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FOREWORD: THE CONSTITUTION OF CHANGE LEGAL FUNDAMENTALITY WITHOUT FUNDAMENTALISM

Morton J. Horwitz

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FOREWORD: THE CONSTITUTION OF CHANGE: LEGAL FUNDAMENTALITY WITHOUT FUNDAMENTALISM

*Morton J. Horwitz**

INTRODUCTION

During the past half century, the Supreme Court, like many other institutions, has been forced to confront the destabilizing force of modernism. As in modern art, science, and religion, so in law, the question whether to stay up-to-date and "in touch" with modern ideas and developments has grown more pressing with each decade. Both modern art and modern science have forced us to come to terms with their challenges to the Enlightenment's picture of art and science as a "mirror of nature."[1] In modern art, the abandonment of "mimesis" or representation as an ideal has raised questions on how one determines artistic quality.[2] In science, the collapse of the notion of "objective causation" and the turn to probabilistic correlation in the wake of Werner Heisenberg's "uncertainty principle"[3] have culminated in Thomas Kuhn's widely influential theory that scientific revolutions occur despite the "incommensurability" of paradigms.[4] The result has been to challenge the conventional view of scientific method as a progressive and incremental process of adapting scientific theory to the discovery of empirical fact. In the process, the "objectivity" of science itself has been drawn into question.

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[1] *See generally* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 333 (1979) ("Shopworn mirror-metaphors are of no help in keeping intact the inheritance — both moral and scientific — of Galileo.").

[2] *See generally* ERICH AUERBACH, MIMESIS: THE REPRESENTATION OF REALITY IN WESTERN LITERATURE *passim* (Willard R. Trask trans., Princeton Univ. Press 1953) (1946) (presenting the classic study of representational realism in literature). Edmund Wilson traces the movement from literary naturalism, a cousin of realism, to symbolism. *See* EDMUND WILSON, AXEL'S CASTLE: A STUDY IN THE IMAGINATIVE LITERATURE OF 1870–1930, at 1–25 (1931). Wilson views the movement between objectivity and subjectivity as cyclical. *See id.* at 293–94. Peter Novick chronicles the parallel challenge to nineteenth-century standards of objective history. *See* PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION *passim* (1988).

[3] *See* DOUGLAS C. GIANCOLI, PHYSICS 666–69 (2d ed. 1985).

[4] *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 77–91 (2d ed. 1970); *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 62–63 (1992) (noting that, by the late 1920s, theories of objective causation "had begun to be discredited in most fields, especially in the natural sciences").

In law, modernism has challenged those analogous aspects of legal method that once purported to endow law with the quality of "objectivity."[5] Drawing on developments in both the philosophy of language[6] and the sociology of knowledge,[7] legal thinkers have focused upon the classification and categorization of legal phenomena and have concluded that, like art or science, law is not a "mirror of nature." Because there are no "natural classes," the process of categorization and classification is a social creation, not an act of reflecting some prior organization of nature.[8]

The subversive assault by the spirit of modernity on the static conceptualism of traditional theories of law has had a destabilizing effect. As law in the modern world has increasingly cut itself loose from its once-powerful grounding in religious sources of authority, it has been challenged to acknowledge, along with every other secular field of knowledge,[9] the implications not only of historical change, but also of changes in historical consciousness. Those fixed and "self-evident truths"[10] that Thomas Jefferson could so confidently invoke have been forced to face the historicist critique that even truth changes over time.

Constitutional law has been especially susceptible to the crisis of legitimacy that follows modernist destabilization. Although such crises are often seen simply as reflecting sharp political fluctuations between periods of inertia and periods of change,[11] this explanation is far from

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[5] *See, e.g.*, J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 767–72 (1987) (giving an example of the deconstructionist technique of "inversion of hierarchies" in a legal context); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 61–62 (1984) (showing that "objective" notions such as "industrialization" and "efficiency gains" reflect a normative Victorian optimism); David Luban, *Legal Modernism*, 84 MICH. L. REV. 1656, 1656–59 (1986) (analogizing Critical Legal Studies to modernist art). *See generally* Pierre Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929, 929–34 (1988) (describing the death of stare decisis and the rise of the legal distinction as a formal mode of policy argument in its wake); Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1196–97 (1989) (stating that legal realism "sought to de-center" the rule of law within scholarly discourse and to "subvert its ruling stature in practice").

[6] *See, e.g.*, J.L. AUSTIN, HOW TO DO THINGS WITH WORDS *passim* (J.O. Urmson & Marin Sbis eds., 2d ed. 1975); JACQUES DERRIDA, OF GRAMMATOLOGY *passim* (Gayatri C. Spivak trans., Johns Hopkins Univ. Press 1976) (1967); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS *passim* (G.E.M. Anscombe trans., 3d ed. 1968).

[7] The foundational work on the sociology of knowledge is KARL MANNHEIM, IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE (Louis Wirth & Edward Shils trans., 1936).

[8] *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809–21 (1935) (ridiculing the notion that a "heaven" of transcendental legal concepts exists).

[9] *See* PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE 4–6, 83–85 (1967).

[10] THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

[11] *See* ARTHUR M. SCHLESINGER, JR., THE CYCLES OF AMERICAN HISTORY 23–48 (1986).

complete. Although it is undoubtedly true that the Supreme Court is susceptible to periodic political shifts due to its obvious connection to changes in political power, constitutional law also represents a special case of the general problem of legitimacy that legal modernism has brought to the fore. Constitutional law is special because it must inevitably embody a conception of legal fundamentality that is particularly vulnerable to the critique of legitimacy that modernism represents. Because it grew out of traditional conceptions of fundamentality that were rooted in religious structures of meaning, constitutional law has always tended toward incorporating a pre-modern vision of timeless and unchanging truths — toward, in a word, equating legal fundamentality with legal fundamentalism.[12]

The idea of a Constitution[13] as fundamental law is one of America's most important contributions to civilization. The written constitutions, promulgated in the states after 1776, seem to have embodied a new understanding of a constitution, not as simply an arrangement or frame of government, but as fundamental law more basic than ordinary legislation. Whatever the intellectual origins of the American conception of fundamentality — whether derived from natural law, popular sovereignty, or a combination of the two — that conception ultimately has rested on the notion that fundamental law is timeless and unchanging, a view that cannot be reconciled either with twentieth-century constitutional practice or with modern theories of law, language, and consciousness. Thus arises the question that underlies the contemporary legitimacy crisis in constitutional law: how can the idea of fundamentality be rescued from its historic association with fundamentalism? How, in other words, is it possible legitimately to incorporate changing ideals or values, or dynamic meanings or understandings of the state of the world, into constitutional doctrine that aspires to fundamentality?

That question has become all the more perplexing in the last quarter-century, in which a conservative Supreme Court has devoted itself to dismantling the Warren Court legacy.[14] The intellectual re-

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Schlesinger acknowledges his debt to his father, who viewed history as a "spiral." ARTHUR M. SCHLESINGER, THE PATHS TO THE PRESENT 87 (1949); *see* SCHLESINGER, THE CYCLES OF AMERICAN HISTORY, *supra*, at 24.

[12] *See* J.W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 12–29 (1955).

[13] Precisely when and why this change from small "c" constitutions, as they were understood in eighteenth-century Britain, to large "C" Constitutions occurred has been the subject of a generation of fruitful historical work on the intellectual origins of the American Revolution. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 66–87, 198–229 (2d ed. 1992); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 259–91 (1969).

[14] Beginning with the efforts of President Richard Nixon and Attorney General John Mitchell to use material in FBI files to force liberal Justices Douglas and Fortas off the Court, *see* LAURA

action against the Warren Court has been dominated by the search for a methodology that would eliminate the possibility of judicial discretion by substituting an "objective" or "neutral" method for what many critics regarded as the "subjective" or "political" value judgments of that Court.[15] A return to the traditional conservative emphasis on stare decisis hardly seemed sufficient, because the prevailing precedents were precisely what needed to be overthrown in the process of undoing a constitutional revolution.[16] There thus began a search for some more fundamental source of authority that would permit a new majority to overturn the Warren Court precedents without itself being considered illegitimately "political."

Judicial conservatives began to offer varieties of originalism and textualism as their new favorite methodology.[17] This new methodology created a potential conflict between traditional stare decisis conservatism and more radical — literally reactionary — forms of conservativism, a conflict that came to a head with the campaign to overrule *Roe v. Wade*.[18]

Thus, the Court's decision in the recent abortion case *Planned Parenthood v. Casey*[19] was as much about the legitimacy of constitutional change as it was about the right to abortion created by *Roe*. Justices O'Connor, Kennedy, and Souter, the architects of *Casey*'s joint opinion,[20] were part of a generation that had arrived at legal maturity

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KALMAN, ABE FORTAS 366–70 (1990); JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 395–400 (1980); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 18–21, 76 (1979), and continuing with the plan of President Ronald Reagan and Attorney General Edwin Meese to screen possible nominees to the Court through various "litmus tests," *see, e.g.*, John A. Jenkins, *The Partisan*, N.Y. TIMES, Mar. 3, 1985, § 6 (Magazine) at 28; Neil A. Lewis, *Selection of Conservative Judges Insures a President's Legacy*, N.Y. TIMES, July 1, 1992, at A13; Stuart Taylor, Jr., *The One-Pronged Test for Federal Judges*, N.Y. TIMES, Apr. 22, 1984, at E5, almost 25 years of Republican appointments have been made against a background of self-conscious reaction against the decisions of the Warren Court.

[15] *See, e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 (Scalia, J.) (criticizing rival legal rules, because they do not afford "an objective, value-free basis" on which to decide cases); ROBERT H. BORK, THE TEMPTING OF AMERICA 251–59 (1990) (arguing that originalism is the only legitimate method of constitutional adjudication, because only it eschews moral decisionmaking in favor of an "objective" stance); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989) (arguing that "general rule[s] of law" are superior "to personal discretion to do justice").

[16] In Payne v. Tennessee, 111 S. Ct. 2597 (1991), the Court listed 33 prior cases overruled in whole or in part during the 20 Terms since the Warren Court ended. *See id.* at 2610 n.1.

[17] *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8–11 (1971) (claiming that only an ethical system based on the values embodied in the Constitution can serve as a valid, neutral basis for judicial decisionmaking).

[18] 410 U.S. 113 (1973).

[19] 112 S. Ct. 2791 (1992).

[20] According to the *New York Times*, the core of the majority's joint opinion was written principally by Justice Souter. *See* Linda Greenhouse, *The Supreme Court: A Telling Court Opinion*, N.Y. TIMES, July 1, 1992, at A1.

haunted by Chief Justice Charles Evans Hughes's well-known warning that, in "three notable instances" during the nineteenth century — the *Dred Scott* case[21] being the most notorious — the Supreme Court "ha[d] suffered severely from self-inflicted wounds."[22] The Chief Justice's warning, delivered in 1928, although it did not mention *Lochner v. New York*[23] or what came to be known as the Lochner era, was widely understood after 1937 to have forecast the disastrous consequences that would befall any Court that became inattentive to the bases of its own legitimacy.[24]

The joint opinion in *Casey* was partially driven by the recognition that a reversal of *Roe* might be remembered as another self-inflicted wound, another grievous blow to the legitimacy of the Supreme Court.[25] The authors of the joint opinion suggested that considerations of legitimacy had led them to affirm the "central holding" of *Roe* "with whatever degree of personal reluctance any of us may have" on the merits.[26] "A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to . . . the rule of law."[27] Thus, without deciding that *Roe* was correct as an original proposition, the joint opinion rested its conclusion on the "profound and unnecessary damage to the Court's legitimacy" that any overruling of *Roe* would entail.[28]

The opinion of the three Justices is perhaps unique in American constitutional history for its highly self-conscious discussion of the

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[21] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[22] CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 50 (1928). Chief Justice Hughes claimed the wounds were inflicted in the *Dred Scott* case; the first legal tender case, Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870); and, the income tax case, Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, *aff'd on reh'g*, 158 U.S. 601 (1895).

[23] 198 U.S. 45 (1905).

[24] *See* Abram Chayes, *Nicaragua, The United States, and The World Court*, 85 COLUM. L. REV. 1445, 1479 (1985) (showing that Chief Justice Hughes's phrase "self-inflicted wounds" has become synonymous with the dangers of the Court's ignoring the bases of its own legitimacy); *see also* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 221, 231 (1960) (noting the Court's perceived tendency to overstep the boundaries of its power during the period from the Civil War to 1937); ROBERT G. MCCLOSKEY, THE MODERN SUPREME COURT 129 (1972) (demonstrating that Chief Justice Hughes's apprehensions had gained added significance in the late 1930s and beyond).

[25] *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2814–16 (1992). The question of institutional legitimacy is central not only to the joint opinion, but also to the opinions of Chief Justice Rehnquist and Justice Scalia. *See id.* at 2860–67 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 2875, 2882–85 (Scalia, J., concurring in the judgment in part and dissenting in part). The joint opinion used the word "legitimacy" eleven times; the opinion of Chief Justice Rehnquist used the word, often in derisive quotes, fourteen times, and Justice Scalia's opinion contemptuously repeated the word six times.

[26] *Casey*, 112 S. Ct. at 2812.

[27] *Id.* at 2816.

[28] *Id.*

question of judicial legitimacy, which it regarded as no less than "the source of this Court's authority."[29] Perhaps its most suggestive statement is a quote from Justice Stewart:

> A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.[30]

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[29] *Id.* at 2814.

[30] *Id.* (internal quotation marks omitted) (quoting Mitchell v. W.T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting)). There was some basis in recent history for the Justices' fear that overruling *Roe* might be understood to be based "upon no firmer ground than a change in our membership." The "litmus test" for judicial appointments established by the Reagan Administration concentrated on a potential appointee's willingness to overrule *Roe*. *See supra* note 14. Such a precondition was virtually unparalleled in American constitutional history. Only once before, 120 years earlier, after the first legal tender case, Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870), had a president conditioned appointment on a candidate's willingness to overrule a specific decision of the Supreme Court:

> When in January 1870 President Ulysses S. Grant received advance intelligence of the Supreme Court's impending invalidation of the Legal Tender Act, he moved swiftly to fill two vacancies with appointees who could be counted on to convert the minority in support of the act into a majority. The pragmatic [Joseph P.] Bradley was an obvious choice for one seat; the other went to William Strong. Once on the Court, the two dutifully voted to overturn the year-old precedent and uphold the Legal Tender Act.

John V. Orth, *Bradley, Joseph P.*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 81 (Kermit L. Hall, James W. Ely, Jr., Joel B. Grossman & William M. Wiecek eds., 1992). The supposition that President Grant had prior notice of the decision in *Hepburn* is based on a secret exchange between Chief Justice Salmon Chase and Treasury Secretary Thomas Boutwell. Chief Justice Chase, formerly the head of Treasury, warned his successor, two weeks in advance of the delivery of the opinion, that the Court would declare paper money unconstitutional, allowing the Department time to prepare for a run on gold. The fair inference is that the Secretary informed his President. *See* Sidney Ratner, *Was the Supreme Court Packed by President Grant?*, 50 POL. SCI. Q. 343, 350–52 (1935). *But see* 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 238–40 (1923) ("The President himself formally stated that he had no advance knowledge as to the decision of the Court, and members of his cabinet later stated the same thing."). The bitter confirmation battles involving Judges Bork and Thomas took place on the widely-shared assumption that these potential Justices represented the fifth vote to overrule *Roe*. *See, e.g.*, Gary J. Simson, *Thomas's Supreme Unfitness — A Letter to the Senate on Advise and Consent*, 78 CORNELL L. REV. 619, 626 (1993) (arguing that Justice Thomas is a "Bork-like" jurist who represents a possible vote to overturn the abortion cases). Indeed, Attorney General Meese regularly proclaimed the need to undo the jurisprudence of the Warren Court as well as that of the post-1937 New Deal Court. *See, e.g.*, Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464 (1986). *See generally* Anthony Lewis, *Law or Power?*, N.Y. TIMES, Oct. 27, 1986, at A23 (reporting Attorney General Meese's comments that Supreme Court precedents are not sacrosanct).

After Justice Thomas's narrow confirmation, it was widely believed that there were finally enough votes to overrule *Roe*. As a result, the refusal of the "intermediate" Justices to fulfill their expected roles came as one of the most surprising and dramatic events in modern Supreme Court history. *See* Kathleen M. Sullivan, *The Supreme Court, 1992 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 33 (1992); Al Kamen, *Center-Right*

The joint opinion addressed the issue of legitimacy by turning to the traditional conservative principle of stare decisis. Even if the possibility of overruling *Roe* were not an extraordinary event in constitutional history, the joint opinion declared, "normal *stare decisis* analysis" would lean toward affirming its central holding.[31] For "when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law."[32] The opinion offered a series of criteria to test whether under "normal" circumstances the Justices would be prepared to overrule an established precedent, and it concluded that "the stronger argument is for affirming *Roe*'s central holding."[33] "In a less significant case," the joint opinion announced, "*stare decisis* analysis could, and would, stop at [this] point . . . . But the sustained and widespread debate *Roe* has provoked calls for some comparison between that case and others of comparable dimension that have responded to national controversies . . . ."[34] Concluding that there are "[o]nly two such decisional lines from the past century," the joint opinion examined these to demonstrate that they "accord[] with the principles we apply today."[35]

The two overruling lines of decision that the joint opinion examined are the ones associated with *Lochner v. New York*[36] and *Plessy v. Ferguson*,[37] respectively.[38] These overruling decisions, the three Justices wrote:

> [E]ach rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. Each case was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day . . . had not been able to perceive. . . . [T]he decisions were . . . defensible, not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principle to facts as they had not been seen by the Court before. In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part

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Coalition Asserts Itself, WASH. POST, June 30, 1992, at A1 (describing the voting coalitions in *Casey* as "confounding" and "surprising").

[31] *Casey*, 112 S. Ct. at 2812.

[32] *Id.* at 2808.

[33] *Id.* at 2812.

[34] *Id.*

[35] *Id.*

[36] 198 U.S. 45 (1905).

[37] 163 U.S. 537 (1896). The Supreme Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954), overruled *Plessy* in 1954. *See id.* at 494–95.

[38] *See Casey*, 112 S. Ct. at 2812–13.

> of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.[39]

The Court therefore turned to constitutional history to provide a standard for determining when overruling precedent is appropriate.

This revival of interest in American constitutional history within the legal community[40] is a noteworthy development because of what it suggests about current constitutional thought. In the natural sciences, as Kuhn shows, the attainment of maturity in a scientific field is usually accompanied by the elimination of all real interest in the history of that field.[41] The "normal science" texts that emerge after a scientific revolution has run its course invariably portray the history of the field as the story of how the scientific method led to the discovery of new facts that slowly, but inevitably, produced incremental progress, culminating in the prevailing paradigm.[42] Conversely, in law, as in science, the turn to history often occurs when doubts accumulate about whether timeless truths, prevailing paradigms, or neutral principles are available to answer legal questions, so that more contingent, more contextual, and less universal sources of meaning and explanation are required.[43]

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[39] *Id.* at 2813.

[40] The legal academy has witnessed a similar renaissance in constitutional history. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE 4–5 (1991); Barry Cushman, *Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow Dog Contract*, 1992 SUP. CT. REV. (forthcoming 1993); Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from* Swift *to* Jones & Laughlin, 61 FORDHAM L. REV. 105, 106–08 (1992). Scholarship in this area has increased dramatically. *See, e.g.*, Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 2–6 (1991); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 873–75 (1987); Daniel J. Hulsebosch, Note, *The New Deal Court: Emergence of a New Reason*, 90 COLUM. L. REV. 1973, 1973–74 (1990).

[41] *See* KUHN, *supra* note 4, at 137–38.

[42] *See id.* at 136–40.

[43] The crisis of legitimacy generated by an obstructionist Court during the Great Depression spawned many inquiries into the history of the Court, its doctrine, and its constitutional role. *See, e.g.*, 1 LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY at vi (1932) (arguing that "[t]he actual practice of the courts is to declare any law *unconstitutional* of which they strongly disapprove"); EDWIN S. CORWIN, COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT 1–17, 80–84 (1938) (examining the Supreme Court's exercise of its power of judicial restraint and the Court's role in the American scheme of government) [hereinafter CORWIN, COURT OVER CONSTITUTION]; EDWARD S. CORWIN, THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY at xv (1934) (presenting the history of American constitutional theory in relation to the problem of "establishing a national power commensurate with the national scope of our economy") [hereinafter CORWIN, THE TWILIGHT OF THE SUPREME COURT]; *see also* CHARLES G. HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 44–63, 122–48, 204–32 (1959) (examining the historical development and nature of the judicial review of legislation); CHARLES G. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 210–32 (1930) (explicating the relationship between various natural law theories and American constitutional jurisprudence); ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY at xvi (1941) (setting "the Roosevelt Court proposal and the Court's own steps to reform in their historical and constitutional perspective"). *See*

The joint opinion in *Casey* thus may also be symptomatic of a crisis of legitimacy in constitutional thought in which the generally accepted paradigms and modes of thought are no longer felt capable of yielding convincing solutions to constitutional questions. *Casey*'s turn to history to provide a justification of its theory of stare decisis is especially suggestive because history usually becomes the arbiter of constitutional theory only as a last resort in moments of intellectual crisis. Moreover, *Casey* represents an acknowledgment of the intellectual disarray that has befallen constitutional conservatism. Above all, it is a recognition, not only of the incoherence of originalism and textualism after a decade of powerful attacks on their premises, but also of their seemingly unlimited potential to call into question all of existing constitutional law. If the joint opinion foreshadows the restoration of stare decisis as the central doctrine of constitutional conservatism, it also raises the danger that, by failing to heed the powerful lessons of legal realism, stare decisis itself also will eventually degenerate into mechanical jurisprudence. And the dangers associated with mechanical jurisprudence are either that law increasingly loses touch with life or that virtually all change in doctrine grinds to a halt.

This Foreword takes the question the Court struggled with in *Casey* — "Do we have a changing constitution?" — as central to an understanding of both constitutional law generally and the current Court in particular. As we shall see, the dominant tradition of constitutional discourse has maintained that timelessness, not change, defines constitutional law.[44] As such, it has rejected modernism and espoused a legal method dependent on formalistic and categorical modes of reasoning. The current Court, despite its awareness of the legitimacy crisis that resistance to modernism entails, has largely rooted itself in this dominant tradition. By tying its holdings to such reified concepts as "content neutrality" and "color blindness," the current Court threatens to repeat the errors of the most infamous of premodern Courts, the Lochner Court.

This Foreword begins in Part I with an historical exploration of the theories of constitutional change that have sought to resolve the tension between modernism and the desire for fundamentality. Part II examines the current Court's theory of change as articulated in the *Casey* joint opinion by evaluating the opinion's characterization of two momentous overrulings: *Brown v. Board of Education*'s reversal of *Plessy* and the New Deal Court's overruling of *Lochner*. Part III

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generally BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION 63–92 (1942) (examining the role of lawyers in securing the adoption of laissez-faire principles into American constitutional jurisprudence); BENJAMIN F. WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION at xiii–vii, 243–59 (1938) (examining the significance of Contract Clause jurisprudence in the context of legal, political, and economic history).

[44] *See infra* p. 41.

argues that the Court's anti-modernist theory of change has manifested itself in a correspondingly static form of legal reasoning in a number of fields. The Foreword concludes with a challenge to the emerging Court to articulate a theory of dynamic fundamentality, a theory that acknowledges the existence of a "living Constitution" without abandoning the search for fundamental truths.

I. Do We Have a Changing Constitution? An Historical Survey of the Theories

A. Introduction

Whether constitutional meaning changes over time has not, until recently, been a central preoccupation of constitutional theorists. For at least the first one hundred years after the ratification of the Constitution, constitutional theory continued to be dominated by what the historian Michael Kammen has described as a Newtonian conception of the Constitution in which institutional arrangements such as separation of powers, checks and balances, and federalism were thought to embody something akin to the timeless scientific truths of Newtonian mechanics.[45] One way to capture the historical weakness of the competing idea of a "living" or changing constitution is simply to count the citations to its most prestigious early statement — Chief Justice Marshall's famous declaration in *McCulloch v. Maryland*[46] that "[the] constitution was intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[47] Amazingly, the Supreme Court cited this statement only once during the entire nineteenth century,[48] which suggests a deep resistance to any idea of a "living constitution." Even by 1945, the Supreme Court had cited Chief Justice Marshall's passage only six times.[49]

As eighteenth-century Newtonian mechanics launched American constitutional theory on a static course, the powerful cultural influence of Protestant thought in America reinforced the static, literalist theory of interpretation. As Sanford Levinson has shown, one of the major sources of disagreement between Catholics and Protestants from the time of the Reformation centered on the legitimacy of biblical inter-

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[45] *See* Michael Kammen, A Machine That Would Go of Itself 17 (1986).

[46] 17 U.S. (4 Wheat.) 316 (1819).

[47] *Id.* at 415 (emphasis omitted).

[48] Strictly speaking, the Court quoted the phrase from *McCulloch* once in the nineteenth century: in the dissent to the first legal tender case, Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 630 (1870) (Miller, J., dissenting).

[49] Two of these citations came in very significant "crisis" cases. *See* Hirabayashi v. United States, 320 U.S. 81, 100–01 (1943) (upholding the internment of Japanese-Americans during the Second World War); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 443 (1934) (upholding the Minnesota Mortgage Moratorium Law, which was passed during the Great Depression).

pretation.[50] Protestants insisted that the Bible ought to be widely printed and made available to everyone in order to avoid priestly interpretations that distorted biblical text. Protestant anti-interpretativism, textualism, literalism, and biblicism[51] were eventually absorbed into evangelical fundamentalism in America, so that, in defending the Tennessee Anti-evolution Act in the famous Scopes Trial, William Jennings Bryan was prepared to argue that any departure from the literal account of a seven-day creation was incompatible with treating the Bible as divine truth.[52]

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[50] *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 23–25 (1988); *see also* HANS-GEORG GADAMER, TRUTH AND METHOD 153–56, 174–87 (Garrett Borden & John Cumming trans., Crossroad Publishing Co., 2d ed. 1988) (1965) (discussing the difference between Luther's view that the "scripture is sui ipsius interpres," which implies that "[w]e do not need tradition to reach the proper understanding of it, . . . but [that] the text of the scripture has a clear sense that can be derived from itself," and the more "dogmatic tradition of the church"); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 889–94 (1985) ("Protestants rejected the rich medieval tradition of interpretation, according to which literal exposition of the text was only one (and by no means necessarily the most important) methodology; likewise, they spurned the medieval acceptance of Pope and council as authoritative interpreters.").

[51] George Lee Haskins demonstrated the biblicism and tendency toward literalism of the English and American Puritans. *See* GEORGE L. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 158 (1960). Julius Goebel also found the "growth of biblicism and the exaltation of the Mosaic law" in Calvinism to have influenced colonial law, especially its "seemingly unprecedented enthusiasm for the *lex scripta*, for codification." Julius Goebel, Jr., *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416, 423, 430 (1931).

> In addition to this more articulate aspect of biblicism a major characteristic was the insistence upon a literal use of the Book and an irrefragable confidence in the written word. It is here that we shall find at least a partial explanation of the desire strikingly manifested throughout New England to have the rule of law reduced to written form, the absence of judicial interpretation, the requirements for the recordation of titles, and the preservation in writing of evidence.

Id. at 432 (footnote omitted); *cf.* ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 155 (1938) (arguing that Puritans disliked equity and preferred "a universal and unyielding rule"); Roscoe Pound, *Puritanism and the Common Law*, 45 AM. L. REV. 811, 826 (1916) ("For our legislation exhibits an inconsistency that is part of the Puritan character. He rebelled against control of his will by state or magistrate, yet he loved to lay down rules, since he realized the intrinsic sinfulness of human nature.").

The relentless literalism of the American Puritans enabled them to view America as the fulfillment of biblical prophecy. Sacvan Bercovitch suggests that the Puritans resorted to literalism to "preclude[] personal interpretation. It serve[d] as a wall of flame to secure the pristine Word against any snare of the intellect, all flights of the imagination." SACVAN BERCOVITCH, THE PURITAN ORIGINS OF THE AMERICAN SELF 111–12 (1975).

[52] *See* WILLIAM J. BRYAN & MARY B. BRYAN, THE MEMOIRS OF WILLIAM JENNINGS BRYAN 537 (1925) ("[T]he evolutionary hypothesis, carried to its logical conclusion, disputes every vital truth of the Bible. Its tendency, natural, if not inevitable, is to lead those who really accept it, first to agnosticism and then to atheism."). *But cf.* LAWRENCE W. LEVINE, DEFENDER OF THE FAITH: WILLIAM JENNINGS BRYAN: THE LAST DECADE, 1915–1925, at 349 (1965) ("Bryan admitted [under direct examination by Darrow] that the six days described in the Bible were probably not literal days but periods which might have encompassed millions of years.").

The cultural domination of American fundamentalist religion also stood in the way of the rise of an historical consciousness.[53] The religious focus on timeless truths outside of history resisted any conception of law (or religion) that emphasized the contingent and changeable nature of truth. Nevertheless, with the "decline of a theological world view" by the end of the nineteenth century, American scholars were "[s]horn of their reliance on Providential power and God's unchanging truth."[54] The late nineteenth century "appears to be the decisive period in which the balance shifted from theological toward naturalistic world views, and from Providential toward historicist views of time."[55]

Whatever influence historicist views of time may have had on twentieth-century thought in general, however, American constitutional theory remained resistant to historicism throughout the 1800s. This resistance continued even after the second half of the nineteenth century, when Darwinian evolutionary conceptions finally began to undermine the static Newtonian model and contribute to the idea that law changes over time.[56] Yet as significant as Darwinism was in introducing ideas of historical change into social and legal theory, surprisingly by the beginning of the twentieth century, it had barely gained a foothold in the development of constitutional thought. The cultural domination of a static conception of constitutional fundamentality continued to prevail. It was only after *Lochner* that a progressive view of the Constitution began to emerge.

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[53] *See* Dorothy Ross, *Historical Consciousness in Nineteenth-Century America*, 89 AM. HIST. REV. 909, 916–20 (1984).

[54] *Id.* at 924.

[55] *Id.* at 925; *see also* Robert Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1037–45 (1981) (discussing the evolution of American legal thought from the antebellum period to the 20th century).

[56] Oliver Wendell Holmes's *The Common Law* is the most important example of the recognition of historical change in legal theory inspired by the introduction of evolutionary ideas. *See* O. W. HOLMES, JR., THE COMMON LAW 1–2 (1881). On the idea of evolution in Justice Holmes's work, see E. Donald Elliott, *Holmes and Evolution: Legal Process as Artificial Intelligence*, 13 J. LEGAL STUD. 113–46 (1984); and Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CAL. L. REV. 343, 362–67 (1984). On evolutionary theory in law more generally, see E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38 (1985), who traces the concept of evolution as the basis for several legal theories, *see id.* at 38–94, and Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645 (1985), who reviews the conflict between "Social Darwinists" and the "Reform Darwinists" over the proper evolutionary model of the law, *see id.* at 645–85. For Justice Holmes's view of the organic constitution, see Missouri v. Holland, 252 U.S. 416 (1920), in which he stated that "[t]he case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago," *id.* at 433, and Gompers v. United States, 233 U.S. 604 (1914), in which he stated that "the provisions of the Constitution and the amendments . . . are not mathematical formulas[,] . . . they are organic living institutions[,] . . . their significance is vital not formal," *id.* at 610.

The vitality of static originalism in American conceptions of constitutional change was born in early American thought and was shaped by its English origins and its elaboration by the Founders. It was not until the progressive era early in the twentieth century that this originalist understanding waned and a more dynamic vision of constitutional meaning began to be articulated. But static originalism was restored to its privileged position, first in a more subtle way, through the novel appeal to democracy as a legitimating concept, and then later in a direct way through an aggressive originalist crusade spearheaded by Attorney General Edwin Meese in the mid-1980s.

B. Early American Originalism

1. Introduction. — Originalism has been the dominant interpretative paradigm for most of American constitutional history. Indeed, at the time of the framing of the Constitution, its only established competitor was the common law tradition.[57] The notions of change already absorbed into the English common law made their way to America, but did not supplant the appeal of Whig originalism.[58] Yet an anti-literalist strand in some early American legal thought added a wrinkle to the originalist view: how strict or loose must an originalist be in construing the constitutional text? That question would loom large in more modern variations of the debate about whether the Constitution changes over time.

2. English Origins of Originalism. — Originalism's chief competitor in early legal thought, the common law, had not always incorporated change into its own methodology.[59] In fact, during most of the constitutional struggles of the seventeenth century, the theory of the common law remained overwhelming static.[60] Although a movement began to introduce the idea of change into the common law, by the end of the nineteenth century, a static theory has become dominant once more.

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[57] *See* Powell, *supra* note 50, at 887.

[58] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 9 (1977). These different intellectual sources may explain why the common law was more instrumental whereas constitutional law was more formalistic early in the nineteenth century.

[59] In the fourteenth century, English judges froze the system of common law writs. *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 158 (5th ed. 1956). Equity was developed to provide relief from the law's inertia. *See id.* at 177–78, 675–77.

[60] Because all theories of stare decisis are ultimately derived from common law methodology, the fact that, through much of its history, the common law has supported a static and unchanging conception of law should give pause to those who believe that they can maintain a difference, especially in constitutional law, between strict theories of precedent and simple political conservatism.

For our purposes, two precepts of seventeenth-century English Whig constitutional thought are most relevant. The first idea, the theory of the "Ancient Constitution," relates to the earliest and most powerful version of originalism in Anglo-American Law.[61] The idea that England had an ancient constitution that restricted monarchical power from "time immemorial" was developed in opposition to the expanding power of the Tudor and Stuart monarchies.[62] During this period, the four-hundred-year-old Magna Carta was rescued from the scrap heap of history and elevated to its subsequent preeminence as the crown jewel of that ancient constitution.[63] This emphasis on history expressed the legitimating idea of an ancient constitution that drew from a fixed and static past. At the very outset of its development, then, the idea of fundamental law was strongly identified with fixed customary standards of "immemorial usage."

The second and related Whig idea concerned the relationship between feudalism and the common law. Sir Edward Coke and most other Whig lawyers took as an article of faith that an earlier, simpler, and more just Anglo-Saxon system had been distorted by the Norman invasion and the establishment of a feudal system.[64] Seventeenth-century Whig doctrine was therefore dependent primarily on static conceptions either of an ancient constitution derived from immemorial custom or of a long-past Anglo-Saxon golden age that provided the standard by which the common law could return to its original purity. How then, by the time of the American Revolution, did the common

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[61] *See* J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 38 (1957). Sir Edward Coke's four-part *Institutes*, SIR EDWARD COKE, COKE ON LITTLETON (1628); SIR EDWARD COKE, SECOND PART OF THE INSTITUTES (1641), was the best-known propagator of the "ancient constitution," the belief that English liberties were based in custom since time immemorial. POCOCK, *supra*, at 45 n.2.

[62] *See* GOUGH, *supra* note 12, at 31 n.1; ANNE PALLISTER, MAGNA CARTA: THE HERITAGE OF LIBERTY 2 (1971).

[63] At the same time, others searched the Tower of London to look for evidence of an actual, written Ancient Constitution. William Prynne conducted research among the records in the Tower of London and examined "great decaying masses of records: writs of summons, returns and other documents relevant to parliamentary elections," POCOCK, *supra* note 61, at 158, in order to show that "[t]he law he was upholding had been constitutional law since the time of the Britons," *id.* at 159.

> The chaotic heaps of documents among which contemporaries saw him labouring . . . were the repository of all constitutional truth, all political wisdom, and he was defending the constitution not merely intellectually by his pen, but physically by protecting these precious evidences and guarding them against neglect, decay and the malice of enemies.

Id.; *see also* 5 SIR WILLIAM HOLDSWORTH, HISTORY OF ENGLISH LAW 405–07 (1924) (describing Prynne's research in the Tower records).

[64] Sir Edward Coke believed that the Anglo-Saxon common law survived despite the Norman Conquest and that the concept of a Parliament antedated the Conquest. *See* POCOCK, *supra* note 61, at 42–46.

law manage to cast off this static originalism and acquire a predisposition toward viewing law as changing?

This new view was largely due to Sir Matthew Hale, whose history of the common law, first published posthumously in 1713,[65] was the catalyst for a "new comprehension of the process of change" in the common law.[66] "What set the seventeenth century apart, and especially . . . after 1660, was the degree to which a legal disposition of mind was used, naturally and unselfconsciously, to explain, to rationalize, and to facilitate political change."[67] It was Hale who expressed "the enlivened awareness of the possibilities of change":[68]

> Hale agreed that law might indeed be immemorial, but only in the sense that its origins in custom were too distant in time to be known. Otherwise, the law was quite fluid, perpetually adapting to the continuing, if imperceptible, movement in conditions and circumstances. Acts of Parliament could still be, as Coke had preferred, declarative of the common law, but there was now the much more confident recognition of statutes as introductive of new law as well. All this was consistent with the law's being brought into closer harmony with a more practical and more empirical view of the world. In this new understanding it would be permissible to say that laws might be "laid aside as useless, because the Reason of them is ceased" and to recognize the law as an imperfect instrument of man's creation. The myth of immutability was therefore no longer so important, since there was a greater admission of the reality of change. The result was for a sharper focus on movement and adaptation — an acknowledgement that the spirit of the common law was not to be located in its substance but in its continuity and process.[69]

Hale thus envisioned the changing content of law both reflecting and contributing to an evolving world.

If one sought to make the case for the proposition that Darwin drew his evolutionary theories from English culture, not that (as is usually assumed) evolutionary theories in law followed Darwin's theories,[70] it would be to Hale that one would turn first. Hale be-

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[65] *See* Charles M. Gray, *Editor's Introduction* to SIR MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND at xiii (Charles M. Gray ed., 1971) (3d ed. 1739); *cf.* POCOCK, *supra* note 61, at 170 (stating that Hale's *History* appeared, posthumously, in 1715).

[66] HOWARD NENNER, BY COLOUR OF LAW: LEGAL CULTURE AND CONSTITUTIONAL POLITICS IN ENGLAND, 1660–1689, at 16 (1977).

[67] *Id.* at 4.

[68] *Id.* at 19.

[69] *Id.* (footnotes omitted). Barbara Shapiro has shown that Hale and other contemporary scholars actively participated in the London scientific community and that their involvement helped shape their "empirical" approaches to the common law. *See* BARBARA J. SHAPIRO, PROBABILITY AND CERTAINTY IN SEVENTEENTH-CENTURY ENGLAND 169–73 (1983).

[70] Darwin has been the beneficiary of extraordinary attention by legal thinkers. For example, Oliver Wendell Holmes, in discussing Herbert Spencer, remarked: "I doubt if any writer of English except Darwin has done so much to affect our whole way of thinking about the

queathed to Blackstone (and to Darwin) a dynamic evolutionary orientation quite different from Coke's static search for "immemorial usage" in an ancient constitution.[71] Others were doing the same. Just as Hale and, a century later, Lord Mansfield[72] were crafting a dynamic version of the common law, Whig constitutional historians such as Thomas B. Macaulay were incorporating the idea of slow constitutional progress and change into English legal culture.[73]

This movement, however, stopped in England during the late nineteenth century when the House of Lords, sitting as Britain's highest court, astonishingly proclaimed that it was unconstitutional for a court to overrule a prior case. As part of this new doctrine, in 1861, the Law Lords[74] stated that any court that asserted a power to overrule a prior precedent "would be arrogating to itself the right of altering the law, and legislating by its own separate authority."[75]

With their accustomed elegant logic, the Law Lords soon drew the ultimate conclusion — that all overruling of prior cases constituted intrusion on the legislative power under the constitution.[76] This conclusion also meant, of course, that every common law decision was meant to last forever, unless changed by the legislature. As Professor John Dawson observed: "Judges who declare themselves slaves to the

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universe." Letter from Oliver Wendell Holmes, Jr. to Lady Pollock (July 2, 1895), *in* 1 HOLMES-POLLOCK LETTERS 58 (Mark D. Howe ed., 1941). Nevertheless, "[j]urisprudence was . . . 'evolutionary' long before Darwin." Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645, 645 (1985); *see also* PETER STEIN, LEGAL EVOLUTION: THE STORY OF AN IDEA at ix (1980) (noting that the history of legal evolution "begins in the eighteenth century").

One of the most famous of the "Social Darwinist" texts is HERBERT SPENCER, SOCIAL STATICS (London, John Chapman 1851), which coined the phrase "survival of the fittest" and presented a theory of gradual evolution of society, preceded by six years the publication of CHARLES DARWIN, ON THE ORIGIN OF SPECIES (New York, D. Appleton & Co. 1857). *See* RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 39 (rev. ed. 1955).

Sir Henry S. Maine's evolutionary ideas on law and society — although not his first and most important book, HENRY S. MAINE, ANCIENT LAW (New York, Charles Scribner 1861) — also preceded Darwin's *Origin of Species*. *See* J.W. BURROW, EVOLUTION AND SOCIETY: A STUDY IN VICTORIAN SOCIAL THEORY 140 (1968) (dating Maine's formation of ideas to the decade of 1843–1853). "Maine used an evolutionary model to describe the passage of law through several successive stages without referring to the theory of natural selection as a device for explaining this development." Hovenkamp, *supra*, at 649 n.18.

[71] *See supra* p. 45.

[72] *See infra* note 80.

[73] *See* Hugh Trevor-Roper, *Introduction* to THOMAS B. MACAULAY, THE HISTORY OF ENGLAND 7–16, 28–30 (Hugh Trevor-Roper ed., Penguin Books 1979) (1848–61).

[74] In England, a second — and final — appeal may be made from the Court of Appeals to the House of Lords, which sits in its judicial, rather than its legislative, capacity. *See* ROBERT STEVENS, LAW AND POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800–1976, at xv (1978).

[75] Beamish v. Beamish, 9 H.L. Cases 274, 338–39 (1861), *quoted in* JOHN P. DAWSON, THE ORACLES OF THE LAW 90 (1968).

[76] *See* DAWSON, *supra* note 75, at 92–93.

past are thus in some degree, inescapably, sovereigns in controlling the future."[77] Professor Dawson also noted seventy years after the House of Lords, in 1898, solidified this rule: "This self-declaration of infallibility by the House of Lords followed by only twenty-eight years the declaration of papal infallibility by the Vatican Council of 1870."[78]

3. American Reactions. — Although American lawyers of the Framers' day recognized the alternative that Hale's dynamic common law offered, they were firmly wedded to Whig originalism. These American lawyers enthusiastically repeated the two ideas central to Whig originalism and thus rooted English law in either an ancient constitution or a golden Anglo-Saxon age. Jefferson, for example, was an ardent Whig originalist. Reporting on his efforts after the Revolution as one of the Virginia codifiers, he declared that "'the common law of England, by which is meant that part of the English law which was anterior to the date of the oldest statutes extant,' was 'made the basis' of the [proposed Virginia] code."[79] Thus, according to Jefferson, only the "true" common law, as it existed before the Norman Conquest, had been made the basis of Virginia law.

Nor was Jefferson — that legal fundamentalist and Whig originalist — much enamored of more dynamic conceptions of English law that were developed around the time of the American Revolution. The reforming jurisprudence of Lord Mansfield,[80] who served on the King's Bench from 1758 to 1788, for example, failed to please Jefferson. Although

> "the object of former judges ha[d] been to render the law more & more certain," Jefferson wrote in 1785, Mansfield had sought "to render it more uncertain under pretence of rendering it more reasonable. No period of English law of what ever length it be taken, can be produced wherein so many of it's [sic] settled rules have been reversed as during the time of this judge."[81]

He thus concluded that Mansfield's "accession to the bench should form the epoch, after which all recurrence to English decisions should be proscribed."[82]

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[77] *Id.* at 93–94.

[78] *Id.* at 91–92.

[79] HORWITZ, *supra* note 58, at 18 (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 148 (1853)).

[80] On Lord Mansfield, see generally C.H.S. FIFOOT, LORD MANSFIELD (1936), which discusses Lord Mansfield's life and legal work. *See also* 1 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 3–208 (1992) (discussing Lord Mansfield's career as a barrister, politician, and judge on the Court of King's Bench).

[81] HORWITZ, *supra* note 58, at 18 (quoting THOMAS JEFFERSON, 4 THE WRITINGS OF THOMAS JEFFERSON 115 (1907); THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 148 (1853)) (alterations in secondary source).

[82] *Id.*

But as firmly as Whig originalism seemed ensconced in early American constitutional thought, originalism itself could not wholly settle the matter of how one should actually interpret the constitutional text. How literal must an interpretation be? Although Protestant biblical literalism powerfully shaped the anti-interpretative presuppositions of American culture,[83] a distinct anti-literalism seems to have been present among some of the Virginia founders.

The extent to which the Framers actually absorbed a "plain meaning" conception of language from Protestantism is still not entirely clear.[84] Jefferson's theory of constitutional meaning seems clearly to have represented a literalist version of the "plain meaning" of language. For Jefferson, the contest over "strict" versus "loose" construction of the constitutional powers of the federal government turned on the distinction between "express" and "implied" constitutional provisions. Because the federal government was a creature of limited powers, Jefferson maintained, it should not be permitted to go beyond the express grants of power in the document.[85] A "plain meaning" understanding of language thus seems to be at the core of Jefferson's constitutional position.

By contrast, there is some reason to believe that both James Madison and Chief Justice Marshall were actually engaged in a process of incorporating into constitutional theory more complex conceptions of language that were emerging in English and Scottish philosophy. Reflecting the influence of the Scottish enlightenment — and of David Hume, in particular — on his thought, Madison expressed a complex view of the range of meanings that could be derived from language. "The use of words is to express ideas," Madison stated.[86]

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[83] *See supra* p. 42.

[84] *See* Powell, *supra* note 50, at 889–93; Mark Tushnet, *Constitutional Interpretation and Judicial Selection: A View from the Federalist Papers*, 61 S. CAL. L. REV. 1669, 1682, 1697–98 (1988).

[85] *See, e.g.*, GERALD GUNTHER, CONSTITUTIONAL LAW 80 (12th ed. 1991); DUMAS MALONE, JEFFERSON AND HIS TIME: THE SAGE OF MONTICELLO 352–53 (1981); G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 127 (1988).

[86] THE FEDERALIST No. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961). See Locke's similar discussion of why language produces ambiguity in JOHN LOCKE, III AN ESSAY CONCERNING HUMAN UNDERSTANDING 321–423 (Geo. Rutledge & Sons Ltd. 1905) (1689). Perhaps Madison derived his ideas about language from the Scottish "common sense" philosopher Thomas Reid who wrote:

> There are, without doubt, many words signifying genera and species of things, which have a meaning somewhat vague and indistinct; so that those who speak the same language do not always use them in the same sense. But if we attend to the cause of this indistinctness, we shall find, that it is not owing to their being general terms, but to this, that there is no definition of them that has authority.

THOMAS REID, ESSAYS ON THE INTELLECTUAL POWERS OF MAN 475 (MIT Press 1969) (1785). Like Madison, Reid discusses how complex conceptions are derived from more simple ideas, and he also observes that greater complexity produces greater varieties of meaning. *See also* Douglass Adair, *"That Politics May Be Reduced to a Science": David Hume, James Madison,*

> Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined.[87]

For Chief Justice Marshall, the problem of constitutional meaning may also have been primarily a question of language. He believed that most of the important words and phrases in the Constitution were capable of being given either a strict, literal meaning or a broad, purposive interpretation. When he proclaimed that "it is *a constitution* we are expounding," Chief Justice Marshall was insisting, in Chief Justice Stone's words, that constitutional provisions "were to be read not with the narrow literalism of a municipal code or a penal statute, but so that its high purposes should illumine every sentence and phrase of the document and be given effect as a part of a harmonious framework of government."[88] In *McCulloch*, Chief Justice Marshall analyzed the powers of the federal government by asking whether particular "means" were "appropriate" for pursuing those "legitimate" ends expressed in the constitutional text.[89] For our purposes, his most important category of legitimate means were those that "consist with the letter and the spirit of the constitution."[90] The

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and the Tenth Federalist, 20 HUNTINGTON LIBRARY Q. 343, 343–60 (1957) (discussing the influence of Scottish Common Sense Philosophy on Madison); *cf.* MORTON G. WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 97–141 (1978) (discussing the influence of Moral Sense philosophy on the Framers).

[87] THE FEDERALIST NO. 37, *supra* note 86, at 229.

[88] *Proceedings in Memory of Mr. Justice Brandeis* (Dec. 21, 1942) (Harlan F. Stone, C.J., responding) *in* 317 U.S. XLVII [hereinafter *Brandeis Proceedings*].

[89] "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

[90] *Id.* It would be interesting to learn where Marshall took the distinction between the "letter" and the "spirit" from, and how pervasive it was in late eighteenth-century American law or theology. There is a long history of Christian theological dogma, beginning with St. Paul, that condemned so-called Jewish "legalism" and regarded Christianity as superior for having disregarded the "letter" of the law in favor of its "spirit." "But now we are delivered from the law, that being dead wherein we were held; that we should serve in newness of spirit, and not in the oldness of the letter." *Romans* 6:6. "Who also hath made us able ministers of the New Testament, not of the letter, but of the spirit; for the letter killeth, but the spirit giveth life." 2 *Corinth.* 3:6. In colonial New England, the clergy competed with evangelical lay people

distinction between the letter and the spirit appears to have been a major source of anti-literalism during the nineteenth century.[91]

The nineteenth-century debates over constitutional meaning took place entirely within Jefferson's and Chief Justice Marshall's framework of express versus implied powers and loose versus strict meaning of words. But if the debate between narrow and broad readings introduced a measure of flexibility into early constitutional interpretation, it was a flexibility firmly anchored to the premises of originalism.

C. Progressive Conceptions of Constitutional Change

1. Introduction. — The earliest efforts to develop a theory of an historically changing constitution were associated with progressive legal writers after *Lochner*, who wished to explode the static picture of constitutional meaning that had been frozen into the *Lochner* Court's jurisprudence.[92] Among the first progressive thinkers to elaborate a theory of a changing constitution was Woodrow Wilson, who wrote in 1908, at the height of his fame as a constitutional scholar, that constitutional government "does not remain fixed in any unchanging form, but grows with the growth and is altered with the change of

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over "the uniqueness of the Bible as 'the word,'" and thus over the appropriateness of lay interpretation of the Bible.

> The very premises on which they based their own identity as godly writers, that printed books were secondary to the Word of God, and that faith enabled the unlearned to understand the Bible, became potent weapons among radicals who argued that the English Bible was superior to the 'inventions' of the clergy.

DAVID D. HALL, WORLDS OF WONDER, DAYS OF JUDGMENT: POPULAR RELIGIOUS BELIEF IN EARLY NEW ENGLAND 24, 62 (1989). Instead, the lay people "guarded for themselves . . . the right of judgment . . . . [T]hey turned this familiarity with Scripture — their own capabilities as readers — into criticism of the ministers." *Id.* at 69; *cf.* RHYS ISAAC, THE TRANSFORMATION OF VIRGINIA, 1740–1790, at 163–77 (1982) (drawing a distinction between evangelicals, who emphasized emotion, equality, and order, and the gentry-dominated Anglicans). In colonial Virginia, it appears, the letter thus became associated with the learnedness of the clergy, and the spirit with lay interpretation. *See also* GEORGE L. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 141–62 (1960) (describing early colonists' reliance upon biblical precedent and authority).

[91] Up through 1840, the Supreme Court used some version of the letter-spirit dichotomy 86 times, although its actual substantive meaning is obscure. There needs to be more investigation of this distinction as a source of anti-literalism in early American law and religion. It is clear, however, that the distinction did not originate in Montesquieu's notion of the "spirit of the laws." *See* JUDITH SHKLAR, MONTESQUIEU 69 (1987) ("The spirit of the laws is thus a mixture of intentional human designs and of the deep circumstances which condition all the rules of a society."); David Carrithers, *Montesquieu's Philosophy of History*, 47 J. HIST. IDEAS 61, 69 (1986) ("Major political events . . . are the necessary result of the influence of a complex chain of causes resulting in what he will later label a society's *esprit general*.").

[92] *Cf.* PAUL W. KAHN, LEGITIMACY AND HISTORY 73–84 (1992) (discussing the evolutionary understanding of the Constitution developed by conservative constitutional scholars Thomas Cooley and Christopher Tiedeman in the late nineteenth century).

the nation's needs and purposes."[93] Wilson declared that "government is not a machine, but a living thing . . . . It is accountable to Darwin, not to Newton."[94]

The boldness of Wilson's words illustrates the degree to which progressive views of constitutional change marked a sharp departure from static originalism. That departure served as a catalyst for theories of constitutional change that were developed by jurists such as Louis D. Brandeis and Benjamin N. Cardozo. In the end, however, the progressive view of constitutional change faded as a result of the particular way progressive legal thinkers justified the constitutional revolution they had initiated.

2. Changed Circumstances. — Operating in an originalist legal culture, progressives imported flexibility into constitutional meaning through a "changed circumstances" justification for constitutional change. Introduced as an advocacy tool skillfully employed by Brandeis, this formulation soon became a mechanism used to construct broader, progressive understandings of constitutional change. Thus, even if the changed circumstances justification could be understood narrowly to conform to originalist premises, as first Justice Sutherland and later the *Casey* joint opinion understood it, when conceived of broadly it remained a conceptual point of departure from static originalism.

The most famous post-*Lochner* effort to conceptualize a changing constitution was embodied in the Brandeis Brief, written by future Supreme Court Justice Brandeis and his sister-in-law Josephine Goldmark. After the *Lochner* decision struck down the New York maximum hour law for bakers,[95] the Court was asked in *Muller v. Oregon*[96] whether "freedom of contract" also required the invalidation of an Oregon maximum hour law for women.[97] In his successful argument on behalf of the law's constitutionality, Brandeis daringly broke with convention and submitted a brief consisting of two pages of conventional legal argument and 110 pages of sociological and economic data on the situation of working women, as well as of excerpts from state and foreign laws.[98] The Brandeis Brief was the

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[93] KAMMEN, *supra* note 45, at xxiii (quoting WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 22 (1908)). As early as 1885, Wilson declared that "[w]e are the first Americans to hear our countrymen ask whether the Constitution is still adapted to serve the purposes for which it was intended." WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 27 (World Publishing Co. 1973) (1885).

[94] WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES, *supra* note 93, at 56.

[95] *See* Lochner v. New York, 198 U.S. 45, 64 (1905).

[96] 208 U.S. 412 (1908).

[97] *See id.* at 417.

[98] *See* PHILLIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 121 (1984).

most prominent example of the idea of "changed circumstances" as a justification for changing constitutional meaning.[99]

One of Justice Brandeis's most famous "changed circumstances" opinions is his great dissent in the wiretapping case, *Olmstead v. United States*.[100] He refused to accept Chief Justice Taft's conclusion that wiretapping could not be a "search or seizure" under the Fourth Amendment because telephones did not exist when the Fourth Amendment was written.[101] Instead, Justice Brandeis maintained that constitutional provisions "must have a . . . capacity of adaptation to a changing world."[102] Even though constitutional provisions were enacted to deal with specific evils, Justice Brandeis argued: "[I]ts general language should not . . . be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth."[103]

Justice Brandeis's ideas were soon broadened into the distinction between what Roscoe Pound called "law in books" and "law in ac-

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[99] Using the sort of deft legal maneuvers one associates with his contemporary, Justice Cardozo, Justice Brandeis mediated between the nineteenth-century tradition of affirming the true meaning of the constitution in derogation of precedent, *see supra* note 56, and the realist critique of stare decisis, which treated the role of precedent as both internally incoherent and politically conservative, *see* Harold J. Berman, *Legal Reasoning*, *in* 9 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 197, 199 (David L. Sills ed., 1968); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 72 (1928); Max Radin, *Case Law and Stare Decisis: Concerning Prajudizienrecht in Amerika*, 33 COLUM. L. REV. 199, 199–201 (1933). Justice Brandeis pioneered a trail of cases that suggested that, although a decision might have been correct at the time decided, it could be proved wrong by experience. *See, e.g.*, Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74 (1938) ("Experience in applying the doctrine of *Swift v. Tyson*[, 41 U.S. (16 Pet.) 1 (1842)], had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue."); Burnet v. Coronado, 285 U.S. 393, 407–08 (1934) (Brandeis, J., dissenting) ("The Court bows to the lessons of experience and the force of better reasoning."); Jaybird Mining Co. v. Weir, 271 U.S. 609, 619 (1926) (Brandeis, J., dissenting) ("It is a peculiar virtue of our system of law that the process of inclusion and exclusion, so often employed in developing a rule, is not allowed to end with its enunciation and that an expression in an opinion yields later to the impact in facts unforeseen."); Washington v. W.C. Dawson & Co., 264 U.S. 219, 237 (1924) (Brandeis, J., dissenting) ("Experience and discussion have also made apparent how unfortunate are the results, economically and socially. . . . These far-reaching and unfortunate results of the rule declared in *Southern Pac. Co. v. Jensen*[, 244 U.S. 205 (1917),] cannot have been foreseen when the decision was rendered."). Justice Brandeis's progressive approach to precedent was grounded in pragmatist thinking. *See* John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 23 (1924) ("As matter of actual fact, we generally begin with some vague anticipation of a conclusion (or at least of alternative conclusions), and then we look around for principles and data which will substantiate it or which will enable us to choose intelligently between rival conclusions.").

[100] 277 U.S. 438 (1928).

[101] *See id.* at 475–76 (Brandeis, J., dissenting).

[102] *Id.* at 472.

[103] *Id.* (quoting Weems v. United States, 217 U.S. 349, 373 (1910)).

tion."[104] Freedom of contract in *Lochner*, Pound argued, represented a conception of "equal rights" between employees and employers that could only be called a "fallacy" "to everyone acquainted at first hand with actual industrial conditions."[105] "Why then do courts persist in this fallacy?" Pound asked. "Why do so many of them force upon legislation an academic theory of equality in the face of practical conditions of inequality?"[106] One of Pound's answers was that the American courts had lost touch with reality by adopting a system of "mechanical jurisprudence" that enabled them to screen out the significance of social change.[107]

As explained in more detail below, the Pound-Brandeis idea undergirds the *Casey* joint opinion's conclusion about the legitimacy of overruling *Lochner* and *Plessy*: that "[t]he facts upon which the[se] earlier case[s] had premised a constitutional resolution of social controversy had proved to be untrue, and history's demonstration of their untruth not only justified but required" overruling them.[108]

3. Cardozo's Vision of the Changing Constitution. — As Justice Brandeis and Pound were creating the intellectual framework for the progressive view of a changing constitution, Judge Cardozo was further elaborating this position in his work, *The Nature of the Judicial Process*.[109] "The great generalities of the constitution," Cardozo wrote, "have a content and significance that vary from age to age."[110] Cardozo thus broadened the Pound-Brandeis idea to emphasize that constitutional "content" and "significance" themselves could change. Cardozo sought to reformulate the quite narrow version of "changing circumstances," developed in a common law context and expressed by the orthodox idea that a fixed rule could be validly distinguished from its changing application to new facts. He thereby associated himself with the writings of legal realist scholars who were also arguing that the meaning of a rule could not be determined independently of the sum of its specific applications.[111] That Cardozo had moved beyond

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[104] Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 35–36 (1910).

[105] Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 464, 464 (1909).

[106] *Id.*

[107] *See* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 606–07, 609–10 (1908).

[108] Planned Parenthood v. Casey, 112 S. Ct. 2791, 2812 (1992).

[109] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

[110] *Id.* at 17.

[111] *See id.* at 22–23. Max Radin, for example, argued:

> As applied in the United States, the rule of *stare decisis* is a matter of technique. In whatever way courts reach their conclusion, they are expected to place the situation they are judging within the generalized class of some existing decision. In doing so, they may, if they choose, disregard the opinion-essay of that decision entirely.

Radin, *supra* note 99, at 212; *see id.* at 210 (distinguishing decision from opinion, preferring stare decisis to "stare opinionibus"); *see also* William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 739 (1949) ("It is better that we make our own history than be governed by the dead. We too must be dynamic components of history if our institutions are to be vital, directive

the traditionally narrow rendition of the "changing circumstances" formula can also be seen in his unpublished concurring opinion in the *Minnesota Mortgage Moratorium Case*,[112] which involved a test of one state's response to the Great Depression:

> 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 may be inconsistent with things that they believed or took for granted. Their beliefs to be significant must be adjusted to the world they knew. 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.[113]

Justice Cardozo withdrew his concurring opinion,[114] however, when Chief Justice Hughes boldly included his own statement of a living constitution in the Court's majority opinion:

> 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." When we are dealing with the words of the Constitution, . . . "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most of its gifted begetters. . . . The case

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forces in the life of our age."); Oliphant, *supra* note 99, at 74–75, 159 (calling for pragmatic "radical empiricism" in adjudication to limit extent of prior dicta — stare decisis rather than "stare dictis"). Progressive legal thinkers had long targeted stare decisis as an obstacle to change. The classic judicial formulation that suggests the limits of stare decisis is Justice Brandeis's dissent in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–10 (1932) (Brandeis, J., dissenting).

[112] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

[113] Benjamin N. Cardozo, Unpublished Concurrence in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (available in Harlan F. Stone Papers, Library of Congress), *quoted in* Stanley C. Brubaker, Benjamin Nathan Cardozo: An Intellectual Biography 323 (1979) (unpublished Ph.D. dissertation, University of Virginia). I wish to thank Professor Richard Polenberg of Cornell University for providing this reference.

[114] *See* Brubaker, *supra* note 113, at 321.

> before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."[115]

It is important to appreciate the boldness of Chief Justice Hughes's declaration. It was only the fifth time — and the first since *Lochner* was decided — that the Court had cited Chief Justice Marshall's statement that the Constitution should be "adapted to the various *crises* of human affairs."[116] Perhaps even more significantly, Chief Justice Hughes, like Justice Cardozo, associated himself with the legal realist critique of the traditional common law "changed circumstances" formula. He declared:

> Nor is it helpful to attempt to draw a fine distinction between the intended meaning of the words of the Constitution and their intended application . . . . The vast body of law which has been developed was unknown to the fathers, but it is believed to have preserved the essential content and the spirit of the Constitution . . . . This development is a growth from the seeds which the fathers planted.[117]

4. The Restoration of Static Originalism. — Surprisingly, this progressive elaboration of a theory of a changing constitution in reaction to the *Lochner* Court's static view of constitutional meaning ground to a halt after 1937.[118] We see no more of the progressive assertion that constitutional meaning changes over time until the Warren Court returned to the idea of a changing constitution.[119] Instead, the victorious New Deal majority sought to portray its triumph not as constitutional revolution, but as constitutional restoration. The new majority justified overruling the *Lochner* Court precedents not because a living constitution inevitably required periodic reinterpre-

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[115] *Home Bldg. & Loan Ass'n*, 290 U.S. at 442–43 (citations omitted) (second ellipsis in original) (quoting Missouri v. Holland, 252 U.S. 416, 433 (1920); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407, 415 (1819)).

[116] *Id.* at 443 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 415). Other cases that quote Chief Justice Marshall are *In re* Strauss, 197 U.S. 324, 330–31 (1905); Fairbank v. United States, 181 U.S. 283, 288 (1901); Juilliard v. Greenman, 110 U.S. 421, 439 (1884); and, Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 630 (1870).

[117] *Home Bldg. & Loan Ass'n*, 290 U.S. at 443–44. The great constitutional historian Edward Corwin was quick to see the innovation in Chief Justice Hughes's opinion:

> Witness, too, the Chief Justice's opinion for the Court in [*Home Bldg. & Loan Ass'n*], with its invocation of Marshall's doctrine of adaptive interpretation, and its insistence upon change in *outlook* as something which must be taken into account, no less than change in *conditions*, if the Constitution is to be kept viable.

CORWIN, THE TWILIGHT OF THE SUPREME COURT, *supra* note 43, at 45; *see also* Hulsebosch, *supra* note 40, at 1990 (asserting that Chief Justice Hughes's opinion contained "evidence of a modern theory of the Constitution that . . . was consistent with the [original intent] of its framers").

[118] *See* HORWITZ, *supra* note 4, at 7, 264.

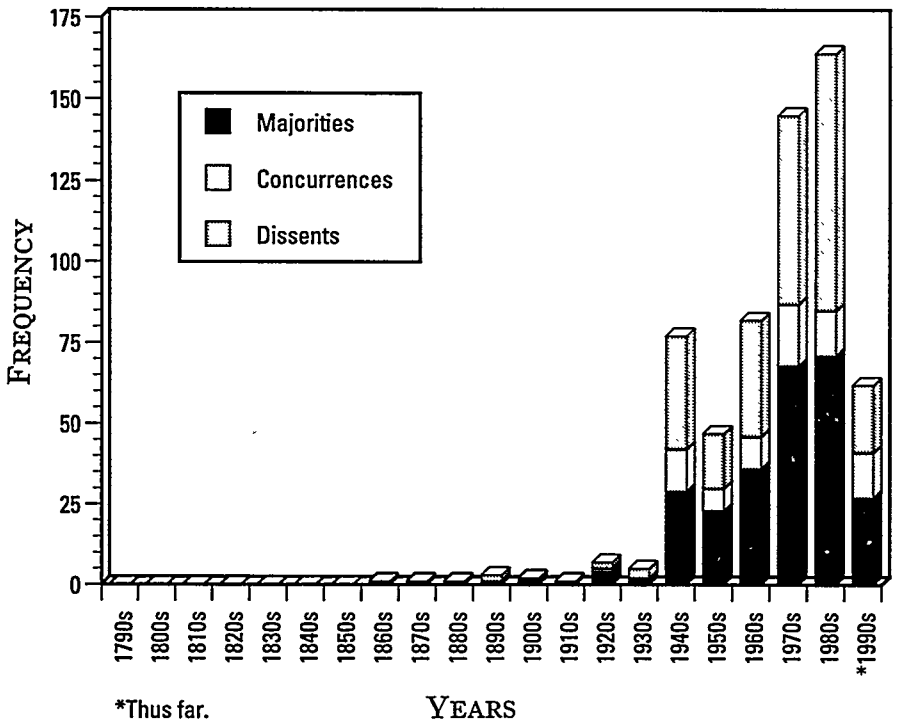
[119] See the discussion of Brown v. Board of Education, 347 U.S. 483 (1954), below in Part IIB. Witness also the debate between Justices Black and Douglas over whether there is a "changing constitution." *Compare* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669–70 (1966) (contending that the substantive meaning of constitutional provisions changes historically) *with id.* at 675–80 (Black, J., dissenting) (arguing that the Article Five amendment provision provides the only legitimate process for constitutional change).

tation and adaptation to a changing world, but rather on the ground that the *Lochner* majority itself had departed from the timeless truths of constitutional legitimacy.[120] Suddenly, democracy was put forth as the fundamental source of constitutional principle. In this way, a static and ahistorical concept of democracy — or, later, of "neutral principles" — became the basis of the Court's constitutional theory.

D. Democracy As a New Form of Static Originalism

1. Introduction. — Democracy suddenly became a central legitimating concept in American constitutional law. Its earlier absence as a central ideal can be seen dramatically in the following table that traces the frequency of the word "democracy" in Supreme Court opinions over the past two hundred years:

Frequency of Use of "Democracy" and "Democratic" in Supreme Court Opinions by Opinion Type



[120] *See* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 458 (1989); Morton Horwitz, *History and Theory*, 96 YALE L.J. 1825, 1827–30 (1987); Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 3–4 & n.4 (1991) (recognizing that the portrayal of the New Deal majority's decisions as constitutional restoration is now "appreciated as a myth created by scholars wishing to justify the New Deal Court's departure from *Lochner* Court norms").

Although it may be possible that a more nuanced choice of words would demonstrate that the conventions of word usage explain this result,[121] it is likely that a more qualitative approach would reinforce the conclusion that a deep change in constitutional theory has occurred — that for the past half century, and not before, democratic theory has been presented as the new "timeless truth" that could provide a uniquely correct foundation for constitutional interpretation.[122]

2. Early Visions of Democracy. — A brief survey of the history of the term "democracy" demonstrates why it did not — and could not have — become a foundational concept of American constitutional law before the twentieth century. Democracy was consistently a negative term for most of the Framers' generation.[123] *Federalist No. 10*, for example, distinguished sharply between a republic (positive term) and a democracy (negative term) on the dubious definitional basis that democracy constituted direct rule by the people and therefore was unwisely opposed to representative government.[124] Madison's more

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[121] This table comes from research for an article being written by Orlando do Campo, a third-year Harvard Law School student, and me. We will present, in a more complex way, the results of our computer study of alternative keywords and phrases, such as "Republicanism" or "popular sovereignty," that might have been understood as roughly synonymous with democracy. So far, no word has appeared with any significant frequency before 1937 as a rough substitute for democracy.

[122] *See* HORWITZ, *supra* note 4, at 255–58 (discussing the development of post-World War II democratic theory); *cf.* EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 235–72 (1973) (explaining that the status quo orientation of postwar American democracy was based on the view, common to a variety of intellectual disciplines, that American democracy was and should be normative).

[123] Bernard Bailyn has pointed out that, at the time of the American Revolution, "'democracy' — a word that denoted the lowest order of society as well as the form of government in which the commons ruled — was generally associated with the threat of civil disorder and the early assumption of power by a dictator." BAILYN, *supra* note 13, at 282. As Gordon Wood has reminded us, "most Americans, even the most radical-minded, could not conceive of a scheme of government for their states that would dissolve 'the GREAT GOLDEN LINE between the Rulers and Ruled.'" WOOD, *supra* note 13, at 223 (citation omitted).

Or, as *Federalist No. 48* warned:

> In a democracy, where a multitude of people exercise in person the legislative functions and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended, on some favorable emergency, to start up in the same quarter.

THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

[124]

> [A] pure democracy, by which I mean a society consisting of a small number of citizens . . . can admit of no cure for the mischiefs of faction. . . .
>
> A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect and promises the cure for which we are seeking. . . .
>
> The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens and greater sphere of country over which the latter may be extended.

general point was that the institutional arrangements of the new government were designed to filter popular opinion in order to curtail the chances of a "tyranny of the majority."[125] The electoral college system for electing the President and the election of two senators per state regardless of population were examples of how the Constitution deliberately and desirably diluted the popular will.[126]

Until the twentieth century, the word "democracy" as well as the idea itself carried mostly negative connotations in American political and legal culture. "[N]ineteenth-century scholars, with few exceptions, were generally agreed in castigating Jacksonian Democracy as a corrupt, demoralizing force in national politics . . . ."[127] Until the appearance of Frederick Jackson Turner's essay on frontier democracy in 1893,[128] the dominant historical interpretation of Jacksonian Democracy was "as a destructive, degrading expression of the mob spirit in politics."[129] It was Turner's essay, with its celebration of western

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THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961). This distinction has appeared again periodically, including in the argument of plaintiff's counsel in Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912), that a law passed through initiative is a violation of the Republican Government Clause of the United States Constitution, *see id.* at 124–25. This view was popular with treatise writers as well. Justice McClain of the Iowa Supreme Court wrote in 1904:

> By the Constitution of South Dakota (1898), Oregon (1902), and Oklahoma (1907), provision is made for legislation by the people, through the initiative and referendum. The agitation in favor of this form of legislation is based on the assumption that the ultimate power resides in the people, and that they should have the opportunity of acting directly through the qualified body of electors . . . . It is apparent, however, that such an exercise of legislative power on the part of the people is inconsistent with the general theory of our government, which involves action of the people through representatives and the division of the functions of government among distinct departments.

EMLIN MCCLAIN, CONSTITUTIONAL LAW IN THE UNITED STATES 10 (2d ed. 1913).

[125] THE FEDERALIST NO. 10, *supra* note 124, at 80, 82. *But see* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 243 (Henry Reeve trans., 1838) (maintaining that, in America, "no sure barrier is established against" majority tyranny).

[126] *See* THE FEDERALIST NO. 68, at 411–13 (Alexander Hamilton) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 62, at 378 (James Madison) (Clinton Rossiter ed., 1961). *See generally* MAX FARRAND, THE FRAMING OF THE CONSTITUTION 166–71 (1913) (discussing Electoral College rationale).

[127] ALFRED A. CAVE, JACKSONIAN DEMOCRACY AND THE HISTORIANS 26 (1964).

[128] FREDERICK J. TURNER, *The Significance of the Frontier in American History*, *in* THE FRONTIER IN AMERICAN HISTORY 1 (1920).

[129] CAVE, *supra* note 127, at 27. On Turner's progressivism and the relationship of his work to democracy, see RICHARD HOFSTADTER, THE PROGRESSIVE HISTORIANS: TURNER, BEARD, PARRINGTON 63–64, 121–41 (1968); and NOVICK, *supra* note 2, at 92–93. Cave detected little in the way of positive attitudes toward democracy among historians until the Populist era. For example, Yale Professor William Graham Sumner labeled prominent Jacksonian Thomas Hart Benton's belief that legislators were bound by the wishes of their constituents "an assault on the Constitution." CAVE, *supra* note 127, at 9 (quoting WILLIAM G. SUMNER, ANDREW JACKSON 97 (photo. reprint 1970) (Boston, Houghton, Mifflin & Co. 1882)). Much of the historians' opposition to Jackson came on legal grounds — his potential for subverting the rule of law. *See id.* at 14–15. Hermann von Holst's eight volume *The Constitutional and Political History of the United States*, for example, charged Jackson with arbitrary rule, *see* 2 HERMANN VON HOLST, THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES 49 (John J.

democracy, that helped exemplify the populist era's positive attitude toward democracy.[130]

The dominant attitude toward the democratic idea was illustrated in lawyers' arguments before the Supreme Court that condemned the spread of the initiative and referendum during the progressive era. In *Pacific States Telephone & Telegraph Co. v. Oregon*,[131] the Court confronted a challenge to a law passed by popular initiative. Pacific Telephone argued that taxation by initiative was inconsistent with the Republican Government Clause of the Constitution.[132] "An oligarchy or a democracy is equally unrepublican; each was equally hateful to the founders of our government, and each is equally subversive of the structure which they erected."[133] As the counsel for the company boldly phrased it: "The initiative is in contravention of a republican form of government. Government by the people directly is the attribute of a pure democracy and is subversive of the principles upon which the republic is founded."[134] Chief Justice Edward D. White's

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Lalor trans., Chicago, Callaghan and Co. 1888), and with acting "counter to the spirit of the Constitution," *id.* at 46. Various, often inconsistent, critiques of Jacksonian Democracy emerged in the nineteenth century. Those of conservatives von Holst and Sumner called for "strict constitutional restraints upon the majority will to guarantee social stability and to assure respect for the rights of property." CAVE, *supra* note 127, at 26.

[130] *See* RAY A. BILLINGTON, FREDERICK JACKSON TURNER 108–31 (1973). Alfred Cave has written:

> By implication, Turner's frontier thesis challenged the Gilded Age interpretation of the Jacksonian era. Though earlier nineteenth-century scholars had occasionally referred to Jacksonian Democracy as an expression of the Western frontier, they had found little reason to celebrate the triumph of the Western spirit in American politics. . . . In his 1893 essay, Turner hailed Jackson as the herald of "democracy as an effective force" and proclaimed the Jacksonian movement "the triumph of the frontier."

CAVE, *supra* note 127, at 21 (quoting TURNER, *supra* note 128, at 31). Turner offered an alternative vision of American democracy:

> [Democracy] was not carried in . . . the *Mayflower* to Plymouth. It came out of the American forest, and it gained new strength each time it touched a new frontier. Not the constitution, but free land and an abundance of natural resources open to a fit people, made the democratic type of society in America for three centuries while it occupied its empire.

TURNER, *supra* note 128, at 293, *quoted in* HOFSTADTER, *supra* note 129, at 121–22.

[131] 223 U.S. 118 (1912); *see also* Kiernan v. City of Portland, 223 U.S. 151, 166 (1912) (dismissing for lack of jurisdiction a companion case to *Pacific States Telephone & Telegraph Co.*).

[132] *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

[133] *Pacific States Tel. & Tel. Co.*, 223 U.S. at 123 (quoting the argument of counsel for the plaintiff).

[134] *Id.* at 138. The counsel for the plaintiff in the companion case, *Kiernan*, similarly worried that "[i]t would be but a short step further for the electors to abolish the state courts and try lawsuits by secret ballot under the initiative and referendum amendment. . . . Laws must emanate from the law-making power, and in a constitutional republic that power can only be a representative legislature." *Kiernan*, 223 U.S. at 154, 156 (quoting the argument of counsel for the plaintiff) (citations omitted).

opinion dismissing the suit as a political question may be taken as more of a statement of judicial deference to state political processes than as an endorsement of democracy.[135]

Only after the ratification in 1913 of the Seventeenth Amendment, which provided for the direct election of senators, and in 1920 of the Nineteenth Amendment, which provided for women's suffrage, would it have made sense to speak of American Democracy as "by the people." The historians of the progressive era recognized the emerging emphasis on democracy and encouraged it. Thus, the most prominent historian of the period, Charles Beard, who found that, throughout American history, the Constitution had been "the bulwark of every national sin . . . from slavery to monopoly,"[136] wrote to William LaFollette, it is not "a question of 'restoring' the government to the people," but "a question of getting possession of it for them for the first time."[137] Indeed, it was arguably only after the 1964 "one person, one vote" decision in *Reynolds v. Sims*[138] — from which Justice Harlan dissented on the grounds that democracy had never been the foundational concept of American government[139] — that democracy finally became the active governing ideal of American constitutional law.

3. The Rise of Democracy As a Foundational Concept. — As noted in the previous section, democracy only began to be considered a foundational concept around 1940. The earliest appeals to democracy

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[135] *See* 9 ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910–1921, at 311–12 (1984). Public reaction to the decision recognized the different conceptions of democracy that were involved. As one newspaper put it, "[t]he Supreme Court has restored the people to power." *Id.* at 312. But the *New York Times* worried about states "destroying representative institutions and setting up what is called direct government in their place." *Id.* (quoting N.Y. TIMES, Feb. 21, 1912, at A10).

[136] Charles A. Beard, *Editorial*, DEPAUW PALLADIUM, May 17, 1898, *quoted in* ELLEN NORE, CHARLES BEARD: AN INTELLECTUAL BIOGRAPHY 55 (1983).

[137] Letter from Charles A. Beard to Robert M. La Follette, Sr. (May 14, 1913) (on file with La Follette Family Collection, Series B, Box 73, Library of Congress), *quoted in* NORE, *supra* note 136, at 55.

[138] 377 U.S. 533 (1964).

[139] *See id.* at 590 (Harlan, J., dissenting) ("Whatever may be thought of this holding as a piece of political ideology — and even on that score the political history and practices of this country from its earliest beginnings leave wide room for debate . . . I think it demonstrable that the Fourteenth Amendment does not impose this political tenet on the States or authorize this Court to do so."). Justice Harlan cited Justice Frankfurter's dissent in Baker v. Carr, 369 U.S. 186 (1962). Justice Frankfurter thought that the notion of representation proportional to "the geographic spread of population" was not a tradition of the English-speaking peoples. He stated:

> It was not the English system, it was not the colonial system, it was not the system chosen for the national government by the Constitution, it was not the system exclusively or even predominantly practiced by the States at the time of adoption of the Fourteenth Amendment, it is not predominantly practiced by the States today.

Id. at 301 (Frankfurter, J., dissenting).

in Supreme Court opinions were either as rhetorical explanations of the differences between the free world and Nazism[140] or, as the Cold War deepened, between democracy and communism.[141] Otherwise, the major appeal to democracy after the New Deal majority formed was to advocate or to justify radical limitations on judicial power.[142] Beginning with Justice Stone's *Carolene Products* footnote,[143] however, various versions of democracy were articulated in order to justify judicial intervention to assure the continuing openness of the democratic process.[144] These process-oriented theories of democracy, however, were never able to incorporate Justice Stone's second category of justifications of judicial activism — the protection of "discrete and insular minorities."[145] As a result, the ideal of democracy itself came to be understood to have nothing to say about the protection of minorities.[146] In fact, in order to limit judicial review, New Deal ideologues narrowly and mechanically defined democracy simply to

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[140] *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1, 35–37 (1949) (Jackson, J., dissenting); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640–42 (1943) (Frankfurter, J., dissenting).

[141] *See, e.g.*, Dennis v. United States, 341 U.S. 494, 497–98, 516–17 (1951) (upholding the convictions of leaders of the Communist Party for advocating the overthrow or destruction of the United States government in violation of the Smith Act).

[142] *See, e.g.*, *Barnette*, 319 U.S. at 661–62, 663, 667 (Frankfurter, J., dissenting) (arguing that the courts should exercise restraint when they review legislation because the courts are not the ones charged, in a democratic system, with the making of laws); Learned Hand, *Chief Justice Stone's Concept of the Judicial Function*, *in* THE SPIRIT OF LIBERTY 201, 202–04 (Irving Dillard ed., 2d ed. 1953) (noting that Chief Justice Stone's jurisprudence was animated by a conviction that courts should, as a matter of simple democratic theory, defer to the judgment of the legislature in most cases).

[143] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[144] The *Carolene Products* footnote states, in relevant part:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation, is to be subjected to more exacting scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. For an explanation of the historical significance of this footnote from the point of view of process-oriented jurisprudence, see JOHN H. ELY, DEMOCRACY AND DISTRUST 73–77 (1980); and Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1063, 1072–73 (1980).

[145] *Carolene Products*, 304 U.S. at 152 n.4.

[146] *See* HENRY S. COMMAGER, MAJORITY RULE AND MINORITY RIGHTS 59–60 (1943) (observing that the checks and balances system protects the minority less than it enables them "to delay and defeat the majority"); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 133 (1956) (arguing that the problem in American government is not that "the majority" will impose its will on a minority, but that "various minorities in a society will frustrate the ambitions of one another").

entail majority rule.[147] Judicial review eventually came to be characterized negatively as "counter-majoritarian," and democracy came to be defined to be in fundamental tension with minority rights.[148] No wonder that neutral principles and legal process theorists were paralyzed in their efforts to justify *Brown* in the face of charges that it represented a revival of the Lochnerian legacy, when the judicial branch unnecessarily interfered with the legislature.

4. Democracy and Judicial Review. — The competing conceptions of democracy and its relationship to judicial review noted in the previous section have framed the central debates in American constitutional theory during the past fifty years. One school — to which Thayer, Justice Frankfurter, Hand, Bickel, and Bork belonged — insisted that judicial review and democracy are opposed concepts such that, in Bickel's words, judicial review presents a "counter-majoritarian difficulty"[149] because it threatens democratic legitimacy. Another school of thought, arguably created by Brandeis,[150] and followed by the Warren Court majority — Chief Justice Warren and Justices Brennan, Thurgood Marshall, Douglas, Goldberg, and Fortas — understood that judicial review could potentially enhance democracy. They regarded democracy not as some mechanical and undigestible version of "the majority must always win," but as a multilayered system of public values.[151]

The singular achievement of the Warren Court is that it sought to reconcile the supposed conflict between majority rule and minority rights by assuming that greater social inclusiveness and empowerment of minorities was an extension of democratic values.[152] The Warren Court majority believed that the values embodied in the Bill of Rights were capable of incorporation into a rich conception of democracy.[153]

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[147] *See* Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 44, 63, 70–71 (1989); *cf.* ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 176–79 (1941) (describing how Roosevelt and his supporters used Roosevelt's 1936 victory to push for Court reform).

[148] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (2d ed. 1986).

[149] Bickel gave us the phrase. *See id.* at 16–23.

[150] *See* Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 199 (1952) (describing Justice Brandeis's belief that judicial review is well adapted to a democracy).

[151] *See* Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451, 454–66 (1988) (comparing Justices Holmes's and Brandeis's justifications for free speech and linking Justice Brandeis to the tradition of civic virtue); G. Edward White, *Warren as Jurist*, 66 VA. L. REV. 461, 539–40 (1981) (describing the Warren Court's approach to majoritarianism, judicial review, and the protection of minority interests).

[152] *See* ELY, *supra* note 144, at 74–75; Morton J. Horwitz, *Law and Political Culture: The Warren Court: Rediscovering the Link Between Law and Culture*, 55 U. CHI. L. REV. 450, 456–57 (1988).

[153] *See, e.g.*, Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern*

Thus, for example, tolerance of political or religious minorities did not derive from non-democratic sources, but rather was part of the task of creating a pluralistic version of democratic culture.[154]

For the process-oriented school of thought, on the other hand, political equality was, at most, the only substantive commitment that democratic theory required.[155] Although most of this first group believed that *Brown* was in disturbing tension with democratic legitimacy,[156] the Warren Court majority believed that *Brown* was a precondition for, and fulfillment of, democratic ideals. For the Warren Court majority, some degree of social inclusiveness was a necessary precondition for a well-functioning democracy.[157] A society with substantial inequalities of wealth and power is incapable of becoming a thoroughly functioning democracy.

As democracy has become one of our central legitimating constitutional ideals during the past half century, the conflict between narrow and broad — between political-versus-social and procedural-versus-substantive — definitions of democracy has provided the subtext for much of constitutional theory. Although the central role of democracy as a legitimating ideal might conceivably be derived from an originalist understanding of the spirit of the Civil War Amendments,[158] the basic explanation for the elevation of the democratic

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Reassessment of the Noerr-Pennington Doctrine, 41 HASTINGS L.J. 905, 913 (arguing that the Warren Court's decisions regarding interest group politics were guided by a vision of an "uncontroversial political conception of the representative process" and an "uncontroversial constitutional principle"). *See generally* ELY, *supra* note 144, at 74 (arguing that the Warren Court's interventionism was driven "by a desire to ensure that the political process — which is where [particular substantive] values *are* properly identified, weighed, and accommodated — was open to those of all viewpoints" equally).

[154] In the school prayer cases, for example, the Court denied that protecting the religious freedom of the minority by prohibiting the state to sanction any religion interferes with the majority's right to free exercise of religion. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225–26 (1963). Rather, the Court asserted that state sanctioning of religion, because it suppresses minority views, inevitably threatens government. *See* Engel v. Vitale, 370 U.S. 421, 431 (1962).

[155] "[J]udicial review . . . can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack." ELY, *supra* note 144, at 181; *see also* LEARNED HAND, THE BILL OF RIGHTS 37 (1958) (arguing that "[t]he proper scope of judicial review of a statute [is] only to set the ambit of what is legislation and not to redress any abuses in the exercise of power").

[156] According to one commentator, the central problem with *Brown* is that it subordinates the majority to the minority: "[I]f the freedom of association is denied by segregation, integration forces an association upon those for whom it is repugnant." Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

[157] *See* Brown v. Board of Educ., 347 U.S. 483, 493 (1954); *see also* HORWITZ, *supra* note 4, at 265–68 (discussing Weschler's justification of *Brown* through his theory of "neutral principles").

[158] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 256–57 (1988) (arguing that the political and ideological context of the Fourteenth Amendment evinces a Republican desire to "protect the freedmen's rights, short of the suffrage" and to guarantee "equality before the law"). *But see id.* at 66–67, 199 (noting that the interpretation

ideal in recent constitutional law can only be derived from a long-term transformation in fundamental political values. The meaning of democracy not only slowly acquired institutional and cultural forms very different from prior understandings, but also became a potential model of how dynamic fundamentality might operate in American constitutional law.

E. Modern American Originalism

1. Introduction. — In reaction to the Warren Court's expansive conception of constitutional meaning, in 1985 Attorney General Meese launched his own originalist "Great Awakening"[159] very much in the spirit of those earlier recurrent surges of evangelical enthusiasm with which religious Americans expressed their yearnings for a return to a truer and simpler past. Perhaps the Attorney General was reaching all the way back to that archetypal form of American originalism, the Puritan jeremiad that, as Perry Miller has shown, "reestablished continuity with the past"[160] and called on the community to repent its fall from original virtue. That Meese's originalism has resulted in almost a decade of scholarly controversy is itself testimony to its archetypal power, for it rested on only the most slender of intellectual foundations.

One of the central dilemmas of the modern American originalism is whether it can live up to the legitimating task it has set for itself. Applied in the modern world, originalism ironically appears to demonstrate the degree to which we in fact have a "living constitution." To the extent proponents of originalism insist that their constitutional vision reflects timeless textual truths, the exceptions they make — either for practical or political purposes — strip the theory of much

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of the Thirteenth Amendment was an "open question," and observing that "several states ratified with the 'understanding' that Congress lacked the power to determine the future of former slaves").

[159] *See, e.g.*, Edwin Meese III, Address Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), *in Construing the Constitution*, 19 U.C. DAVIS L. REV. 22, 23–26 (1985) (describing the Reagan Administration's approach to constitutional interpretation as a jurisprudence of original intention); Edwin Meese III, *Our Constitution's Design: The Implications for Its Interpretation*, 70 MARQ. L. REV. 381, 381–83 (1987) (arguing that, in recent decades, the interpretation of the Constitution has strayed radically from the traditional interpretivist approach). An earlier influential statement appeared in Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971), in which he argued that only constitutional interpretation based on "neutral principles" derived from the text of the Constitution and the intent of the framers can guarantee the legitimacy of the judicial branch, *see id.* at 17.

[160] PERRY MILLER, THE NEW ENGLAND MIND FROM COLONY TO PROVINCE 39 (1953). Miller notes that the jeremiad was a ritualistic purgation that helped rationalize ongoing, inevitable change. *See id.* at 40; *see also* SACVAN BERCOVITCH, THE AMERICAN JEREMIAD at xi (1978) ("The American jeremiad was a ritual designed to join social criticism to spiritual renewal, public to private identity, the shifting signs of the times to certain traditional metaphors, themes and symbols.").

of its legitimating power. Thus, the question arises: in the modern world, can originalism legitimate anything?

2. Practical Problems With Modern Originalism. — Practical difficulties abound when originalism is applied to constitutional questions. For example, none of the proponents of originalism ever suggested applying its premises to an atomic age presidency, which would have meant reverting to the assumption of George Washington's day that the primary mission of the chief "executive" was simply to "execute" the laws.[161] Indeed, it strikes us as rather quaint that Jefferson should have agonized so thoroughly over how to legitimate the Louisiana Purchase on originalist grounds.[162] Nor could any of the subsequent innovations in foreign affairs, such as the executive agreement, undeclared wars, or "police actions," have survived strict originalist scrutiny.

Second, constitutional historians have always understood that any faithful adherent of originalism would be required to condemn many Supreme Court decisions that she would not want to do without. Could the application of the Contracts Clause to corporate charters be defended on originalist grounds?[163] Could the inclusion of corporations as "persons" under the Fourteenth Amendment be so justified?[164] Could the application of the First Amendment to seditious libel or, indeed, to anything other than censorship or licensing of the

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[161] *See* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 1–12 (1973) (discussing the limitations placed upon the president by the Founding Fathers, including the delegation to Congress of sole authority to make wars and to impeach, and the requirement of Senate approval of treaties).

[162] *See* MERRILL D. PETERSON, THOMAS JEFFERSON AND THE NEW NATION 770–71 (1970) (describing the "gagging conviction" that Jefferson's purchase "exceeded the limits of the Constitution"); SCHLESINGER, *supra* note 161, at 23–24 ("[Jefferson's] doubts concerned the constitutional authority of the national government *as a whole*, President and Congress combined, to annex new territory.").

[163] *See, e.g.*, WRIGHT, *supra* note 43, at 39–40 (concluding that the ruling in Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819), "with the rapid growth of the corporate form of industrial organization, made possible a breadth of application for the clause which would have astonished most, if not all, of those who voted for its adoption in 1787 and 1788"). Nor was Chief Justice Marshall's application of the Contracts Clause to contracts between individuals and a state in Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), justified on originalist grounds. "The Framers of the Constitution and those who supported it in 1787–1788 never gave any indication of such a breadth of meaning." WRIGHT, *supra*, at 32–33. Indeed, "[i]t is safe to assert that the contract clause as the Framers thought of it was a very different thing from the clause at the end of Marshall's years on the Supreme Court." *Id.* at 27.

[164] I have argued that the inclusion of corporations as persons subject to Fourteenth Amendment protection did not begin with Santa Clara v. Southern Pacific Railroad, 118 U.S. 394 (1886), as is usually supposed, but came about through a gradual change that was not completed until 1910. *See* HORWITZ, *supra* note 4, at 66–107.

press be explained in originalist terms?[165] Indeed, one wonders whether so-called "horizontal" judicial review of congressional statutes — of which there are only two instances before the Civil War — could ultimately be defended from an originalist perspective.[166]

The dilemmas faced by modern American originalism seem not to have concerned Attorney General Meese or his followers. Yet it is precisely the area in which originalism fails that constitutional interpretation can only be defended in terms of a living constitution that must "be adapted to the various *crises* of human affairs."[167]

3. Political Problems With Modern Originalism. — One is not surprised to learn that the passions of the originalists were never directed at recovering a broad original meaning of the Civil War Amendments. Instead, the appeal of originalism was confined almost exclusively to those who opposed the activism of the Warren Court and sought to de-legitimate the Court's claimed powers. This is the problem of the two originalisms. If a broad reading of the Fourteenth Amendment could be defended on originalist grounds — for which, as we shall see, there is ample historical justification — then a true originalist might have been forced to conclude that the Civil War Amendments were meant to produce a Constitutional "revolution."[168] This revolution not only fundamentally reconceived the relationship of the citizen to the state, but also recognized in Section Five of the Fourteenth Amendment a continuing supervisory power of Congress (and of society) over the remaining vestiges of slavery. Indeed, it is possible to have a strong originalist reading of *Brown*: that *Brown* in fact represented a return to the true original spirit of the Fourteenth Amendment.[169]

Thus, as the originalist crusade was launched, it became necessary to make sure that the originalist argument did not turn back upon itself and end up supporting a broad reading of the Court's authority

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[165] *See* LEONARD W. LEVY, LEGACY OF SUPPRESSION 1–17 (1960); *see also* LEONARD W. LEVY, JEFFERSON & CIVIL LIBERTIES: THE DARKER SIDE 48–49 (1963) (illustrating Jefferson's conviction that libelous publications should not be protected).

[166] *See* BICKEL, *supra* note 148, at 14–16. *But see* RAOUL BERGER, CONGRESS V. THE SUPREME COURT 336 (1969) (relating the author's conviction, based on a review of the historical materials, "that fear of Congressional despotism bulked large in the thinking of the Founders" and thus that "their assurances that judicial review would serve as an effective 'check' gain added weight").

[167] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

[168] *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 19 (1991).

[169] *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 677 n.7 (1966) (Black, J., dissenting) ("In my judgment the holding in *Brown* against racial discrimination was compelled by the purpose of the Framers of the Thirteenth, Fourteenth, and Fifteenth Amendments completely to outlaw discrimination against people because of their race or color.").

under the Civil War Amendments to assure the rights of all Americans. As a result, "historians have been engaging in a debate which parallels that of the lawyers."[170] For the past fifteen years, we have been subjected to a series of complex and elaborate historical claims and counterclaims about the original meaning of the Fourteenth Amendment.[171]

"The debate among legal historians about the purposes and intentions of the Fourteenth Amendment's framers is linked, in turn, to a more general historical controversy over the nature of Reconstruction. . . . Voluminous evidence has been presented in support of both the expansive and narrow readings of the Fourteenth Amendment's history."[172] Professor William Nelson sees an "impasse . . . [in] historical scholarship on the adoption of the Fourteenth Amendment." There are "conflicting interpretations, all of them supported by impressive arrays of evidence."[173] Yet many agree that the historical evidence is not only inconsistent or ambiguous but also that "[c]onfusion and contradiction abound."[174]

The lawyers' arguments against originalism that developed in reaction to the Meese Crusade[175] apply equally to the claims of the originalist historians. For example, all of the problems of finding original intent in a contract, a statute, or the Constitution[176] are

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170 WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 2 (1988).

171 *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 6–8 (1977) (asserting that the legislative history of the Fourteenth Amendment incontrovertibly proves that "the framers meant to leave control of suffrage with the states . . . and to exclude federal intrusion" and criticizing "revisionist" alternative interpretations); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 939 (1986) (arguing that the Framers were concerned more that the national government possess the primary authority to determine the rights of American citizens).

172 NELSON, *supra* note 170, at 3; *see id.* at 2–4 (summarizing the conflicting assessments of the Fourteenth Amendment); W. R. Brock, *Race and the American Past: A Revolution in Historiography*, 52 HIST. 49, 49, 58–59 (1967) (describing the conflicting views of the Reconstruction).

173 NELSON, *supra* note 170, at 4.

174 *Id.* (quoting JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION 102 (1983), and Earl A. Maltz, *The Concept of Equal Protection of the Laws — A Historical Inquiry*, 22 SAN DIEGO L. REV. 499, 540 (1985)).

175 *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 224, 229–37 (1980) (arguing that nonoriginalist adjudication better serves fundamental values and the ends of constitutional government); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 477–78 (1981) (claiming that judges cannot decide the Framers' intent without making value judgments); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793–804 (1983) (outlining several critiques of the attempts to follow the intent of the Framers in judicial decisionmaking).

176 *See, e.g.*, Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CAL. L. REV. 1049, 1071–73, 1090–92 (1979) (comparing the

equally applicable to an historical inquiry. The first question that should be raised by an historian interested in determining the intent of the Framers needs to focus on how one chooses the level of generality at which to pursue the inquiry.[177] This must be seen as well as a major — and inevitable — source of ambiguity, contradiction, and confusion in every historical inquiry.

The problem of generality and particularity — in visual language, how widely or narrowly to open the lense — must inevitably produce "confusion" in answering any originalist inquiry because there will often be "ambiguity" or "contradiction" in evidence produced when questions are asked at different levels of generality. The memo that law clerk (and future Professor) Alexander Bickel wrote for Justice Frankfurter on the eve of *Brown* remains the classic statement of the problem. He noted that the legislative history of the Fourteenth Amendment "rather clearly" demonstrated "that it was not expected in 1866 to apply to segregation."[178] But his historical survey found "an awareness on the part of [the Framers of the Fourteenth Amendment] that it was *a constitution* they were writing, which led to a choice of language capable of growth," and he concluded that "the record of history, properly understood, left the way open to, in fact invited, a decision based on the moral and material state of the nation in 1954, not 1866."[179] We can now see that Bickel was propounding a variation on the "changed circumstances" formula that Chief Justice Warren was to deploy in his *Brown* opinion. For Bickel, the fundamental distinction was between a fixed constitutional *principle* of equality and varying specific *applications* of that principle over time. Even if the Framers of the Fourteenth Amendment did not mean to apply the principle of equality to segregated facilities, later generations were not bound by their specific intentions, at least when the Framers used general language to express their ideas. Although he framed the question as a special problem of constitutional interpretation, Bickel was in fact drawing on a classical common law distinction between a principle (or rule) and its application (or, alternatively, between a principle and a precedent).[180] Ronald Dworkin has offered a similar idea to distinguish between a concept and a conception.[181]

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complexity of determining the original purpose of a constitutional provision to that of determining the legislative purpose of a statute); Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 456–65 (1984) (discussing particularly the problem of projecting intent over time).

[177] *See, e.g.*, Brest, *supra* note 175, at 209–11 (using a hypothetical ordinance prohibiting vehicles in a park to explore the meaning of intentionalism in constitutional interpretation).

[178] Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 64 (1955).

[179] *Id.* at 63, 65.

[180] *See* HORWITZ, *supra* note 58, at 8–9.

[181] *See* RONALD DWORKIN, LAW'S EMPIRE 70–72 (1986) (distinguishing between concept,

But beyond the generality-particularity problem, other difficulties also inevitably conspire to produce ambiguous answers to originalist historical inquiries. In the debates over the interpretation of the Fourteenth Amendment, for example, at least three other sets of variables lead to multiple interpretations of an original intent. First, whether one reads a statement broadly or narrowly often depends on how enthusiastically one supports it.[182] As with Bickel, the interpreter needs independently to decide how specific is too specific, and how general is too general. There are no neutral principles with which to decide the appropriate level of generality. Second, one can assign varying weights to broad (and often vague) "political" utterances as compared to narrow, carefully tailored "legal" formulations. Arguments over the historical scope of the Bill of Attainder, Self-Incrimination, and Cruel and Unusual Punishments Clauses reflect the ambiguity produced by the tension between reliance on evidence of tight technical formulation and reliance on the less well formulated laypersons' political understanding of the provisions' purposes.[183] Finally, originalist interpretations can be manipulated by a changing and dynamic time frame. For example, after the Civil War, fluctuations in popular support for black aspirations or for Reconstruction among the political elite changed dramatically over time. In such a dynamic and unfolding situation, the expressions of individual views on the scope or purpose of any broad or controversial provision can be expected to change rapidly. Jefferson's changing views on the scope of the First Amendment is such an example.[184]

Modern originalism thus appears to depend on its exceptions — exceptions that either reveal the extent to which constitutional change is a reality or the extent to which originalism is a rather thin disguise for political conservatism. Either way, modern originalism carries far less legitimating power in the modern world than it did in the religious age that gave birth to it.

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which pertains to connections internal to a community of discourse, and conception, which pertains to the "controversy latent in" the abstraction that is a concept).

[182] *Cf.* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 75–92 (1960) (denoting the various ways a judge can limit or expand judicial precedent).

[183] *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 242–44, 253–56 (1972) (Douglas, J., concurring) (discussing the historical origins of the Cruel and Unusual Punishments Clause); United States v. Lovett, 328 U.S. 303, 315–17 (1946) (discussing the historical and legal meaning of bills of attainder); LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT at xv–xvi (2d ed. 1986) (arguing that the prohibition of self-incrimination — despite contrary rulings by the Supreme Court — was historically considered a "right" and not a "privilege"); *id.* at viii–ix (depicting former Attorney General Meese as a political person who incorrectly interprets the Fifth Amendment).

[184] *See* LEVY, *supra* note 165, at 42–69.

II. THE *CASEY* JOINT OPINION'S THEORY OF CHANGE

Against this historical and theoretical backdrop, the joint opinion in *Casey* struggled to articulate a persuasive account of constitutional change that would justify its refusal to overturn *Roe*. Its own theory emerges from its characterization of the overruling of *Lochner* by the New Deal Court and the overruling of *Plessy* by *Brown* — truly the twin peaks of modern constitutional law. The joint opinion's theory echoes the "changed circumstances" formulation advanced by Justice Brandeis,[185] but it is a pre-modern version infused with the static originalism that gave birth to it.

That these two overrulings of *Plessy* and *Lochner* were legitimate and justified is a rare point of unanimous agreement among the Justices of the Rehnquist Court. Despite strong evidence that, as a twenty-seven-year-old Supreme Court law clerk, Chief Justice Rehnquist disputed the legitimacy of *Brown*,[186] as Justice and Chief Justice he has reluctantly come to affirm its legitimacy.[187] In contrast to his

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[185] *See supra* pp. 52–53.

[186] In a 1952 memorandum to Justice Jackson entitled "A Random Thought on the Segregation Cases," Rehnquist, Justice Jackson's law clerk at the time, wrote:

> I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed. If the Fourteenth Amendment did not enact Spencer's Social Statics, it just as surely did not enact Myrdahl's [sic] American Dilemma.

Memorandum from William H. Rehnquist to Supreme Court Justice Jackson (1952), *reprinted in* 117 CONG. REC. 45,313, 45,440–41 (1971).

[187] *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2862, 2865 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). The Chief Justice has come to this position quite slowly. In his 1971 confirmation hearing, he acknowledged several times that *Brown* was the "established constitutional law of the land." *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Senate Comm. on the Judiciary*, 92nd Cong., 1st Sess. 76 (1971); *see id.* at 55. But it was not until after his confirmation hearings had ended that *Newsweek* published an excerpt from his memorandum to Justice Jackson on *Brown*. Justice Rehnquist sent a letter to Senator Eastland, the Chairman of the Judiciary Committee, to explain his memorandum, stating "unequivocally," "I fully support the legal reasoning and the rightness from the standpoint of fundamental fairness of the *Brown* decision." 117 CONG. REC. 45,440 (1971). Justice Rehnquist explained that the memorandum "was prepared by me at Justice Jackson's request" and reflected Justice Jackson's, not his own, views. *Id.*; *see also* SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 10, 14 (1989) (discussing Chief Justice Rehnquist's confirmation hearings). The memorandum has produced an interpretive conflict over Chief Justice Rehnquist's attitude toward *Brown*. Several historians have questioned Chief Justice Rehnquist's assertion that it merely reflected Justice Jackson's views. *See, e.g.*, RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 605–09 (1975) (describing the memorandum's ambiguities); Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson and the* Brown *Case*, 1988 SUP. CT. REV. 245, 247 (arguing that Justice Jackson's draft concurrence is inconsistent with Chief Justice Rehnquist's assertion that the memorandum reflected Justice Jackson's views).

As recently as 1985, when interviewed for a *New York Times Magazine* article, Justice Rehnquist continued to demonstrate some ambivalence. Justice Rehnquist "says he now accept

equivocation about *Brown*, Rehnquist has continually expressed disdain for *Lochner*, "one of the most ill-starred decisions" the Court "ever rendered,"[188] apparently because it represents judicial interference with the legislature.[189]

Justice Scalia, like Chief Justice Rehnquist, has shown disdain for *Lochner*. In his dissent in *Casey*, for example, he linked *Dred Scott* and *Lochner* together with *Roe* and argued that *Dred Scott* was "very possibly the first application of substantive due process in the Supreme Court, the original precedent for *Lochner v. New York* and *Roe v. Wade*."[190] Unlike Justice Rehnquist, Justice Scalia has, however, ex-

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[sic] *Brown* as the law of the land, yet he still maintains: 'I think there was a perfectly reasonable argument the other way.'" Jenkins, *supra* note 14, at 28, 32. When the issue arose again during his confirmation hearings for the chief justiceship, Justice Rehnquist responded to Senator Orrin Hatch's questioning with the observation that, when he wrote the Jackson memo, he did not think that *Plessy* was a correct statement of the Fourteenth Amendment and that he "certainly [does] not" think that *Plessy* is correct now. *Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 301 (1986).

That did not quiet concern over his attitude toward *Brown*, however. Once again new evidence emerged after his confirmation hearings had ended. This time the allegations were that, in 1970, when he was in the Department of Justice, Rehnquist advocated a constitutional amendment that would have made it easier to maintain segregation. *See* 132 CONG. REC. 23,313–14 (1986) (statement of Sen. Metzenbaum). And Chief Justice Rehnquist's recent book, published in 1987 after he became Chief Justice, contains a remarkably bland rendition of why *Plessy* was wrongly decided. He explicitly avoids (for reasons of judicial propriety) discussion of any cases that have come to the Court since 1953. *See* WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 8 (1987). Nevertheless, in his discussion of *Plessy*, Chief Justice Rehnquist mentions *Brown*: "From the perspective of the present day it seems that this decision was extraordinarily insensitive to the onus blacks must have felt as a result of enforced segregation, and the *Plessy* decision was overruled in substance nearly sixty years later by the decision in *Brown v. Board of Education*." *Id.* at 313.

[188] REHNQUIST, *supra* note 187, at 205. Chief Justice Rehnquist devotes an entire chapter of his book to *Lochner*-era decisions with the apparent intention of showing what is wrong with judicial interference with the legislature. *See id.* at 199–214. One might, incidentally, contrast his lengthy criticism of *Lochner* with his one-paragraph condemnation of *Plessy*. *See id.* at 312–13.

[189] *See* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 702–03 (1976).

[190] Planned Parenthood v. Casey, 112 S. Ct. 2791, 2883 (1992) (Scalia, J., concurring in the judgment in part, and dissenting in part) (quoting DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: 1789–1888, at 271 (1985)); *see also id.* (stating that West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), "produced the famous 'switch in time' from the Court's erroneous . . . constitutional opposition to the social measures of the New Deal").

Both Justice Rehnquist and Robert Bork have been criticized for seeing *Dred Scott* to have led to *Lochner*. *See* BORK, *supra* note 15, at 30–32; REHNQUIST, *supra* note 187, at 214; Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 CONST. COMMENTARY 37, 50 (1993).

pressed clear support for the other peak of twentieth-century constitutionalism, *Brown*.[191]

Yet the consensus that the overrulings were legitimate does not translate into agreement over the theory of change underlying these reversals. How one understands *Brown* and the overruling of *Lochner* are controversial subjects in both modern constitutional history and theory.[192] There are many possible ways to understand these two overrulings, and as one would expect, the interpretations have roamed freely across the open range of modern constitutional discourse. During the years immediately after *Brown* was decided, for example, several prominent jurists criticized *Brown* as the revival of *Lochner*.[193] How one explains and justifies these cases, therefore, has implications not only for substantive constitutional law, but also for its foundational concepts, including the very idea of a "living constitution." Our interpretation of these two great moments in American constitutional history ultimately defines the legitimate province of change in American constitutional law.

A. Casey*'s Theory Through Its Account of* Lochner

1. Casey*'s Account of* Lochner. — Although Chief Justice Hughes was too tactful to include *Lochner* — or indeed, any other twentieth-century case — in his list of the Supreme Court's "self-inflicted wounds,"[194] that case stands as the very symbol, after *Dred Scott*, of the Supreme Court's periodic tendencies toward institutional suicide.[195] "It now seems that the ultimate punchline in the criticism of a constitutional decision is to say that it is 'like Lochner.'"[196] Professor John Ely has even minted a generic verb, "to Lochner," to describe

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[191] In his dissenting opinion in Rutan v. Republican Party, 497 U.S. 62 (1990), Justice Scalia argued:

> [A] tradition of *unchallenged* validity did not exist with respect to the practice in *Brown*. To the contrary, in the 19th century the principle of 'separate-but-equal' had been vigorously opposed on constitutional grounds, litigated up to this Court, and upheld only over the dissent of one of our historically most respected Justices.

Id. at 95 n.1 (Scalia, J., dissenting).

[192] *See, e.g.*, William W. Justice, *The New Awakening: Judicial Activism in a Conservative Age*, 43 SW. L.J. 657, 665 (1989); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 761–62 (1988).

[193] *See* LEARNED HAND, THE BILL OF RIGHTS 54–55 (1958); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959).

[194] HUGHES, *supra* note 22, at 50; *see supra* note 22.

[195] *See, e.g.*, Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 326 & n.99 (1993) (referring to *Dred Scott* and *Lochner* as prominent examples of the Court's "embarrassments").

[196] Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 711 n.35 (1975).

whatever-it-was-so-awful-the-Court-did-in-*Lochner*.[197] How one explains why *Lochner* was illegitimate has become the necessary first step in the development of a modern constitutional theory. Indeed, because of its centrality, judges and scholars have subjected *Lochner* to a barrage of interpretations of its place and meaning in American constitutional history.[198]

The *Casey* joint opinion explained when and why *Lochner* was overturned by focusing on the factual assumptions made by the *Lochner* Court rather than on its legal perspective or its world view. "The *Lochner* decisions," the three Justices told us, "were exemplified"[199] by *Adkins v. Children's Hospital*,[200] which struck down a minimum-wage law.[201] Fourteen years later, *West Coast Hotel Co. v. Parrish*[202] signaled the demise of *Lochner* by overruling *Adkins*.[203]

> In the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. As Justice Jackson wrote of the constitutional crisis of 1937 shortly before he came on the bench, "The older world of *laissez-faire* was recognized everywhere outside the Court to be dead." The facts upon which the earlier case had premised a constitutional resolution of social controversy had proved to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced. Of course, it was true that the Court lost something by its misperception, or its lack of prescience, and the Court-packing crisis only magnified the loss; but the clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law.[204]

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[197] John H. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 944 (1973).

[198] *See, e.g.*, American Fed'n of Labor v. American Sash & Door Co., 335 U.S. 538, 543 (1949) (Frankfurter, J., concurring) (arguing that, if the Court had not abandoned the *Lochner* approach, there would have been no real limit on judges reading their own beliefs into the Fourteenth Amendment's prohibitions); Siegel, *supra* note 40, at 108 ("*Lochner* era jurisprudence may be seen as having much in common with the jurisprudence of its opponents and as being a traditional concept forming a bridge from early to modern constitutional theory."); Sunstein, *supra* note 40, at 875 ("*Lochner* should be taken to symbolize not merely an aggressive judicial role, but an approach that imposes a constitutional requirement of neutrality, and understands the term to refer to preservation of the existing distribution of wealth and entitlements under the baseline of the common law. Thus understood, *Lochner* has hardly been overruled.").

[199] Planned Parenthood v. Casey, 112 S. Ct. 2791, 2812 (1992).

[200] 261 U.S. 525 (1923).

[201] *See id.* at 553–62.

[202] 300 U.S. 379 (1937).

[203] *See id.* at 400.

[204] Planned Parenthood v. Casey, 112 S. Ct. 2791, 2812 (1992).

Thus, the *Casey* joint opinion's explanation of the overruling of *Lochner* rests squarely on a changed factual circumstances thesis. An examination of history, however, suggests that this explanation is inadequate.

2. "What Was Wrong With Lochner*?":*[205] *An Historical View.* — How are we to understand the joint opinion's assertions that "the interpretation of contractual freedom . . . rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare" and that "[t]he facts upon which" the freedom of contract doctrine was premised "proved to be untrue, and history's demonstration of their untruth not only justified but required"[206] overruling? Is "the capacity of a relatively unregulated market to satisfy minimal levels of human welfare" a strictly factual determination that can be separated from differing accounts of the state of the world or differing interpretations of what "satisfy[ing] minimal levels of human welfare" means? Is it possible to explain the overruling of *Lochner* without reference to the much broader change from, in Justice Jackson's words, the "older world of *laissez-faire*," to what Justice Holmes characterized as "paternalism and the organic relation of the citizen to the State"?[207] Did, in fact, history demonstrate the doctrine's untruth?

Evaluation of the joint opinion's treatment of *Lochner* requires an exploration of the nature of the famous case and the case, or forces, that overruled it. Although *Brown* overruled *Plessy*, it is not clear what overruled *Lochner*. Is *Lochner* indeed a case, so that we can determine which later case overruled it? Or is *Lochner* a Court in the sense in which we speak of the Warren or Rehnquist Courts?

If *Lochner* were a case, presumably it would have to have been overruled. Yet an inquiry into when it was overruled yields no satisfying answer. An extremely narrow rendition would argue that *Lochner* was overruled as early as 1917. In *Bunting v. Oregon*,[208] an equally divided Supreme Court — with Justice Brandeis not participating — sustained a general ten-hour day for manufacturing workers, male and female, and permitted up to three hours of overtime at time-and-a-half pay. The Court did not even mention *Lochner*. Indeed, there was never again a constitutional challenge to a maximum-hours law. As Professor Gunther suggests, however:

> [R]egulation of hours [was] more acceptable than regulation of wages because (despite the Lochner result) control of hours worked could be seen as promoting health, a legitimate legislative end, while control

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[205] GUNTHER, *supra* note 85, at 444.

[206] *Casey*, 112 S. Ct. at 2812.

[207] Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[208] 243 U.S. 426 (1917).

> of wages looked more like redressing inequalities in bargaining power in the market, a generally impermissible objective . . . . Does the laissez faire attitude toward 'equalizing' legislation even more clearly explain the majority's hostility to price regulations . . . ?[209]

Not only is there no New Deal decision that overruled *Lochner* on its facts, but also the conclusion that maximum-hour laws could be upheld and constitutionally distinguished from minimum-wage laws seems to have become accepted *sub silentio* much before 1937. Although it would therefore be possible to say that the "facts" involving maximum-hour laws were different from those concerning minimum-wage laws, such a characterization would apply to the *Lochner* Court a very narrow and unilluminating definition of its scope and meaning. This characterization would simply avoid any of the broader "paradigmatic" questions about the failure of the *Lochner* Court to recognize the legitimacy of the redistribution of wealth in the regulatory-welfare state.

Even if *Lochner* is a "Court" rather than a "case," the problem of identification remains. When do we assume that the *Lochner* Court began? Any discussion of the Warren Court, for example, would necessarily be tied to a specific set of decisions drafted by specific Justices during the specific dates of Earl Warren's Chief Justiceship. One might be able to date the *Lochner* Court according to its personnel.[210] The more accepted answer, however, has been to define the beginnings of the *Lochner* Court with reference to some set of (usually controversial) *legal* concepts — the rise of substantive due process, the revival of natural law concepts, or the emergence of mechanical jurisprudence or of legal formalism.[211]

Tracing the history of any of these concepts is a difficult and often disputed undertaking, especially because the underlying concepts

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[209] GUNTHER, *supra* note 85, at 452 n.3.

[210] All five Justices in the majority were appointed between 1888 and 1898. Only one of the dissenters, Justice (soon to be Chief Justice) White, was appointed during this decade. Of the others, Justice Harlan was appointed much earlier (1877) and Justices Holmes (1902) and Day (1903) were appointed later. *See id.* at app. B-3 to B-4. Of perhaps greater significance, the Court that decided *Lochner* had, between 1890 and 1897, lost the three intellectual giants of the postbellum era, Justices Miller, Field, and Bradley. On their respective careers, see CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT *passim* (1939); Charles Fairman, *Mr. Justice Bradley*, *in* MR. JUSTICE MILLER AND THE SUPREME COURT 65, 65–91 (Allison Dunham & Philip B. Kurland eds., 1956); Jonathan Lurie, *Mr. Justice Bradley: A Reassessment*, 16 SETON HALL L. REV. 343, 351–75 (1986); and, Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61 J. AM. HIST. 970 *passim* (1975). With the exception of Justices Harlan and Holmes, it was a remarkably mediocre Court.

[211] *See, e.g.*, SIDNEY FINE, LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE 132 (1956); CLYDE E. JACOBS, LAW WRITERS AND THE COURTS 90–92 (1954); Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 61 & n.17 (1987); Siegel, *supra* note 40, at 8 & n.28.

themselves are so slippery or historically ungrounded. Even the widely used notion of substantive due process as the doctrinal key to the *Lochner* Court depends on the historically problematic, although widely espoused, assertion that there was a shift from "procedural" to "substantive" due process after the Civil War.[212]

Despite the challenge presented by the task of tying *Lochner* to a theoretical concept, the prevailing theories of why *Lochner* was wrong, and hence why it was overruled, focus on the conceptual outlook of the Court. Progressive politicians such as Theodore Roosevelt and progressive historians such as Charles and Mary Beard launched what would become for an entire generation of American thinkers the dominant interpretation of *Lochner*: a shocking example of the Court's capitulation to big business.[213] One form of that interpretation was

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[212] Until recently, scholars had not criticized *Lochner* based on a substantive interpretation of the Fourteenth Amendment, but had generally discredited the *Lochner* Court by demonstrating that its resort to "substantive due process" after the Civil War departed from a previous "procedural" understanding of "due process of law." This line of attack began shortly after *Lochner*, when the great constitutional historian, Edward S. Corwin, declared that "the moment the Court, in its interpretation of the Fourteenth Amendment, left behind the definite, historical concept of 'due process of law' as having to do with the *enforcement* of law and not its *making* . . . [was] the moment it committed itself to a course that was bound to lead" to *Lochner*. Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 670 (1909). The New Deal historians elaborated this version of what was wrong with *Lochner* with a vengeance. *See, e.g.*, 2 BOUDIN, *supra* note 43, at 374–96.

But this view of *Lochner*'s legacy has fallen on hard times. Scholars have revealed that antebellum state judges and those who drafted and ratified the Fourteenth Amendment expressed a variety of historical concepts that came to be called "substantive" due process. Moreover, the Justices of the *Lochner* Court seem to have operated under the Fourteenth Amendment not very differently from the way that antebellum state supreme court justices decided cases under the Contracts Clause or the way state judges elaborated "takings" law before the Civil War. *See* ACKERMAN, *supra* note 40, at 101 ("Like the courts of the early republic, the *Lochner* Court was exercising a preservationist function, trying to develop a comprehensive synthesis of the meaning of the Founding and Reconstruction out of the available legal materials."); Horwitz, *supra* note 120, at 1827–30; Siegel, *supra* note 40, at 23–62 (arguing that, from the Marshall era until 1937, Supreme Court Justices embraced "constitutional conceptualism"). Indeed, two years after his 1909 article, Corwin substantially retreated from his claim that the *Lochner* Court's interpretation of the Due Process Clause had ignored a "definite, historical concept" of procedural due process. Instead, he explained that pre-war judges had developed "a number of restrictive principles" that were "easily susceptible of resuscitation," and he listed no fewer than ten different lines of doctrine before the Civil War that "included many, if not all, of the essential elements of the modern, flexible doctrine of due process of law." Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 477–79 (1911). In short, a shift from "procedural" to "substantive" due process does not accurately characterize the *Lochner* era.

[213] Using *Lochner* and United States v. E.C. Knight Co., 156 U.S. 1 (1895), as examples, Theodore Roosevelt said in 1910:

> [T]he courts, instead of leading in the recognition of the new conditions, have lagged behind; and, as each case has presented itself, have tended by a series of negative decisions to create a sphere in which neither nation nor state has effective control; and where the

the popular argument that the Fourteenth Amendment resulted from a conspiracy between the Amendment's Framers and big business.[214]

Most progressive thinkers, including even as circumspect a figure as Judge Learned Hand, agreed with the Beardian interpretation.[215] Both conservatives and liberals accepted the explanation. In a memorandum to Justice Jackson on *Brown*, Chief Justice Rehnquist, then a law clerk, wrote:

> After the Civil War, business interest came to dominate the Court, and they in turn ventured into the deep water of protecting certain types of individuals against legislative interference. . . . [T]he high water mark of the trend in protecting corporations against legislative influence was probably *Lochner v. N.Y.*[216]

According to this view, the entire orientation of the Court, not merely the circumstances surrounding the employment of bakers, lay at the heart of *Lochner*'s error.

Other interpretations of what was wrong with *Lochner* also focused on the Court's outlook. Some scholars maintained that the Supreme

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great business interests that can call to their aid the ability of the greatest corporation lawyers escape all control whatsoever.

Theodore Roosevelt, *The Nation and the States*, *in* THE NEW NATIONALISM 34, 38–40 (1910); *see also* THEODORE ROOSEVELT, *Constitutions and Courts as Instruments of Social Justice*, *in* PROGRESSIVE PRINCIPLES 249, 253 (1913) ("In every one of these [court] decisions . . . the law was made a weapon with which the strong should smite down the weak."). Thus, *Lochner* became the single case invoked by "reformers who claim that the Court stands as an obstacle to 'social justice' legislation." 2 BOUDIN, *supra* note 43, at 461–62 (quoting Charles Warren, *Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 294 (1913)).

Charles and Mary Beard portrayed what they claimed to be the general pro-business stance of the Supreme Court:

> [T]he ablest lawyers, whose primary function was then as always to protect and enlarge the pecuniary advantages of their clients, as a rule held with Hon. Joseph H. Choate that "the preservation of the rights of private property was the very keystone of the arch upon which all civilized government rests." To seasoned members of the judiciary, this doctrine seemed axiomatic and, in following it, courts invalidated hundreds of legislative acts — laws regulating the hours of labor in bakeshops, providing compensation for people injured in industry, and making other invasions into the ancient practices agreeable to the beneficiaries.

2 CHARLES A. BEARD & MARY R. BEARD, THE RISE OF AMERICAN CIVILIZATION 587 (rev. ed. 1935) (1927).

[214] The Beards popularized the "conspiracy theory," which posited that Representative John Bingham intended to grant corporations protection under the Fourteenth Amendment by granting due process protection to "persons" and not just "citizens." *See* 2 BEARD & BEARD, *supra* note 213, at 111–14. *But see* Howard J. Graham, *The "Conspiracy Theory" of the Fourteenth Amendment: 2*, 48 YALE L.J. 171, 193–94 (1938) (concluding that the "persons" language of § 1 of the 14th Amendment was not specifically designed to benefit corporations). Like the arguments regarding legitimacy of judicial review, "[t]he Beards' hypothesis[] . . . was a mirror and reflex of their times." HOWARD J. GRAHAM, EVERYMAN'S CONSTITUTION 26 (1968).

[215] *See, e.g.*, Hand, *supra* note 142, at 201, 202–04 (emphasizing the Supreme Court's triumph, after 50 years, over "propertied interests").

[216] Memorandum from William H. Rehnquist to Supreme Court Justice Jackson, *supra* note 186, at 45,440.

Court Justices had, under cover of natural law, written their own political or economic views into the Constitution.[217] During the progressive era, both Pound and Justice Brandeis developed versions of why *Lochner* should be overruled.[218] They, along with other progressive thinkers, accused the Court of a variety of errors ranging from unfounded allegiance to natural law, an unjustified penchant for substantive due process,[219] or a commitment to a mechanical jurisprudence that left the Justices out of touch with the changing social reality.[220]

3. Justice Holmes's Dissent: Dynamic Fundamentality? — Justice Holmes's dissent in *Lochner* provides further insight into the perceived mistakes of the *Lochner* Court. To Justice Holmes, the majority's fault went far beyond its mistaken understanding of the facts and circumstances. Instead, his dissent amounted to an assault on the legal consciousness that had kept the Court from perceiving social reality. According to Justice Holmes:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views . . . .[221]

Thus far, Justice Holmes's dissent emphasized the democratic theme of "the right of a majority to embody its opinions in law,"[222] as well

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[217] *See, e.g.*, JACOBS, *supra* note 211, at 90–91; TWISS, *supra* note 43, at 137; BENJAMIN F. WRIGHT, JR., AMERICAN INTERPRETATIONS OF NATURAL LAW 303 (1931) ("[S]ince there is no standard by which the reasonableness of the state's interference with the liberty of contract may be measured except the opinion of the court, it is clear that the court's judgment is substituted for that of the legislature.").

[218] *See supra* p. 54.

[219] Whether this resulted from bad politics or values, or from a misguided judicial methodology, was debated from the beginning. *See* CHARLES G. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 185–89 (1930) (arguing that "the concept liberty of contract as an absolute right is ill-suited to the industrial conditions now prevailing in many American communities"); WRIGHT, *supra* note 217, at 303–04 (arguing that the *Lochner* Court substituted its own judgment for that of the legislature).

[220] Thus, Pound presents a distinction between an out-of-touch "law in books" and an in-touch "law in action." *See supra* p. 54. The Brandeis Brief was also designed to break through the fog of conceptualism that Felix Cohen called the "heaven of legal concepts," Cohen, *supra* note 8, at 809, in order to force the Court to get back in touch with social reality.

[221] Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

[222] *Id.*

as the need for the Court to be "neutral" with regard to social theories.[223] Another formulation of this position is that courts should decide cases only on the basis of "principles" and that "policy" decisions should be left to the legislatures. These ideas echo the arguments of those who insist that a static conception of democracy should be the foundation of American constitutional theory.[224]

Justice Holmes also took the majority to task for its interpretive approach:

> General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. . . . I think that the word "liberty," in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us.[225]

The expression "[g]eneral propositions do not decide concrete cases"[226] connects to an elaborate critique of "conceptualistic," "formalistic," and "mechanical" legal reasoning that Justice Holmes initiated and bequeathed to Pound and the followers of progressive legal thought, and later, to Morris and Felix Cohen, John Dewey, and many other great legal realist writers.[227] Justice Holmes's interpretative critique underlines the fact that one cannot accurately discuss the justification for overruling *Lochner* without also addressing the various challenges to the modes of reasoning within classical legal thought.

When Justice Holmes wrote "that the word 'liberty,' in the Fourteenth Amendment[] is perverted when it is held to prevent the natural outcome of a dominant opinion,"[228] he provided interpreters of his

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[223] *See id.*

[224] *See supra* p. 58.

[225] *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

[226] *Id.*

[227] Writings that reflect Justice Holmes's critique of mechanical legal thought include the following: Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 215–17 (1931); Morris R. Cohen, *Justice Holmes and the Nature of Law*, 31 COLUM. L. REV. 351, 353 (1931); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 8–11 (1927); Cohen, *supra* note 220, at 847–49; John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 673 (1926); John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 19 (1924); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605–07 (1908).

[228] *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting); *see* SAMUEL KONEFSKY, THE LEGACY OF HOLMES AND BRANDEIS 21–24, 92–113 (1956); Felix Frankfurter, *Mr. Justice Holmes and the Constitution*, *in* MR. JUSTICE HOLMES 86 (Felix Frankfurter ed., 1931) ("In all the varieties

dissent with much additional grist for their mill. Interpretations of the "natural outcome of dominant opinions" range all the way from versions of democratic theory and interest-group politics to variations on "might makes right" themes in social Darwinism.[229] But once one understands that Justice Holmes had been concerned much earlier with the word "liberty," one realizes that he clearly sought to mount a broad critique of the legal reasoning of the *Lochner* Court and, in particular, its abstraction and reification of concepts like "liberty."[230] His insistence that "[t]he [correct] decision [in *Lochner*] . . . depend[s] on a judgment or intuition more subtle than any articulate major premise" brings to mind Justice Holmes's earlier critique of syllogistic (*non*-Euclidian) reasoning.[231] The author of the aphorism "the life of the law has not been logic; it has been experience"[232] was certainly sensitive to the dangers of legal "theology" and of the processes by which law becomes out of touch with reality.

Although Justice Holmes's *Lochner* dissent has often been construed simply to mean that the majority should always win, Justice Holmes added an important limiting principle that is frequently overlooked. The majority should be overruled, Justice Holmes wrote, only when "a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[233] Thus, Justice Holmes did not betray his belief in immutable constitutional principles to the whims of the majority. Such an exchange would have been quite inconsistent with what became his First Amendment jurisprudence. Justices Holmes and Brandeis were steadfast in their demand for fundamentality in the First Amendment at a time when not only the Supreme Court, but also dominant legal opinion, were willing to justify virtually all legislative restrictions on unpopular speech. Therefore, in sharp contrast to the joint opinion

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of state action evoked by a complex industrial civilization, [Holmes] permits the States ample scope for energy and individuality.").

[229] *See* HOFSTADTER, *supra* note 129, at 167–69; PURCELL, *supra* note 122, at 206–09.

[230] *See Lochner*, 198 U.S. at 76 (Holmes, J., dissenting) ("General propositions do not decide concrete cases."); Vegelahn v. Gunter, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting) (asserting that employees "have the same liberty [as employers] to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control"); *see also* HORWITZ, *supra* note 4, at 132–36 (discussing Justice Holmes's efforts to counter the reliance on abstract rights in formulating law).

[231] *See* OLIVER W. HOLMES, JR., THE COMMON LAW 1, 36 (1881). It also brings to mind Justice Holmes's charge that Dean Langdell was the "greatest living legal theologian." Book Notice, 14 AM. L. REV. 233, 233–34 (1880) (reviewing C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES (2d ed. 1879)).

[232] HOLMES, *supra* note 231, at 1.

[233] *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

of *Casey*, Justice Holmes's criticism of *Lochner* offered a vision of the Court's role that tolerated change but still maintained allegiance to a belief in fundamental constitutional principles.[234]

B. Casey*'s Theory Through Its Account of* Brown.

The second great overruling case that the joint opinion discussed is *Brown*. In an analysis similar to its treatment of *Lochner*, the joint opinion posited a changed circumstances rationale for *Brown*'s reversal of the "separate but equal" doctrine.[235] Yet because it recognized that *Plessy* may have been "wrong the day it was decided," it was unable to use it to formulate a dynamic constitutional theory.

1. Casey*'s Account of* Brown *and* Plessy. — According to the authors of *Casey*'s joint opinion, *Brown* corrected an erroneous factual assumption. The *Plessy* court, the three Justices explained, had "reject[ed] the argument that racial separation enforced by the legal machinery of American society treats the black race as inferior."[236] The joint opinion quoted the notorious reasoning in *Plessy*:

> [T]he underlying fallacy of the plaintiff's argument . . . consist[s] in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[237]

The Court in *Brown*, the joint opinion insisted, merely corrected this erroneous assumption. "Whether, as a matter of historical fact, the Justices in the *Plessy* majority believed this or not," they wrote, "this understanding of the implication of segregation was the stated justification for the Court's opinion. But this understanding of the facts and the rule it was stated to justify were repudiated in *Brown*."[238] The three Justices then quoted approvingly from Professor

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[234] If "originalism" were our guide, it would be very difficult to find justification in the "text" of the Constitution for the belated triumph of the Holmes-Brandeis position on free speech in Brandenburg v. Ohio, 395 U.S. 444 (1969). For a discussion of the dissent by Justices Holmes and Brandeis, see ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919–1920, at 224–26 (1955). *See generally* Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("[E]ven advocacy of [law-breaking], however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on."); Abrams v. United States, 250 U.S. 616, 621 (1919) (Holmes, J., dissenting) (arguing that one cannot be convicted for the content of written material absent a showing of intent to imminently curtail government prosecution of the war).

[235] *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2813 (1992).

[236] *Id.*

[237] *Id.* (quoting Plessy v. Ferguson, 163 U.S. 537, 551 (1895) (internal quotation marks omitted)).

[238] *Id.*

Charles Black's classic article on *Brown*. As Black put it, the question before the Court in *Brown* was:

> [W]hether discrimination inheres in that segregation which is imposed by law in the twentieth century in certain specific states in the American Union. And that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid.[239]

In the course of developing a "changed circumstances" explanation of *Brown*, the joint opinion added:

> The Court in *Brown* addressed these facts of life by observing that whatever may have been the understanding in *Plessy*'s time of the power of segregation to stigmatize those who were segregated with a "badge of inferiority," it was clear by 1954 that legally sanctioned segregation had just such an effect, to the point that racially separate public educational facilities were deemed inherently unequal. Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896. . . . [T]he *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required.[240]

On the verge of offering a "changed circumstances" explanation of *Brown*, however, the joint opinion unexpectedly declared that "we think *Plessy* was wrong the day it was decided."[241] If that is so, then *Brown* is not even an example of the changed circumstances approach, but of simple correction of an original error. Professor Black's wise appeal to the "ground of history and of common knowledge about the facts of life"[242] forces us still further backwards to inquire into the social reality at the time *Plessy* was decided to assess whether *Plessy* was "wrong the day it was decided."

2. An Historical Critique of Casey*'s View of* Brown. — The joint opinion's assertion that *Plessy* was wrong the day it was decided implies that only a misperception of facts — or more generously, different circumstances — led to the holding that "separate but equal" was permissible under the Fourteenth Amendment. A review of the Supreme Court's treatment of the Fourteenth Amendment, however, reveals the weakness of the *Casey* joint opinion's theory. The *Plessy* Court was not unaware of the facts, but chose not to enforce the primary purpose of the Civil War Amendments: to protect the former

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[239] Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960).

[240] *Casey*, 112 S. Ct. at 2813.

[241] *Id.*

[242] Black, *supra* note 239, at 427.

slaves. At virtually every point in the development of Fourteenth Amendment jurisprudence before *Plessy*, the claims of blacks were sacrificed — first, by those who wished to maintain that the Amendment did not change the balance between the federal government and the states; and second, by those whose expansive interpretation of the Due Process Clause relegated blacks (who were clearly meant to be the primary beneficiaries of the Civil War Amendments) to the periphery as marginal claimants under those Amendments.[243]

The *Slaughter-House Cases*[244] provided the first interpretation of the scope of the Fourteenth Amendment. Justice Miller's opinion, which virtually emptied the Privileges and Immunities Clause of content, was long regarded as heroic resistance to the Lochnerization of the Fourteenth Amendment.[245] By contrast, the claims of Justices Field and Bradley in dissent that the Amendment had in fact introduced a revolutionary change in the nature of federalism and of the rights of citizenship were dismissed as simply foreshadowing the *Lochner* era.[246]

But in the midst of Reconstruction, even Justice Miller understood that the Civil War Amendments needed to be read *at least* to secure new rights for the freed slaves. Alluding to the Civil War and Reconstruction as "events, almost too recent to be called history, but which are familiar to us all," Justice Miller acknowledged that "no one can fail to be impressed with the one pervading purpose" found in "all" of the Civil War Amendments: "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[247] It was the next-to-last time before the twentieth century[248] that the Supreme Court even bothered to acknowledge this "one pervading purpose" of the Civil War Amendments.[249] With the exception of one area —

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[243] Corwin was among the first historians to notice the "irony" that, under the Fourteenth Amendment, "property, or . . . the corporations succeed to the rights which those who framed the Fourteenth Amendment thought they were bestowing upon the Negro." Corwin, *supra* note 212, at 672.

[244] 83 U.S. (16 Wall.) 36 (1872).

[245] *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 118–21 (1960).

[246] *See Slaughter-House*, 83 U.S. (16 Wall.) at 90, 93–95; ROBERT G. MCCLOSKEY, AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE 1, 79–82 (1951).

[247] *Slaughter-House*, 83 U.S. (16 Wall.) at 71.

[248] The last time the Court referred to the race interpretation of the Fourteenth Amendment in the nineteenth century was in Strauder v. West Virginia, 100 U.S. 303, 307 (1879).

[249] *Slaughter-House*, 83 U.S. (16 Wall.) at 71. Professor Nelson refers to Justice Miller's "extreme position . . . that the Fourteenth Amendment applied only to cases involving blacks and did not protect fundamental rights, such as rights of property and contract." NELSON, *supra* note 170, at 179. But Justice Miller wrote: "We do not say that no one else but the negro can share in this protection . . . ." *Slaughter-House*, 83 U.S. (16 Wall.) at 72. Nor is there any necessary reason to say that:

state-legislated exclusion of blacks from jury pools[250] — the Supreme Court did not rule in favor of blacks seeking protection against discrimination in any case decided during the twenty-eight years between the enactment of the Fourteenth Amendment and the decision in *Plessy*.

The Supreme Court thus stripped the Fourteenth Amendment of its power to protect blacks against harmful discrimination. This act required several steps. The first was the previously noted virtual emasculation of the Privileges and Immunities Clause, which before *Slaughter-House*, was widely considered to be a broad guarantee of fundamental rights for blacks,[251] and the subsequent abandonment of

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> Judges and legal thinkers had only two choices consistent with the framers' intentions: they could interpret the Fourteenth Amendment as a guarantee merely of equal rights, or they could read it as an absolute protection of fundamental rights, subject, however, to power on the part of the states to regulate those rights equally.

NELSON, *supra* note 170, at 182. There is no reason that Justice Miller's view could not have developed into a "core" and "periphery" model of the Amendments, with something like strict scrutiny applied only to race. It is also possible to read congressional power under § 5 of the Fourteenth Amendment to extend to remedying those "badges of servitude," The Civil Rights Cases, 109 U.S. 3, 37 (1883) (Harlan, J., dissenting), and not, after the fashion of the Court in civil rights cases, to allow no positive, substantive powers to Congress. Thus, it was not necessary to ignore the "one pervading purpose" because of an understandable fear of creating a general centralized federal charter of constitutional rights.

[250] *See* Gibson v. Mississippi, 162 U.S. 565, 591 (1896); Bush v. Kentucky, 107 U.S. 110, 121–22 (1882); Neal v. Delaware, 103 U.S. 370, 394 (1880); *Strauder*, 100 U.S. at 307–09. As Richard Kluger explains, given the uncertain value of integrated jury pools not matched by the requirement of integrated juries, it was difficult to enforce even the symbolic right. The Department of Justice did not prosecute violations, and local judicial systems were "composed entirely of white sheriffs, white prosecutors, white juries, and white judges." KLUGER, *supra* note 187, at 64.

In three cases, the Court did vindicate black plaintiffs who claimed civil rights violations, but it did so on grounds of federal sovereignty and not because of any adherence to the anti-discrimination principle. *See, e.g.*, *In re* Quarles & Butler, 158 U.S. 532, 536 (1895) (supporting the right to be protected from violence while informing federal officials of violations of federal law); Logan v. United States, 144 U.S. 263, 285 (1892) (upholding the right to be protected from violence while in federal custody); Ex parte Yarbrough, 110 U.S. 651, 665–66 (1884) (vindicating the right to be free from violence while exercising the right to vote). The statutory basis in each of these three cases was the criminal conspiracy provisions of the 1870 Enforcement Act. The Court upheld the Act, but in none of the cases did the Court discuss the rights as the civil rights of blacks, or of any individuals. Indeed, it did not ground its opinions on what would seem, after the Civil War, the obvious basis — the Reconstruction Amendments. For a discussion of the historical context of the Enforcement Acts, see FONER, cited above in note 158, at 454–59.

[251] Historical research suggests that the Clause was originally considered to require and empower the federal government to protect the natural rights of all citizens. *See, e.g.*, HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW 406 (1982) (describing the congressional debates surrounding § 1 of the Fourteenth Amendment); ROBERT J. KACZOROWSKI, THE NATIONALIZATION OF CIVIL RIGHTS 93 (1987) ("[F]undamental rights included within [the comity] clause would be brought under the protection of the national government."); JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1607–1870, at 347–48 (1978)

Justice Miller's "race theory" interpretation of the Fourteenth Amendment.[252] Second, the Equal Protection Clause was "[v]irtually strangled in infancy by post-civil-war judicial reactionism. It was relegated to decades of relative desuetude while the Due Process Clause of the Fourteenth Amendment, after a short germinal period, flourished as a cornerstone in the Court's defense of property and liberty of contract."[253] Third, in the *Civil Rights Cases*,[254] the Court drastically shrank the reach of the Fourteenth Amendment to "state action," striking down a congressional act passed in 1875 that prohibited racial discrimination in public accommodations.[255] It thereby denied even to Congress the power under Section Five of the Fourteenth Amendment to implement the "one pervading purpose" of the Amendment: the protection of the newly-freed black from "the oppression of those who had formerly exercised unlimited dominion over him."[256]

("[C]learly both supporters and opponents of the Fourteenth Amendment conceived of it as protecting an indefinite — but not an unlimited or undefinable — set of fundamental privileges attached of right to citizenship."); JACOBUS TENBROEK, EQUAL UNDER LAW 236 (1965) ("The privileges or immunities of citizens of the United States . . . were the natural rights of all men or such auxiliary rights as were necessary to secure and maintain those natural rights."). This Clause held out the greatest promise to former slaves of the broadest possible vindication of their new right of citizenship. *See, e.g.*, MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 115 (1986) (contending that the Privileges and Immunities Clause protected "certain absolute rights"); GRAHAM, *supra* note 214, at 318 ("[E]ver since Birney's day, opponents of slavery had regarded all the important 'natural' and constitutional rights as being privileges and immunities of *citizens of the United States*. This had been the cardinal premise of antislavery theory from the beginning, and this had been the underlying theory and purpose of Section One from the beginning."); HYMAN & WIECEK, *supra*, at 411 (explaining that Representative Bingham thought the Privileges and Immunities Clause was the key to the Fourteenth Amendment); TENBROEK, *supra*, at 235 (stating that the Fourteenth Amendment was designed to protect people "in their natural rights or of citizens in their privileges and immunities"); Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1220–22 (1992) (arguing that the words "privilege" and "immunity" are synonymous with the words "rights" and "freedoms" found in the Bill of Rights); Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45, 68 (1987) (arguing that the Supreme Court should have extended civil rights for ex-slaves more vigorously); Kaczorowski, *supra* note 171, at 863, 939 ("They interpreted references in the [F]ourteenth [A]mendment to United States citizenship and the privileges and immunities of United States citizens as guarantees of the status and natural rights of freemen.").

[252] *See supra* p. 85.

[253] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (Powell, J.) (quoting with approval Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 381 (1949)).

[254] 109 U.S. 3 (1883).

[255] *Id.* at 11. It was the last important act of the Reconstruction Congress. The Civil Rights Act of 1875, ch. 114, §§ 3–5, 18 Stat. 336, 337 (1875), and the Jurisdiction and Removal Act, ch. 137, 18 Stat. 470 (1875), which facilitated removal of civil rights cases to federal court, were passed by the lame-duck 43rd Congress, following the Democratic landslide in November 1874. *See* FONER, *supra* note 158, at 555–56.

[256] The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1872). It took almost another

The fourth step involved striking down or narrowly reading various civil rights acts as unauthorized by the Fourteenth Amendment.[257] In the same spirit, the Court limited the Enforcement Acts of 1870 and 1871, which had "embodied the Congressional response to violence" against blacks.[258] The Court did so on the ground that Congress had no power to punish a private conspiracy to prevent blacks from assembling to vote.[259] Finally, after 1875, when *United States v. Cruikshank*[260] was decided and when Reconstruction ended

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century for Congress to pass another civil rights statute and for the Supreme Court finally to recognize congressional power to remove those remaining "badges of servitude." In 1964, the Supreme Court upheld The Civil Rights Act of 1964 under the Commerce Clause. *See* Katzenbach v. McClung, 379 U.S. 294, 304 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241, 250 (1964). Two years later, in Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court upheld the elimination — under the Voting Rights Act of 1965 — of an English language literacy requirement for voting. The Court did so based on a wide reading of congressional power under § 5 of the Fourteenth Amendment. *See id.* at 646–47. The Court later recognized § 5 as the source of congressional authority to promulgate an affirmative action plan in Fullilove v. Klutznick, 448 U.S. 448, 476–78 (1980).

[257] *See, e.g.*, *Civil Rights Cases*, 109 U.S. at 14–15 (holding the Civil Rights Act of 1875 unconstitutional because it was authorized by neither the Thirteenth nor the Fourteenth Amendments); United States v. Harris, 106 U.S. 629, 639 (1883) (declaring the criminal provisions of the Ku Klux Klan Act unconstitutional). Contrary to this view, there is a strong body of historical work that argues that the Fourteenth Amendment was meant to constitutionalize the Civil Rights Act of 1866. Professor Foner has written, in a field in which little is clear, that "[c]learly, Republicans proposed," in the Fourteenth Amendment, "to abrogate the Black Codes and eliminate any doubts as to the constitutionality of the Civil Rights Act." FONER, *supra* note 158, at 257. Professor Nelson has also recognized that the Fourteenth Amendment and Civil Rights Act "were inextricably linked . . . since section one was added to the [Fourteenth] [A]mendment at least in part to remove doubts about the constitutionality of the 1866 act." NELSON, *supra* note 170, at 104; *see also* TENBROECK, *supra* note 251, at 224–27 (arguing that § 1 of the Fourteenth Amendment was designed to write the Civil Rights Act of 1866 "into the Constitution itself"). If this is so, it would mean that the Fourteenth Amendment, the narrow interpretation of which became the basis for striking down laws just like the Civil Rights Act of 1866, was in fact meant to legitimate such broad congressional power to remove those "badges of servitude" that the end of slavery had not eliminated.

[258] FONER, *supra* note 158, at 454.

[259] *See* United States v. Cruikshank, 92 U.S. 542, 552–54 (1875). The *Cruikshank* Court interpreted both the Fourteenth and Fifteenth Amendments narrowly, holding that the Fourteenth Amendment applies only to state action and the Fifteenth Amendment does not guarantee the right to vote, only the right not to be deprived of the vote solely because of racial discrimination. *See id.* As a result of this interpretation, the Court found that the Enforcement Acts did not ban a private conspiracy to keep blacks from voting without an express statement in the indictment that the defendants had a discriminatory motive. *See id.* at 556. In thus constraining the applicability of the Acts, the Court signaled the end of federal protection of blacks against Southern white terrorism and intimidation. *See* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 691 (1962); NELL I. PAINTER, STANDING AT ARMAGEDDON: THE UNITED STATES, 1877–1919, at 8 (1987). Similarly, in *Harris*, the Court struck down a portion of the Ku Klux Klan Act of 1871, designed to protect blacks from Southern vigilante groups, *see Harris*, 106 U.S. at 639–40.

[260] 92 U.S. 542 (1875).

under the Compromise of 1877[261] as federal troops were withdrawn from active enforcement of rights in the South, the Supreme Court abandoned any conception of "the one pervading purpose" of the Civil War Amendments as primarily to protect blacks.[262] Thereafter, the Court regularly averted its eyes from what was happening in the South: the use of organized white terror to disenfranchise blacks and institutionalize Jim Crow laws designed to reinstate a system of racial subordination.[263]

So when Professor Black suggested that the meaning of segregation could be understood "only on the ground of history and of common knowledge about the facts of life,"[264] he was adverting to the restoration of a system of racial subordination that the Supreme Court not only legitimated in *Plessy*, but also had done its best to encourage during the previous two decades. If *Plessy* was "wrong the day it was decided," it was not because the Supreme Court had failed to inform itself about the "facts" that underlay racial segregation or because the Court was unaware of the social meaning of Jim Crow laws, but rather because, almost from the moment the Civil War ended, the Court's decisions constituted betrayal of the "one pervading purpose" — the underlying spirit — of the Civil War Amendments.[265]

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[261] In the November 1876 Presidential election, initial returns indicated that Democratic candidate Samuel Tilden won the popular vote. Tilden appeared to be the first Democrat elected President since James Buchanan in 1856. However, Republicans used their control of election boards in Florida, South Carolina, and Louisiana to invalidate enough votes to swing those key states in favor of Rutherford B. Hayes, giving him sufficient support in the electoral college to be elected president. Controversy ensued as to which candidate had been elected. Hoping to resolve this controversy, Congress established a special Election Committee to investigate alleged improprieties. The Committee, composed of 15 members, eight Republicans and seven Democrats, split exactly along party lines in awarding the Florida, Louisiana, and South Carolina electoral votes to Hayes. Democrats were outraged and threatened to obstruct the Hayes presidency. *See* FONER, *supra* note 158, at 575–82. In an effort to calm the furor, the Republicans promised to stop using federal troops to protect blacks in the South. *See* DU BOIS, *supra* note 259, at 692. The year 1877 thus "marked a decisive retreat from the idea, born during the Civil War of a powerful national state protecting the fundamental rights of American citizens." FONER, *supra* note 158, at 582.

[262] *See* FONER, *supra* note 158, at 529.

> Pronouncing the southern record closed, northerners anxious to get on with the business of business expressed satisfaction in April 1877, when Republican President-by-Compromise Rutherford B. Hayes removed the last United States troops from southern state capitols. . . . Hayes's action left Democratic "redeemers" in control of their states and ended an era in American politics. . . . No longer would "the South" bedevil national politics.

PAINTER, *supra* note 259, at 2.

[263] *See* DU BOIS, *supra* note 259, at 690–91, 694.

[264] Black, *supra* note 239, at 427.

[265] As Professor Black notes:

> But if a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated "equally," I think we ought to exercise one of the sovereign prerogatives of philosophers — that of laughter.

3. The Meaning of Brown. — If *Plessy* was wrongly decided in 1896, what is the basis for such an assertion? The *Casey* joint opinion offered little explanation. In *Brown*, Chief Justice Warren recognized that, in order to achieve unanimity, a compromise over the status of *Plessy* was necessary in order not to offend Southern sensibilities.[266] Therefore, "[h]is moral tone did not contain any accusations against the South (that would certainly have raised the hackles of [Justices] Reed and Clark . . .), but said only that segregation was no longer justifiable 'in this day and age.'"[267] To say in 1954 that *Plessy* had originally been wrongly decided was to acknowledge that the entire Southern way of life, built upon the Jim Crow laws, had always been illegitimate.

The *Brown* Court's adoption of a changed circumstances view of the relationship between *Brown* and *Plessy* must be analyzed in light of Chief Justice Warren's concerns about offending the South. Although he seemed to invoke a timeless truth in holding that "[s]eparate educational facilities are inherently unequal,"[268] he arrived at this conclusion only after declaring that the Court could not "turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation."[269] The Chief Justice further intimated that the stigmatizing effect of segregation may have only developed over the course of American history; that because it was possible that segregation may not have been perceived as a "badge of inferiority"[270] at the time *Plessy* was decided, the *Brown* Court's "finding" that segregation had a "detrimental effect" on black school children, he wrote, was "amply supported by modern authority."[271]

Id. at 424. The purpose and impact of segregation in the southern regional culture, Professor Black wrote, were "matters of common notoriety, matters not so much for judicial notice as for the background knowledge of educated men who live in the world." *Id.* at 426.

[266] *See* KLUGER, *supra* note 187, at 679–80. As one of Justice Jackson's former clerks recalled, Chief Justice Warren "had come from political life and had a keen sense of what you could say in this opinion without getting everybody's back up. His opinion took the sting off the decision [and] it wasn't accusatory." *Id.* at 697 (quoting Barrett Prettyman, former clerk to Justice Jackson).

[267] BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT — A JUDICIAL BIOGRAPHY 88 (1983). Chief Justice Warren's maneuvering was designed to win support for his position outside, as well as inside, the Court. Pursuant to a compromise formula, the Court declared segregated schools unconstitutional "before the close of the 1953 Term" and held for reargument the remedy, which "would give the South nearly a year to condition itself to the Court's edict." KLUGER, *supra* note 187, at 695.

[268] Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

[269] *Id.* at 492–93.

[270] Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

[271] *Brown*, 347 U.S. at 494 (quoting the U.S. District Court for the District of Kansas) (footnote omitted).

At this point, the Court dropped its controversial social science footnote eleven for the purpose of showing that "modern authority" and more up-to-date "psychological knowledge" had already proved the "detrimental effect" of segregation.[272] In the spirit of the Brandeis Brief, footnote eleven argued implicitly that a changed understanding of the effects of segregation justified overruling *Plessy*. Thus, the Court pointedly avoided deciding whether *Plessy* was wrong the day it was decided.

Regardless whether one regards Chief Justice Warren's decision to deploy a changed circumstances rationale as a noble compromise essential for achieving unanimity,[273] as I do, the choice has had important consequences for how we understand the constitutional history of race relations. If *Plessy* was wrong the day it was decided, it was wrong not only because its understanding of the facts was incorrect, but also because it was the culmination of two decades of decisions by the Supreme Court betraying the promise of racial justice that the Fourteenth Amendment had held out.[274] If, however, it was not necessary to examine *Plessy* because the application of its "separate but equal"[275] standard to changed circumstances led to different conclusions, then it was entirely possible that *Plessy* was not "wrong the day it was decided."[276]

Although *Brown* may have justifiably invoked changed circumstances in service of a noble end, it did encourage the view that *Plessy* may actually have been correct in its own day. *Brown* thus foreclosed any serious historical understanding of the Court's own inglorious role in originally narrowing the Fourteenth Amendment, a role whose consequences continue beyond *Plessy* to the present day.

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[272] *Id.* at 494 n.11.

[273] *See* KLUGER, *supra* note 187, at 679–80; SCHWARTZ, *supra* note 267, at 87–88 (arguing that Chief Justice Warren recognized the need to adopt a changed circumstances rationale to avoid antagonizing his fellow Justices while he affirmed the present immorality of segregation); *see also* G. EDWARD WHITE, EARL WARREN 168 (1982) ("[T]he decision was a political compromise, trading off the eradication of segregation on a constitutional basis for the implementation of the change . . . .").

[274] For a brief history of Supreme Court segregation rulings prior to *Plessy*, see KLUGER, cited above in note 187, at 51–72.

[275] *Brown*, 347 U.S. at 491 (quoting Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting)).

[276] At least Justice Reed seems to have understood that Chief Justice Warren's position entailed the argument that *Plessy* may have been right. In conference, Justice Reed "recognize[d] that this is a dynamic Constitution and what was correct in *Plessy* might not be correct now." SCHWARTZ, *supra* note 267, at 87 (quoting Justice Reed); *see also* KLUGER, *supra* note 187, at 680 (stating that Justice Reed "could grant that the Constitution was a dynamic document and that what had been constitutionally justifiable at the time of *Plessy* might no longer be so"). On the other hand, Justice Jackson argued that segregation still was constitutional; however, he stated that the issue was "a question of politics," and that "[a]s a political decision I can go along with it." SCHWARTZ, *supra* note 267, at 89 (quoting Justice Jackson).

C. Casey's *Resulting Theory of Constitutional Change*

The joint opinion's emphasis on "facts . . . [that] had proved to be untrue"[277] as the justification for overruling *Lochner* and *Brown* seems to be an effort to utilize the extremely narrow idea of "changed circumstances"[278] that underlay the Brandeis Brief.[279] True, Brandeis suggested that the facts of social life might be objectively determined by social science research.[280] When on the Court, Justice Brandeis already recognized that any sharp dichotomy between unmediated "facts" and "interpretation of facts," or between "facts" and "values," had been repeatedly challenged in the twentieth-century debates over objectivity.[281]

Only once did the joint opinion acknowledge the modern conflation of pure facts and mediated facts: it offered a somewhat broader formulation of the circumstances under which it is appropriate to overrule, declaring that *Lochner* and *Plessy* "each rested on facts, or *an understanding of facts*"[282] that had changed. "Each case was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day . . . had not been able to perceive."[283]

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[277] Planned Parenthood v. Casey, 112 S. Ct. 2791, 2812 (1992).

[278] *Id.* at 2798.

[279] *See supra* pp. 52–72. The predominance of facts in the Brandeis Brief represents the effort of a skilled advocate to distinguish factually the situation of working women from that of bakers. In Muller v. Oregon, 208 U.S. 412 (1908), Justice Brewer — the high priest of Lochnerian orthodoxy — enthusiastically endorsed Brandeis's method precisely because it was derived from the narrowest and most orthodox common law ideas of when legal change is legitimate, *see id.* at 418–19 & n.1. The most articulate exponent of the traditional "changed circumstances" formula in the twentieth century was Justice Sutherland, who invoked the narrowest version of the formula in his attempts to restrain the Court during the New Deal. *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 451 (1934) (Sutherland, J., dissenting) ("The provisions of the Federal Constitution, undoubtedly, are pliable in the sense that in appropriate cases they have the capacity of bringing within their grasp every new condition which falls within their meaning. But, their *meaning* is changeless; it is only their *application* which is extensible." (footnote omitted)).

[280] *See* STRUM, *supra* note 98, at 120–22. For a discussion of one progressive era social scientist's conception of the normative relationship between social science, law, and social reform, see ELLEN FITZPATRICK, ENDLESS CRUSADE: WOMEN SOCIAL SCIENTISTS AND PROGRESSIVE REFORM 44–46 (1990). For a discussion of the influence of social science on the legal scholarship of the progressive era, see John H. Schlegel, *American Legal Realism and Empirical Social Science*, 29 BUFF. L. REV. 195, 293–96 (1980).

[281] *See* Philippa Strum, *Brandeis and the Living Constitution*, *in* BRANDEIS AND AMERICA 118, 125–26 (Nelson L. Dawson ed., 1989) (discussing in general Brandeis's attitude toward free speech).

[282] *Casey*, 112 S. Ct. at 2813 (emphasis added).

[283] *Id.*

There is a potentially great difference between changes in unmediated or pre-interpretive[284] "facts"[285] and changes in "understanding of facts"[286] as the justification of constitutional change. The second, broader formulation must eventually include some notion of varying cultural interpretations of the same facts; or indeed, some recognition that shifting paradigms or judicial methods permit judges to create forms of legal categorization and classification that, by either privileging or screening out various facts, make it possible for judges to lose touch with social reality. Thus, the real question about the *Lochner* and *Plessy* Courts, and the very question the *Casey* joint opinion avoided, is this: How had those Courts "not been able to perceive"[287] a social reality that was concededly already understood by the rest of the country?

The *Casey* joint opinion's theory of constitutional change thus too narrowly defines when it is legitimate for changed factual circumstances to alter the application of fundamental law. Although the Court alluded to the role of evolving historical interpretation of social conditions, it did not explore the dynamic nature of social or legal consciousness.

D. Application of the Casey *Theory:* Harper v. Virginia Department of Taxation

The Court in *Casey* considered itself faced with a rare point in constitutional history when a "decision has a dimension that the resolution of the normal case does not carry."[288] This Term, however, the originalist theme of timeless truths reappeared in full splendor in a case that involved a complex doctrinal history and little of the political furor of the abortion issue. The Court's decision illustrates the weaknesses of an originalist theory that does not consider the demands of social reality.

In *Harper v. Virginia Department of Taxation*,[289] a case that involved state taxation of federal retirement benefits, five Justices[290] endorsed a broad statement of the retroactive application of the Supreme Court's constitutional interpretations:

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[284] *Cf.* Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 n.113 (1993) (arguing that all access to facts in the world is mediated by "human frameworks").

[285] *Casey*, 112 S. Ct. at 2813.

[286] *Id.*

[287] *Id.*

[288] *Id.* at 2815.

[289] 113 S. Ct. 2510 (1993).

[290] Although six other Justices joined at least parts of Justice Thomas's opinion for the Court (Justices White, Blackmun, Stevens, Scalia, Kennedy, and Souter), only four joined Justice Thomas's broad statement on retroactivity (Justices Blackmun, Stevens, Scalia, and Souter). *See id.* at 2513.

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.[291]

The decision in *Harper* shows the Court's insistence on restoring the most traditional forms of common law orthodoxy in reaction to its own legitimacy crisis. By treating the complex area of retroactivity with such originalist simplicity, the Court simply avoided acknowledging that its own jurisprudence often produces significant, abrupt change. The Court was only able to maintain this appearance of fundamentality through forms of extremely abstract conceptualism that render it out of touch with the consequences of its own ideas. In this sense, *Harper* illuminates not only the Court's static theory of constitutional change, but also the highly impractical consequences that this theory can produce.

The Warren Court employed prospective overruling as a practical means to ameliorate the consequences of the abrupt changes that the Court had brought about in constitutional criminal procedure.[292] The extension to the states of the protections of the Bill of Rights threatened to throw open the jailhouse doors to thousands of convicts who had been convicted under earlier, more limited, procedural protections. In *Linkletter v. Walker*,[293] for example, the Court first refused to apply retroactively its decision in *Mapp v. Ohio*[294] to persons who had been convicted before the Fourth Amendment's protection against "unreasonable searches and seizures" and its enforcement through the exclusionary rule had been held to extend to the states.[295]

The Burger Court provided criteria for when it would permit retroactive application in civil cases. In *Chevron Oil Co. v. Huson*,[296] an opinion by Justice O'Connor, the Court introduced a three-prong test to determine when it would be unfair to apply new law retroactively.[297] In order to mitigate the harsh effects that full retroactive application can have on parties or institutions, courts imposed two types of limits on retroactive application. Under the first, "pure prospectivity," judicial interpretations were given no retroactive effect;

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[291] *Id.* at 2517.

[292] *See, e.g.*, Linkletter v. Walker, 381 U.S. 618, 637–38 (1965) (discussing the administrative difficulties of applying the Mapp v. Ohio, 367 U.S. 643 (1961), exclusionary rule retroactively).

[293] 381 U.S. 618 (1965).

[294] 367 U.S. 643 (1961).

[295] *Linkletter*, 381 U.S. at 636–40.

[296] 404 U.S. 97 (1971).

[297] *See id.* at 106–07. Under this test, a decision's retroactive application could be limited if the decision established a new principle of law; if nonretroactive application would not frustrate the rule's operation; and, if the limitation was necessary to avoid substantial injustice.

under the second, "selective prospectivity," rulings were applied only to some of the cases in which the operative events occurred before the decision.[298]

The Rehnquist Court first rolled back the Warren Court's nonretroactivity doctrine in criminal cases. In *Griffith v. Kentucky*,[299] the Supreme Court overturned the entire line of Warren Court nonretroactivity decisions for state criminal cases pending on direct review.[300] The assertion of a power to disregard current law, the Court reasoned, would violate "basic norms of constitutional adjudication" because it "is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation."[301] The Court thus appeared to endorse the so-called declaratory theory of law or what Justice Harlan called "the Blackstonian theory that the law should be taken to have always been what it is said to mean at a later time."[302]

The Court in *Harper* has now also restored the norm of retroactivity in civil cases. In an earlier decision, *Davis v. Michigan Department of the Treasury*,[303] the Supreme Court had invalidated a Michigan practice of taxing retirement benefits paid by the federal government while exempting retirement benefits paid by the state or its political subdivisions. The Court had ruled that this practice violated intergovernmental tax immunity. When Virginia taxpayers sought a refund under *Davis*, the Virginia Supreme Court held that *Davis* need not be applied to taxes that had already been paid before the decision.[304] "[T]he *Davis* decision established a new rule of law by deciding an issue of first impression whose resolution was not clearly foreshadowed,"[305] the Virginia Supreme Court held, citing *Chevron Oil*. "[T]he Davis decision is not to be applied retroactively."[306]

The Supreme Court rejected the state court's limitation, insisting that *Davis* be given full retroactive effect regardless of the cost to the state or the foreseeability of the change that *Davis* wrought.[307] "Our approach to retroactivity," Justice Thomas announced, "heeds the admonition that '[t]he Court has no more constitutional authority in

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[298] *See* Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2527 (1993) (O'Connor, J., dissenting); James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2443–45 (1991).

[299] 479 U.S. 314 (1987).

[300] *See id.* at 326–28.

[301] *Id.* at 322–23 (quoting Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in the judgment)).

[302] *Mackey*, 401 U.S. at 677 (Harlan, J., concurring in the judgment). Justice Harlan himself has disavowed the Blackstonian theory. *See id.*

[303] 489 U.S. 803 (1989).

[304] *See* Harper v. Virginia Dep't of Taxation, 401 S.E.2d 868, 873–74 (Va. 1991).

[305] *Id.* at 872.

[306] *Id.* at 873.

[307] *See* Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2517–18 (1993).

civil cases than in criminal cases to disregard current law.'"[308] Although the Court purportedly only rejected the idea of selective prospectivity — "the erection of selective temporal barriers to the application of federal law"[309] — Justice Thomas also suggested that the "dicta" in *Griffith* that indicated that *Chevron Oil*'s balancing of the equities still applied to civil cases would now be abandoned.[310]

The opinion explicitly characterized the Court's position on retroactivity as a rejection of the modernist — more specifically, legal realist — challenge to orthodox principles of constitutional adjudication. "Mindful of the 'basic norms of constitutional adjudication,'"[311] Justice Thomas endorsed Justice Scalia's "perception that prospective decisionmaking is incompatible with the judicial role."[312] In a concurring opinion, Justice Scalia provided a characteristically fuller explanation of the Court's underlying reasons:

> Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of *stare decisis*. It was formulated in the heyday of legal realism and promoted as a "techniqu[e] of judicial lawmaking" in general, and more specifically as a means of making it easier to overrule prior precedent. . . . The true *traditional* view is that prospective decisionmaking is quite incompatible with the judicial power, and that courts have no authority to engage in the practice.[313]

The Court's discomfort with the message sent by prospective application recalls the early American originalist response to such a challenge to the rule of law. In the nineteenth century, the Supreme Court raised a storm of controversy with its decision in *Gelpcke v. City of Dubuque*,[314] which held that an Iowa Supreme Court reversal of an earlier decision that empowered municipalities to issue bonds to

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[308] *Id.* at 2517 (quoting American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 214 (1990) (Stevens, J., dissenting)).

[309] *Id.*

[310] *See Harper*, 113 S. Ct. at 2516–17. Justice O'Connor took issue with the breadth of the Court's condemnation of nonretroactivity: "[T]he question of pure prospectivity is not implicated here . . . . Accordingly, there is no reason for the Court's careless dictum regarding pure prospectivity, much less dictum that is contrary to clear precedent." *Id.* at 2528 (O'Connor, J., dissenting).

[311] *Harper*, 113 S. Ct. at 2517 (quoting Griffith v. Kentucky, 479 U.S. 314, 322 (1987)).

[312] *Id.* (quoting *American Trucking*, 496 U.S. at 201 (Scalia, J., concurring in the judgment)).

[313] *Id.* at 2522 (Scalia, J., concurring) (internal citations omitted). Justice Scalia's strict adherence to a declaratory theory of law is puzzling in light of his admission that the theory is a legal fiction. In a concurrence to an earlier prospectivity case, Justice Scalia acknowledged: "I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law." James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2451 (1991) (Scalia, J., concurring in the judgment). If judges make law, then is there no basis for insisting that the separation of powers distinction between legislation and adjudication produce the *Harper* result?

[314] 68 U.S. (1 Wall.) 175 (1864).

subsidize railroads itself violated the Contracts Clause.[315] Justice Holmes criticized the *Gelpcke* decision for violating a fundamental foundational norm of the legal system, namely "that the law was always the same as expounded by the later decision, not that the state court makes new law."[316]

Indeed, the Rehnquist Court's broad rejection of the threat posed by the Warren Court's retroactivity doctrine harkens back to the nineteenth-century English Law Lords, who declared that the overruling of precedent was itself an unconstitutional act of legislative power.[317] Although the Law Lords had the comparatively simple task of disavowing their own authority to effect change, the Rehnquist Court stood in the paradoxical position of having to overrule several decades of precedent in order to restore the norm of stare decisis.[318] The Court thus denied that the law changes — that its decisions could be "new" for the purposes of fair application.[319]

The Court's adherence to a rigid conception of the role of the judiciary in constitutional adjudication requires it to turn away from the context and consequences of its decision. When *Davis* held that preferential tax treatment of state and local pension benefits were unconstitutional, twenty-three states had such structures in place.[320] The decision therefore potentially created massive state liability for refunds. Although this consideration surely drove the state courts to limit the retroactive application of *Davis*, the Court's opinion devoted little attention to the consequences of full retroactivity.[321]

More generally, the *Harper* Court expressed its discomfort with the consideration of equitable factors to determine the extent of retroactive application. Justice Thomas insisted that "we can scarcely permit 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on

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[315] *See id.* at 206.

[316] 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 472 n.1(a) (O.W. Holmes, Jr., ed., 12th ed. 1873).

[317] *See supra* pp. 47–48.

[318] The fact that the Rehnquist Court was forced to overrule *Chevron Oil* (at least in dicta) in the name of defending stare decisis put the Justices in the odd posture of having to respond to a dissent based almost entirely on precedent. Justice Scalia's response encapsulated the Court's position with respect to the deeds of the Warren Court: "[T]he dissent is saying, in effect, that *stare decisis* demands the preservation of methods of destroying *stare decisis* recently invented in violation of *stare decisis*." Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510, 2522 (Scalia, J., concurring).

[319] *See id.* at 2528 (Kennedy, J., concurring in part and concurring in the judgment).

[320] *See Harper*, 113 S. Ct. at 2515.

[321] The Court in *Harper* did leave open an escape hatch for the trial court by deeming the question, whether the taxpayers were entitled to refunds, a matter of "remedies." *See id.* at 2520; *see also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1797–1807 (1991) (dismissing arguments that Article III precludes courts from withholding remedies in cases involving new law).

an old rule and of harm from a retroactive application of the new rule."[322] To the Court, such power involved too much discretion and too much of an opportunity to reflect the value preferences of particular Justices. It was preferable to foreclose this possibility by adhering to a strict prohibition, despite the fact that a strict prohibition ignores the pervasive uncertainty over whether any tax classification can survive equal protection scrutiny.

The Court's strict position on retroactivity also sharply contradicts its habeas corpus jurisprudence. In the context of collateral review of criminal cases, in which the Court has been obsessed with the demands that lack of finality imposes on federal courts, the distinction between "new" and "old" law is the basis of the Court's central test. *Teague v. Lane*,[323] decided after *Griffith* eliminated limitations on retroactivity in direct review of criminal cases,[324] held that a habeas petitioner is not entitled to the benefit of decisions handed down after his trial if the decision was "new."[325] It defined a "new" decision as one which "breaks new ground" or "was not *dictated* by precedent existing at the time the defendant's conviction became final."[326] The *Teague* distinction between "old" and "new" law dominates a number of this Term's decisions that further restrict habeas review.[327]

Thus, the Court clung to an almost caricatured version of legal orthodoxy in *Harper* that portrayed all law as unchanging, only to adopt an incredibly dynamic version of change in *Teague* such that almost any legal change is in effect treated as "new" law. That the Court's uncharacteristic departure from its originalist premises comes on behalf of virtually eliminating habeas corpus suggests, as did the problem of the two originalisms in the context of Fourteenth Amendment jurisprudence, that the claimed legitimating power of originalism often serves as but a thin mask for simple political conservatism. One familiar with the originalist dilemma should not be surprised, however, that the Court has been unable to adhere fully to an orthodox

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[322] *Harper*, 113 S. Ct. at 2517 (quoting James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2447 (1991) (alterations in original)).

[323] 489 U.S. 288 (1989).

[324] *See* Griffith v. Kentucky, 479 U.S. 314, 326 (1987).

[325] *See Teague*, 489 U.S. at 315–16.

[326] *Id.* at 301.

[327] *See, e.g.*, Johnson v. Texas, 113 S. Ct. 2658, 2668 (1993); Gilmore v. Taylor, 113 S. Ct. 2112, 2116–19 (1993); Graham v. Collins, 113 S. Ct. 892, 898–903 (1993). But see Lockhart v. Fretwell, 113 S. Ct. 838 (1993), in which a habeas petitioner's claim of ineffective assistance of counsel in a capital case was turned down even though the constitutional rule at the time of his conviction was favorable to his claim, *see id.* at 844. Because it was subsequently changed by a "new" rule more restrictive than the law at the time he had been convicted, the Court simply ignored its own "old" law–"new" law habeas jurisprudence and refused to give him the benefit of the "old" law on the grounds that he would have thereby benefited from a "windfall." *See id.* at 841.

view of the rule of law. Insisting that the law is timeless — that the Constitution does not change — exacts a cost that sometimes even originalists themselves are unwilling to pay.

III. THE RETURN TO *LOCHNER*

A. Introduction

If *Casey* marked the Court's awareness of its legitimacy crisis, *Harper*'s rigid denial of the possibility of constitutional change suggests its inability to solve it. Politically committed to dismantling decades of Warren Court doctrine, yet culturally bound to an originalist conception of constitutional change, the current Court's jurisprudence has thus devolved into conceptualism and technicality. Perhaps Roscoe Pound's characterization of the *Lochner* Court comes closest to capturing the present moment — this is a court trapped in the grips of mechanical jurisprudence.[328]

Although Supreme Court opinions from the time of Chief Justice Marshall have been the preeminent American State Papers through which it has been possible to study some unfolding vision of the American Experience, there is hardly a trace of wisdom concerning the meaning of the American past or the possibilities of its future to be found in the opinions of the current Court. There is no picture of American ideals or American destiny. There is no real sense that "[t]he life of the law has not been logic; it has been experience."[329] There is no recognition that the world is rapidly changing and that the Court's understanding of the role of law may be growing dangerously out of touch with American society. Instead, most of this Court's opinions are surrounded by a thick undergrowth of technicality. With three or four "prong" tests everywhere and for everything;[330] with an almost medieval earnestness about classification and categorization; with a theological attachment to the determinate power of various "levels of scrutiny";[331] with amazingly fine distinctions that produce multiple opinions designated in Parts, sub-parts, and sub-sub-parts,[332]

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[328] *See* Pound, *supra* note 227, at 616 n.63.

[329] HOLMES, *supra* note 56, at 1.

[330] *See, e.g.*, United States Dep't of Treasury v. False, 113 S. Ct. 2202, 2209 (1993) (establishing a multi-prong test for insurance policy); Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., 113 S. Ct. 1920, 1929 (1993) (establishing a multi-prong test for copyright infringement).

[331] *See, e.g.*, Shaw v. Reno, 113 S. Ct. 2816, 2825–26 (1993) (treating voting district boundaries); City of Cincinnati v. Discovery Network, 113 S. Ct. 1505, 1513 (1993) (applying the First Amendment).

[332] See, for example, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993):

> Kennedy, J., delivered the opinion of the Court with respect to Parts I, III, and IV, in which Rehnquist, C.J., and White, Stevens, Scalia, Souter, and Thomas, JJ., joined, the

this is a Court whose Justices appear caught in the throes of various methodological obsessions.[333]

How is it then that a Court so convinced that it is undoing decades of illegitimate constitutional jurisprudence itself has come to repeat the errors of that most infamous of "illegitimate" Courts? The beginnings of an answer lie in the hostility to constitutional change at the heart of *Harper* and *Casey* and the connection that hostility to change has with a particular conservative legal style.

Deeply rooted in the early religious culture that gave it birth, static originalism has been modern American legal culture's chief means of infusing the nation's founding political document with an objective authority that modernism refuses to concede. In a post-religious age, this quest for objectivity takes the path of creating formal systems that offer the hope of producing "neutral" agreement despite an inability to agree objectively on the particular content of values. Versions of this approach have dominated constitutional discourse from early Whig originalism until the more modern use of democracy as a legitimating tool.

The desire for a jurisprudence that is content neutral accords with the persistent yearning in American constitutional culture to separate law from politics.[334] Content neutrality serves this need by creating the appearance of objective and non-political decisionmaking. The appearance of neutrality can only be maintained, however, through the creation of increasingly general categories that are abstracted from concrete or particular power relations.

Thus, there is a dialectic between resistance to change and content neutrality. Fear of change manifests itself in content neutrality as a reaction to "subjectivity" and "discretion." In turn, content neutrality

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opinion of the Court with respect to Part II-B, in which Rehnquist, C.J., and White, Stevens, Scalia, and Thomas, JJ., joined, the opinion of the Court with respect to Parts II-A-1 and II-A-3, in which Rehnquist, C.J., and Stevens, Scalia, and Thomas, JJ., joined, and an opinion with respect to Part II-A-2, in which Stevens, J., joined. Scalia, J., filed an opinion concurring in part and concurring in the judgment, in which Rehnquist, C.J., joined. Souter, J., filed an opinion concurring in part and concurring in the judgment. Blackmun, J., filed an opinion concurring in the judgment, in which O'Connor, J., joined.

Id. at 2221.

[333] After devoting quite of bit of time just to reading the endless concurrences and dissents in any important case, one then is faced with the olympian task of trying to determine whether there is an actual majority behind any proposition (for example, Justice Souter agrees with all but Part III-B).

> With characteristic wryness, Justice White ended his 31-year Supreme Court career . . . by expressing the hope that the Court's future opinions would be "clear, crisp" and easy for lower court judges to understand and apply. Whatever new departures are now in store for the Court, fulfilling Justice White's wish is not likely to be one of them.

Linda Greenhouse, *Overview of the Term: The Court's Counterrevolution Comes in Fits and Starts*, N.Y. TIMES, July 4, 1993, § 4, at 1.

[334] *See* HORWITZ, *supra* note 4, at 9–10.

reinforces resistance to change by creating reified and abstract conceptions that are out of touch with life. As a consequence, the legitimating promise of content neutrality is revealed to be misleading. Although overly abstract concepts create the appearance of generality and universality, their inability to make real world distinctions must be compensated for by extremely technical, ad hoc exceptions. Those technical distinctions only highlight the degree to which the Court's jurisprudence has lost touch with the underlying social reality.

Without some deeply compelling theory about the source of objectivity in law, any single-minded quest for "objective" answers must inevitably degenerate into pure technicality. Technicality thus invariably becomes a major symptom of constitutional theory in crisis. Just as literalism is the symptom of a degenerate textualism that sacrifices all other constitutional values in pursuit of unambiguous meaning; just as a mechanical search for a single true intent is the mark of a degenerate originalism; so too does hyper-technicality generally serve as a substitute for constitutional ideas that have sacrificed all hope of capturing deeper and more complex realms of meaning on the altar of objectivity.

This hostility to change and desire for neutrality correlates not only with a technical style of legal argument, but also with a substantively conservative approach to constitutional law. As Professor Cass Sunstein has shown, all ideas of neutrality simply assume a "baseline" from which to determine whether to label a change neutral or non-neutral.[335] Because that baseline usually takes for granted existing institutions as well as the existing distribution of entitlements,[336] neutrality can only be defined with reference to an *existing order* under which the beneficiaries of prior injustice are able to

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[335] *See* Sunstein, *supra* note 40, at 882–83 (arguing that *Lochner* failed because it selected an inappropriate "baseline" for its constitutional analysis). Professor Sunstein has also analyzed neutrality in terms of "background conditions." Cass R. Sunstein, *Republicanism and the Preference Problem*, 66 CHI.-KENT L. REV. 181, 194–97 (1990). *See generally* MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 46–57 (1988) ("If neutrality is to serve as a meaningful guide, it must be understood not as a standard for the content of principles but rather as a constraint on the process by which principles are selected, justified, and applied."); Richard D. Parker, *The Past of Constitutional Theory — and Its Future*, 42 OHIO ST. L.J. 223, 225 (1981) (critiquing "process-oriented" constitutional theory as a response to the tension between the content-neutral foundationalist and modernist "pictures" of "constitutional order"); J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 776–805 (1971) (critiquing Bickel's understanding of the value of neutral principles in constitutional analysis).

[336] *See* HORWITZ, *supra* note 4, at 194–98; CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 3 (1993); Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471–78 (1923) (arguing that the legal definition and enforcement of property rights are shaped by the distribution within society of income and "relative power of coercion"); Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 2–3 (1992).

entrench themselves by initially defining those entitlements. To the extent, for example, that the existing distributions of wealth and power were acquired on the basis of injustice — for instance, a long history of racial domination and subordination — then neutral principles analysis will tend to ratify as the "given" and accepted neutral background those prior distributions of privileges whose acquisition was aided by injustice.

It was precisely this recognition of the deep connection between a hostility to change and politically conservative jurisprudence that inspired Justice Brandeis and other progressive legal thinkers to craft the "changed circumstances" justification for constitutional change.[337] The attempt by legal progressives to legitimate a changing conception of constitutional meaning was an important first step in their broader effort to overcome the injustices of the existing order. But if conservative thinkers could accept the progressive conception of change as long as it was confined to the neutral ground of assessing changed "facts," they had no tolerance for broader versions in which constitutional change was dependent on one's more subjective "outlook."[338] Conservative constitutionalists such as Justice Sutherland understood the dangers posed to the existing order that tied constitutional meaning to the "play of social forces that lay hidden in the womb of time,"[339] and they thus had powerful political, psychological, and cultural impulses inducing them to provide a reified and timeless conception of abstractions such as Federalism or Liberty.[340]

The *Lochner* Court supported its constitutional conservatism by entrenching as neutral principles common law rules that defined extremely hierarchical employment relationships and individualistic and absolutist conceptions of Lockean property rights. *Adair v. United States*[341] provides perhaps the most famous example of Lochnerian content neutrality. Justice Harlan[342] articulated the *Lochner* Court's

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[337] *See supra* pp. 51–56.

[338] For one version of the progressive view, see CORWIN, THE TWILIGHT OF THE SUPREME COURT, cited above in note 43, which states that "change in *outlook* . . . must be taken into account, no less than change in *conditions*," *id.* at 45.

[339] Cardozo, *supra* note 113, at 323.

[340] Thus, Justice Sutherland wrote at the height of the debate over the New Deal, "[constitutional] *meaning* is changeless; it is only [its] *application* which is extensible." Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 451 (1934) (Sutherland, J., dissenting) (citing South Carolina v. United States, 199 U.S. 437, 448–49 (1905)).

[341] 208 U.S. 161 (1908).

[342] Of the *Lochner* Justices, only the reputations of Justices Harlan and Holmes have survived intact. Although Justice Harlan dissented in *Plessy*, Justice Holmes's underdeveloped identification with the oppressed may have led him in the opposite direction if he had been on the Court when *Plessy* was decided. *See* BICKEL & SCHMIDT, *supra* note 135, at 780–81 (noting Justice Holmes's support for separate railroad cars for blacks and whites); Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM.

conception of content neutrality in a neutral nonredistributive state: "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it."[343] The equivalence having been established, it is not surprising that Justice Harlan concluded that "any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."[344]

Just as the *Lochner* Court in *United States v. E.C. Knight Co.*[345] ignored the momentous problem of regulating new giant national corporations by invoking a technical distinction between "commerce" and "manufacturing,"[346] so too the present Court has engaged in a flight of Lochnerian abstraction that prevents it from confronting changing social reality. This Part examines these similarities in two distinct doctrinal areas: the current Court's attachment to the abstract concept of "color blindness" in its recent race cases as a manifestation of its desire for content neutrality, and the current Court's recent First Amendment cases as an illustration of how content neutrality substitutes technical manipulating for constitutional vision.

B. Color Blindness

1. Introduction. — It was possible for the freedom of contract decisions of the *Lochner* era to insist upon content neutrality in a bargain between giant corporations and individual employees only if they emphasized formal contractual equality while ignoring actual inequalities of power and knowledge. But it is often forgotten that *Plessy*, also decided during the *Lochner* era, was equally meant to be an application of neutral principles. The "underlying fallacy" of the black plaintiff's argument, the Court observed, "consist[s] in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by

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L. REV. 1622, 1642–44 (1986) (discussing the influence of Justice Holmes's racial views on his reasoning).

[343] *Adair*, 208 U.S. at 174. *See generally* Michael L. Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 298 (1985) (arguing that a commitment to content neutrality, and not laissez-faire biases, motivated the *Lochner* Court).

[344] *Adair*, 208 U.S. at 175. As Roscoe Pound contended in his great critique of the *Lochner* Court, this example of content neutrality was a fallacy "[t]o everyone acquainted at first hand with actual industrial conditions." Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454 (1909).

[345] 156 U.S. 1 (1894).

[346] *Id.* at 12–13.

reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[347]

The *Plessy* Court thus wished to regard racially separate but equal public facilities as, in effect, no different from gender-based separate but equal bathrooms. Because the Constitution guaranteed equal "civil" and "political" rights, the Court maintained, one race "cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."[348] Even though "social" inequality concededly existed, the Court considered it a violation of neutral principles to interfere with "private" discrimination. Under Lochnerian neutrality, only "political," not "social," equality was constitutionally guaranteed.

This reading of *Plessy* led Professor Herbert Wechsler, in his famous article on neutral principles, to confess not only that he saw a "point" in the *Plessy* analysis, but also that he could not justify *Brown* on grounds of neutral principles.[349] Ignoring past injustices, he explained that neutral principles provided no more basis for forcing whites to associate with blacks than for prohibiting blacks from associating with whites. This position may have derived from political philosopher Hannah Arendt's argument that "social," as opposed to "political" and "private," segregation mitigated against the invidious tendency toward conformism in a democracy.[350] It is also similar to Justice Harlan's view in *Adair* that "the right of the employee to quit . . . is the same as the right of the employer . . . to dispense with the services of such employee."[351]

Content neutrality and its offspring, color blindness, depend on the elimination of the relevance of domination and subordination — in short, ignorance of real world power relations. Thus, all "content neutral" definitions of race relations attain their neutrality by ignoring past injustices and the unfair advantages that whites as a group have acquired through racial discrimination and subordination.

2. Last Term's Cases. — There was a fleeting moment last Term when it seemed that Justice Thomas might actually help bring the Court back in touch with the historical reality of racial oppression in American society. Yet despite Justice Thomas's unusually candid recitation of the facts of the nation's racial history in *Graham v. Collins*,[352] he recalled that history only to ignore it in the name of legal formalism.[353] In the final analysis, Justice Thomas allowed disem-

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[347] Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

[348] *Id.* at 551–52.

[349] *See* Wechsler, *supra* note 193, at 33.

[350] *See* Hannah Arendt, *Reflections on Little Rock*, 6 DISSENT 45, 51 (1959).

[351] Adair v. United States, 208 U.S. 161, 174–75 (1908).

[352] 113 S. Ct. 892 (1993).

[353] *See id.* at 904–06 (Thomas, J., concurring).

bodied legal categorization to reduce the realities of racism to technical legal distinctions.

In *Graham*, the Court affirmed the Court of Appeals for the Fifth Circuit and refused to allow a habeas corpus appeal in a death penalty case on the grounds that the petitioner's claim constituted "new law" under *Teague*.[354] In a concurring opinion, Justice Thomas reviewed the history of the Supreme Court's death penalty jurisprudence, noting that "[i]t is important to recall what motivated Members of this Court at the genesis of our modern capital punishment case law."[355] *Furman v. Georgia*,[356] he observed, "was decided in an atmosphere suffused with concern about race bias in the administration of the death penalty — particularly in Southern States, and most particularly in rape cases."[357]

Justice Thomas referred approvingly to Justice Douglas's concurring opinion in *Furman*:

> Justice Douglas stressed the potential role of racial and other illegitimate prejudices in a system where sentencing juries have boundless discretion. He thought it cruel and unusual to apply the death penalty "selectively to minorities . . . whom society is willing to see suffer though it would not countenance general application of the same penalty across the board." Citing studies and reports suggesting that "[t]he death sentence [was] disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups," especially in cases of rape, Justice Douglas concluded that
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> > the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.[358]

Justice Thomas recalled that "[t]he racial figures for all men executed in the United States for the crime of rape since 1930 are as follows: 48 white, 405 Negro, 2 other. In Georgia, the figures are: 3 white, 58 Negro."[359]

Because the current Court did not often acknowledge the unpleasant racial facts of life, one must wonder what motivated Justice

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[354] *See* discussion of *Teague supra* pp. 97–98. Petitioner claimed that a Texas capital sentencing statute prevented a jury from considering mitigating factors of youth, family background, and positive character traits. *See Graham*, 113 S. Ct. at 897.

[355] *Graham*, 113 S. Ct. at 904 (Thomas, J., concurring).

[356] 408 U.S. 238 (1972).

[357] *Graham*, 113 S. Ct. at 904 (Thomas, J., concurring).

[358] *Id.* (quoting *Furman*, 408 U.S. at 245, 249–50, 255 (Douglas, J., concurring)).

[359] *Id.* at 905 (quoting Brief for Petitioner at 15, Jackson v. Georgia, 408 U.S. 238 (1972) (No. 69-5030)).

Thomas's unusual observations. His opinion makes clear that he advocates a more stringent approach to capital punishment appeals than even this Court has adopted. Justice Thomas pressed the Court to overrule *Penry v. Lynaugh*,[360] because he saw a contradiction between *Furman*'s strict rule orientation and the emphasis on particularity, contextualism, and jury discretion that emerged from *Penry*'s requirement that a sentencing jury hear evidence of mitigating circumstances.[361]

Only for the purpose of eliminating the individual criminal defendant's opportunity to present mitigating circumstances did Justice Thomas remind us of the class and racial sociology of capital punishment before *Furman*. But as Justice Stevens observed in dissent, there was no basis for Justice Thomas's "remarkable suggestion" that *Penry* "somehow threatens what progress we have made in eliminating racial discrimination and other arbitrary considerations from the capital sentencing determination."[362] Justice Stevens proceeded to show that the rule-oriented, anti-discretionary capital decisions are for the purpose of "narrowing . . . the class of death-eligible offenders" in order to "eradicate any significant risk of bias in the imposition of the death penalty."[363] "Finally, at the end of the process, when dealing with the narrow class of offenders deemed death-eligible, we insist that the sentencer be permitted to give effect to all relevant mitigating evidence offered by the defendant, in making the final sentencing determination," Justice Stevens concluded.[364]

How could Justice Thomas have expressed so sensitive an understanding of the social reality of the racial history of capital punishment, while believing at the same time that the problem of racial discrimination could be eliminated simply through the application of non-discretionary rules that limit which crimes may be punished by death? Because there are numerous points in the criminal justice system — from decisions about whether to investigate and prosecute to those about whether to accept a plea bargain instead of asking for the death penalty — that continue to be heavily influenced by racial considerations,[365] how is it possible to believe that a formal, non-discretionary rule applied at the sentencing stage can correct for the pervasiveness of racial considerations in our society? Here is another

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[360] 492 U.S. 302 (1989).

[361] *See Graham*, 113 S. Ct. at 913.

[362] *Id.* at 915 (Stevens, J., dissenting).

[363] *Id.* at 916.

[364] *Id.*

[365] *See, e.g.*, M. Shanara Gilbert, *Racism and Retrenchment in Capital Sentencing: Judicial and Congressional Haste Toward the Ultimate Injustice*, 18 N.Y.U. REV. L. & SOC. CHANGE 51, 55 (1990); Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1396–1400 (1988).

example of a disembodied formalism that somehow enables judges to divorce their "legal" views from their own clear understandings of the state of the world.

If *Graham* exhibits the way legal formalism can make irrelevant social realities that are well understood, *Shaw v. Reno*[366] suggests the way in which the desire for content neutrality can shield experience from recognition. In *Shaw*, the Court, by a 5–4 majority, affirmed a claim that North Carolina's newly-drawn majority-black Twelfth Congressional District was an unconstitutional racial gerrymander.[367] After stating that the appellants were "wise" in making the "concession" that "race-conscious redistricting is not always unconstitutional" and that "[t]his Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances," the Court declared: "What appellants object to is redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."[368]

Justice O'Connor's opinion, which invoked the ideal of "a multiracial democracy,"[369] wished away existing racial realities with the same cruel formalism that was characteristic of the Court's post-Civil War decisions. She wrote: "A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid."[370]

The equivalence Justice O'Connor drew between "apartheid" and a majority-black congressional district designed to ensure the state's first black congressional representative in more than a century exemplified the dialectic between fear of change and content neutrality. Moreover, *Shaw* revealed the way in which this dialectic can push a Court, as was true in the *Lochner* era, toward an increasingly technical jurisprudence not rooted in the experience of social life.

Unable to accept that the Constitution could at one time prohibit the use of racial classifications, while at another time approve of them, the Court seeks to invoke a timeless principle of color blindness running throughout constitutional law. Such an abstract principle keeps constitutional jurisprudence fixed in the originalist framework and safe

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366 113 S. Ct. 2816 (1993).

367 *See id.* at 2832.

368 *Id.* at 2824.

369 *Id.* at 2827 (quoting Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088 (1991)).

370 *Id.*

from the "play of social forces."[371] However, this abstraction demands a false equivalence between apartheid and the race-conscious integration of political institutions.[372] Only if one ignores the structure of power relations between whites and blacks is it possible to equate such different social practices solely on the basis of their formal similarity.

Such formal, but fallacious, equivalences are central to the color-blind turn in the Court's recent race cases. Justice Scalia offered a particularly clear example in his "color-blind" concurrence in *City of Richmond v. J.A. Croson Co.*:[373]

> It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups. But those who believe that racial preferences can help to "even the score" display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still.[374]

The color-blind analysis, like all content-neutral judicial abstractions, enabled the Court to legitimate the existing distribution of entitlements through these appeals to formal equivalence.

But the flight to abstraction and formal categorization paradoxically requires a turn toward technicality to make the categories hold in the face of social reality. *Shaw* thus stands as an example of the paradox inherent in the Court's attempt to achieve legitimacy through the content neutrality demanded by a static originalist view of constitutional meaning.

Content neutrality as color blindness reduces the problem of racial inequality to a mere question of a "manner of thinking"[375] in which race matters. But having so generalized the problem, the Court then risks its legitimacy when confronting such widely supported laws as the Voting Rights Act of 1965.[376] Under that Act, as Justice Souter reminded the *Shaw* majority,[377] Congress has authorized the consideration of race in the drawing of district lines to prevent the dilution of minority voting strength. Thus, ad hoc and technical exceptions to the abstract principle of color blindness must be created to preserve both the content-neutral legal abstraction and the popularly chosen

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[371] Cardozo, *supra* note 113, at 351.

[372] This false equivalence recalls the "fallacy" of Justice Harlan's equation of employer and employee in *Adair*. *See* Adair v. United States, 208 U.S. 161, 174–75 (1908).

[373] 488 U.S. 469 (1989).

[374] *Id.* at 527–28 (Scalia, J., concurring in the judgment).

[375] *Id.* at 527.

[376] 42 U.S.C. § 1973 (1988).

[377] *See* Shaw v. Reno, 113 S. Ct. 2816, 2845 (Souter, J., dissenting).

social policy. The *Shaw* majority's opinion ultimately rested on such a technical distinction.[378]

We are never told on what basis one could possibly distinguish between a legitimate and illegitimate creation of a majority-black district. Although the Court purported to "express no view as to whether the intentional creation of majority-minority districts[] without more always gives rise to an equal protection claim,"[379] it is difficult to imagine, given this opinion, any "compelling state interest"[380] that could justify such districts. Nowhere did the Court suggest what a sufficiently compelling justification might be.

Moreover, the Court cited approvingly the holding in *Beer v. United States*[381] "that a reapportionment plan that created one majority-minority district where none existed before passed muster . . . because it improved the position of racial minorities."[382] But why should *Beer* not apply to the North Carolina plan? There is no dispute about the racial motivation behind the creation of districts such as the Twelfth.

To make it possible for reapportionment plans to take account of race and still make redistricting subject to the principle of color blindness, the Court seized on a technical criterion: "sound districting principles."[383] Justice O'Connor borrowed from the opinion of three Justices in *United Jewish Organizations v. Carey (UJO)*[384] that it is

> permissible for a State, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority.[385]

To the *Shaw* majority, the present North Carolina case was "critically different" from *UJO* "precisely because" the statute in *UJO* "adhered

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[378] *See Shaw*, 113 S. Ct. at 2828.

[379] *Id.* (internal quotations omitted).

[380] *Id.* at 2848 (Souter, J., dissenting).

[381] 425 U.S. 130 (1976).

[382] *Shaw*, 113 S. Ct. at 2830. Indeed, just three months earlier the Supreme Court unanimously upheld an Ohio apportionment plan that created eight new majority-minority assembly districts. "[T]he State may create any district it might desire," Justice O'Connor wrote, "so long as minority voting strength is not diluted as a result." Voinovich v. Quilter, 113 S. Ct. 1149, 1154 (1993).

[383] *Shaw*, 113 S. Ct. at 2832 (quoting United Jewish Orgs. v. Carey (*UJO*), 430 U.S. 144, 168 (1977)).

[384] 430 U.S. 144 (1977).

[385] *Shaw*, 113 S. Ct. at 2829 (quoting *UJO*, 430 U.S. at 168) (emphasis omitted).

to traditional districting principles."[386] "Put differently, we believe that reapportionment is one area in which appearances do matter."[387]

The Court thus appeared to say that it is permissible to create majority-minority districts as long as one stays within the constraints of "sound districting principles." If a majority-minority district has been created according to such principles, there is no need to look behind such districting schemes to inquire into allegations of racial motivation. But the Court never explained why it was prepared to accept mere "appearances" when more intense scrutiny might uncover actual racial motivation.

That such a question was left unanswered should not be surprising given the structure of legal reasoning that undergirds content-neutral analyses such as the application of the color-blind principle. Abstract legal concepts, instead of reality, are the driving force in such a conservative legal style. Technical distinctions thus have a logic of their own.

C. The Lochnerization of the First Amendment

1. Introduction. — During the last twenty-five years, free speech doctrine has taken a surprising turn. When the Warren Court drew to a close in 1969, it was possible to characterize the typical beneficiary of First Amendment doctrine as a member of some weak, dissident, and unpopular political or cultural minority.[388] Since then, the Court has extended free speech doctrine to a variety of social contexts in ways that one would hardly have imagined possible twenty-five years

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[386] *Id.* Justice White, who wrote the primary opinion in *UJO*, articulated this notion in his dissent in *Shaw*:

> The Court today chooses not to overrule, but rather to sidestep, *UJO*. It does so by glossing over the striking similarities, focusing on surface differences, most notably the (admittedly unusual) shape of the newly created district, and imagining an entirely new cause of action. Because the holding is limited to such anomalous circumstances, it perhaps will not substantially hamper a State's legitimate efforts to redistrict in favor of racial minorities.

Id. at 2834 (White, J., dissenting).

[387] *Shaw*, 113 S. Ct. at 2827.

[388] After 1957, when the Court belatedly applied the First Amendment to overturn many of the forms of political repression that it had acquiesced in during the McCarthy era, the Court helped create a political and legal culture that was more respectful of civil liberties than ever before in American history. And as southern policy turned to "massive resistance" against *Brown*, the Court also invoked the First Amendment to protect the NAACP against state attempts to destroy it. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 282–83 (1964); NAACP v. Button, 371 U.S 415, 428–29 (1963); NAACP v. Alabama, 357 U.S. 449, 462–63 (1958). The expansive use of First Amendment doctrine to protect the Civil Rights movement and the press from persecution by southern legislatures, prosecutors, and sheriffs was a dominant theme of free speech jurisprudence during the Warren years.

ago.[389] The generalization and universalization of freedom of speech, and the Court's concomitant devotion to its abstract doctrine of "content neutrality," however, have combined to produce a Lochnerization of the First Amendment. As John Dewey noted, "[i]deas that at one time are means of producing social change have not the same meaning when they are used as means of preventing social change."[390] Content neutrality has assumed such a guise.

Looking back at the *Lochner* Court, a similar transformation occurred in the history of "freedom of contract." Both Adam Smith and Sir Henry Maine celebrated the shift from "status" to "contract" as an emancipatory transformation in human history.[391] Only a century later, during the *Lochner* era, when freedom of contract came to be applied — also in a supposedly "content neutral" way — to the new reality of giant corporations contracting with unorganized laborers, did "contract" become a favorite doctrine of the wealthy and the powerful.[392]

The generalization and universalization of the First Amendment was the first step in the process of its Lochnerization. The widening scope of the First Amendment has made the search for limiting principles ever more desperate. Moreover, as the protected categories have expanded, there has been justifiable anxiety that the core values of the First Amendment might be diluted in order to accommodate an

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[389] For example, the Court found that the "symbolic speech" and "content neutrality" doctrines extend First Amendment protection to a white terrorist act of burning a cross on the lawn of a black family. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2547–48 (1992).

[390] John Dewey, *The Future of Liberalism*, *in* THE LATER WORKS, 1925–1953, at 291 (Jo Ann Boydston ed., 1987). Dewey said more fully:

> Even when the words remain the same, they mean something very different when they are uttered by a minority struggling against repressive measures and when expressed by a group that has attained power and then uses ideas that were once weapons of emancipation as instruments for keeping the power and wealth they have obtained. Ideas that at one time are means of producing social change assume another guise when they are used as means of preventing social change.

Id.

[391] *See* MAINE, *supra* note 70, at 163–65 ("Through all its course [the movement of the progressive societies] has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. . . . [W]e may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract.*"). *See generally* PATRICK S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 292–303 (1979) (discussing the theories of Adam Smith).

[392] The Court in Coppage v. Kansas, 236 U.S. 1 (1915), stated the *Lochner* Court's version of "content neutrality" as applied to "freedom of contract":

> [S]ince it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the Fourteenth Amendment . . . debars the States from any unwarranted interference with either.

Id. at 17.

ever widening circle of applications.[393] Unfortunately, as its analysis of hate speech demonstrated, the current Court's solution has been to turn to a *Lochner*-like legal style.

Just as the *Lochner* Court made numerous technical exceptions in order to preserve the concept of "liberty," so too the current Court has entwined itself in a hopelessly complicated doctrinal thicket in the name of content neutrality. The Court's manipulation of levels of scrutiny allows it to maintain that it is only applying content-neutral standards. All "policy" and "balancing" may be hidden under a preliminary technical inquiry into what level of scrutiny the Court will apply.[394]

2. Hate Speech. — (a) Introduction. — The original goal of the First Amendment libertarian thinkers, such as Chafee, and Justices Holmes, Brandeis, Rutledge, Murphy, Black, and Douglas, was to create a "pure" essentialist category of speech that courts could distinguish from conduct in a simple binary manner.[395] It would then be possible to raise speech to the level of a near absolute value regardless of its social consequences.

The first effort to expand speech to cover "conduct" occurred in the line of labor picketing cases culminating in *Thornhill v. Alabama*.[396] A "bright line" distinction between speech and conduct had been a staple of Justice Black's effort to develop an absolutist conception of the First Amendment that would nevertheless contain a clear limiting principle.[397] Over Justice Black's protests, however, the

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[393] *See* Robert F. Nagel, *How Useful Is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302, 326–34 (1984).

[394] *See generally* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48–50 (1987) (defining seven standards of review in content-neutral cases).

[395] *See, e.g.*, Cohen v. California, 403 U.S. 15, 27–28 (1971) (Blackmun, J., joined by Black, J., dissenting); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES *passim* (1946).

[396] 310 U.S. 88 (1940) (arguing that freedom of speech consists also of freedom of discussion). *Thornhill* was criticized as a revival of "substantive due process" under the First Amendment. *See* Robert G. McCloskey, *The Supreme Court Finds a Role: Civil Liberties in the 1955 Term*, 42 VA. L. REV. 735, 742 (1956) ("Without arguing the individual merits of the free speech cases . . . it must be conceded that they simplified an intricate problem and assumed, without arguing, that the Court could properly sit in judgment on the substantive power of the legislature . . . ."); *see also* Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 59–62 (suggesting that the Supreme Court refrain from further steps toward "re-establishing judicial review of laws infringing occupational freedom").

Note that Brown v. Louisiana, 383 U.S. 131 (1966), anticipated the collapse of the speech-conduct distinction. In that case, Justice Fortas emphasized that First Amendment rights "are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest." *Id.* at 142. This collapse of the speech-conduct distinction was already foreshadowed by the symbolic significance attributed to the flag salute in West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), which held that a flag salute was symbolic speech protected by the First Amendment, *see id.* at 642.

[397] Justice Black first drew the distinction in Giboney v. Empire Storage & Ice Co., 336

Court recognized the category "symbolic speech" in *Tinker v. Des Moines Independent Community School District*.[398] Although the recognition of "symbolic speech" rightly reflected the inadequacy of the speech-conduct distinction, the blurring of that distinction opened up the real possibility that, just as the *Lochner* Court had threatened to "propertize" or "contractualize" the world through the Fourteenth Amendment, this Court might end up having to include virtually everything under the First Amendment. Once action as well as speech came to be regarded as communicative, once "sticks and stones" could not easily be distinguished from "names that never harm me," what could not arguably come under the purview of the First Amendment?

This collapse of the distinction between speech and conduct developed in parallel with the efforts of the Burger and Rehnquist Court Justices to create a formal and neutral system of free speech doctrine that could escape from what it regarded as the "subjective" and "political" criteria of the Warren era. The only way to appear to avoid taking values into account in First Amendment jurisprudence is to create a "content-neutral" approach that substitutes the manipulation

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U.S. 490 (1949), in which he held that "conduct otherwise unlawful" does not gain First Amendment immunity "because an integral part of that conduct is carried on by display of placards by peaceful picketers," *id.* at 498. Justice Douglas echoed this speech-act distinction in his dissent in Dennis v. United States, 341 U.S. 494 (1951), in which he stated, "[W]e deal here with speech alone, not with speech *plus* acts of sabotage or unlawful conduct," *id.* at 584 (Douglas, J., dissenting), as did Justice Black in Barenblatt v. United States, 360 U.S. 109 (1959), in which he stated, "There are . . . cases suggesting that a law which primarily regulates conduct but which might also indirectly affect speech can be upheld if the effect on speech is minor in relation to the need for control of the conduct," *id.* at 141.

Justice Douglas also asserted, in Garrison v. Louisiana, 379 U.S. 64 (1964), that "[f]reedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it," *id.* at 82 (quoting Roth v. United States, 354 U.S. 476, 514 (1957)). Justice Douglas continued: "Unless speech is so brigaded with overt acts of that kind there is nothing that may be punished . . . ." *Id.* Justice Black also drew the distinction in Street v. New York, 394 U.S. 576 (1969), in which he dissented from overturning a criminal conviction in which the defendant chanted, in protest, "we don't need a flag" while burning an American flag, *see id.* at 610 (Black, J., dissenting). Justice Black stated:

> It is immaterial to me that words are spoken in connection with the burning. It is the *burning* of the flag that the State has set its face against. "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."

Id. (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)); *see also* Mishkin v. New York, 383 U.S. 502, 518 (1966) (Black, J., dissenting) ("I think the Founders of our Nation in adopting the First Amendment meant precisely that the Federal Government should pass 'no law' regulating speech and press but should confine its legislation to the regulation of conduct."); Griswold v. Connecticut, 381 U.S. 479, 508 (1965) (Black, J., dissenting) ("[S]peech is one thing; conduct and physical activities are quite another."); Cox v. Louisiana, 379 U.S. 536, 577 (1965) (Black, J., dissenting) ("A State statute . . . regulating *conduct* — patrolling and marching — as distinguished from *speech*, would in my judgment be constitutional . . . .").

[398] 393 U.S. 503, 505 (1969) (holding that wearing black arm bands as protest constituted protected "symbolic speech").

of neutral abstractions for making concrete value judgments. Such a "content neutral" approach, however, necessarily ignores what had originally been the central practical goal of modern First Amendment history: the use of free speech doctrine to "level the playing field" in order to provide economically or socially weak political dissidents with a chance to engage in political debate.[399]

The Court's treatment of the constitutional status of "fighting words" — which create injury or incite breaches of the peace — illuminates what the mix of "content neutrality" and obliviousness to social consequences has wrought. The view that "fighting words" were not protected by the First Amendment always stood as an important doctrinal limitation on absolutist speech ideas.[400] It tilted against "content neutrality" by insisting that the legitimacy of types of speech was properly a function of their social context. It stood against anti-consequentialism by insisting that certain kinds of harmful speech could be proscribed. Most importantly, the doctrine clearly recognized that, like action, words can sometimes cause major social harm.

Free speech activists during the 1950s rightly feared that the fighting words doctrine might legitimate a variety of repressive police measures involving rallies, marches, and labor organization.[401] It was clear that it would be difficult to challenge an on-the-spot police evaluation of the potential for danger to public order. As the Court became increasingly dogmatic about "content neutrality" as the center of free speech jurisprudence, however, the fighting words doctrine had the potential to serve as a useful check upon the Supreme Court's flight into abstraction and anti-consequentialism.[402] It offered the possibility of creating an island of content in a sea of content neutrality; an oasis of contextualism in a desert of increasingly abstract conceptualism about the meaning of the First Amendment. This pros-

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[399] *See Cohen*, 403 U.S. at 24–25 (stating that wearing a jacket with a sign that reads "fuck the draft" is not a criminal offense and is protected by the First Amendment); Whitney v. California, 274 U.S. 357, 378–79 (1927) (Brandeis, J., joined by Holmes, J., concurring) (interpreting clear and present danger standard to require "imminent" danger of "substantial" harm.

[400] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem."); Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940) ("Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution.").

[401] This is exemplified by Justice Black's "fear that the creation of 'tests' by which speech is left unprotected under certain circumstances is a standing invitation to abridge it." Konigsburg v. State Bar, 366 U.S. 36, 63 (1961) (Black, J., dissenting).

[402] The concurring opinions in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), criticized the majority for eliminating the "strict scrutiny" requirement and substituting in its place an absolutist conception of the First Amendment free from any balancing test that takes either content or context into account. *See, e.g., id.* at 2563 (Stevens, J., concurring in the judgment).

pect was dealt a fatal blow by the Court's decision the Term before last in *R.A.V. v. City of St. Paul*,[403] which represented the outer limit in protecting expression regardless of its social consequences.

(b) R.A.V *and* Wisconsin v. Mitchell. — Just as *Croson* represented a major escalation of this Court's tendencies toward equating "color blindness" and content neutrality,[404] the 1992 decision in *R.A.V.* carried the Lochnerization of the First Amendment to new levels of conceptual daring. In a 5–4 decision written by Justice Scalia, the Court struck down on First Amendment grounds a St. Paul ordinance that punished

> plac[ing] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.[405]

Before one jumps too quickly to characterize the case as one that concerns the constitutional validity of hate speech, it should be emphasized that the allegedly criminal activity in this case was the act of burning a cross on a black family's lawn, historically the first warning before acts of physical violence were unleashed. The Court framed the doctrinal question to turn on whether the State's conceded constitutional power to punish "fighting words" as unprotected speech justified an ordinance that singled out certain kinds of "fighting words," but not others. The Court held that it was unconstitutional to punish only a particular subset of fighting words based on their content.[406] Justice Scalia declared that "[c]ontent-based regulations are presumptively invalid."[407] Because the ordinance applied only to fighting words that insult, or provoke violence "on the basis of race, color, creed, religion or gender,"[408] it was unconstitutionally discriminatory.

In an attempt to explain the clear counter-instances in which the law does permit content-based distinctions, Justice Scalia wrote:

> When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of

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[403] 112 S. Ct. 2538 (1992).

[404] *See supra* p. 107.

[405] *R.A.V.*, 112 S. Ct. at 2541 (quoting ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990).

[406] *See id.* at 2553 (White, J., concurring in the judgment).

[407] *R.A.V.*, 112 S. Ct. at 2542.

[408] *Id.* at 2547.

> the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.[409]

Why should the prohibition of hate speech not also be treated as a subcategory of fighting words "neutral enough to form the basis of distinction within the class"? Like especially prurient obscenity, why not consider hate speech in our society to be "the most patently offensive" instance of "fighting words"? And like threats against the President,[410] which are treated as a subcategory of proscribable threats of violence, why, given the history of racial violence, is not there also "special force" in treating cross burning as an especially threatening example of fighting words?

Only through the manipulation of the scope of categories and classes is Justice Scalia able to distinguish the clear instances in which the law makes content-based distinctions to regulate different kinds of speech. How generally or particularly one describes the category "fighting words" will also ultimately determine how broadly or narrowly we characterize the reasons for the prohibition. How we describe the reasons will, in turn, determine whether hate speech is treated as a particularly egregious subcategory that can be singled out for punishment.

These categorical manipulations are an excellent example of how this Court regularly resorts to technical sleights of hand in order to maintain the appearance of neutrality. But as *R.A.V.* demonstrated, neutrality can only be an appearance. In its insistence upon neutrality, the *R.A.V.* majority ignored the reality of the case before it. Spurred on by its methodological obsession with "content neutrality" to protect the defendant's freedom to "symbolically" express his abstract ideas, the *R.A.V.* majority ended up shielding the defendant's rather concrete terrorist act of cross-burning on the lawn of a black family.

The impossibility of consistently living up to the demands imposed by abstract conceptualism quickly forced the Court to make a technical exception to its new mega-theory of "content neutrality." Thus, this Term the Court unanimously permitted the introduction of evidence of hateful intent for purposes of criminal sentencing by making an exceedingly fine distinction from *R.A.V.*

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[409] *Id.* at 2545–46. To illustrate his point, Justice Scalia continued:

> A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience* — i.e. that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages. And the Federal Government can criminalize only those threats of violence that are directed against the President since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President.

Id. at 2546.

[410] *See supra* note 409.

In *Wisconsin v. Mitchell*,[411] the Court upheld a penalty-enhancement statute that permitted increased sentences when a convicted criminal defendant "[i]ntentionally selects" a victim "because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person."[412] The Court distinguished *R.A.V.* by reasoning that, "whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression (i.e., 'speech' or 'messages,' [sic] the statute in this case is aimed at conduct unprotected by the First Amendment."[413]

Perhaps the *Mitchell* opinion may be interpreted as a satisfactory recognition that, one way or another, hateful expression may be punished as anti-social. Perhaps it is judicial statesmanship to bury recognition of the unpleasant practical consequences of abstract conceptualism in technical distinctions like those between expression and conduct, between rights and remedies, or between the substantive crime and its punishment. But because it hid the limitations of content-neutrality in the technicalities of criminal sentencing, *Mitchell* nevertheless still served to perpetuate the Lochnerization of the First Amendment.

CONCLUSION

The central problem of modern constitutionalism is how to reconcile the idea of fundamental law with the modernist insight that meanings are fluid and historically changing. One path, constitutional originalism, simply refuses to accept the modernist insistence on the changing nature of constitutional meaning. It turns instead to constitutional history or text in order to discover the timeless truths of constitutional meaning. In this picture, which has dominated the history of American constitutional discourse, there is only one true meaning of a constitutional provision. The discretion of judges is thus thought automatically capable of being limited by determinate answers to constitutional questions derived from studying history and text.

Originalism in constitutional theory is a form of legal fundamentalism that denies the legitimacy of changing constitutional meanings and thus resists any conception of a "living Constitution." Because originalism has been one of America's powerful forms of cultural legitimation, it has constantly threatened to bring constitutional change to a halt. Thus, one of the central issues of constitutional theory has been how to prevent constitutional law from becoming frozen, from — in a word — sliding from legal fundamentality into legal fundamentalism.

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[411] 113 S. Ct. 2194 (1993).

[412] *Id.* at 2197 n.1 (quoting WIS. STAT. § 939.645 (1989–1990).

[413] *Id.* at 2201.

For the present Supreme Court, the growing unease that modernism has spawned has been exacerbated by the apparent sudden defeat of the originalist crusade begun by the Reagan Administration with the aim of overruling *Roe*. The term before last, in *Casey*, the joint opinion of Justices O'Connor, Kennedy, and Souter presented a major rebuff to originalist ideas by offering a theory of when it is legitimate for the Court to produce fundamental constitutional change. As its models of legitimate overruling, the joint opinion turned to those twin peaks of modern constitutional law — the overrulings of *Lochner* and of *Plessy*. Compared to the justification for these overrulings, the joint opinion concluded, there was insufficient justification to overrule *Roe*.

Close analysis of the joint opinion's conception of when change in constitutional meaning is legitimate reveals, however, that the joint opinion's vision of the legitimate scope of constitutional change is much too narrow. This narrowness derived in part from a continuing attachment to originalist premises.

In addition, the effort of the joint opinion to escape from the confines of static originalism not only signals a major split in constitutional conservatism, but also reflects a genuine legitimacy crisis on the present Supreme Court. This Foreword examines the legitimacy crisis in the light of current constitutional theory and doctrine and concludes that the Supreme Court has returned to many of the forms of legal theory and legal reasoning reminiscent of the notorious *Lochner* Court. One of the most important manifestations of this return to Lochnerism is the recent turn to "color blindness" and "content neutrality," which has culminated in the Lochnerization of the First Amendment. Like the *Lochner* Court, this Court has increasingly sought to evade its legitimacy problems by resorting to "mechanical jurisprudence" — to highly technical formulae that permit the Justices to avoid coming to terms with the deepest challenges that modernism has presented.

On the other hand, any dynamic conception of constitutional fundamentality that can satisfactorily meet this modernist challenge needs to avoid the risk of enabling judges undemocratically to impose values. This Foreword's discussion of the history of "democracy" as a foundational concept in constitutional law presents glimpses of a potential model for a theory of a changing constitution that is capable of combining classical ideas of fundamental law with modernist conceptions of dynamic change. Until this Court meets the challenge of fully developing and adopting such a conception, its political conservatism will continue to steer it to identifying fundamentality with unchanging constitutional principles.