Clause itself. The idea of the Supreme Court striking down state laws as arbitrary under the Due Process Clause is highly contested, with its own long history. Justice Souter's opinion traces that history, struggling to embed the Supreme Court's manner of deciding these cases in current understandings about the role of the Constitution and the Supreme Court.³³¹ In a lesser fashion, even the Chief Justice did the same.³³² Thus, *Glucksberg* stands both as a united statement in favor of the use of substantive due process and as a mirror of the broad public consensus that the right to die is not, at this time, one of our fundamental commitments.

None of this is meant to glorify the result in *Glucksberg*. Like many constitutional decisions handed down each term, it has had its proponents and opponents. But, in *Glucksberg*, the Supreme Court seems to have come together in understanding the need to consider present commitments in light of their historical developments. Although the task was perhaps made easier in that it was a substantive due process case in which the Court's own formula is directed to this very inquiry, *Glucksberg* nevertheless stands as a model of sedimentary interpretation.

³²⁹ See *id.* at 2262-75 (considering the broad historical treatment of assisted suicide); *id.* at 2286-89 (Souter, J., concurring) (same).

³³⁰ See *id.* at 2268 & n.17 (describing the debate between the Court and Justice Souter over whether the law at issue is consistent with "[o]ur Nation's history, legal traditions, and practices" (the Court's position), or whether it sets up "one of these 'arbitrary impositions'" or "purposeless restraints" (Justice Souter's position) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting))).

³³¹ See *Glucksburg*, 117 S. Ct. at 2277-86 (Souter, J., concurring) (explaining that the Court may not derive its values merely from personal and private notions, but rather is "bound to confine the values that it recognizes to those . . . expressed in the constitutional text, or those exemplified by 'the traditions from which [the Nation] developed'" (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting))).

³³² See *id.* at 2267-68 (discussing the role "[o]ur Nation's history, legal traditions, and practices" must play in guiding responsible decisionmaking).

III. HARD QUESTIONS: RECONCILIATION, CONTESTABILITY, AND COMPETENCE

The practice of sedimentary interpretation may be stated simply, but it poses questions of great theoretical difficulty. The task of a constitutional interpreter is to use history to understand today's deeper, long-standing commitments, and to reconcile those commitments with present preferences.³³³ Yet, how can we reconcile deeper values with present preferences when those "deeper" or more fundamental values actually rest quite close to the top of the constitutional topography? And, how can we pretend that the values we identify are, in fact, "our" values in a plural society in which historical commitments are contested? Moreover, why is it that judges are seemingly privileged in this identification of fundamental values, if in fact the process of identification is one of historical narrative? These are the problems of reconciliation, contestability, and judicial competence.

Rather than purporting to offer clear resolution of these difficult questions, this Part instead explains why they are the correct "hard questions" of constitutional interpretation. In the process, it offers some tentative conclusions. No theory of constitutional interpretation is either determinate or problem free. Any promise to the contrary (as originalism sometimes appears to make) is illusory. Every theory of constitutional interpretation has its own difficult questions. The relevant issue, however, is whether the difficult questions presented are the correct ones, not whether these questions have clear and certain answers.

Moreover, despite the apparent difficulty in answering these questions, it is worth bearing in mind that we manage to address them innately on a daily basis. We do it in both our personal lives and in our collective constitutional life. We may struggle with difficult cases, but we nonetheless resolve them and move on. A good measure of the worth of sedimentary interpretation is that we often already interpret the Constitution in this very way. As difficult questions are tackled, therefore, keep in mind that however difficult they are, they are questions which we seem prepared to grapple with every day.

³³³ A similar proposition was advanced by Jed Rubenfeld, when he wrote: "An account of constitutional interpretation must be able (1) to distinguish interpreting from rewriting, rooting interpretation somehow in text and history; and yet (2) to explain and incorporate the undeniable role of normative judgment in constitutional law, beyond the letter of the law, and sometimes in defiance of the original intentions." Jed Rubenfeld, *On Fidelity in Constitutional Law*, 65 *FORDHAM L. REV.* 1469, 1487 (1997).

A. *The Problem of Reconciliation*

At bottom, constitutionalism necessarily must be the reconciliation of present-day, popular preferences with some set of deeper, more enduring values. Without the juxtaposition between present-day preferences and more enduring values, the idea of constitutionalism is meaningless.³³⁴ If there is no difference between present desires and these other values, then the very idea of constitutionalism collapses upon itself and we are left with nothing but popular preferences, no matter how they are aggregated and represented. Constitutionalism necessarily implies some idea of restraint—of constraint.³³⁵ Constitutionalism may be much more, but it cannot be less.³³⁶

Stated in this way, it becomes clear that the real problem is one of perspective. The closer the constitutional commitments or values are to the surface of the sedimentary Constitution, the more difficult it is to tell them apart from present-day preferences. One conceptual advantage of originalism is that the values it enforces are quite distinct from present preferences. But originalism is impossible in practice, for all the reasons discussed previously, and so its conceptual advantage is rendered futile. Instead, as the distinctions between present desires and past values become less clear, we necessarily must confront the problem of reconciliation.

Despite the difficulty of reconciliation, this idea of past commitments running alongside present preferences is not an unfamiliar one. We encounter it daily in our ordinary lives. It may be a beautiful day, and the present preference may be to go swimming, or work in the garden; but it may also be a Sabbath day and many people may have much deeper commit-

³³⁴ See Sherry, *supra* note 218, at 1013 (“The task of the pragmatist decisionmaker [, especially in constitutional cases,] is to reconcile a flawed tradition with an imperfect world so as to improve both and do damage to neither.”).

³³⁵ See HOLMES, *supra* note 134, at 274 (“Constitutionalism . . . assumes that the passions of men will not conform to the dictates of reason and justice without constraint.”); Rubinfeld, *supra* note 333, at 1483 (defining constitutionalism as “self government over time,” restrained by “commitment”).

³³⁶ It may seem that this definition sidesteps a large part of what the Constitution *does*, in that, as many have observed, the Constitution’s foremost function seems to be the structuring of American government. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 90 (1980) (noting that the body of the Constitution is devoted almost entirely to questions of structure). But the two functions of structure and interpretation are not mutually exclusive, for interpretive questions about the mechanics of government regularly arise. If no such questions emerge, it means that we have agreed on those values underlying the present governmental structure. If disagreement arises as to structural mechanics, then the same problem presents itself: How do we reconcile the interpretation we wish to give structural provisions today with what our commitment to constitutional values suggests is the correct interpretation? See Sandalow, *supra* note 13, at 1069 (“Constitutional law is the means by which we express the values that we hold to be fundamental in the operations of government.”).

ments that lead them to worship. We might receive an invitation that would cause us to break plans with a friend, but, although the invitation is appealing, longer-standing loyalties lead us to decline. We reconcile these conflicts between present preferences and deeper commitments regularly, sometimes with great struggle and sometimes quite easily.³³⁷ Indeed, the heightened level of angst that accompanies some such decisions is likely a function of factors that mirror the idea of constitutionalism: how important is the deeper commitment, how strong is our present desire, how compelling is the reason to deviate from deeper principles, what are the consequences of such departure likely to be, and how well are we able to rationalize the departure?

As in our personal lives, the problem of reconciliation in our collective constitutional life is also one we solve every day. Constitutionalism is difficult precisely because it challenges us to decide on a daily basis who we are and for what we stand.³³⁸ It would be nice if we could elude the question simply by turning to a rule book written two hundred years ago that answered all of these hard questions, but we cannot. To make matters worse, present preferences inevitably influence our perception of our deeper commitments. Precisely because our desire to act upon our present preferences is so compelling, we are prone to distort our understanding of deeper commitments, thus complicating the process of reconciliation.

Despite the difficulty of reconciliation, it is precisely the correct problem; solving it gives content to our understanding of who we are and what we are about. Constitutionalism in a very real sense is the process of constituting ourselves,³³⁹ and it should come as no great shock to learn that the task is not an easy one. Although our generation defines its commitments daily as it resolves these difficult problems,³⁴⁰ any theory that purports to offer easy answers is likely to be a chimera. Sedimentary constitutionalism

³³⁷ See Bartlett, *supra* note 160, at 334 (“Individuals attain new understandings of themselves and others by struggling to resolve the incoherence between their deeply ingrained habits and norms and their experiences and insights.”).

³³⁸ Cf. Hoy, *supra* note 21, at 497 (“In understanding the law we are really trying to understand ourselves, and the tradition of legal interpretation and judicial practice is an important part of what we have become.” (footnote omitted)).

³³⁹ See WOLIN, *supra* note 156, at 9 (“A constitution not only constitutes a structure of power and authority, it constitutes a people in a certain way.”); Mark Tushnet, *Constituting We the People*, 65 *FORDHAM L. REV.* 1557, 1560 (1997) (discussing “a coherent narrative in which the Constitution constitutes the people of the United States”); Winter, *Indeterminacy and Incommensurability*, *supra* note 137, at 1486 (explaining the “double sense” of the word “constitutional” as “simultaneously constituted and constituting” the “human subject”).

³⁴⁰ See Tushnet, *supra* note 339, at 1560-61 (noting that constitutionalism is “a *project*, that is, a self-creating activity in which the people of the United States daily decide whether to continue to pursue the course we have been pursuing”).

presents the problem squarely, which in and of itself suggests the sense of the approach.

B. *The Contestability of History*

Although the process of reconciling deeper commitments with present preferences is hard enough in our personal lives, it appears almost overwhelming in the constitutional context. After all, the American people are not a monolith.³⁴¹ We are a disparate people come ashore from many different lands, each with our own history and our own way of understanding that history.³⁴² Given our differences, the deeper commitments we seek to identify necessarily will be contested.³⁴³ But it is this very process of con-

³⁴¹ See Eisgruber, *supra* note 308, at 56 n.23 (stating that it is important to ask whether "Americans living under the Constitution in fact constitute a single people with shared commitments"). National differences and their place in a national "civic" history are the focus of Rogers Smith's extensive treatment of American citizenship laws. ROGERS M. SMITH, *CIVIC IDEALS* (1997). Smith examines how citizenship laws have been used to mold a national story, while excluding different groups at different times. Smith's book tackles at great length the question, "How and why do people come to construct civic identities?," *see id.* at 30, a question treated only briefly in this section. Although Smith concedes the need to construct a national story, *see id.* at 480, his broader theme is the peril of doing so in ways that exclude or disrespect individual group identity.

³⁴² This is the basis for Appleby's book describing the tension placed on a unified national story by the constant waves of immigrants, each wave with its own story to tell. *See, e.g.*, APPLEBY ET AL., *supra* note 4, at 133-34 (noting that Turner's frontier thesis of Americans was immediately problematic in light of the millions of uprooted Europeans arriving on our shores); *see id.* at 294-302 (describing the difficulty of creating a national story for the United States in light of the many separate group stories).

³⁴³ *See id.* at 255-61 (arguing that even if the facts are agreed upon, different groups will emphasize different facts, or see them in different ways); *see also* Rudolph J.R. Peritz, *History as Explanation: Annals of American Political Economy*, 22 LAW & SOC. INQUIRY 231, 234-35 (1997) (discussing how "historical knowledge ultimately emerges out of . . . the very interpretive divergences produced by juxtaposing alternative historical accounts," and then going on to discuss history as "discourse"). There is obviously a tension between recognizing that different groups will have experienced different histories, and the need to construct a national identity. The debate over this tension plays out, in part, in academic history circles in the debate over "synthesis" in American history. Compare Thomas Bender, *Wholes and Parts: Continuing the Conversation*, 74 J. AM. HIST. 123, 126 (1987) (explaining that synthesis requires "neither orthodoxy nor an authoritative 'we'"), and Thomas Bender, *Wholes and Parts: The Need for Synthesis in American History*, 73 J. AM. HIST. 120, 126-27 (1986) (arguing for the role of history in creating a public culture), with Richard Wightman Fox, *Public Culture and the Problem of Synthesis*, 74 J. AM. HIST. 113, 114-15 (1987) (questioning whether synthesis is likely to express the dominant group's views), Nell Irvin Painter, *Bias and Synthesis in History*, 74 J. AM. HIST. 109, 110-11 (1987) (expressing concern that synthesis might fail to recognize various groups' histories), and Roy Rosenzweig, *What Is the Matter with History?*, 74 J. AM. HIST. 117, 118 (1987) (wondering in whose voice a synthesis history will be told).

test and resolution by which we define ourselves as a constitutional nation.³⁴⁴

The telling of history is inevitably the process of choosing.³⁴⁵ In describing past events, the historical interpreter must cull from the many facts that “really” happened those that have significance for the narrative being told.³⁴⁶ Thomas Jefferson wrote many, many things. Much of what he wrote occupies little of our attention today, while certain letters, documents, and tracts play a prominent role in our national narrative.³⁴⁷ We decide what it is from the past that we are to emphasize or integrate into our present being.³⁴⁸ The rest, we cull. As Alfred North Whitehead put so elegantly, the past is “[perpetually] perishing.”³⁴⁹

What is taken from the past, and what is left out, inevitably is influenced by the person or people piecing the narrative together, as well as by

³⁴⁴ See APPLEBY ET AL., *supra* note 4, at 63 (describing how nations use history to construct national identity); WOLIN, *supra* note 156, at 12 (“Societies try to express what they are about as political collectivities by appealing to or constructing their pasts and connecting that past with present arrangements of power. . . . What is at stake here is an interpretation of the meaning of collective identity as expressed through the constitutionalization of power.”). The authors of *Telling the Truth About History* describe at length how history has been used by Americans to create national identity, a special problem for Americans after the Revolution. See APPLEBY ET AL., *supra* note 4, at 90-159. They go on to explain the tension in America today between telling stories that are unifying, but omitting crucial parts of specific group stories, or the telling of faithful group stories, even though those histories splinter national identity. See, e.g., *id.* at 116 (contrasting “melting pot” with “colorful patchwork quilt”); *id.* at 289 (“Democracy and history always live in a kind of tension with each other. Nations use history to build a sense of national identity, pitting the demands for stories that build solidarity against open-ended scholarly inquiry that can trample on cherished illusions.”).

³⁴⁵ See Boorstin, *supra* note 163, at 428 (“Selection is usually a difficult, and always crucial task for the historian. To give form to the chaos of the past is never easy, and sometimes seems impossible.”).

³⁴⁶ See CARR, *supra* note 158, at 10 (“The historian is necessarily selective. The belief in a hard core of historical facts existing objectively and independently of the interpretation of the historian is a preposterous fallacy, but one which it is very hard to eradicate.”); DANTO, *supra* note 158, at 14 (“Perhaps not everything is part of history as a whole, nor is history as a whole the widest possible context. A story, as we have said, must leave things out.”); Boorstin, *supra* note 163, at 433 (“The legal historian can hope only to give to the data of the past one of many possible illuminating formulations.”); Sandalow, *supra* note 15, at 1070 (“[W]e search out from the past those elements of experience and strains of thought that appear most relevant to our own time.”).

³⁴⁷ See *Everson v. Board of Educ.*, 330 U.S. 1, 11-13 (1947) (discussing Jefferson’s works on prohibiting governmental establishment of religion).

³⁴⁸ See *supra* note 153-155 and accompanying text. Karl Llewellyn recognized this over sixty years ago when he wrote, referring to the correct frame for constitutional decisionmaking, “[t]he base-line . . . becomes so much of the past only *as is still alive*, and the immediate future comes to bear as well.” Llewellyn, *supra* note 22, at 33; see also Bartlett, *supra* note 160, at 330-31 (“[T]he question is . . . which traditions among this patchwork we will come to identify as our ‘own.’”).

³⁴⁹ See WHITEHEAD, *supra* note 153, at 237-38, 274.

their purpose in telling it.³⁵⁰ History is a narrative that seeks to make sense of the past, and the sense in the telling comes from a description of cause and effect. But understanding cause and effect in human behavior turns on one's understanding of what leads people to act. A story told one way will make sense of history to one audience. Another audience will need to hear the story in a slightly different fashion for it all to come together. If it were otherwise, we would not need countless histories of the Civil War, or even of specific battles, let alone numerous independent tellings of such critical events as emancipation.

What constitutional law has going for it is that it is perpetually being retold by many different people.³⁵¹ Constitutional law is the telling of who we are, and what we value most highly.³⁵² It is a story often told by judges, but it is also a story told by the people, by immigrants who have adopted this story as their own, by outsiders who seek to tell a story like our own, by insiders who wish to have the story told one way rather than another.³⁵³ In

³⁵⁰ This is a central theme of APPLEBY ET AL., *supra* note 4. The authors argue that democratization has led to the fragmentation of history, as groups tell the story of their history differently. Each group will emphasize different aspects even of a shared story. *See id.* at 11 (“Even in a democracy, history always involves power and exclusion, for any history is always someone’s history, told by that someone from a partial point of view.”). It is also the one sense in which Arthur Danto concedes that history can be relativistic. He explains:

[I]mposition of a narrative organization [on history] logically involves us with an in-expungable subjective factor. There is an element of sheer arbitrariness in it. We organize events relative to some events which we find significant in a sense not touched upon here. It is a sense of significance common, however, to all narratives, and is determined by the topical interests of this human being or that. The relativists are accordingly right.

DANTO, *supra* note 158, at 142.

³⁵¹ This point is emphasized by the “arrival” (albeit self-proclaimed) of critical history “as a category of intellectual practice relevant to law.” Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1024 (1997). As for the definition of critical history, Gordon explains:

[I]t is any approach to the past that produces disturbances in the field—that inverts or scrambles familiar narratives of stasis, recovery or progress; anything that advances rival perspectives (such of those as [sic] the losers rather than the winners) for surveying developments, or that posits alternative trajectories that might have produced a very different present

Id. at 1024.

³⁵² *See also* SEIDMAN & TUSHNET, *supra* note 98, at 4 (“Two centuries after our founding, we are still debating precisely what kind of country the United States is and what it stands for at the core.”); Eisgruber, *supra* note 308, at 53 (“Constitutionalism is, among other things, a way for a political community to ‘talk out’ its political identity.” (citations omitted)).

³⁵³ *See* Brown, *supra* note 20, at 205 (“[O]ur traditions are formed by many overlapping communities. Not infrequently, the traditions of a geographical, ethnic, religious, or political community will run at cross-purposes with the traditions of the larger communities—state and national—in which they are nested.”).

this constant retelling, our constitutional history is boiled down, synthesized, and reduced to a common narrative.³⁵⁴

It is difficult to tell a shared story, but it also is essential—and inevitable—that we try.³⁵⁵ We are a nation of immigrants, having come to these shores in successive waves, each with very different stories. Yet, we have had to make a nation of ourselves. It is no accident, as Rebecca Brown points out, that we require naturalized citizens to learn about the Constitution: “Why should we care if new citizens know the Constitution,” Brown asks. “It does not touch on their immediate concerns or activities as some other societal prescriptions might.”³⁵⁶ The Constitution is essential because it is the foundation on which we build this shared story. It is the place where we establish consensus about our most fundamental values.³⁵⁷

Although essential, the telling of an uncontested history is in some sense also impossible.³⁵⁸ We are going to disagree about shared values, and we are going to tell the story of our history in ways that emphasize the par-

³⁵⁴ See I ACKERMAN, *supra* note 10, at 36 (“[T]he narrative we tell ourselves about our Constitution’s roots is a deeply significant act of collective self-definition; its continual retelling plays a critical role in the ongoing construction of national identity.”); cf. Rakove, *supra* note 131, at 1038 (“We turn to history to understand how the present emerged from the past; to derive lessons that enable us to act responsibly as citizens; to fashion notions of individual and communal identity within the modern patriotic, pluralistic, polyglot, and polycultural state.”).

³⁵⁵ This is the tension at the bottom of Rogers Smith’s *Civic Ideals*:

And just as it is hard to see why national allegiances should often prevail, given democratic cultural pluralist views, it is also hard to see how these pluralist positions can be politically sustainable if national obligations are minimized. If citizens feel that their most profound commitments go to a racial, ethnic, religious, regional, national, or voluntary subgroup, then the broader society’s leaders may find that their government lacks adequate popular support to perform some functions effectively.

SMITH, *supra* note 341, at 480. Shared stories are so essential to nation-building that often they are just that: stories. It is not uncommon for national histories to include myth as well as reality. See MCNEILL, *supra* note 152, at 13-22 (discussing national myths and “mythistory”).

³⁵⁶ Brown, *supra* note 20, at 177.

³⁵⁷ See Nelson, *supra* note 137, at 1269 (“[E]ven though American society is characterized by deep cleavages and conflicting social practices, nearly all Americans accept and participate in an abiding social consensus. This consensus binds society together, and if it did not exist, society itself could not exist.”).

³⁵⁸ As Rogers Smith explains:

Almost every state contains many people whose political history, religious or political beliefs, ethnicity, language, or other traits give them reason to decide that their primary political identity and allegiance is to some group other than that defined by the regime governing the territory in which they reside. . . . The U.S. has native tribes that have never accepted the national government’s claim of sovereignty, black and Chicano nationalists, citizens who believe that their religious memberships outweigh their national allegiance, and many others who at least sometimes do not feel that they are first and foremost Americans.

SMITH, *supra* note 341, at 32.

ticular values we hold most dear.³⁵⁹ Presently, we fight a battle over whether the First Amendment permits restrictions on hate speech.³⁶⁰ Each side of that battle tells a different history of who we are: one history emphasizes our tradition of autonomy and claims a preferred position for unfettered speech; the other history is communitarian and emphasizes values of human dignity and equality.³⁶¹ As caught up as we get in this debate, we should remember that it is not a new one, nor one that will likely be settled for all time. At the outset of World War II, a similar debate occurred between those who believed speech could be curtailed in the service of democracy, and those who felt democracy could tolerate no restriction on speech.³⁶² As time passed, and as we compared ourselves with the totalitarian regimes that were our foes, the values of free speech prevailed.³⁶³ It was, however, evolving values that settled the controversy, and because those values continue to evolve under differing sets of circumstances, no dispute over deep values will remain settled for all time.

The contestability of history is less unsettling if we can understand that this contest may represent an essential element of nation-shaping. The very process of telling the story, of disagreeing about it, of emphasizing one

³⁵⁹ See WOLIN, *supra* note 156, at 3 (“[The framers] set in motion a form of politics, a good part of which would be absorbed by contests to settle the meaning of the Constitution by unsettling some competing meaning.”).

³⁶⁰ For a critique of the Left’s argument in favor of hate speech restrictions, see Amy Adler, *What’s Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1511-16, 1541-72 (1996) (arguing that leftist censors of speech invariably do their own causes harm, because hate speech has been used to fight hate speech, and it is impossible to develop a theory that permits “subversive” uses of such speech but limits “oppressive” uses).

³⁶¹ Compare Nadine Strossen, *Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?*, 46 CASE W. RES. L. REV. 449, 458-62 (1989) (arguing that censoring hate speech ignores the free speech tradition of First Amendment jurisprudence and could undermine equality goals), with Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2378-79 (1996) (arguing that an absolutist First Amendment response to hate speech actually sanctions racism and fails to remedy the injuries caused by hate speech).

³⁶² Compare *Dennis v. United States*, 341 U.S. 494, 561-70 (1951) (Jackson, J., concurring) (arguing that the “clear and present danger test” is ineffective against the “well-organized, nation-wide conspiracy” of communism), with *id.* at 581-91 (Douglas, J., dissenting) (insisting that the United States cannot accept the totalitarian suppression of speech typical of the Soviet state). For a historical review of First Amendment doctrinal development in reaction to totalitarianism, see Richard Primus, Note, *A Brooding Omnipresence: Totalitarianism in Post-War Constitutional Thought*, 106 YALE L.J. 423, 437-47 (1996).

³⁶³ See STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 69-72 (1990) (comparing other countries’ conception of democracy with the typical American conception and concluding that “[f]rom an American perspective, any system of government that tells its citizens that they may not dissent ‘in any way’ from the ideology of the ruling party is by that fact alone an undemocratic government”).

piece or another to integrate the peoples who tell it, is what the Constitution is about. Our nation not only has changed over time; it has been called upon to integrate wave after wave of immigrants who have settled on this land. Debating our deeper values forms who we are. Looking to history to resolve those debates enables us to develop a shared history, one upon which we can all find some basic agreement. Inevitably our attention will be focused on areas in which there is disagreement, but this overlooks the vast areas in which there is some shared understanding of what it means to be an American and to share an American past. The study of history and the debates over what that history teaches us lead us to claim a shared past, a past that represents the Constitution of the nation.

C. *The Role of Judges*

But what about the judges?

The role of judges is one that causes academics unease. For approximately half a century, academics have worried about the role that judges play in our democracy, and have struggled over how to reconcile judicial review and majoritarian government.³⁶⁴ There is ample room for profound skepticism about whether the “countermajoritarian difficulty” has any basis whatsoever in the actual operations of American government.³⁶⁵ Nonetheless, to complete a discussion of the role of history in constitutionalism, it is appropriate to take account of these concerns and to discuss the role of the historian judge.

Seeing constitutional law as inevitably historical reshapes the role of judges in a critical fashion. To understand how this is so, it may be profitable to return briefly to Lawrence Lessig, the one theorist who seems attracted to the sedimentary understanding of constitutional law, but who nonetheless tumbles at the end of his theory into the countermajoritarian difficulty. After explaining at length how judges can remain faithful to the Constitution by translating not only facts but also changed background understandings, Lessig confronts the problem of contested background understandings.³⁶⁶ What is a judge to do if there is contest over the background discourse?

³⁶⁴ See Friedman, *supra* note 192, at 579 (detailing the academic struggle over judicial review during the last quarter-century); Friedman, *supra* note 273, at 334-39 (describing academia's historical obsession with the countermajoritarian difficulty).

³⁶⁵ See Friedman, *supra* note 192, at 628-53 (challenging the premises of the countermajoritarian difficulty); Friedman, *supra* note 273, at 337-39 (describing scholarly work that questions the premises of the countermajoritarian difficulty).

³⁶⁶ See Lessig, *Fidelity and Theory*, *supra* note 8, at 471.

Despite his cogent understanding that constitutional law is about the background discourse, Lessig nonetheless stumbles by casting his decision rule for judges in terms of democracy.³⁶⁷ According to Lessig, if the background understanding has shifted and there is no contest, judges may translate consistent with the now uncontested understanding. If there is contest in the discourse over background understandings, however, then Lessig argues that judges must try to remain “agnostic,” meaning that “legislatures receive greater deference within domains of contested discourses.”³⁶⁸ Further, “[w]here a discourse is rendered contested, if possible, judgments within that contested sphere will be shifted to those with the strongest political pedigree.”³⁶⁹ Thus, Lessig’s theory is ultimately one framed against a background discourse itself: the norm of democracy, defined as the work of actors other than judges.³⁷⁰

If constitutionalism is the weighting of historically identified, deeper values over present preferences, judges should worry about history, not democracy.³⁷¹ Lessig is far too sanguine about how often (actually, how sel-

³⁶⁷ *See id.*

³⁶⁸ *Id.* at 439.

³⁶⁹ *Id.*

³⁷⁰ Lessig is not the only constitutional scholar who makes this mistake. Michael McConnell, for example, argues that “[f]or most judges, . . . the principal constraint on constitutional authority is not text, history, or even precedent, but deference to the decisions of representative institutions in close cases.” 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, 1289 (1997). Thomas Merrill falters over this point as well. After describing his theory of “conventionalism,” which has many affinities with sedimentary constitutionalism, he states,

conventionalism basically shuts off the courts as an avenue for social change. We tend to think of activist judges as the great antithesis of democratic governance, and a judiciary controlled by conventionalist judges would be a very inhospitable place for judicial activism. . . . Far better to hire a lobbyist and see if you can get a law enacted in Congress.

Merrill, *supra* note 137, at 522. David Strauss also makes the point that his version of common law constitutionalism is “at least broadly consistent with the demands of democracy.” Strauss, *supra* note 122, at 930.

³⁷¹ To illustrate this point, consider the argument, advanced by many self-professed originalists, that originalism is the most democratic form of constitutional interpretation. *See supra* note 101 (quoting originalist scholars who express the view that constitutional change should occur through the amendment process, not through judicial decision-making). Yet as Michael Dorf and Michael J. Klarman have persuasively argued, originalism simply substitutes one countermajoritarian difficulty for another. *See Dorf, supra* note 202, at 353 (explaining that originalism merely “empowers judges to override modern majorities in the name of old majorities”); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 *GEO. L.J.* 491, 494 & n.16 (1997) (“Text, original intent, and tradition are problematic sources because of the dead hand problem—that is, a current generation is being governed by values endorsed in the past.”); *see also* Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 *YALE L.J.*, 1119, 1133 (1995) (“If the Court exercises its leadership effectively,

dom) the background, structural discourse he describes will be uncontested. Almost any time there is controversy over the outcome of a constitutional case, there will be contest about the background discourse. Moreover, Lessig's (or anyone else's) version of democracy is itself contestable and contested. For example, is there general agreement that administrative officials, Congress, police officers, or municipal personnel directors have a "strong[er] political pedigree" than Supreme Court Justices?³⁷²

History is also contested, but the proper role of the constitutional interpreter is to address this contest over deeper commitments. Democracy as a metric tells us almost nothing about what judges should do. Judges should refrain from invalidating other acts of government when they cannot identify a fundamental, historically based, deeper commitment that justifies striking down the act of another branch of government. If deeper commitments cannot be identified, judges should not disturb the present-day decisions of other actors whose job it is to make them. Judges are not paid to defer to what some people imagine to be more democratic or politically tenable actors, but to identify deeper commitments. Too much focus on the former has distracted judges from the latter, more appropriate, task.

Under our sedimentary Constitution, judges inevitably have a central role in constitutional interpretation. Judicial review, like all of constitutional law, has itself been the subject of sedimentary evolution. As early as *Marbury v. Madison*,³⁷³ judges claimed the right to interpret the Constitution and measure the acts of other governmental commands against it. Even after *Marbury*, however, this judicial role was contested. Judicial supremacy in interpretation has built up beneath us. As Steven Winter perceptively argues, today no one seriously questions the practice of judicial review.³⁷⁴ The expanded role of judges is inevitable; the only serious question concerns how judges perform that role.

To the extent that judges play a privileged role in constitutional interpretation, sedimentary interpretation at the least provides them with a role they are relatively qualified to play. The role of judges is to examine the sedimentary history of our country and identify the deeper commitments revealed by that history. The common countermajoritarian complaint about such a role is that judges act at some remove from the body politic. Histori-

today's countermajoritarian decision may yet receive tomorrow's stamp of popular approval.").

³⁷² Lessig, *Fidelity and Theory*, *supra* note 8, at 439.

³⁷³ 5 U.S. 137 (1803).

³⁷⁴ Winter, *Upside/Down View*, *supra* note 137, at 1923-24 (arguing that "judicial review is itself an institution so firmly established . . . that its continued existence is utterly unassailable").

ans tell us, however, that history is best told at a remove. Of course, remove is a question of degree, not of kind, and even judges are not as removed from politics and political life as we sometimes idealize them to be. In their role as national historians, however, their remove is both appropriate and essential. Identifying deeper commitments is a function best performed by the constitutional actor least caught up in identifying present preferences.³⁷⁵ If there is to be a struggle between the two, and constitutionalism is precisely this struggle, then it is the judges who should have precedence in the telling of our history.

Moreover, as Thomas Merrill has explained, identifying historical commitments is much like what we ordinarily expect of judges.³⁷⁶ The telling of history is an evidentiary exercise. It requires judges to sift through competing evidence offered by litigants in support of their views as to what that history reveals about fundamental commitments. In a compelling article, Merrill persuasively argues that judges are uniquely suited to this task.³⁷⁷ Referring to his somewhat analogous idea of conventionalism, Merrill explains:

Conventionalism is essentially the stuff of the law office memorandum. One collects the most directly applicable precedents, first of the Supreme Court, then of the lower courts. Then one looks for executive interpretations, or interpretations reflected in subsequent statutes. . . . [T]he skills required to engage in conventionalist interpretation are generally well within the ken of the average lawyer and judge.³⁷⁸

The very nature of sedimentary interpretation, however, makes clear that although judges resolve contests between competing stories, they are hardly the only storytellers. The evidence of historical commitments is not the creation of judges, but rather the product of all human existence. As the discussion of sources of interpretation made clear, judges should, and regularly do, consider a wide variety of information. In *Washington v. Glucks-*

³⁷⁵ Suzanna Sherry offers a view of pragmatic judging with great affinity to sedimentary interpretation:

Judging—especially in difficult constitutional cases—is not a mechanical exercise, but a learned and lived craft. The tools of the trade are a thoughtful life lived in American social and legal culture. A pragmatist finds no formula by which to decide the difficult questions, but instead internalizes legal precedents, cultural traditions, moral values and social consequences, creatively synthesizing them into the new patterns that best suit the question at hand.

Sherry, *supra* note 218, at 1013.

³⁷⁶ See Merrill, *supra* note 137, at 518.

³⁷⁷ See *id.*; cf. Nelson, *supra* note 137, at 1283 (observing that judges are similarly well-suited to answer historical questions regarding the evolving social consensus on an issue).

³⁷⁸ Merrill, *supra* note 137, at 521; see also GADAMER, *supra* note 153, at 324-41 (depicting the judge as the ideal historical interpreter).

berg,³⁷⁹ as in *Roe v. Wade*,³⁸⁰ the Court considered the judgments of legislative enactments, expert commissions, popular elections and referenda, evolving practice, and the like. This body of evidence is something to which we all contribute.

Perhaps more important, because sedimentary development is ongoing, no actor in our constitutional system has a final say. It is somewhat remarkable that people seem to miss the fact that the telling of constitutional history is an ongoing process, one that does not cease with one iteration. The national narrative is not static, and judges are hardly the only contributors to the narrative. History tells its own story. To believe otherwise is to miss the accretions of narrative that have occurred, marked by either rapid change (such as when the Supreme Court reversed itself in the flag salute cases)³⁸¹ or slow evolution. To reiterate an earlier point, the judges that decided these important cases did not conjure it all up themselves. Rather, they merely reflected changes that already had occurred in the population at large.³⁸² Thus we are all participants in the telling of this history.

In a sense, constitutional decisions provide a focal point in an ongoing societal dialogue about the meaning of our deepest commitments.³⁸³ Judicial decisions attempt to summarize the nature of these commitments and are then held up for public scrutiny. By centering the debate, judicial decisions play a vital role in constituting and recording our national commitments. But the political science approach to understanding judicial review has made clear, at least since Robert Dahl's seminal work, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*,³⁸⁴ that the judiciary is seldom out of step with the dominant opinion of a national majority.³⁸⁵

³⁷⁹ 117 S. Ct. 2365 (1997).

³⁸⁰ 410 U.S. 959 (1973).

³⁸¹ See *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), decided just three years earlier).

³⁸² See Winter, *Upside/Down View*, *supra* note 137, at 1920 (stating that "much of what the [Supreme] Court does necessarily employs mainstream conceptions . . . [by] exercising control not against the prevailing majority, but on its behalf").

³⁸³ See *supra* notes 236-45 and accompanying text (noting that the Supreme Court's inquiry in constitutional decisions explores historical commitments as well as popular preferences); see also Friedman, *supra* note 192, at 653-80 (discussing the process of judicial review as "dialogue" in which the entire country participates in framing constitutional meaning).

³⁸⁴ 6 J. PUB. L. 279 (1957).

³⁸⁵ See *id.* at 285 (concluding that "policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States"); see also ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 190 (1989) (same); ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 224 (1960) (asserting that it is

The difficult questions revolve around understanding why this is so and how we can improve the process of constitutional dialogue. Many scholars, from a variety of disciplines, are presently engaged in resolving these questions. But, as with other difficult questions of constitutional interpretation, at least this approach realistically portrays the role of a constitutional judge. The “countermajoritarian difficulty” overstates the finality of judicial decisions and the exclusivity of the judicial role. Sedimentary interpretation, by contrast, sees the creation of constitutional law as a gradual societal process, and asks how judges can best participate in that process.

CONCLUSION

We end where we began. Ours is not the Constitution of 1787. It is a constantly developing charter layered over throughout all of our constitutional history with new and important understandings. Constitutional change is both gradual and sudden. The task of the constitutional interpreter is to study history in order to tell the accumulated story of today’s constitutional commitments. This is not an easy task. Resolving contested views and reconciling deeper commitments with present desires is difficult. It is the correct task, nonetheless, and one in which we often engage. The point only is to ensure that we do so more self-consciously. Constitutional interpretation must explain the present in relation to the past.

“hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand”).