Philosopher King Courts: Is the Exercise of Higher Law Authority Without a Higher Law Foundation Legitimate?

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You seem . . . to consider the judges as the ultimate arbiters of all constitutional questions, a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy.¹ — Thomas Jefferson

Our national Constitution was adopted more than two hundred years ago, yet, with relatively few changes, it remains the governing law of the land to this day (at least in theory). The republican institutions it crafted were grounded in the political philosophy set out a decade earlier in the Declaration of Independence. This document defined both the foundation and the purpose of legitimate government—that governments derive their just powers from the consent of the governed, and that those powers are delegated to enable government to secure the inalienable rights of its citizens.²

Our founders divided the powers of government between different branches; each with a vested interest in checking the powers of the others so that no branch would become tyrannical, and each in its own way accountable to the people who were the ultimate source of sovereign authority. The founders also divided sovereign powers between entirely

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² See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
different governments: one national—responsible for the common defense and general welfare of the entire nation; the others state and local—responsible for the day-to-day concerns of the people in their particular states and locales and more directly accountable.

Those who drafted the Constitution were so convinced of the efficacy of these structural provisions for securing the fundamental liberties of the people that the document submitted to the people for ratification did not include a bill of rights. James Wilson argued, for example, that having a bill of rights in the text of a constitution of only delegated powers “would have been superfluous and absurd,” and even “preposterous and dangerous.” Alexander Hamilton contended that a bill of rights in a constitution providing for the delegation of only limited powers, to be exercised by the representatives of the people themselves, was “not only unnecessary . . . but would even be dangerous,” for “[t]hey would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.” His defense of structural protections, rather than reliance on the “parchment barriers” of a bill of rights—to use James Madison’s phrase—demonstrates a clear appreciation for the consent-based nature of the new government they were proposing:

It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was MAGNA CHARTA, obtained by the barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the Petition of Right assented to by Charles I., in the beginning of his reign. Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions, professedly founded upon the power of

the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations. "WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.7

In the end, Madison and other opponents of a bill of rights agreed to propose amendments once the new Constitution was ratified, and they proceeded to honor that pledge in the First Congress.8 But Madison drafted the new amendments with great care so as not to create the implication that they were merely "abridgements of prerogative in favor of privilege" or "stipulations between kings and their subjects."9 Rights were not granted by the Bill of Rights but recognized, echoing back to the Declaration’s claim of inalienable rights. And to negate the concern that the listing of rights would provide a “colourable pretext” for claims to more power than had actually been delegated, the Ninth and Tenth Amendments were added as well, respectively recognizing the inalienable nature of rights, whether or not specifically enumerated, and the rights-protecting structural guarantee of federalism.10 The structures of government established by the Constitution would remain the primary means by which the inalienable rights of the citizens would be secured; but a judicially-enforceable bill of rights would provide an added measure of security, particularly for individuals and groups in the political minority, against the potential problem of majority tyranny.11

Given the founders' extensive attention to the institutions of republican government and the “consent of the governed” theory that gave them legitimacy, it is odd that so many of the major political controversies of the past half-century have been resolved (or at least decided) by the

7. THE FEDERALIST NO. 84 (Alexander Hamilton), supra note 5, at 534.
9. THE FEDERALIST NO. 84 (Alexander Hamilton), supra note 5, at 534.
10. U.S. CONST. amends. IX & X.
11. E.g., Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 14 THE PAPERS OF THOMAS JEFFERSON 659 (J. Boyd ed., 1958) (“In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the check which it puts into the hands of the judiciary.”).
dictates of unelected, life-tenured judges rather than by the deliberative processes of the elected branches of government. Abortion,\textsuperscript{12} school prayer,\textsuperscript{13} sodomy,\textsuperscript{14} nude dancing,\textsuperscript{15} assisted suicide,\textsuperscript{16} capital punishment,\textsuperscript{17} and even marriage\textsuperscript{18} have all laid claim to judicial, rather than legislative, determination. While it is possible that the “consent” envisioned by our nation’s founders was a sort of Hobbsean version of consent, by which individuals in the state of nature hand over their collective will to an omnipotent sovereign,\textsuperscript{19} Madison and his colleagues had in mind something very different—even if the institution claiming such omnipotent powers was more benevolent than Hobbes’ \textit{Leviathan}. An assessment of the legitimacy, rather than just the efficacy, of the role the Court has taken upon itself in recent decades to determine matters of social policy is therefore in order.

There are several theories on which it might be argued that a non-


\textsuperscript{14} E.g., Lawrence v. Texas, 539 U.S. 558 (2003).
\textsuperscript{17} E.g., Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002); Furman v. Georgia, 408 U.S. 238 (1972).
\textsuperscript{19} In his monumental work, \textit{Leviathan}, Thomas Hobbs wrote:

The only way to erect such a Common Power, as may be able to defend them from the invasion of [foreigners], and the injuries of one another, . . . is [to] confe[r] all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will . . . . This is more than Consent, or Concord; it is a real [unif[y] of them all, in one and the same Person, made by Covenant of every man with every man . . . . This done, the Multitude so united in one Person is called a \textit{Common-wealth}; in Lat[i]n \textit{Civitas}. This is the Generation of that great \textit{Leviathan}, or rather (to speak[[]] more reverently) of that \textit{Morta[ll] God}, to which w[e] owe under the \textit{Immortal God}, our peace and defen[s]e.

THOMAS HOBBES, \textit{LEVIATHAN} 120 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651). This is essentially the claim made by those who argue that some clauses of the Constitution, such as the Eighth Amendment’s prohibition on cruel and unusual punishment, actually amount to a delegation of authority to the courts to apply evolving standards—a purportedly \textit{originalist} claim for a living constitution.
majoritarian institution such as the judiciary has the authority to invalidate acts of the legislature. The first is in this country almost universally acknowledged, and is older than even Chief Justice John Marshall’s opinion in *Marbury v. Madison*\(^ {20}\) itself. There is a hierarchy of positive law, and a written constitution, ratified by a supermajority of the people, is of higher authority than mere statutory law.\(^ {21}\) Moreover, it is the duty of courts, when faced with a conflict between the two, to give effect to the higher law of the Constitution.\(^ {22}\) As Alexander Hamilton noted:

> A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning, of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.\(^ {23}\)

This proposition seems to have been widely assumed by the delegates to the Constitutional Convention as well. Mason noted, for example, that judges “could declare an unconstitutional law void.”\(^ {24}\) And during debate over whether the Supreme Court should serve as a council of revision, both sides agreed that judges, in their judicial capacity, would already have “a negative on the laws.”\(^ {25}\) This is not really a claim that the judiciary has some authority over the legislature, but that the Constitution, adopted directly by the people, is binding on the agents of the people, even the legislative agents who derive their own power from the very same

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\(^{21}\) *Id.* at 177 (“The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law . . . .”).

\(^{22}\) *Id.* at 178 (“If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.”).


\(^{25}\) *Id.* at 76 (detailing Martin’s position on the role of the Supreme Court); see also *id.* at 73 (recording Wilson’s observation that “the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights”).
Constitution.

The problem for our present inquiry, though, is that this source of judicial authority is utterly inadequate for the task of lending legitimacy to the exercises of judicial power mentioned above, for no one really seriously contends that the text of the Constitution, as understood by those who ratified it (and hence those who gave it the higher positive law authority upon which this theory of judicial authority rests), even addresses, much less resolves, these controversial social issues. Chief Justice Margaret Marshall of the Massachusetts Supreme Judicial Court, for example, acknowledged as much in her controversial decision in *Goodridge v. Department of Public Health*,26 which mandated gay marriage in that state by noting that the “decision marks a change in the history of [Massachusetts’] marriage law.”27 Of course, that candid admission defeats the claim of legitimacy under the “constitutional text as higher positive law” theory.28 The judicial authority described by Hamilton and others was designed to give effect to “certain specified exceptions” contained in the text of the Constitution itself, as those exceptions were understood by those who consented to them through their ratification votes.29 Non-textual claims, or even claims such as those in *Goodridge* that require the importation of new meaning into old text, simply cannot find ground for legitimacy in this theory of judicial authority.

Another theory supporting the authority of an unelected, non-majoritarian judiciary to invalidate statutes adopted by a majoritarian legislature is one that also posits a hierarchy of law, but one grounded in notions of natural law rather than positive law. Natural law theory dates back at least to Aristotle and Cicero, and later continued through the common law tradition in England and the appeal to “nature and nature’s God” in the Declaration of Independence. This theory recognizes natural law limits on the positive law authority of legislatures, even majority-supported legislatures. As John Locke noted in his *Second Treatise of

27. *Id.* at 948; see also *id.* at 952 (“‘The everyday meaning of ‘marriage’ is ‘[t]he legal union of a man and woman as husband and wife,’ and the plaintiffs do not argue that the term ‘marriage’ has ever had a different meaning under Massachusetts law.’”) (citation omitted); cf. *id.* at 952–53 (“‘Far from being ambiguous, the undefined word ‘marriage,’ as used in G.L. c. 207, confirms the General Court’s intent to hew to the term’s common-law and quotidian meaning concerning the genders of the marriage partners.’”).
28. See supra note 21 and accompanying text.
29. See generally THE FEDERALIST NO. 78 (Alexander Hamilton), supra note 23.
Government, “the law of nature stands as an eternal rule to all men, legislators as well as others.”30 Some laws are simply against natural justice, whether our understanding of natural justice is derived from human reason (“nature”) or divine revelation (“nature’s God”),31 and as a result are void.32 Even if it is true, there are two problems with relying on a natural law theory as support for the proposition that the modern day unelected judiciary can invalidate acts of the legislature.

First, it is not at all clear that judges would be better at ascertaining the precepts of the natural law than legislators or the people themselves. As Luther Martin noted during debate at the Constitutional Convention over the appropriateness of having the Supreme Court serve as a council of revision, “A knowledge of mankind, and of Legislative affairs cannot be presumed to belong in a higher deger [sic] degree to the Judges than to the Legislature.”33 Second, it is even less clear that our Constitution assigns such a role to the judiciary, in any event. This is the essence of Justice Scalia’s critique of natural law as the basis of judicial decision-making.34 As the Justice noted during a 2005 speech at Chapman University School of Law, “Surely it is obvious that nothing I learned during my courses at Harvard Law School or in my practice of law qualifies me to decide whether there ought to be, and therefore is, a fundamental right to abortion or assisted suicide.”35 This was also the essence of Justice Iredell’s critique long before Justice Scalia, when he wrote the following in Calder v. Bull:

It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government any court of justice would possess a power to declare it so.

30. John Locke, Two Treatises of Government 190 (Thomas I. Cook ed., Hafner Publ’g Co. 1947) (1690); see, e.g., Marcus Tullius Cicero, De Legibus (Clinton Walker Keyes trans., 1928); Marcus Tullius Cicero, De Re Publica (Clinton Walker Keyes trans., 1928).
31. The Declaration of Independence para. 1 (U.S. 1776).
33. 2 The Records of the Federal Convention of 1787, at 76 (Max Farrand ed., 1911).
35. Flaccus, supra note 34 (quotation marks omitted).
It has been the policy of all the American states, which have, individually, framed their state constitutions, since the revolution, and of the people of the United States, when they framed the federal constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of congress, or of the legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the legislature of the Union, or the legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the court could properly say, in such an event, would be, that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

Indeed, English common law jurists grappled with the problem even before the American Revolution. Sir Edward Coke, for example, boldly debated the point with King James I in 1607, noting in his Prohibitions Del Roy that the King was accountable to the law of right reason, as determined by judges. Here is Coke's description of the King's response: "[T]hen the King said, that he thought the Law was founded upon reason, and that he and others had reason, as well as the Judges." At some personal risk, Coke pressed the point:

[T]o which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the

38. Id. at 1343.
cognizance of it.  

Coke’s response to the King is not entirely satisfying, for it both avoids the King’s contention and undermines any claim of higher law authority that might come from grounding a decision in natural law, or “natural reason.” Why the artificial reason of the judge’s art should have the same claim to binding effect as the law of natural reason Coke does not say. He could not lay claim to the binding force of natural reason as a ground of judicial authority without directly confronting the King’s claim of equal endowment, a confrontation that likely would have separated Coke from his head.

Freed of Coke’s understandable concern with self-preservation, we have the luxury of assessing the validity of the claim Coke would like to have made. While it is unlikely that judges are any more endowed with knowledge of natural reason than others, we can at least consider whether there is something in the structure of the judicial office that lends itself to the “long study and Experience” necessary for this task. Perhaps there is. It should be noted here that the practice of performing the duties of office by written opinion rather than edict is largely unique to the judicial branch. Congress may pass a statute without legislative findings or a statement of purpose, and, nevertheless, the statute has the binding force of law. Presidents may issue executive orders that are simply orders, yet, they too are obligatory on those to whom they are directed. However, more is expected from the courts. While technically an unadorned judicial order is as binding as an unadorned statute, an opinion supporting the order with reasoned argument is expected before the judicial process has run its course. This is particularly true if the order is to have binding effect on others not party to the case. The weight of precedent depends on the

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39. Id.
40. See id.
41. Id.
42. It is worth noting a significant exception: When the President vetoes an act of Congress, he is obliged to return it to Congress “with his Objections.” U.S. Const. art. I, § 7, cl. 2. Apparently, the bare executive order is sufficient for the executive branch, but a reasoned attempt to persuade is required for an interbranch exchange.
43. The lack of a thorough, well-reasoned opinion binding not just on the parties but available to serve as precedent (and to be tested in the crucible of future litigation), is one of the principal objections to the recent practice by many courts of deciding cases by unpublished opinion. See Jon A. Strongman, Comment, Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional, 50 U. Kan. L. Rev. 195, 211–23 (2001); see also
strength of the arguments marshaled in support of the judicial decree.

As importantly, the doctrine of stare decisis, which provides (at least as originally conceived) that a court will not lightly revisit the decisions of a predecessor,\(^ {44}\) contains the important caveat that prior judgments that do not bear the weight of reasoned scrutiny need not be adhered to.\(^ {45}\) In other words, Coke may have been right (though not on his terms—this is an argument that applies to “natural reason,” not any kind of “artificial reason” as he stated).\(^ {46}\) There may well be something in the way the judicial office is undertaken that lends itself more to the kind of deliberation necessary to arrive at the true principles of natural reason than is perhaps possible in the hustle and bustle of elected office.

Even if we assume this to be true (Justices Scalia and Iredell notwithstanding), we need to address a second problem with modern day courts relying on theories of natural justice as authority for invalidating acts of the legislature and advancing the court’s view of social justice. Whether rightly or wrongly, that notion has been pretty thoroughly repudiated by the Supreme Court. Indeed, it was the single-most important accomplishment, for good or ill, of Justice Oliver Wendell Holmes’s life’s work.\(^ {47}\) Beginning with his book on the common law, Holmes challenged the longstanding view that there was a natural law, knowable by human reason, that could be implemented by judges through the common law.\(^ {48}\) For Holmes, there was no such thing as a self-evident

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Suzanne O. Snowden, Note, *That’s My Holding and I’m Not Sticking to It!: Court Rules that Deprive Unpublished Opinions of Precedential Authority Distort the Common Law*, 79 WASH. U. L.Q. 1253, 1256 (2001); *cf.* Alex Kozinski & Stephen Reinhardt, *Please Don’t Cite This!: Why We Don’t Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, at 43, 43–44 (explaining the differences between published opinions and unpublished memorandums).


\(^ {46}\) See supra notes 37–41 and accompanying text.

\(^ {47}\) The implications of Justice Holmes’ successful repudiation of a natural law basis for the common law are profound and much broader than the scope of this particular Article. For a more thorough discussion, see John C. Eastman, *Judicial Review of Unenumerated Rights: Does Marbury’s Holding Apply in a Post-Warren Court World?*, 28 HARV. J.L. & PUB. POL’Y 713 (2005).

truth, which the common law sought to articulate. Rather, the common law was just the exercise of lawmaking power from the bench rather than from the halls of Congress or the state legislature. Taking aim at Justice Joseph Story, who adhered to the traditional view, Holmes wrote in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*\(^{49}\) that Story’s opinion in *Swift v. Tyson*,\(^{50}\) which held that federal courts were not bound by state court interpretations of state common law,\(^{51}\) reflected the notion that “there is one august corpus” of common law—“a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.”\(^{52}\) Story’s belief in a “transcendental body of law” meant that the federal courts were as capable of rendering opinions attempting to articulate that body of law as were the state courts; the notion that they had to defer to what were, in their view, erroneous decisions of the state courts was therefore anathematic to the very enterprise.

Holmes dissented in the *Black & White Taxicab* case, but his position emerged victorious a decade later in *Erie Railroad Co. v. Tompkins*.\(^{53}\) In that case, the Court held that when sitting in diversity and applying state law, federal courts were as much bound by state court common law pronouncements as they were by state legislative acts.\(^{54}\) According to the Court, this was because the notion that the courts were simply trying to discover and apply some inherent truth was not true.\(^{55}\) There was no such thing as truth.\(^{56}\) This view of the law remains firmly entrenched—only Justice Thomas on the current Court has consistently staked out a position in support of natural law jurisprudence (though we have not yet had much of a chance to see whether Chief Justice Roberts or Justice Alito might agree with him on this score). It is therefore hard to claim a natural law-based higher law authority for judicial invalidation of legislation when the very foundation of that authority is denied by the Court.

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51. *Id.* at 18.
52. *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting).
54. *Id.* at 78–79.
55. *See id.* at 78 (admitting that judges had fallen into the habit of erroneously supervising states’ actions and setting aside the independence and autonomy granted to states in the Constitution).
A third theory for judicial authority to invalidate majority supported legislation is really an amalgam of the first two. Some clauses of the Constitution, such as the Privileges and Immunities Clause of Article IV and its sister Privileges or Immunities Clause in the Fourteenth Amendment, and perhaps the Republican Guaranty Clause as well, were arguably designed to codify the principles of natural justice, at least as those principles were articulated in the Declaration of Independence. Moreover, unlike the open-ended Ninth Amendment, which some have also claimed as a source of judicially enforceable natural rights (an argument which Judge Robert Bork denounced during his ill-fated confirmation hearings with his famous “ink-blot” analogy), there is specific text here to enforce; that fact should appeal, at least facially, to textualists like Justice Scalia. All we have to do is figure out what the Privileges and Immunities Clause means, for example, and the courts not only can, but should, set about to enforce it as they do other clauses of the Constitution.

Justice Bushrod Washington, riding circuit, attempted to do just that in Corfield v. Coryell. Justice Washington was of the view that the Article IV Privileges and Immunities Clause protects those privileges and immunities “which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.” In other words, Justice


I do not think you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says ‘Congress shall make no’ and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it.

Id.


61. Id. at 551.
Washington was of the view that the Privileges and Immunities Clause protected, as a matter of positive law and not just natural law, fundamental natural rights. Then, in enigmatic fashion as frustrating to the inquiring reader as Pierre de Fermat’s famous claim that he had found “a truly marvelous demonstration” of a particularly intractable mathematical proof “which this margin is too narrow to contain,” Justice Washington declined to provide a list of rights he thought to be fundamental, noting that “it would perhaps be more tedious than difficult to enumerate” such a list. He did provide some general guidelines, though:

They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.

Of course, as edifying as this description is, it does not offer much in the way of specific resolution of the various social issues that have been considered by the Court in the past generation. Which is more important in the above formulation, for example: A mother’s right to the enjoyment of liberty, or her unborn child’s right to the enjoyment of life? Which is more properly the subject of “such restraints as the government may justly prescribe for the general good of the whole”? Neither Justice Washington’s general formulation nor the text of the Privileges and Immunities Clause itself answers those questions. Resort has to be made

63. Corfield, 6 F. Cas. at 551.
64. Id. at 551–52.
65. Id. at 552.
instead to the claim of natural justice itself, which, as noted above, has been rejected by the current Court.

A fourth theory is also textually grounded, but is based on open-ended rather than definitive text. Here, the theory is that, as a matter of original interpretation, the people who drafted and ratified the Constitution and the Bill of Rights actually intended to confer on the courts an open-ended power to address at least some constitutional claims in light of evolving standards of justice. The Eighth Amendment’s prohibition on cruel and unusual punishment, and the claim that it is to be understood according to “evolving standards of decency,” is perhaps the best example frequently cited by proponents of this theory. The theory, if true, has the benefit of providing a positive, higher law authority, legitimized by the consent of the Constitution’s ratifiers, for the judiciary to serve as a roving commission. Given the founders’ extensive focus on republican institutions and concern for unchecked power by any branch of government, though, it is simply inconceivable that such open-ended judicial power was part of the original constitutional design. Yet without that original understanding, the theory loses its consent-based claim to legitimacy.

Finally, there is what I call the Felix Frankfurter theory of constitutional interpretation. Much as Frankfurter’s “best and brightest” sought to remake the executive branch by stocking the administrative agencies with experts “independent” of the pernicious influence of politics (which means, of course, insulated from the legitimizing consent of the governed), the post-New Deal Court took it upon itself to decide all sorts of constitutional questions. 


68. See, e.g., Dworkin, supra note 66, at 120–26; see also Atkins, 536 U.S. at 312 (“[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”) (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion))).


70. See, e.g., Humphrey’s Ex’r v. United States, 295 U.S. 602 (1935); Peter P. Swire, Incorporation of Independent Agencies into the Executive Branch, 94 YALE L.J. 1766, 1766 (1985) (noting the “distinctive expertise and impartiality of independent
of policy matters as though it had a monopoly on insight. Although the Court occasionally tries to ground its social policy decisions in Constitutional text, in its more candid moments it readily acknowledges that the text does not really answer, or even address, many of the thorny social problems that the Court has undertaken to decide.

So what is it that gives the Court legitimacy in this enterprise? At times it looks to “trends” of public opinion, as it did in Lawrence,71 Roper,72 or even Griswold,73 without any appreciation for the contradiction inherent in this claim. If the trend of popular opinion was really as the Court claimed, the legislative process would have corrected the archaic social policy without the necessity of judicial involvement. That some legislatures were slower to reach the “enlightened” position than others should not have been grounds for judicial mandate.

Moreover, as it made powerfully clear in Planned Parenthood of Southeastern Pennsylvania v. Casey,74 the Court is not really seeking to follow public opinion on these matters, but rather considers itself above and even immune from public opinion when rendering decisions dealing with matters that are fundamentally questions of policy judgment:

[W]here, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in Roe and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of Brown and Roe.[75]

75. The Court might have bolstered its point by noting that it had addressed the nation in such a fashion three times in its history—the third occasion being in Scott v. Sanford (Dred Scott), 60 U.S. (19 How.) 393 (1856). By limiting its assessment to the
But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. . . . [O]nly the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure.\textsuperscript{76}

By contending that they should not overrule \textit{Roe} because to do so would be seen as “a surrender to political pressure,”\textsuperscript{77} Justices O’Connor, Kennedy, and Souter disavowed any claim to be following public opinion trends\textsuperscript{78} and rejected as well the foundational principle of our constitutional order, namely, that the people are the ultimate sovereign. Instead, this trio of Justices erroneously claimed that “[t]he root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court.”\textsuperscript{79} That is a far cry from the notion that the Court’s legitimacy is drawn from public opinion trends.

There is another version of public opinion, though, that might better explain the Court’s actions. Looking again to the Court’s decisions in \textit{Roper} and \textit{Lawrence}, one sees a bit of a red-state/blue-state bias in how the Court describes the public opinion trend. At the time of these cases, respectively, twenty states permitted the death penalty in the circumstances presented in \textit{Roper},\textsuperscript{80} and thirteen states had anti-sodomy prohibitions similar to the kind at issue in \textit{Lawrence}\textsuperscript{81}—both significant enough numbers that it is hard to describe those states as so far out of step with the rest of the county as to have warranted judicial intervention into their policy choices.\textsuperscript{82} In \textit{Roper}, the Court listed the states permitting the death penalty

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\textsuperscript{76} Casey, 505 U.S. at 866–67.
\textsuperscript{77} Id. at 867.
\textsuperscript{78} Id. at 869.
\textsuperscript{79} Id. at 865.
\textsuperscript{80} Roper v. Simmons, 543 U.S. 551, 564 (2005).
\textsuperscript{81} Lawrence v. Texas, 539 U.S. 558, 573 (2003).
\textsuperscript{82} If one excludes the twelve states that have banned the death penalty altogether, the states that permitted execution of those who committed their heinous crimes while still sixteen or seventeen actually constituted a \textit{majority}—20 out of 38—of the states still utilizing the death penalty. \textit{Roper}, 543 U.S. at 564.
for juveniles—including most southern states and several outliers such as Idaho and New Hampshire, as well as the states that prohibited its use. One senses in the Court’s litany a bit of disdain for these “backward” states—fly-over country for the more fashionable places on the coasts. It is therefore not public opinion generally, but the public opinion of the elite from which the Court seems to be taking its cue, and this point is confirmed by the increasing frequency with which the Court cites foreign law as authority.

We should be clear about how radical a transformation in our constitutional understanding this new claim of judicial authority—judicial supremacy, really—actually is. No longer will fundamental policy choices be made by the consent of the governed; rather, controversies over social policies are to be decided for us. Whether or not that is a good thing, it is clearly not the system that the Constitution’s authors envisioned, as a brief return to the debate in the Constitutional Convention over making the Court a council of revision will confirm. Recall that both proponents and opponents of the council of revision proposal acknowledged that the Court would already have the power to negative acts that were contrary to the Constitution. The issue, then, was not about judicial review as we know it from Marbury, but about whether the judiciary should essentially have a policy veto on legislation in addition to the legal veto. That proposal was defeated in the Constitutional Convention, so it forms no part of the Constitution as actually ratified. Whether the Courts should have such a role in assessing not just the legality but the wisdom of social policy legislation is another matter, but we should not pretend that the Court’s attempt to arrogate this power to itself has any constitutional legitimacy.

83. Id. at 579–80, app. AI.
84. Id. at 580, app. A.II.
85. See, e.g., id. at 576 (referencing Article 37 of the United Nations Convention on the Rights of the Child, which contains an express prohibition on capital punishment for crimes committed by juveniles under 18); Lawrence, 539 U.S. at 573 (referring to a decision by the European Court of Human Rights, which held Northern Ireland’s laws proscribing homosexual conduct were invalid under the European Convention on Human Rights).
86. See supra text accompanying notes 22–25.
87. See id.