You raise your head and you ask, “Is this where it is?”
And somebody points to you and says, “It’s his”
And you say, “What’s mine?” and somebody else says, “Well, what is?”
And you say, “Oh my God, am I here all alone?”
But something is happening and you don’t know what it is
Do you, Mr. Jones?

- Bob Dylan, “Ballad of a Thin Man”\(^1\)

Rebecca Brown, at the University of Southern California, has been teaching constitutional law for 35 years. “While I was working on my syllabus for this course, I literally burst into tears,” she told me. “I couldn’t figure out how any of this makes sense. Why do we respect it? Why do we do any of it? I’m feeling very depleted by having to teach it.”

- The New York Times\(^2\)

*At points in American history, there have been significant, even massive shifts in constitutional understandings, doctrines, and practices. Apparently settled principles, and widely accepted approaches, are discarded as erroneous, even illegitimate, in favor of a new set of principles and approaches. Less momentously, views that were once considered unthinkable do not quite become the law on the ground but instead come to be seen as plausible and part of the mainstream. Relatedly, Americans transform how they talk and think about their Constitution – its core commitments and underlying narratives – and those transformations change our practices. Our goal here is to provide a conceptual map of radical constitutional change. We seek to describe how and why such change occurs. First, we ask whether theories of interpretation trigger radical change or whether desires for radical change impel people to generate new (or modify old) theories of interpretation. Second, we explore why so many are baffled or outraged by*

\(^{1}\) Bob Dylan, *Ballad of a Thin Man* (Columbia Records 1965).
constitutional paradigm shifts. Third, we explore the drivers of radical constitutional change, both the familiar bottom-up pressures from “We the People” and the less-familiar top-down approaches, where legal elites foment and impose a new constitutional regime. We end with a brief discussion of Edmund Burke and conclude that Burkeanism has a complex and ambivalent relationship with radical constitutional change.

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Introduction: From the Margin to the Mainstream

How do constitutional understandings change? How do ideas about constitutional meaning move from the margin to the mainstream? How do understandings about constitutional law that once seemed extreme or even outlandish become normalized and even standard? For orientation, consider a few examples, drawn from current law:

- the Constitution forbids racial segregation by both the states and the national government;\(^3\)
- the Constitution forbids compulsory school prayer;\(^4\)
- the Constitution calls for a rule of one person, one vote;\(^5\)
- the Constitution requires states to recognize same-sex marriage;\(^6\)
- the Constitution protects commercial advertising;\(^7\)
- the Constitution permits governments to ban abortion;\(^8\)
- the Constitution protects the right to possess firearms;\(^9\)
- the Constitution permits Congress to regulate marijuana use and possession throughout the nation;\(^10\)
- the Constitution authorizes the President to use military force against foreign nations.\(^11\)

In a matter of decades, these understandings moved from the margin to the mainstream – from the unthinkable, to the outlandish, to the extreme, to the new conventional wisdom.\(^12\) We should be able to acknowledge this point whether we celebrate or lament the relevant movements. Those who praise one or another radical change might think that the position that ultimately triumphed was always the right interpretation of the founding document.\(^13\) Alternatively, they might suppose that the position that prevailed was not the right position when it was previously overlooked or rejected, but that it was the right position when it triumphed.\(^14\) Those who lament radical shifts might believe that the now-mainstream position has always been

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\(^8\) See Gonzales v. Raich, 545 U.S. 1 (2005).
\(^10\) It would be possible to question whether that claim fits for all the examples we have listed. We believe that it does, but the general point holds even if that belief is wrong.
\(^11\) That is a standard position for those who favor radical change. See, e.g., Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard Coll., 600 U.S. 181 (2023) (contending that color-blindness was always the right interpretation of the Fourteenth Amendment).
\(^12\) Cf. Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 COLUM. L. REV. 1 (arguing that the original Constitution did not require a unitary executive but that the case for a unitary executive is far stronger today).
mistaken. Of course, they might think that some approach or reading might have been right in the past, but that it is mistaken today.15

In this Article, we offer a conceptual map, focusing above all on three sets of claims:

1. Theories of constitutional interpretation do not much constrain radical constitutional change, either because most theories are flexible enough to accommodate such change, or because those promoting radical constitutional change embrace a theory that mandates or permits it.16 Indeed, some people might well embrace a theory because it mandates or permits radical change.

2. Radical constitutional change is often a product of bottom-up influences, as when groups of ordinary citizens insist on such change. But radical constitutional change can also be a product of top-down influences, as when relevant elites (within the government, academy, and bar) articulate a new theory or approach and convince others to adopt it. The role of elites, rather than the public, in engineering radical constitutional change has received far too little attention.

3. Radical constitutional change produces a predictable sense of dislocation among those educated in or committed to the status quo. Often, they feel disoriented or even “gaslighted.” This sense of dislocation occurs in part because old theories are discarded, and new ones take their place. It occurs in part because old narratives, widely accepted for decades, are repudiated in favor of new narratives. It occurs in part because of changes in canonicity; canonical cases lose that status, and new cases, or long-neglected cases, become the new canon.17

The topic of radical constitutional change is hardly new. Years ago, it was discussed in connection with “constitutional moments,”18 understood to result from a large-scale political rethinking of constitutional commitments, culminating in formal or informal constitutional transformation. The Founding, the Civil War, and the New Deal have been described as constitutional moments.19 According to Bruce Ackerman, these were legitimate constitutional transformations because they reflected fundamental, popular reformation and reconceptualization of the Constitution.20 More recently, David Strauss has highlighted many other changes in constitutional practices and conceptions, each of which arose outside of the Article V amendment process.21 Most of those changes were not significant enough to count as

15 For examples of this view as applied to interpretation of the Second Amendment, see generally David Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 YALE L.J. 551 (1991); Wendy Brown, Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson’s The Embarrassing Second Amendment, 99 YALE L.J. 661 (1989).
16 See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST (1981).
17 We are grateful to Lawrence Solum for help with the formulation in this paragraph. Consider here the canonization of Brown, much criticized in its time, but now taken for granted by all sides.
19
constitutional moments, but many were by no means incremental. Further, some of those changes were part and parcel of a larger constitutional transformation.

It is notoriously difficult to specify necessary and sufficient conditions for constitutional moments.22 There is great debate about how stringent such tests should be.23 In any case, most large-scale shifts in constitutional understandings lack the procedural rigor and popular support that Ackerman and others demand of legitimate constitutional transformation. Whether legitimate or not, the Warren Court generated radical change across a range of doctrines. And we believe that (almost) everyone can recognize the sweeping changes in constitutional thinking before our eyes.24 Whether one lauds or loathes it, the Roberts Court is the new Warren Court.25

There is no doubt that constitutional law—both doctrine and practice—periodically experiences “constitutional paradigm shifts,” in which constitutional actors repudiate

23 See 1 A C K E R M A N, supra note 20, at 266–27 (describing the “life cycle of a successful movement” in four stages: signaling, when a movement develops “sufficiently deep and broad support amongst the private citizenry” to demand placement “at the center of sustained public scrutiny”; proposal, when the movement’s ideas are concretized into “operational proposals”; mobilized public deliberation, in which proposals are tested “within the higher lawmaking system”; and codification, when proposals become constitutional law); 3 B R U C E A C K E R M A N, W E T H E P E O P L E: T H E C I V I L R I G H T S R E V O L U T I O N 4 4 – 4 6 (2014) (proposing a similar, but slightly different process that requires signaling, proposal, a “triggering election,” “mobilized elaboration,” a “ratifying election,” a “consolidating phase,” and finally a return to “normal politics”).
24 For an early recognition of the change, see Lawrence B. Solum, How NFIB v. Sebelius Affects the Constitutional Gestalt, 91 WASH. U. L. REV. 1, 2–4 (2013). Solum’s account is broadly compatible with ours.
25 Some will contest our assertion that we are in the midst of radical constitutional change. Little in our general framework depends on accepting our assertion; it would be possible to accept that framework while also insisting that the Roberts Court is engaged in something incremental. For instance, it might be argued that the number of overrulings remains limited, or that while judicial doctrine has changed, here and there, the real world has not changed all that much. It is true, moreover, that the effects of particular rulings might be disputed, perhaps because the criteria are not specified. It might be urged, for example, that Dobbs has not much affected the number of abortions and that SFFA has not much changed the racial composition of entering college classes. But in our view, the landscape of constitutional law is dramatically different now from what was in (say) 2007. The rise of Second Amendment rights, the new emphasis on a strongly unitary executive, the protection of commercial advertising, the growing solicitude for the rights of religious believers, the emphasis on originalist and historical methodology (whether consistent or not)—all this signals that something is happening here. See sources cited supra notes 7, 9, 29, 158. We know what it is, Mr. Jones.

To offer a bit more detail: The discarding of Roe v. Casey is a monumental change by itself. Roe had shaped people’s perceptions of the Constitution and the Court. Positive Views of Supreme Court Decline Sharply Following Abortion Ruling, PEW Rsch. Ctr. (Sept. 1, 2022), https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/. Its termination, via Dobbs, is a watershed, even if most states permit abortion and do not rush to ban it. Furthermore, Dobbs signals a significant change in the operation of “substantive due process.” The focus on (relatively) ancient history and traditions signals that this Court frowns on the use of the two Due Process Clauses as twin engines of constitutional innovation. Dobbs v. Jackson Women’s Health Org., 597 U.S. 215, 240 (2022). Likewise, the discarding of Grutter v. Bollinger in SFFA clearly signals that transformation is afoot. Students for Fair Admissions v. Presidents & Fellows of Harvard Coll., 600 U.S. 181, 211–25 (2023). SFFA is momentous because it overturned a highly permissive regime, one in which colleges could use race in their admissions. If SFFA fails to have an immediate impact on class composition, it will eventually as colleges get sued for flouting its constraints. SFFA also will spur suits against the use of race in governmental employment and contracting, with courts likely to strike down many such programs. And, of course, there are other constitutional changes afoot, regarding free exercise, the Establishment Clause, standing, takings, and more.
longstanding understandings and frameworks. As we understand it, a paradigm is a defining approach or framework, not an isolated ruling or action. Modest modifications of some obscure doctrine or practice are hardly the stuff of radical constitutional change. And yet, a single decision, or an approach that makes it possible, might rest on a particular paradigm, and the repudiation of that longstanding decision or approach might reflect a nascent, or a newly regnant, paradigm shift. We shall use the phrase “paradigm shift” synonymously with “radical change.”

A new paradigm is most evident when there are wholesale changes to judicial doctrines and constitutional practices. In one year, a view may be “off-the-wall,” or beyond the pale, or out of bounds. In another year, that same view may be very much in bounds, or on the table. In yet another year, that view might become the conventional wisdom. Moving from an era of constrained federal legislative power and robust judicial review of economic legislation to the post-New Deal world was a radical shift, as the Supreme Court discarded Commerce Clause precedents in favor of a far broader reading of federal legislative authority, and simultaneously signaled a reluctance to police economic legislation involving contracts or otherwise. Likewise, the Warren Court’s famous revolution marked an obvious realignment, as the Court shifted away from judicial deference to multiple forms of judicial intervention in American society, as, for example, by striking down all forms of racial segregation and longstanding practices in the domain of criminal procedure.

More subtly, a novel paradigm can influence decisions and practices without generating much in the way of new law. In particular, new constitutional theories and, just as importantly, new policy preferences can change the terms of the constitutional debate by shifting people’s understanding of what counts as outlandish, extreme, or mainstream. For instance, the doctrine of judicial restraint, so often advanced by the Warren Court’s critics, may have led the Burger

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26 Cf. generally Thomas Kuhn, The Structure of Scientific Revolutions (1962) (exploring how paradigms shift in scientific fields). We are using the idea of paradigm shift in a more colloquial way than Kuhn does.
30 Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (“The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases...has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.”); see, e.g., Stephen Garthbaum, New Deal Constitutionalism and the Unshackling of the States, 64 U. Chi. L. Rev. 483, 484 (1997) (arguing that the “New Deal Court engineered a massive project of constitutional centralization involving a fundamental shift in the relationship between the states and the federal government” by recognizing “expanded powers of Congress under the Commerce Clause”).
31 See, e.g., A. Kenneth Pye, The Warren Court and Criminal Procedure, 67 Mich. L. Rev. 249, 249 (1968) (“[T]here can be little doubt that the developments of the past fifteen years have unalterably changed the course of the administration of criminal justice in America.”).
32 Of course, the idea of judicial restraint has many faces. A commitment to stare decisis is one; respect for the decisions of the democratic process is another. Those who embrace one conception of judicial restraint might reject another.
Court to halt some of the more progressive changes that might have been in the offing, like a constitutional right to welfare and a bar on the death penalty.

Furthermore, an attachment to judicial restraint may have discouraged the Rehnquist Court from wholly overruling much in the way of precedent. The Rehnquist Court did not overturn *Miranda* or *Roe* or, arguably, much of consequence from the Warren and Burger Courts. Judicial minimalists like Justice Anthony Kennedy and Sandra Day O’Connor favored modest change but generally disfavored radical transformation. One might suppose that during the Rehnquist era, the paradigm shift was towards a form of judicial minimalism, albeit with a conservative bent. In other words, perhaps the Rehnquist Court’s radical constitutional change took the form of eschewing abstract theorizing and rejecting demands for radical doctrinal transformation. Judicial minimalism is no longer much with us today.

Finally, a paradigm shift occurs when the courts, or other institutions, fundamentally change how we speak about the Constitution. For instance, the move from more purposivist and intentionalist approaches to interpretation to a more (but hardly entirely) textualist stance has altered the way that litigants make their cases and the way that courts (and other institutions, including administrative agencies) author their opinions or otherwise talk about law. No competent litigant or judge can now focus on purposes, intentions, and spirits to the exclusion of some consideration of the text.

The renewed attention to text likely has had some influence on how officials decide what the Constitution and relevant statutes forbid, require, or permit. Some decisionmakers who claim to focus on the text mean not only to invoke textualism but wish to follow its strictures, whatever they are. Others may be less enthusiastic about textualism, but may feel the need to demonstrate that the theory has influenced their decisions. Lower courts, and executive officials, might be more textualist in order to reach results that will not be overturned by a more textualist Supreme Court. In any event, many of us—judges, scholars, politicians—now perceive the Constitution at least in part through the lens of textualism.

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35 Consider, for example, their incremental approach to change defended and practiced in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
36 On the bench, the most prominent adherent of this approach is J. Harvie Wilkinson. See Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance (2012).
37 See, e.g., Aaron-Andrew P. Bruhl, *Supreme Court Litigators in the Age of Textualism*, 76 FLA. L. REV. 59 (2024) (finding a “textualist shift” in Supreme Court briefing, although not one as large as that of the Court itself).
40 See, e.g., Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 484 (2015) (“as the Supreme Court became more favorably disposed toward textualist tools like linguistic canons in recent decades, so did the lower courts”). But see Lawrence Baum & James J. Brudney, *Two Roads Diverged: Statutory Interpretation by the Circuit Courts and Supreme Court in the Same Cases*, 88 FORDHAM L. REV. 823 (2019) (finding more mixed evidence of lower court compliance with Supreme Court interpretive methodologies).
As noted earlier, we aim to offer a conceptual map, setting radical constitutional change in a broader framework. Part I lays out a constitutional continuum, thereby offering a visual representation. We also describe the phenomenon in all its forms—the transformation of doctrine and practices (e.g., Roe, Grutter, and other decisions that are overturned), the alteration of argumentation (e.g., a focus on “discrete and insular minorities”), and the realignment or expansion of the mainstream, where once-unthinkable claims become part of it.

We consider the complicated relationship between radical constitutional change and theories of constitutional interpretation in Part II. Does the desire for constitutional change cause people to reconfigure, or modify, existing constitutional theories? Does that desire lead people to generate and adopt new constitutional theories? Are existing theories, say originalism or moral readings, retardants or accelerants when it comes to constitutional change?

Part III supplies two hypotheticals that seem to border on science fiction, one involving a claim that states must ban abortion and the other a claim that the Senate is unconstitutional in its current form. Some pro-life advocates already contend that the Constitution forbids abortion, meaning that states must extend equality under the law to unborn human life. These advocates seek to mainstream their view, and to convince officials (executive, legislative, and judicial) to adopt it. Claiming that the Senate is unconstitutional because it violates the equal protection component of the Due Process Clause of the Fifth Amendment seems unthinkable. And yet we suggest that under imaginable (though hardly likely) circumstances, the argument could be mainstreamed, even accepted. Our point is not to convince you that either claim will become the

41 We have learned a great deal from work on the transition from “off the wall” to “on the wall,” above all by Jack Balkin. See, e.g., Jack M. Balkin, Agreements with Hell and Other Objects of Our Faith, 65 Fordham L. Rev. 1703, 1729 (1997) (introducing the idea of “off the wall” interpretations of the Constitution as those which are “clearly unpersuasive at any given point in time, given the political and professional consensus of opinion”); Jack M. Balkin, Constitutional Redemption: Political Faith in an Unjust World 179–83 (2011) (further developing the idea of “off the wall” vs. “on the wall” as “a convenient shorthand for a more complicated array of views—call it the ‘spectrum of plausibility’—that well-socialized lawyers might have about a constitutional claim”); Jack M. Balkin, From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream, The Atl. (June 4, 2012), https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/ (describing the “changing perception of the individual mandate [in the Affordable Care Act]” as “an example of one of the most important features of American constitutional law—the movement of constitutional claims from ‘off the wall’ to ‘on the wall’”). Consider this illuminating (and charming) comment:

[My own judgment about what is “on the wall” and what is “off the wall”...is slowly but surely moving out of the mainstream...My sense of what is possible and plausible, what is competent legal reasoning and what is simply made up out of whole cloth is probably mired in an older vision of the Constitution that owes much to the Warren and Burger Courts as well as to the predominantly liberal legal academy in which I was educated, trained, and now teach.

Jack M. Balkin, Bush v. Gore and the Boundary Between Law and Politics, 110 Yale L.J. 1407, 1446 (2001). Our account overlaps with Balkin’s, though we speak of paradigm shifts, which involve large-scale shifts in understandings, pursuant to which previous opinions and rulings often seem baffling or from another jurisprudential world, and though we emphasize top-down as well as bottom-up processes. Other differences will emerge, though we will refrain from identifying all relevant contrasts.


43 See infra notes 125, 236.
doctrine or practice, only that certain forms of radical constitutional change may seem unlikely if not unthinkable until they belatedly occur.

Part IV addresses the varied reactions to radical constitutional change, with a particular emphasis on incredulity and horror. To those who discard a previous constitutional regime or conception, those superseded understandings often seem worse than a mistake; they are taken to be a desecration of the true Constitution. Think: The post-Lochner Court’s disdain for the Lochner era,44 the modern disparagement of Plessy v. Ferguson;45 the view that Roe v. Wade was a second Dred Scott.46

Those favoring the displaced paradigm often will regard the changes as bewildering and disheartening, a form of politics, or naked power, masquerading as law.47 From their point of view, the familiar and favored paradigm has been unceremoniously discarded by a pack of yahoos, or haven’t-got-a-clue abstract theorists, who reject the wisdom and justice reflected in the discarded paradigm.48 "This is not law; this is not our Constitution,” some will think and despair, and others will proclaim to anyone who will listen. The advocates of the new paradigm will be seen as defiling almost sacred conceptions of the Constitution. From the perspective of the old guard, the proponents of the new paradigm are gaslighting, engaging in a form of doublespeak, when they insist that “this is the Constitution.” 49

Indeed, once a paradigm has shifted completely, meaning that the new order is widely accepted, judicial opinions from a bygone era may seem exceedingly outdated, even jarring; they seem to come from a different planet, to be beyond the pale, and in some deep sense illegitimate. “How was all this plausible, much less the law?” a reader might ask. The opinions and materials might even be hard to read. Some of the relevant decisions might become part of the “anticanon.”50 Whether or not they are anticanonical, they seem to be written in an unfamiliar language – as, for example, when modern readers, steeped in textualism or originalism,

44 See, e.g., Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (“The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases…has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.”).
45 See, e.g., Students for Fair Admissions v. Presidents & Fellows of Harvard Coll., 600 U.S. 181 (2023) (contending that color-blindness was always the right interpretation of the Fourteenth Amendment); Rick Rojas, Homer Plessy’s Arrest in 1892 Led to a Landmark Ruling, Now He May Get Justice., N.Y. TIMES (Nov. 12, 2021), https://www.nytimes.com/2021/11/12/us/plessy-ferguson-pardon.html (describing the Plessy decision as “one of the most shameful decisions in the court’s history”).
46 See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 984–85, 998 (Scalia, J., concurring in part and dissenting in part) (citing Dred Scott v. Sandford, 60 U.S. 393 (1857)). The theme of desecration is an unmistakable part of Students for Fair Admissions v. Presidents & Fellows of Harvard Coll., 600 U.S. 181 (2023) (contending that color-blindness was always the right interpretation of the Fourteenth Amendment).
47 For a vivid example, see James J. Kilpatrick, The Southern Case for School Segregation (1962).
48 See the discussion of Burke, infra.
49 See LEARNED HAND, THE BILL OF RIGHTS (1965); Kilpatrick, supra note 46.
50 See Jamal Greene, The Anticanon, 125 HARV. L. REV. 380, 380 (2011) (“[T]he project of identifying the Supreme Court’s worst decisions is not solely a normative one. There is a stock answer to the question, not adduced by anyone’s reflective legal opinion but rather preselected by the broader legal and political culture…[these cases] are the American anticanon. Each case embodies a set of propositions that all legitimate constitutional decisions must be prepared to refute.”).

We discuss the drivers of radical change in Part V. There is a rich literature about social movements56—interest groups that seek to shift the Overton Window and, with luck and hard work, alter constitutional doctrine or practice.57 Think of citizens committed to racial equality, or LGBTQ rights, or the rights of gun owners. Here the courts and other officials make the constitutional changes sought by these movements. We expand the lens from bottom-up catalysts to encompass the paradigm shifts that originate from the top, meaning from legal elites. Judges, scholars, and lawyers have theories about the Constitution and are not merely reacting to bottom-up pressures. Top-down shifts include the textualist turn,58 the swing in favor of the unitary executive,59 and the 1970s scholarly push that almost mainstreamed a constitutional right to welfare.60 We believe that these shifts do not reflect mass movements. Instead, elites looked at the world, thought something was profoundly amiss, as a matter of law and perhaps policy, and sought to alter the debate and the world through constitutional argumentation and advocacy.61

Relatedly, a focus on interest-group politics and popular movements, and the judicial reaction to them, may distort our sense of paradigm shifts. Sometimes the President inaugurations radical constitutional change by undertaking actions previously deemed extreme or even unthinkable. Sometimes Congress triggers a paradigm shift in the breadth of congressional power by consistently pursuing new legislative avenues, as it did in the New Deal.62 Likewise,

51 198 U.S. 45 (1905).
52 323 U.S. 214 (1944).
54 381 U.S. 479 (1965).
56 An intriguing account of two such movements, focused on James Baldwin and William F. Buckley, Jr., is NICHOLAS BUCCOLA, THE FIRE IS UPON US (2019). Baldwin’s movement, as we might call it, had serious consequences for constitutional law in the 1960s and 1970s, as did Buckley’s decades later. There are stories to tell there, but we will not tell them here.
the states can influence what is unthinkable and mainstream by repeatedly taking action that creates new space in the mainstream.

Part VI briefly explores the relationship among Burke, Burkeanism, and radical constitutional change. While it might seem that Burkeanism stands opposed to radical constitutional change, the reality is more complicated and more intriguing.

A few words about the contours of our project are necessary. We address radical constitutional change without regard to whether the transformations are legitimate or illegitimate, misguided or long overdue. Ours is a descriptive project, not a normative one. Those who think that the Warren Court was something to celebrate or something to deplore might agree with our claims here, and the same is true for those who welcome or abhor the Roberts Court’s decisions. Everyone can ponder the phenomenon of radical constitutional change without revisiting their previous stances on doctrines and practices. Relatedly, we will not endorse (or reject) any theory of constitutional interpretation. Our view is that most, if not all, theories of constitutional interpretation have within them the materials necessary to foster radical constitutional change. Indeed, that is one of our central conclusions. Finally, nothing we say here should be understood to downplay or denigrate our preferred methodologies. One of us is a staunch originalist; the other is an ambivalent Burkean.53 But whether one is a Dworkinian,44 a believer in the Compact Theory,45 or an enthusiast for representation reinforcement,46 everyone can profit from pondering radical constitutional change by temporarily sidelong their preferred theory of interpretation.

We find ourselves in yet another era of radical constitutional change in doctrine, practices, and thought, a transformation that has left some feeling disoriented, disaffected, even gaslit. This makes it an apt moment for theorizing about such changes, and asking why and how they occur.

I. A Continuum of Constitutional Space

We begin by briefly mapping out the constitutional space, discussing the rough categories and guideposts. As we undertake our mapping project, we also briefly describe some of the jarring movements that are the hallmark of radical constitutional change.

As with many phenomena, the boundaries of radical change, or of a paradigm shift, do not have necessary and sufficient conditions. We will accumulate examples of radical change, but we will not fuss a great deal over definitional matters. It would be inadequate, of course, to say that we know it when we see it. But a shift from the approach of Carolene Products to originalism unquestionably counts as a radical change; so does the New Deal Court’s jettisoning of Lochner; so does the rise of the Carolene Products framework,47 as reflected in Brown48 and

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53 At least he thinks so, today.
44 See RONALD DWORKIN, LAW’S EMPIRE (1986).
45 See JOHN C. CALHOUN, EXPLOSION AND PROTEST (1829).
46 See ELY, supra note 16.
Baker v. Carr,\(^{69}\) so does the near-obliteration, as we see it, of substantive due process in Dobbs;\(^{70}\) so does the rise of modern free speech law in New York Times v. Sullivan\(^ {71}\) and Brandenburg v. Ohio.\(^ {72}\) As noted earlier, radical change can be methodological, as in the adoption of judicial restraint (understood as a strong reluctance to invalidate legislation) or the embrace of originalism (which can of course be understood as a form of restraint). It can be doctrinal, as reflected in the Supreme Court’s cases about the First Amendment, the Fourteenth Amendment, and Article II, section 1.\(^ {73}\) And it can be practical, as in the case of our modern conception of the presidency as a popular institution that serves as an engine of lawmaking and policy innovation.

Radical constitutional change implies significant movement, even disruption, within constitutional law. Radical constitutional change is easiest to identify when it occurs abruptly (or relatively so). When a driver of constitutional change—often the Supreme Court—transforms many foundational doctrines within a short period, say a year or two, the transformation might seem obvious to all. Nonetheless, constitutional law can change more slowly but nonetheless do so in a way that amounts to radical constitutional change. For instance, the multitude of changes to the constitutional understanding of the presidency constitute a paradigm shift even though they have taken place over centuries. We have gone from an office principally focused on law execution to a powerful politician with a popular mandate to craft and implement an extremely robust policy agenda that stretches to matters of welfare, defense, public schooling, medicine, and beyond.\(^ {74}\) That change in focus has had numerous constitutional consequences. Likewise, over the course of decades, if not centuries, we went from a regime where Congress was by far the most important constitutional actor, with courts being relatively marginal, to one where the courts occupy a more central role.\(^ {75}\) If one compares the Supreme Court of John Jay with the Supreme Court of John Roberts, one is examining radically different institutions.

While radical constitutional change is more obvious when multiple doctrines or provisions are being reconceptualized, even a single amendment or clause can be the seed of radical constitutional change. The Contracts Clause was the principal instrument of invalidation of state legislation in the early 19th century; it might well have been the source of the most important constitutional right, as least as judged by the attention paid to it by the courts.\(^ {76}\) But the judicial internment of the Clause has been quite successful, meaning that there has been a

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\(^{71}\) 376 U.S. 254 (1964).
\(^{74}\) SAIKRISHNA BANGALORE PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS 162 (2020).
radical constitutional change. We tend not to see it that way because most are unaware of the revolution and the few that are aware of it tend to favor it.

To give a more salient example, the Supreme Court has created what might be seen as an entire Constitution from the various provisions of the Fourteenth Amendment. When it comes to rights, that Amendment’s influence far outstrips any others because of a radical reconceptualization of its meaning and scope. Slaughterhouse’s cramped reading of the Fourteenth Amendment was followed by Lochner’s precursors, each of which adopted a broad interpretation of the Due Process Clause. And Lochner’s focus on freedom of contract, as part of the “liberty” protected by the Due Process Clause, was eventually shifted elsewhere to so-called privacy rights and to the incorporation of the Bill of Rights against the states. The creation of this robust Fourteenth Amendment regime, without more, constituted a radical constitutional change. So too would its total destruction, and so too is its partial destruction in Dobbs.

Obviously, incremental developments or adjustments fall within a different category and do not, by definition, count as radical change. Casey strikes us as an incremental adjustment to Roe and the same could be said of the carve-outs that the Rehnquist Court made to the Warren Court’s criminal procedure rulings. These were modest changes within a constitutional regime, and not the stuff of radical constitutional change. To be sure, we can identify intermediate cases, where reasonable people might disagree about whether certain change is incremental or is instead part of a radical transformation. Indeed, one might always say what Chou En-Lai said in 1972 when asked what he thought about the French Revolution: “It is too soon to tell.” Sometimes we do not know whether we are in the midst of a constitutional transformation until the new era is well underway. Something is happening here, but we do not know what it is (yet).

77 Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398 (1934).
79 Again, this is a descriptive claim, not a normative one.
82 Our focus is on the Supreme Court and the radical constitutional changes it delivers. This may make radical constitutional change seem like the presidential regime change on which American political scientists have focused. There are indeed parallels. Certain presidents help establish a “regime,” where one political party dominates legislatively and electorally. According to Stephen Skowronek, there have been six such presidential regimes. Likewise, within a constitutional paradigm, one likewise can speak of an established regime. There was a Lochner regime, a New Deal regime, a Warren Court regime, and now a Roberts Court regime. But in our view, it would be a mistake to regard paradigm shifts as akin to presidential regimes, with the Supreme Court standing in place of a Jefferson or a Reagan. To begin with, a constitutional paradigm shift is not invariably a judicial phenomenon. Other institutions—the states, the federal executive, and Congress—can generate radical change no less than the courts. Indeed, they have done so over the course of American history. We leave the similarities and differences to others.
84 We have said that the Rehnquist Court adopted minimalism, which can be seen as a radical step in its way. Still, the Rehnquist Court cannot be said to have inaugurated radical change in the same way that the post-Lochner Court did, or the Warren Court did, or the Roberts Court seems to be doing.
86 Whether Mr. En-Lai was referring to the 1789 Revolution or student riots of 1968 is much disputed. But one point is undisputable. Someone can find themselves amid a revolution and not perceive it as such until much later.
A. Outlandish No More

In 1930, it would have been outlandish to suggest that the U.S. Constitution forbids racial segregation;\textsuperscript{87} calls for a rule of one person, one vote;\textsuperscript{88} requires (what are now known as) \textit{Miranda} warnings;\textsuperscript{89} or imposes constitutional restrictions on libel law.\textsuperscript{90} By 1970, what was once outlandish, even unthinkable, had become the law of the land. In that year, it would have been outlandish to suggest that the U.S. Constitution requires states to recognize same-sex marriage.\textsuperscript{91} broadly protects commercial advertising.\textsuperscript{92} and recognizes an individual right to possess firearms.\textsuperscript{93} By 2015, all those propositions were accepted by the Supreme Court.\textsuperscript{94}

In the 1960s and 1970s, some prominent law professors, judges, and lawyers regarded the Warren Court as lawless.\textsuperscript{95} Their perception of that Court likely reflected old lessons imbibed during the New Deal, where criticisms of the \textit{Lochner} Court were prominent and dominant. Before the New Deal, many justices imagined that the Constitution embraced certain political commitments, often going by the name of “laissez-faire.” For the \textit{Lochner} skeptics, however, the paradigm of an illegitimate judicial ruling was \textit{Adkins v. Children’s Hospital},\textsuperscript{96} striking down minimum wage legislation; their model of a legitimate judicial ruling was \textit{Ferguson v. Skrupa},\textsuperscript{97} upholding economic legislation under the “rational basis” test. The \textit{Lochner} skeptics believed that the founding document allowed wide scope for the operation of democratic processes. For the most part, the people would decide.\textsuperscript{98}

To the critics of the Warren Court’s constitutional paradigm, the beau idéal of a judge was Oliver Wendell Holmes. Their model of a judicial opinion was his \textit{Lochner} dissent.\textsuperscript{99}

\begin{itemize}
\item \textsuperscript{88} Reynolds v. Sims, 377 U.S. 533 (1964).
\item \textsuperscript{89} Miranda v. Arizona, 384 U.S. 436 (1966).
\item \textsuperscript{91} In fact, in 1972 the Supreme Court dismissed an appeal of Minnesota’s denial of a marriage license to a same-sex couple, finding no “substantial federal question.” See Baker v. Nelson, 409 U.S. 810, 810 (1972).
\item \textsuperscript{92} See Bigelow v. Virginia, 421 U.S. 809 (1975).
\item \textsuperscript{94} See supra notes 3–8.
\item \textsuperscript{96} 261 U.S. 525 (1923).
\item \textsuperscript{97} 372 U.S. 726 (1963).
\item \textsuperscript{98} See James Bradley Thayer, \textit{The Origin and Scope of the American Doctrine of Constitutional Law}, 7 Harv. L. Rev. 129 (1893). A valuable discussion of Thayer’s motivations, emphasizing what he sees as Thayer’s political conservatism and desire to activate political focus on combating ill-considered progressivism, is Mark Tushnet, \textit{Thayer’s Target: Judicial Review or Democracy?}, 88 NW. U. L. Rev. 9 (1993). For a definitive account of how a version of Thayerism came to have a short-lived triumph, see Brad Snyder, \textit{Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment} (2022).
\item \textsuperscript{99} Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).
\end{itemize}
The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question of whether statutes embodying them conflict with the Constitution of the United States.

For this cohort of law professors, judges, and lawyers, the Warren Court was repeating the mistakes of the Lochner era – imposing radically different values, to be sure, but with the same hubris. Brown v. Board of Education, it was said, violated the necessary commitment to “neutral principles.” Roe v. Wade, it was said, was “not constitutional law” and had “almost no sense of an obligation to try to be.” The Warren Court’s critics lamented that what had long been thought to be illegitimate was now somehow taken seriously. In fact, what the Court was doing was lawless, made up, an assertion of will, a naked exercise of power.

Because Brown has become so iconic, and is so widely accepted, it is difficult, jarring, and keenly illuminating for contemporary judges and lawyers to try to see how contested it was at the time. In a much-discussed and widely admired Harvard Law Review Foreword, Herbert Wechsler famously rejected it. In his view, “the question posed by state-enforced segregation is not one of discrimination at all.” Instead, one had to consider whether integration consisted of a “denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved.”

He then put his finger on what he thought to be the core issue: “Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?” Wechsler’s answer to that question: “I should like to think there is, but I confess that I have not yet written the opinion.” In his view, neither he nor the Court was quite up to the task of justifying Brown.

Wechsler was not an originalist, which fit the time; originalism was not a widely accepted approach to constitutional law. But some of the attacks on Brown were in the originalist key, and the critics were incredulous at what they saw as the Court’s radical transformation of the Fourteenth Amendment. At the time, James J. Kilpatrick offered some of the most detailed

100 See Snyder, supra note 98.
102 See generally Wechsler, supra note 95.
103 410 U.S. 113 (1973).
105 See generally Wechsler, supra note 95.
106 Id. at 34.
107 Id.
108 Id.
arguments in support of that incredulity. Kilpatrick depicted Brown as utterly lawless, a form of judicial usurpation, a radical shift justified by nothing more than the moral views of the justices, who understood neither the Constitution nor the South. Kilpatrick noted that the very Congress that proposed the Fourteenth Amendment “provided for racially [segregated] schools in the District of Columbia.” He added that for “a long period of years following adoption of the Amendment, States both North and South continued to operate separate [segregated] schools, without protest or interference of any sort from Congress.” For Kilpatrick, “the States that ratified the amendment did not understand or contemplate that it was intended to abolish segregation in schools: One after another, they provided for racially separate schools in the same breath with which they ratified the amendment.” Hence his final verdict on Brown: the justices “substitute[d] their own notion of what was right for the plain history of what was constitutional.”

One need not think that Wechsler posed the right question, or that Kilpatrick got the history right, to emphasize the historical point: At the time of Brown, prominent critics felt that they had been gaslit. In their view, the Court effectively amended the Constitution, reflecting a particular view of “what was right,” for the actual document. And it is worth emphasizing that Wechsler, a kind of moral reader, thought that Brown was hard to defend on moral grounds, while Kilpatrick, an originalist, thought that on originalist grounds, Brown was preposterous. Learned Hand, an advocate of judicial restraint, agreed. He saw Brown as a rerun of Lochner, a “patent usurpation” of the democratic process by which the Court transformed itself into “a third legislative chamber.”

Today, some prominent law professors, judges, and lawyers believe that the Roberts Court has become lawless. These critics were educated in the shadow of the Warren and Burger Courts, when (they believed) the justices understood the Constitution in a way that maintained essential fidelity to the document’s defining commitments. Many of them suppose that the Constitution, rightly understood, protects “discrete and insular minorities” and subjects “legislation which restricts . . . political processes” to heightened scrutiny. They thought that as the founding document was understood in (say) 1990, constitutional law was hardly perfect but was sound, broadly speaking, and that existing doctrine provided a suitable launching point for further welcome developments.

But the Roberts Court, some think, has become wholly political. In the view of the admirers of the Warren and Burger courts, the current Court is reading the Constitution in a way

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110 Id. at 163–65.
111 Id. at 161.
112 Id.
113 Id. at 161.
114 Id. at 166.
117 See, e.g., Michael J. Klarman, The Degradation of American Democracy—And the Court, 134 HARV. L. REV. 1 (2020); Mark A. Lemley, The Imperial Supreme Court, 136 HARV. L. REV. F. 97, 97 (2022) ("Armed with a new,
that tracks the most extreme views of the Republican party. The critics seem to feel that they are experiencing a form of constitutional gaslighting. They are being told one thing, when the reality is quite another. The critics believe that “originalism” is a mask. Whether or not they are right, what has long been thought to be extreme, even outlandish is now taken seriously, and a large portion of the right’s legal agenda is in the domain of the possible. In short, we are in the midst of a constitutional paradigm shift. The constitutional plates are shifting, sometimes over sizable distances, and the grinding and the rumbling are causing great unease among the acolytes of the previous dispensation. The old, comfortable, and comforting regime is being displaced by what they see as a jarring, and fundamentally mistaken, new order.

Of course, every paradigm shift sidelines certain perspectives that were once accepted, moving them from the mainstream to the margin and beyond. Consider the following views:

1. The Constitution allows the states to segregate people on the basis of race. Brown v. Board of Education was wrongly decided.
2. The Constitution allows the national government to segregate people on the basis of race. Bolling v. Sharpe was wrongly decided.
3. The Constitution allows states to criminalize blasphemy; nothing in the First Amendment dictates otherwise.
4. The Bill of Rights does not apply to the states.
5. The First Amendment does not forbid Congress to ban speech that it believes to be dangerous.

Today, all these stances count as outlandish, at least in the sense that a nominee to the Court who favored all of them, or indeed any one of them, would almost certainly be rejected for that

nearly bulletproof majority, conservative Justices on the Court have embarked on a radical restructuring of American law across a range of fields and disciplines.”); Sheldon Whitehouse, Conservative Judicial Activism: The Politicization of the Supreme Court under Chief Justice Roberts, 9 HARV. L. & POL’Y REV. 195 (2015); Nina Totenberg, The Supreme Court is the Most Conservative in 90 Years, NPR (July 5, 2022), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative.
119 See, e.g., Editorial, The Supreme Court Isn’t Listening, and It’s No Secret Why, N.Y. TIMES (Oct. 1, 2022), https://www.nytimes.com/2022/10/01/opinion/supreme-court-legitimacy.html (“Over the past several years, the court has been transformed into a judicial arm of the Republican Party.”); Nicholas O. Stephanopoulos, The Anti-Carolene Court, 2019 SUP. CT. REV. 111, 178 (2019) (arguing that the Supreme Court’s decisions involving the political process “are consistent with the recommendations of conservative elites” and “empirically benefit the Republican Party, whose presidents appointed a majority of the sitting Justices”).
123 See Pleasy v. Ferguson, 163 U.S. 537 (1896).
124 347 U.S. 497 (1954). We note, however, that the analysis in Bolling is not uncontroversial, and there is considerable angst about it. See, e.g., Gregory Dolin, Resolving the Original Sin of Bolling v. Sharpe, 44 SETON HALL L. REV. 749 (2014).
126 See Barron v. Baltimore, 32 U.S. 243, 250 (1833) (“These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them”).
reason. And yet there was a time when every one of these positions was mainstream. Indeed, there was a time when each of them was essentially taken as a given. Perhaps one or more of them will be taken as given again. We don’t expect so. But the world is full of surprises.

**B. Unthinkable, Outlandish, Extreme**

In terms of what we have in mind, there is a continuum from unthinkable views, to outlandish views, to extreme views. It is difficult, of course, to aim for objective or agreed-upon criteria for applying these categories. You might think that a view is unthinkable; we might think that it is merely extreme. Still, some things are clear. The claim that the Constitution guarantees the right to rape is essentially unthinkable; if someone makes that claim, a student of constitutional law would think that they are making a horrible joke or that they have lost their mind. This claim will always be unthinkable, or so we hope.

Other constitutional claims have more mobility, or at least the potential for it. In (say) 1950, the view that the Constitution guarantees the right to same-sex marriage would have been regarded as unthinkable. In 2005, that view would have been extreme, but it was far from unthinkable. At the present time, the view that the Constitution guarantees a right to polygamous marriage is extreme and would seem outlandish to most, but it is not exactly unthinkable.\(^\text{126}\)

Now consider the following views:

6. The Constitution does not allow administrative agencies to issue any regulations with the force and effect of law (a super-nondelegation doctrine).\(^\text{127}\)
7. The Constitution forbids states to allow abortions.\(^\text{128}\)
8. The Constitution forbids states to recognize same-sex marriages.
9. The Constitution allows the government to punish speech that is critical of the president.
10. The Constitution allows states to require school prayer, but only if it recognizes the divinity of Jesus Christ.

As of now, these positions are at least outlandish. At the same time, two of the positions are not exactly unthinkable. Position (6) has been vigorously defended.\(^\text{129}\) The same is true of


\(^{127}\) See Philip Hamburger, *Is Administrative Law Unlawful?* (2014). This is a super-nondelegation doctrine in the sense that it does not merely ban Congress from granting broad discretion to agencies; it forbids agencies to issue binding rules even if their discretion has been sharply constrained.

\(^{128}\) See Adrian Vermeule, *Common Good Constitutionalism* 41 n.103 (2023) (“I believe that there is a straightforward argument, not on originalist grounds, that due process, equal protection, and other constitutional provisions should be best read in conjunction to grant unborn children a positive or affirmative right to life that states must respect in their criminal and civil law. This view is not a mere rejection of *Roe v. Wade*, but the affirmation of the opposite right, and would be binding throughout the nation.”).

\(^{129}\) See Hamburger, supra note 127.
position (7).\textsuperscript{130} It is difficult, but not impossible, to envision a situation in which a majority of the Court ultimately embraces positions (6) and (7). Imagine, if you would, a shift in the nation and in the composition of the Court – a shift comparable, perhaps, to the shift that occurred between (say) 1980 and 2024, or even between 2015 and 2024. Imagine that a large percentage of the population favors position (7), or at least is open to it, and that position (6) also has some appeal, particularly among elite lawyers. Imagine that the Court includes some justices who were educated in a period in which positions (6) and (7) were the subject of serious, reasoned discussions in law schools and law reviews. Would it be so shocking if positions (6) and (7) became law? Any more shocking than what happened between 1954 and 1972, or between 1990 and 2024?

By contrast, positions (8), (9) and (10) may seem unthinkable. To our knowledge, Position (8) has not been defended. Position (9) could not be accepted without rejecting both the prohibition on viewpoint discrimination\textsuperscript{131} and the clear-and-present danger test.\textsuperscript{132} Position (10) could not be accepted without a repudiation of existing understandings of both the Free Exercise and Establishment Clauses.\textsuperscript{133} Under what circumstances could positions (8), (9) and (10) become the law? Position (9) might seem utterly bizarre. But something like position (9) was, in fact, the operative law during the presidency of John Adams, for the Sedition Act made it a crime to publish a “scandalous and malicious writing” about the president.\textsuperscript{134} Many went to jail for their criticisms of the government.\textsuperscript{135}

Position (10) might seem even more fanciful and take us into the realm of science fiction. Yet it does not take a great deal of creativity to sketch an outline of how that position could become the law. The United States would have to experience radical political change – far more radical, perhaps, than anything that happened in the twentieth century. But if the country did experience that transformation, one could imagine that even without a constitutional amendment, the political branches and the Supreme Court could converge on something like positions (9) and (10).\textsuperscript{136} It would not be impossible even to imagine what the relevant arguments and judicial opinions might look like (though we spare readers a sketch of them).

C. The Mainstream

We began with examples of the move from the margin to the mainstream. But we have not yet clarified what we meant by the “mainstream.” In short: We mean a range of views that


\textsuperscript{134} Sedition Act, Ch. 74, 1 Stat. 596 (expired 1801).

\textsuperscript{135} See generally WENDELL BIRD, CRIMINAL DISSERT: PROSECUTIONS UNDER THE ALIEN AND SEDITION ACTS OF 1798 (2020).

many (or most) legal elites regard as within the realm of the plausible readings of the Constitution. We believe that the perceptions of legal elites matter because most of those outside the legal profession have little or no familiarity with many constitutional claims, much less a conception of what set of constitutional claims are inside, or outside, the legal mainstream.

The claim that the Due Process Clause or the Equal Protection Clause protects same-sex sodomy was outside the mainstream in the 1960s. But it was firmly within the mainstream by the time of Bowers v. Hardwick.\textsuperscript{137} We know this because more than a few justices objected to the Georgia law forbidding same-sex sodomy.\textsuperscript{138} In fact, the assertion likely was in the mainstream before Bowers, because many lawyers had previously voiced it.\textsuperscript{139} The claim that the Constitution limits or constrains, to some degree, the congressional delegation of broad discretion in making policy might have been outside the mainstream in the 1970s and 1980s.\textsuperscript{140} But with the dissenting opinion in Gundy v. United States, it is firmly in the mainstream now.\textsuperscript{141} (Note that this is not the super-nondelegation doctrine of position (6) above; it is the nondelegation doctrine itself.)

Likewise, the view that the Constitution fully protects sex between consenting adults has been in the mainstream after Lawrence v. Texas;\textsuperscript{142} in that the Court might yet strike down laws against adultery, certain forms of incest, and the like; it is within the set of views regarded as plausible by legal elites. And yet the Court might uphold such laws, drawing distinctions among forms of sexual activity. Likewise, the assertion that the President must comply with a subpoena from Congress for official records is within the mainstream, as is the position that the separation of powers shields the President, in some measure, from intrusive congressional oversight.\textsuperscript{143} The former stance is voiced by members of Congress from time to time and the latter reflects the stance of the executive branch;\textsuperscript{144} both are within the set of views regarded as plausible by legal elites.

Like our other concepts—unthinkable, outlandish, extreme—these are a matter of collective perceptions, and on particular issues, reasonable people might differ. How members of the legal elite treat constitutional claims matters. The respectful consideration of a constitutional claim suggests that it is more likely within the mainstream. We are more apt to give respectful consideration to a perspective that seems plausible, as reflected by our sense of what others think. Yet a quick and dismissive attempt to mark a particular claim as “outside the mainstream”
does not mean that the view is, in fact, outside the mainstream. Some members of the legal elite may have a myopic (and parochial) view, where the mainstream is composed of their perspective and rather little else. On other occasions, saying that some reading is outside the mainstream is a rhetorical move -- an attempt to cast that view as beyond the pale. For instance, the claim that the Constitution does not protect abortion rights was in the mainstream before Dobbs, even as many rejected the claim as extreme or outlandish.\footnote{Since 1989, roughly one-third of Americans have supported overturning Roe. See Megan Brenan, \textit{Steady 58\% of Americans Do Not Want Roe v. Wade Overturned}, \textit{Gallup} (June 2, 2022), https://news.gallup.com/poll/393275/steady-americans-not-roe-wade-overturned.aspx. Within the legal community, some scholars have long opposed the claim that the Constitution safeguards abortion rights. See infra note 236.}

We suppose that if a Justice of the Supreme Court makes a claim about the Constitution, that assertion is almost certainly in the mainstream, whatever its status before.\footnote{We say “almost certainly” because a Justice might have a view that is broadly understood to be exotic. See, e.g., \textit{Sierra Club v. Morton}, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting).} Further, if the President says something about the Constitution, it is more likely than not to be part of the mainstream.\footnote{We say “more likely than not” because a President might have a view that is broadly understood to be exotic.} When prominent and respected people say something about our Constitution, it tends to influence others, without regard to their previous views on the subject. Relatedly, when justices and presidents voice opinions on constitutional law, they sometimes do so in a way that advances a policy or a political movement, meaning that people who favor either the policy or the movement will coalesce around the constitutional claim. If a President believes that presidents should have absolute criminal immunity for their official acts,\footnote{See, e.g., \textit{Trump Urges US Supreme Court to Endorse ‘Absolute Immunity’ for Ex-Presidents}, \textit{Reuters} (Mar. 19, 2024), https://www.reuters.com/world/us/trump-files-us-supreme-court-brief-arguing-immunity-prosecution-2024-03-19/.} a good portion of his or her supporters will come to see the wisdom of a stance that, minutes before, they had never even considered (or might even have rejected). “Of course, the President has absolute criminal immunity,” they will seriously intone. Likewise, if a Justice favors a new and expansive reading of the Takings Clause, we suppose that plenty of property owners will applaud that reading even if it never had been voiced before.

For the most part, the mainstream partly reflects, and encompasses, existing doctrine or practices. What the Supreme Court has declared, and what constitutional actors are saying and doing, influences the sorts of arguments one thinks are plausible. What the Court says, and what political actors say and do, influences what is seen as normatively right,\footnote{See Morris Cohen, \textit{The Basis of Contract}, 46 \textit{Harv. L. Rev.} 553, 582 (1933) (discussing “the normative power of the actual” and its origins from the work of Georg Jellinek).} and also has an anchoring effect on perceptions of what changes are plausible and what is extreme.

Yet occasionally (if rarely), the mainstream departs from longstanding judicial doctrine. In \textit{Trump v. Hawaii},\footnote{585 U.S. 667 (2018).} one might say that the Court’s belated and remarkable repudiation of \textit{Korematsu} reflected a sense that the legal mainstream had long shifted away from \textit{Korematsu}. Recognizing this, and facing sharp criticism from Justice Sonia Sotomayor that the majority was
adopting a *Korematsu*-like stance, the Court denounced *Korematsu* in a case where the majority ultimately believed that the case was not relevant, much less a dispositive precedent.151

D. Introducing the Continuum

Figure 1 offers our rough sense of the constitutional space, with areas marked unthinkable, outlandish, extreme, and mainstream. There is also an area of judicial doctrine or political practice that represents the status quo. Some aspects of doctrine and practice are clear, but because some are not, it makes sense to think of the status quo as a portion of the line rather than a single point. Because we are mostly discussing the constitutional space in left/right terms, it is a one-dimensional line. But a more thorough representation of the space would depict multiple dimensions (for example, from more libertarian to less libertarian). Further, on either side of the status quo, there is a mainstream and areas of extremity, outlandishness, and unthinkable. As we have envisioned it, there is a certain symmetricity around the axis. But, again, it need not be so.

Figure 1

On the right side of the spectrum, saying that the Constitution requires Congress to subsidize childbirth is unthinkable (leave aside the fact that we—and you—have just thought it). Arguing that the state governments cannot fund public schools because they are unconstitutional is outlandish but not exactly unthinkable.152 Asserting that former Presidents cannot be prosecuted at all seems extreme.153 And a claim that the Constitution forbids congressional grants of rulemaking authority that are extremely open-ended is now firmly in the mainstream, albeit on its right bank.154

151 Id. at 710 (“The dissent’s reference to *Korematsu*…affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—‘has no place in law under the Constitution.’”).
153 Cf. Brief for the Petitioner at 10, Trump v. United States, No. 23-939 (Mar. 19, 2024) (arguing that “a former President has absolute immunity from criminal prosecution” for official acts).
154 For more information on the nondelegation doctrine, see infra notes 174, 263.
For progressives, there is an array of parallel claims. Arguing that the Constitution forbids incarceration is unthinkable. Claiming that the Constitution requires Social Security, or a similar retirement scheme, is outlandish. An assertion that states must subsidize the exercise of campaign speech is extreme. Declaring that Congress faces no judicially enforceable subject matter limits on its legislative powers is within the left side of the mainstream.

Our aim is not to supply an unquestionably accurate spatial description of various constitutional claims, much less to insult or offend any that might hold these positions. For our purposes, all that matters is that different constitutional claims have varying levels of current constitutional plausibility. People have diverse views about what the Constitution permits or requires. But observers will perceive those perspectives in different ways, depending upon their perception of the mainstream and, perhaps, their own priors. And, of course, no one is entitled to have others regard their favored positions as mainstream, much less correct.

II. The Constitution and Theories of Interpreting It

What about the Constitution and theories about how to interpret it? We have said little about either, as if they were irrelevant. But obviously they are central. The Constitution, and the various theories of interpretation, help organize our constitutional thoughts and assist us in navigating new constitutional disputes.

Recall that in the 1960s and 1970s, prominent constitutional scholars thought that the Court had essentially abandoned the founding document (as amended),156 and that in the current era, prominent scholars think the same thing.157 Here we discuss theories of interpretation and whether they permit, spur, or curb radical constitutional change.

A. The Constitution Itself

We should make some distinctions here. “The Constitution” might refer to the founding document itself – to its four corners, so to speak. Some people endorse “textualism,” understood as the view that the Constitution must be interpreted conformably to its text.158 Other people endorse “semantic originalism,” understood as the view that the Constitution must be understood in accordance with its original semantic meaning.159 For textualists and semantic originalists, it would be unacceptable to say that a teenager may serve as president, that there can be two presidents, or that the executive power is vested in Congress.160 But textualism and semantic

156 See supra notes 95–115 and accompanying text.
157 See supra notes 115–117 and accompanying text.
160 U.S. CONST. art. II, § 1.
originalism seem to leave many questions open. One could say, consistently with textualism and semantic originalism, that mandatory school prayer is permissible or not permissible;\textsuperscript{161} that the Bill of Rights is or is not incorporated by the Fourteenth Amendment;\textsuperscript{162} that the First Amendment does or does not protect blasphemy;\textsuperscript{163} that the Constitution does or does not allow agencies to issue regulations with the force and effect of law.\textsuperscript{164}

Because textualism and semantic originalism leave open a wide space for reasonable disagreement on a host of issues, one must wade through and consider many plausible interpretations. Given the considerable interpretive space, textualism and semantic originalism permit some forms of radical constitutional change, in the sense that a constitutional paradigm shift, from Time 1 to Time 2, can occur even if all judges embrace one or the other theory.

Now suppose that one embraces the view that the Constitution should be interpreted consistently with its original public meaning.\textsuperscript{165} On that assumption, courts and the political branches ought always to adhere to that original public meaning. Following the original public meaning signals that some radical constitutional movements will be foreclosed in principle. Suppose, for example, that the First,\textsuperscript{166} Second,\textsuperscript{167} Fifth,\textsuperscript{168} and Fourteenth\textsuperscript{169} Amendments have meanings that are not only fixed but also ascertainable and specific. If the existing doctrines and practices reflect that original meaning, radical constitutional change should not occur and indeed, even modest adjustments should not occur.

But consider four points. First, and as just suggested, public meaning originalists might well insist upon a constitutional paradigm shift if previous decisions were not rooted, and did not purport to be rooted, in the original public meaning. Suppose, for example, that the edifice of doctrine, with respect to freedom of speech or free exercise, was erected in defiance of the original public meaning. In that case, radical change might be required. Public meaning originalists have vigorously debated the question of whether original meanings should prevail over precedent.\textsuperscript{170} Some public meaning originalists have argued that much of the Supreme Court’s jurisprudence is wrong as a matter of original public meaning and that the Court ought to

\textsuperscript{163} See Note, Blasphemy and the Original Meaning of the First Amendment, 135 Harv. L. Rev. 689, 690 (2021).
\textsuperscript{164} See sources cited supra note 263.
\textsuperscript{166} See, e.g., Eugene Volokh, Symbolic Expression and the Original Meaning of the First Amendment, 97 Geo. L.J. 1057 (2009).
\textsuperscript{167} See Dist. of Columbia v. Heller, 554 U.S. 570, 625 (2008) (embracing “the original understanding of the Second Amendment”).
\textsuperscript{169} See, e.g., Michael B. Rappaport, Originalism and the Colorblind Constitution, 89 Notre Dame L. Rev. 71 (2013).
\textsuperscript{170} For discussion of how originalist judges should grapple with non-originalist precedents, see Amy Coney Barrett, Originalism and Stare Decisis, 92 Notre Dame L. Rev. 1921 (2017); Randy E. Barnett, Trumping Precedent with Original Meaning: Not as Radical as It Sounds, 22 Const. Comment. 257 (2005); John O. McGinnis & Michael B. Rappaport, Reconciling Originalism and Precedent, 103 Nw. U. L. Rev. 803 (2009).
revamp many of its doctrines. On one view, originalists should also care about stability and should be willing to overrule precedents only in cases of demonstrable error, as where there is no serious debate about whether a prior ruling is inconsistent with the original public meaning.

Second, public meaning originalists should acknowledge that novel historical research might uncover surprises about original public meaning. We might have had a clear view in 1990 about the original public meaning of some clause, but we might be clear, now, that our previously clear view is clearly wrong. For instance, at Time 1 suppose we thought that the original public meaning of Article I, section 1 forbade Congress from granting broad discretion to the executive. In that hypothetical era, the doctrine and practice reflected that constraint. At Time 2, suppose new research establishes that Article I does no such thing. That shift in our conception of the original public meaning portends radical change, as Congress delegates more generously under a newly discovered, and less confining, original public meaning.

Third, public meaning originalists should acknowledge the possibility that understood in terms of its original public meaning, some provisions might consist of abstract ideas or principles whose specific meaning was understood to depend on context, and hence to change over time. For instance, the Privileges or Immunities Clause might call for results now that are radically different from the results it demanded in 1900. Some originalists have argued that the Clause implicitly takes into account the number of states that recognize a right. If a supermajority of states come to recognize a new right, the breadth of the Clause expands. This originalist claim necessarily introduces a level of dynamism, and possibly radical change, in the definition of constitutional rights. Of course, it is true that some provisions might freeze things in place.

Fourth, some public-meaning originalists have devoted a great deal of attention to the “construction zone.” In some cases, the original public meaning leaves certain matters open, and judges are engaged in construction, rather than elicitation of meaning. Once interpreters are in the construction zone, we cannot rule out the possibility of radical changes over time, perhaps because of changes in background facts, perhaps because of changes in relevant values. It is

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172 For an argument about the eighteenth-century status of demonstrably erroneous precedent, see Caleb Nelson, Stare Decisis and Demonstrably Erroneous Precedent, 87 VA. L. REV. 1 (2001). For another valuable discussion, see Mark Moller & Lawrence B. Solum, The Article III “Party” and the Originalist Case Against Corporate Diversity Jurisdiction, 64 WM. & MAR. L. REV. 1345, 1439 (2023).


175 See RANDY E. BARNETT & EVAN BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 43–44 (2021) (arguing that “the set of privileges or immunities protected by this clause was not closed” and that “the original meaning of ‘privileges or immunities’ of US citizens included…later-developing rights” that were “not fully specified by the constitutional text”).

176 Id. at 246–47 (arguing that “broad state consensus” can identify rights that fall under “privileges or immunities”).

177 See generally Lawrence Solum, The Interpretation-Construction Distinction, 27 CONST. COMMENT. 95 (2010).
possible to read *Brown v. Board of Education* in that way. Those who believe in a broad construction zone might be prepared to welcome or generate radical change.\(^{179}\)

Leaving originalism to one side, let us now suppose that one embraces the view, associated with Ronald Dworkin, that judges are, and should be, “moral readers.” Under that view, judges should fit their moral readings with the existing legal materials and also construe those existing legal materials in the most attractive light.\(^{180}\) If judges are indeed moral readers, either some of the time or all of the time, no one should be surprised by radical constitutional change. The Court’s opinion in *Brown* can certainly be understood as a moral reading.\(^{181}\) In *Obergefell v. Hodges*,\(^ {182}\) the Court seemed to embrace moral readings in explaining why the content of the idea of “liberty” can change radically over time.\(^ {183}\)

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Justice Anthony Kennedy seemed to be saying that moderns had better grasped the “meaning” of liberty and that the Court had embraced that revised conception.

Moral readers ought not to be at all surprised by what happened in the 1950s or the 1960s, or by what is happening today. They might question and deplore some of the Court’s decisions along the dimension of fit or justification,\(^ {184}\) but that is very different from saying that the Court has disregarded “the Constitution.” A right-of-center moral reader might have a view about sexual privacy, freedom of speech, or the right to possess firearms that is very different...
from that of a left-of-center moral reader. Radical constitutional changes might occur because left-of-center moral readers have been replaced by right-of-center moral readers, or vice-versa.

Other approaches to constitutional interpretation also accommodate radical constitutional change. If one believes in democracy-reinforcing judicial review, many of the decisions of the Warren Court may seem quite appealing, even if they were radical in their time. In fact, some proponents of such an approach to judicial review envision a host of other innovations that would at least be on the table, and not outlandish at all. While one could imagine a situation in which a democracy-reinforcing approach resulted in a highly stable set of constitutional doctrines, that would be an exceedingly surprising outcome. There is a powerful tendency to observe, or discover, new problems in representative government, to reconceptualize democracy as a result, and to use those reformed conceptions to understand anew the Constitution in a bid to solve those novel difficulties.

Those who embrace common law constitutionalism tend to have Burkean inclinations and hence to favor incremental rather than radical change. They might deplore the latter on Burkean grounds. Whether they are right to do so would depend on whether a Burkean approach to constitutional change is the right one. In any event, committed Burkeans can implement (or endorse) repeated modest changes over time which will, in the aggregate, generate radical constitutional change. Even slow walkers can, with time, traverse vast distances and thereby generate a paradigm shift. One might suppose that in a series of removal cases, the Supreme Court is slowly undermining decisions like Morrison v. Olson and Humphrey’s Executor, adopting a more robust conception of executive power to remove, and restricting Congress’s ability to impose constraints on the president’s removal power. Similarly, the movement from Bowers v. Hardwick to Lawrence v. Texas included a more modest, intermediate step. Lawrence cited Romer v. Evans as a case that had undermined Bowers.

B. Theories of Interpretation Confront Radical Constitutional Change

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185 See Ely, supra note 16.
196 Bowers, 478 U.S. at 573–74 (arguing that Romer “cast [the Bowers] holding into…doubt”).
When paradigm shifts occur, what happens to theories of constitutional interpretation? Are they obstacles that must be overcome? Are they facilitators? Are they options, which judges choose, depending on whether they are fit for purpose—meaning, likely to yield the preferred set of outcomes? One scholar has argued, quite plausibly, that constitutional law is suffused with options.  

One point is self-evident: A strong theory of stare decisis seems to be an obstacle to radical constitutional change and hence to paradigm shifts. During periods of such change, judges typically relax relevant considerations for overruling prior decisions, perhaps by carving out exceptions (say, for constitutional cases), perhaps by insisting that in cases of egregious error, judges are relatively unconstrained in overruling previous decisions. It is plausible to say that what we might call the “Egregious Error Rule” played a defining role in constitutional law in the 1950s and 1960s, and is also playing such a role in the current period. It is also plausible to say that in eras of large-scale doctrinal shifts, judges who prefer the status quo, or who do not deplore the status quo, will urge that the Egregious Error Rule is a recipe for chaos.  

Another point is self-evident: The idea of a living constitution may not be much of a retardant to radical change and, indeed, may sometimes be an accelerator. When proponents of living constitutionalism believe that current doctrines or practices are foolish, wrong, or even evil, some of them will promote constitutional change as the cure. Having said that, some living constitutionalists might be Burkes and hence only favor gradual change, albeit shifts that may become transformational as the many alterations accumulate.  

In any event, consider the view that people, judges included, choose a theory of interpretation at least in part by asking whether it is likely to yield a preferred set of outcomes. It is often said that the Constitution is not a suicide pact. The intuition is that if a constitutional

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197 To be sure, prioritizing outcome creates serious problems. See the exceptionally illuminating discussion in Lawrence B. Solum, Outcome Reasons and Process Reasons in Normative Constitutional Theory, 172 U. Pa. L. Rev. 913 (2024). We might want to understand outcomes very broadly, to include the “process reasons” emphasized by Solum.  

198 See Richard Re, Permissive Interpretation, 172 U. Pa. L. Rev. 1651 (2023) (arguing that the three primary inputs in legal interpretation are “literal text, legislative goals, and pragmatic consequences” and that these inputs permit a wide range of choices).  

199 Many people have claimed that the Court’s treatment of stare decisis has been inconsistent. See Frederick Schauer, Stare Decisis—Rhetoric and Reality in the Supreme Court, 2018 SUP. CT. REV. 121 (2018). And there are others who relatably claim that the Court has, on occasion, overturned cases for no other reason than that its members deemed them wrong. See Akhil Reed Amar, America’s Unwritten Constitution 235 (2012) (arguing that some cases were “overruled[ed] based simply on the belief that the prior case was wrongly decided”).  

200 This is a possible reading of Dobbs v. Jackson Women’s Health Org., 597 U.S. 215 (2022).  

201 We are aware that this is a contentious term. The standard approaches to assessing whether to overrule a precedent depend on multiple factors, not just the egregiousness of a prior error. See id. at 263–92 (discussing factors to consider when deciding whether to overrule a precedent and applying them to Roe v. Wade and Planned Parenthood v. Casey). But let us indulge a little legal realism, down here in the footnotes: In periods of paradigm shifts, the Egregious Error Rule is the operative one.  

202 A version of this view is defended as a normative matter in Cass R. Sunstein, How to Interpret the Constitution (2023). It is productively challenged in Lawrence B. Solum, Outcome Reasons and Process Reasons in Normative Constitutional Theory, 172 U. Pa. L. Rev. 913 (2024).  

203 For the origins of this saying, see Termiacci v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (warning not to “convert the constitutional Bill of Rights into a suicide pact”).
theory generates some terrible outcomes—say the dissolution of the Union, or horrific injustice—then that theory must be mistaken. The argument emphatically turns on consequences and assumes that constitutional interpreters should care about consequences. If that is true, and it seems true to us, people will generally not embrace a theory of interpretation that yields constitutional suicide, or less dramatically, terrible outcomes.204 If the Constitution is not a suicide pact, one might also conclude that it is not pact of moral bankruptcy or a document meant to yield poverty or imiseration. People, judges included, will adopt a theory that, from their perspective at least, is not a suicide pact, and not a deal with the devil.

Now turn to the various constitutional theories that might be said to reflect this concern with outcomes. Consider Thayerism: the view that courts should uphold the actions of the democratic branches unless the constitutional violation is beyond dispute.205 Justice Oliver Wendell Holmes embraced that view,206 as did the Court for a (brief) period after the demise of Lochner-era understandings.207 For Holmes, and the New Deal Court, the preferred formula was more democracy and less juristocracy.208 Thayerism was a great fit.

Consider Carolene Products footnote 4: the view that courts should be highly deferential to the political process except in cases in which political rights are themselves at stake, or in which discrete and insular minorities face discrimination.209 That view evidently spoke to, and help organize the work of, the Warren Court.210 It retained weak review for restrictions on contractual freedom and property rights and redirected judicial resources to protecting (what the Court saw as) the politically marginalized. These results evidently appealed to judges (and many others)11 at the time.212

Consider moral readings, which seemed to help legitimate a libertarian “liberty of contract” during the Lochner era and then, in the mid- to late-twentieth century, to legitimate broad understandings of equality and liberty, ones genial to the political left. Consider originalism, which spoke to those who deplored the work of the Warren Court. Originalism seemed to promise a methodology that would prevent further adventures in left-of-center constitutionalism and a foundation for overruling the worst of what had come before,213 and a

204 For some complications, see Solum, supra note 202.
205 See supra note 98.
206 See Lochner v. New York, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting) (“I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”). 207 See Cass R. Sunstein, Thayerism, U. Chi. L. Rev. ONLINE (Feb. 19, 2014), https://lawreview.uchicago.edu/sites/default/files/2024-02/Sunstein_ESSAY_v91_Online.pdf.
208 See Snyder, supra note 208.
210 See id., supra note 16.
211 See id.
212 For an interesting commentary, written in what seem like another constitutional era, see Bruce A. Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713 (1985). 213 See Pamela S. Karlan, Constitutional Law as Trademark, 43 U.C. DAVIS L. REV. 385, 396 (2009) (“Originalism as a primary theory of constitutional interpretation had its origins in the conservative attack on various Warren Court decisions.”); Keith E. Whittington, The New Originalism, 2 GEO. J.L. & PUB. POL’Y 599, 599 (2004) (“As the Warren Court’s rights revolution became increasingly controversial in the late 1960s, critics of the Court frequently recurred to original intent to ground their disagreement with the Court’s innovative rulings.”).
means of curbing judicial discretion. Consider traditionalism, which also stands opposed to left-of-center adventures, and which could also protect what, to traditionalists, most deserves protection, namely longstanding traditions and practices. Consider common good constitutionalism, which has risen, and found devotees, in part because of dissatisfaction with originalism’s purported indifference to traditional conceptions of morality. Some on the right prefer the outcomes that common good constitutionalism seems to promise. Indeed, it is fair to say that they like common good constitutionalism precisely because of the outcomes that it promises. They are clear on that, for the very label—common good constitutionalism—describes the point of the new theory.

It is possible, of course, to think that theories of interpretation should be accepted or rejected independently of their consequences. For example, judges might embrace public meaning originalism even if they deplore the results to which it leads. Justice Scalia claimed that he did not always favor the results generated by his methodology.

But, counterfactually, would someone choose to be an originalist if they believed that the original Constitution systematically yielded terrible results and if there were other interpretive approaches on offer? Perhaps some dedicated originalists would retain their preferred views about interpretation. Conceivably, they might regret a highly imperfect constitution and simultaneously retain their theoretical commitments. Of course, that must be an

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217 See VERMEULE, supra note 129.
218 See id.
219 See BARNETT & BERNICK, supra note 126, at 380 (“[I]n many, if not most, cases, we do not start with normative priors. In such cases, we need an interpretive method in which we are confident to position us to identify the law… We think theoretical arguments in favor of originalism…not whether originalism produces outcomes that fit one’s normative priors, are the better way to gain this confidence.”); Solum, supra note 202.
220 Justice Scalia famously defended flag burning on originalist grounds despite saying: “If it was up to me, I would have thrown this bearded, sandal-wearing flag burner into jail.” Lesley Stahl, Justice Scalia on the Record, CBS News (Apr. 24, 2008), https://www.cbsnews.com/news/justice-scalia-on-the-record/. On issues of criminal procedure, originalism also brought Justice Scalia to outcomes he otherwise may not have supported. See, e.g., Stephanos Bibas, Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?, 94 Geo. L.J. 183 (2005); Gary Lawson, Confronting Crawford: Justice Scalia, the Judicial Method, and the Adjudicative Limits of Originalism, 84 U. Chi. L. Rev. 2265 (2017).
221 Maybe so. See BARNETT & BERNICK, supra note 126, at 380 (“We resist the modern tendency to justify methods of interpretation based solely on whether they produce normatively attractive results.”). For the view that any theory of interpretation must be justified in terms of the constitutional order that it would produce, see generally SUNSTEIN, supra note 202. For a different or (better) complementary view, suggesting the importance of considering process reasons and not simply outcomes, see Lawrence B. Solum, Outcome Reasons and Process Reasons in Normative Constitutional Theory, 172 U. Pa. L. Rev. 913 (2024).
222 Some originalists have pointed to what they see as the need to defend the use of the Constitution’s original meaning on consequentialist grounds. See JOHN McGINNIS & MICHAEL RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013). For a different view, emphasizing “process reasons,” see Solum, supra note 221.

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Electronic copy available at: https://ssrn.com/abstract=4834688
option.\footnote{223} When someone admonishes “don’t blame the messenger,” they are implicitly suggesting that any ire ought to be directed towards the message. Likewise, perhaps any discomfort, disaffection, and ire ought to be directed towards the misguided constitution, rather than the dictionary, rules of grammar, original intentions, original meaning, and the like. Still, it is fair to question whether originalism would maintain its appeal if it produced a terrible or deeply unappealing constitutional order.\footnote{224}

Similarly, would proponents of democracy-reinforcing judicial review, like John Hart Ely, have much patience for that theory in a world where electoral majorities sought to dominate and subjugate rights holders, of whatever sort? In that world, one might suppose that one needed less democracy and more substantive rights. Finally, we have seen some progressives move from a theory of judicial veneration\footnote{225} to stances of judicial denigration and contempt\footnote{226} There has been a corresponding move on the right from a theory of judicial restraint to demands for a robust, crusading judiciary.\footnote{227}

The arc of constitutional law, the phenomenon of radical change, and human nature suggest something different, a consistent tendency: theories of interpretation and adjudication are partly products of desired ends, rather than merely of abstract, ends-blind thinking. As a new constitutional faction rises, reflecting different moral commitments and perspectives on sound government, this avant-garde group adopts a congenial constitutional theory, one that furthers their commitments and perspectives. If they are lucky enough to prevail, their judgments about constitutional law shift from the margin to the mainstream, sometimes baffling and outraging members of older generations. To quote Bob Dylan, “something is happening here,” they well know; but they “don’t know what it is.”\footnote{228}

III. Science Fiction Becomes Fact

Previously, we spared readers an account of how radical constitutional change occurs. Here we take up that matter, discussing two hypotheticals. Because we have largely described existing theories and doctrines, there may be a (mistaken) sense that these theories and doctrines were always seen as plausible, as within the mainstream. As noted earlier, it might be difficult to fathom how seemingly reasonable contemporary understandings were, at one time, deemed outlandish or even unthinkable.

\footnote{223} See, e.g., ROBIN BLACKBURN, THE AMERICAN CRUCIBLE 298 (2013) (quoting William Lloyd Garrison as stigmatizing the Constitution as a “Covenant with Hell” and a “pact with the Devil.”).

\footnote{224} We do not mean to answer that question here. See \textit{supra} note 202.


\footnote{226} See, e.g., Ryan D. Doerfler & Samuel Moyn, Democraticizing the Supreme Court, 109 CAL. L. REV. 1703 (2021) (advocating for “disempowering reforms” that sharply limit the power of the courts).

\footnote{227} See Jack M. Balkin, Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time, 98 TEX. L. REV. 215, 216 (2019) (noting that conservatives have recently “emphasized the importance of courts” and even “called for ‘judicial engagement’ to protect important constitutional structures and rights”).

\footnote{228} DYLAN, \textit{supra} note 1.
To whet your appetite, we briefly highlight a prominent and contemporaneous example of how novel, some might say outlandish, arguments quickly become more plausible. Two prominent originalists, Will Baude and Michael Paulsen, argued that section 3 of the Fourteenth Amendment arguably created exceptions to the Ex Post Facto and Bill of Attainder prohibitions in Article I, sections 9 and 10, and to the Free Speech Clause of the First Amendment.\(^\text{229}\) We wonder whether such an argument had ever been expressed before, at least as to Section 3. Of greater relevance, Baude and Paulsen convinced many people that Donald Trump was barred (or could be barred) from America’s ballots. In the span of mere months, they moved claims that were once outlandish to the mainstream of legal thought.\(^\text{230}\)

The mainstreaming of Section 3 as a bar to Donald Trump’s candidacy was not simply a function of the power of their argument. It also reflected the fact that a segment of the country was highly receptive to what Baude and Paulsen had to say. Indeed, it is fair to say that millions were particularly eager to embrace Baude and Paulsen’s claims about Section 3 and above all its application to Donald Trump, without regard to whether their numerous intricate (and interesting) arguments were within the mainstream before they were uttered.\(^\text{231}\) That the Supreme Court rejected an element of their argument—whether states could enforce section 3 against federal officials and office-seekers\(^\text{232}\)—did nothing to undercut our sense that the Baude-Paulsen article had moved certain arguments from the margins to the mainstream.

**A. Is Permitting Abortion Unconstitutional?**

Having finally succeeded in helping to overrule \textit{Roe v. Wade},\(^\text{233}\) portions of the pro-life movement are catching their breath and weathering a backlash.\(^\text{234}\) But in academic and other circles, a committed, vocal, energetic segment favors even more radical change.\(^\text{235}\) Its members would like to replace \textit{Dobbs} with a ruling declaring that abortion is always unconstitutional. In


\(^{232}\) See Anderson, 601 U.S. 100.

\(^{233}\) See \textit{Dobbs}, 597 U.S. 292 (\textit{Roe and Casey} must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.


\(^{235}\) See Cohen et al., \textit{supra} note 234, at 6 (“[t]he antiabortion movement will continue to push the envelope as it strives for a nationwide abortion ban”).
this view, fetuses are persons, each of whom enjoys constitutional rights. The failure to recognize their personhood, and to protect them from abortions, is akin to past failures to recognize the rights of African Americans and women. The state may no more refuse protection for unborn persons than they may refuse to protect racial minorities or women. While many will reject these comparisons, it would not be the first time an analogy failed to convince a majority even as it seemed obvious to a multitude.

How would these super-pro-lifers prevail, for a second time, in the courts? As a matter of text, they might argue that failure to treat fetuses as persons is an abridgment of the Privileges or Immunities Clause, the Due Process Clause, the Equal Protection Clause, or all three. To be sure, there is a problem in that the Fourteenth Amendment begins with this sentence: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” Under conventional understandings, fetuses are not yet born because they are in the womb and, if not yet born, they are not yet citizens. Hence there is an argument that the Privileges or Immunities Clause is inapplicable: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”

Still, fetuses might count as “persons” even if they are not citizens and hence the failure to protect them might run afoul of the Due Process or Equal Protection Clauses (“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”). That is, even though only persons “born” are citizens, a fetus can be a person without being born and, because fetuses are persons, they must receive the protections of the Due Process and Equal Protection Clauses. Or so the super-pro-life argument might go.

Several theories of interpretation might accommodate the super-pro-lifers. Public meaning originalists could claim that the Equal Protection Clause requires states to ban abortion, to protect unborn “persons” equally. If people who are born are protected against murder, failing to extend the protections to the unborn may seem rather unequal. Public meaning

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237 See, e.g., Jack Wade Nowlin, Roe v. Wade Inverted: How the Supreme Court Might Have Privileged Fetal Rights Over Reproductive Freedoms, 63 MERCER L. REV. 639, 663–66 (2012) (suggesting that fetuses are persons and have “experienced a history of invidious government discrimination in the United States” similar to racial and gender-based discrimination).

238 U.S. CONST. amend. XIV, § 1.

239 Id.

240 Id. But see Roe v. Wade, 410 U.S. 113, 157 (1973) (claiming that “persons” as used in the Constitution has application “postnatally” and that there is little warrant for supposing it has “pre-natal application”).

originalists might argue that when a government affirmatively sanctions the killing of the unborn, that action offends the Due Process Clause. After all, there are some who believe that the second Due Process Clause—found in the Fourteenth Amendment—contains a substantive component.\footnote{See, e.g., Ryan C. Williams, \textit{The One and Only Substantive Due Process Clause}, 120\textit{ Yale L.J.} 408 (2010).} With respect to the Privileges or Immunities Clause, they could argue that “born in the United States” reflects a principle that turns on science. They might argue that some scientists regard fetuses as human lives and that fetuses ought to be considered as “born in the United States” while in the womb. Further they might suppose that the Clause demands that the state extend legal protections to all persons equally.\footnote{See, e.g., John C. Harrison, \textit{Reconstructing the Privileges and Immunities Clause}, 101\textit{ Yale L.J.} 1385 (1992) (arguing that the Clause meant to incorporate the Civil Rights Act of 1866 and serves as an equality provision that ensures intrastate equality as to all citizens).} Of course, this might be a bit of a stretch, on many dimensions, and would be fiercely contested by their opponents.

Of course, pro-life advocates need not be originalists. Common-good constitutionalists could coalesce around the view that allowing abortion is inconsistent with fundamental background principles, built into constitutional interpretation.\footnote{See \textit{Vermeule, supra note 124.}} In addition, one can imagine pro-life devotees of \textit{Caroleene Products’} footnote 4 arguing that fetuses are discrete and insular minorities and hence worthy of additional judicial solicitude. (After all, unborn persons cannot vote.) A devotee of Ronald Dworkin, committed to moral readings, might well find within his theory of interpretation a path to a super-pro-life jurisprudence, albeit one requiring fit and justification.

Under existing law, any super-pro-life constitutional claim\footnote{See id.; Finnis & George, \textit{supra note 241.}} must be counted as extreme. But their presence in contemporary debates suggests that they are not quite outlandish. How could this pro-life vision move from the extreme to the mainstream, and from there, to established judicial doctrine? As suggested by the examples that we have mentioned, the answer lies in changing minds and perhaps in mass mobilization. With respect to abortion rights, the United States has witnessed two sets of informational cascades,\footnote{See Sushil Bikhchandani, David Hirshleifer & Ivo Welch, \textit{A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades}, 100 J. Pol. Econ. 992 (1992).} in which a judgment moves over time from a few people to many, and in which the many people who end up holding that judgment are strongly influenced by the judgments of those who held it before them.\footnote{See id. at 994 (describing the mechanism that creates informational cascades); Cass R. Sunstein, \textit{Conformity: The Power of Social Influences} 35–77 (2019) (exploring how informational cascades can create broad movements).} The first cascade led to the establishment of the abortion right in \textit{Roe}; the second cascade led, over many decades, to \textit{Dobbs}. A similar informational cascade, in favor of a constitutional prohibition on abortion, would be required. For such a cascade to occur, influential and credible people, committed to their position, would have to be joined by those who are relatively receptive to the argument, who would have to be joined by those who are willing to listen, to the point where the position is no longer marginal at all.\footnote{On some of the dynamics here, see Sunstein, \textit{supra note 247, at 38 (describing the way informational cascades form).}
With respect to constitutional law, of course, every informational cascade is different; each has its own dynamics. For minds to change in this context, relevant people must be convinced of multiple related propositions: (1) that the Constitution contains provisions that are naturally or plausibly taken to forbid abortion; (2) that the right theory of interpretation is consistent with that conclusion; (3) that a constitutional prohibition on abortion is not intolerably or profoundly out of step with other constitutional rulings; and (4) most broadly, that abortion should not be left to the caprice of democratic processes any more than the rights of racial or religious minorities should be left to the ballot box. It is safe to say that as an empirical matter, it will be hard (or impossible) to convince older critics of *Roe v. Wade*, many of whom have been strongly committed to the view that constitutional law should recede in this domain and that ultimate judgments should be left to democratic processes within the states. Indeed, *Dobbs* itself seemed to reflect that view. But younger scholars, and pro-lifers, may not be as wedded to the pre-*Dobbs* idea that the Constitution says nothing about abortion and that, therefore, the legality of abortion should be a matter of legislative choice at the state level.

While popular backing for radical constitutional change is not necessary, we much doubt that this Court will be eager to embrace fetal rights. If, however, 40 or 50% of the nation comes to adopt the now extreme pro-life view, this Court (or another) would be more likely to accept it. Alternatively, if a presidential candidate asserted that the Constitution forbade abortion and then subsequently won the election, the claim would enter the mainstream, potentially leading some justices to see the argument as plausible or correct. And as discussed earlier, the constitutional claim would become more plausible, and could prevail, if new nominees to the courts acquired their legal education in an era where people openly discussed the possibility, with prominent people prominently insisting that states cannot permit abortion any more than they could permit murder of other persons.

**B. Is the Senate Unconstitutional?**

Now turn to another example, one from the opposite end of the spectrum. Many progressives believe that the Senate is anachronistic, even an abomination, and intolerably anti-democratic. Importantly, they also believe that it defies fundamental constitutional principles, grounded on democracy and equality. Why do small states like Delaware or Montana have the same representation in the Senate as California or Texas? Relatedly, why do the peoples of Delaware and Montana have such a much larger say on who makes our laws? Moreover, the outsized influence of small states infects the electoral college that elects the President, making it

249 See *Dobbs* v. Jackson Women’s Health Org., 597 U.S. 215, 231–32 (2022) (“The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision... It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives.”).


251 See sources cited supra note 250.
more likely that a candidate becomes President without a plurality, much less a majority, of the popular vote. Is it such a gigantic leap to the admittedly radical view that what is a democratic horror is also a constitutional outrage and transgression?

It is true that if you said today that the Senate, as currently composed, was unconstitutional, you would likely be met with some derision and awkward glances. You might receive what some people call “side eye.” A central reason is that the Senate and its composition are specified in the Constitution; how could something so specified be unconstitutional? We will return to that point. For the moment, consider the possibility that a large part of that expected reaction is based on the sheer novelty of the claim. Yet the more familiar that claim becomes—the more it is voiced in the Harvard Law Review, the Stanford Law Review, the New York Times, the Wall Street Journal, and Bloomberg—the more the suspicious glances get replaced by respectful engagement or even by knowing, nodding heads. Remember that many already regard the Senate as a retrograde institution, one that is malapportioned and an undemocratic check on the more democratic House. Further, many regard the small states as having an outsized, unjustly influential voice in who becomes President.\footnote{252 See, e.g., Al From, The Challenge to Democracy—Overcoming the Small State Bias, BROOKINGS (July 6, 2022), https://www.brookings.edu/articles/the-challenge-to-democracy-overcoming-the-small-state-bias/; Katy Collin, The Electoral College Badly Distorts the Vote, And It’s Going to Get Worse, WASH. POST (Nov. 17, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/17/the-electoral-college-badly-distorts-the-vote-and-its-going-to-get-worse/ .}

The textual argument against the disproportionate influence of small states seems an utter loser, until it belatedly assumes some plausibility. The Constitution says that the Senate “shall be composed of two Senators from each state.”\footnote{253 U.S. CONST. amend. XVII.} That seems to signal that each state must have two, and only two, senators. But perhaps someone will argue that “shall” means “may” not “must.”\footnote{254 See BRYAN GARNER, LEGAL WRITING IN PLAIN ENGLISH 105–06 (2001) (“Often, it’s true, shall is mandatory…[y]et the word frequently bears other meanings—sometimes even masquerading as a synonym of may.”).} If that argument seems too adventurous, someone might claim that if every state has at least two Senators, but some states have many more, there is no violation of the text. To say that the Senate shall be composed of two Senators from each state does not necessarily mean that more populous states cannot have larger Senate delegations. Every state will have two Senators even if some have ten or twenty. Or so someone might argue.

After sidestepping the conventional reading of the text, the argument will move to why equal state suffrage in the Senate is unconstitutional. Specifically, perhaps the equal protection component of the Fifth Amendment\footnote{255 See Bolling v. Sharpe, 347 U.S. 497 (1954).} makes the outsized role of the small-population states unconstitutional. And, conceivably, maybe the move to popular election of Senators\footnote{256 See U.S. CONST. amend. XVII (amending Article I to establish that senators “shall be…elected by the people”).} eliminates (or undermines) the argument for equal state suffrage, leaving it more vulnerable to constitutional challenge. While the Senate was constitutional for a long spell, the Fifth Amendment, the Seventeenth Amendment, and evolving and updated perceptions of the requirements of democracy might render the modern Senate unconstitutional.

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For many (including the present authors), all this seems utterly outlandish, even mad. But consider the death penalty and the fact that some believe it to be unconstitutional.\textsuperscript{257} For more than a century, this assertion was unthinkable.\textsuperscript{258} But with changes in moral judgments about the sanctity of life, a focus on the arguable arbitrariness of the infliction of the death penalty, a claim that the death penalty had disparate racial impacts, the unthinkable became merely outlandish, then extreme, then a part of mainstream discussion.

This radical change in constitutional thought happened despite the Fifth Amendment’s explicit reference to capital punishment.\textsuperscript{259} According to proponents of the view that the death penalty is unconstitutional, the fact that capital punishment seems to be contemplated by the Fifth Amendment must yield to the (perceived) reality that the death penalty is always cruel and unusual punishment under the Eighth Amendment. The more people that said that the death penalty was unconstitutional, the easier it was for courts to act on that claim. Not so long ago, some justices endorsed the proposition.\textsuperscript{260} Nonetheless, the Supreme Court ultimately refrained from making that fateful move for multiple reasons, including a change in Supreme Court personnel\textsuperscript{261} and (perhaps) a popular clamor for getting tough on crime.\textsuperscript{262}

The assertion that the death penalty is unconstitutional went from the unthinkable, to the outlandish, to the extreme, to the mainstream. But it now perhaps has moved back to the extreme or beyond. After all, no sitting justice has voiced the view. As a result, there seems little prospect of it becoming doctrine. But as we have argued throughout, the Supreme Court’s doctrines are far less permanent than they seem at any given moment. Nothing prevents a legal argument from repeatedly moving into, and out of, the mainstream. The fact that the Roberts Court is rather unlikely to embrace the claim is no grounds for concluding that future Courts would perpetually reject it.

Similarly, the more people insist that the power of small states is undemocratic and a violation of equal protection of the laws and the subsidiary principle of one person, one vote, the easier it is for courts to take the idea seriously. If it was possible to do away with non-

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\item See U.S. Const. amend. V (“No person shall be held to answer for a capital…crime….nor be deprived of life, liberty, or property, without due process of law”).
\item Justices Brennan and Marshall believed that the death penalty was unconstitutional. See, e.g., Furman v. Georgia, 408 U.S. 238, 257 (1972) (Brennan, J., concurring); \textit{id.} at 314 (Marshall, J., concurring). Justices Powell, Blackmun, and Stevens eventually came to believe that the death penalty should be abolished. See Fletcher, \textit{supra} note 257, at 828; see also Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting); Baze v. Rees, 553 U.S. 35, 86 (Stevens, J., concurring).
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\end{footnotesize}
equipopulous districts in state legislatures and the House, practices that predated the Constitution, it might be possible to banish the non-equipopulous Senate and Electoral College. Will this ever happen? We doubt it. It does seem outlandish, even unthinkable. But stay tuned.

IV. Perceptions of the Continuum

What seems extreme or outlandish, or not, is at least partly a function of one’s professional and social spheres. The revival of the nondelegation doctrine is long overdue, utterly justified, and perhaps imminent, at least if you speak to an influential subset of law professors, lawyers, and judges, mostly on the right.263 It is striking, even disorienting, for those skeptical of a revival to discuss the matter with that subset of law professors and judges. They seem to live in a different jurisprudential world.264 Within the law professoriate, prison abolition may seem mainstream.265 But among almost all government officials, especially prosecutors, it must seem extreme if not outlandish or unthinkable. That difference in perception reflects the fact that law faculties are far more to the left than prosecutors.

Because of the largely progressive complexion of law faculties, many members of the law professoriate find themselves in a left-of-center echo chamber.266 There is an old story, likely apocryphal, about the Yale Law School faculty. In late 1980, after the presidential election, one faculty member supposedly remarked to another, “I don’t know how Ronald Reagan won. I don’t know anyone who voted for him.”267 The joke has two implications—the law school professoriate is insular, and it has a distorted perception of the rest of society. What may have been said about Reagan at Yale likely reflected the perception of faculty at other schools, both in the past and today.

Within law school faculties, certain propositions seem so obvious that there may be little critical discussion of them: the Roberts Court poses a threat to the constitutional order; New York Times v. Sullivan was rightly decided; affirmative action is a good idea; the federal Constitution is profoundly undemocratic. Yet other propositions are not taken seriously until the Court embraces them.268 The revival of the nondelegation doctrine is overdue, and perhaps imminent, at least if you speak to a subset of law professors and judges. They seem to discuss the matter with that subset of law professors and judges. The joke has two implications—the law school professoriate is insular, and it has a distorted perception of the rest of society. What may have been said about Reagan at Yale likely reflected the perception of faculty at other schools, both in the past and today.


264 For example, many progressives now take Mortenson & Bagley, supra note 174, to be absolutely decisive, and Wurman, supra note 174, to be a patently failed effort to respond; many conservatives take Mortenson & Bagley, supra note 174, to be utterly unconvincing, and Wurman, supra note 174, to be a decisive rejoinder.


266 On the effects of discussions among the like-minded, see generally Sunstein, supra note 247.

mandate was beyond the scope of the Commerce Clause.268 Many regarded that assertion as implausible, even outlandish.269 It was derided by many professors, lawyers, and judges, in part because they were educated in a time when many supposed that Commerce Clause permitted Congress to regulate anything under the sun and because they favored that conclusion.270

In a sense, we fear that in the current era, some number of progressive lawyers, judges, professors, and students have a view of the constitutional continuum that is akin to the distorted sense of reality reflected in Saul Steinberg’s New Yorker cover “View of the World from 9th Avenue.”271 For many professors and law students, what right-of-center scholars discuss and propose seems distant, often outlandish, at times cartoonish. In particular, the perception of what is now in fact mainstream, especially if it is to the right of the Supreme Court’s current doctrines, may seem narrow and constrained. For some, there may not appear a great deal of room for the Supreme Court to move further to (what is taken to be) the right. Yet there is always more room.

This perception not only suggests an impoverished and distorted constitutional vision on the part of some scholars; it also perhaps reflects a pragmatic recognition that what is within (or outside) the mainstream is a social construct. If enough people declare that some constitutional perspective is out of the mainstream, extreme, outlandish, or even unthinkable, that declaration may influence how others regard that constitutional position. There may be a few rebels who revel in embracing the unorthodox. But in all likelihood, many more scholars wish to be in the mainstream and decline to embrace views seen by others as extreme or outlandish. Given the nature of law, that is no less true for judges. The more one proclaims that some stance is extreme or outlandish, the more one may have pushed that view beyond the margins of acceptability.272

Knowing this fact of human psychology induces some litigators, and scholars, to portray other perspectives as not only mistaken, but also unthinkable. After the Court issued Dobbs, GLAD said the decision was “Outrageous and Unthinkable.”273 Whatever one thinks of Dobbs as a normative matter, this was warmed-over rhetoric from the unsuccessful attempt to shore up abortion rights, for overturning Roe was hardly unthinkable. For decades, millions of people had been thinking about this very prospect.274

268 See Randy E. Barnett, Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional, 5 N.Y.U. J.L. & LIBERTY 581 (2010). In Nat’l Fed. Indep. Bus. v. Sebelius, 567 U.S. 519 (2012), the Supreme Court found that the individual mandate was unconstitutional as an expression of Congress’s Commerce Clause powers but upheld the mandate as a tax.

269 See, e.g., Erwin Chemerinsky, A Defense of the Constitutionality of the Individual Mandate, 62 MERCER L. REV. 618, 618 (2011) (“Under current constitutional law, I do not think this is a close question.”). Chemerinsky recounts how Charles Fried, a Bush Administrator Solicitor General, told Fox News that he “had recently been to Australia and purchased a kangaroo hat, and he would eat that hat if the Supreme Court were to declare this law unconstitutional.” Id.

270 Wickard v. Filburn, 317 U.S. 111 (1942), was the start of a long period of Supreme Court deference on Commerce Clause powers.

271 See Saul Steinberg, View of the World from 9th Avenue (illustration), in NEW YORKER, Mar. 29, 1976.

272 See David Levari et al., Prevalence-Induced Concept Change in Human Judgment, 360 SCI. 1465 (2018).


274 See supra notes 233–237.
In light of the makeup of the law school professoriate and the elite bar, both of which trend progressive, the Roberts Court’s jurisprudence is especially disorienting and disconcerting.\textsuperscript{275} First, as noted earlier, the jurisprudential moves come not out of left field but from the less familiar right field. Some portion of the professoriate did not see the changes coming. Second, the paradigm shift came on the heels of the election of Donald Trump in 2016 (a surprise to many), which subsequently yielded several conservative Justices instead of the progressive justices, to be chosen by Hillary Clinton, which many fully expected. Third, progressives long saw the Supreme Court as their institution, full of stalwart heroes fighting for what they saw to be justice. But now the heroes have become the villains.\textsuperscript{276} Imagine if Luke Skywalker, in Episode 6, had joined hands with the reviled Emperor to strike down Darth Vader and rule the galaxy.\textsuperscript{277} The disorientation and sense of betrayal would have been incalculable.

Finally, the progressives behold (what they see as) a cramped space from which to operate. They must battle on (what they see as) the sterile field of text and history, making arguments that some of them deem irrelevant (or silly) to advance causes that seem lost before they file the first brief. The most progressive among the professoriate went to bed on Election Day 2016, foreseeing a welcome end to “Defensive Crouch Liberal Constitutionalism.”\textsuperscript{278} They woke up to what they took to be a dystopian world, where the crouching would continue as far as the eye could see. All in all, the arc of history seems to be bending away from justice, at least as progressives understand justice. More likely than not, the disappointment will continue, at least in the short term.

In contrast, conservatives and libertarians behold a Supreme Court remarkably receptive to their views, ones that were once beyond the mainstream. Defensive Crouch Conservative Constitutionalism is in the rearview mirror. Due to the composition of the federal courts, the relatively small numbers of conservatives and libertarians on law school faculties have an outsized influence on the judiciary, especially the Supreme Court. If one wants to catch a glimpse of tomorrow’s Supreme Court opinions today, one might attend a Federalist Society conference. Some of the Court’s recent decisions on privacy rights, affirmative action, standing, Chevron, the individual mandate, the proper treatment of precedent, the unitary executive, and the nondelegation doctrine reflect scholarship and arguments generated on the right.\textsuperscript{279}

\begin{notes}
\item[275] See supra notes 112-119.
\item[276] This may in part be responsible for a proposed constitutional paradigm shift by left-of-center scholars, who favor a weakened role for the Supreme Court. See Nikolas Bowie & Daphna Renan, The Separation-of-Powers Counterrevolution, 131 Yale L.J. 2020 (2022); Doerrler & Moyn, supra note 226. Perhaps such now-extreme proposals will, in time, produce what they seek.
\item[277] See CASS R. SUNSTEIN, THE WORLD ACCORDING TO STAR WARS (2016).
\item[278] Mark Tushnet, Abandoning Defense Crouch Liberal Constitutionalism, Balkinization (May 6, 2016), https://balkin.blogspot.com/2016/05/abandoning-defense-crouch-liberal.html. At least one of us finds this jarring and even horrifying, because the phrase suggests that scholars have a “side,” and that they are playing either offense or defense. But for many progressives, the phrase resonated.
\item[279] For example, the Court’s decision to invalidate the CFPB Director’s removal protections in Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197 (2020), came after new scholarship argued that broad removal powers were rooted in the original understanding of the Constitution. See Saikrishna Prakash, New Light on the Decision of 1789, 91 CORNELL L. REV. 1021 (2006). Similarly, Justice Gorsuch’s advocacy for a revival of the nondelegation doctrine in Gundy v. United States, 139 S. Ct. 2116 (2019), reflected arguments made by conservative scholars, including Lawson, supra note 173.
\end{notes}
Some of the right-leaning law professoriate, and their allies among public intellectuals and think-tankers, see almost limitless possibilities. They may or may not have a distorted sense of what this Supreme Court will do. A good portion of this Court was educated in an era in which conservatives inveighed against a large judicial role in American government. Judges were the villains and not the heroes. But if the conservative and libertarian professoriate and their allies succeed in pushing the legal mainstream rightward, they might yet achieve some of their goals in coming years. There are many reasons why some right-of-center scholars laud “judicial engagement” and downplay criticisms of “judicial activism.”

To return (and end) with the disorientation of the progressives: As the Roberts Court continues with its changes, radical and otherwise, it will become easier for progressives, on and off law school faculties, to belatedly come to grips with this Court’s new paradigm. Eventually the new paradigm will no longer be, or feel, novel. Progressives will become accustomed to it and react only to the pleasing sensation of being surprised by unexpected triumphs and by the inevitable advent of the next new thing, the new paradigm that will replace the current regime. There is always a new paradigm in the offing; the only uncertainty is when it will begin.

V. Bottom-Up vs. Top-Down Change

Many movements to change the Constitution are largely bottom-up, meaning that members of the public are calling for constitutional reform, usually for a reconceptualization of doctrine or the text. One such example, mentioned earlier, is the phenomenon of constitutional moments, where a hyper-engaged electorate apparently endorses significant constitutional change, inside or outside of Article V. We are not sure whether the New Deal (for example) is rightly characterized as a constitutional moment, to be treated as akin to a formal amendment, but we are certain that it involved radical constitutional change. Another example is any broad social movement that presses politicians, and the courts, to recognize a new constitutional right, to extend an existing right, or to eliminate a right that the courts currently recognize. Here we would include gay rights, gun rights, and the pro-life movement. Others have focused on such movements and the mechanisms of legal change.

We wish to describe a third phenomenon, one not tied to the grand theory of constitutional movements or the much-discussed constitutional change that reflects large-scale


282 See generally ACKERMAN, supra note 20.

283 See, e.g., Reva Siegel, Text in Contest: Gender and the Constitution from a Social Movement Perspective, 150 U. PA. L. REV. 297, 345 (2001) (“Over the life of the Republic, social movements have played a significant role in shaping constitutional understandings.”); Robert C. Post & Reva B. Siegel, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 YALE L.J. 1943 (2003); see also WILLIAM N. ESKRIDGE JR. & CHRISTOPHER R. RIANO, MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS (2020).

284 See Post & Siegel, supra note 283.
social movements. It is a top-down theory of constitutional change, where elites decide, without any prompting from the public, that constitutional innovation is in order or necessary.

For instance, the move to resuscitate the nondelegation doctrine, whether ultimately successful or not, reflects an elite movement rather than anything bubbling up from below, from the public. We do not deny that advocacy groups have pressed the Court to impose a more stringent nondelegation doctrine. These groups are likely funded by interests that have economic or ideological reasons for their stance. Their arguments are made plausible by academic work that cannot be said to reflect much in the way of bottom-up thinking or pressures. Undoubtedly some ordinary citizens are passionate about the nondelegation doctrine. But their collective passion cannot, of course, be compared to the fervor behind the pro-choice or pro-life movements. The legal mainstreaming of the nondelegation doctrine is a top-down phenomenon, though it can also be directly connected with bottom-up concerns, or agitation, about the modern administrative state.

Similarly, think of the sea change in the conception of presidential war powers. In the eighteenth and nineteenth centuries, presidents were not seen as having the power to take the nation to war. As recently as World War II, Congress declared war after several nations declared war against the United States, a practice suggestive of the view that even after other nations have thrust a war upon the United States, Congress would still have to decide how to respond. Since the Korean War, however, executive branch officials, including presidents, have asserted that commanders in chief have rather significant power to engage in military action without congressional authorization. There is a bipartisan consensus within the topmost echelons of the State Department, the Defense Department, and the Department of Justice that every President has considerable power to use military force against foreign nations. Officials tend to emphasize the difference between engaging in limited military actions against foreign nations and waging war. But whatever one thinks of the distinction, the changes in practice and understandings might well be seen as a radical constitutional change.

285 See, e.g., Lawson, supra note 173; Wurman, supra note 174.
287 Although the majority in Gundy v. United States, 139 S. Ct. 2116 (2019), did not embrace the nondelegation doctrine, Justice Gorsuch’s dissent (joined by Chief Justice Roberts and Justice Thomas) and Justice Alito’s concurrence indicate that the idea of reviving the nondelegation doctrine has significant support.
289 See SaiKrishna Bangalore Prakash, Imperial From the Beginning: The Constitution of the Original Executive 145–49 (2015) (presenting historical support for the proposition that the decision to wage war lay with Congress).
291 See id. at 162–69 (describing the Executive Branch’s increasingly expansive conceptions of its war powers).
This change reflects a top-down phenomenon, with legal and policy elites concluding that in a dangerous, nuclear-armed world, where America has multifarious economic and strategic interests, the President must be able to use force without first securing the consent of Congress via a ponderous and uncertain process of bicameralism and presentment. The status of the United States as a superpower, its vital role in promoting human rights and world peace, and the need to assure a vast array of weak and skittish allies, make it necessary (they believe) for the President to engage in an assortment of military actions. Unlike other radical constitutional changes, this one has occurred without the blessing of the courts. But the lack of a judicial imprimatur does nothing to diminish the magnitude of the paradigm shift.\(^{293}\)

Consider the presidency more generally. An officer whose primary mission was federal law enforcement is now perhaps best understood as a lawmaker and a policy entrepreneur. Presidential candidates did not make promises in the eighteenth century and early parts of the nineteenth.\(^{294}\) As late as \textit{Youngstown}, Justice Hugo Black said that the duty to faithfully execute the law refuted the idea that presidents are lawmakers.\(^{295}\) But we have experienced radical constitutional change in conceptions of the presidency, largely initiated by Presidents. Modern presidential candidates make a plethora of legislative and policy promises as they run for office. \(\)While in office, they act to fulfill those promises, using all the tools at their disposal. Presidents shift enforcement and execution resources, prioritize (and deprioritize) certain laws, and radically reconceptualize the meaning of existing laws.\(^{296}\) Executive lawmaking is temporary because their successor may undo their law and policymaking. But that does little to diminish their lawmaking prowess.

Or ponder the far narrower arguments about the president’s supposed power to issue debt in the face of a pending debt-issuance halt. In recent years, politicians have used the debt ceiling as a tool to extract concessions (or score points) against the opposition.\(^{297}\) When congressional Republicans have used the debt ceiling against Democratic presidents, some portion of the law professoriate has argued, quite adventurously, that the President may issue debt unilaterally to fund government functions at the level that Congresses have previously sanctioned.\(^{298}\)

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\(^{293}\) See id. at 151 (“Since Truman, presidents have remodeled the War Constitution.”).
\(^{294}\) See PRAKASH, LIVING PRESIDENCY, supra note 290, at 48–49.
\(^{295}\) See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (“[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”).
\(^{296}\) See PRAKASH, LIVING PRESIDENCY, supra note 290, at 51–53.
\(^{297}\) The debt ceiling has frequently been bemoaned as a “bargaining chip” or “leverage.” Former Treasury Secretary Jack Lew argues that there was a “universal expectation…that Congress would continue to pay the nation’s bills, and assertions to the contrary were deemed radical or purely posturing.” However, in “recent years…some in Congress have become increasingly aggressive in promoting what was once deemed off the table,” with “the threat of default employed as an affirmative bargaining chip in a way that is unprecedented and dangerous.” Jacob J. Lew, \textit{Managing Our National Debt Responsibly: A Better Way Forward}, 54 HARRY J. ON LEGIS. 1, 2 (2017).
\(^{298}\) See, e.g., Neil H. Buchanan & Michael C. Dorf, \textit{How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) From the Debt Ceiling Standoff}, 112 COLUM. L. REV. 1175, 1243 (2012) (“In the debt ceiling context, given the balance of constitutional, practical, and prudential considerations, the least unconstitutional choice would be for the President to continue to issue debt, in the amounts authorized by the duly enacted budget of the United States.”); Garrett Epps, \textit{Biden Can Raise the Debt Ceiling Without Congress}, WASH. MONTHLY (Nov. 22, 2022), https://washingtonthemonthly.com/2022/11/22/biden-can-raise-the-debt-ceiling-without-congress/ (arguing that the President has the “power and the obligation to pay [the debt] without congressional permission, even if that requires borrowing more money to do so”).
President has unilaterally issued debt. But the progressive professors have changed the terms of the debate, for an idea once unthinkable has become one which a President may yet seize.299

Consider the rise of standing, reviewability, and affiliated justiciability concepts during the New Deal.300 There were always constraints on the power of the courts to hear cases.301 But in the wake of legal challenges to the New Deal, the Court that Franklin Roosevelt built sought to reduce the judiciary’s footprint.302 There is no reason to imagine that this reflected a popular uprising for stronger nonjusticiability doctrines. Rather the constitutional paradigm shift reflected the sensibilities of the new justices that less was more. Less judicial intervention in the economy, and otherwise, was consistent with democratic ideals and would allow the government to fix the economy.303 So too, modern efforts to rethink standing, reviewability, and affiliated doctrines, sometimes fueled by the right, reflect top-down thinking, not bottom-up pressures.304

Congress itself has some ability to shift a paradigm. By repeatedly enacting statutes that are inconsistent with current doctrines and conceptions, Congress challenges them and can pressure the courts to shift their jurisprudence. If Congress pushes for greater oversight over the executive, say by passing a law that gives each member of Congress the right to access agency files directly,305 its actions might shift the debate about what is unthinkable and what is merely extreme. As Congress enacts more such acts, a shift becomes more likely. When a live dispute between Congress and the executive arises over governmental records and executive privilege, a portion of the law professoriate, and the commentariat, would cite such laws as a reason for why members of Congress must have access to the records. The courts would then be deciding the case in the context of this altered framework. We cannot say how the courts would decide. But we are confident that such laws could shift the debate.

Congress has even greater influence where the courts are absent. For instance, Congress can shift constitutional thinking regarding what is an impeachable offense by acting on a novel or disputed claim. What is the proper understanding of “treason, bribery, and other high crimes and misdemeanors”? Does that phrase include offenses that do not involve exercises of official

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299 And indeed, one proponent of unilateral presidential action has reflected that this “seemingly fringe constitutional idea…journeyed like a comet from the dark reaches of space into the very center of the national debate.” Epps, supra note 298.


302 See Winter, supra note 300; Cass R. Sunstein, What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III, 91 MICH. L. REV. 163, 179 (1992) (arguing that Justices Brandeis and Frankfurter were “principal early architects of what we now consider standing limits” who acted to “insulate progressive and New Deal legislation from frequent judicial attack”).

303 See Winter, supra note 300, at 1457 (arguing that heightened standing requirements served to protect “governmental actions with many, diffuse, and indirect effects,” including “social and economic programs”).


305 During the Articles of Confederation period, for example, the Continental Congress had significant control over the Treasury. See Prakash, supra note 279, at 1029 (“these departments helped implement Congress’s executive powers” and were “entirely under congressional control”). As part of this control, the Treasury was required to share a copy of its books with the Continental Congress. See Aditya Bamzai, Tenure of Office and the Treasury: The Constitution and Control over National Financial Policy, 1787 to 1867, 87 GEO. WASH. L. REV. 1299, 1310 n.48 (2019).
Can the House and Senate impeach and convict a sitting officer of the United States based on acts that occurred before they were in office? The impeachment and removal of District Court Judge Thomas Porteous based in part on acts before he was a federal officer reflects an important shift. Something that was debatable became the reality, at least for Judge Porteous. Similarly, if Congress impeached and removed a federal official for private conduct—e.g., assault, tax fraud, or theft—its action would influence perceptions about the scope of “treason, bribery, and other high crimes and misdemeanors” in Article II, section 4. The chambers would be pushing the boundaries of congressional authority outward and would mark a constitutional paradigm shift, at least as to impeachment.

In our federal system, the states may shift the constitutional paradigm as well. Here are three examples. In the early nineteenth century, Southern state officials inveighed against high federal tariffs on imports, arguing that they were unconstitutional. They never prevailed even as they perhaps succeeded in moving their claims from outlandish to extreme, if not mainstream. Second, consider this counterfactual: If state courts had been using state equal-protection analogs to strike down partisan gerrymandering for 10 or 20 years prior to Veith v. Jubelirer, perhaps Justice Anthony Kennedy would have joined the dissenters and found the Pennsylvania gerrymander to be unconstitutional under the federal Equal Protection Clause. That consistent state practice might have shifted the debate and the doctrine. Concerns about judicial administrability tend to decline in the face of real-world examples of such administrability. Third, if state legislatures and executives had articulated a consistently expansive reading of “invasion” under Article IV, Section 4, that broad reading might have authorized states to do more in the wake of surging border crossings. Governor Greg Abbott of Texas is attempting to do that right now. Whether he succeeds in mainstreaming his view that “invasion” encompasses mass migrations is partly a function of what other state officials say in his wake.

We conclude this section by underlining three points. First, we suspect that large-scale social movements tend to have the biggest impact on conceptions of rights, both within the public and within the government. Individual rights—to abortion, guns, speech, and free exercise—are more personal and hence more likely to engage the citizenry, either for or against. These rights involve moral intuitions of the sort that move and energize engaged citizens.

Second, many paradigm shifts do not reflect large-scale social movements. They reflect elite thinking. The public knows little about presidential war powers, much less standing,

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307 Part of Porteous’s wrongdoing was “intentionally mis[leading] the Senate during his confirmation proceedings.” See Jennifer Steinhauer, Senate, for Just the 8th Time, Votes to Oust a Federal Judge, N.Y. TIMES (Dec. 8, 2010), https://www.nytimes.com/2010/12/09/us/politics/09judge.html.


309 For more information on the Nullification Crisis, see William W. Freehling, Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1836 (1965).


311 U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion”).

reviewability, or presidential authority to issue debt. The public did not clamor against the Gun-Free School Zones Act,\textsuperscript{313} taxpayer standing,\textsuperscript{314} or for-cause removal restrictions on the executive.\textsuperscript{315} In these structural contexts, the shifts largely reflect top-down thinking, where elites were the drivers of constitutional change.

Third, and relatedly, although courts play a central role in mainstreaming marginalized views and marginalizing mainstream views, they do not act in a vacuum, and they are not the only institutions that serve that function. Congress, the president, and the states can help trigger constitutional paradigm shifts of various sorts. While they can facilitate shifts in perceptions of constitutional rights, they perhaps have a greater (relative) role to play in structural paradigm shifts that are no less significant.

VI. Whither? Burkeanism and the Hall of Jurisprudential Shame

We have emphasized that this is a descriptive paper, not a normative one. It would be possible to agree with everything we have said here (if so, thank you so much) while also insisting that the Warren Court was essentially right, that common good constitutionalism is the best path forward, that originalists have it right, or that Dworkin is the only constitutional theorist who has seen things clearly. But whatever one thinks, one person casts a shadow over the topic of radical constitutional change: Edmund Burke. It is time to engage him directly, if only very briefly.\textsuperscript{316}

To say the least, Burke did not like radical change. In his famous essay on the French Revolution, he opposed abstractions, born of theories, and spoke favorably of “prejudices,” born of appreciation of traditions. Here is his lament, a kind of cri du coeur against revolution and in favor of legal tradition:

And first of all, the science of jurisprudence, the pride of the human intellect, which, with all its defects, redundancies, and errors, is the collected reason of the ages, combining the principles of original justice with the infinite variety of human concerns, as a heap of old exploded errors, would no longer be studied. Personal self-sufficiency and arrogance (the certain attendants upon all those who have never experienced a wisdom greater than their own) would usurp the tribunal.\textsuperscript{317}

Note Burke’s embrace of jurisprudence as “the pride of human intellect,” and his emphasis on the perils of rejecting it “as a heap of old exploded errors.” On one view, the Warren Court produced a minor kind of French Revolution; it was arrogant, and it was in the

\textsuperscript{316} We are aware that Burke was a complicated character. See Richard Bourke, Empire and Revolution: The Political Life of Edmund Burke (2017).
grip of a theory. On another view, something similar can be said about the Roberts Court. Is originalism, even in its best theoretical form, a product of personal self-sufficiency and arrogance? Are moral readings exactly that? Alternatively, might some forms of radical constitutional change be defended as Burkean in nature? Might they be restoring, rather than rejecting, the collected wisdom of the ages?\textsuperscript{318} Might that be what originalism, or constitutional traditionalism, is all about?

Without answering these questions, let us isolate four positions. On one view, every American advocate for radical change attempts to garb, or disguise, their desired transformation through citation of previous jurisprudential materials. The New Deal Court cited John Marshall’s opinion in \textit{Gibbons v. Ogden}\textsuperscript{319} as justification for expanding the reach of the Commerce Clause.\textsuperscript{320} The Brown Court cited \textit{Sweatt v. Painter}\textsuperscript{321} and other cases to make it clear that the doctrine of “separate but equal” required \textit{true} equality.\textsuperscript{322} The Lawrence Court cited “our laws and traditions of the past century,” a weak nod to Burkeanism, but a telling one nonetheless.\textsuperscript{323} The Roberts Court, as it undid \textit{Roe} and \textit{Casey}, cited cases that were supposedly inconsistent with the analysis used in those cases, like \textit{Glucksburg} and \textit{McDonald}.\textsuperscript{324} American law is suffused with Burkeanism.

On another view, the Roberts Court is repudiating hard-won wisdom, not of the ages but at least of many decades, and it is rightly criticized on Burkean grounds. At least some of the time, it is driven by abstractions, not by an appreciation of practice.\textsuperscript{325} On that view, Burke really is a man for all seasons. For those who embrace that view, the \textit{Lochner} Court was and is rightly criticized on Burkean grounds, and the same is true for the Warren Court. \textit{Carolene Products} constitutionalism, as we might call it, was a constitutional law equivalent of the French Revolution, and should be placed in the hall of jurisprudential shame for that reason. Indeed, every institution that inaugurates radical constitutional change belongs in that hall of shame, for radicalism is the criteria for induction.

On a third view, those who do not much like the Roberts Court – let’s call them the left – do and should invoke Burke and Burkeanism, not because they are really committed to them, but as a matter of strategy. Their first best is (let us say) moral readings, but because they cannot get the moral readings they prefer, they use Burke and Burkeanism strategically. For them, a Burkean Supreme Court is second-best. (In a slogan: Burkeanism for thee, moral readings for me.) It seems evident that in the current era, second-best Burkeanism is appealing on the left, just

\textsuperscript{318} See ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).
\textsuperscript{319} 22 U.S. (9 Wheat.) 1 (1824).
\textsuperscript{320} Wickard v. Filburn, 317 U.S. 111, 120 (1942).
\textsuperscript{321} 339 U.S. 629 (1950).
\textsuperscript{323} Lawrence v. Texas, 539 U.S. 558, 571 (2003).
as it was appealing on the right in the days of the Warren Court. Is it also the right strategy? Too soon to tell.

There is, of course, a fourth possibility: a Burkean might be critical of what seems (or is) a burgeoning jurisprudential revolution. But at some point, perhaps years or (better) decades later, the legal principles emerging from that framework become seen as part of the wisdom of the ages and are treated, by committed Burkeans, as deserving a healthy measure of respect and deference. The previously abhorred movement emerges from the jurisprudential hall of shame to be belatedly tolerated, and eventually venerated. The problem, of course, is that we have many different wisdoms from many ages. We suppose that a Burkean would attempt to synthesize these strands. But how does one synthesize supposed judicial deference with undoubted judicial hubris? How does one interweave anti-Lochnerism with (what some see as) a sexual Lochnerism evident in some of the Court’s opinions? It might seem that one cannot square these circles. But we have no doubt that a Burkean would try mightily to produce a serviceable composite, perhaps by venerating those traditions that are genuinely longstanding.

**Conclusion**

Most of the time, constitutional developments tend to be “normal science.” The foundations of constitutional law do not shake. Even within the Supreme Court, rulings often fill gaps, sometimes by answering questions deliberately left open, sometimes by applying established principles to new domains, and sometimes by discovering or creating modest exceptions to old principles. Reasoning by analogy tends to be the coin of the realm. Even when a constitutional right to use contraceptives within marriage is extended to include the right to purchase contraceptives for use outside of marriage, constitutional law moves incrementally. It adjusts; it does not transform.

During these times of relative stasis, people might guess about the outcome, and they might well be surprised; but no one is shocked. The Court uses the familiar methods and familiar approaches. If Justice William Brennan disagrees with Chief Justice Warren Burger, at least it can be said that they live within the same constitutional community. If Justice Lewis Powell disagrees with Chief Justice William Rehnquist, at least it can be said that they are speaking the same language.

On some occasions, however, there is some kind of a break or a rupture. The foundations shake. *Ferguson v. Skrupa*\(^{329}\) is in a different constitutional universe from *Adkins v. Children’s Hospital*\(^ {330} \). To modern readers of *Loving v. Virginia*,\(^ {331} \) with its clear disapproval of “White

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326 For vivid examples, see the account of tradition-centered conservative constitutional thought, and the views of William F. Buckley, in Nicholas Buccola, The Fire Is Upon Us (2017).
327 It is beyond the scope of the current discussion to say what a committed Burkean would do, confronted with different traditions of different degrees of longevity.
330 261 U.S. 525 (1923).
331 388 U.S. 1 (1967).
Supremacy," Plessy v. Ferguson332 seems inexplicable, a kind of constitutional glitch. After Brandenburg v. Ohio, Dennis v. United States334 seems baffling, an intruder from a parallel universe. After Dobbs,335 Eisenstadt v. Baird336 and even Obergefell v. Hodges337 seem to rest on a theory of privacy rights that lacks constitutional moorings. For their part, those who learned and worked in that period are baffled; they think that the paradigm shifters are in the grip of something, and probably something untoward and perhaps even nefarious.338 The old guard feels gaslighted. To the failed keepers of the superseded order, the radical changers claim to be following the law but are clearly practicing something else altogether. So it was in the 1930s; so it was in the 1960s; so it is today.

Paradigm shifts are often a result of popular forces, a bottom-up surge where the people yearn for, and sometimes produce, a new set of constitutional understandings, taken (rightly or wrongly) to be part and parcel of the founding document. The particular issue could be abortion, free speech, or even what is “public use.”339 But much of the time, the shifts arise from the top-down, where legal elites believe that some existing conceptions are mistaken in some way. We need a stronger executive or a more deferential Court. Or we must have a weaker Congress and more powerful states.

The new understandings might reflect an effort to recover something—the true and long-lost meaning of, say, the Due Process Clause, the Commerce Clause, the Equal Protection

332 163 U.S. 537 (1896).
338 See, and see again, and then see once more. the incredulous dissenting opinion in West Coast Hotel v. Parrish:

The suggestion that the only check upon the exercise of the judicial power, when properly invoked to declare a constitutional right superior to an unconstitutional statute, is the judge's own faculty of self-restraint is both ill-considered and mischievous. Self-restraint belongs in the domain of will, and not of judgment. The check upon the judge is that imposed by his oath of office, by the Constitution, and by his own conscientious and informed convictions, and since he has the duty to make up his own mind and adjudge accordingly, it is hard to see how there could be any other restraint.

It is urged that the question involved should now receive fresh consideration, among other reasons, because of “the economic conditions which have supervened”; but the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written -- that is, that they do not apply to a situation now to which they would have applied then -- is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise.

339 For example, after the Supreme Court’s decision in Kelo v. New London, 545 U.S. 469 (2005), the vast majority of states enacted either legislation or constitutional amendments to restrict the meaning of “public use.” See Dana Berliner, Looking Back Ten Years After Kelo, 125 YALE L.J. F. 82, 84–85 (2015).
Clause, or the Second Amendment. The new decisions might be a part of a project to fulfill “the promise” or “the aspiration” of some provision, perhaps with an understanding that the promise or aspiration might call, now, for a result for which it did not necessarily call, way back then. The new doctrines and results might stem from an appeal to changed circumstances—to changes in facts340 or values341 that are taken to permit or to require dramatic departures from past understandings.342

When a radical constitutional change occurs, it might appear to be a product of some new interpretive methodology—say, a shift to moral readings, a shift to a democracy-reinforcing approach to judicial review, or a shift to originalism. We have raised the possibility that in fact, the preferred methodology stems from a desire to secure and constitutionalize the newly preferred paradigm, or the results that the methodology produces, and is not in fact a cause of it. That is, the newly triumphant theory of constitutional interpretation may not have triumphed because of anything highfalutin, or because of its abstract appeal; it might have triumphed precisely because of the constitutional order that it made possible or inevitable.

Bottom-up ideas, ultimately attributed to social movements, can turn the unthinkable into the conventional.342 When that happens, those in or of an earlier generation might be outraged and shocked. The same is true when top-down ideas, attributable to an elite, turn out to prevail, even if they were originally deemed to be daft. One implication is that some adventurous

342 See Planned Parenthood v. Casey, 505 U.S. 833 (1992), claiming that large-scale constitutional change occurs because of new understandings of facts:

Fourteen years later, West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937), signaled the demise of Lochner by overruling Adkins. In the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in Adkins rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. . . .

The Court in Brown addressed [the] facts of life by observing that whatever may have been the understanding in Plessy’s time of the power of segregation to stigmatize those who were segregated with a “badge of inferiority,” it was clear by 1954 that legally sanctioned segregation had just such an effect, to the point that racially separate public educational facilities were deemed inherently unequal. 347 U. S., at 494-495. Society’s understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896. While we think Plessy was wrong the day it was decided, see Plessy, supra, at 552-564 (Harlan, J., dissenting), we must also recognize that the Plessy Court’s explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine Plessy was on this ground alone not only justified but required.

Id. at 861–63.

343 See the discussion of what is deemed (boldly!) to be the “standard model” of the Second Amendment in Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 TENN. L. REV. 461 (1995) (coining the term); Saul Cornell, Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory, 16 CONST. COMMENT. 221 (1999) (critiquing the standard model). To those raised on the view that the Second Amendment does not include an individual right, this discussion seems surreal, a form of gaslighting.
understandings of the Constitution, now deemed by experts to be beyond the pale, will end up as the law, and sooner rather than later. Some science fiction writers are prophets.344