CREATIVE CONSTITUTIONAL INTERPRETATION AS JUSTIFICATION FOR RULE BY THE SUPREME COURT

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Contemporary constitutional scholarship presents the puzzling phenomenon of scholars endlessly writing and debating methods of constitutional interpretation as the central issue to be decided despite the apparent fact that the Constitution plays very little role in the Supreme Court's so-called constitutional decisions. Constitutional law is the product of judicial review, the extraordinary power, suspect in a democracy, of unelected judges to overturn social policy choices made by elected legislators and other officials of government ostensibly on the ground that they are prohibited by the Constitution. The reality is that our very old and very brief Constitution, even as amended, does not and cannot provide answers to contemporary controversial social problems. It precludes very few policy choices. The Supreme Court's rulings of unconstitutionality are, therefore, necessarily almost always the result of the policy preferences of a majority of the Justices and their willingness to substitute them for the preferences of legislators.[1] The central issue of constitutional law, therefore, is not how the Court should interpret the Constitution, but whether the Court should be the most important institution of American government with the power to remove from the ordinary political process any policy issue it chooses and assign it for final decision to itself. In essence, it is whether decision making by

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1. *See, e.g.*, Lino A. Graglia, *Constitutional Law Without the Constitution: The Supreme Court's Remaking of America*, *in* A COUNTRY I DO NOT RECOGNIZE (Robert H. Bork ed., 2005); Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601, 1602 (2015); Richard A. Posner, *The Supreme Court 2004 Term, Forward: A Political Court*, 119 HARV. L. REV. 32, 40 (2005) ("[T]he Supreme Court, when it is deciding constitutional cases, is political in the sense of having and exercising discretionary power as capacious as a legislature's."); Eric. J. Segall, *The Constitution Means What the Supreme Court Says It Means*, 129 HARV. L. REV. F. 176, 177 (2016); David A. Strauss, *The Supreme Court 2004 Term, Forward: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 4, 29 (2015) ("[C]onstitutional 'interpretation' usually has little to do, in practice, with the words of the text", "we should reconsider the notion that constitutional law is derived from the text in some meaningful way."); Jeremy Waldron, *Eisgruber's House of Lords*, 37 U.S.F. L. REV. 89, 93 (2002).

majority vote of a committee of nine unelected officials effectively holding office for life and deciding for the nation as a whole from Washington, D.C., is an improvement of the system of representative self-government in a federalism with separation of powers created by the Constitution. The function of unusual alleged methods of constitutional interpretation is to obscure that issue.

If democracy or representative self-government is our norm, constitutional restrictions on popular choice should be disfavored and seen as in need of justification, not expanded or multiplied. Like it or not, the only alternative to majority rule in a secular society is minority rule; there is nobody here but us, no superior source of wisdom or authority to relieve us of the burden of policy choice. As the great legal realist Karl Llewellyn forcefully pointed out almost a century ago, the notion that the Constitution is such a source—the theoretical basis of judicial review—is pretense and delusion:

> Is this not extraordinary? The [Constitution] was framed to start a governmental experiment for an agricultural, sectional, seaboard folk of some three millions. Yet it is supposed to control and describe our [present situation] after a century and a half of operation; it is conceived to give basic information about the government of a nation, a hundred and thirty millions strong, whose population and advanced industrial civilization have spread across a continent.[2]

The debate on methods of constitutional interpretation is, broadly speaking, between "originalists" who seek to limit the policymaking role of the Court by giving the Constitution a fixed meaning and "nonoriginalists," proponents of the idea of a "living Constitution" who seek to defend or expand that role. Originalists argue that the Constitution should, like any writing, be interpreted to mean what its authors or ratifiers intended or understood it to mean. This, they contend, is what "interpretation" means: to write is to attempt to send a message; to read or interpret is to attempt to receive it and make communication possible. Because it is the only method that gives the Constitution a fixed meaning not changeable by judges, it is the only method, they argue, that is consistent with the rule of law, separation of powers, and democracy. Living constitutionalists, on the other hand, insist—often with some heat[3]—that there are other methods of determining the meaning of the Constitution that can also properly be called "interpretation"

2. K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 3 (1934); *see also* Thomas Reed Powell, *The Logic and Rhetoric of Constitutional Law*, 15 J. PHIL. PSYCHOL. & SCI. METHODS 645, 652 (1918).

3. *See, e.g.*, Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009); Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193 (2015).

and that allow judges a much wider basis for rulings of unconstitutionality. Nonoriginalists' two main objections to originalism are that the intent of the Framers as to a present-day issue may not be knowable or, more likely, never existed; and being bound by it, in any event, amounts—as Jefferson pointed out—to rule by the dead. Both objectives are valid, but the answer, a true originalist can reply, is that if the Constitution is not known to prohibit a policy choice, the only correct conclusion is that it is not prohibited, and the "dead hand" problem is an objection to constitutionalism, not originalism—a reason that constitutional restrictions should not be favored.

Living constitutionalism is essentially a project devised by liberal constitutional scholars to justify Supreme Court policymaking by attempting to tie it to the Constitution. To the extent that the point of constitutionalization is permanence, living constitutionalism is an oxymoron. Its effect is to defeat the Constitution's basic principles of representative self-government, federalism, and separation of powers in the name of interpreting the Constitution. The project faces the initial and seemingly insuperable difficulty that the Constitution is a particularly unsuitable vehicle for a program of judicial supremacy by constitutional interpretation. The original Constitution adopted in 1789 is not only very old but very brief—easily printed with all amendments, repeals, and obsolete matter as a pamphlet of about a dozen pages—not at all like the Bible, the Talmud, or even the tax code in which many things can be found with sufficient search. It was adopted for the specific and limited purpose of creating a strong national government, primarily for reasons of defense, finance, and commerce—not to limit substantive policy choices by creating individual rights.[4] The Obligation of Contracts Clause,[5] adopted to prohibit state debtor-relief legislation, stands out as a striking exception. The first ten amendments, the so-called Bill of Rights, added two years later, dealing primarily with criminal procedure and meant to apply to only the federal government, adds few substantive rights.

4. *See* THE FEDERALIST NO. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[B]ills of rights are, in their origin, stipulations between kings and their subjects . . . . they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants.").

5. U.S. CONST. art. I, § 10 ("No State shall . . . pass any . . . [l]aw impairing the Obligation of Contracts . . . ."). The history of the only substantive limit in the original Constitution provides a convincing demonstration that such restrictions may not be good ideas. The problem is that life and humans are too complex and varied to allow meaningful absolute principles. Payment of debts, for example, is a very good idea but not a good constitutional obligation. In *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), the Court effectively read it out of the Constitution by upholding a Minnesota law that granted struggling farmers relief from mortgage foreclosures during the Great Depression by allowing delay in making mortgage payments.

The First Amendment's guarantee of "freedom of speech"[6] cannot be read literally. The government can and must be able to limit speech in many ways. One can say of it what Hamilton said of the guarantee of freedom of the press: it cannot be given "any definition which would not leave the utmost latitude for evasion."[7] The Second Amendment grants a highly qualified and dubious[8] right of gun ownership[9] and the Fifth prohibits property confiscation.[10] Not only is the Constitution extremely brief with few provisions restricting policy choices, but very little of it is even purportedly involved in most constitutional decisions.

The bulk of constitutional law involves state, not federal, law and nearly all of it purports to be based on a single constitutional provision, the second sentence of the Fourteenth Amendment.[11] Nothing better illustrates the shaky basis of constitutional law than the extent to which it depends on what the Court has imaginatively made of that one sentence, largely reducing constitutional law to two pair of its words: "due process" and "equal protection." The origin and purpose of the Fourteenth Amendment are not mysterious or obscure. Very briefly, the Thirteenth Amendment was adopted in 1865 to constitutionalize the prohibition of slavery that ended with the defeat of the South in the Civil War and gave Congress the power to enforce the prohibition. The southern states' response to the problems presented by large populations of newly freed blacks was to enact what came to be called Black Codes that had the effect of severely limiting blacks' civil rights. Congress, under the control of the Radical Republicans, responded by enacting our first civil rights legislation, the Civil Rights Act of 1866,[12]

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6. U.S. CONST. amend. I.

7. THE FEDERALIST NO. 84, *supra* note 4, at 514.

8. *See* McDonald v. City of Chicago, 561 U.S. 742, 767 (2010); District of Columbia v. Heller, 554 U.S. 570, 618 (2008).

9. U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

10. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

11. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

12. Civil Rights Act of 1866, ch. 31, §1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981 (2018)) ("That all persons born in the United States and not subject to any foreign power . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security

based—Congress thought—on its power to enforce the Thirteenth Amendment. President Andrew Johnson disagreed, vetoing the Act as beyond Congress's power.[13]

Congress easily overrode the veto, but saw the need for another constitutional amendment to remove all doubt. Representative Thaddeus Stevens, Chairman of the fifteen-member Joint Committee on Reconstruction, proposed an amendment simply prohibiting race discrimination by the states.[14] The proposal was defeated because of fear that northern states would refuse to ratify the amendment because of their opposition to granting blacks the right to vote, which the Fourteenth Amendment explicitly excluded.[15] Ratification by the southern states was coerced by making it a condition of their readmission to Congress. The committee at first considered a proposal simply making clear Congress's power to legislate on civil rights, but decided to go further and effectively make the 1866 Act a part of the Constitution safe from repeal by later legislation. Committee member John A. Bingham successfully moved that this be mostly done by incorporating into the amendment language already present elsewhere in the Constitution, giving the amendment its present form.[16]

As a result, the Fourteenth Amendment does not replicate the language of the 1866 Act, but, as Professor David Currie has pointed out,[17] it nonetheless closely replicates its structure. The first section of the Act provides that all persons "born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."[18] The first sentence of the Fourteenth Amendment similarly provides that "[a]ll persons born or naturalized in the United Sates, and subject to the jurisdiction thereof, are citizens of the United States."[19] The heart of the Act is its provision that "citizens, of every race and color, . . . shall have the same

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of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.").

13. *See* 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1194–1201 (Paul E. Freund ed., 1971).

14. *Id.* at 1260–61.

15. U.S. CONST. amend. XIV, § 2.

16. FAIRMAN, *supra* note 13, at 1274. Bingham was "[t]he member of the Joint Committee principally concerned with the section dealing with civil rights . . . from first to last the drafting bore the traits of his peculiar mode of thought." *Id.* at 1270.

17. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 347–49 (1985).

18. Civil Rights Act of 1866 §1.

19. U.S. CONST. amend. XIV, § 1.

right" to make contracts, use the courts, and own property "as is enjoyed by white citizens."[20] It is strictly an anti-discrimination measure, creating no rights. The heart of the second sentence of the Fourteenth Amendment is its provision that "[n]o State . . . shall abridge the privileges or immunities of citizens of the United States,"[21] adopting the "privileges and immunities" language of Article IV Section 2 of the Constitution,[22] which is also, the Court had long held, an anti-discrimination measure.[23] The most reasonable conclusion would seem to be, as Justice Field pointed out in his dissenting opinion in the *Slaughter-House Cases*,[24] the Court's first encounter with the Fourteenth Amendment, that the "privileges or immunities" clause was also meant as an anti-discrimination measure.

The Act concludes with a guarantee of "full and equal benefit of all laws and proceedings for the security of persons and property" and of "like punishment, pains, and penalties" for offenses.[25] The second sentence of the Fourteenth Amendment likewise concludes with the Equal Protection Clause, the subject of which is protection, not as the Court holds, equality, elevating the adjective to the noun.[26] As Professor Currie has concluded:

> equal protection seems to mean that the states must protect blacks to the same extent that they protect whites: by punishing those who do them injury. "Protection of the laws" is, after all, a peculiar way to express a general freedom from discrimination; it may well have been the privileges or immunities clause instead that was meant to protect blacks' rights to contract, to sue, and to hold property.[27]

In the *Slaughter-House Cases*, the Court was faced with a claim by white butchers asking it to declare Louisiana's regulation of slaughterhouses in New Orleans unconstitutional,[28] a claim that would have been inconceivable before the amendment was adopted. An incredulous Justice Miller correctly insisted in the Court's majority opinion that the "one pervading purpose" of

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20. Civil Rights Act of 1866 § 1.

21. U.S. CONST. amend. XIV, § 1.

22. U.S. CONST. art. IV, § 2, cl. 1.

23. *See* The Slaughter-House Cases, 83 U.S. 36, 77 (1872) (stating that the Privileges and Immunities Clause is construed as a guarantee of equal treatment).

24. *Id.* at 100–01 (Field, J., dissenting).

25. Civil Rights Act of 1866 §1.

26. U.S. CONST. amend. XIV, § 1.

27. CURRIE, *supra* note 17, at 349 (footnote omitted); *see also* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1392–93 (1992) (stating that the Privilege or Immunities Clause should be read to "ensure[ ] that all the citizens of every state shall be entitled to the privileges and immunities of state citizenship, thereby mandating equality of rights").

28. *Slaughter-House*, 83 U.S. at 58.

the Thirteenth, Fourteenth, and Fifteenth Reconstruction Amendments, "lying at the foundation of each, and without which none of them would have been even suggested," is "the freedom of the slave race . . . and the protection of the newly-made freeman and citizen from the oppressions of those who had formally exercised unlimited dominion over him."[29] It is only the desperate need of lawyers to find a basis for litigation that could try to make it mean anything else.[30] If the Court could invalidate New Orleans' regulation of slaughterhouses, Justice Miller saw, it could, as a practical matter, invalidate any state law. The result would be to make the Court "a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve."[31] Since the amendment gave Congress the power to enforce its provisions, the result would also be to remove all federalism restrictions on Congress's power. The Court could not believe that "so great a departure from the structure and spirit of our institutions" was "intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them."[32] That conclusion would seem too clearly correct for challenge.

Justice Miller apparently saw no way of preventing the Privileges or Immunities Clause from meaning too much—giving the Court unlimited policymaking power—except by making it mean almost nothing, which he did by holding that it protected citizens only in their privileges and immunities of federal citizenship, most of which were already otherwise protected. Though reviled by living constitutionalists as a gross misinterpretation, later Courts, apparently also seeing no way to limit the Clause's scope, have mostly allowed the *Slaughter-House* interpretation to prevail.[33] Miller's purpose in adopting it, however—to keep the Court from becoming effectively a superlegislature as to state law—has not prevailed. It is inherent in judicial review and a good reason to reject it that its practical effect inevitably will be to transfer legislative power to courts. It is unrealistic to expect that ordinary humans, much less lawyers, can be given an unreviewable and unsanctioned power to invalidate legislative policy choices

29. *Slaughter-House*, 83 U.S. at 71.

30. *See* Davidson v. City of New Orleans, 96 U.S. 97, 104 (1877) ("[T]here exists some strange misconception of the scope of [the Due Process Clause]. . . . [It] is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision again him . . . .").

31. *Slaughter-House*, 83 U.S. at 78.

32. *Id.*

33. An earlier case that was quickly overruled, *Saenz v. Roe*, 526 U.S. 489 (1999), is the only exception.

as unconstitutional and not succumb to the temptation to use it for personal political ends.[34]

The Fourteenth Amendment, it is probably safe to say, was fated to become the answer to, as Professor David Currie neatly put it, the Justices' "incessant quest for the judicial holy grail . . . a clause that lets us strike down any law that we do not like."[35] The Court's attempt in *Slaughter-House* to avoid becoming a superlegislature by reading the Privileges or Immunities Clause out of the Fourteenth Amendment served only to cause the Court in its pursuit of this quest to resort to what was left: the Due Process and Equal Protection Clauses, however ill-suited their history and language made them to the task. By a sheer act of will the Justices worked a judicial *coup d'état* by simply "interpreting" the clauses as giving themselves the power *Slaughter-House* had denied them. From the Due Process Clause's prohibition of "depriv[ing] any person of life, liberty, or property, without

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34. The inevitability of the use of judicial review for political purposes could hardly be better illustrated than by its use in the very case that established it: In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Chief Justice John Marshall, after justifying judicial review as necessary to correct legislative violations of clear constitutional prohibitions—which almost never happen—such as a law permitting conviction for treason on the testimony of one witness in the face of the constitutional provision that requires two, *see* U.S. CONST. art. III, § 3, he exercised the newly created power in order to reach his politically desired result. In effect he created a statute that did not exist—finding a grant to the Court of original jurisdiction by a statute that did not mention original jurisdiction—in order to find that it violated a constitutional provision prohibiting such a grant that also does not exist. He was thus able to write an opinion berating his political enemy President Jefferson as a violator of rights while avoiding a decision against the Jefferson administration that would likely have been ignored. To achieve this result, Marshall sat as a judge in a case in which he was intimately involved and should have recused himself. *See* William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 1–2.

A recent biographer of Marshall concludes, "It is apparent that James Marshall [John Marshall's brother, the central witness in the case] perjured himself in the Supreme Court and that the chief justice not only knew this but probably asked him to lie." JOEL RICHARD PAUL, WITHOUT PRECEDENT 254 (2018). In *Marbury*, Marshall "resorted to a line of sophisticated dicta to get even with his political enemy." MORRIS COHEN, *Constitutional and Natural Rights in 1789 and Since*, *in* THE FAITH OF A LIBERAL 175, 179–80 (1946). In a letter to a colleague, he "offered to abandon judicial supremacy in the interpretation of the Constitution in return for security against impeachment." *Id. Marbury* illustrates that fact and logic are not requisites of Supreme Court opinions, which are subject to no review. They are legal briefs, not objective discussions.

Further demonstrating the inevitable misuse of judicial review, Marshall in later cases held that a constitutional provision is not actually necessary for a finding of "unconstitutionality," which can be based, instead, on "certain great principles of justice," Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133 (1810), or "natural justice." Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 52 (1815). Marshall also demonstrated that if a constitutional prohibition should be thought to be necessary or useful, one can with sufficient lawyerly skill almost always be found. *See*, *e.g.*, Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

35. David P. Currie, *The Constitution in the Supreme Court: Limitations on State Power, 1865–1873*, 51 U. CHI. L. REV. 329, 347 (1984).

due process of law,"[36] the Court in effect excised the qualifying language "without due process of law," making the Clause literally a prohibition of any deprivation of "liberty," i.e., of all law,[37] which untenable result had to be modified by adding "unreasonably." From the Equal Protection Clause's prohibition of any law that "den[ies] any person . . . the equal protection of the laws,"[38] the Justices similarly effectively excised the word "protection," making it an unexplained and inexplicable requirement of equality, i.e., a prohibition of discrimination[39] that would again literally disallow all law, a result avoided, again, by adding "unreasonably."

The Court thus succeeded in making itself what Justice Miller foresaw and sought to avoid, the perpetual censor of all state law. But the achievement also clearly eliminates, it would seem, any justification of judicial review as enforcement of constitutional prohibitions. Once the Court invokes the revised Due Process or Equal Protection Clause, the Constitution drops out of the picture, leaving the Court to decide only the pure policy issue of the challenged law's "reasonableness." This makes it impossible, it would seem, for living constitutionalists to claim that there are nonoriginalist methods of constitutional interpretation that show the Court's constitutional decisions to be based on the Constitution and not just political judgments.

Impossible or not, living constitutionalists necessarily make that claim as it is the only available response to the charge that the Court's constitutional decisions are political. This is illustrated by recent articles by two of the most prominent and insistent living constitutionalists, Professors Cass Sunstein and Mitchell Berman[40] whose arguments for unusual methods of interpretation simply ignore the fact that in nearly all cases, nothing in the Constitution is being interpreted. Like all living constitutionalists, they begin, as they must, by insisting that arguing that the Constitution does not necessarily mean what it was intended to mean does not mean that it can be made to mean anything, which would make it too obviously irrelevant.[41] Freeing judges from the Constitution's intended meaning does not free them,

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36. U.S. CONST. amend. XIV, § 1.

37. *See* EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT 151–53 (1948).

38. U.S. CONST. amend. XIV, § 1.

39. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("[T]he equal protection of the laws is a pledge of the protection of equal laws.").

40. *See* sources cited *supra* note 3.

41. This leaves them with the question, however, of what then, the Constitution *does* mean. "Perhaps the most glaring defect of Living Constitutionalism," according to Justice Scalia, "next to its incompatibility with the whole antirevolutionary purpose of a constitution, is that there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution." ANTONIN SCALIA, A MATTER OF INTERPRETATION 44–45 (1997).

they argue, from all constitutional restraint. It does not mean, Sunstein argues, that just any interpretation would become possible, because "some imaginable practices cannot count as interpretation at all. If judges do not show fidelity to authoritative texts, they cannot claim to be interpreting them."[42] Berman agrees that "some claimed interpretations of a text must, in principle, be excluded . . . . Otherwise, putative interpretation is an unconstrained exercise in wish fulfillment."[43] Nonoriginalist judges must still search for and abide by the Constitution's meaning, they argue; it just need not be the meaning its authors intended. Berman agrees that interpretation is a search for meaning, but "the text's meaning depends," in his view, not on authorial intent, but "upon the language that the author intended to employ . . . ."[44] This would seem to mean, as it has to many commentators, that the nonoriginalist judge, though not bound by the intended meaning of the Constitution's words, is bound by their literal meaning.[45] But it appears that this is not correct. Berman denies "that the Constitution can be validly interpreted in any way so long as it is consistent with current English usage . . . ."[46] This is because there is the further constraint on judges, he believes, imposed by "the argumentative norms of a culture and of a practice" and the fact that the interpreter "must be prepared to give reasons" justifying the interpretation.[47] It is not true that, as originalists charge, a nonoriginalist judge can in effect amend the Constitution by being able to give it "any meaning at all," because, Berman argues, that "is not how judges act" and it is not "sanction[ed]" by "our concept and practice of interpretation."[48]

The argument illustrates the extraordinary faith living constitutionalists have in the wisdom and integrity of judges combined with a deep distrust in elected legislators. It happens, unfortunately, that there is very little that a Supreme Court Justice "must" do. It also illustrates how normally hardheaded

42. Sunstein, *supra* note 3, at 193.

43. Berman, *supra* note 3, at 51.

44. *Id.* at 48.

45. *See* Richard Ekins, *Objects of Interpretation*, 32 CONST. COMMENT. 1, 9 (2017) ("There is nothing unintelligible about imposing on a form of words some meaning that a possible or imagined language user might use those words to convey. But in such imposition the nominal interpreter is in truth the speaker or author."). Literary theorist Walter Benn Michaels points out that the "words only" approach does not succeed in freeing the interpreter from reliance on the intent of the Constitution's authors, because it is their intent that determines the language in which the words are being used: "[W]e can have no non-arbitrary reason for committing ourselves to the importance of the author's intention with respect to the language she was using but then ignoring it with respect to the statements she was using the language to make." Walter Benn Michaels, *A Defense of Old Originalism*, 31 W. NEW ENG. L. REV. 21, 29 (2009).

46. Berman, *supra* note 3, at 66.

47. *Id.*

48. *Id.* at 65.

secular realists become able to hold such metaphysical beliefs as that undefined "argumentative norms of a culture and of a practice" provide meaningful constraints on Supreme Court Justices.[49] Like other living constitutionalists, Sunstein and Berman seem to assume a more elaborate constitution than the one we have. Their frequent general references to "the text" of the Constitution as a restraint on judges seem to overlook the central fact, noted earlier, that the Constitution provides little relevant text for the "argumentative norms of a culture" to apply to.

It is also doubtful that a judge willing to overcome the intended meaning of the Constitution to reach a desired result—or to avoid a "terrible" result, as Sunstein recommends[50]—will be prevented from reaching it by Berman's illusive supposed constraints or by Sunstein's requirement of "fidelity to [the] text[ ],"[51] especially since fidelity does not mean, according to Sunstein, that the judge "must always 'follow' the text, or may never depart from [the] ordinary meaning," but only that the judge "must always make the text the foundation for interpretation."[52] Sunstein does not explain how that seemingly self-contradictory operation can be performed.

According to Berman's view of the role of judges in constitutional cases, while a judge may sometimes choose to "tether[ ] her interpretation of constitutional meaning to original understandings[,]" she may at other times "act in accordance with what she deems compelling demands of political justice[,]"[53] which seems to say that the Constitution may, at the judge's option, sometimes be ignored. He similarly argues that "[i]nterpretation might be understood as an effort to attribute to a text the meaning that would best serve a hypothetical reasonable interpreter's reasons for engaging in the activity of interpretation or would best serve her . . . criteria for success."[54] This approach, which might be more accurately described as "attribution"

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49. Nonoriginalists have a point, however, in arguing that if nonoriginalism does not constrain judicial discretion, originalism does not seem to do much better. *See, e.g.*, FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 171–72 (2013); J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY 46 (2012) ("For all its virtues, originalism has failed to deliver on its promise of restraint. Activism still characterizes many a judicial decision, and originalist judges have been among the worst offenders."). The problem, of course, is not with originalism but the fact that self-identified originalists also succumb to the temptation to see their policy preferences prevail. If his supposed commitment to originalism did not prevent Justice Scalia, one of its strongest proponents, from, for example, finding in the Constitution a prohibition of federal "commandeering" of state resources (in *Printz v. United States*, 521 U.S. 898 (1997)), its restraints, nonoriginalists are correct, cannot be very severe.

50. *See infra* note 58.

51. Sunstein, *supra* note 3, at 194.

52. *Id.* at 206.

53. Berman, *supra* note 3, at 63.

54. *Id.* at 54.

than "interpretation,"[55] seems to conflict with the basic premise of communication that there is a difference between writing and reading. It would also seem to abandon Berman's requirement that judges abide by the meaning of the Constitution's words, which (even taking "argumentative norms" into account) surely may sometimes not serve "compelling demands of political justice" or the "interpreter's" criteria for success.

It seems clear that Sunstein and Berman reject originalism less because they have found textualism a better way to determine the Constitution's meaning than because they are dissatisfied with the Constitution and would substitute a different one that better accords with their policy preferences. Like many liberal constitutional theorists, they seem to forget (or regret) that we live, or at least aspire to live, in a democracy[56] and argue as if policymaking by courts is or should be the norm. Government by elected legislators may be acceptable, Sunstein argues, in a country with a constitution that is "good, or good enough," but not where the constitution is "hopelessly undemocratic, or . . . entrenches racial injustice," "which is not an implausible account of the American Constitution."[57] Sunstein's objection seems to be, however, not that the Constitution is "hopelessly undemocratic"—it was once a radical experiment in democracy—but that it is not undemocratic enough in that it does not remove enough basic social policy decisions from the hands of the people and assign them to the courts. The most undemocratic feature of our present system of government is the Court's virtually unlimited policymaking power that Sunstein defends. His statement that the Constitution "entrenches racial injustice"[58] is untrue of the present Constitution which has no provision requiring racial injustice and has

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55. *See* Stanley Fish, *The Intentionalist Thesis Once More*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 99, 104 (Grant Huscroft & Bradley W. Miller eds., 2011) ("But there is no end of reasons to which the interpretive task can be bent, and once reasons are accorded a place of privilege, interpretation dances to their tune, and meanings are specified because they accord with the interpreter's vision of how things should be, with 'her criteria for success.'").

56. That the Constitution has several undemocratic features—such as that each state has two votes in the Senate regardless of a state's small population, *see, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006), does not justify virtually abandoning democracy to the Supreme Court.

57. CASS SUNSTEIN, CONSTITUTIONAL PERSONAE: HEROES, SOLDIERS, MINIMALISTS, AND MUTES 51 (2015).

58. *Id.* Sunstein similarly argues that "there would be serious reason to question any approach to the Constitution that would declare race and sex discrimination to be unobjectionable." *Id.* at 61. There is, of course, no such approach. It is fundamental to understanding constitutional law that the fact that the Constitution does not prohibit something does not mean that it recommends or requires it.

some that protect against it by prohibiting racial discrimination in voting[59] and civil rights.[60] Sunstein's complaint is not with what the Constitution does, but with what it does not do: impose his racial agenda.

Because the Constitution is so seriously defective in Sunstein's view, judges should choose a method of interpretation that "makes our constitutional system better rather than worse."[61] They should not stick with original meaning "[i]f the consequences of sticking with it would be terrible, and if those consequences could be avoided with another approach."[62] As noted above, this reasoning would seem to also be available to overcome Sunstein's requirement of fidelity to the words of the Constitution, for surely textualist judges should not stick to the meaning of the Constitution's words if the consequences would be terrible and could be avoided with another approach. Although the judge might not then be seen as "interpreting" any specific constitutional provision, he or she might still be seen as faithfully interpreting the Constitution as a whole—seen, as some nonoriginalists do, not as a meaningful document, but as merely an expression of an aspiration for justice.[63]

Berman agrees that seeking the author's intention is the appropriate method of interpretation when the purpose of a text, such as a grocery list, "is to coordinate with the author or to glean information from him," but argues that it may not be appropriate when the purpose of a text, such as a constitution, is "in part to secure good outcomes within broad constraints."[64] That, however, is clearly too broad and vague a purpose to provide any meaningful guidance or restraint. It would make the Constitution an empty abstraction, defeating its actual specific purpose to create a stronger national government in a system of democratic federalism while imposing very few substantive policymaking restraints. In any event, since it is judges who will determine the "good outcomes" and it is very difficult to specify the "broad constraints," the practical effect of adopting this method of interpretation, as

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59. U.S. CONST. amend. XV.

60. U.S. CONST. amend. XIV.

61. Sunstein, *supra* note 3, at 194.

62. *Id.* at 200.

63. *See, e.g.*, William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 433 (1986) ("[T]he Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being."). *But see* Lino A. Graglia, *How the Constitution Disappeared*, COMMENT., Feb. 1986, at 19, 19–20; Lino A. Graglia, *Constitutional Mysticism: The Aspirational Defense of Judicial Review*, 98 HARV. L. REV. 1331, 1332 (1985) (reviewing SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS (1986) & JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY (1984)).

64. Berman, *supra* note 3, at 55.

of all living constitutionalism methods, is the transference of legislative power to judges.

Although Sunstein "emphasize[s] that the concept of interpretation does impose constraints," he accepts as a legitimate "nonoriginalist approach" to interpretation Ronald Dworkin's view that "the Constitution should be taken to include abstractions that invite moral reasoning from judges, and that judges must give those generalities the best moral reading that they can,"[65] which would seem, at least to a secularist, to be about as clear a prescription for the absence of constraints on judges as one could imagine. Dworkin's idea of "legal interpretation," Sunstein tells us, nonetheless "involves two obligations": "one of 'fit'" and "one of 'justification.'"[66] These obligations mean that "an interpreter cannot simply ignore the materials that are being interpreted" and, on the "analogy of a chain novel" "cannot make up a whole new novel" or "depart from what has come before" but should "make the novel good rather than terrible."[67] It is hard to believe that this can seriously be put forward as a restraint on judicial discretion. Its first problem is the assumption that the Supreme Court has "obligations," that, for example, there are some materials that it "cannot ignore." It can and does ignore whatever it chooses to ignore. No one should be asked to believe that Justice Brennan, for example, might be deterred from voting for his preferred result because he is constrained by a concern for a desirable chain novel-like continuity in constitutional decision-making.[68]

Sunstein also apparently accepts as a valid interpretive method the view of "some originalists . . . that the Constitution was deliberately written in broad terms whose meaning was meant to evolve over time."[69] This is the view, however, of only pretend or would-be originalists who seek to obscure the originalist-nonoriginalist distinction as a way of saving living constitutionalism.[70] The "broad" terms of the Constitution usually turn out to

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65. Sunstein, *supra* note 3, at 202.

66. *Id.* at 203.

67. *Id.*

68. Justice Brennan, probably the least constrained Justice in our history and most influential political figure in the last half of the twentieth century, was constrained by neither logic nor truth. *See, e.g.*, Lino A. Graglia, *When Honesty Is "Simply . . . Impractical" for the Supreme Court: How the Constitution Came to Require Busing for School Racial Balance*, 85 MICH. L. REV. 1153, 1173–78 (1987) (book review).

69. Sunstein, *supra* note 3, at 202.

70. The leading example comes from Jack M. Balkin. JACK M. BALKIN, LIVING ORIGINALISM 3 (2011). Once we realize, he tells us, that the Constitution is merely "an initial framework for governance . . . that Americans must fill out over time through constitutional construction," we will see that originalism and living constitutionalism are the same thing. *Id.* Adoption of his "method of *text and principle*" (his italics), he believes, which requires "fidelity"

be little more than the Due Process, Equal Protection, and Privileges or Immunities Clauses and the First, Fourth, and Eighth Amendments. If they are exceptionally broad, it is largely because the Court has made them so. Read in historical context with an appropriate presumption disfavoring expanding constitutional restrictions and favoring legislative choice, they can be seen as quite limited. The Framers, who opposed judicial policymaking,[71] would have had to be extremely naïve not to realize that authorizing judges to enforce a Constitution written in "broad terms . . . meant to evolve over time" is authorizing them to rewrite, not merely interpret, the Constitution.

The same must be said about Sunstein's suggestion that we "consider" whether "judges should decide, as a matter of principle, whether current practices do deny people 'equal protection of the laws', or violate 'the freedom of speech' rather than asking about the original meaning of those words."[72] This seems inconsistent, however, with his earlier insistence on the need for judicial fidelity to the words. He does not tell us what the relevant principle or principles are, and it is doubtful that there are any with meaningful content. Like other living constitutionalists, he seems to forget that general principles do not decide concrete cases. "Equality" is essentially meaningless as a legal concept;[73] since it cannot mean that everyone must be treated equally in all regards at all times, its meaning in any given case—i.e., whether a challenged classification is justified—is necessarily a policy choice. The same is true of "the freedom of speech," which cannot mean that government cannot regulate speech—as it does and must in many ways—making its meaning in any given case also a policy choice. Even if a judge is

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to both "the original meaning of the Constitution" and "the principles that underlie the text" whose "reach and application evolve over time" will cause the supposed difference between the two methods to disappear. *Id.* Constitutional decisions by judges applying this method to the text—after determining its "evolved" reach and application—will then be seen, this leading constitutional theorist would have us believe, as based on interpretations of the Constitution, freeing them from the calumny of being political decisions. *Id.*; *see also* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015). *But see* Larry Alexander, *The Method of Text and ?: Jack Balkin's Originalism With No Regrets*, 2012 U. ILL. L. REV. 611; Nelson Lund, *Living Originalism: The Magical Mystery Tour*, 3 TEX. A&M L. REV 31 (2015).

71. Alexander Hamilton, for example, defended judicial review on the ground that judges would invalidate laws only if they were "contrary to the manifest tenor" of and in "irreconcilable variance" with the Constitution. THE FEDERALIST No. 78, at 466–67 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Elbridge Gerry argued at the convention that "[i]t was quite foreign from the nature [of the office of judges] to make them judges of the policy of public measures." JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 101 (E.H. Scott ed., Chicago, Albert, Scott & Co. 1893) (1840).

72. Sunstein, *supra* note 3, at 207.

73. *See* PETER WESTEN, SPEAKING OF EQUALITY, at xiii (1990); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 596 (1982).

deciding cases on the basis of principles that he or she will largely have to invent falls within what Sunstein calls "the capacious rubric of 'interpretation,'"[74] it, like the other nonoriginalist methods of interpretation that Sunstein approves, does not seem to provide any significant element of restraint. Indeed, Sunstein himself recognizes this, concluding that his suggestion presents a "normative question" about the "appropriate judicial role" which cannot be answered by philosophical analysis of the nature of language and the meaning of "interpretation."[75] That is true, as it is true of all nonoriginalist methods of "interpretation," but the question then should be addressed directly as such, not obfuscated in a book or article purporting to discuss methods of constitutional interpretation.

Perhaps no decision more clearly demonstrates the Court's lack of "obligation" and the game-playing character of constitutional law than the Court's third encounter with Connecticut's anti-contraception law in 1965.[76] It is almost fair to say that Connecticut was simply not big enough in that New Age era for that unenlightened law and the Yale Law faculty, one of whom argued for plaintiffs.[77] It clearly had to go, but how? The obvious answer was the always-available, all-encompassing "substantive due process" doctrine, but Justice Douglas, the author of the Court's opinion and a former member of the Yale Law faculty, had spent decades denouncing the doctrine and vowing to do no more in constitutional cases than enforce the Bill of Rights.[78] The difficulty that there apparently was no relevant Bill of Rights provision he was able to solve by announcing that some provisions of the Bill of Rights have "emanations" that form "penumbras,"[79] in which the needed right condemning the law could be found: a maneuver good for a chuckle, one must admit, but not for a passing grade, one hopes, in a high school debate. It is all the reasoning that the Court needs, however, to overturn a state law as unconstitutional. Did the Court invent a new method of constitutional interpretation, or did it demonstrate on the contrary that it does not take as seriously as do Sunstein and Berman that a new method is required or available?

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74. Sunstein, *supra* note 3, at 207.

75. *Id.*

76. Griswold v. Connecticut, 381 U.S. 479 (1965).

77. *Id.* at 479.

78. *See, e.g.*, Gregory C. Cook, *Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process*, 14 HARV. J.L. & PUB. POL'Y 853, 857 (1991) ("Although Justice Douglas's *Griswold* opinion attempts to avoid substantive due process, both commentators and the Court itself have ultimately seen *Griswold* as a substantive due process decision.").

79. *Griswold*, 381 U.S. at 484.

As if to provide a more complete demonstration of the let's-pretend quality of constitutional law, Justice Goldberg added a concurring opinion joined by Chief Justice Warren and Justice Brennan. Apparently not fully convinced by Douglas's performance, he sought and was able to find further constitutional basis for the decision. He rescued from obscurity the theretofore "forgotten" Ninth Amendment,[80] making it ever since a favorite of living constitutionalists. It provides that "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."[81] Thus, Justice Goldberg explained, in addition to the Constitution's "enumerated rights," there must also be "unenumerated rights" that can also, he assumed, be found in the Constitution and that the Court is authorized to discover and take into account in its decision-making.[82] Bolstering the Court's constitutional decisions with these newly discovered unenumerated rights will help show, we are expected to believe, that they are Constitution-based, allaying the cynical suspicion that the Court is just making it all up.[83]

The intended audience for Professors Sunstein and Berman's efforts—other than other constitutional law professors—is not clear. If addressed to judges, it is likely to have little effect: originalist judges are unlikely to be convinced of this newly granted policymaking discretion, and the living constitutionalists need no convincing—though they may be grateful for the putative intellectual endorsement of their position. There can be little doubt that the public is aware, even if Sunstein and Berman are not, that the Court's constitutional decisions are policy judgments. This is clear enough from the

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80. *Id.* at 491 (Goldberg, J., concurring); *see generally* BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955).

81. U.S. CONST. art. IX.

82. *Griswold*, 381 U.S. at 488–90 (Goldberg, J., concurring).

83. Douglas's opinion—relying on two decisions, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), that gave birth to the substantive due process doctrine—also illustrates that while the Court's rulings of unconstitutionality are not based on the Constitution, they are based on earlier such rulings that are also not based on the Constitution, each of which becomes in effect a new constitutional provision and springboard to further expansion of judicial power. That *Griswold* itself was so used was dramatically demonstrated eight years later in *Roe v. Wade*.

Justice Black, joined by Justice Stewart, issued a long dissent. *Griswold*, 381 U.S. at 507 (Black & Stewart, JJ., dissenting). He had joined Douglas in denouncing the use of the Due Process Clause to invalidate state laws as "unreasonable," but being, as he said, "somewhat old fashioned" and perhaps less intellectually flexible, he differed from Douglas in that he meant it. *Id.* at 522. Their insistence that the Court should "not sit as a super-legislator," Douglas now limited to "laws that touch economic problems, business affairs, or social conditions" while Black considered acting as a superlegislature "no less dangerous when used to enforce this Court's views about personal rights." *Id.* at 482, 522.

decisions themselves. If *Brown v. Board of Education*[84] did not illustrate this clearly enough, the Court's simultaneously holding school segregation unconstitutional in Washington, D.C., despite the absence of the Equal Protection Clause that was the supposed basis of *Brown*, surely did.[85] No one believes, presumably, that the states lost power to restrict abortion in 1973[86] or ban same-sex marriage in 2015[87] because the Justices discovered something in the Constitution that had not been noticed before. The personal policy preference basis of the Court's decisions should be clear enough from the fact so many are 5–4, showing two almost evenly-matched groups of Justices supposedly reading the same Constitution and coming to opposite conclusions. It is even more clear from the voting patterns of the Justices, with one group of four consistently voting together for the liberal result and another group of four almost as consistently voting for the conservative result almost regardless of the issue and with each group voting consistently with its members' known political convictions.[88]

Public awareness of the political role of the Justices is shown by the bitter debates over their selection, which no one supposes is about the nominee's legal talents. It is shown in the argument at every presidential election that the primary consideration in voting for a president may be that the president nominates Supreme Court Justices, perhaps the most important thing he or she can do. A president lasts for at most eight years while a Supreme Court Justice can last for decades permanently immune from any further public input or concern.[89]

Finally, it should be noted that living constitutionalism rests to a large degree on a single Supreme Court decision, *Brown v. Board of Education*,

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84. Brown v. Bd. of Educ., 349 U.S. 294 (1955).

85. Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (stating that continued segregation in D.C., the Court said, was "unthinkable").

86. Roe v. Wade, 410 U.S. 113, 114 (1973).

87. Obergefell v. Hodges, 135 S. Ct. 2584, 2591 (2015).

88. This left the decision in many of the most important constitutional cases to the ninth "swing" Justice, with the result that we have, for example, a constitutional individual right to own a gun, McDonald v. City of Chicago, 561 U.S. 742, 778 (2010); District of Columbia v. Heller, 554 U.S. 570, 570 (2008), and Congress cannot constitutionally restrict corporate campaign contributions, Citizens United v. FEC, 558 U.S. 310, 311 (2010), because Justice Kennedy chose in those cases to vote with the conservatives, while the states cannot ban single-sex marriage, *Obergefell*, 135 S. Ct. at 2591, or impose term-limits on their federal representatives, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 837 (1995), because in those cases he voted with the liberals. The Constitution, of course, would have rested equally peaceful and content with the opposite decisions. The ideological split of the Justices is equally clear and consistent in non-constitutional cases as in constitutional cases. *See*, *e.g.*, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

89. U.S. CONST. art. III, § 1.

which declared school racial segregation and, effectively, all official racial discrimination unconstitutional.[90] Although the Court could not and did not enforce the decision, requiring that segregation be ended only "as soon as practicable,"[91] its effective endorsement by Congress by the 1964 Civil Rights Act followed by the 1965 Voting Rights Act and 1968 Civil Rights Act led to it being considered the initiator of a new civil rights era of efforts to advance black equality.[92] The result, understandably, was to raise it to an iconic status that made objection seem a character defect. To argue for originalism thereafter was to be met with the question "So, you disagree with *Brown*?" As it was not politically, socially, or morally acceptable to disagree with *Brown*, the debate on methods of constitutional interpretation was over and living constitutionalism had won. Thus Sunstein can gloat:

> Few contemporary originalists are willing to concede that under their approach, racial segregation is constitutionally acceptable—even though nothing in the original meaning [of the Fourteenth Amendment] bans segregation by the national government, and even though it is not at all easy to show that the Constitution bans segregation at the state level.[93]

Sunstein has no need to worry, however, that *Brown* may still be needed to protect us from "constitutionally acceptable" segregation. In fact, ironically enough, *Brown* is now actually an obstacle to some steps to increase integration that some school districts would otherwise take,[94] a problem that would not have arisen if segregation had been ended by Congress instead of the Court.

Professor Adrian Vermeule's bold response to the inevitable questions is that:

> It is pusillanimous to duck a challenge, so I acknowledge that [on a strict originalist view] *Brown* was indeed wrong, in the sense that the judges had no business deciding that sort of question in the first

90. Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN. ST. L. REV. 837, 855 (2011).

91. Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955).

92. James T. Patterson, Brown v. Board of Education *and the Civil Rights Movement*, 34 STETSON L. REV. 413, 414 (2005).

93. Sunstein, *supra* note 3, at 201.

94. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 710 (2007) (explaining that school districts may not act to increase integration by taking race into account in assigning students to oversubscribed schools). The apparently paradoxical result, as to the formerly segregated Louisville School District, was that the Constitution required such drastic steps as busing to increase integration on one day, and prohibited even the mildest steps to increase it on the next.

> place. [And] the view that accounts of constitutional interpretation and judicial review should be tested against any particular decision is seriously misguided.[95]

Given judicial review, however, the Court probably could not avoid deciding the case; another unfortunate aspect of judicial review is that a decision the other way would inevitably be seen as an endorsement of segregation. A better answer is that as even a stopped clock is right twice a day, and even as a lawless decision can have a good result, this does not justify endorsing lawless decisionmaking. The best answer is probably that *Brown* should be considered *sui generis*: a case without precedent or precedential value, in effect an act of judicial civil disobedience arguably justifiable by the unique circumstances of the seriousness and intractability of the problem.[96] There are no analogies to the black historical experience in American law. How far *Brown* is from an ordinary constitutional decision is shown by the fact that for the first and only time, the Court created a constitutional right that did not have to be immediately enforced and found a violation without providing a remedy, permitting the "successful" plaintiffs to be returned to the unconstitutionally segregated schools.

As important as *Brown* was for its decision, it proved to be even more so for the change it made in the meaning of judicial review, making living constitutionalism seemingly defensible. It served to convince many people, including at least some of the Justices, of the superiority of decision-making by the Court ostensibly on the basis of principle and morality to decision-making by politicians subject to popular control. It in effect gave the Court a quasi-clerical role as the nation's ultimate moral as well as legal authority. The Court then used this new understanding of its power to make decisions,

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95. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 280 (2006).

96. *See* Posner, *supra* note 1, at 47. ("*Brown* illustrates a small class of Supreme Court decisions that seem at once political and right, because sometimes the considerations of policy and morality that (along with interest group pressures, ignorance and emotion) drive political judgments all line up on the same side.").

Because the primary purpose of the Fourteenth Amendment was to protect blacks' civil rights, *Brown* can be said to at least have some relation to the Constitution that the Court's non-racial decisions supposedly also based on the Fourteenth Amendment do not. Indeed, *Brown* can plausibly be argued to follow from *Strauder v. West Virginia*, 100 U.S. 303, 307–08 (1879), which effectively held that the adoption of the Fifteenth Amendment granting blacks the right to vote abolished the previous distinction between protected civil rights and unprotected political rights for blacks, making the Fourteenth Amendment a prohibition of all "discrimination . . . against them because of their color," giving them an "exemption from unfriendly legislation." The Court began the *Brown* opinion by citing and quoting *Strauder*, and it might well have written a more defensible opinion by basing the decision on it. *See* Lino A. Graglia, "*Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1041–43 (1992).

such as on the abortion issue, where the alleged moral advance is much less clear. On the race issue itself, the accolades for *Brown* led the Court to move from *Brown*'s prohibition of segregation as unlawful race discrimination to a much more ambitious and questionable requirement of race discrimination to increase integration. Because it could not openly defend it as such, the Court has always denied that there is such a constitutional requirement, insisting that the requirement is not integration for its own sake but only "desegregation," the undoing of the *de jure* segregation prohibited in *Brown*.[97] This new requirement led to the nation's largest and most destructive social experiment—one that could never have been imposed but apparently could not be stopped by the political process—a nation-wide program of compulsory transportation of public school children away from their neighborhood schools to more distant schools to increase school "racial balance." The result, due to the flight of the mostly white middle class, was almost always not more but less integration, transforming the public school systems of the nation's major cities—sometimes almost overnight—from majority white to majority non-white.[98] There can be no greater tribute to the power of the Court than that this program, bitterly and sometimes violently opposed by the American people, imposing enormous costs on school districts and states[99] with no known educational benefit, was nonetheless carried out and is to some extent still being carried out,[100] across the country.

Unless limited as famously advocated by James B. Thayer at the end of the nineteenth century[101]—which would reduce it to a matter of little more than academic interest—judicial review is essentially a prescription for rule by judges inconsistent with the rule of law, representative self-government,

97. *See, e.g.*, Washington v. Davis, 426 U.S 229, 240 (1976) ("That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause.").

98. *See* LINO A. GRAGLIA, DISASTER BY DECREE 279–81 (1976).

99. In Kansas City, Missouri, alone, a single district court judge imposed on the school system and state nearly incredible costs of over two billion dollars in a futile attempt to attract whites from the suburbs back to the system from which they had just escaped. *See* JOSHUA M. DUNN, COMPLEX JUSTICE: THE CASE OF *MISSOURI V. JENKINS* 2 (2008).

100. *See, e.g.*, Stout v. Jefferson Cty. Bd. of Educ., 882 F.3d 988, 1013 (11th Cir. 2018) (a city and school district may not split from the county if the result would be to impede "desegregation").

101. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (advocating a rule of "clear mistake": courts "can only disregard [a law] when those who have the right to make laws have not merely made a mistake, but a very clear one,—so clear that it is not open to rational question"); *see also* VERMEULE, *supra* note 95, at 280 ("[U]nder conditions of severe uncertainty and bounded rationality, judges' best bet is to limit themselves to enforcing clear and specific coordinating texts and leave more aspirational or open-ended provisions to legislatures.").

separation of powers and federalism. Great Britain[102] and the Netherlands[103] show that it is possible to get by quite well without it; its abolition here would be the greatest improvement that could be made in our political system. It would allow the states to return to the "Republican Form of Government" guaranteed them by the Constitution,[104] quieting interest in secession.

If, however, the belief of living constitutionalists that leaving all or some social policy issues for final decision by the Supreme Court is an improvement on democracy,[105] it should be advocated openly and honestly, not misrepresented as a matter of how to interpret the Constitution.

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102. *Judicial Review*, CTS. & TRIBUNALS JUDICIARY, https://www.judiciary.uk/you-and-the-judiciary/judicial-review/ [https://perma.cc/QGL2-Y9RR] (last visited Feb. 5, 2019).

103. *See* GW. [CONSTITUTION] art. 120 (Neth.).

104. U.S. CONST. art. IV, § 4.

105. *But see* Posner, *supra* note 1, at 78 ("[T]he case for the Court as a 'good' superlegislature—so good as to be qualitatively distinct from the official legislatures . . . fails . . . ."); Mark Tushnet, *A Goldilocks Account of Judicial Review?*, 37 U.S.F. L. REV. 63, 63–64 (2002).