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The Anatomy of Constitutional Revolutions

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The Anatomy of Constitutional Revolutions

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I. INTRODUCTION

Contemporary constitutional theory rests on the mistaken assumption that judicial decisionmaking is a unitary activity.¹ This mistaken assumption is usefully called "the fallacy of unitary adjudication," or to coin a phrase, "the unitaristic fallacy" for short. Constitutional conventionalists, pragmatists and coherence theorists are all committed to this mistaken assumption, inevitably resulting in a serious failure to understand the nature of constitutional change.² The result of this failure is catastrophic. If we cannot recognize constitutional *change*, we cannot identify the current state of constitutional law. Consequently, we cannot know what the law *is* in a given case.

Constitutional conventionalists commit the unitaristic fallacy by insisting that judicial decisions are based solely upon explicit legal conventions about which there is a consensus in the constitutional community.³ Such theorists usually point to some well-accepted convention as the basis for constitutional interpretation. The conventionalist believes that since everyone agrees that the text,⁴ the framers'

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1. Constitutional jurisprudence is not alone in assuming the unitary or singular nature of adjudication. The common law, especially tort theory and contract theory, is committed to the same erroneous assumption. The obvious consequence of this mistaken assumption is the erroneous conclusion that legal methodology is similarly unitary.
 2. One presupposition of this enterprise is that constitutional jurisprudence and legal philosophy generally must take legal *change* more seriously. Constitutional practice is not a fixed system. Rather, it is designed to change and evolve. See J. DEWEY, RECONSTRUCTION IN PHILOSOPHY 61 (1920) (describing change as the measure of reality). See also A. MILLER, TOWARD INCREASED JUDICIAL ACTIVISM 177 (1982) (arguing that constitutional law is paradoxically another name for constitutional change).
 3. Textualism and originalism are examples of constitutional conventionalism. See *infra* notes 4-5. Conventionalism is an interpretive version of legal positivism, i.e., it is a positivist conception of legal practice designed to show that practice in its best light. Positivism is a legal theory that attempts to discover necessary and sufficient conditions for the existence of a legal system. Typically, contemporary positivists explain law as a system of rules. See H.L.A. HART, THE CONCEPT OF LAW (1955); H. KELSEN, GENERAL THEORY OF LAW AND STATE (1946). A standard feature of positivism is the separation of law and morality. See J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 184 (1954) (arguing that "[t]he existence of a law is one thing; its merit or demerit is another").
Conventionalism maintains "that collective force should be trained against individuals only when some past political decision has licensed this explicitly in such a way that competent lawyers and judges will all agree about what that decision was, no matter how much they disagree about morality and politics." R. DWORKIN, LAW'S EMPIRE 144 (1986). In this view, "legal practice, properly understood, is a matter of respecting and enforcing [legal] conventions." *Id.* at 115. Legal conventions are the agreed-upon sources of law such as statutory and judicial authority. In novel cases, in which there are no conventions, judges must use their discretion to make law. *Id.*
 4. Textualism and intentionalism or originalism dominate contemporary discussions of constitutional conventionalism. Textualism holds that constitutional meaning

intent,⁵ the history, structure and logic⁶ of the Constitution are rele-

is determined by the words of the constitutional text. *Sturges v. Crowningshield*, 17 U.S. (4 Wheat.) 70, 106 (1819)("[A]lthough the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words."). In distinguishing between textualism and originalism, I depart from custom. Ordinarily, the term originalism, or interpretivism, includes textualism and intentionalism. See, e.g., Brest, *The Misconceived Quest for Original Understanding*, 60 B.U.L. REV. 204 (1980). I depart from custom because textualism presents a model of ascertaining a text's meaning that is appealing because it appears automatic. To know what a text means, just read it. Consequently, to understand the Constitution, or to determine whether a statute is constitutional, just read the statute and compare it with the Constitution. Consider, for example, the following:

The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is involved beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and having done that, its duty ends.

United States v. Butler, 297 U.S. 1, 62 (1936).

This method, if viable, provides an apparently mechanical and neutral way to determine meaning. Textualism, however, cannot explain the meaning of open-textured or indeterminate provisions. In that event, we then have the following choice. Where the text fails to determine a constitutional choice, we may either remain silent or seek a supplemental method for determining constitutional meaning. See Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683 (1985)(evaluating recent attempts to formulate a textualist model).

5. Originalism or intentionalism contends that when the text is insufficient to supply constitutional meaning, the only other legitimate avenue is to interpret the recalcitrant clauses according to the framers' original understanding of the Constitution. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). Originalism is an interpretive methodology in Dworkin's sense of the term. See R. DWORKIN, *supra* note 3. In this sense it has more in common with other interpretive methodologies, such as non-originalism, than it does with textualism. On the other hand, originalism also seeks a relatively neutral mechanism for understanding the Constitution. In this regard, it is closer to textualism than it is to non-originalism. Theoretically, textualism and originalism can be viewed as one theory which states that the framers' intentions control constitutional meaning. Textualism then states that the text provides conclusive evidence of the framers' intentions. Originalism states that evidence of their intentions can be determined from extra-textual sources. In this regard, textualism and originalism are inextricably interwoven. See Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 831 n.159 (1982). See also R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) (weaving together textualist, structuralist and intentionalist threads to create a novel brand or originalism).
6. History is relevant to constitutional interpretation by revealing the objective forces at work in creating the Constitution. Structuralism insists that the formal structure of the Constitution, and the government it creates, determines the

vant to interpretation, these conventions should exhaust constitutional methodology.⁷ An underlying presupposition of this view is that constitutional interpretation should be objective and not depend upon the particular moral or political convictions of particular judges.⁸ Appealing to explicit constitutional conventions in judicial interpretation is designed to achieve objectivity.

Traditional constitutional pragmatists commit the unitaristic fallacy by exhorting judges to always make the best moral or political decision he or she can in a given case.⁹ Consequently, the pragmatist's

meaning of constitutional provisions. For example, this structure includes the concepts of the separation of powers and federalism. C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). Structuralism contends that constitutional meaning and the resolution of constitutional questions derive from "inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures. . . . Structural arguments . . . depend on deceptively simple logical moves from the entire Constitutional text rather than one of its parts." P. BOBBIT, *CONSTITUTIONAL FATE* 74 (1982). We should distinguish structuralism from a view that permits inferring implicit rights from the logic of particular constitutional provisions. For example, the right to listen to a speech is implied by the structure of the first amendment. Easterbrook, *Implicit and Explicit Rights of Association*, 10 HARV. J.L. & PUB. POL'Y. 91, 100 (1987). Here, the implicit right is derived from the "logic" of the first amendment. Appeals to "logic" are conventionalist strategies.

7. There are at least two additional forms of constitutional adjudication exhibiting *some* conventionalist features: passivism and essentialism. Constitutional passivism recognizes the necessity of limited judicial interference with the democratic processes of government. To restrict constitutional adjudication, passivism proposes restrictions on the circumstances under which the Court can hear a case. See A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (describing the general motive for passivism).

Essentialism is my term for theories that derive constitutional meaning from particular conceptions of the essential nature of the Constitution. For example, Professor Ely contends that political participation is the essential component of the Constitution. Hence, the Supreme Court is justified in intervening in the political process when, and only when, judicial review will strengthen political participation. See J. ELY, *DEMOCRACY AND DISTRUST* (1967). See also R. DWOR-KIN, *supra* note 3.

8. For example, advocates of judicial restraint and positivists regard the concept of legislative intent as a legitimate convention "because [it] appear[s] to provide an empirical, historical, and legal answer that does not depend upon moral judgments." Kress, *The Interpretive Turn*, 97 ETHICS 834, 846 (1987).
9. Constitutional pragmatism contends that the point of judicial decisions is to solve contemporary problems in terms of the best conception of our constitutional democracy. Consequently, a constitutional pragmatist will endorse a strong principle requiring affirmative action even if she concedes that such a principle cannot be discovered by using ordinary constitutional conventions. Michelman's contention that welfare rights should be constitutionally guaranteed or Karst's proposal to view constitutional law in terms of certain feminist theories are examples of constitutional pragmatism. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659; Karst, *Women's Constitution*, 1984 DUKE L.J. 447. Often traditional pragmatism involves the balancing of competing values in

vision does not include consistency with the past for its own sake.¹⁰ A concern for the past should be honored if it leads to the best future; if not, it should be abandoned.

The unitaristic fallacy is evident in the coherence theorist's contention that correct judicial decisions can always be explained in terms of moral or political principles inherent in constitutional practice.¹¹ According to this view, a judge's duty is to ferret out these principles from prior cases, statutes, constitutions and administrative rules, formulate them clearly and apply them to the present case. Coherence theorists believe that the *sine qua non* of constitutional law is its consistency, reflection and extension of the past's essential vision.

Each jurisprudential theory offers its preferred model as the *sole* basis of judicial decisions.¹² This Article's thesis is that no unitary model can adequately explain¹³ and justify constitutional practice.¹⁴

order to bring about the society's best future. See *infra* notes 49-71 and accompanying text.

Some forms of non-originalism have a pragmatic dimension. Non-originalism maintains that constitutional meaning may be derived from a contemporary understanding of the provisions involved. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 2 (1984)(arguing that there are supplemental sources of constitutional law). See also M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* (1982)(modern constitutional decisions are a species of policymaking made without reference to any value judgment constitutionalized by the framers).

10. But see Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1344 (1988)(arguing that pragmatism holds that consistency with the past is "a necessary ingredient in all human reasoning").
11. To date, Ronald Dworkin's law as integrity is the most influential and carefully argued coherence theory. In some places, Lawrence Tribe exhibits a sympathy for coherence theories. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1421-35 (2d ed. 1987). For other discussions of coherence theory see Fallon, *A Constructivist Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987). See also Chang, *Conflict, Coherence and Constitutional Intent*, 72 IOWA L. REV. 753 (1987); Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactively, and the Linear Order of Decisions*, 72 CALIF. L. REV. 369 (1984)(criticizing Dworkin's coherence theory).
12. Some scholars might insist that conventionalism, pragmatism and coherence are theories of "hard cases," not *general* jurisprudential theories at all. Consequently, as theories of "hard cases," these theories recognize the dualistic character of constitutional adjudication. Even so, such "dualist" theories merely pay lip service to the different types of constitutional adjudication without showing how these different types are structurally interrelated.
13. The point here is that traditional unitary theories of constitutional adjudication fail to explain actual practice. Unitary theories either take the explanatory dimension of constitutional theory too seriously, or not seriously enough. Consequently, a conventional unitary theory insists that judges should stick close to the actual decisions in a series of cases. Pragmatist theories permit judges to ignore the actual decisions. Conventionalist theories, therefore, cannot explain the pragmatic choices that result in radical constitutional change, while pragmatic theories cannot explain slower, more organic change.
14. Describing constitutional adjudication as unitary does not suggest that it is monis-

Instead, conventionalism, pragmatism and coherence each reflect different movements in the unified structure of constitutional adjudication. A candid, unbiased look at the way constitutional adjudication actually operates¹⁵ reveals a jurisprudential theory that integrates these models, revealing each model's appropriate place in the constitutional landscape.¹⁶ Such candor¹⁷ enables us to formulate a dualistic theory¹⁸ of constitutional adjudication, recognizing two conceptually

tic. A unitary theory says that whenever a judge decides a case he uses the same process. A judge uses this process whether it involves one or several factors, such as, text, intent, theory, precedent or moral and political values. Hence, a unitary theory might include a pluralistic model for deciding cases. The theory presented in this Article is dualistic, describing two different, but interrelated, periods of constitutional adjudication. Lipkin, *Conventionalism, Pragmatism and Constitutional Revolutions*, 21 U.C. DAVIS L. REV. 645, 729-57 (1988). Cf. L. TRIBE, *supra* note 11, at 1-2 (describing seven basic models of constitutional adjudication). The dualism I have in mind applies to each of Tribe's models.

15. A candid, unbiased look at constitutional adjudication requires taking the history of constitutional adjudication seriously. Taking this history seriously reveals that "[o]ur judges have, as a matter of unarguable historical fact, developed a body of unwritten constitutional law—doctrine whose normative content cannot be derived from examining the language of the Constitution or investigating the intent of its framers." Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 844 (1978). Furthermore, it requires that we study the Constitution or constitutionalism as it actually operates, not as a particular ideology would have it operate. See A. MILLER, *POLITICS, DEMOCRACY, AND THE SUPREME COURT* 345 (1985). Taking history seriously in constitutional theory simply involves a commitment to describe constitutional adjudication as we describe other social practices. A corollary to this commitment is the view that such descriptions can reveal novel constitutional theories, capable of revising and refining our understanding of constitutional practice. See also Komesar, *A Job for Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657 (1988) (describing institutional analysis to determine the proper role for judges in our constitutional scheme).
16. On the view presented here, there are important structural interdependencies between and among the different types of adjudication. Consequently, the dualist theory offered here is not a mere amalgam of the different types of jurisprudential models. Instead, it integrates and describes the relationship among the different models. In short, this theory explains how each model affects and is affected by the other models, and how this interaction accounts for constitutional change.
17. Although my enterprise includes a normative component, I first want to determine just how constitutional adjudication actually works. My hunch is that we will abandon a unitary model of constitutional adjudication once we candidly look at actual constitutional practice. Cf. TenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 27 CALIF. L. REV. 399, 410 (1939) (arguing that "[w]e must conclude that any theory which . . . denies the proper influence of the altering factual world upon the meaning of the document . . . is an utterly false portrayal of what the Supreme Court actually does").
18. Some writers have detected the non-unitary complexity of constitutional evolution. Ackerman, for instance, contends that there are two forms of politics: higher and normal. Normal politics for Ackerman is the familiar clash of self-interested parties and probably depicts legislative activity more than judicial activity. Higher politics involves discovering the politics of the common good and

distinct, though related, movements:¹⁹ revolutionary adjudication²⁰ and normal adjudication.²¹ The name of this dualistic theory of constitutional adjudication is "the theory of constitutional revolutions."²² This Article describes and defends the theory of constitutional revolutions²³ and elaborates the implications this theory has for the jurisprudence of constitutional law.

public virtue. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022-23 (1984).

Iredell Jenkins describes a triadic conception of law. According to his view, law "always has the three tasks of preserving continuity with the established order, providing for the emergence of new forces and purposes, and directing the passage toward a future order." I. JENKINS, *SOCIAL ORDER AND THE LIMITS OF LAW (A THEORETICAL ESSAY)* 214 (1980).

There is a similarity between the view expressed in this Article and Gilmore's eloquent characterization of the relationship between classicism and romanticism. As Gilmore stated:

During the classical periods, which are, typically, of brief duration, everything is neat, tidy and logical; theorists and critics reign supreme; formal rules of structure and composition are stated to the general acclaim. During classical periods, which are, among others things, extremely dull, it seems that nothing interesting is ever going to happen again. But the classical aesthetic, once it has been formulated, regularly breaks down in a protracted romantic agony. The romantics spurn the exquisitely stated rules of the preceding period; they experiment, they improvise; they deny the existence of any rules; they churn around in an ecstasy of self-expression. At the height of the romantic period, everything is confused, sprawling, formless and chaotic—as well as, frequently, extremely interesting. Then, the romantic energy having spent itself, there is a new classical reformulation—and so the rhythms continue.

G. GILMORE, *THE DEATH OF CONTRACT* 102 (1974). Classical periods correspond to normal adjudication, while romantic periods are similar to revolutionary adjudication.

19. One might object that these movements are not really distinct, but instead represent different points on a continuum. Some forms of adjudication are closer on the continuum to revolutionary adjudication, while others are closer to normal adjudication. Every piece of adjudication, so the argument goes, is partly revolutionary and partly normal. Two replies are immediately in order. First, for this objection to be persuasive it must show that it is impossible for any case to be exclusively revolutionary or exclusively normal. Such a demonstration is unlikely. Second, even if this can be shown, the objection itself depends upon the distinction between revolutionary and normal adjudication.
20. See *infra* notes 147-60 and accompanying text.
21. See *infra* notes 161-76 and accompanying text.
22. The theory of constitutional revolutions was first described and defended in Lipkin, *supra* note 14, at 729-57 (describing two different, but interrelated periods of constitutional adjudication). I characterize the theory as a theory of *constitutional revolutions* for purposes of exposition. In fact, it is a theory of the structural relationships between revolutionary and normal constitutional adjudication as well as the interdependencies of various kinds of normal adjudication.
23. This Article is concerned only with revolutionary constitutional *adjudication*. This does not mean that constitutional revolutions are effected only by the courts. The executive and legislative branches also engage in constitutional revolutions. See A. MILLER, *supra* note 2, at 177.

In Part II of this Article, I present the theory of constitutional revolutions, a theory involving a dualistic conception of constitutional methodology. Part III illustrates how the theory of constitutional revolutions explains some of the Marshall and Warren Courts' critical revolutionary cases. In Part IV, the Article demonstrates how important controversies in constitutional jurisprudence can be fruitfully reinterpreted and resolved by applying the theory of constitutional revolutions. Finally, in Part V, the theory of constitutional revolutions demonstrates the futility of relying exclusively on coherence theories when interpreting constitutional law.

II. THE THEORY OF CONSTITUTIONAL REVOLUTIONS

A. The Classical Conception of Constitutional Adjudication

The theory of constitutional revolutions opposes a familiar rationalistic picture of constitutional change.²⁴ On this view, there exist neutral,²⁵ objective²⁶ and coherent principles²⁷ that express the meaning of explicit constitutional provisions.²⁸ These principles, according

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24. The classical conception of law contends that there are correct judicial procedures for settling legal conflicts. Typically, the classical conception includes some of the following conditions: law is rationally grounded; legal principles are intersubjectively valid; legal conflicts have correct, determinate answers; and law represents a domain of human practical reasoning that is sufficiently distinct from ethics and politics to be called autonomous. See Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986).
 25. In constitutional law, the virtue of neutrality is advocated most eloquently by Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959). But see Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1982).
 26. The quest for objectivity is a motive for seeking legal standards that are independent of the judge's personal values. A judge does not decide a case objectively when he reads his personal values into the law. However, we must distinguish between the judge's personal values and public, defensible values that the judge holds personally. Bennett, *Objectivity in Law*, 132 U. PA. L. REV. 445, 477 (1984).
 27. See *infra* notes 361-426 and accompanying text.
 28. In fact, this familiar conception of law is really a spectrum of related conceptions. At one end of the spectrum there is "mechanical jurisprudence," holding that formal legal rules will generate particular answers to legal questions. See L. FRIEDMAN, *LAW AND SOCIETY* 94 (1977). At the other end of the spectrum is the view that legal decisions must be principled. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 87 (1979) (insisting that constitutional argument must be principled and based on reason); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981). To oppose the view that legal decisions must be principled is not to endorse arbitrariness in legal reasoning. Rather, it is a call to recognize the futility in seeking a consensus concerning what counts as a "principle." Moreover, most theories concerning how principles generate legal results are marginally true at best. See Lipkin, *supra* note 14, at 685 n.124. Most importantly, one need not be totally disenchanted with principle and consistency to acknowledge that an excessive concern with either distorts legal and moral reality. See Coons,

to the familiar picture,²⁹ can be produced by a unique form of reasoning concerning the text, intent, history, structure or logic³⁰ of the Con-

Consistency, 75 CALIF. L. REV. 59 (1987)(criticizing consistency as an ideal and recommending instead the prudent use of inconsistent outcomes); Murphy, *Dworkin on Judicial Discretion: A Critical Analysis*, 21 U.C. DAVIS L. REV. 767, 784 (1988)(arguing that judicial discretion cannot be explained by an appeal to principle); Shiffrin, *Radicalism, Liberalism and Legal Scholarship*, 30 UCLA L. REV. 1103 (1982)(arguing against Dworkin's devotion to fundamental general principles in political philosophy). The defect in mechanical conceptions of judicial reasoning is that the judge is viewed as a technician, a mechanic, capable of starting the engine but not influencing its operation. See Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 U. ILL. L. REV. 9, 96-98 (1922). Even theories like Dworkin's that recognize the role of moral and political theory in adjudication depict judges as discoverers, not inventors. Cf. M.R. COHEN, *LAW AND SOCIAL ORDER* 112 (1933)(arguing that had judges never made law, the common law could never have developed and changed).

My conception of "mechanical jurisprudence" refers to any conception of adjudication that does not take into account the judge as an independent a moral evaluator, or, pardon the term, a moral philosopher. If true, we should be more concerned with the purely philosophical and theoretical credentials of judges than whether they are in the mainstream. Applying this criterion, Robert Bork would still be disqualified as a Justice of the Supreme Court. He is no doubt a respected legal *scholar*. However, he does not pretend to be, nor is he, a moral or legal *philosopher*. Perhaps, we should consider appointing as Justices people such as Hart, Dworkin, Unger, Finnis, Morris, Moore, Wasserstrom, Radin and Cornell. Some Supreme Court Justices have been legal academics, but no Justice has ever been a *bona fide* legal, moral or political philosopher. See Freund, *Umpiring the Federal System*, 54 COLUM. L. REV. 561, 574 (1954)(stating that a Supreme Court Justice should be a philosopher, but not too much of a philosopher).

29. This familiar picture refers to "explicit constitutional conventions" as one model of constitutional meaning. By "explicit constitutional conventions" I mean those constitutional provisions that are uncontroversial. These conventions are what Bickel referred to as the "manifest constitution." A. BICKEL, *THE MORALITY OF CONSENT* 30 (1975). Here, Bickel argues that there is a moral obligation to obey the manifest constitution. Bickel tells us, for instance, that the President cannot decide to stay in office for six rather than four years. "To deny this idea is in the most fundamental sense to deny the idea of law itself." *Id.*

However, this proposition does not explain how the imperial presidency acquired its place in our constitutional structure. Surely, the office of president today has much greater power than that anticipated by the framers. See Schlesinger, Jr., *After the Imperial Presidency*, 47 MD. L. REV. 54, 70 (1987)(arguing that the framers explicitly rejected the notion that the executive have sole responsibility for foreign policy). Nor are these powers derived from the manifest constitution. Does the imperial presidency deny the idea of law itself? What Bickel fails to recognize is that many fundamental changes in constitutional law have occurred without either "judicial" or formal amendment. Does that mean that the Korean or the Vietnam Wars were necessarily unconstitutional because they were not declared wars? Only an ideological view totally distorting constitutional reality would insist that we answer in the affirmative.

30. One question constitutional conventionalists try to avoid is whether it is possible to deploy these interpretive devices independently of moral and political theory.

stitution.³¹ In principle, this form of reasoning is capable of establishing *true* legal propositions.³² The classical conception of law maintains that legal reasoning is not reducible to other modes of discourse such as politics, ethics, economics or sociology.³³ The entire constitutional landscape—including Supreme Court decisions, constitutional scholarship and constitutional education in law school—adopt some part of this familiar view.³⁴

Adopting the classical view³⁵ does not entail Langdellian formalism³⁶ any more than repudiating it entails legal realism.³⁷ The classical view, however, has some of the same deficiencies as formalism.

31. See Schauer, *Precedent*, 39 STAN. L. REV. 579, (1987). See also Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988).

32. Some versions of the classical conception of law insist that there are uniquely correct answers to constitutional questions. Other versions of the classical conception contend that constitutional reasoning can reduce the field of possible answers, but only in rare instances can it determine one uniquely correct answer. Importantly, the question of whether there are uniquely correct answers to constitutional problems goes to the heart of the issue of legal skepticism. It could be argued that if there are unique answers to constitutional questions, constitutional theory avoids skepticism. Here, we must make an important distinction between conceptual and epistemological skepticism. Conceptual skepticism denies the possibility of providing a coherent definition of truth in law. Epistemological skepticism is weaker, maintaining that although we can provide a coherent definition of truth in law, we can never know whether a legal proposition is true. For example, suppose I say that a legal proposition is true if it follows from the best abstract theory of politics. In providing this definition, I am resisting conceptual skepticism. However, unless I can show which is the best abstract theory of politics, my definition of truth in law moves me closer to epistemological skepticism. In this case, although I may know what it means to say that a legal proposition is true, I can never know when or if it is true since I do not know which is the best abstract theory of politics. See Lipkin, *supra* note 14, at 697-98.

33. A reductionist legal theory maintains that law, as a system of propositions, can be replaced by an alternative system without loss of meaning. There are several different types of reductionist theories. Some reductionist theories, such as law and economics, apparently seek a near total replacement of law by economic theory. Other theories, such as law as integrity, apparently contend that law is partially reducible to ethics and politics.

34. I have described only the formal component of the classical conception of law. Occasionally, this conception has a substantive component, namely, the maximization of liberty. For a discussion of this conception of law see the discussion of Panel I in Barry, *The Federalist Society Sixth Annual Symposium on Law and Public Policy: The Crisis in Legal Theory and the Revival of Classical Jurisprudence*, 73 CORNELL L. REV. 283-310 (1988) [hereinafter cited as *Symposium*].

35. The classical conception of law is predicated on the notion that judges do not govern, but regulate. As Justice Brewer remarked, "The court . . . makes no laws, they establish no policy, they never enter the domain of public action. They do not govern." Brewer, *The Nation's Safeguard*, in PROCEEDINGS OF THE N. Y. STATE BAR ASSN. 46.

36. Langdellian formalism contends that an indefinite number of legal problems can be resolved by applying a distinct number of legal concepts and rules. According to this view, the essence of law is its logical form and principles of reasoning. Law is a formal science the principles of which can be extrapolated from case

Both views obscure the dualistic dimension of constitutional adjudication.³⁸ Similarly, both the classical view and formalism obscure the

decisions. C. LANGDELL, *STILL CASES ON CONTRACTS* at vi (1971); C. LANGDELL, *BRIEF SURVEY OF EQUITY JURISPRUDENCE* 220 (1905).

More contemporary conceptions of formalism insist minimally on a separation of law and policy. See Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988). Formalism holds that "the law must be internally consistent and self-contained." *Id.* at 382. See also Schauer, *Formalism*, 97 YALE L.J. 509 (describing some of the virtues of formal rules restricting judicial choice); Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985) (criticizing certain "formalistic" solutions to the countermajoritarian challenge in constitutional theory); Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431, 434 (1985) (arguing that "doctrinal formalism" is a desirable and essential feature of constitutional jurisprudence).

37. Legal realism maintains that we must study legal phenomena from a scientific point of view. The legal realist seeks to discover the causes and effects of legal phenomena. Bingham, *What is Law?*, 11 MICH. L. REV. 1, 9 (1912). Legal realists deny the existence of an irreducibly internal point of view consisting of rules, principles, arguments and reasons. The internal point of view maintains that legal rules function as critical standards of conduct for participants in a social practice. H.L.A. HART, *supra* note 3, at 55. The external perspective emphasizes the view of a non-participatory observer concerned with describing regularities in behavior.

One must bear in mind that legal realists are a diverse group and no simple definition captures the richness of their views. See generally W. RUMBLE, JR., *AMERICAN LEGAL REALISM* (1968). Realism is usually characterized as abandoning a conceptual or theoretical view of the law and instead seeking principles that would allow one to predict judicial decisions, thereby gaining some control over social and political life. See T. BENDITT, *LAW AS RULE AND PRINCIPLE* 11-16 (1978).

Although there were many significant differences between the Langdellian formalists and legal realists, their views share a structural similarity. Both of these perspectives were committed to the mistaken position that there was a science of law. Consider Gilmore's views:

The Legal Realists of the 1930s embraced the fallacy quite as enthusiastically as the Langdellian formalists. As a group, the Realists unquestioningly accepted the idea of the "one true rule of law" which was waiting to be discovered if only the search was conducted in the right way. Realist jurisprudence proposed a change of course, not a change of goal.

G. GILMORE, *THE AGES OF AMERICAN LAW* 100 (1977).

The theory of constitutional revolutions differs from legal realism in that the former adopts both an internal and external perspective toward constitutional questions, while legal realism adopts only an external perspective. See *infra* note 40. One feature the theory of constitutional revolutions shares with legal realism is that both theories are committed to "accurate recording of things as they are, as contrasted with things as they are imagined to be, or wished to be, or as one feels they ought to be." Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

38. This Article embraces a skeptical view concerning the existence of a distinctive form of legal reasoning. See Posner, *supra* note 31, at 859 (arguing that "[t]here is no distinctive methodology of legal reasoning"). Progress in constitutional theory will be impeded until we recognize that there is no distinctive form of constitutional reasoning. Instead, constitutional reasoning is just a special kind of practical reasoning.

role interpretation plays in legal theory.

B. The Interpretive Turn

Recently, legal theory has taken the interpretive turn.³⁹ Essentially, the interpretive turn insists that meaning does not inhere in a text waiting to be discovered.⁴⁰ Instead, a text's meaning is a function of the author's intent, its sentences and the interpretive resources brought to the text⁴¹ by the reader. The reader's goal is to apprehend the text's point or meaning.⁴² In the case of a mature constitution, the interpreter must also apprehend the point of the judicial decisions interpreting the document. A clear, well-accepted interpretation of a foundational constitutional provision plays a special role in this process; until overruled, it represents the final word on the meaning of the provision.

The interpretation of constitutional provisions and subsequent judicial decisions involve a subtle interplay of explanatory and justificatory factors. For a judge to decide a case, she must construct a principle that fits with or explains the prior judicial decisions.⁴³ A

39. See Lipkin, *supra* note 14, at 657-61. See also Kennedy, *The Turn to Interpretation*, 58 S. CAL. L. REV. 251 (1985) (characterizing the interpretive turn as a liberal response to left wing legal theory).

40. The interpretive turn emphasizes the interpreter's perspective.

41. Interpretation, of course, is not restricted to written text. We also interpret sounds, sights and social practices.

42. See R. DWORKIN, *supra* note 3, at 47.

43. One argument against the possibility of explaining case law is that legal principles are indeterminate. See Tushnet, *supra* note 4, at 683, 685. In reply, some scholars maintain that "theorists who matter least are those who find language so indeterminate that any text can mean almost anything. These theorists seem to assume that a statute is not essentially different from a poem. They deny one of the fundamental premises of the polity, [that we try to govern ourselves with legal texts, not town meetings or Platonic guardians], and consequently make themselves irrelevant." Laycock, *Constitutional Theory Matters*, 65 TEX. L. REV. 767, 773-74 (1987).

There are several objections to these remarks. First, no serious observer can argue that *poems* can mean anything at all. For example, imagine someone suggesting that the most obvious interpretation of Hamlet's famous soliloquy is that it is an attempt to determine whether two plus two equals four, or whether it is possible to square the circle. More importantly, it is far from obvious that a society operating with a Platonic guardian or a town meeting could dispense with interpretation. The problem of interpretation affects these methods of government just as much as it affects a society operating with texts. Finally, of course, it is foolish to contend that constitutional or statutory language is so indeterminate as to mean anything at all. Our Constitution cannot be seriously viewed as the foundation of a constitutional monarchy or theocracy. Moreover, it cannot be interpreted as creating Hitlerian fascism or Stalinism. However, within certain parameters, key provisions of our Constitution can be interpreted in conflicting ways. For example, the equal protection clause can be interpreted in Nozickian or Rawlsian terms, or even in terms of radical egalitarianism.

The problem with the indeterminacy argument is that it needs to be spelled

principle explains prior judicial decisions when the present judge can use that principle to replicate those decisions. In seeking explanatory principles, the judge adopts an internal perspective, that is, she evaluates competing principles as a socialized participant in our system of law.⁴⁴

The justificatory role of interpretation shows what is good or attractive about prior decisions. For instance, if two principles explain equally well a series of cases, a judge should choose the principle which portrays the practice in the best moral and political light.⁴⁵ The interplay of explanatory and justificatory elements of interpretation is not limited to cases where there are two equally proficient explanatory principles. Often one principle provides a better explanatory account of a series of cases, but loses out to a less proficient explanatory principle because the latter provides a better justification of the practice. Conservative and progressive approaches to interpretation differ over the relationship between explanation and justification. Conservative approaches generally require a much higher explanatory threshold, while progressive approaches require only a minimal explanatory fit when evaluating an especially attractive justification. Interpretation, to put the point differently, may be narrow or broad. Narrow interpretations stick closer to the actual constitutional conventions, while broader interpretations transcend these conventions.

The interpretive turn takes constitutional change seriously and therefore is conducive to the task of identifying constitutional revolutions.⁴⁶ Constitutional revolutions are statements of principle that do not, in any obvious manner, flow from the Constitution or Supreme Court decisions. These decisions are pragmatic⁴⁷ choices which are derived from principles of morality and politics, not from well-accepted legal sources.⁴⁸

out in greater detail. Does it rule out the possibility of constraints on interpretation? If not, is this a sufficient response to the indeterminacy argument? If textual meaning is fundamentally cultural, constraints may exist that defeat or dissipate the force of the indeterminacy argument. Cf. White, *Thinking About Language*, 96 YALE L.J. 1960, 1973 (1987) (describing meaning as cultural and communal and residing in a background of unstated assumptions).

44. See H.L.A. HART, *supra* note 3.

45. R. DWORKIN, *supra* note 3, at 52.

46. Because "[l]egal interpretation is never *just* exposition of an 'existing' principle; it is also a positing of the very principle it reads into the case law through the enunciation of the 'should be' inherent in the justification of principles." Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135, 1144 (1988).

47. See *infra* notes 49-71 and accompanying text.

48. Dworkin insists it is a mistake to argue that legal principles must be derived from well-accepted legal conventions. According to his view, such principles are derived from the underlying scheme of principles that explain and justify our constitutional practice. The problem with this view is that if there is no way of guaranteeing agreement concerning the principles contained in that scheme, we

C. The Pragmatic Turn

In this Article, the term "pragmatic legal theory" refers to any theory maintaining that judges should "tr[y] to do what is morally correct in each case."⁴⁹ Legal pragmatism has a prospective dimension counselling judges to "make whatever decisions seem to them best for the community's future, not counting any form of consistency with the past as valuable for its own sake."⁵⁰ Pragmatism⁵¹ counsels judges to

are committed to legal justificatory solipsism. That is, we are committed to a view that 'reason' functions only in an egocentric context in which an individual judge determines the fundamental justificatory principles underlying our system of constitutional law. See Lipkin, *supra* note 14, at 698. Once an individual judge determines which justificatory principles to choose, that ends the matter. There are no inter-subjective principles for choosing one judge's decision over the others.

49. Alexander, *Striking Back at the Empire: A Brief Survey of Problems in Dworkin's Theory of Law*, 6 LAW & PHIL. 419, 432 (1987)(arguing against Dworkin's characterization of legal pragmatism as the view that judges should try to "advance the community's goals in each case").
50. R. DWORKIN, *supra* note 3, at 95. Coercion is justified by showing how it contributes to making "the community's future brighter, liberated from the dead hand of the past and the fetish of consistency for its own sake." *Id.* at 151. Non-pragmatic legal theories, such as conventionalism and coherence theories, contend that a judicial decision is sometimes justified simply because it follows from legal authorities, such as precedent, not because it has any substantive merit as the best decision.

Pragmatism, as a legal theory, has other meanings. A pragmatic approach to law can be concerned with making legal decisions on a case-by-case basis rather than enunciating sweeping legal principles. Pragmatism can be understood as common sense decisions not guided by logic or theory. Another kind of pragmatism holds that reason, as opposed to sentiment, is inappropriate to explain legal practice. Pragmatism might also refer to a consequentialist or utilitarian approach to ethics and political theory. For an illuminating discussion of pragmatism in English law see generally P. ATIYAH, PRAGMATISM AND THEORY IN ENGLISH LAW (1987). See also R. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 20-22 (1982)(describing pragmatic instrumentalism). One brand of pragmatism concerns itself with reason as opposed to tradition, seeking change based on reason and experience rather than depending upon formal structures in legal theory. R. SUMMERS, PRAGMATISM, STATESMANSHIP AND THE SUPREME COURT 40-41 (1977). Pragmatism may also be described as "the view that the ultimate test is always experience." Farber, *supra* note 10, at 1341. Some forms of pragmatism contend that there are usually diverse perspectives on any issue. Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U.L. REV. 541, 587 (1988).

My use of "pragmatism" maintains only that judicial decisions should be evaluated in terms of whether the decision would make a positive contribution to the community's future. Other meanings of the term might be pragmatic in this sense, but I am not committed to endorsing any other judicial strategy. In my view, a pragmatic theory might embrace principles or theories; it can be monistic or pluralistic. A pragmatic theory of law can include consequentialistic or non-consequentialistic conceptions of what is right and what is good. Therefore, the type of pragmatic theory I am concerned with should not be confused with "pragmatic instrumentalism," which is an essentially consequentialist legal theory.

evaluate a legal decision in terms of how it contributes to bringing about this goal.⁵² On a pragmatic view of adjudication, the Constitution, statutes and case law must be interpreted with the future in mind,⁵³ liberated from the dead hand of the past.⁵⁴ Consequently, ac-

See Summers, *Professor Fuller's Jurisprudence and America's Dominant Theory of Law*, 92 HARV. L. REV. 444, 437-38 (1978). For clarity, I have suggested that we call "superpragmatic" any theory of adjudication primarily concerning itself with how judicial decisions contribute to the future of the republic. Lipkin, *supra* note 14, at 729. There are more radical forms of philosophical pragmatism that have important implications for legal theory. See generally R. RORTY, *CONTINGENCY, IRONY AND SOLIDARITY* (1989). I critically examine Rorty's liberal ironism in *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 CORNELL L. REV. (1990) (forthcoming).

51. Pragmatism must be distinguished from conventionalism and coherence theories of adjudication. Conventionalism maintains that whenever possible, a judge should decide a case by appealing to explicit constitutional paradigms. When there are no such paradigms, a conventionalist judge should use judicial discretion in deciding the case. Coherence theories maintain that judges should decide cases in terms of the justifiatory principles underlying the legal system.

52. I am not suggesting particular judges are self-consciously pragmatic in this way. The pragmatic turn appeals to extrinsic factors for interpreting foundational constitutional provisions, such as moral and political. Common sense might also be an extrinsic factor for interpreting foundational provisions. Consider the following: "It will be apparent how much of our constitutional law is merely getting at the common sense of the matter when we consider how few of the questions of constitutional law are answered by any specific language in the Constitution. When the language is really specific questions seldom arise." Powell, *The Logic and Rhetoric of Constitutional Law*, in *ESSAYS IN CONSTITUTIONAL LAW* 85, 89 (R. McCloskey ed. 1957) [hereinafter cited as *ESSAYS IN CONSTITUTIONAL LAW*].

The pragmatic turn may involve an appeal to custom as a source of law. One writer defines "custom" as "the uniformity of conduct of all persons under like circumstances." J. CARTER, *LAW: ITS ORIGIN GROWTH AND FUNCTION* 122-23 (1974). All law, with the exception of legislation, is custom. *Id.* at 173. Custom, the source of law, makes legal propositions knowable and objectively justified. *Id.* at 191. Custom tends to make law coherent. *Id.* at 331. Custom also tends to make law uniform. *Id.* at 334. Customs continuously change and, therefore, on the view of law as customs, law must change also. *Id.* at 258. Custom includes habitual rules of conduct as well as ethical principles. *Id.* at 120-21.

53. The notion of a better future as the test of truth and justice is an essential tenet of pragmatism. See G. JACOBSON, *PRAGMATISM, STATESMANSHIP AND THE COURT* 51 (1977). Consider the contrary view:

People are always shouting they want to create a better future. It's not true. The future is an apathetic void of no interest to anyone. The past is full of life, eager to irritate us, provoke and insult us, tempt us to destroy or repaint it. The only reason people want to be masters of the future is to change the past.

M. KUNDERA, *THE BOOK OF LAUGHTER AND FORGETTING* 22 (1981).

Isn't that what it means to be a master of the future?

54. This is the principle focus of superpragmatism. Superpragmatism can include any substantive moral theory. It can be utilitarian, libertarian, deontological or egoistic. See Lipkin, *supra* note 14, at 729-30. In fact, my brand of pragmatism is compatible with natural law theory. Cf. Barnett, *Judicial Pragmatism: A Definition*, in *ECONOMIC LIBERTIES AND THE JUDICIARY* 205 (J. Dorn & H. Manne

ording to constitutional pragmatism, neither the Constitution nor case law dictates constitutional decisions.⁵⁵ Instead, these decisions are derived from some source extrinsic to constitutional law.⁵⁶

The Constitution symbolizes different, sometimes incompatible, moral and political visions of the best society.⁵⁷ When the Court chooses one set of principles, it is choosing between different visions of the good society. The Constitution represents a non-binding constraint on judicial decisions.⁵⁸ The Constitution's symbolic function

eds. 1987)(defining "pragmactivism" as a judicial philosophy testing judicial decisions by their practical results).

55. This does not suggest that constitutional constraints do not exist. It does suggest that except for some procedural constraints, constitutional constraints are derived from our participation in a cultural constitutional interpretive community. Constraints on constitutional interpretation flow from this community. As such, an interpretation is precluded only if limited by that cultural interpretive community. Furthermore, an interpretation not presently included in the cultural interpretive community may not always be excluded. Cf. Greenstone, *Against Simplicity: The Cultural Dimensions of the Constitution*, 55 U. CHI. L. REV. 428, 431-32 (1988)(constitutional interpretation must reflect social realities).
56. Superpragmatism may still value consistency, precedent and other formally constraining factors. Simply put, the pragmatic attitude insists that we should solve social problems unless these constraining factors weigh too heavily to the contrary. See R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 97-98 (1922). But see W. KENNEDY, PRAGMATISM AS A PHILOSOPHY OF LAW 63, 69-70 (1925). Yet, naturalism also has a role to play in this process. Concerns for perennial rights can outweigh certain kinds of solutions to social problems. Moreover, such concerns might even lead to progressive solutions to such problems. *Id.* at 73.
57. Indeed, the Constitution determines the parameters of the constitutional debate about what constitutes a good and just society. Determining the parameters of the debate need not entail determining the debate's content or its conclusions. In fact, the content or conclusions of the debate might need to be reconstituted with every passing generation. See J. WHITE, WHEN WORDS LOSE MEANING 265-66 (1984).
58. How can the Constitution (or any written document) *dictate* the choice of principle? Does this mean that there is ever one and only one possible answer to a given constitutional problem? Even when the constitutional text appears to yield just one answer, there are other answers possible, given a change in the needs of the interpretive community. For example, U.S. CONST. art. II, § 1, cl. 5, says that a president must be thirty-five years of age. Suppose after President Nixon resigned and President Ford assumed office it was revealed that President Ford was only thirty-four. In this situation must the Court disqualify him as ineligible for the presidency? Instead, could one argue that the constitutional provision concerning the age of the president did not apply to these unforeseeable circumstances? Or, perhaps a better argument would be that the framers had in mind a sufficient degree of maturity as a requirement for the presidency. If this example does not convince you, try the following.

Suppose a new epidemic attacks all those thirty-five and over. Is there any doubt that some thirty-four year old would constitutionally serve as president at least until a suitable amendment was passed? The simple point is constitutional provisions have both a constraining and creative dimension. However, we cannot specify in advance what results these two dimensions will have in any given case. See Fish, *Still Wrong Again After All These years*, 6 LAW & PHIL. 401, 404 (1987).

merely rules out certain choices. For example, under present circumstances no constitutionally persuasive argument could establish the legitimacy of a monarchistic or theocratic state. However, within these constraints, different theories of interpretation⁵⁹ have generated very different conceptions of equality, due process and liberty. Traditionally, this has enabled the Court to be a creative force supplying the Constitution with meaning.⁶⁰ In other words, the Court has, from its very inception, initiated constitutional revolutions.⁶¹

A constitutional revolution occurs when the Court pragmatically creates a formal⁶² or substantive⁶³ principle of constitutional adjudication. Marshall's foundational decisions concerning the Court's role in reviewing federal legislative acts and state judicial decisions represent articulations of formal constitutional principles.⁶⁴ The decision in *Brown v. Board of Education*⁶⁵ represents a substantive principle. Both kinds of pragmatic choices are designed to improve our constitutional democracy. Typically, pragmatic choices are based upon factors extrinsic to actual constitutional practice.⁶⁶ These extrinsic factors are comprised of moral and political considerations derived from the wider political culture or from abstract ethical or political theory.

1. Sources of Pragmatic Choices

Pragmatic choices are based on many factors. Common sense or economic theory are just two examples of such sources. Ordinary lan-

59. But see Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209, 213 (1983).

60. Shaman, *The Constitution, the Supreme Court, and Creativity*, 9 HASTINGS CONST. L.Q. 257, 258-66 (1982). See also Shaman, *Constitutional Fact: The Perception of Reality by the Supreme Court*, 35 U. FLA. L. REV. 236, 253 (1983).

61. Lipkin, *supra* note 14, at 649 nn.4 & 6.

62. A formal constitutional principle is concerned with *how* a certain result is reached. For example, the principle of judicial review is a formal principle of constitutionalism. It does not resolve the substantive issue of whether a statute is unconstitutional or whether an individual's right to free speech has been violated.

63. A substantive constitutional principle determines a particular result, for example, that segregated schools are constitutionally invalid.

64. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Hunter v. Martin's Lessee* 14 U.S. (1 Wheat.) 304 (1816); *Fletcher v. Peck* 10 U.S. (6 Cranch) 187 (1810); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

65. 347 U.S. 483 (1954).

66. Constitutional practice includes the text, the framers' intent, as well as the history, structure and logic of the Constitution. Where these conventional factors resolve a problem, the result is derived from something intrinsic to the Constitution. Typically, in the case of early constitutional history, there were at least two possible ways to resolve an issue: a Federalist solution and an Anti-Federalist solution. Consequently, history itself does not determine the result. In such cases, a judge's decision would be based on his conception of the best reading of history. Whenever history permits two possible interpretations, P and not-P, the stage is set for revolutionary adjudication.

guage, reason and the collective conscience of humanity are other examples of factors leading to pragmatic choices. Ultimately, on the appropriate level of abstraction, pragmatic choices are influenced by moral and political considerations. These considerations can be systematized in moral and political theories.

a. Pragmatic Naturalism

Pragmatic choices can be grounded in natural law.⁶⁷ When a pragmatic theory insists upon yet undiscovered natural rights, it represents a theory that is both pragmatic in its concern with the future and naturalistic in its concern with rights, the existence of which is not completely dependent upon positive law.⁶⁸ I refer to this theory as "pragmatic naturalism." Though some may consider this barbarism,⁶⁹ pragmatic naturalism is the view that there are natural rights, not yet recognized or recognized only dimly, that should be appealed to over precedent.

Pragmatic naturalism acknowledges two kinds of "natural" or non-conventional rights: absolute and relative natural rights. Absolute natural rights exist independently of a particular system of positive law. Relative natural rights are created as a result of the interaction of absolute natural rights and living political institutions. They are derived from particular legal and cultural circumstances,⁷⁰ but have not yet been declared to be positive law. Pragmatic naturalism contends that basic rights—relative natural rights—exist that depend in part on the fundamental principles of a particular political society.⁷¹ A pragmatic

67. See Lipkin, *supra* note 14, at 654 n.27.

Pragmatic naturalism is naturalistic in yet another sense. It is concerned with human flourishing; it offers a pragmatic strategy for understanding the concept of human nature and for applying it to concrete social circumstances.

68. Positive law refers to explicit legal conventions such as written constitutions, statutes, judicial decisions and administrative codes. See generally H.L.A. HART, *supra* note 3.

69. One reason for alarm at the notion of "pragmatic naturalism" is due to the sound historical reason that the original purpose of pragmatic legal theory was to counter natural law. Hence, how can there be a pragmatic natural law theory? In my estimation, traditional natural law theory had three fatal defects. First, some versions of natural law had questionable ontological commitments. Second, natural law often failed to provide an adequate epistemological basis for legal theory. Finally, natural law theories are typically derived from a legally, morally and politically conservative ideology. A natural law theory claiming new rights, *i.e.*, rights that have emerged as a result of historical evolution, is neither conservative nor necessarily epistemologically or ontologically inadequate.

70. See Dworkin, "Naturalism" *Law Revisited*, 34 U. FLA. L. REV. 165, 183-84 (1982)(arguing that instrumentalism, a form of pragmatism, denies the existence of such rights).

71. This Article is committed to the view that during our republic's founding, pragmatic naturalism was the operative legal theory. See B. BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 161 (1944). At that time, property rights and individual liber-

naturalist might also endorse the view that once these rights are created, their importance in reflecting the justificatory principles underlying the positive law permits them to be considered as part of an abstract moral and political system. In other words, these rights develop contextually, but once developed and identified, their importance transcends the particular culture in which they developed.

Interpretation supports pragmatic naturalism. Interpretation is a process that analyzes, redefines, and creates new constitutional values. Essentially, pragmatic naturalism leads a judge to create new law. However, new law must be based upon the judge's conception of how existing law should progress towards reaching an ideal state. A judge must look to various theories of this progression, theories that describe and explain prior law and provide a vision of its progression to the ideal. Such theories can be described generally as "constitutional background theories."

2. *Constitutional Background Theories*

Constitutional background theories are moral and political theories bearing a special relationship to the Constitution. There are two *general* categories of constitutional background theory: intrinsic and extrinsic background theories.⁷² Intrinsic theories are intimately connected to the text, intent, history, structure and logic of the Constitution.⁷³ Extrinsic constitutional background theories informally influence the evolution of constitutional law. Intrinsic theories can explain and sometimes justify constitutional practice, while extrinsic theories can only justify such practice. Only a theory that is intimately connected to constitutional law can explain constitutional practice. When a theory justifies constitutional practice, it may do so either because it brings cultural values to bear on the evolution of constitutional law, or because it provides an ideal toward which constitutional law should aspire.⁷⁴ The theory of constitutional revolutions is based

ties were a great revolutionary concern. See R. MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* (1987).

72. Lipkin, *supra* note 14, at 738.

73. Again let me express the simple caveat that when history clearly yields one particular interpretation, it is an intrinsic factor. When history is indeterminate, it becomes an extrinsic factor. For a contemporary judge to decide a case in terms of a view of *some*, but not all, of the framers' and ratifiers' beliefs he must appeal to an extrinsic constitutional factor. When history is indeterminate in this manner, it is difficult to see how two contradictory principles can be intrinsic to the Constitution.

74. In ideal circumstances, a background constitutional theory explains *and* justifies constitutional practice. In non-ideal circumstances, where actual practice does not live up to the ideal, the best explanatory principle will be an inadequate justificatory principle. We can, of course, avoid this result by giving up the quest for a justificatory principle reflecting the best moral and political principle *tout court*. If we give up this quest, then the best justificatory principle will closely

on three types of constitutional background theory, the first is an intrinsic background theory, while the second and third are extrinsic background theories. The three types of theories are: relativized constitutional theories, critical cultural theories and abstract moral and political theories.

a. Relativized Constitutional Theories

The term "relativized constitutional theory" should be understood as standing for a set of principles that are implied by the Constitution or by foundational constitutional decisions.⁷⁵ The principle of judicial review in *Marbury v. Madison*⁷⁶ is a relativized constitutional principle as that term is defined in this Article. Similarly, the general right of privacy created in *Griswold v. Connecticut*⁷⁷ is now a principle contained in our relativized constitutional theory.

Relativized constitutional theories must reflect the foundational constitutional provisions in the particular constitution they explain. For example, if a constitution includes an implied notion of equality that does not permit segregation, then the relativized constitutional theory explaining that constitution cannot permit segregation. The Supreme Court determines the meaning of foundational constitutional provisions. Consequently, the relativized constitutional theory must explain foundational constitutional decisions. The difference between a relativized constitutional theory and a list of actual constitutional decisions is that the former systematizes the latter and in some cases its principles are more general than the actual constitutional decisions.

b. Critical Cultural Theories

Critical cultural theories⁷⁸ include principles that would be accepted upon reflection by a reasonable citizen of a particular society, irrespective of whether such principles have been declared to be law.⁷⁹

reflect the explanatory principle. For example, if the best explanatory principle, the one that best fits actual constitutional decisions, is a principle tying sexual privacy to heterosexuality, then the justificatory principle must be one that closely reflects *this* explanatory principle, and not a more general principle concerning personal autonomy generally.

75. See Note, *Dualistic Legal Phenomena and the Limitations of Positivism*, 86 COLUM. L. REV. 823, 826 (1986).

76. 5 U.S. (1 Cranch) 137 (1803).

77. 381 U.S. 479 (1965).

78. See D. BEYLEVELD & R. BROWNSWORD, *LAW AS A MORAL JUDGMENT* 423 (1986).

79. Critical cultural theories include abstract components, but, in addition, they take particularized cultural conditions more seriously than do abstract moral and political theories. In fact, a critical cultural theory is related to common sense and reasonableness. See Powell, *The Logic and Rhetoric of Constitutional Law*, in *ESSAYS IN CONSTITUTIONAL LAW*, *supra* note 52, at 85, 87. A principle is in-

Of course, identifying these principles may be controversial, but the important point here is that critical cultural principles are those that a reflective citizen believes best explains and justifies our political culture.⁸⁰ For example, most Americans would probably now agree that an individual is entitled to be free from official state-imposed segregation.⁸¹ Political culture is in harmony with the Constitution when the relativized constitutional theory is consistent with the critical cultural theory. However, this is not always the case.⁸² Historically, the critical cultural theory may conflict with the relativized constitutional theory.⁸³ A constitutional crisis occurs when critical cultural principles

cluded in a critical cultural theory if a reasonable citizen, upon reflection, would endorse it. Such a procedure may not always yield one unequivocal answer. Indeed, there may exist more than one reasonable answer to many important constitutional matters. It may be a general feature of practical reasoning that while being able to rule out many proposals, one is always left with two or more competing views, neither of which is decidable in terms of reason, morality or law. In fact, two or perhaps three irreducible, general, moral and political perspectives may exist that yield incompatible answers.

Justices often appeal, albeit tacitly, to principles of critical cultural theory in deciding cases. See C. CURTIS, JR., *LIONS UNDER THE THRONE* 332 (1947). If there are more than one equally reasonable competing principles in a critical cultural theory, a judge's appeal to this theory will produce a different constitutional result depending upon the judge. *Id.*

80. Cf. A. BICKEL, *supra* note 28, at 86 (arguing that justification of a constitutional judgement "turns on issues of moral philosophy and political theory, which we abstract from the common political process.").

81. With a few notable exceptions, I believe this principle, or one very much like it, would be accepted by most Americans regardless of political persuasion. Furthermore, such a principle must *now* be included in our relativized constitutional theory. It does not follow, of course, that there was a consensus about any such principle prior to *Brown*.

Dworkin argues that "[i]t seems plain that the Constitution mandates some individual right not to be the victim of official, state-imposed racial discrimination." R. DWORKIN, *supra* note 3, at 382. But if *Plessy* controlled the meaning of the equal protection clause and therefore the meaning of equal protection in the relativized theory, how can the Constitution mandate such a right? Dworkin believes that "[t]he American people would almost unanimously have rejected [the rule in *Plessy*], even in 1954, as not faithful to their convictions about racial justice." *Id.* at 387.

There are two important problems with Dworkin's argument. First, even if most people rejected the rule in *Plessy* in 1954, it does not follow that the principle in *Brown* was contained in the relativized constitutional theory of our Constitution. If foundational constitutional decisions define what the Constitution means, then prior to *Brown* the Constitution permitted state-imposed racial segregation. Lipkin, *supra* note 14, at 740-49. Second, as an empirical matter, it just seems wrong to contend that the right Dworkin advocates was part of the political culture of the time. Perhaps, some reasonable citizens endorsed such a right, but other reasonable citizens did not.

82. The civil rights movement was predicated on the conviction that constitutional practice was inconsistent with our critical cultural theory as well as abstract moral and political theory. Therefore, constitutional practice had to be altered.

83. Presently, our relativized constitutional theory permits abortion. Anti-abortion

find no obvious place within constitutional practice.⁸⁴ When this occurs, the citizenry must abandon the conviction that these principles should be law or the Court must interpret constitutional law to include the controversial principles. When it does so, the relativized constitutional theory then contains the same principle as the critical cultural theory. *Brown v. Board of Education*⁸⁵ is a good example of this process. Prior to *Brown*, constitutional practice, or the relativized constitutional theory, was controlled by *Plessy v. Ferguson*.⁸⁶ Though constitutional practice followed the rule of separate but equal treatment,⁸⁷ many people began to question the compatibility of equality and segregation. Ultimately, the Court effected a constitutional and social revolution which would permanently alter our conception of equality and racial justice. This illustrates how newly acquired cultural values become constitutional law.

c. *Abstract Moral and Political Theories*

Abstract moral theories consist of principles derived from systematized intuitions concerning virtue and justice. These philosophical theories need not be tied to specific historical conditions in the same manner as relativized constitutional and critical cultural theories.⁸⁸ Abstract moral and political theories attempt to describe universal, objective elements of human personality and society. These theories eschew the concrete in an attempt to provide a foundation for, and a

advocates contend, probably incorrectly, that most reflective people abhor abortion. In our terms, their argument can be described as insisting that there is a radical break between the relativized constitutional theory and the critical cultural theory.

84. Sometimes, the relativized theory *and* the critical cultural theory imply one decision, while abstract moral and political theories imply a contrary decision. For a long time, that was probably the case with regard to slavery; both the Constitution and critical cultural theory sanctioned slavery, while abstract theory did not.

85. 347 U.S. 483 (1954).

86. 163 U.S. 537 (1896).

87. Just prior to *Brown*, several cases progressively revealed discomfort with *Plessy*. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Gong Lum v. Rice*, 275 U.S. 78 (1927); *Cumming v. Board of Education*, 175 U.S. 528 (1899). The seeds of the revolution can be observed in a discrete number of prior cases; this is one way a constitutional revolution occurs.

88. Relativized constitutional theories must be tied to the foundational provisions of the Constitution as interpreted by the Supreme Court. Critical cultural theories must be tied to historical circumstances and to the reflective sentiments of reasonable citizens. Abstract moral theories need not be tied either to the legal system or to the historical circumstances existing in a particular society. Abstract moral theories are utopian in the limited sense that they tell us what is right for anyone and any society. If you do not believe in utopian theories, critical cultural theories will embody the extent of your moral and political vision.

method of, criticizing and correcting existing social systems.⁸⁹

The methodology for formulating an abstract moral and political theory consists of the following. Seeking a critical point of view, an individual collects his considered intuitions or pre-theoretical moral and political beliefs in order to determine which intuitions he wants to stand behind or endorse. He then seeks to determine whether his intuitions implicitly express any general principles.⁹⁰ If so, these principles represent the rationale—the explanation and justification—of his considered intuitions. After formulating these principles, he puts them in some sort of theoretical order.⁹¹ He then has an abstract moral and political theory with which to guide his actions and criticize social and political structures. If no such principles exist, the individual must embrace skepticism concerning the possibility of constructing a viable theory of ethics and politics.⁹²

Abstract moral and political theories center around systematizing one's considered intuitions about moral and political practice. The central questions here are how closely must a principle or theory match our considered intuitions,⁹³ and how do we resolve a conflict between our moral intuitions and a proposed ethical theory? There are at least three conventional approaches to these questions: ethical intuitionism,⁹⁴ ethical formalism⁹⁵ and reflective equilibrium.⁹⁶

89. Such theories need not be foundationalist in a Cartesian sense. Rather, they may simply provide a foundation for other kinds of constitutional background theories.

90. In considering a principle, we test it against our considered intuitions as well as certain formal or metatheoretical factors. A theory should conform to our considered intuitions, but it should also be elegant. A theory is elegant when it is simple, general, fecund and reenforced or supported by theories in other domains. W.V.O. QUINE & J. ULLIAN, *THE WEB OF BELIEF* (1970); Quine, *Posits and Reality*, in *THE WAYS OF PARADOX* (1966) (describing various metatheoretical virtues such as fecundity and simplicity).

91. By theoretical order, I mean a person must decide whether his theory is monistic or pluralistic. If it is monistic, one theoretical factor explains and justifies his judgments. If a theory is pluralistic, several theoretical factors explain and justify his judgments. In this event, the individual must determine how these different principles can be ranked, the weight to be accorded to different principles and so forth.

92. Most skeptical attacks against the possibility of constructing such a theory are directed at *abstract* moral and political theories.

93. Constructing a critical cultural theory also requires answering these questions. Describing the relativized constitutional theory, on the other hand, requires systematizing actual judicial decisions. One must systemize judicial decisions, whether or not these decisions are correct, from the vantage point of critical cultural or abstract theories.

94. Ethical intuitionism holds that a moral theory should be elegant and must match each considered intuition. If the theory fails to match an intuition, the theory must be rejected. According to this view, our pre-theoretical intuitions are sacrosanct and remain constant throughout history. Whenever there is a conflict between one's intuitions and theory, one's intuitions win. A theory may provide a

How a person resolves the problem of intuition over principle de-

short-hand device for referring to a set of considered intuitions, but the theory never has any independent epistemic significance. The theory cannot be a means of deriving novel ethical knowledge, or of requiring the abandonment of a considered intuition. A corollary of the intuitionist position is that there is always the possibility of several irreducible intuitions with no more general principles under which they can be subsumed. Indeed, these intuitions may encompass a plurality of moral principles and values. *See also* W.D. ROSS, *FOUNDATIONS OF ETHICS* (1960)(describing the ethical intuitionist program and its hostility toward ethical theories); Shiffrin, *supra* note 28, at 1201 (arguing that a theory of rights must be based on persistent intuitions). Cf. B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 349-55 (1980)(arguing against intuitionism). Notice there is an ambiguity in the notion of "intuition." It might stand for a pre-theoretical belief or it might refer to an infallible process of obtaining knowledge. My use of the term "intuition" is restricted to the first sense only.

There are, of course, standard objections to ethical intuitionism and formalism. First, ethical intuitionism has been criticized for taking intuition too seriously. According to this objection, there is no reason to regard intuitions as incorrigible or unrevisable. Intuitions derive from a particular society and contain the prejudices of that society. Regarding intuitions as sacrosanct constitutes nothing more than dignifying the prejudices of that society. Additionally, such a methodology leaves us bereft of a procedure for determining which intuition is right when the intuitions of different people or societies conflict. Because there is no obvious intuitionist answer to this problem, ethical agreement is illusory. Perhaps, more importantly, a single person's intuitions often conflict. If there is no way to go beyond intuitions in ethical reasoning, there would be no way for a solitary practical reasoner to generate his own moral judgments. Only by attempting to devise moral theories as, among other things, a way of testing or criticizing moral intuitions can we hope to avoid ethical skepticism.

To demand a theory match all our considered intuitions is to require too much of the theory because it is unlikely any rationale will fit all our intuitions. At least, there is no *a priori* reason to think that it should. Some intuitions will, no doubt, be inconsistent with others, and thus some will have to be abandoned. This should remain a possibility even if it, in fact, should turn out to be false. If a moral theory is to be more than a mere rationalization or apology for our prejudices, we must consider the possibility that some intuitions are false. To require the theory match all our considered intuitions is to rule out this possibility in advance.

95. If ethical intuitionism denigrates theory, ethical formalism distrusts intuition. Instead, formalism seeks to find systematic principles of reason or language that are elegant and provide a way of determining which moral judgments are true. A theory need not match any considered intuitions as long as it is elegant and generates judgments with which we can live. When there is a conflict between theory and intuition, it is the intuition that must give way. For example, suppose one devises a theory showing the absolute necessity of telling the truth. This theoretical principle conflicts with the intuition that we should lie to a murderer when he asks the whereabouts of an innocent victim the murderer intends to kill. On a formalistic view, the intuition should be abandoned. *See* I. KANT, *GROUNDWORK TO A METAPHYSICS OF MORALS* (1964); I. KANT, *CRITIQUE OF PRACTICAL REASON* (1951). *See* R. Hare, *MORAL THINKING: ITS LEVELS, METHOD, AND POINT* 11 (1981)(contrasting the allegedly different epistemic roles of linguistic and moral intuitions). *See also* Hare, *Liberty and Equality: How Politics Masquerades as Philosophy*, in *LIBERTY AND EQUALITY* 1, 3, 6 (1985)(all illustrating Hare's ethical formalism); Hare, *Rawls' Theory of Justice*, in *READING RAWLS* (N. Daniels ed.

depends on her meta-moral theory, that is, her views regarding the methodology appropriate to moral and political theory construction. Intuitionists decide the issue in terms of the considered intuitions. Formalists, such as Kant, Hare and some act-utilitarians⁹⁷ decide in favor of the principle. Those endorsing Rawls' method of reflective

1975). See Bayles, *Intuition in Ethics*, 23 DIALOGUE 439, 452 (1984); Singer, *Sidgwick and Reflective Equilibrium*, 58 THE MONIST 490, 516 (1974) (denigrating the role of intuitions in ethical theory). Cf. Quinn, *Truth and Explanation in Ethics*, 96 ETHICS 524, 530 (1986) (distinguishing three kinds of moral intuitions).

Ethical formalism has been criticized for not taking intuitions seriously. Perennial intuitions help define our ethical conceptual scheme. Though our intuitions may not be sacrosanct, they are an important starting place for, and a test of, newly developing ethical theories. Denying this role to intuitions would be tantamount to admitting the possibility that all our intuitions are false. And such a result is absurd. Since intuitions are the subject matter or building blocks of ethical theory, some intuitions must be true.

The supposition that an elegant theory may be acceptable despite not matching any of our considered intuitions is implausible. There does not seem to be any reason for constructing such a theory in the first place. Taking a formalistic view, our intuitions simply provide a stepping stone for developing a moral theory. The theory then has a life of its own and its value lies in its having implications with which we can live. If the theory has unacceptable implications, then we abandon the theory. We must be prepared to let the theory generate whatever judgments it implies—and hope we can live with the results.

96. Reflective equilibrium presumably avoids the defects in ethical intuitionism and ethical formalism while retaining their virtues. According to this method, a theory must be elegant and match some of the more centrally considered intuitions. In this view, it is generally improper to choose theory over intuition or vice versa as a matter of methodological principle. Sometimes we abandon the theories and other times we abandon the intuitions. Our goal is to hold a set of our intuitions and a theory in a "reflective equilibrium." In doing this, we sometimes modify our considered intuitions to fit the theory, while other times we revise the theory to fit our considered intuitions. See J. RAWLS, A THEORY OF JUSTICE 48-51 (1971) (describing how reflective equilibrium works). See also A. GOLDMAN, EPISTEMOLOGY AND COGNITION 66 (1986) (endorsing reflective equilibrium as a method in epistemology); Daniels, *Reflective Equilibrium and Archimedean Points*, 10 CAN. J. PHIL. 83 (1980).

Imagine an ethical conceptual scheme consisting of concentric circles, each circle representing principles deriving from reflective intuitions. The more central a principle is, the less likely we will abandon it in favor of a theory. On the other hand, if a particular theory helps us systematize and order our ethical conceptual scheme, i.e., if it has significant explanatory power, even a central principle may be abandoned. Based on this view, no principle is immune from revision; none must be retained at all costs. We can even abandon well entrenched moral principles even though we cannot do it all at once. On the other hand, principles contained in a moral theory must be tested, in part, by determining how well they preserve the truth of more central intuitions. Without anchoring a moral theory (at least temporarily) in more central intuitive principles, the theory loses its connection with its subject matter and loses the right to be called a *moral* theory.

97. Act-utilitarians contend that a particular act is right if, and only if, it maximizes happiness. Act-utilitarians differ from rule-utilitarians since rule-utilitarians believe that an act is right if it follows from a *rule* which, if adopted, would maximize happiness.

equilibrium do not decide this issue in advance. When a principle is very attractive, one abandons the intuition. When the intuition is central to one's ethical conceptual scheme, one repudiates the principle. There is a pragmatic element in this process. No *a priori* rules exist telling us to always choose intuitions over theory or theory over intuitions.

This process of "reflective equilibrium" has an application to constitutional theory. There are no *a priori* answers to the question of how we decide a case when precedent and normative attractiveness collide. What we must do is to pragmatically evaluate the precedent's comparative value against the value of the novel principle and decide which is more important in a given case.⁹⁸ This is a pragmatic procedure, one which eschews a mechanical or lexical method for deciding how closely a principle must fit our intuitions.⁹⁹ Our decisions, in cases of conflict of this type, are influenced by a moral and political theory.

D. The Nature of Constitutional Revolutions

1. *Foundational Constitutional Provisions*

Constitutional provisions are foundational in the sense that they determine the meaning and application of critical constitutional concepts throughout the legal system. So, if the Court defines equal protection in a certain manner, all other areas of relevant adjudication must reflect that foundational interpretation. Furthermore, if there were two constitutional provisions that bear on the same issue, and one of these provisions is foundational and the other not, the first provision provides constraints on the interpretation of the second provision. One principal question in constitutional law is how foundational constitutional provisions acquire their meaning. The traditional picture of constitutional adjudication postulates the existence of a fairly recognizable methodology which is neutral between the parties; this methodology can determine which party should prevail in a given case.¹⁰⁰ The theory of constitutional revolutions, on the other hand, denies the existence of such a methodology and instead maintains that

98. This process does not necessarily simply entail a balancing procedure as the ultimate standard of evaluation. Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987)(evaluating the major forms of constitutional balancing).

99. Essentially, we seek a fit between some subset of all possible moral principles, their justifying theories and our considered judgments, as well as the considered judgments of society. In other words, we seek a *wide* reflective equilibrium. K. NIELSEN, *EQUALITY AND LIBERTY: A DEFENSE OF RADICAL EGALITARIANISM* 27 (1985).

100. Furthermore, the traditional view insists that the solution to the problem exists in constitutional law prior to a judicial determination.

foundational constitutional provisions acquire their meaning through constitutional revolutions.¹⁰¹

2. *Foundational Decisions*

A Supreme Court decision is the final authoritative statement of American constitutional law.¹⁰² Until such a decision is overruled, that decision becomes a controlling constitutional principle. Moreover, a constitutional foundational principle occupies a central place in the background theory, specifically, in the relativistic constitutional background theory. It makes no sense to declare that a foundational constitutional decision says one thing, but that the principle upon which the decision is based is not reflected in the relativistic background theory. For example, if separation of the races is constitutionally permissible, then the separate but equal principle controls the concept of equal protection in the relativized constitutional background theory. The constitutional background theory is the systematized set of foundational decisions of the Court interpreting key provisions of the Constitution. Consequently, the actual declarations of the Court must find refuge in the relativized theory.

3. *Constitutional Revolutions*

Constitutional revolutions¹⁰³ are landmark decisions that determine what the law is in a given area.¹⁰⁴ Constitutional revolutions

101. Constitutional revolutions are changes in the meaning of constitutional provisions. See Lipkin, *supra* note 14.

102. Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1044-45 (1977).

103. By "constitutional revolution," I mean a legal change not clearly authorized by the Constitution. See R. HOAR, CONSTITUTIONAL CONVENTIONS, THEIR NATURE, POWERS AND LIMITATIONS 33 (1917). Such unauthorized change is not necessarily illegitimate. If the possibility of this type of change is a feature of constitutional practice, we can jettison revolutionary methodology only by abandoning or radically altering the practice. Achieving this monumental counter-revolution itself requires numerous revolutions throughout constitutional law. Explaining our federal judiciary is impossible without the notion of a constitutional revolution.

104. Constitutional revolutions fundamentally change the character of the legal system. See H. Kelsen, *supra* note 3, at 368 (stating "the State and its legal order remain the same only as long as the constitution is intact or changed according to its own provisions"). A constitutional revolution may involve defining an abstract constitutional provision, or overriding a prior Supreme Court decision. There are, of course, other types of revolutionary legal change. See A. WATSON, THE EVOLUTION OF LAW 110 (1985). See also J. RAZ, THE CONCEPT OF A LEGAL SYSTEM (1970) (discussing the identity and individuation of laws); Finnis, *Revolutions and Continuity of Law*, in OXFORD ESSAYS IN JURISPRUDENCE 44 (A. Simpson ed. 1973) (discussing what counts as a change in the identity of a legal system).

Interestingly, the process of constitutional revolution is an alternative process of amending the Constitution. Generally, this Article presupposes that any constitutional scheme, or system of practical rules, not having an easily accessible

may break new ground or reverse prior decisions.¹⁰⁵ In any case, a constitutional revolution is revolutionary because it does not follow

formal process of amendment, will develop an alternative revolutionary process. The formal amendment process in American constitutionalism is difficult to deploy; hence, revolutionary adjudication is inevitable. If the founders had created a less cumbersome process for amending the Constitution not controlled by Congress, the nature of American revolutionary constitutionalism *might* be very different. On Congress' role in the amending process see Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983). But see Dellinger, *Constitutional Politics: A Rejoinder*, 97 HARV. L. REV. 446 (1983); Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433 (1983).

Constitutional revolutions can be explained only by appealing to factors extrinsic to constitutional law. See Lipkin, *supra* note 14, at 738. There is something inevitable about the revolutionary constitutional process. Consider this statement: "Despite its tone, and despite the way we often talk about it, the Constitution has no force except to the extent that it is invoked and used by individual Americans pursuing actual goals. Until used it is inert. Alone it can do nothing." J. WHITE, *supra* note 57, at 244.

Others have recognized that the form and content of judicial review are based upon neither the text, intent, history, structure or logic of the Constitution, nor, until *Marbury*, upon precedent. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Grey, *supra* note 9; Grey, *supra* note 15; Shaman, *The Constitution, the Supreme Court, and Creativity*, 9 HASTINGS CONST. L.Q. 257, 258-66 (1982); Shaman, *The Rule of Reasonableness in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and the Establishment of a Viable Theory of the Equal Protection Clause*, 2 HASTINGS CONST. L.Q. 153, 171-72 (1975).

Consider also:

Our own Federal Constitution is an admirable specimen of written law. Its framers, well knowing the folly of attempts to foresee the future, confined themselves to large general enactments under which any of the policies which experience in the actual course of human events should advise might be adopted. If it had been pointed out to them that under the instrument they had framed with a jealous care to limit the central power, banks could be chartered, railroads constructed, seceding States reduced to subjection by war, the privileges of the mail service denied to lotteries in which many of the States themselves participated, and the President of the United States exercise authority to permanently rule over populations of millions inhabiting territories in distant seas, it would have commanded the assent of but a feeble minority; but had they lived to the present time all or most of these successive extensions of Federal power might have been acquiesced in by them as authorized by their own language.

J. CARTER, *supra* note 52, at 319.

105. The Court itself describes a revolutionary strategy when it says that: [w]e must realize that they [the words of the Constitution] have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The 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.

Missouri v. Holland, 252 U. S. 416, 433 (1929).

directly¹⁰⁶ from the Constitution itself or from any intrinsic constitutional background theory.¹⁰⁷ Constitutional revolutions, when justified, are decisions based on pragmatic grounds, namely, that the decision makes our constitutional democracy better from the perspective of moral or political theory. When a constitutional revolution occurs, for example, in free speech cases, adjudication in that area reflects a new model for deciding controversial cases.¹⁰⁸ Once the revolution is completed, constitutional adjudication in that area becomes normal. In normal adjudication, the new constitutional paradigm provides the precedential authority for deciding cases in that area. The new paradigm provides answers to such questions as which facts raise a relevant constitutional issue, what standard of review is appropriate, upon whom does the burden lie, and which facts will be dispositive. Normal adjudication generates decisions that, although not self-evident, are readily seen by members of the litigating community as flowing from the paradigm.¹⁰⁹ At times, the precise nature of the revolutionary paradigm achieves no consensus and adjudication in that area cannot be stabilized.¹¹⁰

E. Stages of Constitutional Adjudication

The Kuhnian distinction between revolutionary and normal sci-

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106. Of course, one could argue that most decisions follow indirectly from the Constitution but what does "indirectly" mean? Terms like "indirectly" and "implicitly" are weasel words used when we believe, often without evidence, that something follows from the Constitution, but, however hard we try, we cannot prove it. I do not mean to suggest it is impossible to construct a theory of "indirection." However, until we have such a theory, talk of a decision flowing indirectly from the Constitution, and rights implicit in the Constitution, are virtually meaningless.
107. Talking about constitutional revolutions is compatible with, but does not entail, a revolutionary political stance. Essentially, constitutional revolutions are conceptual revolutions, revolutions concerning how we envision and dispose of important constitutional problems. However, since these constitutional problems can also be political and moral problems, constitutional revolutions may exhibit some of the features of political revolutions. Therefore, a constitutional revolution falls somewhere between a scientific revolution and a political revolution. A scientific revolution is a conceptual revolution; whereas a political revolution is a romantic concept, "designed . . . to re-create the self of the [revolutionary] by transforming the world he lives in." J. POCOCK, *POLITICS, LANGUAGE AND TIME* 276-77 (1971).
108. For example, with respect to the advocacy of unlawful conduct, the clear and present danger model has been redefined by the paradigm in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
109. This statement does not mean that there are no advances in normal adjudication. Normal adjudication involves problem-solving which creates incremental changes in the paradigm, but does not change it conceptually.
110. If one believes that normal adjudication is the goal of revolutionary adjudication, then this is an unacceptable eventuality. In times of instability, the Court must finally define the paradigm with precision in order to permit the implementation of normal adjudication.

ence¹¹¹ together with Rorty's distinction between revolutionary and normal discourse¹¹² serve as models for understanding constitutional adjudication.¹¹³ In this section, I will use these distinctions¹¹⁴ to explain the dualistic nature of constitutional law.

In order to fully appreciate the dualistic dimension of the evolution of constitutional law, it will be useful to describe both the traditional and Kuhnian conceptions of science. Both these conceptions address the question: how does science progress?

1. *Scientific Change*

a. *The Traditional Conception*

The traditional conception contends that there is cumulative growth in scientific knowledge. New scientific discoveries add to the prior body of scientific knowledge. On this view, a scientific theory explains phenomena and therefore pictures reality.¹¹⁵ If that theory is then discarded, it is due to its failure to explain all the relevant phenomena. Though discarded, it still pictures a part of reality. A theory that replaces the first theory explains both what the first model explained and what it failed to explain. Scientific knowledge is therefore cumulative. Each successive theory provides information that increases scientific knowledge.¹¹⁶ Consequently, on the traditional view of scientific development, scientific development occurs rationally because each change can be explained by reference to a prior the-

111. T. KUHN, *THE ESSENTIAL TENSION* (1977) [hereinafter *ESSENTIAL TENSION*]; T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1969) [hereinafter *SCIENTIFIC REVOLUTIONS*]; Kuhn, *Reflections on My Critics*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE* (1970) [hereinafter *CRITICISM*]. The analogy between constitutional and scientific revolutions is far from perfect. However, attending to the structure of scientific revolutions is a promising heuristic device for beginning a systematic explanation of revolutionary and normal moments in constitutional adjudication.

112. Consider Rorty's statement of this distinction:

[N]ormal discourse [adjudication] is that which is conducted within an agreed-upon set of conventions about what counts as a relevant contribution, what counts as answering a question, what counts as having a good argument for that answer or a good criticism of it. Abnormal discourse [adjudication] is what happens when someone joins in the discourse [adjudication] who is ignorant of these conventions or who sets them aside.

R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 320 (1979).

113. Lipkin, *supra* note 14, at 734-37. For an independent application of Kuhn's conception of scientific revolutions to law, see Castro, *The Erie Doctrine and the Structure of Constitution Revolutions*, 62 *TULANE L. REV.* 907 (1988).

114. Since Rorty's distinction is derived from Kuhn's, I will concentrate on Kuhn's use of the distinction.

115. I do not mean to imply that the traditional conception of scientific progress is inextricably connected to a correspondence theory of truth.

116. Similarly, law develops cumulatively, with each new decision extending and revising prior law.

ory. This process enables scientific knowledge to move closer and closer to a complete view of reality.

b. The Structure of Scientific Revolutions

Thomas Kuhn has argued persuasively that scientific development and change does not occur in this fashion.¹¹⁷ Scientists or the scientific community acquire paradigms or models that determine the concepts, methodologies and scientific laws in a given area of science.¹¹⁸ The paradigm functions as *the* model,¹¹⁹ exemplar¹²⁰ or "master-theory"¹²¹ which is part of a "disciplinary matrix"¹²² employed by the scientific community¹²³ in a particular scientific enterprise.¹²⁴ In these circumstances, scientists agree on the basic concepts and methods of their respective disciplines. As a result of this agreement concerning the scientific paradigm—a period called "normal science"¹²⁵—scientists

117. I do not mean that I believe that Kuhn is clearly correct. Rather, my use of his model depends only upon the fact that his theory must be taken seriously.

118. Kuhn's use of the notion of a "paradigm" is not without its difficulty. See Masterman, *The Nature of a Paradigm*, in CRITICISM, *supra* note 111, at 59, 61-65 (arguing that Kuhn uses "paradigm" in 21 different senses).

119. A model supplies a particular scientific community "with preferred or permitted analogies and metaphors" for carrying on normal scientific investigation. SCIENTIFIC REVOLUTIONS, *supra* note 111, at 184.

120. An exemplar is the paradigmatic application of a theory to phenomena. See F. SUPPE, *THE STRUCTURE OF SCIENTIFIC THEORIES* 139 (2nd ed. 1977).

121. S. TOULMIN, *HUMAN UNDERSTANDING* 100 (1972).

122. SCIENTIFIC REVOLUTIONS, *supra* note 111, at 182.

123. Kuhn gives the notion of the scientific "community" an important status in understanding the relation between normal and revolutionary science. See generally W. HAGSTROM, *THE SCIENTIFIC COMMUNITY* (1965) (describing the role of the scientific community in deriving scientific knowledge). Essentially, the scientific community socializes practitioners by inculcating in them particular scientific norms. See G. WISE, *AMERICAN HISTORICAL EXPLANATIONS* 2D 124 (1980).

124. When the scientific community adopts a novel paradigm, the new paradigm determines what counts as good reasoning in that area. Shapere, *The Structure of Scientific Revolutions*, in PARADIGMS AND REVOLUTIONS: APPRAISALS AND APPLICATIONS OF THOMAS KUHN'S PHILOSOPHY OF SCIENCE 27, 36 (G. Gutting ed. 1980) [hereinafter PARADIGMS AND REVOLUTIONS]. A radical consequence of such a view is that there are no good reasons for adopting the novel paradigm. Whether Kuhn is committed to such a conclusion is not something we can answer here. However, whether true of scientific revolutions or not, constitutional revolutions have a matrix of potentially good reasons for adopting the novel constitutional paradigm. These reasons usually derive from moral and political theory, but can also result from economics and social science.

125. For Kuhn, "normal science" means research firmly based upon one or more past scientific achievements, achievements that some particular scientific community acknowledges for a time as supplying the foundations for its further practice. SCIENTIFIC REVOLUTIONS, *supra* note 111, at 10. During such "normal periods there is a consensus on the guiding principles of research . . . a consensus reinforced by the dogmatic style of scientific education." Musgrave, *Kuhn's Second Thoughts*, in PARADIGMS AND REVOLUTIONS, *supra* note 124, at 41.

According to Kuhn, coherent scientific traditions develop once a paradigm is

are able to solve a myriad of problems defined by the paradigm. Within normal science, progress *is* cumulative as scientists extend and refine the nature of the paradigm.¹²⁶

Generally in normal science, dissent over the foundations of the domain is suppressed. Scientists cannot accumulate knowledge when there is continuous debate as to the nature of the paradigm governing their scientific efforts.¹²⁷ As long as normal science succeeds in solving problems within the confines of the paradigm, suppressing dissent is perfectly acceptable.¹²⁸ A crisis occurs, however, when scientists are no longer able to make progress within normal science.¹²⁹ In these circumstances, dissent becomes possible. If the crisis cannot be overcome, a scientific revolution occurs and a familiar paradigm is abandoned and replaced by another.¹³⁰

According to Kuhn, the second paradigm is revolutionary; it cannot be explained by reference to the prior paradigm.¹³¹ In fact, sometimes the successive paradigms are completely incompatible. Surprisingly, a paradigm may not answer precisely the same question as its predeces-

decided upon. SCIENTIFIC REVOLUTIONS, *supra* note 111, at 10. A shared paradigm determines the appropriate means for solving problems within that scientific enterprise. *Id.* at 23. A scientific paradigm, "like an accepted judicial decision in the common law . . . is an object for further articulation and specification under new or more stringent conditions." *Id.*

Normal science develops within a framework, which "must be lived with and explored." Kuhn, *Reflections on My Critics*, in CRITICISM, *supra* note 111, at 242. This development "is generally a cumulative process by which the accepted beliefs of a scientific community are fleshed out, articulated, and extended." *Id.* at 251. Of course, this assumes that we can distinguish between conceptual change within the same enterprise and conceptual change that creates a new enterprise. *But see* Toulmin, *Does the Distinction Between Normal and Revolutionary Science Hold Water?*, in CRITICISM, *supra* note 111, at 49.

126. The process of normal science has a simple epistemological point. Obtaining knowledge only takes place when practitioners share the same framework for solving problems in that area. In normal science, practitioners agree on the methods for problem solving while, in revolutionary periods, this agreement is absent.
127. Certainly, questions about the precise nature of the paradigm can arise. However, such questions must be infrequent or the explanatory power of the paradigm and the possibility of normal science diminishes.
128. Pragmatically, if a working paradigm enables scientists in a particular scientific domain to solve what they consider to be important problems, then there is no need for dissent over the foundations of the domain.
129. Kuhn modified his view about the relationship between crises and revolutionary science. Crises usually precede revolutions; however, they are not a necessary precursor to all revolutionary science. SCIENTIFIC REVOLUTIONS, *supra* note 111, at 181.
130. In Kuhn's view, one never abandons a scientific paradigm without replacing it with another. Changes in constitutional paradigms occur in a similar fashion.
131. SCIENTIFIC REVOLUTIONS, *supra* note 111, at 103 (arguing that "[t]he normal-scientific tradition that emerges from a scientific revolution is not only incompatible but often actually incommensurable with that which has gone before").

sor.¹³² Since paradigms do not always address the same problems, one paradigm cannot be explained as the rational outgrowth of a former paradigm. Scientific communities change paradigms for pragmatic reasons, *i.e.*, because the new paradigm is a better predictor, not necessarily because one paradigm is ideally or rationally superior to its predecessor.¹³³

2. *Constitutional Paradigms*

Constitutional paradigms are interpretations of foundational constitutional provisions.¹³⁴ Like scientific paradigms, constitutional paradigms determine how a particular constitutional problem is to be conceptualized as well as what arguments and facts are relevant to disposing of the case.¹³⁵ Specifically, a constitutional paradigm determines the following: (1) the type of facts that give rise to the relevant constitutional question; (2) the standard of review to be employed; (3) the analytic framework for discussing and evaluating the facts; (4) the rules of law to be applied; and (5) the available remedies.

The present equal protection paradigm illustrates the nature of a constitutional paradigm. According to this paradigm, the Court should engage in heightened scrutiny whenever a piece of legislation burdens a suspect classification or a fundamental right. In cases not involving a suspect classification or fundamental right, the Court should, according to the present paradigm, defer to the legislature.¹³⁶ While this basically describes the concept of equal protection, the

132. Indeed, two successive paradigms may not relate to the same reality. Since paradigms in part determine reality, "[t]here is not one reality against which all putative knowledge can be measured." R. TRIGG, *UNDERSTANDING SOCIAL SCIENCE* 28 (1985).

133. Depending upon the level of generality, all paradigms address the same problem. For example, if we want to know how the planets move, both Ptolemaic and Copernican models provide an answer to this same question. However, asking a more refined question concerning Copernican movement may not be translatable into a Ptolemaic scheme.

Kuhn's conception of scientific revolutions blurs the distinction between science and art. In fact, Kuhn's theory rejects the dichotomy between scientific and artistic revolutions. G. VATTIMO, *THE END OF MODERNITY: NIHILISM AND HERMENEUTICS IN POST-MODERN CULTURE* 91 (1985).

134. A case of first impression usually calls for revolutionary adjudication.

135. There are many different kinds of constitutional paradigms. Some paradigms pertain to the entire discipline of constitutional law such as judicial review as stated in *Marbury*. Other paradigms are sub-disciplinary, such as the levels of review in equal protection analysis.

136. Recently, there has been some movement to toughen this level of review in certain cases. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (invalidating social legislation on an invigorated rational basis scrutiny); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (suggesting that the rational basis standard is not entirely toothless).

present paradigm is slightly more complex.¹³⁷ When a classification involves gender, an intermediate level of scrutiny is invoked. Some Justices would like to see something like this middle level of judicial review replace the fundamental rights strand of the two-tier approach.¹³⁸ If successful, this would involve a restructuring of the present constitutional paradigm.¹³⁹

The holding in *Plessy v. Ferguson* includes a constitutional paradigm. The *Plessy* paradigm states that when the physical facilities are the same, equal protection is satisfied even when the races are segregated.¹⁴⁰ In other words, given its best reading, the holding in *Plessy* rested on the conviction that the equal protection clause was satisfied so long as both races were given access to equal physical surroundings on trains. The *Plessy* court refused to constitutionalize the psychological stigma suffered by blacks as a result of segregation. According to the paradigm in *Plessy*, if the physical environment was the same, psychological stigma was constitutionally irrelevant to the question of equal protection.

Brown v. Board of Education was a constitutional revolution overruling *Plessy*.¹⁴¹ The *Brown* paradigm, based on extensive, if somewhat dubious social scientific evidence,¹⁴² states that in educational

137. Some might say that the paradigm is slightly more confused. One problem here is whether it makes sense to speak of three standards of review, or whether one standard of reasonableness is sufficient.

138. *Dandridge v. Williams*, 397 U.S. 471 (1970)(Marshall, J., dissenting).

139. The new paradigm would concern itself with "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification." *Id.* at 521 (Marshall, J., dissenting).

140. Another interesting feature of constitutional paradigms is that old paradigms, though repudiated formally, do not always entirely lose their influence. For a parallel with science see Martins, *The Kuhnian 'Revolution' and Its Implications for Sociology*, in *IMAGINATION AND PRECISION IN THE SOCIAL SCIENCES* 13, 35 (1972).

Multiple or competing paradigms often characterize constitutional development and change. One might even characterize constitutional law as a multiple-paradigm discipline. Cf. G. RITZER, *SOCIOLOGY: A MULTIPLE PARADIGM SCIENCE* 12 (1980)(describing a multiple paradigm science as one "in which there are several paradigms vying for hegemony within the field as a whole"). The standard tensions within constitutional debate suggest that there is more than one paradigm operating and "that supporters of one paradigm are constantly questioning the basic assumptions of those who accept other paradigms." *Id.* In constitutional theory there exist several competing paradigms of such important concepts as nationalism, federalism, individual rights and so forth.

141. Strictly speaking, *Brown* did not overrule *Plessy*. *Brown's* holding applied only to educational contexts.

142. *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954), states the social scientific basis of the contention that segregation impedes education. Does this contention really require the support of social scientific evidence?

contexts racial segregation precludes equality of education.¹⁴³ Under the old paradigm, equality in physical accommodations satisfied constitutional requirements. The new paradigm dispensed with the possibility of such proof, holding that segregation itself precludes equality.

Together, *Brown* and several subsequent cases represent a broader constitutional paradigm concerning equality in public facilities.¹⁴⁴ This broader paradigm stated that segregation in public facilities was intolerable.¹⁴⁵ In issuing the decisions perfunctorily, the Court "obviously meant to teach that *Brown* was to be read broadly as a declaration of American policy that race relations will not be solved by apartheid."¹⁴⁶

3. *Revolutionary Adjudication*

A jurisprudential theory must be evaluated from two different perspectives. The first perspective, a temporal perspective, concerns itself with legal practice over time, while the second perspective concerns itself with legal practice on a case-by-case basis.¹⁴⁷ From the temporal perspective, constitutional revolutionary adjudication is cyclical.¹⁴⁸ Creative periods are followed by uneventful periods.¹⁴⁹ Periods of revolutionary adjudication are followed by periods exalting precedent.¹⁵⁰ The salient feature of constitutional revolutions is that

143. The argument in *Brown* need not rely on social scientific evidence. Just as the Court in *Plessy* appealed to so called "common knowledge," the appeal in *Brown* can be understood as an appeal to common sense knowledge about the effects of exclusion.

144. *Johnson v. Virginia*, 373 U.S. 61 (1963)(abolishing segregation in courtroom seating); *Turner v. City of Memphis*, 369 U.S. 350 (1962)(abolishing segregation in airport restaurants and restrooms); *State Athletic Comm'n v. Dorsey*, 359 U.S. 533 (1959)(abolishing racial segregation in athletic contest); *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956)(abolishing racial discrimination in admission to tax-supported law school); *Gayle v. Browder*, 352 U.S. 903 (1956)(abolishing racial segregation of buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955)(abolishing racial segregation in public golf facilities); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955)(abolishing racial segregation in public beaches and bathhouses); *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954)(abolishing segregation in parks).

145. If *Brown* is taken to rest primarily on the contention that segregation impedes educational progress, how does the paradigm in *Brown* extend to public facilities such as golf courses? The Court would have been much more candid had it declared in *Brown* that invidious racial discrimination must not be tolerated regardless of questions concerning stigma or educational progress. Alternatively, the Court might have stated that segregation stigmatizes, and such a stigma is incompatible with treating an individual as an equal member of society.

146. Craven, *Paeon to Pragmatism*, 50 N.C.L. REV. 977, 990 (1972).

147. R. DWORKIN, *supra* note 3, at 135-36 & 157.

148. As in science, there are many different types of revolutions in constitutional adjudication. See W. HAGSTROM, *supra* note 123, at 259-60.

149. See G. GILMORE, *supra* note 18.

150. See *infra* notes 174-76 and accompanying text.

they find their source in factors extrinsic to the Constitution.¹⁵¹

Constitutional revolutions occur in the "context of social, economic, and ideological upheaval."¹⁵² Constitutional revolutions are designed to resolve conflicts, to order and control social change.¹⁵³ Constitutional revolutions occur when the Constitution fails to provide a readily accessible procedure for accommodating such change.¹⁵⁴ More often than not, constitutions fail to provide such procedures, creating the need for revolutionary adjudication. Indeed, the notion of adopting a "constitution" as opposed to a legal code is to license and to direct¹⁵⁵ the areas in which constitutional revolutions should occur.¹⁵⁶ In that sense, though particular constitutional revolutions are not implied by their constitutions, the *idea* of constitutional revolutions is

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151. If it is true that a principle of law follows from the Constitution several conditions must be met. First, the principle must be explicitly stated in the Constitution. For example, the free speech protection of the first amendment. Second, it must have a sufficient degree of specificity. For example, that Congress may declare war, or that a President must be thirty-five years of age.

In some cases, principles directly implied by the text of the Constitution clearly exist. For example, free speech implies free thought. If the government could constitutionally deny free thought, free speech would be impossible for the simple reason that speech expresses thought. Consequently, the first amendment must protect thought as well as speech. The theory of constitutional revolutions maintains that this strategy of inferring principles from the Constitution is strictly limited. According to this theory, the claim that most important Supreme Court decisions are implied by the Constitution is unpersuasive. Whether this is true depends on the breadth of one's conception of implication. If one has a narrow conception of the term "implication," one will agree with me. If one's conception of "implication" is expansive, one will find that the Constitution implies many, if not all, important moral and political values. In my view, there is no epistemological way to establish an expansive conception of "implication." Furthermore, there is no way to decide between the narrow and expansive view of implication. The only way of settling these issues is by an existential leap of faith.

152. Bestor, *The American Civil War as a Constitutional Crisis*, 69 AM. HIST. REV. 327, 328 (1964).

153. Consider:

A constitution, after all, is nothing other than the aggregate of laws, traditions, and understandings—in other words, the complex of institutions and procedures—by which a nation brings to political and legal decision the substantive conflicts engendered by changes in all, the varied aspects of its societal life.

Id.

154. The process for amending the Constitution is not such a procedure.
155. Arguably, the ninth amendment licenses and directs constitutional revolutions.
156. Constitutional progress comes about when change brings us closer to achieving the Constitution's ideals. On this view, we can say that *Dred Scott*, though revolutionary, did not help us achieve these goals. G. JACOBSON, *THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION* 108 (1986). Hence, *Dred Scott* was decided incorrectly and should have been overruled by the Court, as it was by the fourteenth amendment.

the life-blood of any morally and politically acceptable constitution.¹⁵⁷ Any society taking morality and politics seriously sets the stage for revolutionary adjudication. Once revolutionary adjudication becomes an integral part of constitutional practice, two factors make it impossible to abandon. First, it is a sign of the moral vitality of the legal system that revolutionary adjudication has a structured, disciplined role in legal practice.¹⁵⁸ By "a structured, disciplined role in legal practice," I mean a role that shows how revolutionary adjudication contributes to the solution of moral and political problems, as well as to the stability of the legal system. The theory of constitutional revolutions connects revolutionary adjudication and normal adjudication.¹⁵⁹ The capacity of a legal system to select moral and political solutions to its problems from the larger culture, and then incorporate these solutions into conventional law has obvious survival value for any legal system.¹⁶⁰

157. Any acceptable constitution must be durable and flexible. Without revolutionary adjudication this is impossible. But consider:

The refinements to which the Supreme Court of the United States has resorted . . . have brought it about that the law is uncertain and that the actual decisions reached by that august body are by some accounted for by the personal predilections of the individual members of the court rather than by the logical application of legal principles. Our constitutional law is losing what legal character it may once have had, and is becoming more or less a system of political science which at one time favors the demands of the advocates of the maintenance of the status quo in the domain of political relations, and at another is influenced by conceptions of present economic and social needs.

- F. GOODNOW, *SOCIAL REFORM AND THE CONSTITUTION* 15-16 (1911). The error here is to suppose that the Court ever functioned differently in constitutional contexts. In short:

[t]he Supreme Court of the United States has really become a political body of the supremest importance. For upon its determination depends the ability of the national legislature to exercise powers whose exercise is believed by many to be absolutely necessary to our existence as a democratic republic. What we need more than anything else at the present time is a consistent theory of constitutional interpretation, which will permit of our orderly development as a nation in accordance with our economic and social needs, and is not confined within the political and legal conceptions of a century or more ago.

Id. at 16.

The theory of constitutional revolutions is a theory based on the belief that "the political and legal conceptions of a century or more ago," as illustrated by the Marshall Court, never restricted the role of the judiciary.

158. Revolutionary adjudication is unlikely in closed societies having a fixed moral and political structure.
159. In American constitutional practice, revolutionary adjudication seeks its own stabilization and normalcy. Through a process of creative change, a constitutional revolution becomes a conventional feature of the legal system.
160. Typically, constitutional revolutions are successful. When a Court is inclined to institute a revolution, it usually becomes an integral part of constitutional practice. The exceptions to this rule are notable. First, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), was overturned by the adoption of the eleventh amendment.

Second, once revolutionary adjudication is in place, an exhortation to change is itself revolutionary. Consequently, there is something inconsistent in calling for the end of revolutionary adjudication. Of course, it is conceptually possible to call for a revolution to end all future revolutions. However, it is difficult to see what apocalyptic vision could possibly justify this exhortation.

4. *Normal Adjudication*

Normal adjudication, like normal science, takes place within the context of a shared paradigm which members of the legal community use to define relevant facts, constitutional questions, appropriate analytic frameworks, arguments, conclusions and remedies. The Constitution's text itself serves as a constitutional paradigm. Normal adjudication can be based on constitutional language. When normal adjudication is based on the text of the Constitution, its authority is apparent. When a constitutional argument rests on history, the historical result must be uncontroversial. For example, no one can dispute that the framers of the fourteenth amendment intended the equal protection clause to protect blacks. Any interpretation of that clause that did not apply to blacks would be preposterous.¹⁶¹ When a constitutional provision's historical purpose is controversial, it may not be persuasive for that reason. The purpose of originalism is to settle constitutional controversies, not to replicate them at the level of interpretation. Similarly, the structure and logic of the Constitution is useful in deciding constitutional issues when their implications are clear. When implications are themselves controversial, these devices cannot settle the issue and instead condemn us to eternal controversy. Normal adjudication functions by appealing to constitutional text, intent, history, structure and logic. One can, of course, contend that all constitutional decisions are derived from one or more of these conventions. In my estimation, however, not only is such a contention erroneous, but more importantly, constitutional scholarship demonstrates just how erroneous it is.¹⁶² Despite the objections to the reasoning in *Marbury v. Madison*, for example, constitutional scholars

Second, *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), was partially overturned by the incorporation theory. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), was overruled by the civil war amendments. A series of cases overruled *Lochner v. New York*, 198 U.S. 45 (1905). *Brown v. Board of Educ.*, 347 U.S. 473 (1954), overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896). Many hope, for very different reasons of course, that *Roe v. Wade*, 410 U.S. 113 (1973), and *Bowers v. Hardwick*, 478 U.S. 186 (1986), have a similar destiny. Revolutionary adjudication almost always resolves a moral or political problem that could not be resolved by a direct application of the Constitution itself.

161. My point is that an interpretation excluding blacks from the protection of this provision is impossible, not that such protection must be limited to blacks.

162. See *infra* note 214.

still regard it as good law. Surely something other than the decision's logic persuades scholars to endorse it.

There are three phases of normal adjudication: adjudication that perfects the revolution, adjudication that stabilizes the revolution and routine or ordinary adjudication.

a. Perfecting and Refining the Revolution

A constitutional revolution is a judicial decision establishing a model for disposing of constitutional cases in that area of law. Once a revolution occurs, the Court must then attempt to refine and perfect the revolution so that the paradigm extends to every similar case.¹⁶³ Sometimes the paradigm entails a set of rights conflicting with another set of rights.¹⁶⁴ In such cases, the Court must find some criteria to determine whose rights prevail. This does not necessarily entail a balancing procedure. It might be that one set of rights, according to the paradigm, is significantly more important than the other. Consequently, the paradigm might explain why rights in these circumstances must be lexically ordered. This context should be distinguished from a situation where a particular right is restricted by irrelevant considerations, the purpose of which is to impede the activity the right entails.¹⁶⁵ When this occurs, normal adjudication is sabotaged. Because an irrelevant factor operates here, possibly even the desire to overturn the paradigm, the paradigm is arbitrarily restricted.¹⁶⁶ As a result, we are deprived of discovering the full scope of

163. This is just the sort of process involved in normal science. B. BARNES, T.S. KUHN AND SOCIAL SCIENCE 46 (1982)(describing normal science as "a process of extending and filing out the realm of the known").

164. This can be illustrated by the cases dealing with the right of a parent or husband to be informed about or to consent to an abortion. *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Planned Parenthood v. Ascroft*, 462 U.S. 476 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). The abortion paradigm must determine whose rights take precedence in these cases.

165. The decisions disallowing federal payment for abortions are cases of this sort. *Harris v. McRae*, 448 U.S. 297 (1980)(holding that federal payment is not required for medically necessary abortions); *Maher v. Roe*, 432 U.S. 464 (1977)(holding that federal payment is not required for elective abortions). See Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 STAN. L. REV. 1113, 1120 (1980)(arguing that *McRae* is "inconsistent with the narrowest possible coherent reading of *Roe*"); Simson, *Abortion, Poverty and the Equal Protection of the Laws*, 13 GA. L. REV. 505 (1979)(arguing that the restriction in *Maher* violates equal protection). See also R. DWORKIN, *supra* note 3, at 176-84.

166. Such restrictions might be warranted in cases involving controversial moral questions. A forthright judge, however, will concede that her vote to restrict the right is based on her conviction that no such right exists in the first place, rather than pretend that there are neutral reasons for the restriction.

the paradigm.¹⁶⁷

Sometimes the creation of a paradigm does not settle every problem in that area. In *Brown*, the foundational paradigm for equal protection enunciated in *Plessy* was overturned. Racial segregation was no longer consistent with the preferred equal protection paradigm. Two questions immediately arise. The first question centers around whether invidious discrimination is constitutionally invalid only in cases involving *racial* discrimination or whether it applies as well to other types of discrimination.¹⁶⁸ When the Court proceeds beyond racial discrimination it alters the paradigm and extends the revolution.¹⁶⁹ In such cases, the revolution is not complete until the law becomes settled in the equal protection area.

The second question involves remedies. Do certain kinds of remedies, such as affirmative action, follow from the new paradigm, or does such a proposed remedy itself violate the paradigm? Until the appropriate remedies are determined, the revolution is incomplete. A remedy itself might be revolutionary relative to what is thought possible concerning remedies in that area.

The central concern during the period in which the paradigm is perfected and refined is coherence with the paradigm. Coherentism does not merely appeal to the paradigm as a precedent. Instead, it attempts to create general principles which adequately state the essential values embodied in the paradigm. The logical limits of a paradigm might not be obvious until the paradigm is perfected and refined. The precise nature of the paradigm's values are not revealed until the logical limits of the paradigm are determined.

It is important to say something more about the character of the methodology employed when the paradigm is perfected and refined. What sort of methodology is employed in this context? Is a pragmatic or conventionalist methodology applied?¹⁷⁰ Or is it some combination of these approaches to constitutional law?

167. Arguably, *Harris v. McCrae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977), are examples of this process.

168. There is an equal protection argument against supposing that the fourteenth amendment can be restricted to racial classifications only. If special protection is appropriate for those subject to racial classifications, and other groups have suffered relevantly similar discrimination, then they deserve the same protection.

169. Such alterations need not be inappropriate. There might be a good argument for generalizing the paradigm's core value. If so, the value should be stated not as "equality for blacks," but "equality for an oppressed group." Typically, there is no way to generalize the core value without an appeal to factors not contained within the paradigm. Therefore, contrary to contemporary philosophical consensus, there is a pragmatic element in the very process of generalization. For an examination of contemporary philosophical attempts to analyze the concept of generality in ethics see R. HARE, *supra* note 90. See also M. SINGER, *GENERALIZATION IN ETHICS* (1961).

170. If coherence has a distinctive application, it is only during this period.

Dworkin's theory, law as integrity,¹⁷¹ contends that a constitutional decision must closely fit the constitutional paradigm. When two possible decisions fit the paradigm, we should choose the one that provides the best interpretation of the constitutional practice from the point of view of the community's moral and political convictions. Cultural, moral and political considerations enter into this process. But they enter into the process only insofar as they help identify the legal paradigm decided in the revolutionary moment. Furthermore, these considerations are only relevant when there are two or more possible decisions consistent with the revolutionary paradigm. When there is only one decision consistent with the paradigm, routine adjudication occurs. While routine adjudication essentially adopts a conventionalist approach to constitutional law, revolutionary adjudication adopts a pragmatic approach. Adjudication in the period of perfecting and refining the revolution incorporates both conventionalist and pragmatic elements in reaching constitutional decisions.

b. Stabilizing the Revolution

Once the revolutionary paradigm has been fully explored, the revolution is refined and perfected. At that point, the Court begins to stabilize the paradigm.¹⁷² Court decisions begin to explicitly deny the extension of the paradigm. Sometimes this occurs when lower courts fail to extend the paradigm and the Supreme Court denies certiorari. Other times, the Court will take the case in order to prevent the extension of the paradigm.¹⁷³ Once the Court responds in either of these ways, the paradigm is completed and the revolution is stabilized.

Conceivably, perfecting the revolution could conflict with the revolution's stabilization. In these circumstances, some courts appeal to the revolutionary paradigm, while other courts continue to extend and refine the paradigm. Such a process may continue indefinitely. Usually, however, a higher court will decide whether the paradigm needs further refining or whether it is time for stabilization.

c. Routine Adjudication

Routine adjudication is comprised of decisions that depend upon

171. See R. DWORKIN, *supra* note 3.

172. Ultimately, the inability of normal adjudication to stabilize the paradigm indicates that a counter-revolution is likely. Sometimes a revolutionary paradigm is stabilized, followed by routine adjudication, yet, a counter-revolution occurs anyway. The period of revolutionary adjudication followed by normal adjudication and then counter-revolution has been accurately described by Holmes as "that period of dry precedent which is so often to be found midway between a creative epoch and a period of solvent philosophical reaction." O. HOLMES, *THE COMMON LAW* 72 (M. DeWolfe Howe ed. 1963).

173. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

well-accepted legal paradigms.¹⁷⁴ By "well-accepted" I mean principles about which there is a consensus in the legal community regarding the relevance of certain facts, the analytic framework and the arguments and remedies to be deployed. Adjudication based directly on a textually pellucid clause of the Constitution, or one that directly follows from a controlling statute or Supreme Court decision, is routine adjudication. For example, deciding an economic or social welfare case by adopting rational basis review is often routine.¹⁷⁵ Such a case unequivocally applies the framework set up by the paradigmatic case or set of cases. Normal and routine adjudication took place in the cases upholding separate but equal facilities following *Plessy*.¹⁷⁶

Routine adjudication need not involve open and shut cases. The facts might be complex and their proper interpretation and evaluation might be unclear at the start. Routine cases, furthermore, may even add a small wrinkle or nuance to the analytic framework set up by the paradigm in that area of law. On the other hand, routine adjudication may involve cases that never get litigated, or are handled summarily by a court. According to the theory of constitutional revolutions, routine "adjudication" refers to what occurs in the courtroom, as well as an attorney's office. In the latter case, routine adjudication occurs when an attorney advises a client that he, the client, doesn't have a cause of action or if he does, that his case is weak and he should settle.

F. Precursors to Revolution

In describing key constitutional cases as revolutionary, I do not mean to imply that they are made of whole cloth. Nor do I mean to say that constitutional revolutions have no constitutional basis upon which to build. On the contrary, some are perfectly predictable. There are important judicial precursors to some constitutional revolutions which may be described as prerevolutionary adjudication.¹⁷⁷

Indeed, the seeds of the revolution in *Brown* were evidenced by two lines of cases. In 1944, the Court created the strict scrutiny strand of equal protection analysis, making classifications based on racial characteristics "immediately suspect."¹⁷⁸ If no "pressing public neces-

174. Constitutional text or controlling Supreme Court precedent usually supply well-accepted paradigms.

175. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

176. This is not to suggest that routine adjudication is always conceptually trivial or easy to deploy. Many methods of routine adjudication exist such as following precedent, distinguishing precedent, using statutory construction and logical analysis, to name just a few. See D. RHODE & H. SPAETH, *SUPREME COURT DECISION MAKING* 34-49 (1976).

177. Generally, prerevolutionary adjudication is one stage of revolutionary adjudication.

178. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

sity"¹⁷⁹ could justify the classifications, it had to be struck down. The Court finally made it clear that racial antagonism¹⁸⁰ could not justify a statute that classified individuals according to race.

Although I believe that the strict scrutiny strand of equal protection analysis was a precursor to the principle in *Brown*, it is astounding that it is not mentioned in *Brown*.¹⁸¹ The cases mentioned in *Brown* were cases in which the *Plessy* doctrine was upheld, but integration was ordered due to unequal facilities.¹⁸² These cases indicate the uneasiness the Court felt at this time with the doctrine in *Plessy*. Precursors to revolutionary decisions come in different forms. The difference between *Korematsu v. United States*¹⁸³ and the cases upholding *Plessy* consists of this: the cases upholding *Plessy* were not revolutionary in themselves. Instead, they were harbingers of a revolutionary decision. *Korematsu*, on the other hand, was a revolutionary decision in itself, laying the ground work for an even more significant revolution.¹⁸⁴ The revolution in *Brown*, combined with the revolutionary *Korematsu* decision and the per curiam decisions after *Brown*, represent a total rejection of the separate but equal doctrine.¹⁸⁵ Subsequently, the *Brown* revolution was extended from the segregation of public facilities to associational values.¹⁸⁶

179. *Id.*

180. Does "racial antagonism" include benign racial preference? The present Court appears to be working towards such an inclusion.

181. Thurgood Marshall raised the *Korematsu* issue in the appellants' brief. However, no mention of it or strict scrutiny can be found in the *Brown* opinion itself. Furthermore, Marshall raised the issue of racial classifications and strict scrutiny at oral argument, but Chief Justice Warren redirected Marshall to discuss the issue of judicial power. B. SCHWARTZ, *SUPER CHIEF EARL WARREN AND HIS SUPREME COURT* 83 (1983) [hereinafter *SUPER CHIEF*]. Perhaps Warren's desire for an opinion "written in understandable English [avoiding] legalisms" explains the absence of *Korematsu* or any mention of strict scrutiny analysis in the opinion. *Id.* at 97. Still, strict scrutiny analysis would have made the Court's job that much easier. The Court could have based its decision, even a rejection of *Plessy*, on *Korematsu*.

182. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Cumming v. County Bd. of Educ.*, 175 U.S. 528 (1899).

183. 323 U.S. 214 (1944)(holding that legislation curtailing the civil rights of a single race must be strictly scrutinized).

184. The revolution in *Korematsu* is limited to its statement of the strict scrutiny test regarding statutes using racial classifications, not the decision to support the incarceration of Japanese Americans.

185. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 576 (3d ed. 1986) [hereinafter *CONSTITUTIONAL LAW*].

186. *Loving v. Virginia*, 388 U.S. 1 (1967)(striking down antimiscegenation statutes); *McLaughlin v. Florida*, 379 U.S. 184 (1964)(striking down a statute prohibiting cohabitation between white and black people).

G. Revolutionary Decisions as Responses to Crises

1. Constitutional Crises

Generally, a revolutionary constitutional decision is a response to a perceived constitutional or social crisis. Crises occur for many reasons. A crisis may occur when there is an intractable problem in constitutional law itself, for example, when there is no paradigm in an area involving much social and political upheaval. Crises also occur when the current paradigm is indeterminate¹⁸⁷ or radically defective, generating inconsistent decisions or decisions inconsistent with a good paradigm in some other area of constitutional law.

A crisis may also occur when there is a constitutional paradigm which conflicts with the political and moral convictions of some social majority. Such a paradigm no longer solves the general social or moral problem it was designed to solve. For example, the paradigm in *Plessy* precipitated a constitutional and social crisis which led to its replacement in *Brown*. A paradigm precipitates crisis when it is the "correct" legal solution to a problem, but conflicts with deeply held cultural or moral convictions. In these circumstances, something must give.

The American Civil War represented a constitutional crisis. Economic domination, human rights, states' rights and differences in regional cultures all contributed to the crisis facing the nation during the middle part of the nineteenth century. The limiting instance of a constitutional crisis is one that is not satisfactorily resolved by the courts or other governmental agencies and ultimately expresses itself in war.¹⁸⁸

Interestingly, a society's critical cultural convictions can then be

187. Many scholars associated with the Critical Legal Studies Movement contend that every legal paradigm is indeterminate. Singer, *The Player and the Cards: Nihilism in Legal Theory*, 94 YALE L.J. 1 (1984).

188. The American Civil War was such a crisis. Consider:

Within the span of a single generation—during the thirty-odd years that began with the annexation of Texas in 1845 and ended with the withdrawal of the last Union troops from the South in 1877—the United States underwent a succession of constitutional crises more severe and menacing than any before or since.

Bestor, *supra* note 152, at 327.

Furthermore, there is an even more interesting sense that the war between the states was a *constitutional crisis*. Indeed:

"the very form that the conflict finally took was determined by the pre-existing form of the constitutional system." The way the opposing forces were arrayed against each other in war was a consequence of the way the Constitution had operated to array them in peace. Because the Union could be, and frequently had been, viewed as no more than a compact among sovereign states, the dissolution of the compact was a conceivable thing. It was constitutional theorizing, carried on from the very birth of the Republic, which made secession the ultimate recourse of any group that considered its vital interests threatened.

seen as a foundation for, and a test of, the evolution of legal doctrine. Within the confines of a stabilized paradigm, these convictions may be appealed to only in exceptional circumstances. One need not ask whether a case, clearly solvable in terms of the paradigm, is consistent with the society's critical cultural convictions. One only asks whether the case conforms to the constitutional paradigm. However, this is only one possible outcome. When a number of these cases are decided according to the paradigm, but still conflict with common sense or the society's critical cultural theory, it is because the critical cultural perspective has changed. In such circumstances, a conscious shift in the paradigm's meaning is appropriate.¹⁸⁹

2. *Revolutionary Theory Versus Formalism*

The theory of constitutional revolutions contends that American constitutionalism cannot be explained or understood without appealing to the concept of constitutional revolutions. No neutral or formal methodology, for deciding constitutional cases, explains the actual decisions. This has both explanatory and normative implications. If the concept of revolutionary adjudication is necessary to explain our particular brand of constitutionalism, we ought to deploy it. We should deploy this methodology barring a demonstration that our republic and its distinctive brand of constitutionalism is morally pernicious and therefore should not survive.

H. Dualistic Constitutional Methodology

Constitutional adjudication requires two distinctive types of methodology. The first, revolutionary methodology, occurs when the Constitution fails to provide an obvious solution to a pressing moral or political problem. In these circumstances, judges solve the problem by appealing to constitutionally extrinsic factors. The second, normal methodology, perfects, refines and stabilizes a constitutional paradigm until it becomes routine. The justification for our brand of constitutionalism is pragmatic in that it has created the sort of society we desire. Furthermore, it captures a conspicuously human virtue, namely, a penchant for creative growth followed by an exploration and stabilization of what has been created.

Id. at 329.

The decision in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), invalidating the Missouri Compromise and the permissibility of slavery in the territories, was an ill-advised constitutional revolution. Limiting or doing away with slavery, both in economic and moral terms, was clearly the way of the future. Invalidating a progressive solution to this problem, the Court paved the way for the most destructive constitutional crisis of all.

189. When a paradigm no longer solves the moral, social, political or economic problems it was designed to solve, it should be abandoned.

III. REVOLUTIONARY CONSTITUTIONAL DECISIONS

A. Introduction

The theory of constitutional revolutions is supported by the critical accounts of the defective reasoning¹⁹⁰ in many pivotal constitutional cases.¹⁹¹ Constitutional conservatives and liberals alike ascribe to these criticisms.¹⁹² Of course, the decision may be sound as a piece of political philosophy.¹⁹³ Although there is little point in my replicating these discussions, it is necessary to provide some examples of the defects in reasoning contained in some constitutional revolutions. Consequently, I will discuss examples from two periods of constitutional revolutions:¹⁹⁴ the formative revolutions of the Marshall Court and certain foundational equal protection and due process revolutions from the Warren Court.¹⁹⁵ Though there is room for dispute, I would take it as a critical defect in the theory of constitutional revolutions if a good number of the following cases were not considered revolutionary. Of course, there are different degrees of revolutionary adjudication. Some decisions are revolutionary *per se*; other decisions are revolutionary within the context of a constitutional paradigm that is itself a revolution. We can, therefore, analytically distinguish between macro-revolutions and micro-revolutions. Macro-revolutions are decisions creating new paradigms and are based entirely on pragmatic fac-

190. By "defective" I mean that the judicial conclusion does not follow from the claimed authorities, that is, logically, the rule adopted is a *non sequitur*. Sometimes the conclusion follows only by presupposing the very issue in dispute.

191. Van Alstyne's examination of *Marbury* is an exemplar in this regard. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1. See also *infra* note 214.

192. Everyone appears to realize this, though few are willing to candidly admit it. See Shaman, *supra* note 104.

193. For example, even if judicial review is revolutionary, it might still be desirable relative to a particular conception of democracy, nationalism or both. To call judicial review revolutionary simply means that no *normal* constitutional or legal argument can establish its legitimacy.

194. American constitutional history can be divided into three periods. During the first period, from *Marbury* through the Civil War, the central constitutional theme "was directed toward forging as strong a national union as law could produce." Miller & Howell, *The Myth of Neutrality*, in JUDICIAL REVIEW AND THE SUPREME COURT 1, 198, 213 (L. Levy ed. 1967). But see L. TRIBE, *supra* note 11, at 3 (arguing that the Marshall period was based on the model of checks and balances and a federalism giving the states their proper autonomy). The second period, from 1870 to 1937, found the Court struggling with the appropriate role of government in economic and social affairs. Finally, the last period, from 1937 to the present, saw the greatest movement toward the protection of individual civil rights and liberties. A complete statement of the theory of constitutional revolutions must provide a method of classifying the different kinds of revolutions and paradigms occurring during these periods.

195. This selection in no way purports to be an exhaustive account of constitutional revolutions or the process by which constitutional adjudication evolves into normal adjudication.

tors. Micro-revolutions are creations of sub-paradigms within the overall purview of a major paradigm. Micro-revolutions are generated by an appeal to both extrinsic pragmatic considerations, as well as an appeal to the defining features of the paradigm.¹⁹⁶

What directs revolutionary adjudication is a moral or political argument that is not contained in the Constitution or in the relativized constitutional theory. Occasionally, within a revolutionary paradigm, a sub-paradigm is required for the original paradigm to succeed. Naturally, a sub-paradigm is warranted only if the original paradigm is desirable. Furthermore, the sub-paradigm must not conflict with any other constitutional paradigms, or with extrinsic moral and political factors. If the sub-paradigm is objectionable in either of these ways, support for the original paradigm may be withdrawn. The decision whether to retain an original paradigm must be made pragmatically.

Many of the following examples are cases that we could not now imagine repudiating, however dubious their original justification. This suggests that everyone supports revolutionary adjudication, even those judges heralding originalism and judicial restraint.¹⁹⁷

There are several different types of constitutional revolutions. A constitutional revolution occurs when the Court gives meaning to a vague or indeterminate constitutional provision such as due process or equal protection. Almost any important Court decision regarding these provisions will be revolutionary. Consequently, vague or indeterminate constitutional provisions invite revolution. A constitutional revolution also occurs when the Court creates standards for applying constitutional provisions. For example, the constitutional protection of freedom of speech involves revolutionary adjudication when the Court formulates an elaborate framework for applying the provision. Constitutional revolutions also occur when the Court renders a constitutional provision a dead letter, as illustrated by the Court's interpretation of the privileges and immunities clause of the fourteenth amendment.¹⁹⁸

196. Revolutions, whether scientific or constitutional, come in different sizes. The essential feature of either type of revolution is that it is "a special sort of change involving a certain sort of reconstruction of group commitments. But it need not be a large change, nor need it seem revolutionary to those outside a single community" SCIENTIFIC REVOLUTIONS, *supra* note 111, at 181.

197. For example, consider the words of Judge Anthony Kennedy during his confirmation hearings as a nominee for the Supreme Court of the United States:

Well the *Miranda* rule, as I say is in place, it was a sweeping, sweeping rule. It wrought . . . it was almost a revolution. And it was not clear to me that it necessarily followed from the words of the Constitution. Yet it is in place now and I think it's entitled to great respect.

In response to Questions by Senator Leahy, Dec. 15, 1987.

198. *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873)(interpreting the fourteenth amendment's privileges and immunities clause to provide no additional protection over the protections of U.S. CONST. art. IV, § 2).

One particularly interesting revolution occurred regarding article IV, section 3 of the Constitution.¹⁹⁹ Apparently, the framers had discussed and rejected the inclusion of a clause stating that new admittees into the Union would be admitted on an equal basis. Their reason for not including the condition was based on a desire not to bind future congresses. Despite the original rejection of this concept, the Court ultimately interpreted the provision to include this condition.²⁰⁰ In this case, the text of the Constitution, in conjunction with the explicit omission of the provision, should have bound the Court. Instead, the Court embraced the previously abandoned condition on pragmatic grounds. According to the theory of constitutional revolutions, the Court's interpretation of this provision is not dictated by the Constitution's text, intent, history, structure or logic. The propriety of this decision must be found elsewhere in cultural or abstract moral and political values.²⁰¹

199. For a description of the history of this provision see C. CURTIS *supra* note 79, at 4-7.

200. This is a clear example of what Clinton and Perry characterize as contraconstitutional interpretation, as distinguished from extraconstitutional interpretation. The former permits a reading of a constitutional provision that conflicts with the original interpretation of its language. Extraconstitutional interpretation permits "whatever interpretive means are appropriate to breathe precisely the same evolutionary interpretive life into the Constitution that Madison envisioned in *The Federalist* No. 49." Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1265 (1987). On this view, extraconstitutional interpretation is evolutionary and legitimate, while contraconstitutional interpretation is revolutionary and illegitimate. *Id.* See M. PERRY, *supra* note 9, at 20. I doubt that this distinction can be consistently drawn. But even if it can, I believe it can be shown that constitutional interpretation as employed by the Marshall Court was revolutionary, and therefore more contraconstitutional than extraconstitutional.

201. The theory of constitutional revolutions accurately describes one salient feature of constitutional adjudication, namely, that most landmark decisions are based on constitutionally extrinsic factors. Indeed, the source of law in such cases usually comes from our rich political and moral culture, not from the four corners of the Constitution.

The problem is that while most people are aware of how such decisions come about, the myth of basing decisions on the Constitution's text, intent, history, structure or logic still persists. However, the problem here is "not that the Court acts on a myth, but that the talk about it heads the Court in the wrong direction. It backs into questions it ought to face. It's like going up a one way street in reverse." C. CURTIS, *supra* note 79, at 3. Stated differently, no ordinary, intelligent citizen would spontaneously say that Marshall's decision in *Marbury* was "ordained [by the words of the Constitution] in the beginning." A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 12 (1976). He must go to law school to say that. But "[e]ven a lawyer must strain to extrapolate supporting evidence from the words." *Id.* Law school teaches students how to dress extrinsic factors in "acceptable" constitutional arguments.

B. The Counter-Majoritarian Question and the Legitimacy of Judicial Review

Judicial review is a structural feature of American constitutionalism²⁰² that implicates two fundamental features of American government: separation of powers and federalism. This raises the question of whether judicial review is legitimate. Essentially, the challenge here is to reconcile judicial review with democracy.²⁰³ Since judges

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202. There are many different senses to the term "judicial review." Two broad senses of this term roughly correspond to a procedural/substantive distinction. Van Alstyne, *supra* note 191, at 23-24. Furthermore, the character of judicial review varies in different political and judicial systems. See generally Deener, *Judicial Review in Modern Constitutional Systems*, 46 AM. POL. SCI. 1079 (1952). See also E. MCWHINNEY, *JUDICIAL REVIEW IN THE ENGLISH-SPEAKING WORLD* (3d ed. 1965).

Some argue that the kind of judicial review the Marshall Court instituted is very different from the contemporary practice of judicial review. Wolfe, *A Theory of U.S. Constitutional History*, 43 J. POL. 292, 313-14 (1981) (arguing that there are three kinds of judicial review: narrow, broad and loose). One writer even suggests that Marshall instituted "interpretivist review" while contemporary review is "noninterpretivist." Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1, 12 (1981). My hunch is that contemporary objections to noninterpretivist review is merely an extended skepticism concerning the legitimacy of Marshall's revolutionary decision in *Marbury*. Consider: "The important point is that if Marshall's defense of interpretivist judicial review is not compelling, we should be cautious about extending the Court's power to include noninterpretivist methodologies." *Id.* But see Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93, 113 (1983) (arguing that "the Court's institutional behavior does not indicate that the Court recognizes any distinction between interpretive and noninterpretive review"). See also A. MILLER, *supra* note 15, at 22 (stating that it is a literary myth that the Court is the authoritative constitutional interpreter).

Consequently, Grano's view is a *non sequitur*. One can as easily argue that since Marshall's decision in *Marbury* was revolutionary, revolutionary judicial review is central to constitutional practice and should not be artificially restricted. Moreover, it is mystifying how one can believe that Marshall's decision in *Marbury* "could be rendered by reference to the text, intent, history and structure of article III." Grano, *supra*, at 11. Furthermore, interpretivist review requires a political justification, a justification not found in the Constitution's text, history, structure or logic. Thus, interpretivism, if true, can only be justified by an appeal to noninterpretivist principles.

203. Textualists and originalists are especially bothered by the question of legitimacy. They argue that the counter-majoritarian problem is resolved or diminished by following the text of the Constitution, or where interpretation is required, by interpreting the Constitution in terms of the framers' original understanding. However, neither textualism nor originalism resolves the counter-majoritarian challenge. Both methods permit judicial review and the cancellation of majoritarian policies. See E. CHERMERINSKY, *INTERPRETING THE CONSTITUTION* 11 (1987). Furthermore, a careful inspection of the formative years makes it clear that a written constitution was *not* designed to replace appeals to extrinsic constitutional sources. See Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987) (arguing that the founders intended both the written Constitu-

are not elected by the people, nor directly accountable to them except in rare circumstances,²⁰⁴ their role in the republic is potentially counter-majoritarian.²⁰⁵ How can such officials justifiably strike down legislation produced by democratically elected leaders?²⁰⁶ The literature concerning this challenge is abundant, and I will not examine this problem here, except to say that any careful study of the Constitution and the American republic shows that democracy is only one part of its structure. Much of this structure is decidedly countermajoritarian.²⁰⁷ Moreover, one can characterize judicial review as protecting the permanent majority, "the people," from the will of a transient contemporary majority.²⁰⁸

My concern is to provide a framework through which we can understand the actual operation of judicial review. The theory of constitutional revolutions is not an answer to the counter-majoritarian

tion and natural law to serve as sources of law). See also B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 184-98 (1967)(describing the reliance on natural law during the period prior to the revolution).

One writer contends that the relevant "original understanding" or "intentions" are not the founders', but that of the parties to the compact, the states. Powell, *The Original Understanding of Original Intent*, 98 HARV L. REV. 885 (1985). See also Grey, *Constitutionalism: An Analytic Framework*, in CONSTITUTIONALISM 189, 202-03 (1979)(arguing that normative principles of ethics and politics have always been an accepted source of constitutional norms); Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987)(describing the limited role of history in constitutional interpretation).

204. U.S. CONST. art. II, § 2, cl. 1; U.S. CONST. art. II, § 3.

205. The Constitution itself, however, is a counter-majoritarian document. See J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 61 (1980)(stating that "the Constitution consists of a mass of anti-majoritarian imperatives."). See also Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486 (1982). Short of amendment, contemporary Americans do not choose the form of government they live under. This raises problems for "consent theories" of political obligation.

206. The counter-majoritarian problem becomes troublesome depending upon whose ox is gored. Conservatives raise the problem when the Court is liberal. Liberals raise the problem when the Court is conservative. Cf. Mendelson, *Jefferson on Judicial Review: Consistency Through Change*, 29 U. CHI. L. REV. 327 (1962) (describing Jefferson's attitude toward the Court depending upon how tyrannical in any given period he thought the Court was).

207. Federalism is also decidedly counter-majoritarian. Congressional legislation representing the majority position on an issue can be struck down by judicial review because it conflicts improperly with state sovereignty. Cf. B. STRAYER, *THE CANADIAN CONSTITUTION AND THE COURTS* 53 (1983)(describing the counter-majoritarian problem concerning the Canadian constitution).

208. Of course, the permanent majority never actually votes. However, judicial review can be understood as the vote of a reflective, transtemporal citizen. See B. STRAYER, *supra* note 207. See also Cappelletti & Adams, *Judicial Review of Legislation: European Antecedents and Adaptions*, 79 HARV. L. REV. 1207, 1224 (1966)(characterizing the value of judicial review as a "sobering and ennobling experience that befalls those who check their acts against their principles and strive in performing the former never to lose sight of the latter").

problem. Rather, it is an attempt to describe and explain the dualistic dimensions of constitutional adjudication as it existed from *Marbury v. Madison*²⁰⁹ to the present day.

C. The Formative Revolutions

1. *The Revolution to Launch All Judicial Revolutions: Marbury v. Madison*

Judicial review was first asserted as a means of striking down a federal legislative act in *Marbury v. Madison*.²¹⁰ In this revolutionary case,²¹¹ Marshall attempted to do several things. First, he tried to establish the legitimacy of review,²¹² namely, that acts inconsistent with the Constitution are void.²¹³ Second, Marshall assumed that review

209. 5 U.S. (1 Cranch) 137 (1803).

210. The first instance of judicial review by the Supreme Court occurred in *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796) (upholding a congressional tax on carriages). In this case, the three separate opinions "paid little heed to the Constitution's words." Currie, *The Constitution in the Supreme Court*, 48 U. CHI. L. REV. 819, 855 (1981). Instead, "[p]olicy considerations dominated all three opinions." *Id.* at 856. The concept of judicial review goes back at least as far as Dr. Bonam's Case, 77 Eng. Rep. 638 (C.P. 1610). There, Lord Coke adopted a naturalist conception of law, insisting that acts of Parliament were void when inconsistent with "common right and reason." *Id.* at 652.

211. The results of the Philadelphia Convention were themselves revolutionary in that scrapping the Articles of Confederation and designing a new constitution exceeded the authority of the Convention. THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY xix (M. Kammen ed. 1986) [hereinafter ORIGINS].

212. This was in itself revolutionary, since the Constitution nowhere stated or implied any sort of judicial review. Of course, there are many arguments purporting to establish that some sort of review necessarily follows from the notion of a written constitution, or a constitution setting up a limited form of government. However, none of these arguments are completely persuasive.

213. Marshall not only established judicial review as a legitimate judicial function, he established a very strong form of review. One could imagine a principle of review which stated that the Court should interfere with acts of other branches of the government only when it is clear that the Constitution has been violated. If he had fashioned such a rule, our constitutional history would be very different, and the Court's role weakened. However, the question of legitimacy would be rendered less vexatious. Thayer talks about such a rule when he argues that the Court can disregard a legislative act "when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question." Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, in ESSAYS IN CONSTITUTIONAL LAW, *supra* note 52, at 71. See also L. HAND, THE BILL OF RIGHTS 15-18 (1958). Such a rule would permit judicial review and the invalidation of legislation only in extreme cases. I think such a rule would be a bad rule, but not because the Constitution, its text, intent, history, structure or logic entail a stronger one. Rather, on pragmatic grounds, a stronger rule is required for the kind of constitutional government we desire. Cf. McCloskey, *Introduction*, in ESSAYS IN CONSTITUTIONAL LAW, *supra* note 52, at 12 ("If judicial review as we know it in America can be

must be a governmental function, in contradistinction to letting the citizenry throw the scoundrels out. Third, he argued that review must be an exclusively judicial function.

There is an enormous amount of literature describing the errors in Marshall's decision in *Marbury*.²¹⁴ I do not intend to repeat the numerous allegations concerning the impropriety of the reasoning in *Marbury*. My central thesis is that there was no compelling basis for Marshall's decision. Instead, Marshall assumed the power of judicial review.²¹⁵ Furthermore, Marshall's assumption of power in this case was the beginning of a series of constitutional revolutions centralizing power in the federal government.

justified at all, it must be justified as an attempt by men to think coherently about the ordering of human affairs . . .").

214. Marshall has been criticized on several grounds for his reasoning in this case. For perhaps the most comprehensive critique on this subject see Van Alstyne, *supra* note 191, at 37 ("There is . . . no doctrine of national, substantive judicial supremacy which inexorably flows from *Marbury v. Madison* itself . . ."). Others include: Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538 (1914); Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 143-44 (1893) (arguing that judicial review might have been construed to apply only when the legislature's mistake "is not open to rational question"); CONSTITUTIONAL LAW, *supra* note 185, at 8; 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 232, 242-43 (1924) ("It seems plain . . . that it would have been possible for Marshall, if he had been so inclined, to have construed the language of the section of the Judiciary Act which authorized writs of mandamus, in such a manner as to have enabled him to escape the necessity of declaring the section unconstitutional."); L. HAND, *supra* note 213, at 1-11 (1958); J. ELY, *DEMOCRACY AND DISTRUST* 186 & n.11 (1980); L. LEVY, *JUDICIAL REVIEW AND THE SUPREME COURT* (1967).

Some argue that although Marshall's reasoning is defective, the conclusion is still good. Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 219 (1955) ("The courage of *Marbury v. Madison* is not minimized by suggesting that its reasoning is not impeccable and its conclusion, however wise, not inevitable."). Consider Tribe's comments:

[On the issue of judicial review] the Constitution is indeterminate. Marshall resolved the indeterminacy, in essence, by *postulating* that federal courts have the power independently to interpret and apply the Constitution; it is no argument against Marshall's postulate to point out (correctly) that it is not a corollary.

L. TRIBE, *supra* note 11, at 25.

Tribe is certainly right that arguing that judicial review is not a corollary, but instead a useful postulate. However, Tribe must then concede that constitutional interpretation involves a process of revolution. That is, great constitutional postulates are the result of the Court following prudence, morality or common sense, *not* the text, intent, history, structure or logic of the Constitution.

215. This is not to say that Marshall created the idea of judicial review from whole cloth. Several states assumed the practice of judicial review as part of state constitutional law. However, the evidence for this is usually overstated. The practice did not enjoy widespread acceptance. 2 W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 944-75 (1953). Furthermore, Hamilton believed judicial review to be an essential part of judicial prerogative. Nevertheless, the practice of judicial review was an assumed power. ORIGINS, *supra* note 211, at xii.

For Marshall's decision to be the result of normal adjudication, there must be some obvious constitutional paradigm sanctioning the result.²¹⁶ No such paradigm exists. Commentators have conclusively shown that the decision in arguments against the reasoning in *Marbury* is not entailed by the text, intent, history, structure or logic of the Constitution.²¹⁷

Denying that the holding in *Marbury* inextricably follows from the Constitution or constitutional practice does not, according to the theory of constitutional revolutions, indicate that it is bad law. Indeed, pragmatically one could argue that Marshall's conclusion in *Marbury* is good law.²¹⁸ However, this means that we must revise our conception of what constitutes "good law." We may no longer assume that under these circumstances good law can be explicated only in terms of either conventionalistic or coherence conceptions of law.²¹⁹ Instead, we must recognize that as early as *Marbury* justices were creating revolutionary constitutional decisions that can only be explained pragmatically.

Ronald Dworkin is one of the few contemporary commentators who defends Marshall's decision in *Marbury*.²²⁰ Dworkin writes:

He [Marshall] was right to think that the most plausible interpretation of the developing legal practices of the young country, as well as of its colonial and British roots, supposed that an important part of the point of law was to supply standards for the decision of courts. History has vindicated the substantive dimension of that interpretation. The United States is a more just society than it would have been had its constitutional rights been left to the conscience of majoritarian institutions.²²¹

But how do we determine that this was "the most plausible interpretation of the developing legal practices of the young country, as

216. In other words, the constitutional paradigm must be obvious and uncontestable. During the first century of the republic, judicial review certainly was not uncontestable. F. AUMMAN, *THE CHANGING AMERICAN LEGAL SYSTEM* 193 (1969).

217. There are two kinds of criticism of Marshall's reasoning in this case: logical or formal deficiencies, on the one hand, and practical deficiencies on the other. Logical deficiencies are mistakes in reasoning, practical deficiencies are the misuse or abuse of common sense knowledge, precedents or history. For an illuminating thesis that Marshall misused or abused precedents and history see generally Bloch & Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 WIS. L. REV. 301.

218. Such an argument consists of demonstrating, morally and historically, that the principle in *Marbury* has been conducive to bringing about a certain type of polity. There is some evidence that Marshall achieved this goal. A. COX, *supra* note 201, at 16, 29-30.

219. For a conventionalistic account of the decision in this case to be illuminating, the argument must entail judicial review. I submit that there is no such argument. Neither can we base such an argument on general principles required to justify our constitutional scheme. See *supra* notes 180-85 and accompanying text.

220. I do not mean to suggest that most scholars contend that the decision in *Marbury* is wrong. Marshall's "judicial reasoning" comes under attack, not his result.

221. R. DWORKIN, *supra* note 3, at 356.

well as of its colonial and British roots?"²²² What specific legal documents, statutes, or judicial decisions tell us what *the* legal practice was?²²³ More importantly, how can our "colonial and British roots" be part of the developing judicial practice? Wasn't the break with England and the subsequent ratification of the Constitution a paradigmatic example of "beginning a new story?"²²⁴

What Dworkin overlooks is that in the beginning there was no discernible structure to our political environment capable of showing *the* way to the future, save for certain explicit constitutional conventions or paradigms such as the Constitution and case law.²²⁵ A fledgling republic does not have a discernible structure other than these conventions.²²⁶

No doubt Dworkin could reply that even at the beginning of the republic American law exhibited a structure inherited from colonial life and English common law. But American constitutional law cannot be identified with English common law. Moreover, the fact that American constitutionalism can be traced to inchoate beginnings in English law does not prove that there must have been a well-defined structure in early American constitutional law, *i.e.*, a structure that can be a criterion for determining unique answers to hard cases.²²⁷

222. *Id.*

223. One standard argument is that there were pre-constitutional precedents for judicial review in the state governments. *But see supra* note 215.

224. Dworkin regards the distinction between "continuing the same story" and "beginning a new story" as a constraint of judicial interpretation. Consequently, in interpreting prior judicial practice, a judge must have some intuitive conception of what the practice is. Surely, American constitutional practice could not begin prior to the ratification of the Constitution.

225. Dworkin uses the model of a chain novel to explain constitutional adjudication. R. DWORKIN, *supra* note 3, at 228. *But see* Lipkin, *supra* note 14, at 669-77. However, it is not at all clear that at the early stages of a novel there must be, or that there can be, a discernible structure indicating *the* right way to continue the story.

226. There is an obvious reason for this lack of structure. Though American constitutional law stems from English law, it also derives from English and French political philosophy. *See generally* M. WHITE, *PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION* (1987). Indeed, American constitutional law stems from multifarious sources. However, the source of law is not the law itself. When a nation truly has a revolutionary beginning its legal system must itself contain new paradigms, even if these paradigms are also in some sense part of the older tradition. Legally and politically the United States began a new legal tradition with the adoption of the Constitution. Hence, the sort of relativistic moral theory associated with a developing constitutional tradition had little opportunity to develop at the time of *Marbury*. At that time, constitutional law could be identified with explicit constitutional conventions. General principles, conspicuous of a relativized constitutional theory, had not yet emerged.

227. Similarly, it is insufficient to argue that constitutional revolutions must be viewed epistemologically as occurring within the scope of a single coherent intellectual history. Here, I am taking liberties with MacIntyre's interesting argument concerning the superiority of scientific paradigms. MacIntyre argues that

The fact that American constitutional law derives from English law does not show the latter to be the normative authority of the former.

According to the theory of constitutional revolutions, *Marbury* is a paradigmatic revolutionary decision. Prior to this case, the notion of judicial review had been debated with no clear victory for either side.²²⁸ The Constitution itself makes absolutely no mention of judicial review as either a permissible or mandatory judicial power.²²⁹ Besides the language of Marshall's opinion, nothing in the intent, history, structure or logic of the Constitution makes judicial review inevitable.²³⁰ Had Marshall not created this judicial power, the United States would have survived, though it might have turned out to be a very different type of republic.²³¹ Essentially, Marshall created judicial review as a pragmatic response²³² to the problem of the role of the judiciary in the constitutional scheme. Judicial review is conducive to bringing about a certain kind of national republic.²³³ And *that* is what Marshall sought.

epistemological crises are remedied by reconstructing the tradition in which two apparently incompatible paradigms operate in order to compare and evaluate them. MacIntyre, *Crises, Narrative and Science*, in PARADIGMS AND REVOLUTIONS, *supra* note 124, at 54, 70. MacIntyre's theory echoes Dworkin's argument. Each writer believes respectively that the best scientific or the best jurisprudential methodology is the one making the history of the field—science or law—the best it can be. *Id.* at 120. See DWORKIN, *supra* note 3, at 52.

228. *Marbury* was the first case in which the Court struck down a federal statute. However, in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), the Justices, sitting on the circuit courts, decided that the Court could not be compelled to give advisory opinions to the President. Additionally, in *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), the Supreme Court held that a federal tax on carriages was constitutional. Finally, in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), the Court held a state law to be an *ex post facto* law, and therefore unconstitutional.
229. Indeed, Hamilton, in THE FEDERALIST NO. 78, clearly states that judicial review does not follow from the *Constitution*. On his view, judicial review follows from the meaning of a limited constitution; hence, judicial review would be part of any limited constitution. In other words judicial review follows *a priori* from the concept of constitutionalism.
230. One should be struck with the irony of Marshall's argument. At the same time that he is extolling the importance of a written constitution, a constitution creating a limited government, he is assuming power for the judiciary that the Constitution neither stated nor implied.
231. Obviously, in such a situation, the federal judiciary's power would be diminished. Consequently, only majoritarian structures could protect individual rights.
232. Recently, one commentator contended that Marshall's form of constitutional adjudication fused political science (reason) with popular consent (will). The object of consent was the Constitution, and the content of the Constitution was explicated in terms of political science. In short, Marshall appealed to factors extrinsic to the Constitution—reason and science—to be the source of constitutional meaning. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 479-87 (1989). This view supports the contention that Marshall's form of constitutional interpretation was pragmatic and revolutionary.
233. The argument that judicial review is a necessary feature of a constitutional republic is unpersuasive. In hindsight, what now appears *necessary* at the time of

Pragmatic arguments, I maintain, are perfectly acceptable constitutional arguments in the context of revolutionary adjudication. The important point to realize is that *Marbury* is a revolutionary decision. Ordinary constitutional conventions cannot be appealed to as a justification. Relativistic constitutional theory cannot explain the creation of judicial review. Rather than explaining or justifying judicial review, the relativistic constitutional theory itself depends on judicial review for its existence. Normal adjudication may appeal to the Constitution's text, intent, history, structure and logic;²³⁴ revolutionary adjudication cannot.

2. *The Federal Judicial Supremacy Revolution: Martin v. Hunter's Lessee*

In *Martin v. Hunter's Lessee*,²³⁵ the Court, through Justice Story, held that the Supreme Court may invalidate state supreme court decisions. Again, the arguments for this decision are familiar. If there was no federal supremacy, insuperable problems would abound. First, there would be no uniformity in state court decisions interpreting the Constitution. Second, the Supreme Court would have a limited purview over state courts. No doubt, from a contemporary perspective, this decision was a sensible one. Assuming the sort of federalism we have today is desirable, *Martin* was instrumental in bringing about a logical balance of power between the states and the national government. Nevertheless, *Martin* is a revolutionary decision because it did not flow from the text, intent, history, structure or logic of the Constitution.²³⁶

its occurrence appears only to be *useful*. In interpreting the past, a successful means takes on a certain grandeur; it appears as if it is conceptually essential.

Generally speaking, it is dangerously misleading to identify present historical and legal structures with what is essential, privileged or necessary when in fact these structures are at best contingent, and at worst fortuitous. See Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 71 (1984). It is just this sort of identification that precludes personal and social development and evolution.

Since the past appears frozen, it also appears simple and pellucid. Once understood, the various elements comprising our past appear obvious and essential. Constitutional principles appear necessary. Federal judges seem to be "the watchdogs of eternal constitutional verities." See Powell, *The Logic and Rhetoric of Constitutional Law*, in ESSAYS IN CONSTITUTIONAL LAW, *supra* note 52, at 85. This retrospective is inevitable. A changing, conflictual past always appears to the present as fixed and permanent. However, this is a seductive delusion which must be resisted.

234. Many provisions of the Constitution do not lend themselves to revolutionary adjudication. Instead, these provisions are constitutional paradigms that control normal adjudication. In such circumstances, ordinary constitutional conventions such as the Constitution's text, intent, history, structure or logic can be used to decide constitutional issues.

235. 14 U.S. (1 Wheat.) 304 (1816).

236. In fact, some states challenged the right of the Supreme Court to issue writs of

a. *The Historical Agreement Argument*

Martin was one of the formative revolutions occupying a unique place in constitutional adjudication.²³⁷ Some argue that a decentralized government would have been good for the Republic.²³⁸ The possibility of different state courts interpreting the Constitution in different ways is the price one pays for pluralism. Though different from our conception, this is a possible ideal of a just society. Consequently, the result in *Martin* is a pragmatic result.

There is an argument in *Martin* that must be confronted if the theory of constitutional revolutions is to succeed. Because this is a fundamental point, I quote Justice Story's opinion at some length:

[It] is an historical fact, that this exposition of the constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of

error to state courts. See Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 161 (1913).

237. The Constitution authorizes Congress to create federal appellate jurisdiction. Section 25 of the Judiciary Act of 1789 created federal jurisdiction over state court decisions. Consequently, one could argue that the Constitution and congressional discretion warrant federal appellate review of state court decisions. Hence, *Martin* cannot be a revolution, since it merely confirms Congress' legitimate authority under Article III. However, article III, section 2, clause 2 of the Constitution gives Congress authority to affect the appellate jurisdiction of *federal* courts. It must surely be revolutionary, though not unwarranted for that reason, to assume that Congress can use this authority to give the federal courts jurisdiction over state courts.

Since the Court could have held that section 25 was unconstitutional because it conflicted with state sovereignty, legitimatizing section 25 was a revolutionary Court decision. The Court argued that the language of article III and uniformity of federal law requires the decision. However, a plausible federalist argument cuts the other way.

238. Indeed, one central point of contention between the Federalists and Anti-Federalists was the belief that there was a distinction between national consolidation and true confederation, and that the latter was preferable. ORIGINS, *supra* note 211, at xvi. Perhaps a true confederation would have been more likely if the federal judiciary had no power to overrule the decisions of state courts. Consequently, the republic could have developed according to an Anti-Federalist vision. There is an interesting parallel between the argument over federalism that existed between Federalists and Anti-Federalists, and the contemporary debate between those favoring a strong federal government to guarantee individual rights against state majorities and those who want state majorities to be supreme. Anti-Federalists would come down on the side of individual rights against the federal government. Federalists would endorse a strong national government and a limited conception of individual rights. Since the adoption of the fourteenth amendment, the controversy must be realigned. Conservatives come down on the side of state majorities against individual rights guaranteed by the federal courts. Liberals choose a strong federal court system guaranteeing individual rights against state majorities. Marshall and Jefferson initiated this controversy, although it began in different terms. 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 169-230 (1922).

their respective reasoning, both in and out of the state conventions. It is an historical fact, that at the time when the judiciary act was submitted to the deliberations of the first congress, composed, as it was, not only of men of great learning and ability, but of men who acted a principal part in framing, supporting or opposing that constitution, the same exposition was explicitly declared and admitted by the friends and opponents of that system. It is an historical fact, that the supreme court [sic] of the United States has, from time to time, sustained this appellate jurisdiction, in a great variety of cases, brought from the tribunals of many of the most important states in the Union, and that no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the supreme court, [sic] until the present occasion.²³⁹

This argument maintains that when both sides to a constitutional controversy agree about what a constitutional provision means, then that *is* the provision's meaning. Consequently, if Federalists desired, and Anti-Federalists feared, that article III subjects state court decisions to federal appellate review, then that is precisely what article III means. The Federalists believed the Court had the power to review both federal and state court decisions. The Anti-Federalists feared that this would make the central government too strong. However, it simply does not follow that because the Anti-Federalists *feared* such an interpretation, this interpretation was inevitable. The Anti-Federalists feared that the relevant provisions would be interpreted as implying a federal limitation on state courts, not that the relevant provisions *must* be so interpreted. Indeed, Marshall himself at one time believed that such an interpretation was absurd.²⁴⁰

The point here is that Story could have decided the case either way. Hence, his decision depends upon factors extrinsic to the Constitution.²⁴¹ Indeed, Story's decision is a Federalist argument infused with political theory.

b. *The Federalism Argument*

Many commentators have argued that the decision in *Martin* nec-

239. 14 U.S. (1 Wheat.) 304, 350 (1816).

240. Interestingly, Story's decision in *Martin* conflicts with statements Marshall made at the Virginia ratifying convention, to wit: "I hope no gentleman will think that a state will be called at the bar of federal court It is not rational to suppose that the sovereign power should be dragged before a court." Note, *Judge Spencer Roane of Virginia: Champion of States' Rights—Foe of John Marshall*, 66 HARV. L. REV. 1242, 1256 (1953).

241. The question here is the nature of constitutional *meaning*. Is constitutional meaning politically neutral, following logically from the Constitution? Is constitutional meaning dependent upon a particular moral and political perspective? The conventional wisdom is that constitutional meaning is, or should be, politically neutral. However, that view is a charade. Marshall contributed to this charade by presenting his arguments as following from the text, intent, history, structure and logic of the Constitution when, in fact, Marshall was fashioning a strong central government conducive to those with Federalist sensibilities.

essarily follows from the concept of federalism.²⁴² After all, how could there be a federal republic if the states need not bow to federal interpretation of the Constitution?²⁴³ Hence, the decision in *Martin* encourages uniformity of federal constitutional law.²⁴⁴

This is not a very persuasive argument. What is so troubling about the argument is its univocal conception of federalism.²⁴⁵ Perhaps our

242. Charles Black's comments are most persuasive:

[T]here is nothing in our entire governmental structure which has a more leak-proof claim to legitimacy than the function of the courts in reviewing state acts for federal constitutionality. [It] seems to me Congress could have provided for this even without an article III, simply by creating a court and endowing it with the power to perform this necessary and proper function. Insofar, then, as legitimacy in origin is relevant to judicial or public attitude toward the judicial work, the Court ought to feel no slightest embarrassment about its work of reviewing state acts for their federal constitutionality. It seems very clear, moreover, that all present-day political considerations strongly impel toward the same conclusion. In policing the actions of the states for their conformity to federal constitutional guarantees, the Court represents the whole nation, and therefore the whole nation's interest in seeing those guarantees prevail, in their spirit and in their entirety.

C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 74-75 (1969). See L. TRIBE, *supra* note 11, at 11 n.7 (arguing that the result in *Martin* was compelled by the structure of our federal system). See also O. HOLMES, *COLLECTED LEGAL PAPERS* 295-96 (1920) ("I do not think the United States would come to an end if [the Court] lost [its] power to declare an Act of Congress void. I do think that the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end."). Holmes' point is better stated as referring to a particular *conception* of the Union, rather than the Union itself.

Some commentators contend that *Martin* follows readily from *Marbury*. CONSTITUTIONAL LAW, *supra* note 185, at 17 ("The theory of the federal judicial power to review the acts of state governments is easily justified once the basic concept of judicial review of federal statutes is granted."). But see Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts 1801-35*, 49 U. CHI. L. REV. 646, 685-86 (1982).

243. A useful definition of federalism is "that system of political order in which powers of government are separated and distinguished and in which these powers are distributed among governments, each government having its quota of authority and each its distinct sphere of activity." McLaughlin, *The Background of American Federalism*, 12 AM. POL. SCI. REV. 15 (1918).
244. Of course, this *assumes* that federalism requires uniformity. It does not explain why uniformity is *required*. Common law rules are not always uniform across the states. If state sovereignty is sufficiently important, the possibility of differing state interpretations of the Constitution may be desirable. See G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* 43 (1986). Whether or not desirable, the decision in this case follows from a particular political philosophy or common sense perspective, not from the Constitution.
245. It becomes even more troubling when we remind ourselves that in the 1780s, the states truly regarded themselves as sovereign. C. WARREN, *THE SUPREME COURT AND SOVEREIGN STATES* 3-13 (1972).

current conception of federalism is conceptually tied to the *Martin* decision. However, it is a *non sequitur* to conclude that *every* type of federalism requires this decision. Furthermore, even if federalism requires the decision in *Martin*, why is the *Martin* remedy the only one possible?²⁴⁶

We might have had a federalist system that encouraged Congress to withhold funds from states that were not in compliance with federal judicial interpretation. Alternatively, we might have left it to the people to chastize state courts straying from federal interpretations of the Constitution. We might have had a system that permitted the radical independence of state courts in the name of pluralism and diversity. No doubt such possibilities would be less efficient than the present one. However, if the value of states' rights is sufficiently important, arguably, efficiency might be sacrificed.

The point is not to seriously propose an alternative form of federalism.²⁴⁷ Rather, I only want to demonstrate that the *Martin* decision follows from a certain conception—perhaps the best and most likely conception—of federalism.²⁴⁸ Relative to that conception the decision

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246. In other words, is it conceivable for the Supreme Court to have authority to declare acts of the co-equal branches of the federal government to be unconstitutional, and still resist its authority to enforce a judgment against a state court? Such an argument indicates two different kinds of constitutional norms, to wit: those that are fully enforced and those that are not. Consider:

Where a federal judicial construct is found not to extend to certain official behavior because of institutional concerns rather than analytical perceptions, it [is] strange to regard the resulting decision as a statement about the meaning of the constitutional norm in question. . . . [C]onstitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which stop short of these limits should be understood as delineating only the boundaries of the federal courts' role in enforcing the norm: By "legally valid," I mean that the unenforced margins of underenforced norms should have the full status of positive law which we generally accord to the norms of our Constitution.

Sager, *Fair Measure; The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978).

Following this lead, *Martin* could have held that the federal judiciary was supreme in interpreting the federal constitution, statutes and treaties, but render this decision a legally valid *underenforced* constitutional norm for institutional reasons.

247. This alternative conception of federalism, known as states' rights, had its strident defenders throughout the first third of the nineteenth century. For a useful discussion of this history see Warren, *supra* note 236.
248. Essentially, American federalism attempts to "enable the American people to secure the benefits of national union without imperilling their republican institutions. Corwin, *The Passing of Dual Federalism*, in ESSAYS IN CONSTITUTIONAL LAW, *supra* note 52, at 185, 207. Not everyone believed that states' sovereignty would survive ratification of the Constitution. Federalists insisted that it would, while Anti-Federalists believed that ratification would create a perpetual union. Stamp, *The Concept of a Perpetual Union*, 65 J. AMER. HIST. 5, 18 (1978).

in *Martin* is warranted. This is very different from the conventional view that *Martin* is necessitated by a structure of constitutionalism created by the Constitution.²⁴⁹ Consequently, though the revolution in *Martin* was probably grounded more in the structure of the Constitution than the decision in *Marbury*, *Martin* is still a constitutional revolution. It required a Court to decide that federal courts were supreme over state courts in interpreting the Constitution. The Court could have decided differently. If this case could have been decided differently, the reasoning does not necessitate the conclusion.²⁵⁰

On the view presented here, the controversy surrounding the *Martin* paradigm was a political controversy over the nature of the union. One side—the states' rights side—wanted a federal union, *i.e.*, a compact among independent and sovereign states. The other side wanted a national union with limited state powers and a supreme central government.²⁵¹

249. Currie argues persuasively that the principle in *Martin* was permissible, but not required. Currie, *supra* note 242. The question arises whether Supreme Court decisions which the Constitution permits, but does not require, are constitutional revolutions. Arguably, these decisions are constitutional revolutions. Many judicial solutions to national problems are constitutionally permissible. However, the Court chooses only some of these solutions. If among the class of possible constitutional decisions only some are chosen, it follows that there is an independent standard for choosing which possible decisions to pursue. The Court might appeal to moral and political factors, the exigencies of the historical circumstances or common sense in deciding which constitutional course to follow. The theory of constitutional revolutions reflects this structure. The theory informs us that the Constitution does not determine constitutional law in revolutionary contexts.

250. The *Martin* revolution established federal judicial supremacy over state courts. In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), the Court extended the decision in *Martin* by holding that it had appellate jurisdiction over state criminal cases, thereby further restricting the sovereignty of the states. *Martin* held that the states had voluntarily surrendered their sovereignty to some degree. We now see this as a logical point; whereas at the time, Jefferson regarded this "as another step in the scheme of the Supreme Court to destroy the federal constitutional system by consolidating all authority in the central government." A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 287-88 (1970).

Interestingly, in *Cohens* Marshall stated a revolutionary judicial doctrine similar to that enunciated in *McCulloch*:

[A] constitution is framed for ages to come, and is designed to approach immortality, as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, so far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 384 (1821).

251. This controversy over states' rights was ultimately resolved by the civil war. Note, *supra* note 240, at 1258-59.

Indeed, it is possible that the original compact was libertarian in nature. The national government was to be concerned with defense and other national issues, while the state governments were to be concerned with protecting individual lib-

The early constitutional revolutions established structural features of American constitutionalism. By "structural features" I mean decisions which create distributions of power. In *Marbury*, the Court established the federal judiciary's power over federal legislative and executive acts. In *Martin*, the Court exercised federal appellate power over state courts. A constitutional system possessing these structural features of government is very different from a constitutional system not having them. Consequently, the Court in these early cases, rather than implementing structure of the Constitution, in essence created it.²⁵² Marshall's revolutionary jurisprudence implemented a Federalist conception of nationalism which is the forerunner of contemporary constitutional nationalism.²⁵³

3. *The Federal General Powers Revolution—Legislative Means: McCulloch v. Maryland*

The fledgling republic agonized over the legitimacy of a national bank throughout the first third of the nineteenth century.²⁵⁴ The agony came to an abrupt end in *McCulloch v. Maryland*,²⁵⁵ when Marshall interpreted the necessary and proper clause expansively,²⁵⁶

erty. The argument against this form of libertarianism is historical and pragmatic: it did not work. The Marshall Court immediately recognized this fact. On the other hand, the original compact might have had in mind a different form of libertarianism, one specifically concerned with protecting property-owners from oppressive state governments. See generally C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

252. Structural features of American constitutionalism were established by laying the groundwork for a strong national government. A. MILLER, THE SECRET CONSTITUTION AND THE NEED FOR CONSTITUTIONAL CHANGE 17 (1987). But see R. BORK, THE TEMPTING OF AMERICA, *supra* note 5, at 21 (arguing that Marshall's decisions were faithful to the Constitution).

253. It is not clear that federalism expresses a unified conception of nationalism. Rather, it appears to combine some elements of nationalism with tenets of federalism. It is not evident that such a hybrid is conceptually or politically possible.

254. Federalists supported the idea of a national bank, while Anti-Federalists opposed it.

255. 17 U.S. (4 Wheat) 316 (1819). In an earlier case, *United States v. Fischer*, 6 U.S. (2 Cranch) 358 (1805), the Court interpreted the necessary and proper clause to uphold federal legislation.

256. Marshall's interpretation of the necessary and proper clause was at least as broad as the Federalists' interpretation. Jefferson's conception of the necessary and proper clause differed sharply from Marshall's interpretation. Indeed, Jefferson contended that:

the Constitution allows only the means which are 'necessary' not merely 'convenient' for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase as to give any non-enumerated power [to Congress], it will go to every one, for there is no one which ingenuity may not torture into a convenience, in some way or other, to some one of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one phrase as before observed. Therefore, it was that the Constitution restrained them to the

permitting the federal government to have broad powers in solving national problems.²⁵⁷ Marshall's decision is clearly a political decision, and cannot be explained in terms of the classical conception of constitutionalism or any other neutral account of judicial reasoning.²⁵⁸ Obviously, the necessary and proper clause is vague and indeterminate.²⁵⁹ During ratification its indeterminacy was the cause of much concern.²⁶⁰ However, the logic of the clause seems to suggest that only those powers that are necessary and not otherwise inconsistent with the Constitution are permissible. The term "necessary" can mean absolutely required or required relative to circumstances as we know them. It is doubtful, however, that on any reasonable interpretation, it can mean useful or expedient.²⁶¹ Yet, that is precisely the meaning Marshall gave to the clause.²⁶² Marshall's revolution in this case cre-

necessary means, that is to say, to those means without which the grant of power would be nugatory.

T. JEFFERSON, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, in 19 PAPERS OF THOMAS JEFFERSON 275, 278 (J. Boyd ed. 1974). *But see* A. HAMILTON, *Final Version of An Opinion on the Constitutionality of An Act to Establish a Bank*, in 8 PAPERS OF ALEXANDER HAMILTON 97, 102-03 (H. Syrett ed. 1965).

257. *See* CONSTITUTIONAL LAW, *supra* note 185, at 124-30.

258. Marshall's decision also deploys non-political forms of analysis. Among these forms of analysis are: linguistic analysis, conceptual analysis, common sense and rationalism. However, in the end, Marshall's argument is political, not judicial. In fact, he was implementing a Federalist political philosophy. *But see* B. SIEGEN, *THE SUPREME COURT'S CONSTITUTION* 11-14 (1987) (arguing that the decision in *McCulloch* reflects a very different political philosophy than the one endorsed by Hamilton and Madison).

259. 1 C. WARREN, *supra* note 238, at 500.

260. *Id.*

261. The implausibility of interpreting "necessary" in this manner was noted in 1820 soon after the decision was handed down. J. TAYLOR, *CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED* 177 (1970) ("But this interpolation of the words, 'convenient, useful and essential,' into the constitution is in my view not even a plausible argument. It is merely a tautology of the phrase 'necessary and proper,' but excluding the restriction attached to the latter."). Marshall's interpretation of this clause was controversial even to his contemporary, interpretive community.

262. One argument Marshall advances equates "necessary means" with "best means". On this view, if *M* is the best means to *E*, then *M* is necessary. To deny that Congress may take action in this sense of "necessary," is:

[t]o have declared that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415-16 (1819).

This suggests that reason compels us to accept the principle of legislative discretion. Consequently, if you want a legislature, you must accept legislative discretion. Yet, this proposition is clearly false. Having a legislature such as ours

ated another structural feature of American constitutionalism,²⁶³ namely, where the federal or national government has power, it has supreme power.²⁶⁴ *McCulloch* gives the federal government virtually unlimited power to decide which means to adopt in bringing about constitutionally permissible ends.

In discussing the question whether the Constitution includes unenumerated powers, Marshall's view is strikingly similar to the theory of constitutional revolutions:²⁶⁵

A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the first article, introduced? It is also, in some degree, warranted, by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a *constitution* we are expounding.²⁶⁶

may require legislative discretion. However, a more limited government does not need this discretion, and, indeed, it was the hope of some that the American legislature would be limited.

- 263. Marshall's constitutional methodology involves reconstructing the consciousness of members of the political community to reinterpret the relationship between state and federal government. J. BOYD WHITE, *WHEN WORDS LOSE MEANING* 24-63 (1984). His rhetorical genius consisted in his ability to reconstitute judicial culture without giving the appearance of departing from the traditional framework.
- 264. Some of Marshall's critics have argued that his decision, in effect, destroyed a system of two governments, or, alternatively, that it transformed a government of limited powers into one of unlimited powers. Corwin, *The Passing of Dual Federalism*, in *ESSAYS IN CONSTITUTIONAL LAW*, *supra* note 52, at 7.
- 265. This process of revolution involves rhetorical methods which help revolutionary decisions become prosaic. See R. BROWN, *SOCIETY AS TEXT: ESSAYS ON RHETORIC, REASON AND REALITY* 148 (1987). Prosaic or normal adjudication is the ultimate goal of revolutionary adjudication.
- 266. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). This led Justice Frankfurter to reply that "[p]recisely because 'it is a constitution we are expounding,' we ought not to take liberties with it." *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 647 (1949) (Frankfurter, J., dissenting). See also Kurland, *Curia Regis: Some Comments on the Divine Right of Kings and Courts "To Say What the Law Is,"* 23 ARIZ. L. REV. 581, 591 (1981).

However, it is not obvious that *interpreting* a constitution in terms of our contemporary understanding is "taking liberties with it." Indeed, there are powerful arguments that we avoid taking liberties with the language of the Constitution only by interpreting a Constitution in the context of our contemporary interpretive community.

Several pages later, in discussing the power of Congress, Marshall went on to say that "[t]his provision, [the necessary and proper clause], is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the

Presumably, "*a constitution*" for Marshall is a blueprint for future guidance, but does not fix every important feature of the government. There is pragmatic merit to this conclusion, but it far from follows from the Constitution's text, intent, history, structure or logic. One explanation for the framers writing a document establishing a limited government²⁶⁷ is that they truly wanted it to be limited.²⁶⁸

various *crises* of human affairs." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819). The notion of a constitution intended to endure perennially and apply to different crises charts a revolutionary strategy, in my sense of "revolutionary." *But see* W. BERNES, *TAKING THE CONSTITUTION SERIOUSLY* 207-08 (1987) (arguing, unsuccessfully in my estimation, that the phrase "adapted to the various crises of human affairs" modifies the necessary and proper clause, not the Constitution).

267. I take libertarians to be making such an argument. No doubt our society would be very different had Marshall adopted such a position. Probably, our society would not be as vibrant. However, that does not change the point that Marshall's argument is moral and political, not constitutional. A constitutional argument, strictly speaking, is one that involves normal adjudication. In normal constitutional adjudication, the text, intent, history, structure and logic of the Constitution determines the outcome.

It is important to note that the current controversy over judicial review has its roots in the Marshall Court. Those advocating a narrow role for judicial review are still concerned about its legitimacy. Well, in one very important sense, judicial review, as Marshall conceived it, is not legitimate; it never was authorized by the Constitution. Indeed, Marshall was the first truly revolutionary Justice:

Chief among the founders of American constitutional law was John Marshall. A maker rather than a follower of precedents, he never hesitated to argue from principles of right and justice. . . . Certainly, he [Marshall] did not hesitate to go beyond the express statements of a written constitution to find bases for his decisions.

B. WRIGHT, JR., *AMERICAN INTERPRETATIONS OF NATURAL LAW* 294-95 (1931). Marshall wrote that "[i]n exploring an unbeaten path, with few, if any aids, from precedents or written law, the court has found it necessary to rely much on general principles." *The Schooner Exch. v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

On the other hand, Marshall's conception of judicial review is now a fundamental tenet of American constitutionalism. Narrowing judicial review flies in the face of the nature of constitutional practice.

268. Marshall appears to deal with this point when he concedes the following:

We admit, as all must, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

Marshall makes this point after providing an argument showing that the place of the necessary and proper clause in the Constitution, and the nature of its terms, support his interpretation of the provision. Yet, here he fails to recognize that had the framers wished Congress to have discretion in selecting means to bring about enumerated constitutional goals, they would have said so. Instead, they restricted this discretion by requiring that the choice of means be limited to only those permissible means that are required for achieving the goal. It is then

The formal illegitimacy of Marshall's decision is not diminished by Black's characterization of Marshall's argument as structuralist:

Marshall's reasoning . . . is . . . essentially structural. It has to do in great part with what he conceives to be the warranted relational properties between the national government and the government of the states, with the structural corollaries of national supremacy—and, at one point, of the mode of formation of the Union. [In] this, perhaps the greatest of our constitutional cases, judgment is reached not fundamentally on the basis of the kind of textual exegesis which we tend to regard as normal, but on the basis of reasoning from the total structure which the text has created.²⁶⁹

Appealing to the Constitution's structure suggests that this structure is clear and determinate.²⁷⁰ However, if this Article's thesis is correct, the Constitution's structure was in part created by the formative Supreme Court decisions,²⁷¹ many of which occurred during Marshall's stewardship. Consequently, the decision in *McCulloch* determined the Constitution's meaning, rather than being determined by it.²⁷²

To criticize the reasoning in *McCulloch* is not to deny the impor-

inconceivable how the test in *McCulloch* can be the following: "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." *Id.*

269. C. BLACK, *supra* note 242, at 15.

270. Black also argues against linguistic or textual analysis in favor of structuralism. Consider:

I am inclined to think well of the method of reasoning from structure and relation. [B]ecause to succeed it has to make sense—current, practical sense. The textual-explication method, operating on general language, may often—perhaps more often than not—be made to make sense, by legitimate enough devices of interpretation. But it contains within itself no guarantee that it will make sense, for a court may always present itself or even see itself as being bound by the stated intent, however nonsensical, of somebody else. [Using a structural approach] we can and must begin to argue at once about the practicalities and proprieties of the thing, without getting out dictionaries whose entries will not really respond to the question we are putting, or scanning utterances, contemporary with the text, of persons who did not really face the question we are asking. We will have to deal with policy and not with grammar.

Id. at 22-23.

Thus stated, Black's account of structural analysis sounds very much like pragmatism.

271. In other words, decisions made by the Court and other governmental actors create the structure of the Constitution, not vice versa.

272. Even if it is conceded that the national government has implied powers to bring about enumerated ends, Marshall's conclusion concerning the unconstitutionality of the Maryland tax requires an independent argument. After all, it is only by assuming that the power to tax is an unlimited power that this power becomes the power to destroy. Had Marshall recognized that such a power is a matter of degree, he could have accepted a state tax just as long as it did not have the tendency to significantly interfere with the existence of the bank. Justice Holmes correctly pointed out that the "Court . . . can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax." *Panhandle Oil*

tance of the principle Marshall established. The best way to understand Marshall's argument is to view it as a pragmatic statement, predicated on the supposition that the best way for the fledgling republic to develop into a strong national government would be by having an appropriately qualified principle of legislative discretion.²⁷³ To many observers, history has certainly vindicated Marshall's vision.²⁷⁴ Conventional wisdom now endorses the view that a strong national government is essential for the United States to function as a constitutional democracy in today's treacherous world.²⁷⁵ If so, we may conclude that revolutionary adjudication is necessary to the proper development of American constitutionalism.

4. *The Federal General Powers Revolution—Legislative Ends: Gibbons v. Ogden*

During his tenure as Chief Justice, Marshall's strategy²⁷⁶ was to create a certain type of federal or national government. The early revolutionary decisions established the supremacy of the federal judiciary regarding the proper interpretation of the Constitution. Yet, Marshall was not satisfied with this result.²⁷⁷ His strategy included creating a

Co., v. Mississippi *ex. rel.* Knox., 277 U.S. 218, 223 (1928)(Holmes, J., dissenting). Consequently, "[t]he power to tax [in itself] is not the power to destroy." *Id.*

273. As such, Marshall's decision found its source in political theory. Marshall's argument in *McCulloch* was not original, "[b]ut he deserves the credit for stamping it with the die of his memorable rhetoric and converting it from a political theory into the master doctrine of American constitutional law." R. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 67 (1960). Constitutional revolutions usually create law out of moral and political theory.

274. One writer argues that "[d]iversity and pluralism are . . . [the essence] 'of federalism,' " suggesting that kind of federalism we have today is less than ideal. Van Alstyne, *Federalism, Congress, the States And the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769, 775.

275. At the time, states' rights advocates denounced Marshall's decision in *McCulloch*. However, "it was clear to Marshall, as it has been to posterity, that a national government restricted in its powers by Maryland's narrow interpretation would be incapable of the great tasks that might lie before it." R. MCCLOSKEY, *supra* note 273, at 66. Whether or not the narrow interpretation would have such dire consequences, it is apparent that had the narrow interpretation prevailed, we would not now have a national government as we know it.

276. I leave open the question whether Marshall was fully aware of this strategy.

277. Though Madison argued that the federalism in the new Constitution was not pure federalism, but rather a blend of federalism and nationalism, Marshall was clearly a nationalist. For Marshall:

[l]ocal government was associated in his mind with the petty bickerings of narrow ambition and a dangerous indifference to rights and property. The need for a strong central government, as the indispensable bulwark of the solid elements of the nation, was for him the deepest article of his political faith.

F. FRANKFURTER, *THE COMMERCE POWER UNDER MARSHALL, TANEY AND WAITE* 14 (1937). See also 2 BEVERIDGE, *THE LIFE OF JOHN MARSHALL* (1916). Marshall clearly desired "to restrain local legislatures from hampering the free play of

strong central government.²⁷⁸ Certainly, *Gibbons v. Odgen*²⁷⁹ is one of the most important revolutionary cases to achieve this goal.²⁸⁰ The revolutionary decision in this case consists of two elements. First, Marshall defined commerce²⁸¹ in terms of intercourse;²⁸² and second, he insisted that the federal government's legitimate power to regulate commerce among the states was plenary.²⁸³

commerce among the states," but not by "tying the Court to rigid formulas for accomplishing such restrictions." F. FRANKFURTER *supra*, at 14.

In a certain sense, Marshall's strident nationalism was the embodiment of Madison's federalism-nationalism. Federalism creates a scheme of dual governments with constitutional constraints. Nationalism creates a strong central government. Madison's conception of nationalism would relegate the states to a type of administrative (non-governmental) agency. Yarbrough, *Federalism in the Foundation and Preservation of the American Republic*, in 6 *PUBLIUS: THE JOURNAL OF FEDERALISM* 43, 45 (1976). There were others who would render the states impotent at the drop of a hat. It is, however, a mistake to think that these sentiments were universal. The Federalist leaders knew "that a union which abolished the states would never win acceptance." Ranney, *The Bases of American Federalism*, 3 *WM. & MARY L. REV.* 416, 439 (1946).

In *McCulloch*, Marshall gave the federal government virtually unlimited power in deciding upon the *means* to otherwise constitutionally permissible ends. He now sought a vehicle for granting the federal government power to determine ends not specified by the Constitution.

278. See F. FRANKFURTER, *supra* note 277.

279. 22 U.S. (9 Wheat.) 1 (1824).

280. One reason why this is properly characterized as a revolutionary decision is the simple fact that "when first confronted with the commerce clause, the Supreme Court had to create doctrines without substantial guidance or restriction by previous discussion and analysis." F. FRANKFURTER, *supra* note 277, at 13-14. Marshall used the occasion to restrict the authority of local legislatures. *Id.*

281. Indeed, "Marshall's version of commerce was an importation; it did not correspond to the accepted usage at the time the Constitution was adopted." R. BERGER, *FEDERALISM* 124 (1987). Nor did Marshall's version of "commerce" conform with other obvious authorities. *Id.* Such "terms of art" generally indicate a revolutionary decision.

282. Intercourse among the states is one of the broadest possible interpretations of "commerce." Such a broad interpretation is not required by the constitutional text or the framers' intentions; neither is required by the structure or logic of the Constitution. Similarly, the particular question in this case, whether commerce entails navigation, was not decided by referring to the constitutional text or the framers' original understanding of commerce clause. C. BLACK, *THE PEOPLE AND THE COURT* 166 (1960). The fundamental question concerning the scope of the commerce clause is whether we are to form a strong national government. See *Id.*

283. Consider Marshall's words:

If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.

22 U.S. (9 Wheat.) 1, 197 (1824).

In making this judgment Marshall rejected "the Tenth Amendment as an active principle of limitation." F. FRANKFURTER, *supra* note 277, at 40. Marshall,

Nowhere in the ratification process was this or any other instruction given concerning how the commerce clause was to be interpreted.²⁸⁴ Moreover, "[t]he Constitution itself . . . does not articulate the boundaries of this commerce power vested in Congress, particularly when Congress has not spoken. Whether or not the commerce power is exclusive or to what extent concurrent state regulation may coexist is not textually demonstrable."²⁸⁵ No doubt, providing the federal government with the power to regulate commerce was a principal reason for scrapping the Articles of Confederation and forging a new constitution.²⁸⁶ But this alone cannot account for Marshall's decision.²⁸⁷ If Marshall wanted to create a real balance between the states as semi-independent sovereigns and a strong federal government, there were alternatives to his decision in *Gibbons*. This was not, however, what Marshall wanted.²⁸⁸ While apparently paying the requisite homage to the distinction between regulating commerce among the states and regulating intra-state commercial activity, in essence Marshall's decision destroys this distinction.²⁸⁹

furthermore, "countered with his famous characterization of the powers of congress, and of the commerce power in particular, as the possession of the unqualified authority of a unitary sovereign." *Id.*

284. F. FRANKFURTER, *supra* note 277, at 12.
285. P. HAY & R. ROTUNDA, *THE UNITED STATES FEDERAL SYSTEM: LEGAL INTEGRATION IN THE AMERICAN EXPERIENCE* 71 (1982).
286. More generally, the fundamental defect in the Articles of Confederation was that the document did not create "a government at all, but rather the central agency of an alliance." Corwin, *The Progress of Constitutional Theory between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AMER. HIST. REV. 511, 527 (1925). See also THE FEDERALIST No. 15. In other words, its defect was that it was a compact among the states and not among the people. For a list of the defects in the Articles of Confederation see Farrand, *The Federal Constitution and the Defects of The Confederation*, 2 AMER. POL. SCI. REV. 132, 14951 (1908). This is not to deny that even the Articles of Confederation had "a rudimentary federal system." Levy, *The Making of the Constitution in A GRAND EXPERIMENT: THE CONSTITUTION AT 200: ESSAYS FROM THE DOUGLASS ADAIR SYMPOSIA* 1, 5 (J. Moore, Jr. & J. Murphy eds. 1987).
287. The commerce clause invited revolution. It was written of this provision that "[i]t is remarkable . . . that so important a clause should be so briefly expressed, and leave so much to future determination." E. PRENTICE & J. EGAN, *THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION* 11 (1981).
288. Marshall was not alone in this desire. Alexander Hamilton believed "that the state governments constituted so much unnecessary furniture for a strong national government." R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS* 111 (1983).
289. However, the concept of a federal government presumably not having general police power requires such a distinction. Had Marshall wanted to, he could have interpreted the commerce clause in such a way as to limit intrusion into state sovereignty. The decision in this case no more follows from the commerce clause, its intent, history, structure or logic than any other of Marshall's revolutionary decisions. Remember, arguably, the original purpose behind the commerce clause was merely to give Congress the power to prevent state trade barriers. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV., 432, 468-81 (1941); Epstein, *The Proper Scope of*

In saying that the decision in this case does not follow from any obvious legal authority, I am not asserting that it was a bad decision.²⁹⁰ In fact, it was vital to this nation's ultimate industrialization.²⁹¹ Still, it was a revolutionary decision based on pragmatic considerations. If it was the correct decision, it was correct politically, not constitutionally, that is, it was correct relative to a certain vision of nationhood. Of course, any successful decision that becomes an integral part of our national political culture may appear to be written in stone. It does not follow, however, that at the time anyone could have predicted that Marshall's pragmatic choice would succeed.²⁹²

5. *The Failure of the Individual Rights Revolution: Barron v. Mayor of Baltimore*

In *Barron v. Mayor of Baltimore*,²⁹³ Marshall ended the series of revolutions he began in *Marbury*. In this case, Marshall found that the fifth amendment's prohibition on confiscating private property for public use without just compensation did not apply to state governments. Marshall went further in his decision in concluding that none of the first eight amendments applied to the states.²⁹⁴

While Marshall, in the revolutionary decisions discussed above, reached out to secure sufficient power for the national government to offset the power of the states, his aspirations dwindled when it came to protecting individuals from the excesses of state government. Only

the Commerce Power, 73 VA. L. REV. 1387 (1987)(arguing against the inaccuracy of a broad interpretation of the commerce clause).

290. It is interesting to speculate on the legitimacy of the dormant commerce clause. The dormant commerce clause maintains that even without federal legislation, the commerce clause prohibits states regulating their own commercial activities in a prejudicial fashion. Doesn't this constitute a mini-revolution? The alternative would be to say that where Congress does not speak, the commerce clause is silent. See Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982).
291. Moreover, it can be argued that the decisions in *McCulloch* and *Ogden* were necessary features of the counter-revolution culminating in the reversal of the *Lochner* era in *United States v. Darby*, 312 U.S. 100 (1941). Corwin, *John Marshall, Revolutionist, Malgre Lui*, 104 U. PA. L. REV. 9, 21-22 (1955).
292. Pragmatic decisions, consistent with fundamental values and social aspirations, often appear to be historically inevitable. We must resist this appearance. History and familiarity give decisions that are far from inevitable the appearance of inevitability. Remember, the commerce power could have been defined differently. Had Marshall interpreted the commerce clause differently, that different interpretation would now appear inevitable. If we are ever to fully understand the legal dimension of human behavior, we must begin to take cognizance of these historical and psychological processes that encourage us to accept legal doctrine.
293. 32 U.S. 243 (1833).
294. The Court again examined this issue, finding that the Constitution does not protect a citizen's religious liberties from state interference. *Permoli v. First Mun.*, 44 U.S. 589 (1845).

in the area of human rights did Marshall's belief in the effectiveness of central power wane.²⁹⁵

I am not suggesting Marshall had no basis for his decision. Rather, I am suggesting that there was also creditable evidence to support the view that the Bill of Rights applied to the states.²⁹⁶ In such circum-

295. In contemporary discussions, it is taken as an article of faith that the Bill of Rights was designed to limit the powers of the national government. With certain notable exceptions, the historical evidence, so the argument goes, overwhelmingly supports Marshall's decision in *Barron*. However, not every commentator shares this faith. Indeed, one writer contends that the historical evidence goes against Marshall's decision in *Barron*. W. CROSSKEY, *supra* note 215, at 1066-76. *But see* Fairman, *The Supreme Court and the Constitutional Limitations on State Governmental Authority*, 21 U. CHI. L. REV. 40 (1953). Crosskey's rejoinder appears in Crosley, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954). Crosskey's point is that textualism supports Marshall's decision in *Barron*, but only regarding the first amendment and part of the seventh amendment. The principles in the second through the eighth amendment apply to the states.

Admittedly, there is no explicit textual evidence that the Bill of Rights applies to the states. However, this only means that if the Bill of Rights can restrict the states, its authority to do so is implied. Since many of Marshall's revolutionary decisions involve finding implied powers, why did he hesitate to find implied rights?

If the Bill of Rights consists of such fundamentally important rights, it is implausible to argue that the founders intended to restrict its application to the national government only? The Bill of Rights expresses the people's desire to protect fundamental rights. They wanted protection from *government*, not just from *federal* government.

The point here is that amendments II-VIII to the Constitution proscribe conduct that was "inherently evil." Consequently, "[i]t is . . . utterly impossible to suppose that, as to a single one of the matters the amendments cover, the true intention of the First Congress was to create sole and exclusive state powers to do the things forbidden." W. CROSSKEY, *supra* note 215, at 1059.

Of course, the argument restricting the application of the Bill of Rights to the federal government does not sanction state governments in violating the substance of these amendments. It merely says that a different vehicle for restricting the states must be found.

296. Consider the following clear statement of the principle:

I am, however, inclined to the opinion, that the article in question [the fifth amendment's proscription of double jeopardy] does extend to all judicial tribunals in the United States, whether constituted by the Congress of the United States, or the states individually. The provision is general in its nature, and unrestricted in its terms; and the sixth article of the constitution declares, that the Constitution shall be the supreme law of the land; and that the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding. These general and comprehensive expressions extend the provisions of the constitution of the United States to every article which is not confined, by the subject matter, to the national government, and is equally applicable to the states.

People v. Goodwin, 18 Johns. (N.Y.) 187, 200 (1920).

One early commentator argued that some amendments other than the first apply:

to the state legislatures as well as that of the Union. The important prin-

stances, when normal adjudication—adjudication based on traditional authoritative devices—does not settle the issue either way, Marshall could have effected a revolution concerning individual rights, which would have been no more revolutionary than his other revolutionary decisions. Instead, he mysteriously chose to stabilize his own revolutionary efforts.

6. *The Marshall Court*

Part III of this Article has described the important constitutional revolutions created by the Marshall Court. Each decision is revolutionary because it did not follow directly from the Constitution's text, intent, history, structure or logic. Moreover, each case could have easily been decided differently. Each decision is revolutionary because it read into the Constitution a particular substantive political philosophy,²⁹⁷ not a neutral or objective principle of constitutional law.²⁹⁸ Under the guise of constitutionalism, Marshall implicitly or explicitly appealed to extrinsic political factors on which to base his decisions.²⁹⁹

In these cases, the Marshall Court blended a certain conception of federalism³⁰⁰ with formal constitutional provisions.³⁰¹ The meaning

ciples contained in them are now incorporated by adoption into the instrument itself; they form parts of the declared rights of the people, of which neither the state powers nor those of the Union can ever deprive them.

W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 2D 124-25 (1829). See also Angell, *Restrictions on State Power in Relation to Private Property*, 1 U. S. L. & INTELLIGENCE REV. 4,64 (1829); W. RAWLE, *infra*, at 119-43; *Houston v. Moore*, 18 U.S. (5 Wheat.), 1 (1820); *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.), 235 (1819). For a discussion of these cases and of state court opinions supporting the view that the provisions of the second through the eighth amendment apply to state governments see R. SMITH, PUBLIC PRAYER AND THE CONSTITUTION 137-44 (1987).

297. Marshall clearly sided with the Federalists against the Anti-Federalists in a struggle that persists today over the proper role of government. It is not obvious that the contemporary mind has the capacity to appreciate the fact that the inevitable Federalist victory was not, at the time, considered inevitable. See F. BRODERICK, *THE ORIGINS OF THE CONSTITUTION* 59 (1964) (describing the battle over ratification in Virginia).

298. Marshall was a dedicated Federalist, not a neutral, impartial judge. See C. BEARD, *THE SUPREME COURT AND THE CONSTITUTION* 109 (1962) (quoting Justice Story's view of Marshall).

299. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 353 (1827) (appealing to political philosophical treatises to understand how the framers used certain political concepts).

300. Marshall's version of federalism was much closer to a form of nationalism, the latter being a unitary form of government, deriving its authority from the people rather than a federation of states. A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 299 (1970). The Marshall revolutions can be characterized as comprised of decisions which created a stronger and more pervasive national government. This must be considered revolutionary, for both the Federalists and Anti-Federalists claimed that they disapproved of a na-

of the Constitution regarding these provisions did not reside inherently in its language. Rather, the Marshall Court placed it there in order to advance a particular conception of a constitutional democracy.³⁰² No doubt Marshall claimed to be fulfilling the intentions of the framers.³⁰³ Similarly, Marshall insisted that he was distinguishing

tional form of government. The Federalists denied that the Constitution created a national government while the Anti-Federalists feared that it did. To pacify some of these fears, Madison wrote:

The proposed constitution, therefore, even when tested by the rules laid down by its antagonists, is, in strictness, neither a national nor a federal constitution; but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal, and partly national: in the operation of these powers, it is national, not federal; in the extent of them again, it is federal, not national; and finally in the authoritative mode of introducing amendments, it is neither wholly federal, nor wholly national.

THE FEDERALIST NO. 39, at 195-96 (J. Madison)(M. Beloff ed. 1987).

Madison seemed unaware of the conceptual problems introduced by his hybrid conception of government. Unless one is able to coherently integrate federalism and nationalism, the situation is rife for conflict and revolution. Unless we are able to identify the hybrid under some coherent rubric, simply making a compilation of the ways in which the government was federal and the ways in which it was national, leads inevitably to usurpation by other political actors to achieve one or the other. This "other political actor" could be the judicial branch. This is precisely what John Marshall achieved in revolutionary fashion. *But see Diamond, Commentaries on The Federalist: The Federalist on Federalism: "Neither a National Nor a Federal Constitution, But a Composition of Both,"* 86 YALE L.J. 1273, 1281 (1977)(arguing that "[t]he Federalist's theory of federalism is not only analytically superior to our contemporary approach in explaining the American political system as originally devised, but that it also better illuminates the federal-national balance of the system as it has developed historically").

301. See Kahn, *supra* note 232.

302. Consider: "Marshall, according to received learning, consciously furthered the political goals of the Federalist party, first, by stretching the Constitution's meaning to increase national power at the expense of state power. . . ." Nelson, *The Eighteenth Century Background of John Marshall's Jurisprudence*, 76 MICH. L. REV. 893, 894 (1978).

303. Original intent discourse is a ritualized style of constitutional rhetoric that accompanies an independently derivable constitutional argument. It is a device for announcing a constitutional conclusion, not deriving it. Whether they approved or not, the founders surely knew that the original meaning of constitutional discourse would be altered. Consider:

What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense! And that the language of our Constitution is already undergoing interpretations unknown to its founders will, I believe, appear to all unbiased inquirers into the history of its origin and adoption.

Letter from James Madison to Henry Lee (June 25, 1824), *quoted in* 3 THE RECORD OF THE FEDERAL CONVENTION OF 1787 464 (M. Farrand ed. 1966). See Powell, *The Modern Misunderstanding of Original Intent* (Book Review), 54 U. CHI. L. REV. 1513 (1987).

constitutional law from politics.³⁰⁴ Even if this were a defensible distinction, *drawing* the distinction between law and politics is itself determined by one's political philosophy.³⁰⁵ Neither Marshall, nor anyone else, can permanently disguise the overwhelming political elements in constitutional law.³⁰⁶

D. Contemporary Revolutions

1. *The Civil Rights Revolution: Brown v. Board of Education*

In our own era, *Brown v. Board of Education*³⁰⁷ (*Brown I*) is paradigmatic of a revolutionary decision overturning precedent.³⁰⁸ Yet, this was not merely the reversal of any precedent. It was the overruling of a foundational constitutional interpretation, an interpretation that determined the meaning of the relevant provision throughout the

304. Bloch & Marcus, *supra* note 217, at 336.

Marshall's "rules of interpretation," for the most part, were rhetorical devices for ensuring the legitimacy of his revolutionary decisions. These rhetorical devices helped Marshall conceal the pragmatic nature of his decisions. Whether disguised as a rhetorical device or an explicit appeal to extrinsic factors, Marshall's decisions embodied a pragmatic strategy for achieving certain meritorious political goals.

305. *Id.*

306. The Marshall period of revolutionary adjudication may indeed be unique. Its uniqueness may be attributable to Marshall himself. Frankfurter described Marshall's presence as follows:

Certainly he seized every opportunity to educate the country to a spacious view of the Constitution, to accustom the public mind to broad national powers, and to restrict the old assertiveness of the states. He imparted such a momentum to these views that it carried the Court in his general direction beyond his own time.

F. FRANKFURTER, *supra* note 277, at 44. Oliver Wendell Holmes described the time of Marshall's Chief Justiceship as "perhaps the greatest place that was ever filled by a judge." O. HOLMES, *supra* note 242, at 270. Perhaps a modicum of Marshall's success rests in the fact that American constitutionalism needed to be created and Marshall reserved that job for himself.

One thing we can say with certainty is that the kind of revolutions occurring during this period are not surprising. Anytime a freshly minted written document is to function as positive law, revolutionary decisions will abound. These decisions define the possible ways constitutional law will develop. There are many different, unexplored possibilities to achieve this goal. For example, given the appropriate interpretation of "high crimes and misdemeanors" what would have prevented "Congress from using its power of impeachment to override the President and the Supreme Court at will, on ordinary policy questions, whenever a sufficiently numerous faction is so moved." SAVING THE REVOLUTION 5 (C. Kesler ed. 1987).

307. 347 U.S. 483 (1954).

308. It is hornbook law that *Brown* did not overrule *Plessy*, since the Court in *Brown* was concerned with the special stigmatizing effects of segregation in education. Despite such a literalist interpretation of *Brown*, one can safely say that *Brown* and the several subsequent per curiam decisions successfully began to dismantle segregation. See *supra* note 144.

legal system. We must then determine how it is possible to overturn a foundational constitutional decision. If the decision to be overturned is law, what then is the constitutional basis of the new decision?³⁰⁹ On the view presented here, there is no *constitutional* basis for such a decision because the new decision is a constitutional revolution.³¹⁰

Both conventionalistic and pragmatic theories of law allow for the possibility of constitutional revolutions such as *Brown I*. According to conventionalist theories, judges must decide cases according to well-accepted legal paradigms. When such paradigms run out, a judge is permitted to use his discretion.³¹¹ Pragmatism counsels judges to de-

309. We must guard against thinking that the Constitution's meaning is constant, while only our conception of its meaning changes. L. TRIBE, *supra* note 11, at 1478 ("It was not the concept embodied in the equal protection clause that changed between 1896 and 1954, but only our relevant perceptions and understandings."). On the contrary, Frankfurter wrote that "[i]t is not fair to say that the South has always denied Negroes 'this constitutional right.' It was NOT a constitutional right 'till May 17/54.'" SUPER CHIEF, *supra* note 181, at 108-09.

In Tribe's view, *Brown* was always the correct interpretation of the equal protection clause, despite the fact that constitutional practice declared the contrary. Cf. C. BLACK, *LAW AS AN ART* 6 (1978) (stating that "[i]f the *Brown* decision was right, then it was right all along"). If we accept such a view, constitutional meanings have a life of their own, independent of judicial practice. The problem with such a view is that we have no clue as to how constitutional provisions acquire their meaning. Are constitutional meanings eternal truths? If so, then whatever the "true meaning" of the Constitution is, it need not have anything to do with actual constitutional practice. Consequently, actual constitutional practice might be totally wrong. Of course, it might be that whatever the true meaning of the Constitution, it is read back into the Constitution despite Supreme Court decisions. However, if that is so, then why even bother with the Constitution and actual constitutional practice. Why not decide important "constitutional" questions in terms of abstract moral and political theory?

310. The source of the new principle is not contained in the Constitution or judicial decisions. Instead, it is derived from critical cultural theory or abstract moral and political theory.

It is important to note that the new principle is normative, even if empirical factors are relevant to its justification. In *Brown*, social scientific evidence was adduced to support the normative judgment that separate school facilities were inherently unequal. For a discussion of the desirability of using social scientific data upon which to base constitutional decisions see M. COHEN, *LAW AND THE SOCIAL ORDER* 380-81 (1933) ("If, however, we recognize that courts are constantly remaking the law, then it becomes of the utmost social importance that the law should be made in accordance with the best available information, which it is the object of science to supply."); Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157-58, 167 (1955). Cf. Dworkin, *Social Sciences and Constitutional Right—The Consequences of Uncertainty*, 6 J. L. & ED. 3 (1977) (arguing that legal judgments are interpretive, not merely factual).

311. The term 'discretion' is ambiguous. A weak form of discretion simply means that a judge must use judgment, *i.e.*, that there is no mechanical method of decision. A stronger conception of discretion authorizes a judge to make a decision within the parameters of certain standards, but the judge is the final authority in so deciding. An even stronger conception of discretion permits the judge to decide what standards he is to use to make such decisions. See R. DWORKIN, *TAKING*

cide cases in accordance with the best overall moral and political decision. Consequently, pragmatism can explain *Brown I*. With respect to both conventionalism and pragmatism,³¹² the decision in *Brown I* was new law.³¹³ In such cases, judges are clearly making, not merely applying already existent law.³¹⁴

2. *The Personal Autonomy Revolution: Griswold v. Connecticut*

One of the most important and controversial constitutional revolutions in the twentieth century has been the Court's creation of a general constitutional right to privacy.³¹⁵ *Griswold v. Connecticut*³¹⁶ is important both for the substantive right it created and for the methodology it instituted to find such a right.³¹⁷ In this case,³¹⁸ the Court

RIGHTS SERIOUSLY 32-33 (1977). It is this sort of discretion that some is involved in a constitutional revolutions. It is this sort of discretion that some conventionalist theories permit.

312. According to both theories, there is a clear distinction between what the law is and what it *ought* to be. Minutes before the decision, the principle enunciated in *Brown* was what the law *ought* to be, not what it *was*.

313. Just as *Brown I* was a progressive step into the future, the decision in *Brown v. Board of Educ.*, 349 U.S. 294 (1955), or *Brown II* — ordering desegregation “with all the deliberate speed”—was a retrogressive step into the past. Charles Black correctly observed that “[t]here was just exactly no reason, in 1955, for thinking it would work better than an order to desegregate at once.” Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 22 (1970).

Was *Brown II*'s remedy justified? Do we still think the solution in *Brown II* was the only sensible route to take? If *Brown II* had more teeth, it is unclear that we would have had the tortuous road to integration that ensued. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979) (*Dayton II*); *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*); *Milliken v. Bradley*, 418 U.S. 717 (1974); *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. County School Bd.*, 391 U.S. 430 (1968); *Griffin v. County School Bd.*, 377 U.S. 218 (1964); *Cooper v. Aaron*, 358 U.S. 1 (1958). Could a strong affirmative action remedy have been the remedy called for in *Brown II*? Do we even know how to answer questions of this kind? Does it make sense to say that had *Brown II* included a significant affirmative action remedy, the United States might now be well on its way to overcoming the vestiges of slavery?

314. See *infra* notes 388-417 and accompanying text.

315. By “general” I mean “a constitutional right of privacy divorced from the specific privacy-oriented guarantees of the Bill of Rights.” Posner, *Privacy in the Supreme Court*, 1979 SUP. CT. REV. 173, 197.

316. 381 U.S. 479 (1965).

317. Consequently, the paradigm in this context tells us what kinds of facts generate issues of privacy as well as the sort of methodology to use for discovering implicit constitutional rights. Thus, *Griswold* is a paradigm for disposing of issues of constitutional privacy as well as a paradigm or general methodology for discovering rights.

Both the substantive and methodological paradigm in *Griswold* had a precursor in *Poe v. Ullman*, 367 U.S. 497 (1961) (Douglas, J., dissenting), where Douglas characterized the right of privacy as emanating “from the totality of the constitutional scheme under which we live.” *Id.* at 521.

found a general right to privacy stemming from specific parts of constitutional amendments. The Court appealed to a general principle of privacy or personal autonomy which it thought grounded the particular privacy values contained in the Bill of Rights. It was necessary to postulate this general right of privacy in order to achieve a coherent conception of personal autonomy.³¹⁹

No one denies that the Constitution explicitly recognizes specific grants of privacy.³²⁰ The question arises whether these specific grants are constitutionally sufficient to generate a general right of privacy.³²¹ Since we can easily imagine a society which values only certain kinds of privacy, we cannot insist that the Constitution includes a generalized right to privacy unless it explicitly or implicitly says so.³²² Consequently, the substantive result as well as the methodology adopted

318. The principal precursors to the *Griswold* decision were: *Skinner v. Oklahoma*, 316 U.S. 535 (1942)(invalidating, on equal protection grounds, a law permitting sterilization for certain types of repeat offenders); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)(invalidating a law requiring students to attend public schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923)(invalidating a law requiring teaching only English in grade schools).

319. The Court's unfortunate language states "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). This language is unfortunate because it is merely metaphorical. Without instructions for interpreting and applying the metaphor, we have no way of determining precisely what the methodology is. We know from the opinion that the right of privacy is derived, in some manner, from the first eight amendments and not "independently on an interpretation of the due process clause." Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 244 (1965). How this right derives from the particular amendments is still a mystery. Constitutional revolutions creating innovative adjudicative strategies for creating new substantive constitutional meaning must be based on more than metaphor. See Henly, "Penumbra": *The Roots of Legal Metaphor*, 15 HAST. CONST. L.Q. 81, 96-99 (1987)(discussing some of the problems with "penumbra" as a spatial metaphor).

320. Such specific rights of privacy are found in the first, third, fourth and fifth amendments.

321. Sometimes this general right is referred to as "the right to be let alone," a right that is "implicit in many of the provisions of the Constitution and in the philosophical background out of which the Constitution was formulated." *Griswold, The Right to Be Let Alone*, 55 NW. U.L. REV. 216 (1960). Consider this eloquent statement of the right involved:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478 (1928)(Brandeis, J., dissenting).

322. Of course, in these circumstances, it is incumbent upon those asserting that the

in *Griswold* are both revolutionary.³²³

The privacy cases provide us with a good example of revolutionary and normal adjudication. The decision in *Griswold* functions as a constitutional paradigm. As such, it determined the scope of the general right to privacy. The period following *Griswold* was a period of perfecting and refining the paradigm.³²⁴ This period was the initial period of normal adjudication. Courts attempted to determine whether and to what extent other constitutional problems, for example, contraception among unmarried couples,³²⁵ abortion,³²⁶ family living arrangements,³²⁷ parental rights,³²⁸ the right to marry,³²⁹ personal appearance,³³⁰ the right to die³³¹ and so forth, should be solved according to the paradigm in *Griswold*.

In carrying out normal adjudication, the precise nature and desirability of the paradigm might be questioned. *Bowers v. Hardwick*³³² and the recent abortion cases³³³ are examples of such a challenge to the paradigm. When a paradigm continues to be questioned and modified, there is evidence that there is a continuing or impending crisis in that area of law. If so, a revolution, or counter-revolution, is likely. For example, anti-abortion advocates would like to overturn *Roe*.³³⁴ To achieve this, some seek to overturn the privacy cases or limit them

Constitution implies a general right to privacy to present a clear and demonstrable theory of implication sufficient to justify such a conclusion.

323. One might query, "Why not just say that these decisions are wrong?" In my estimation, if we take actual constitutional practice seriously, courts have been engaging in revolutionary adjudication from the beginning of the republic. To say these decisions are wrong is to invalidate large pieces of 200 years of constitutional practice. There are compelling conceptual, as well as moral, reasons against doing this.
324. If the paradigm cannot be perfected, refined and stabilized, it will be unable to produce routine adjudication. Consequently, if the paradigm survives, adjudication in which it is involved will always be somewhat revolutionary.
325. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
326. *Roe v. Wade*, 410 U.S. 113 (1973).
327. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).
328. *Quilloin v. Walcott*, 434 U.S. 246 (1978).
329. *Zablocki v. Redhail*, 434 U.S. 374 (1978).
330. *Kelley v. Johnson*, 425 U.S. 238 (1976); *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972).
331. *In Re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976).
332. 478 U.S. 186 (1986)(holding that private consensual homosexual sodomy is not constitutionally protected).
333. *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983)
334. It is not certain that even with a conservative Court, *Roe v. Wade* will be overturned. However, the process of chipping away at *Roe* has already begun. See *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989). Moreover, the more extreme anti-abortion advocates will not be satisfied with a decision denying that the constitutional right to privacy protects abortion. Instead, these advocates urge the Court to outlaw abortion on the ground that it violates a fetal person's due process right to life. A Court decision striking down *Roe v. Wade*

to the facts of the case.³³⁵ Typically, counter-revolutions can replace the overturned paradigm with a diametrically opposed paradigm. This occurred with regard to the paradigm in *Lochner v. New York*.³³⁶ The *Lochner* paradigm could have been overturned by replacing the freedom to contract paradigm with a case-by-case consideration of economic issues, sometimes yielding to the freedom to contract, sometimes not. In fact, the Court chose a superior route by replacing the *Lochner* paradigm with a comparatively weak form of review in economic and social welfare matters.³³⁷ In this instance, it took a revolution to reverse a revolution.

We now turn from the historical basis of the theory of constitutional revolutions to an evaluation of some important objections to the theory.

IV. THE CONTOURS OF THE THEORY OF CONSTITUTIONAL REVOLUTIONS

Part IV of this Article examines several important objections to the theory of constitutional revolutions. These are not the only interesting objections to the theory. However, they are objections which must be overcome if the theory is to survive initial scrutiny.

A. Objections to the Theory of Constitutional Revolutions

1. *Macro and Micro Revolutions*

One important feature of the theory of constitutional revolutions is a distinction between macro and micro constitutional revolutions. Macro revolutions are changes of paradigms in constitutional law; whereas micro revolutions are changes within a paradigm. One might raise the objection that if there are macro and micro revolutions, there is really no qualitative distinction between revolutionary and normal adjudication.³³⁸

This objection overlooks the fact that despite the existence of different degrees of revolutionary adjudication, there are also forms of adjudication that have no revolutionary components. During normal

simply returns the decision to the legislatures, unless, of course, the Court engages in revolutionary adjudication.

335. One concern over the possible appointment of Robert Bork to the Supreme Court was his position that the Constitution did not protect a general right to privacy. Critics were concerned that Bork would limit the privacy cases to their facts, and not continue the important process of perfecting, refining and stabilizing the revolution establishing a general right to privacy.

336. 198 U.S. 45 (1905) (holding that the freedom to contract was a constitutionally protected right under the due process clause).

337. *United States v. Carolene Products*, 304 U.S. 144 (1938); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

338. See *supra* note 196 and accompanying text.

or routine adjudication, after a revolution has been stabilized, the paradigm alone determines the results of adjudication. More specifically, pragmatic considerations exclusively determine the nature of a macro revolution, while micro revolutions are generated by a joint appeal to the paradigm and pragmatic factors.

However, the interlocutor can pursue this objection. If you concede that there are different degrees of revolutionary adjudication,³³⁹ how are we to determine when a case involves revolutionary rather than normal adjudication? All adjudication is both revolutionary and normal to some degree.³⁴⁰ Consequently, the model employed by the theory of constitutional revolutions, though pluralistic, is unitary after all.

The existence of macro and micro revolutions or the fact that many important constitutional decisions have revolutionary *and* normal aspects does not vitiate the importance of this distinction.³⁴¹ There are at least three reasons for this conclusion. First, most normal and all routine adjudication have absolutely no revolutionary features at all. Many decisions in federal appellate court are decisions that do not cre-

339. A constitutional revolution involves a change in the meaning of a constitutional provision. This change need not be dramatic. Cf. SCIENTIFIC REVOLUTIONS, *supra* note 111, at 180-81.

340. This objection is similar to one lodged at Kuhn's distinction between revolutionary and normal science. Consider:

By 1965, he [Kuhn] was conceding that his first distinction between 'normal' and 'revolutionary' change in science might have been too sharply drawn; but he was arguing, in reply, that scientific revolutions were in fact, not less frequent, but more frequent than he had previously recognized. His critics' objections had convinced him that the sciences are exposed to profound conceptual changes . . . continually. So he went on to redescribe theoretical change in science as comprising an unending sequence of smaller revolutions or . . . 'micro-revolutions'. Every serious theoretical change in science, even if less than a complete 'paradigm-switch', now committed us to refashioning our concepts in a 'revolutionary' way.

Toulmin, *supra* note 125, at 114. The objection continues:

[A]ny scientific change whatever will normally have both something 'normal' and something 'revolutionary' about it. And, if this were indeed all that Kuhn had ever meant by his use of the phrase 'scientific revolutions', that choice of phrase was grossly misleading; for it simply disguised a familiar (but atemporal) logical distinction in an irrelevantly historical fancy dress. Rather than distinguishing two historical kinds of scientific change, it merely indicated two logically distinct aspects of any theoretical change in science.

Id. at 115.

341. A case may involve normal adjudication concerning one aspect and revolutionary adjudication concerning others. For example, all cases involving judicial review are instances of normal adjudication regarding their reviewability. The judicial paradigm in this instance is pellucid. Consequently, *Brown*, a paradigm of revolutionary adjudication regarding equal protection, is simultaneously an example of normal adjudication regarding judicial review.

ate law in any interesting way at all.³⁴²

Second, the notions of revolutionary and normal adjudication are employed to explain the source of a constitutional principle. If the principle has a revolutionary source, it is based on factors extrinsic to constitutional law. If its source is normal, then it is based upon a constitutional paradigm that was once revolutionary.

Although it adds complexity to the distinction between revolutionary and normal adjudication, the introduction of macro and micro revolutions is still useful because it refines our conception of the source of constitutional principles. In macro revolutions the source of constitutional principles is extrinsic; while in micro revolutions the source is usually intrinsic, although in some cases it is both intrinsic and extrinsic. Consequently, in micro revolutions we must identify two different sources of the principle. Only if it were impossible to distinguish between the two different sources of constitutional principles would the distinction between revolutionary and normal adjudication collapse.

Finally, we can tell the difference between revolutionary and normal adjudication by attempting to explain the decision in a new case by an appeal to a constitutional paradigm. If we fail in such an attempt, we know that there must be a pragmatic explanation for the decision to be legitimate. If, however, the decision must be explained by an appeal to a paradigm *and* pragmatic factors, we know that the decision has both revolutionary and normal features.³⁴³ Certainly, it may be controversial whether and to what extent a decision has revolutionary and normal features. However, the existence of controversy in a given case does not obviate the usefulness for the distinction.

2. *Normative Imperatives and Descriptive Generalizations*

The second important objection to the theory of constitutional revolutions is that it conflates normative imperatives with descriptive generalizations. The popular way of stating this objection is that the theory of constitutional revolutions is guilty of deriving an "ought" from an "is." Perhaps the theory is descriptively accurate, but that does not have normative implications for how judges *should* decide cases. An additional premise stating the normative element associated with actual constitutional practice is required to supply the theory's

342. The Sixth Circuit, for example, has a procedural rule for deciding cases without oral argument or opinion. Presumably, in cases of this sort there is a clear application of a substantive rule to the facts of the particular case.

Of course, in one sense every application of a settled rule to a new fact situation gives us a greater understanding of the rule. However, this is entirely trivial; the new application does not add to the theoretical or conceptual structure of the rule and hence no change in the rule is involved.

343. Additionally, we know that the case represents a micro-revolutionary decision involving a sub-paradigm.

prescriptive force. Without such an additional premise, the objection contends, the theory of constitutional revolutions is irrelevant to the controversy over the correct constitutional methodology.

Several responses are in order here. First, if it is conceded that the theory of constitutional revolutions captures constitutional practice, then it is difficult to see how the critic can insist that it has no prescriptive force.³⁴⁴ It will only be plausible to argue that actual practice has no prescriptive force³⁴⁵ if there is a conclusive moral argument against actual practice.³⁴⁶ What would such an argument involve? Surely such an argument would not involve a direct appeal to the practice itself. Instead, the critic must appeal to factors extrinsic to the practice. In making such an appeal, the critic will justify his argument on pragmatic grounds. If he does so, he will be prescribing a revolutionary change. Consequently, his argument denying the prescriptive force of the theory of constitutional revolutions depends upon this very prescriptive force for its apparent plausibility.

Second, the notions of progress, truth and so forth are defined in terms of actual constitutional practice. If the theory of constitutional revolutions adequately describes actual constitutional practice, these epistemic notions are conceptually tied to practice, explicable only in terms of the theory of constitutional revolutions.

More concretely, the theory of constitutional revolutions helps us bring about the ordered benefits associated with pragmatism and conventionalism. Permitting justices to make pragmatic choices, such as in *Marbury*, enables the emergence of the federal judiciary as a viable institution in our constitutional democracy. Without the inclination to make such choices, that co-equal judicial branch will atrophy. Just as stagnating capitalist enterprises do not survive, so too, vital democratically based political institutions require the ability to develop and

344. Prescriptive force refers to an exhortation to act according to a normative standard. See generally R. M. HARE, *FREEDOM AND REASON* (1963).

345. Actual practice has at least a modicum of prescriptive force, because it defines the context for deliberating over constitutional change. Consequently, the fact that some procedure is a part of actual constitutional practice means that procedure is good, all things being equal.

346. What would we do in the following circumstances? Suppose we discovered incontrovertible evidence that the founders intended constitutional practice to be very different than actual practice. Would that render 200 years of actual constitutional practice unconstitutional or illegitimate? In a constitutional republic such as ours, legitimacy must be defined in part in terms of actual practice, and, concerning actual practice:

Constitutional adjudication is concerned with defining constitutional provisions, many of which are broadly phrased and open ended and so do not convey much meaning in their text alone. The Court has done this ever since *Marbury* asserted and recognized the power of judicial review. In establishing the meaning of the Constitution the Court has not recognized any distinction between interpretive and noninterpretive review.

Sedler, *supra* note 202, at 115.

grow. This must be an internal capacity, that is, a capacity that is derived from the institution itself. Consequently, any vital judicial enterprise must have the internal capacity for growth and self-criticism.

Unfettered pragmatism precludes realizing the conventionalist benefits of predictability and coordination. Consequently, once a revolution occurs and is perfected, refined and stabilized, normal adjudication takes on a conventionalist dimension, thereby permitting us to make economic and personal decisions in a stable environment. An additional virtue of the theory of constitutional revolutions is that these revolutions have a tendency to avoid violent political revolutions.³⁴⁷ Furthermore, even conceding for the sake of argument that revolutionary adjudication is absolutely illegitimate, whatever that means, it is difficult to know how to return to the past.³⁴⁸ Finally, as argued earlier, returning to the past itself requires constitutional revolution.

3. *Judicial Restraint and Judicial Activism*

The theory of constitutional revolutions permits judicial activism.³⁴⁹ Indeed, it describes American constitutional practice as one requiring judicial activism in order to explain the evolution of American constitutional practice. One traditional criticism of judicial activism is that activist judges fail in the primary judicial duty to find or discover law, not to make it.³⁵⁰ This is a general legal imperative, but

347. H. BERMAN, *LAW AND REVOLUTION* 21 (1983).

348. One writer seriously considers the possibility of returning to the past. C. WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW* (1986) (arguing that modern judicial review is much more radical than traditional judicial review). This Article's salient aim has been to demonstrate that this contention rests on a misconception of the type of adjudication used by the Marshall Court. Marshall was as much of an activist as any modern judge, although his concerns were different and now appear obvious to the contemporary observer.

349. Although the theory of constitutional revolutions does not vitiate the distinction between judicial activism and judicial restraint, it forces us to reformulate the distinction. Restrained judges will counsel caution in effecting revolutionary adjudication, while activist judges will insist upon turning more frequently to revolutionary strategies. Moreover, the rhetoric must be restructured. It is no longer possible to quarrel over whether judges are ever permitted to make law. History has clearly and resoundingly answered this question affirmatively. Judges make law in revolutionary adjudication and interpret the law in normal adjudication.

350. Consider Marshall's admonition:

Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.

Osborn v. Bank of the United States, 22 U. S. (9 Wheat.) 737, 773 (1824).

Marshall was a master at paying lip service to this creed, while simultaneously

it assumes greater importance in constitutional adjudication. Since federal judges are not elected, and therefore are not accountable as are officials of the legislative and executive branches, judicial lawmaking is unremittingly illegitimate.

According to the theory of constitutional revolutions, the distinction between restraint and activism, as a choice between mutually exclusive alternatives, flies in the face of actual constitutional practice. In fact, the evolution of constitutional law is cyclical and periodic. A given period of revolutionary constitutional adjudication often begins with judge-made law.³⁵¹ The cycle continues with the first stage of normal adjudication which attempts to spell out the paradigm in terms of its intrinsic meaning as well as external pragmatic factors. This stage of constitutional adjudication is one where micro revolutions and sub-paradigms predominate. During this period, judges continue to make law, but now in terms of the accepted constitutional paradigm and *some* pragmatic factors. During this period the reliance on revolutionary methods decreases.³⁵² Finally, when reliance on pragmatic factors sufficiently declines or ceases, normal or routine adjudication predominates in which judges merely apply the law. In these circumstances, the judge functions conventionally, seeking well-accepted constitutional authorities upon which to base his decisions. When he cannot find such conventions, it may be due to an impending constitutional crisis.³⁵³ In that event, a judge must consider instituting a revolutionary constitutional decision. Summarizing, the two leading theories, conventionalism and pragmatism, have a role to play in

effecting constitutional revolutions by infusing his conception of federalism into the Constitution.

351. It is difficult to understand why this conclusion is so unpalatable. The common law is largely judge-made law. M. SHAPIRO, COURTS 28 (1981). Why doesn't this raise problems of legitimacy and counter-majoritarianism? Perhaps the distinction is based on the relative ease with which an ordinary legislature can overrule a common-law decision, while Congress can not always do so regarding a Supreme Court decision. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 404 (1978). Of course, Congress can restrict the federal judiciary's appellate function in a particular kind of case, although it has been reluctant to do so.
352. In one sense, the revolutionary structure of constitutional adjudication continues during this period. It is true that there is an accepted paradigm, one that was once itself the subject of a revolution; but unless the paradigm has a great deal of intrinsic meaning, the post-revolutionary phase will continue to draw on extrinsic pragmatic factors to determine the paradigm's precise nature. This clearly occurred in the *Griswold* paradigm concerning the privacy cases.
353. A constitutional crisis does not occur every time a paradigm fails to provide an answer to some pressing social question. However, when social forces stifle the expression of a fundamental human right, judicial action is appropriate. See generally *United States v. Carolene Products*, 304 U.S. 144 (1938); Singer, *Catcher in the Rye Jurisprudence*, 35 RUTGERS L. REV. 275, 284 (1983)(suggesting that a proper role for the court "require[s] the community to come to the aid of the weak and disadvantaged").

the dualistic dimension of constitutional adjudication. During constitutional revolutions, pragmatism³⁵⁴ is the fundamental judicial strategy. During normal adjudication, especially routine adjudication, conventionalist adjudication prevails.³⁵⁵

4. *Revolutionary Adjudication and the Rule of Law*

When a society is governed by the rule of law, it has an objective, impartial and fair procedure for settling conflicts. When the rule of law breaks down, the process for settling conflicts, if any, is subjective, arbitrary and unjust. The importance of the rule of law in Anglo-American history³⁵⁶ can be expressed in the following way. Any acceptable legal system must maintain the rule of law. Consequently, preserving the rule of law is a constraint or condition of adequacy for any theory of constitutional adjudication. Since the theory of constitutional revolutions permits important decisions to evolve from factors extrinsic to the Constitution or explicit constitutional practice, it fails to preserve the rule of law and, therefore must fail as an adequate constitutional theory.

More specifically, since the theory of constitutional revolutions insists on the existence of two different approaches to constitutional adjudication, it cannot preserve the virtues of predictability, stability and coordination. Hence, according to the theory of constitutional revolutions, a constitutional system need not preserve the rule of law.³⁵⁷ If true, the cogency of this argument admittedly defeats the theory. In order to assess this argument, let's inquire further into the meaning of the rule of law and attempt to determine why it is deemed so important.

First, the rule of law must mean that decisions concerning a citizen's rights and obligations must be predictable and not arbitrary. In this way, there is no rule of law if your right to free speech is deter-

354. Remember the way I am using this term. Pragmatism need not entail consequentialism or intuitionism. Natural law, contract theory or deontological ethics can each function as a pragmatic legal theory in revolutionary adjudication.

355. In unsettled, normal adjudication, when the paradigm has not yet been perfected, refined and stabilized, some combination of pragmatism and conventionalism predominates. An interesting question arises as to whether there is a principled manner of expressing such a hybrid theory. In Part V of this Article, I consider the possibility that coherence theories explain the evolution of constitutional law in this type of constitutional adjudication.

356. A rough but useful conception of the rule of law informs us that laws cannot be arbitrary; legal decisions must be public and rationally defensible. See I. HARDEN & N. LEWIS, *THE NOBLE LIE* 302 (1986).

357. The argument here is that stability, predictability and coordination are also conditions of adequacy that any acceptable legal system must exhibit. J. FINIS, *NATURAL LAW AND NATURAL RIGHTS* 270 (1980) (describing the rule of law as "the specific virtue of legal systems" consisting of certain formal conditions any acceptable legal system must meet).

mined solely by what a particular individual, a king or a bureaucrat, decides it to be. Second, there is no rule of law if law arbitrarily protects particular classes of people—the wealthy, whites or men for example—but not for others. Third, there is no rule of law if there are substantive laws but no procedural protections for implementing them. Fourth, there is no rule of law if there are good substantive and procedural laws but no one to enforce them or if those entrusted with their enforcement are corrupt.

The theory of constitutional revolutions maintains the rule of law in each of these instances. Furthermore, it promotes stability, predictability, flexibility and coordination by revealing the existence of two judicial rhythms, one permitting stability and predictability, while the other flexibility and coordination. Moreover, it permits the Court to respond to the urgent demand to recognize undeclared individual rights that have developed as an integral part of our constitutional scheme,³⁵⁸ or rights which exist in large part independently of any system of positive law.³⁵⁹

358. In other words, there may exist undeclared rights that develop in certain cultural circumstances and not others. For example, rights or entitlements to governmental financial assistance may be regarded as fundamental rights that have not yet been declared to be constitutional rights. Such rights might not have developed in a more libertarian society. Hence, they are non-positive rights that are still relativistic.

359. There is a conceptual link between the theory of constitutional revolutions and the ninth amendment, an amendment which insists that there are rights that exist independently of the constitutional scheme and which makes possible revolutions in the area of individual rights. Consider the following:

The Ninth Amendment to the Constitution is a basic statement of the inherent natural rights of the individual. On its face this amendment states that there are certain unenumerated rights that are retained by the people. It is a mere assertion that while certain unenumerated rights have been expressly protected by the Constitution, the reservation in the Constitution should not be taken to deny or disparage any unenumerated right which was not so apparently protected. Nothing could be clearer than this statement. It is a declaration and recognition of individualism and inherent right, and such a declaration is nowhere else to be found in the Constitution. Its absence elsewhere in the Constitution accounts for its very presence in this Amendment.

B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 19 (1955).

According to Patterson, "inherent rights, whether enumerated in the Constitution of the United States or not, are entitled to protection, not only against the Federal Government, but also as against the government of the several states." *Id.* at 38; *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Goldberg, J., concurring) (indicating the existence of unenumerated rights); Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack*, 64 CHI.-KENT L. REV. 67 (1988) (arguing that the ninth amendment indicates that some natural rights are justiciable). See also C. BLACK, *DECISIONS ACCORDING TO LAW* 44-48 and n.47 (1981); J. ELY, *supra* note 6, at 34-41; L. TRIBE, *supra* note 11, at 774-75; Barber, *Whither Moral Realism in Constitutional Theory? A Reply to Professor McConnell*, 64 CHI.-KENT L. REV. 111 (1988); Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HAST. L.J. 305 (1987) (arguing that there are

5. *Constitutionalism and Moral Principles*

The final objection to be considered maintains that the theory of constitutional revolutions consists of *external* principles for explaining and justifying constitutional adjudication, thus failing to account for the *internal* perspective so conspicuous of Anglo-American law.³⁶⁰ According to this objection, the relevant explanatory principles must provide standards for constitutional actors to use in deciding cases, not merely a social scientific methodology for describing constitutional practice. Internal principles of constitutional adjudication show how constitutional law depends upon coherent moral principles explaining and justifying the practice. Any theory not preserving the importance of coherence in constitutional adjudication fails as an explanatory and justifactory theory of law. This is a significant challenge to any dualistic theory of constitutional adjudication. Consequently, we must explore this challenge in greater detail.

V. COHERENCE THEORY AS AN ALTERNATIVE TO THE THEORY OF CONSTITUTIONAL REVOLUTIONS

A. The Structure of Coherence Theories

Coherence theories are committed to a unitary paradigm of constitutional adjudication. In short, these theories contend that every constitutional question can be resolved in terms of an appeal to principles embedded in constitutional practice. According to such theories, a judge should decide to seek general explanatory and justificatory principles in order to determine the decision these principles imply for the present case.³⁶¹ Coherence theories favor decisions that follow from and extend past decisions.³⁶² In this Part, I examine two familiar at-

ninth amendment natural rights that can constitute a check on the federal government and even in a limited fashion against state government); Redlich, *Are there "Certain Rights . . . Retained by the People"?* 37 N.Y.U. L. REV. 787, 804-05 (1962)(arguing that the purpose of the ninth amendment was to show that the enumerated rights did not exhaust the rights retained by the people). *But see* Caplan, *The History and Meaning of the ninth amendment*, 69 VA. L. REV. 223, 261 (1983)(arguing that the ninth amendment can neither be a check on federal nor state legislation); Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814 (1966)(arguing that the ninth amendment is not the source of independent rights nor is it a means for protecting them). *But see* McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 1989 (1988)(arguing against the justiciability of ninth amendment natural rights).

360. An internal attitude is the attitude of a participant in a rule-governed activity such as a game. This attitude includes the concepts of reason and justification. An external attitude is the attitude of an observer who is concerned with adequately describing the regularity between two or more events. *See supra* note 37.

361. The principal coherence theories of constitutional adjudication can be found in the works of Ronald Dworkin. *See* R. DWORKIN, *supra* note 3; L. TRIBE, *supra* note 11; Fallon, *supra* note 11; Chang, *supra* note 11.

362. In the limiting context, a coherence theory dictates consistency with prior opin-

tempts at establishing a coherence theory of constitutional adjudication. I conclude by examining a novel version of a coherence theory of constitutional adjudication.

B. Coherence and Functionalism

One adopts a coherence theory when one insists that apparently different cases can be subsumed under a general principle, thereby requiring similar treatment. Because there is no relevant difference between homosexuality and heterosexuality, for example, advocates of coherence theory insist on constitutionally protecting both. On such a view, the Court in *Bowers v. Hardwick*³⁶³ erred by not including consensual homosexual sodomy under the constitutional protection of the general right to privacy. One liberal argument³⁶⁴ contends that the principle of privacy enunciated in *Griswold v. Connecticut*³⁶⁵ extends to homosexuality.³⁶⁶ The enthusiasm for this conclusion is not diminished despite the privacy cases' explicit restriction of privacy to family, marriage and procreation.³⁶⁷ Moreover, this enthusiasm does not wane even in the face of the Court's explicit exclusion of homosexual

ions. A more complex conception of coherence requires us to derive our decision from the scheme of explanatory and justificatory principles underlying the law. Coherence theories may require that there be one super-principle from which all subsidiary principles may be derived.

363. 106 S. Ct. 2841 (1986).

364. Dworkin, *The Bork Nomination*, 34 N.Y. REV. BKS. 6-8 (Aug 13, 1987); L. TRIBE, *supra* note 11, at 1422.

365. 381 U.S. 479 (1965).

366. One commentator contends that the source of the division of the Court in *Hardwick* was a commitment "to two incommensurable and incompatible systems of fundamental values: classical liberalism and classical conservatism." Goldstein, *History, Homosexuality and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1099 (1988). If so, the liberal argument that the majority opinion commits a *judicial* mistake is erroneous. Further, the liberal argument begs the question against the majority opinion.

367. Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting), is taken by many to express the paradigm ultimately made law in *Griswold*. Justice Harlan stated:

The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication, and homosexual practices . . . confin[e] sexuality to lawful marriage, [and] form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.

Further, Justice Goldberg's concurrence in *Griswold* clearly states that the holding in this case "in no way interferes with a State's proper regulation of sexual promiscuity or misconduct." *Griswold v. Connecticut*, 381 U.S. 479, 498-99 (1965) (Goldberg, J., concurring). These remarks suggest clearly that the essential feature of the paradigm in the sexual privacy cases involves the family, marriage and procreation.

privacy from inclusion in the privacy paradigm.³⁶⁸ The liberal argument insists upon a more general principle of independence from state interference,³⁶⁹ or a constitutional value of the freedom of intimate association³⁷⁰ which protects consenting adult homosexual relations.³⁷¹

The essential feature of the functionalist argument is that where there is a constitutionally protected activity, such as heterosexual privacy, which is valued because of the role it plays in an individual's life, then other activities playing the same role in someone's life must be afforded the same protection. Many commentators argue that homosexuality between consenting adults should be protected because homosexuality is a form of intimacy, self-definition or a central feature of being a person. Consequently, barring some compelling justification, the principle of privacy in such cases already extends to homosexual privacy.

Professor Tribe eloquently states the functionalist argument.³⁷² Tribe faults the *Hardwick* majority for misidentifying the state of the law in this case. Tribe's first reason for this objection is that:

[t]he *Hardwick* majority's decision to cut off constitutional protection "at the first convenient, if arbitrary boundary" drawn by prior cases is not only antithetical to the genius of the common law, it also ignored the warning in *Moore v. East Cleveland*, against "clos[ing] our eyes to the basic reasons *why* certain rights . . . have been accorded shelter under the fourteenth amendment's due process clause." As the dissenters pointed out, "we protect the decision whether to marry precisely because marriage 'is an association that promotes

368. *Poe v. Ullman*, 367 U.S. 497, 553 (1961)(Harlan, J., dissenting); *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976); *Lovisi v. Slayton* 539 F.2d 349, 356 (4th Cir. 1976)(Craven, J., dissenting), *aff'g* 363 F. Supp. 620 (E.D. Va. 1973).

369. R. DWORKIN, *supra* note 3, at 377.

370. L. TRIBE, *supra* note 11, at 1423; Karst, *The Freedom of Intimate Associations*, 89 YALE L.J. 624, 634 (1980). See also Fried, *Privacy*, 77 YALE L.J. 475, 477 (1968)(characterizing privacy as necessary for love, friendship and trust).

371. Let me say at the outset that I agree with the liberal conclusion *extending* protection for consensual homosexual sodomy. My criticism of the liberal argument is not with its conclusion. What I object to is the liberal insistence that this conclusion captures the current state of the law as opposed to what the law *should* be. Skepticism is appropriate, in my estimation, when we move from the concept of what should be a right to what is a right. See, e.g., Richards, *Sexual Autonomy and Right to Privacy*, 30 HASTINGS L.J. 957, 1006 (1979)(arguing that laws instructing us how to have sex, and with whom, are constitutionally invalid absent a compelling moral justification).

Furthermore, we can avoid the issue of whether adopting a principle protecting consensual homosexual sodomy constitutes sound constitutional practice. Instead, we could argue that even if homosexual privacy does not trigger strict scrutiny, it is irrational in the extreme to criminalize such conduct. It is irrational because the state can have no non-arbitrary goal in criminalizing this conduct. Of course, to achieve victory here, rational basis scrutiny must have *some* teeth.

372. L. TRIBE, *supra* note 11, at 1421-35.

a way of life, not cause; a harmony in living, not political faiths; a bilateral loyalty, not commercial social projects.' " And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households. The underlying value in those contexts, as in the *Hardwick* case, is protection for intimate human associations.³⁷³

This passage raises important conceptual questions about the relationship between a constitutional result and its justification. If the Court itself fails to connect a particular justification with a constitutional result, what warrants anyone else in doing so? Why must anyone value marriage for the reason Tribe does?³⁷⁴ Some people value marriage because it is sanctioned by their religious beliefs. Must these religious beliefs be characterized in terms of protection for intimate associations? Others value marriage because it contributes to the common good.³⁷⁵ Still others value marriage for egoistic or narcissistic reasons. Why is Tribe's characterization of the value of marriage necessarily

373. *Id.* at 1422-23. See D. RICHARDS, *TOLERATION AND THE CONSTITUTION* 280 (1986) (presenting a functionalist argument for extending constitutional protection to consensual sodomy). But see Grey, *Eros & Civilization and the Burger Court*, LAW & CONTEMP. PROBS., No. 3 1980, at 83, 85 (arguing that *Griswold* "contain[s] no hint of any endorsement of the sexual freedom of consenting adults. Three of the concurring opinions expressly disavowed any notion that the right of privacy . . . cast doubt on sex laws. The opinion for the Court . . . stressed the ancient and sacred character of marriage as the basis for the decision").

374. Grey argues the Court's decisions in the privacy cases are "dedicated to the cause of social stability through the reinforcement of traditional institutions and have nothing to do with the sexual liberation of the individual Where the less traditional values have been directly protected, . . . the decisions reflect . . . the stability-centered concerns of moderate conservative family and population policy." Grey, *supra* note 373, at 88, 90.

375. For example, it can be argued that "[i]mpermanent relationships that perform some intimate or associational 'functions' cannot claim the same position as marriage and kinship in ensuring a political structure that limits government, stabilizes social patterns, and protects pluralistic liberty through the power of its own relational permanency." Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 482 (1983). But see D. RICHARDS, *supra* note 373, at 277 ("[t]here is no good reason to believe that the legitimacy of [sodomy] destabilizes social cooperations").

I do not find persuasive the argument purporting to show that homosexuality destabilizes. For one thing, even if marriage is important, why should we not tolerate other kinds of sexual relations? Nevertheless, those opposing consensual sodomy have a principled position, they simply have the wrong principle. That in itself cannot show that they are wrong about the paradigm in the sexual privacy cases. Similarly, the Supreme Court has described marriage as "the most important relation in life" and "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1988). But see Note, *Bowers v. Hardwick: The Right of Privacy—Only Within the Traditional Family?*, 26 J. FAM. L. 373 (1987) (arguing that the principle in the sexual privacy case has application broader than the family).

the right one?³⁷⁶

One important feature of common-law systems is that there can be an agreement on result without an agreement on justification. Thus, everyone might agree that marriage is a fundamentally important human institution without agreeing why this is so. Consequently, the reason certain rights are accorded protection under the fourteenth amendment's due process clause may differ from social group to social group; yet all may agree on the result.

This distinction between result and justification is one salient difference between law and morality.³⁷⁷ If we agree on the propriety of a particular law, we need not agree on the law's justification. However, sharing an ethical system requires agreeing on the result *and* the justification. A legal system can be understood as those rules promulgated³⁷⁸ and endorsed by diverse moral systems, which are necessary for social life to be stable and to flourish.³⁷⁹

376. Apparently, Tribe believes that a constitutional principle's level of generality is determined mechanically. On the contrary, not only is there no mechanical procedure for determining the appropriate level of generality, there is no reliable procedure at all.

Presently, the law is indeterminate regarding the level of generality of the right to privacy. The law must "embrace" a decision to settle the matter. *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 563 (1986). This shows a revolutionary element in the process of perfecting, refining and stabilizing a revolution.

377. This distinction does not necessarily presuppose a positivistic conception of law. Indeed, this Article has attempted to show that neither conventionalism, pragmatism nor any other single jurisprudential theory can explain the different moments of constitutional adjudication.

There are fundamentally different sources of law. In revolutionary adjudication, morality is one of these sources. In such circumstances, it makes no sense to say that the moral principle is already in the law, since, in revolutionary adjudication, all parties recognize that a new constitutional paradigm is being created. Legal pragmatism helps us understand the nature of revolutionary adjudication, while conventionalism helps us understand routine adjudication. Some combination of coherence and pragmatism is required to explain the period in which a revolutionary paradigm is perfected, refined, and stabilized.

378. I take as a truism that for a rule of conduct to be a law it must be promulgated. See 2 W. BLACKSTONE, COMMENTARIES 44 (arguing that municipal law derives from the supreme power of the state); J. GRAY, THE NATURE AND SOURCES OF THE LAW 84 (2d ed. 1948)(arguing that courts create law); A. ROSS, ON LAW AND JUSTICE 101-02 (1974)(describing the degree of probability as the factor determining whether a source of law is law itself).

379. It is important to note that fundamental rights are always balanced against social interests. However, to make the right of privacy unbounded as applying to intimacy or moral independence gives almost any activity a presumptive correctness. Hafen, *supra* note 375, at 527 ("If the activity, regardless of what it is, is presumed to be within the 'right of privacy' simply because it was carried out in seclusion or in 'intimate' circumstances, a strong presumption against *any* social or state interest is created before any real analysis . . . takes place."). On the other hand, most violent or otherwise obviously harmful activities will easily rebut the presump-

Furthermore, even if you agree with Tribe's reasons for valuing marriage,³⁸⁰ why does this make his conception *the* constitutional paradigm in the privacy cases?³⁸¹ Of course, we might say that the constitutional paradigm in a series of cases is identical to the best moral paradigm. In that case, we abandon the need for justifying our present decision in terms of how well it fits prior case law. In other words, we have given up a commitment to coherence as a condition of adequacy for judicial decisions.³⁸² Instead, we pragmatically seek the best prin-

tion. Other offensive, but harmless activities will be protected as perhaps they should.

380. Tribe's model may be the appropriate moral paradigm without being the paradigm referred to in the privacy cases.

381. A constitutional paradigm is a principle or set of rules for resolving constitutional questions. The paradigm must be the product of formal constitutional statements uttered by the appropriate actors (legislators or judges), so that people can rely upon the paradigm, ordering their affairs accordingly. This does not mean that there cannot be some dispute over the appropriate characterization of a constitutional paradigm. What it does mean is that there is a distinction between what the legal paradigm in a given area is, and the morally best paradigm. Legal paradigms indicate the appropriateness of certain relations among individuals in a political society. See J. AUSTIN, LECTURES ON JURISPRUDENCE 60 (1913) (discussing the concept of positive law). Paradigms involve recognized procedures for determining how to resolve legal conflicts. Finally, legal theory itself involves the morality of actual legal pronouncements, their implications and operations. However, this "morality of the law" is not identical to a correct moral theory.

There is no doubt that a legal paradigm must be clarified in terms of its logical implications. However, it is misleading to describe what we do when we look for these logical implications as:

the imaginative extension of the significations of laws and of other relevant social phenomena to situations and areas in which no plaintiff in a given contemporary society has perhaps as yet brought suit, or about which possibly no member of a past society that is being studied is ever known to have complained.

McBride, *Towards a Phenomenology of International Justice*, in LAW, REASON AND JUSTICE 137, 149 (G. Hughes ed. 1969).

The process McBride describes is a pragmatic, interpretive process that gives new meaning to old laws. This is one principal way the law changes and evolves towards a nobler moral vision. What we can't say of such a process is that it tells us what the law is; instead it tells us what the law should be and what it is becoming.

The fundamental question here is whether this process is a change in the law or whether "the life of the law is a permanent striving to fulfill the practical moral imperatives implicit in legal institutions and legal rules." MacCormick, *Jurisprudence and the Constitution*, in 36 CURRENT LEGAL PROBLEMS 13, 28 (1983). Ultimately, this question is trivial if we permit every plausible moral and political theory to be considered implicit in the law.

382. Suppose the best justifying theory required the paradigm in the privacy cases to include the right of homosexuals to marry. Would we say that they had that right all along? Would we say that this right was originally included in the sexual privacy paradigm? Would we instead say that the sexual privacy paradigm must be perfected and refined according to the best justifying theory so that it could include marriage rights for homosexuals?

One should not interpret this dispute as merely verbal. It matters greatly how

ciple for the future.

Pragmatic constitutional theory looks to the actual paradigm in a constitutional practice and then determines how closely it conforms to the best moral paradigm. If these paradigms are sufficiently close, pragmatic theory interprets the legal paradigm to be identical to the moral paradigm, thereby implying a new constitutional right. If the moral paradigm does not fit the constitutional paradigm in this manner, the moral paradigm will be rejected unless its attractiveness, as a justification, compensates for its poor fit.³⁸³ In such circumstances, pragmatic theory contends that the constitutional paradigm *should* be transformed into a morally acceptable model. Consequently, whatever restrictions case law places on the paradigm, a pragmatic solution will conclude that the paradigm *should* be transformed to protect homosexuality.³⁸⁴

Tribe believes that a concept more general³⁸⁵ than marriage, pro-

we characterize the development of a constitutional paradigm. Indeed, how we characterize this issue is one way of distinguishing between liberal and radical constitutional theory.

383. Lipkin, *supra* note 14, at 748 n.350.

384. Of course, there is another constitutional route to protecting homosexuals. If one can establish that homosexuality is a suspect classification, heightened judicial scrutiny is appropriate. In fact, such scrutiny probably would overturn legislation involving classifications pertaining to homosexuality. Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1297-1305 (1985). See also Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 590-600 (1977) (examining the state's interest in prohibiting homosexuality); Note, *Droneburg v. Zech: Judicial Restraint or Judicial Prejudice?*, 3 YALE L. & POL. REV. 245, 253-56 (1984). Even if the state has the right to criminalize homosexual sodomy, there is no reason to suppose the case cannot be brought under the equal protection clause. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988).

385. Tribe argues that the decision in *Hardwick* is unprincipled. Tribe insists that "the principles of private liberty endorsed by the Court since the 1920s can be limited to the three contexts of marriage, family and procreation only by the most arbitrary judicial fiat." L. TRIBE, *supra* note 11, at 1430. He then cites columnist George Will as partial support for this contention. In the footnote, Tribe writes that "[e]ven such conservative commentators as George Will deemed the Court's distinction between the sexual privacy at issue in *Hardwick* and that involved in prior privacy rulings unprincipled." L. TRIBE, *supra* note 11, at 1430 n.66. This erroneously suggests that Will believes, as does Tribe, that there is a principle of sexual privacy that cannot be limited to heterosexual contexts. Nothing could be further from the truth. See Will, *What 'Right' To Be Let Alone?*, Washington Post, July 3, 1986, at A23, col. 1. The critical term "unprincipled" can be used in at least two ways. One sense makes it inconsistent to endorse the principle of privacy in the privacy cases and to not side with the dissent in *Hardwick*. Tribe uses this sense of the term "unprincipled." Another sense of "unprincipled" refers to a commitment to a slippery slope. This is the sense of "unprincipled" Will uses. Will contends that both the majority and the dissenting opinions in *Hardwick* are unprincipled because once starting down the slippery slope of

creation and family is the appropriate principle in the privacy cases.³⁸⁶ His argument maintains that there exists a general principle or fundamental value, namely, the right of intimate associations. However, this argument presupposes a viable methodology for determining a constitutional principle's appropriate degree of generality. In order to understand Tribe's argument, he must describe and defend this methodology in greater detail.³⁸⁷

Coherence theorists contend that an appeal to coherence is sufficient to explain normal adjudication. If my argument concerning generality is correct, this contention is wrong. Coherence theories do not sufficiently explain the period in which constitutional revolutions are perfected and refined. In such periods, coherence and pragmatic factors must be jointly appealed in order to determine the constitutional paradigm's appropriate degree of generality. Undoubtedly, coherence plays a predominant role in routine adjudication. However, routine adjudication is conceptually the least important form of judicial reasoning for understanding the nature of the evolution of constitutional law. Routine adjudication, though practically important, adds little structure to a constitutional paradigm.

C. Coherence and Integrity

Professor Ronald Dworkin has refined and perfected an ingenious coherence theory of law: law as integrity.³⁸⁸ According to Dworkin's theory, a judicial decision must be grounded in the best explanatory and justificatory interpretation of law in that area.³⁸⁹ One interpretation is better than another if it better fits actual practice and provides a morally and politically superior justification of that practice.³⁹⁰ Hence, if two interpretations fit the privacy cases equally, but one is a better justification, then the better justification prevails. The principle in *Hardwick* and a principle of "moral independence" protecting consensual homosexual sodomy both fit the privacy cases equally. However, since the second principle is a superior justification, it

privacy, there is no way to stop without concluding that almost every legitimate government interest (for example, taxation, police power, conscription and so forth) burdens the fundamental right of privacy. Thus, a principle of sexual privacy stopping at marriage and a principle excluding that homosexual sodomy are, according to Will, equally unprincipled. Consequently, Tribe should not look for comfort or support from George Will.

386. Some argue that the "privacy" involved in the sexual privacy cases is not privacy at all, but is more like autonomy or freedom. Posner, *supra* note 315, at 195.

387. Lipkin, *supra* note 14, at 723-27.

388. R. DWORKIN, *supra* note 3.

389. I am merely simplifying Dworkin's theory for the purpose of argument.

390. Dworkin appears to believe that shared coherent moral principles exist that have evolved as part of American constitutional practice. *But see* A. MACINTYRE, *AFTER VIRTUE* 37 (1981)(arguing that our society as a whole has no such principles).

should be chosen as *the* principle governing constitutional questions of privacy. The second principle is a superior justification because, among other things, it is more general than the first principle.

Dworkin's argument is impressive. Unfortunately, it is subject to the following objection. A principle having a perfect fit will always be a better explanation than a principle having an imperfect fit but whose justification is superior. Consider the following argument. A perfect interpretation is one that fits the relevant case decisions *and only those* decisions. An interpretation can be a poor fit because its fit is too tight or too loose. A fit is too tight when it fails to explain the relevant cases, while it is too loose when it explains the relevant cases but includes an additional judicial principle not yet encountered. This situation presents Dworkin with the following problem. If a principle, P1, explains decisions 1-5, and P2 explains decisions 1-5, but yields a new decision that is either explicitly rejected by the decisions in 1-5, or about which 1-5 are silent, then on the dimension of fit, P2 is a poorer fit than P1. However, on Dworkin's view, P2 is more general than P1 and therefore may be a better justification of 1-5 than P1. Consequently, anytime a principle is preferable to an alternative based on moral or political grounds, the principle is a poorer fit than that alternative. This objection insists that the very feature of a principle that Dworkin exalts on the justificatory dimension—its greater generality—renders the principle a poorer fit.

Certainly, Dworkin could reply that this objection is too mechanical, presupposing that we can never accept a principle representing a better justification but a poorer fit. In fact, we weigh the virtues of a principle's fit and its justification to determine whether it is the best interpretation. A better justification can compensate for a poorer fit. Indeed, when one has a justificatory principle that is normatively attractive, it can compensate for a minimal or non-existent fit. This reply is precisely the move Dworkin should make, but it is a move that makes law as integrity indistinguishable from pragmatism.

Dworkin insists that law as integrity can explain the decision in *Brown v. Board of Education*.³⁹¹ Furthermore, he insists that the ex-

391. 347 U.S. 483 (1954). According to Dworkin, law as integrity can explain the result in *Brown* by appealing to a fundamental justificatory principle presupposed by the structure of constitutional practice. Dworkin's appeal to these justificatory principles does not explain the result in *Brown*. To explain this result, we need to know how to determine which principles are included in the justificatory scheme. By failing to do this, Dworkin is able to overlook that the foundational decision in *Plessy* and years of legal and social practice based on *Plessy* endorsed segregation. In not taking *Plessy* seriously, Dworkin appears to be appealing to a conception of equality that is explicated in terms of what abstract justice dictates independently of how constitutional practice actually operates. Perhaps this should not be surprising. Dworkin has argued that prior to the Civil War, slavery could be held unconstitutional on the ground that it conflicted with the justifica-

planation he offers enables us to say that the "new" principle is already contained in constitutional practice.³⁹² On his view, each sound legal decision explains and justifies past legal practice.³⁹³ Consequently, the principle in *Brown*—denying segregation—explains past decisions and provides the best justification of equal protection law.³⁹⁴ This, however, is a very misleading description of the process of revolutionary constitutional change.³⁹⁵ It is important to point out that the principle in *Brown* could not explain past legal practice because *Plessy*, a denial of *Brown*, controls that practice.³⁹⁶ Consequently,

tory scheme embedded in the structure of constitutional law. Dworkin, *The Law of the Slave-catchers*, Times Literary Supp., December 5, 1975, at 1437. In entertaining this argument, it becomes clear that Dworkin takes neither foundational nor positive law seriously. See generally Fallon, *supra* note 11. See also Eisgruber, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273, 325 (1988) (arguing that Dworkin fails to "distinguish philosophy grounded in experience from philosophy that is speculative, theoretical and visionary").

392. Of course, this contention rests upon what is included in "constitutional practice." If everything that is relevant to and influences constitutional decisions is included in constitutional practice such as social traditions, social science, moral and political philosophy and so forth, then Dworkin is right. A principle reversing constitutional paradigms or foundational constitutional decisions is already part of constitutional practice. But this is a completely trivial result. If, on the other hand, we define constitutional practice as the actual process of making judicial decisions and the principles required to explain these decisions, then Dworkin's contention is false.
393. Sometimes a judicial decision ratifies, so to speak, an already existent constitutional practice. For example, it could be argued that "*Carolene Products* translated two centuries of constitutional practice into constitutional doctrine." Nelson, *The Eighteenth Century Constitution as a Basis for Protecting Personal Liberty*, in LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 50 (1987). Despite having a basis in constitutional practice, a decision such as *Carolene Products* represents, perfects and makes explicit disparate pieces of American constitutionalism. As such, it has revolutionary implications for the future.
394. Dworkin's argument is that there exists a coherent structure underlying actual practice, and the principles required to justify this structure yield the decision in *Brown*. Dworkin's argument presupposes that constitutional law—equal protection law—forms a system, but nowhere does he provide an argument for this questionable contention. A cursory inspection of constitutional law will reveal its unsystematic nature. Cf. Simpson, *The Common Law and Legal Theory*, in LEGAL THEORY AND THE COMMON LAW 8, 24 (W. Twining ed. 1986) (describing "the common law [as] more like a muddle than a system"). The fact that Dworkin can point to coherent *ideals* of equality and liberty is insufficient to establish American constitutionalism as systematic and coherent.
395. Lipkin, *supra* note 14, at 743-51. See also Bodenheimer, *Law as Bridge Between Ought and Is*, 1 RATIO JURIS 137, 148 (1988).
396. *Plessy* was an authoritative statement of what equal protection meant under the Constitution. *Brown* changed the meaning of this provision. Such "[a]uthoritative interpretations of the text often create a new meaning for it, and the original meaning . . . ceases to be the current meaning." Munzer & Nickle, *supra* note 102, at 1045. This is precisely what occurred in *Brown*.

Dworkin's theory which attempts to show that the decision in *Brown*³⁹⁷ was part of the law prior to the actual decision must fail.³⁹⁸

Under what circumstances would we say that a desegregation deci-

397. Dworkin argues that a principle permitting racial segregation may have been "adequate when *Plessy* was decided." R. DWORKIN, *supra* note 3, at 387. However, this principle "is not adequate now, nor was it in 1954. . . . It gains little support from ideals of political fairness. The American people would almost unanimously have rejected it, even in 1954, as not faithful to their convictions about racial justice." *Id.* But see C. BLACK, *supra* note 309, at 6 (stating that in 1950 *Plessy* appeared to be "quite a serious piece of work"). Furthermore, the attitude toward blacks expressed in *Plessy* "predated the founding of the Republic and may even have preceded slavery in England's North American colonies." C. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 7 (1987).

I do not know what evidence Dworkin has to support this sanguine view, because it seems clearly false. In fact, as late as 1956, more than half the population disapproved of integration. J. CASPER, *THE POLITICS OF CIVIL LIBERTIES* 169 (1972). By 1963, probably as a result of *Brown*, almost two-thirds of the population approved of school integration. *Id.* at 16-70. See also Tushnet, *Book Review*, 57 TEX. L. REV. 1295, 1303 (1979) (arguing that the significant Warren Court decisions were not endorsed by local and probably not endorsed by national majorities).

Besides, subsequent history during the civil rights movement seems to suggest many Americans have no great commitment to real integration. Cornell, *supra* note 46, at 1169 n.109. Look what happened in Yonkers in 1988 and 1989 where a federal judge found the city council guilty of contempt for failing over the course of 40 years to provide low-income housing. Such recalcitrance can only be explained in terms of negative stereotypes concerning blacks and poor people. Indeed, stereotypes about blacks "serve a hegemonic function by perpetuating a mythology about both blacks and whites even today, reinforcing an illusion of a white community that cuts across ethnic, gender and class lines." Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1371 (1988).

In 1954, Chief Justice Vinson himself was not ready to overrule *Plessy*. SUPER CHIEF, *supra* note 181, at 74-75. Similarly, Justices Clark and Jackson were originally disinclined to outlaw segregation. *Id.* at 88-89. Justice Black did not believe the South would have accepted integration. *Id.* at 118. It is also arguable whether President Eisenhower ever believed that *Brown* had been decided correctly. Indeed, President Eisenhower, referring to the South, told Warren: "These are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big black bucks." *Id.* at 112-13. See A. BICKEL, *supra* note 6, at 265-66 (describing Eisenhower's lack of commitment to the principle in *Brown*). What further evidence could we adduce as evidence against Dworkin's contention?

One possible reply here is unilluminating. Dworkin might respond that the law is not determined by polls; deeper moral and political convictions are involved, but how do we know these deeper convictions? How are they related to the pollster's evidence?

398. Dworkin must, in order to distinguish his theory from positivism, avoid describing the judicial decision in *Brown* as law as it should be. This would mean that the law changed and that there was a new rule. Such a belief cannot be admitted by Dworkin. But see Finnis, *On Reason and Authority in Law's Empire*, 6 LAW & PHIL. 357, 376 (1987) (arguing that "Hercules' claim obscures the reality that conscientious judges do acknowledge that they are making new law, breaking new ground . . . by choice, a new commitment, not mere discovery and application").

sion followed from *Plessy*? Suppose the Court in *Brown* chose not to deny that separate but equal facilities were constitutionally protected. Instead, "[i]t might have put flesh on *Plessy*'s bones and insisted that racially separate schools be truly equal."³⁹⁹ Call this imaginary case "*Brown Hypothetical*" or "*Brown H*" for short. Would *Brown H* be revolutionary or would it follow from the paradigm in *Plessy*? One thing we can say for sure, a Dworkinian argument that *Brown H* was already the law would be very persuasive.⁴⁰⁰ However, one can still question whether *Plessy* and *Brown H* contain the same principle. The argument against this conclusion would suggest that since *Plessy* did not have teeth, a *Plessy*-like case having teeth represented a different judicial paradigm. Regarding the practical implications this is certainly true,⁴⁰¹ but the paradigm in *Plessy* and *Brown H* are the same. The revolution in *Brown H*, if there was one, would be in the practical results and the remedy.⁴⁰² Conceptually or theoretically there would be no revolution at all.⁴⁰³ Consequently, a Dworkinian argument showing that the principle in *Brown H* was the same principle or judicial paradigm as in *Plessy* could be successful.

But how can the principle in *Brown* follow from actual constitutional practice if *Plessy* is to govern the law in the area of equal protection?⁴⁰⁴ The answer to this question is that it cannot.⁴⁰⁵ How can we

399. J. WILKINSON, III, FROM BROWN TO BAKKE 25 (1979).

400. There are at least two possible reasons for being dissatisfied with *Brown*. First, we are justifiably skeptical over whether separate facilities can ever be equal. However, if they are "the same," we still feel that segregation is wrong. Perhaps that is because part of the evil in segregation is that it violates freedom of association. See Wechsler, *supra* note 25. But see Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 27, 29-30 (1959).

401. The practical implications would be either desegregation due to unequal facilities, or continued segregation with facilities that were equal in all important ways, if such a thing is possible.

402. This is not to disparage revolutions in practical results or remedies. Changes in what the law sanctions often save a person's life, or frees him from jail or enables him to be treated as an equal citizen.

403. This does not mean that no social or political revolution would occur, or that these revolutions would have no benefits for blacks.

404. Suppose, following Corwin, we distinguish between a formal and material constitution. The formal sense of the term "constitution" is the document itself, including its amendments. E. CORWIN, COURT OVER CONSTITUTION 86 (1938). The material sense of constitution refers to:

a body of rules in accordance with which a government is organized and operates; and in this sense "the Constitution of the United States" comprises a vastly extended system of legislation, customs, adjudications, of which the constitutional document is, as it were, the nucleus, and into which it tends ever to be absorbed.

Id. at 87.

Dworkin may then argue that the principle in *Brown* is contained in the material constitution, though not the formal constitution. However, this would imply that there is a fundamental conflict between these two senses of "constitution."

take foundational constitutional decisions like *Plessy* seriously if the decision in that case does not govern equal protection law? Moreover, if foundational constitutional cases like *Plessy* help determine what the law is, as well as the underlying justificatory principles, then a principle denying *Plessy* cannot be encompassed by these principles.⁴⁰⁶

Dworkin might reply that the principle in *Brown* need not explain actual decisions since the decisions based on *Plessy* were wrong. Instead, the principle in *Brown* reflects fundamental justificatory principles underlying constitutional law. Such principles are required to justify the entire scheme of constitutional law. *Brown* is merely an elaboration of this scheme, taking a justificatory principle and declaring it to represent positive law.⁴⁰⁷

Why, in such a conflict should the material sense of the term prevail? Furthermore, even if we conclude that it should prevail, it must be conceded that such a move involves a radical change in the formal constitution. Such a change can only be explained in pragmatic terms. Nothing in the formal constitution prompts such a change; indeed, the formal constitution is the main opposition to a change of this sort.

405. Here, Dworkin might invoke an unfortunate distinction between a legal *rule* and a legal *principle*. A legal rule has an all-or-nothing characteristic, whereas legal principles are *prima facie* reasons which might have a certain degree of weight, but which must be balanced against other values. With this distinction, Dworkin can argue that the "separate but equal doctrine" in *Plessy* is a rule which conflicts with a more fundamental principle of equality that is embedded in our constitutional scheme and which is the basis for the rule in *Brown*. There are two problems with this reply. First, it is unclear that this distinction is viable. Rules are just unopposed principles. Second, what is the justification for insisting that there is a principle of equality embedded in our constitutional system that is opposed to the "rule" in *Plessy*? If this is a justificatory principle, what is its justification? Dworkin cannot say that this principle is required to justify actual practice without begging the question. In fact, what Dworkin really means is that this principle is required to justify the constitutional practice we would like to have, not the practice we actually have.

406. Cf. Lipkin, *supra* note 14, at 746. There are two issues here. First, what is the role of foundational constitutional decisions in determining actual practice? Second, how does actual practice constrain the choice of justificatory principles? If foundational constitutional decisions determine constitutional practice, then *Plessy*, during its reign, determined the meaning of the equal protection clause. Also, if justificatory principles must be consistent with actual practice, no justificatory principle can deny *Plessy*.

407. On this view, there are unstated *principles* in our system of law that may have force in a given situation. Consider Dworkin's words:

A principle like "no man may profit from his own wrong" . . . states a reason that argues in one direction, but does not necessitate a particular decision. If a man has or is about to receive something, as a direct result of something illegal he did to get it, then that is a reason which the law will take into account in deciding whether he should keep it. There may be other principles or policies arguing in the other direction. . . . If so, our principle may not prevail, but that does not mean that it is not a principle in our legal system, because in the next case, when these contravening considerations are absent or less weighty, the principle may be decisive. All that is meant, when we say a particular principle is a princi-

There are several problems with this reply. First, one must show that explicit provisions in the Constitution as well as judicial decisions require the conclusion in *Brown* despite a foundational decision denying *Brown*.⁴⁰⁸ This alternative implies that we need not worry whether the principle has any significant fit with actual practice. Unfortunately for Dworkin, such a view embraces pragmatism.⁴⁰⁹

Second, if a scheme of principles posited to justify explicit constitutional conventions need not reflect key constitutional provisions as interpreted by the Supreme Court, then what constrains the choice of such principles?⁴¹⁰ The answer is that extrinsic factors, such as basic

ple of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another.

Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 26 (1967).

Hence, the rule that Jones not receive the bounty in a given case is justified by the application of the above principle. *But see* Tur, *Positivism, Principles and Rules*, in PERSPECTIVES IN JURISPRUDENCE 42 (E. Atwood ed. 1977) (arguing against Dworkin's distinction between principles and rules). Based on the above account of principles, they function something like prima facie duties that presume a result given no other considerations override them. *See generally* W. ROSS, *THE RIGHT AND THE GOOD* (1930). Still, two fundamental problems plague this approach. First, how do we identify unenacted legal principles? Second, how do we calculate the comparative weight of principles, rules, statutes and judicial decisions?

Similarly, the view that equality precludes segregation may be a principle that constrains our law. If so, then the principle in *Brown* fits past practice because it fits the principle of equality that constrains the law. But how do we know that there is such a constraining principle? Even if such a principle exists, how do we know its content? If we do not require a serious fit with actual practice, then the principle of equality is whatever the best moral and political theory says it is. Consequently, socialist or other radical egalitarian conceptions of equality may fit the bill. If we require a serious fit with actual practice, then it is difficult to see how we can avoid the principle in *Plessy*.

Dworkin, of course, may argue that the principle of non-segregation is a principle of law, while the rule in *Plessy* is merely a rule. Principles are more important than rules; hence, the principle of non-segregation easily overrules the rule in *Plessy*. But how do we distinguish rules and principles in this way? Why isn't the rule in *Plessy* a principle?

408. The argument here is that a foundational constitutional decision must govern all explicit constitutional norms as well as implicit and extra-constitutional norms. *See* Grey, *supra* note 203, at 206 (arguing "that an enacted constitutional norm takes hierarchical precedence over an unenacted norm where the two conflict"). In using the term "govern," I do not mean "forclose." Instead, I mean that, in determining what the law is, we must appeal to foundational constitutional decisions. If on the other hand, we are concerned with what the law should be, due to a constitutional crisis, we may appeal to extrinsic factors.

409. Lipkin, *supra* note 14, at 742-51.

410. Here, Dworkin appears to be committed to a natural law conception. At one point, Dworkin doesn't appear to view this as an objection to this theory. Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165 (1982). In this article, Dworkin embraces a weak conception of the term "fit." A strong justificatory principle can compensate for a weak fit. Such a relaxation of the "fit" require-

cultural ideals, or abstract moral and political theory, constrain such a choice. The scheme of justificatory principles reflects the best normative ideals we can conceive. However, this is a pragmatic result.

I do not assert that *any* scheme of justificatory principles can be a candidate for the justification of American constitutional and political order. Our history will, of course, rule out such normative ideals as a theocracy or monarchy. Consequently, there is a minimal threshold that a justificatory scheme must meet. However, within the spectrum of principles taken seriously in American political life—from a libertarian perspective on one end to a socialist perspective on the other—any normative ideal that can carry the day becomes the best justification of our constitutional practice, and therefore, the ideal should be the law of the land.⁴¹¹

The problem with Dworkin's theory is that it attempts to integrate the virtues of conventionalism and pragmatism into one unitary theory. This is impossible if he wishes to retain the virtues of each theory. According to conventionalism, the law is what the explicit constitutional conventions say it is. The virtue of conventionalism is that it guarantees that the legal system will be predictable and stable. Pragmatism's virtue is its flexibility and its ability to incorporate ethical truths into constitutional law. Dworkin seeks a theory that combines these virtues. The integrity of law seeks to combine actual legal practice and the virtue of conventionalism, but it also seeks to capture pragmatism's virtue by determining the best rule for the future. According to Dworkin, the best rule for the future will be the one implied by the best normative principle.

Here is Dworkin's dilemma. He uses the concept of "fit" equivocally. Should the new rule fit actual explicit practice, or should it fit the normatively correct rule? The problem here can be appreciated by reconsidering the privacy cases. One account of the principle in these cases is that constitutional protection exists for matters involving marriage, procreation and the family. Call this conventionalist principle C1. According to Dworkin, C1 is not the best interpretation because a principle of moral independence explains the actual cases almost as well as C1 and represents a better *justification* of the cases. Call this second principle C2. Must the new principle presented in deciding *Hardwick* fit C1 or C2. If it must fit C1, it is difficult to see how we can ever get to C2. If, on the other hand, the principle in

ment does not help Dworkin explain *Brown*. In that case, the "fit" requirement has a value of zero, something Dworkin's theory does not allow.

411. Keep in mind, in my view, this newly declared principle is now law. It was not law when we started our inquiry. Even if a new rule is in some sense implicit in the constitutional practice, there has still been a change in the law. N. MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 188 (1978)(arguing that "the law is changed the moment after a great 'leading case' is decided from what it was the moment before.").

Hardwick must fit C2, Dworkin is completely correct in his view of how *Hardwick* should have been decided. However, in this case, Dworkin has abandoned the fit dimension. If the fit dimension cannot support C2, then C2 must come from some other source. Does it come from other parts of the legal system? If C2 comes from another source, where does it come from? Furthermore, if it comes from other parts of the legal system, how can it have justificatory force in due process cases? There is one last possibility. The justificatory principle doesn't find its source *within* the legal system at all. Instead, it is a normative principle the truth of which is determined by natural law. If this is Dworkin's solution, his theory has embraced naturalism.⁴¹² Dworkin's insistence that this type of naturalism is perfectly proper is not an adequate substitute for an argument.⁴¹³

Dworkin contends that new rights flow from a background constitutional theory. However, he never identifies the background constitutional theory giving rise to these rights. Is it a relativistic constitutional theory,⁴¹⁴ a critical cultural theory⁴¹⁵ or an abstract moral and political theory?⁴¹⁶ If it is a relativistic constitutional theory, then it must reflect the conception of equal protection stated in *Plessy*. In that case, the background theory fails as a justification for

412. I do not consider this to be an objection to Dworkin's conclusion, but it is an objection to his theory. A natural law theory need not be concerned with explaining an actual legal system. Indeed, naturalism's goal is to criticize actual legal practice, not to defend it.

413. Dworkin scoffs at the criticism that law as integrity is "really two conceptions: law as integrity supplemented, when integrity gives out, by some version of natural law theory." Dworkin's response to this concept is bewildering. Consider: "This is not a very important objection; it only suggests a different way of reporting the conclusion it no longer challenges." R. DWORKIN, *supra* note 3, at 263.

There are two reasons why Dworkin should take this objection more seriously. First, it does not respond to those who believe that once integrity runs out, judicial responsibility ends. More importantly, it signals caution in evaluating Dworkin's theory. Dworkin ignores the fit dimension in *Brown*, suggesting that the natural law component of his theory is at work at the level of fit. Hence, the normative dimension infiltrates the fit dimension, thus making the two indistinguishable. See P. STEIN & J. SHAND, *LEGAL VALUES IN WESTERN SOCIETY* 49 (1974) ("Dworkin's argument depends on the existence of rights having an absolute quality, rights which are independent of the law in the sense of rules enacted by a legislature or recognized by a court."). Natural rights, for Dworkin, exist despite the existence of contrary statutes or judicial decisions. Furthermore, such rights exist independently of the Constitution. Hence, according to Dworkin's naturalism, a judge need not be concerned with the fit dimension at all. In other words, Dworkin's theory is a form of pragmatic naturalism.

414. See *supra* notes 75-77 and accompanying text. The relativistic constitutional theory is a theory that is derivative from the explicit constitutional conventions. See *supra* note 75. One avenue for future research is whether the relativistic constitutional theory can have content not contained in the explicit constitutional conventions.

415. See *supra* notes 78-87 and accompanying text.

416. See *supra* notes 88-99 and accompanying text.

legal practice. If it is a critical cultural or abstract moral and political theory, then it justifies the cases but cannot explain them.⁴¹⁷ Dworkin's theory founders on the Scylla of explanation and the Charybdis of justification. Whenever a foundational constitutional decision is overturned, the same principle cannot both explain *and* justify the reversal.

D. Constructive Coherence

Professor Richard Fallon introduces a theory of "constructive coherence," requiring judicial decisions to be based on the following factors: constitutional text, original intent, theory, precedent and moral and political values.⁴¹⁸ In the standard case, judges should seek coherence—the same answer—from each factor in this hierarchy.⁴¹⁹ Should one factor generate a dissonant result, the final decision must be based on the dissonant result's place in the hierarchy.⁴²⁰ Presumably, if the text clearly rules out an answer, the interpretive process ends. On the other hand, if the text endorses a particular decision or at least is not inconsistent with that decision, a judge should move on to the next factor in an attempt to achieve the same result as before.

In *Brown*, for example, Fallon argues that moral and political values infuse the other factors,⁴²¹ permitting *Plessy* to be overruled.⁴²² Fallon never states explicitly what "infusing value into other factors" means. Presumably, value considerations "infuse" other categories when moral and political values are so great as to compensate for a dissonant result in one or more of the other factors. Fallon states that "[i]n *Brown*, the value arguments that infused the categories of arguments from text and of constitutional theory very arguably would

417. The point here is that it is difficult to see how a principle can explain actual constitutional practice which, after all, includes the *foundational* decision in *Plessy*, and not preclude the decision in *Brown*. As a foundational decision, *Plessy* represents a condition of adequacy which must be satisfied by any acceptable *explanation* of actual constitutional practice.

418. Fallon, *supra* note 11, at 1189-90.

419. *Id.* at 1193.

420. *Id.* at 1193-94.

421. *Id.* at 1280.

422. Presumably, the reason for this is twofold. First, precedent "stands close to the bottom." *Id.* at 1279. See also Maltz, *The Nature of Precedent*, 66 N.C.L. REV. 367 (1988)(describing some of the uses of precedent and the relationship between precedent and other values). Cf. Radin, *Case Law and Stare Decisis: Concerning Prajudizienrecht in Amerika*, 33 COLUM. L. REV. 199, 201 (1933)(arguing that stare decisis applies only when we follow precedent for no other reason than that it is precedent). Second, the concept of value infuses the other categories. Fallon, *supra* note 11, at 1280. Since Fallon never tells us what it means to say "value infuses the other categories" it is difficult to know how to evaluate this argument. Perhaps an obvious reading is that "value" infuses other categories when the importance of the value involved decreases the significance of its lack of coherence with the other categories.

have justified an overruling."⁴²³ Here Fallon appears to be arguing that when value considerations are predominant, the value category improves the chance of generating the same result in other categories.⁴²⁴

Insofar as values are extrinsic features of constitutional practice, the theory of constitutional revolutions is consistent with the theory of constructive coherence. Moreover, even if values are intrinsic to constitutional practice, an explication of the process of overruling a foundational constitutional decision in terms of constructive coherence will take a pragmatic turn. A foundational constitutional decision should be overturned when the moral and political value of doing so overrides retaining the decision.⁴²⁵

Indeed, in order for Fallon's theory to work, it must be restructured. In the normal case, each of Fallon's categories must be satisfied in terms of the hierarchical structure. However, in revolutionary situations the hierarchy is ignored and replaced by a pragmatic argument. Interestingly, like Dworkin's theory, Fallon's argument must be reconstructed along the lines of the theory of constitutional revolutions for it to successfully explain *Brown* and other constitutional revolutions. What first appeared to be a theory of constitutional adjudication having a unitary though pluralistic model, must now be reformulated as a dualistic theory in order to explain constitutional revolutions. Consequently, a coherence theory, like any unitary theory of constitutional adjudication, must be rejected as an inaccurate explanation of actual constitutional practice.

Constitutional pragmatism explains constitutional revolutions. Pragmatism also provides a partial explanation of the first stage of normal adjudication, the period in which a revolution is perfected and refined. Despite the inadequacy of coherence theories in explaining constitutional revolutions, they have some role to play during this stage of adjudication. Conventionalist theory explains routine adjudication.⁴²⁶ Consequently, any constitutional theory attempting a uni-

423. Fallon, *supra* note 11, at 1280.

424. Fallon needs to describe in much greater detail the process involved here.

425. Whether we describe the situation as "value" infusing other categories, or the weight of one factor overriding the dissonant results in the other categories, the result is the same. Pragmatic considerations permit us to emphasize the importance of one category to the exclusion of the others. Such a process is entirely consistent with the theory of constitutional revolutions. Indeed, conceptually there is no way to distinguish between one factor infusing other categories and a pragmatic argument concluding that one category is weightier than the others.

426. There are two different forms of coherence that need to be spelled out. "Macro coherence" refers to the type of coherence employed when perfecting and refining a revolution; this is an appeal to general principles capturing the essential value embedded in the revolutionary paradigm. Pragmatic factors are still relevant at this stage.

"Micro coherence" or strict consistency with the paradigm may slightly mod-

tary model of constitutional adjudication is inadequate. An adequate constitutional theory must integrate the roles played by pragmatism, conventionalism and coherence theory in constitutional adjudication.

VI. CONCLUSION

The purpose of this Article has been to show that contemporary constitutional jurisprudence rests on the mistaken assumption that constitutional adjudication is a unitary activity. Conventionalists, pragmatists and coherence theorists all make this mistake. The Article shows that there are two different stages of constitutional adjudication: revolutionary adjudication and normal adjudication. Revolutionary adjudication occurs when a foundational constitutional provision is given a new constitutional paradigm. Normal adjudication occurs under the authority of the new constitutional paradigm. The first stage of normal adjudication involves first refining and perfecting the paradigm and then stabilizing its meaning. The second stage of normal adjudication involves the routine application of a stabilized paradigm to the appropriate fact situations. Revolutionary adjudication has only pragmatic authority; that is, it is explained and justified in terms of factors extrinsic to constitutional law. The first stage of normal adjudication is explained in terms of both pragmatic and coherence theories. Routine adjudication is explained in terms of conventionalism. The theory of constitutional revolutions locates the appropriate place of these traditional jurisprudential theories in the continuing process of constitutional change.

ify or extend the paradigm. "Micro coherence" occurs in routine adjudication and essentially embodies a conventionalist strategy for adjudicating cases.