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RADICAL CONSTITUTIONAL CHANGE

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At defining points in American history, there have been radical constitutional changes, defined as massive shifts in constitutional understandings, doctrines, and practices. Apparently settled principles and widely accepted frameworks are discarded as erroneous, even illegitimate, in favor of new principles and frameworks. 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. These radical, dizzying changes often trigger a sense of “constitutional vertigo,” particularly in those wedded to the old order. Our goal is to provide a conceptual map and to describe how and why radical constitutional change occurs and the vertigo that it precipitates. First, we ask whether theories of interpretation trigger radical change, or whether desires for fundamental change impel people to generate new (or modify old) theories of interpretation. Second, we explore why so many people experience a form of vertigo.

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Third, we investigate the drivers of radical constitutional change, both the familiar bottom-up pressures from “We the People” (sometimes authorizing or leading to radical change driven by the president or Congress) and the less familiar top-down approaches, where legal elites push for and then impose a new constitutional regime.

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But something is happening
And ya' don't know what it is
Do you, Mister Jones?

- Bob Dylan, "Ballad of a Thin Man"¹

"What feels different at this moment is the ambition and the velocity, how fast and aggressively [constitutional change is] happening"

- Barry Friedman²

"I couldn't stand up in front of the class and pretend the students should take the [Roberts C]ourt seriously in terms of legal analysis."

- Larry Kramer³

INTRODUCTION

Heads have spun before, and heads are spinning now.

Heads spun during the New Deal, with titanic initiatives from Franklin Delano Roosevelt and his New Deal and, eventually, dramatic shifts from the Supreme Court. Heads spun during the heyday of the Warren Court, and Lyndon Baines Johnson's Great Society left many woozy.

Nothing is exactly like anything else, of course, and things that seem alike might be very different—radically different, so to speak. We write in 2025. For many, the Roberts Court's jurisprudential shifts are revolutionary in their scope, magnitude, and pace. Or consider the flurry of executive orders in the early days of the second term of President Donald Trump. Many people think that the United States is in a full-blown "constitutional crisis," stemming from what they see as the executive branch's attempts to topple settled understandings—for example, to reconceptualize birthright citizenship, to reject the independence of independent agencies and thus to overturn *Humphrey's Executor v. United States*, to revive a long-dormant Impoundment Power, and to punish law firms and universities thought to be associated with certain

¹ Bob Dylan, Ballad of a Thin Man, *on Highway 61 Revisited* (Columbia Recs. Aug. 30, 1965).

² Jesse Wegman, The Crisis in Teaching Constitutional Law, N.Y. Times (Feb. 26, 2024), <https://www.nytimes.com/2024/02/26/opinion/constitutional-law-crisis-supreme-court.html>.

³ Id.

causes and points of view.⁴ One powerful adviser to President Trump, now the Director of the Office of Management and Budget, has exhorted the Right to become “radical constitutionalists” and “throw off the precedents and legal paradigms that have wrongly developed over the last two hundred years.”⁵

Our goal is to step back from particular rulings, orders, and events and assess the phenomenon of radical constitutional change writ large. Like that powerful aide to President Trump, we too are interested in radical constitutionalism. But our focus is not on the Roberts Court or President Trump, and we do not have much to say about them here, except to link them with prior developments and to emphasize what is obvious, which is that whether one (or both) are instigators of radical constitutional change will become much more apparent in the years to come.

Our topic is a general phenomenon: on occasion, the scope, magnitude, and pace of constitutional shifts are so significant that contemporaries feel that the foundations are shaking, with much of the past—its theoretical underpinnings, its practices, and its doctrines—abruptly delegitimated. We describe the burial of the past and the advent of a new regime as “radical constitutional change”⁶ or a “constitutional paradigm shift.” Such transformations are the source of constitutional vertigo, a dizzying sense that the old order is crashing down.

There is no doubt that constitutional law periodically experiences paradigm shifts.⁷ As we understand it, a paradigm is a defining approach or framework, not an isolated ruling or action. Considered in isolation, a modest modification of some doctrine or practice does not produce a sense of vertigo. Tinkering is not radical. And yet, a single decision, or a framework that makes it possible, might rest on a widely held paradigm,

⁴ See Protecting the Meaning and Value of American Citizenship, Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 29, 2025); *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935); Adam Liptak, Trump’s Actions Have Created a Constitutional Crisis, Scholars Say, N.Y. Times (Feb. 12, 2025), <https://www.nytimes.com/2025/02/10/us/politics/trump-constitutional-crisis.html>.

⁵ Russell Vought, Renewing American Purpose, *Am. Mind* (Sept. 29, 2022) (emphasis omitted), <https://americanmind.org/salvo/renewing-american-purpose/> [<https://perma.cc/3F66-298G>].

⁶ We use “radical constitutional change” as a relational concept, without any reference to the political left. We use “radical” to connote a far-reaching or thoroughgoing change.

⁷ See generally Thomas S. Kuhn, *The Structure of Scientific Revolutions* (1962) (exploring how paradigms shift in scientific fields). We use the idea of paradigm shift in a more colloquial way than Kuhn does.

and the repudiation of that decision or framework might reflect a nascent, or a newly regnant, constitutional paradigm.⁸

Years ago, a unique form of radical constitutional change received considerable attention. Much was written about “constitutional moments,”⁹ understood as large-scale political and legal rethinking of constitutional commitments, culminating in *legitimate* constitutional transformation. The Founding, the Civil War, and the New Deal have been described as constitutional moments.¹⁰ According to Bruce Ackerman, these were legitimate transformations because they reflected popular reformation of the Constitution.¹¹ More recently, David Strauss has highlighted many constitutional changes, both large and small, that arose outside of Article V.¹² Strauss urges that ours is a common law constitution whose meaning is determined, and altered, through case-by-case judgments. Most of the shifts he describes are not significant enough to count as constitutional moments, but many are by no means incremental and could be said to be part of a larger constitutional transformation.

⁸ Arguable examples include *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (rejecting the *Lochner* Court’s use of substantive economic due process and upholding a state law setting minimum wages for working women); *Brown v. Board of Education*, 347 U.S. 483 (1954) (overruling the “separate but equal” doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), to declare school segregation unconstitutional); *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), to hold that the federal Constitution does not provide a right to abortion); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding that the Second Amendment protects an individual’s right to possess a firearm in his home); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (SFFA)*, 143 S. Ct. 2141 (2023) (holding that affirmative action admissions practices in universities violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that a public official allegedly subject to defamatory falsehoods relating to his official conduct must prove actual malice in order to recover damages for the defamation); and *Reynolds v. Sims*, 377 U.S. 533, 534 (1964) (holding that the “Equal Protection Clause requires substantially equal legislative representation for all citizens in a State regardless of where they reside”).

⁹ See generally 2 Bruce Ackerman, *We the People: Transformations* (1998).

¹⁰ See *id.* at 11–12.

¹¹ See 1 Bruce Ackerman, *We the People: Foundations* 40–44 (1991) (“[B]oth Reconstruction Republicans and New Deal Democrats engag[ed] in self-conscious acts of constitutional creation that rivaled the Founding Federalists’ in their scope and depth.”).

¹² See David A. Strauss, *The Living Constitution* 115–39 (2010).

It is difficult to specify necessary and sufficient conditions for constitutional moments.¹³ There is debate about how stringent such tests should be.¹⁴ In any case, most large-scale shifts lack the procedural rigor and popular support that some demand for *legitimate* transformation. We analyze the phenomenon of constitutional change without regard to whether the changes are legitimate, which makes our project broader than Ackerman's. Further, our account differs from Strauss's. While he focuses on how case-by-case judgments change constitutional law over time, we (mostly) widen the lens and consider why and how radical constitutional change occurs, the vertigo it causes, and the crucial role of top-down, elite-driven change in constitutional law.

Jack Balkin's treatment of "off-the-wall" and "on-the-wall" constitutional claims describes how it is that certain arguments that were once seen as outlandish come to be taken seriously by some and, eventually, by many.¹⁵ We have learned a great deal from Balkin's important work, and portions of our discussion borrow from and build on his insights. Our treatment touches upon additional matters, including the relationship between constitutional theories and change, the vertiginous consequences of paradigm shifts, and top-down, not just bottom-up,

¹³ For discussion, see Daniel Taylor Young, *How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling to Evaluate Bruce Ackerman's Theory of Constitutional Change*, 122 Yale L.J. 990, 993–96 (2013).

¹⁴ Compare 1 Ackerman, *supra* note 11, at 266–67 (describing four necessary stages: signaling, proposal, mobilized public deliberation, and codification), with 3 Bruce Ackerman, *We the People: The Civil Rights Revolution* 44–46 (2014) (advancing a more complicated process of signaling, proposal, a triggering election, mobilized elaboration, a ratifying election, a consolidating phase, and a return to normal politics).

¹⁵ See, e.g., J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 Fordham L. Rev. 1703, 1729 (1997) (describing "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) (developing "off-the-wall" versus "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"). We are particularly taken by this illuminating (and charming) comment:

[M]y 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).

theories of constitutional change. Other differences emerge, though we refrain from identifying all relevant contrasts.

In this Article, we offer a conceptual map and discuss how constitutional arguments move from the margin to the mainstream and thus induce a sense of vertigo. We make five claims:

1. Constitutional understandings can be arrayed along a continuum. In the center is the mainstream of thought. Beyond the mainstream are claims that can be aligned along the continuum from extreme to outlandish to unthinkable. A constitutional argument can move between these categories, shifting from the outlandish to the mainstream or from the mainstream to the unthinkable. Of course, some unthinkable claims are attractive to the left, and others are attractive to the right. (We offer examples.)
2. Theories of constitutional interpretation do not much constrain radical constitutional change, either because most theories are flexible enough to authorize such change, or (in our view, more interestingly) because those seeking radical change tend to endorse a theory that mandates or permits it.¹⁶ Indeed, some embrace a constitutional theory precisely *because* it mandates or permits the radical change they desire. This is the reason, or at least a reason, that some constitutional theories come to be seen as intensely appealing, even if they seemed weird, outlandish, or radical when they were initially proposed. This is also, we think, a significant part of what constitutional theorizing in the academy and elsewhere is about, at least implicitly.
3. Radical constitutional change is often a product of bottom-up influences, as when ordinary citizens insist on such change and institutions respond (including with a theory of interpretation that legitimates such change). But constitutional change also reflects top-down influences, as when legal elites (within the academy, the bar, and the federal government¹⁷) articulate a new theory or argue for new outcomes and convince other elites. The

¹⁶ See, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 50–51 (1980).

¹⁷ More precisely, by legal elites we mean members of Congress, the executive branch, the judiciary, the bar, and the legal academy. In some areas, say, when states are trying to drive constitutional change, what state officials say and do will matter as well.

role of legal elites in driving constitutional change has received far too little attention. In fact, without the backing of at least some legal elites, no constitutional change at the federal level is possible because, as we explain later, elites enjoy a monopoly over all the instruments of change. The undoubted divisions among elites do not diminish this monopoly. Furthermore, elites gatekeep constitutional change, even as some significant elites (legislators and presidents) are subject to an electoral check. Sometimes the public merely authorizes radical constitutional change, and national institutions (presidents, Congress, courts) take the lead.

4. Radical constitutional change produces a sense of vertigo among those educated in, or committed to, the displaced regime. Often, they feel disoriented, even gaslighted. This vertigo occurs because old theories are discarded, and new ones take their place. It occurs because old narratives, widely accepted for decades, are repudiated in favor of new narratives, perhaps understanding U.S. history in novel and different ways. It occurs because some canonical cases lose that status, and new cases, or long-neglected cases, become iconic and part of the new canon.¹⁸ It occurs because canonical cases, or long-neglected cases, become understood in radically new and different ways.
5. Constitutional law is highly contingent—far more so than those immersed in a particular period tend to think. Contemporary lawyers, law professors, and judges often find it difficult to grasp the central methods at work in constitutional law in (say) 1890, 1920, and 1950 because those methods are so far from their own. People immersed in a particular set of understandings—and used to seeing contemporary Justices as larger than life, even giants (perhaps heroes, perhaps villains)—tend to treat their practices and conceptions as somewhat timeless and fixed, rather than as one effort to see through a glass darkly. That is one reason that

¹⁸ We are grateful to Lawrence Solum for help with this paragraph. Consider here *Brown v. Board of Education*, much criticized in its time, but now taken for granted by all sides. *Brown* has been canonized by all. We briefly discuss the contemporaneous critique of *Brown* below, noting that our discussion might be revealing to those who believe that the decision was obviously right. In our view, matters are far more complicated. See *infra* Section I.B.

they experience a sense of vertigo when what seemed timeless is thrown into some kind of garbage can.

Part I lays out a continuum of constitutional claims. We explore change in all its forms—the rejection of established doctrine and practices, the radical changes in theories, and the movement of claims once seen as extreme and outlandish to being taken as reasonable, mainstream, and even correct. When that movement occurs, some people experience a sense of triumph, as if they have won a war, while others have a sense of defeat, as if their world has been lost.

In Part II, we consider the complicated relationship between radical constitutional change and theories of constitutional interpretation.¹⁹ We discuss whether constitutional theories are accelerants or retardants to radical change. We also discuss the possibility that some people modify or create new constitutional theories to legitimate or foster radical constitutional change. As we will see, some carts lead some horses.

Part III focuses on the phenomenon of constitutional vertigo. Some regard radical change, when it occurs, as a byproduct of naked power.²⁰ To them, a pack of yahoos, or extremists, or authoritarians discarded the old regime, with judges and haven't-got-a-clue law professors both following political winds and doing politics.²¹ They hijacked the Constitution. The inmates seem to be running the asylum. “This is not law; this is not our Constitution,” the critics will proclaim.²² The skeptics and the proponents live in different *epistemic communities*; what they think, and what they know, reflects their parochial community and offers (if it is in the ascendancy) a sense of timelessness.²³

¹⁹ Our discussion of the rise and fall of constitutional theories intersects with Philip Bobbitt's constitutional modalities. See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 7 (1982). It is possible that some theories of constitutional interpretation (e.g., a concern for discrete and insular minorities) reflect a focus on ethical arguments, and that other theories (say, originalism) exalt text and history. Most theories of interpretation are pluralistic in the sense that they rely upon more than one of Bobbitt's modalities. While Bobbitt believes that each of his modalities is an appropriate method of interpretation, we wonder whether his work mostly reflects the particular factors that seemed especially relevant at the end of the twentieth century.

²⁰ For a vivid example, see James Jackson Kilpatrick, *The Southern Case for School Segregation* 105 (1962).

²¹ See the discussion of Burke, *infra* Section II.B.

²² See Learned Hand, *The Bill of Rights: The Oliver Wendell Holmes Lectures*, 1958, at 55 (1958); Kilpatrick, *supra* note 20, at 165–66.

²³ The term “epistemic communities” emerged out of and is most often used in the field of international relations in ways that overlap with but are more specific than our usage here. For

But the communities may eventually find common ground, for once the new order is widely accepted, much from the bygone era will seem jarring, even illegitimate, perhaps part of the “anticanon.”²⁴ Long after a new regime takes hold, a lawyer might find past discourse baffling: “How was any of this plausible, much less the law?”

Consider some wisdom from the physicist Max Planck: “A new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it.”²⁵ Science, it is sometimes said, advances one funeral at a time, and there is scientific evidence that this is quite true.²⁶ The same is often true, we suggest, in law. But Planck’s famous statement is too stark. Well before the death of the opponents of a new order, the handwriting may be on the wall, and hence the widespread sense of vertigo. Something is happening here, but the defenders of the old order may not know what it is. Sometimes, the guardians of the old order die twice, as it were—once when their theory is unceremoniously (or ceremoniously) discarded, and once when they pass.

We discuss the drivers of radical change in Part IV, focusing on elites. There is a rich literature about social movements focused on constitutional change²⁷—groups that seek to shift the Overton Window

overviews of the concept as it developed in international relations, see Peter M. Haas, Introduction: Epistemic Communities and International Policy Coordination, 46 *Int’l Org.* 1, 3 (1992); Peter Haas, Epistemic Communities, in *The Oxford Handbook of International Environmental Law* 698, 698–701 (Lavanya Rajamani & Jacqueline Peel eds., 2d ed. 2021). For a valuable account of how people know what they know, with an emphasis on epistemic limits, see generally Russell Hardin, *How Do You Know? The Economics of Ordinary Knowledge* (2009). In law, see Kerstin von Lingen, Epistemic Communities of Exile Lawyers at the UNWCC, 24 *J. Hist. Int’l L.* 315, 316–17 (2022) (discussing epistemic communities among lawyers).

²⁴ See Jamal Greene, *The Anticanon*, 125 *Harv. L. Rev.* 379, 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.”).

²⁵ Max Planck, *A Scientific Autobiography* (1948), *reprinted in* *Scientific Autobiography and Other Papers* 13, 33–34 (Frank Gaynor trans., 1950).

²⁶ Pierre Azoulay, Christian Fons-Rosen & Joshua S. Graff Zivin, *Does Science Advance One Funeral at a Time?*, 109 *Am. Econ. Rev.* 2889, 2889 (2019). We are pleased to report that the authors of this article are all alive.

²⁷ An intriguing account of two such movements, focused on James Baldwin and William F. Buckley Jr., is Nicholas Buccola, *The Fire Is Upon Us: James Baldwin, William F. Buckley*

and alter constitutional doctrine.²⁸ We expand the lens from bottom-up catalysts to encompass the paradigm shifts that originate from the top. Officials, scholars, and lawyers have their constitutional theories and are not merely reacting to bottom-up pressures. Top-down shifts include the textualist turn,²⁹ the swing toward the unitary executive,³⁰ and the push for a constitutional right to welfare.³¹ In these cases, elites sought to alter the law through argumentation and advocacy.³² Members of the public might not know or care much about top-down shifts; they might give a permission slip. Further, we demonstrate that elite buy-in is necessary for *any form of federal constitutional change*, radical or otherwise.

Part V considers two hypotheticals that may border on science fiction: one involving abortion and the other the Senate. Some pro-lifers believe that the Constitution forbids abortion.³³ These advocates hope to mainstream their view and convince officials (executive, legislative, and judicial) to adopt it. Claiming that the Senate is unconstitutional seems unthinkable, perhaps bonkers. Yet under not unimaginable (though hardly likely) circumstances, the argument could be mainstreamed. Our point is not to convince you that either claim will become part of the mainstream,

Jr., and the Debate Over Race in America (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.

²⁸ Reva B. 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, 1945–47, 1950 (2003). See generally William N. Eskridge, Jr. & Christopher R. Riano, Marriage Equality: From Outlaws to In-Laws (2020) (discussing the gay rights movement).

²⁹ See William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, Textualism's Defining Moment, 123 Colum. L. Rev. 1611, 1612 (2023) (describing textualism as creating a "revolution in statutory interpretation").

³⁰ See *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2202–03 (2020); see also Cass R. Sunstein & Adrian Vermeule, The Unitary Executive: Past, Present, Future, 2020 Sup. Ct. Rev. 83, 105–10 (2021) (discussing *Seila Law*'s implications for the future of unitary executive theory).

³¹ See *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970); see also Frank I. Michelman, The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7, 9 (1969) (describing the "judicial 'equality' explosion" and positing that the Court's interventions in the mid-twentieth century were "mainly designed to move us towards a condition of economic equality," with an emphasis on a decent minimum for all).

³² A vivid example is *Goldberg*, 397 U.S. at 262 n.8, which pointedly cited Charles A. Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245, 1255 (1965), and Charles A. Reich, The New Property, 73 Yale L.J. 733 (1964).

³³ See *infra* notes 295–96.

much less established doctrine, but rather that certain forms of radical change will seem exceedingly unlikely, if not unthinkable, until they belatedly occur. For those who find our claims here to be implausible, consider the effort, in 2025, to reconceive birthright citizenship, an effort that might not have even been imaginable just ten years before.³⁴

A few words about the contours of our project are necessary. We do not address whether radical changes are legitimate or illegitimate, misguided or long overdue. Ours is a descriptive project. Further, we ignore Article V. We seek to describe how radical constitutional change occurs on the ground. From that perspective, Article V has been neither necessary nor sufficient for radical constitutional change. Moreover, nothing we say should be read as endorsing or rejecting any particular constitutional theory. Whether one is a Dworkinian,³⁵ a believer in the Compact Theory,³⁶ an originalist, or a fan of representation reinforcement,³⁷ everyone can profit from pondering radical constitutional change by temporarily sidelining their preferred theory of interpretation.³⁸

We believe that (almost) everyone can recognize the sweeping changes right before our eyes.³⁹ The Roberts Court may be (is?) the new Warren Court.⁴⁰ And, we have seen, prominent members of the Trump

³⁴ Protecting the Meaning and Value of American Citizenship, Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 29, 2025).

³⁵ See Ronald Dworkin, *Law's Empire*, at vii (1986).

³⁶ See John C. Calhoun, *The South Carolina Exposition* (1828), reprinted in 6 *The Works of John C. Calhoun* 1, 38–39 (Richard K. Crallé ed., N.Y., D. Appleton & Co. 1855).

³⁷ See Ely, *supra* note 16, at 181.

³⁸ There are two more limits on our project: First, we say nothing about how constitutional change fits within the broader question of legal change. Second, we do not address the role that technology plays in constitutional change.

³⁹ 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.

⁴⁰ Thankfully, one may accept our framework even if one concludes that the Roberts Court has been incrementalist. Skeptics of our claim might argue that the number of overrulings remains limited. For instance, according to Jonathan Adler, the Roberts Court has been far more respectful of precedent as compared to the Warren and Burger Courts. See Jonathan H. Adler, *The Restrained Roberts Court*, Nat'l Rev. (July 13, 2023, 2:17 PM), <https://www.nationareview.com/magazine/2023/07/31/the-restrained-roberts-court/>. Other skeptics might say that while doctrine has changed, the real world has not changed all that much. For example, one might claim that *Dobbs* has not much affected the number of abortions and that *SFFA* has not much changed the racial composition of entering college classes. (These are of course empirical issues.) Further, one might say that the ultimate impacts are uncertain because the Court has not fully specified the criteria that lower courts must apply.

Administration seem bent on radical change.⁴¹ If vertiginous constitutional change is afoot,⁴² it is a particularly apt moment for theorizing about constitutional paradigm shifts.

But let us be stubborn: the landscape of constitutional law looks dramatically different from what it was in (say) 2007, for even if the number of precedents overturned remains relatively low, the sheer magnitude of these changes cannot be gainsaid. The rise of Second Amendment rights; the embrace of a unitary executive; the protection of commercial advertising; the growing solicitude for free exercise claims; the emphasis on textual, originalist, and historical methodology (whether consistently applied or not); the repudiation of the idea that courts should defer to agency interpretations of ambiguous statutes (an abandonment rooted in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803))—all this signals that something is happening here. We know what it is, Mr. Jones.

To offer a bit more detail, the discarding of *Roe* and *Casey* is a monumental change. *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/> [https://perma.cc/DPQ4-AF2P]. Its termination via *Dobbs* is a watershed, even if most states permit abortion. 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.*, 142 S. Ct. 2228, 2248 (2022). Likewise, the discarding of *Grutter v. Bollinger*, 539 U.S. 306 (2003), clearly signals that another transformation is afoot. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2170–75 (2023). *SFFA* is momentous because it overturned a highly permissive regime, one in which colleges could use race in their admissions. It is reasonable to think that *SFFA* will eventually affect admissions and class composition, as colleges get sued for flouting its constraints. *SFFA* also will spur, and is spurring, suits against the use of race in governmental employment, contracting, and funding, with courts likely to strike down some or many such programs. See, e.g., Julian Mark & Aaron Gregg, Federal Judge Halts Disaster Aid Program for Minority Farmers, Wash. Post (June 10, 2024), <https://www.washingtonpost.com/business/2024/06/10/usda-minority-farmers-injunction/> (discussing an equal protection suit brought against the Agriculture Department and other such lawsuits); Anemona Hartocollis, Northwestern Law School Accused of Bias Against White Men in Hiring, N.Y. Times (July 2, 2024), <https://www.nytimes.com/2024/07/02/us/affirmative-action-lawsuit.html> (discussing a Title IX suit and the impact of *SFFA*). And as mentioned earlier, there are other major changes afoot, regarding free exercise, the Establishment Clause, standing, takings, and more.

⁴¹ See, e.g., Vought, *supra* note 5 (calling for the right "to throw off the precedents and legal paradigms that have wrongly developed over the last two hundred years").

⁴² Some colleagues have made to us a more radical point (pun intended): constitutional change is never truly radical unless one witnesses undeniably revolutionary change. The French and Russian Revolutions yielded radical constitutional change; without such a transformation in constitutional fundamentals, there is no paradigm shift. Because radical change is necessarily contextual, we can see why some, particularly those focused on comparative constitutional law, might suppose that none of the changes that America has experienced is radical. But within the American context, we believe that there have been many paradigm shifts that have transformed how we see and implement our Constitution. What can be radical for America may be humdrum elsewhere. May it always be so.

I. MAPPING THE CONSTITUTIONAL SPACE

In short order, we chart a continuum of constitutional space. Rather than focusing on whether some constitutional claims are right or wrong, we believe it clarifying to envision such claims as existing along a spectrum of plausibility, with some assertions becoming more or less acceptable over time. But before we say more about the spectrum, we discuss what constitutes radical constitutional change.

A. What Is Radical Change?

As with many social phenomena, “radical change,” as understood here, does not have necessary and sufficient conditions, *other than that there must be some form of large-scale change*. We assemble examples of what we see as radical change, but we do 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 the famous footnote 4 of *United States v. Carolene Products Co.*, emphasizing protection of “discrete and insular minorities,” to originalism unquestionably counts as a radical change;⁴³ so does the New Deal Court’s jettisoning of *Lochner v. New York*⁴⁴ and everything that accompanied it; and so does the near-obliteration, as we see it, of substantive due process in *Dobbs v. Jackson Women’s Health Organization*.⁴⁵

On the other hand, *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁴⁶ strikes us as an incremental adjustment to *Roe v. Wade*,⁴⁷ and the same could be said of the carve-outs that the Rehnquist Court made to the Warren Court’s criminal procedure rulings.⁴⁸ As noted earlier, incremental and isolated adjustments fall within a different category and do not, by definition, count as radical change; they hardly produce a sense of vertigo.⁴⁹

⁴³ 304 U.S. 144, 152 n.4 (1938).

⁴⁴ 198 U.S. 45 (1905).

⁴⁵ 142 S. Ct. at 2228.

⁴⁶ 505 U.S. 833 (1992).

⁴⁷ 410 U.S. 113 (1973).

⁴⁸ We have said that the Rehnquist Court adopted minimalism, which can be seen as a radical step. 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 is doing. Minimalism can be a radical shift in approach, but by definition, it will call for only incremental change in doctrine.

⁴⁹ See generally *Casey*, 505 U.S. 833 (upholding *Roe*, but replacing the strict trimester framework with the “undue burden” standard for evaluating abortion restrictions);

The advent of a new paradigm is a function of multiple factors: doctrinal movement, methodological switches, alterations in real-world practices, and the breadth, speed, and magnitude of the relevant changes.⁵⁰ All of these are, of course, a product of underlying causes, which may include new appointments to the courts, large-scale swings in public opinion, a new and ambitious president, a rejuvenated and go-getting Congress, or changes on the ground (say, a war, a social movement, or an economic upheaval). If one witnesses rapid and sizable change across multiple dimensions, radical change will be obvious to all. When change is experienced along only one dimension, the scope of the alterations can plausibly be characterized as small or moderate, or when the changes are more occasional and episodic, people will debate whether something radical is stirring.

Consider rapid changes to constitutional doctrines.⁵¹ 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 a slew of Commerce Clause precedents and signaled a reluctance to police economic legislation.⁵² Likewise, the Warren Court marked a period of radical change, for the Court abandoned judicial deference by striking down essentially all forms of racial segregation and revolutionized criminal procedure practices.⁵³ (We note

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (establishing the “public concern” test for free speech).

⁵⁰ We are not the only ones who think that rapidity and magnitude of changes matter. See Andrew Coan, *Too Much, Too Quickly?*, 58 U.C. Davis L. Rev. 407, 407–08 (2024) (describing critiques that the Supreme Court is moving too far, too fast, and observing that moral and ideological judgments inform some of the discontent). To be clear, we do not take a stand on whether and when slow and small changes or fast and big ones are desirable. To every thing there is a season, as they say. (No citations for that one, with a nod to the theologically minded and to fans of the Byrds.)

⁵¹ See, e.g., *Dobbs*, 142 S. Ct. 2228; *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

⁵² *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 Gardbaum, *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”).

⁵³ See Ely, *supra* note 16, at 73–74, 148.

parenthetically that, for many people now teaching law and schooled during the decades after the Warren Court, its once-radical decisions and even its once-contested methods seem entrenched, a kind of permanent status quo.)

The multiple transformations of the Fourteenth Amendment supply dramatic (and in their way, dizzying) examples. *The Slaughter-House Cases*' cramped reading was followed by *Lochner*'s precursors, each of which adopted a broad (and substantive) interpretation of the Due Process Clause.⁵⁴ *Lochner* died in *West Coast Hotel Co. v. Parrish*,⁵⁵ marking a quiescent period. But over time, the Court used the Due Process Clause to incorporate the Bill of Rights against the states and to give birth to (substantive) privacy rights.⁵⁶ Further, and in a clear paradigm shift, the Court "reverse incorporated" the Equal Protection Clause against the federal government.⁵⁷ This Fourteenth Amendment regime, which was relatively stable for decades, was the product of a radical change. So too would be its total destruction, and so too is its partial collapse in *Dobbs*.⁵⁸

Perhaps paradoxically, certain paradigm shifts might generate little in the way of change from the status quo. For instance, one conception of judicial restraint,⁵⁹ calling for less in the way of judicial invalidation of state and federal action and often advanced by the Warren Court's critics,

⁵⁴ See, e.g., *The Slaughter-House Cases*, 83 U.S. 36 (1872); *Mugler v. Kansas*, 123 U.S. 623, 661–63 (1887); *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897).

⁵⁵ 300 U.S. 379 (1937).

⁵⁶ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Gitlow v. New York*, 268 U.S. 652, 670 (1925).

⁵⁷ See generally *Bolling v. Sharpe*, 347 U.S. 497 (1954) (binding the federal government to the same constitutional standards of equal protection as those imposed on the states by the Fourteenth Amendment).

⁵⁸ Radical constitutional change may seem like the presidential regime change that American political scientists have discussed. There are parallels. Certain presidents establish a "regime," where one party dominates legislatively and electorally. According to Stephen Skowronek, there have been multiple presidential regimes. Stephen Skowronek, *The Politics Presidents Make: Presidential Leadership from John Adams to George Bush* 34–45 (1993). Likewise, within a constitutional paradigm, one 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. Nonetheless, 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 paradigm shift is not invariably a judicial phenomenon. Other institutions—the states, the federal executive, and Congress—can generate radical change. Indeed, they have done so over the course of American history. We leave other similarities and differences to one side.

⁵⁹ 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. Some who embrace one conception of judicial restraint might reject another.

may have led the Burger Court to reject demands for more drastic change, like a right to welfare or a bar on the death penalty. The argued-for logic of Warren Court decisions, taken to call for such drastic change, was resisted by something like “No more of that.”

Other understandings of judicial restraint, focused on *stare decisis*, may have discouraged the Rehnquist Court from overruling much in the way of precedent. That Court did not overturn *Miranda v. Arizona*,⁶⁰ *Roe*,⁶¹ or, arguably, much of consequence. Justices Anthony Kennedy and Sandra Day O’Connor tended to disfavor radical change in existing doctrine; in general, they preferred incremental movements, sometimes captured in the idea of “judicial minimalism.”⁶² Judicial minimalism, which could itself be taken as a paradigm shift, is much less with us today.⁶³

Setting aside the Supreme Court, imagine if presidents began to defy judicial judgments by regularly refusing to obey or enforce them. (That would have been hard to imagine in 2024. But many people are imagining it all the time in 2025. We know that this parenthetical will soon be outdated, but we do not know exactly how, why, or when.) Or imagine if Congress significantly pared back the Supreme Court’s appellate jurisdiction, say by excepting the “arising under” jurisdiction. Either change would seem radical without regard to any potential alteration in how we understand the First Amendment or the Commerce Clause. Some structural features are foundational, and significant alterations of those features would constitute radical change.

Some paradigm shifts have less to do with doctrine or practice on the ground and instead fundamentally change how we think and speak about the Constitution. The movement from more purposivist and intentionalist approaches to a more (but hardly entirely) textualist stance has altered how many people (including judges) discuss and interpret the law.⁶⁴ No competent litigant or judge can now focus on purposes, intentions, and

⁶⁰ 384 U.S. 436 (1966).

⁶¹ 410 U.S. 113 (1973).

⁶² Consider their incremental approach in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

⁶³ On the bench, a prominent adherent of this approach is Judge J. Harvie Wilkinson, III. See J. Harvie Wilkinson, III, *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance* 7 (2012). Chief Justice Roberts has also shown such tendencies. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2311 (2022) (Roberts, C.J., concurring in the judgment).

⁶⁴ See, e.g., Aaron-Andrew P. Bruhl, *Supreme Court Litigators in the Age of Textualism*, 76 Fla. L. Rev. 59, 59 (2024) (finding a “textualist shift” in Supreme Court briefing, although not one as large as that of the Court itself).

spirits to the exclusion of *significant* attention to the text.⁶⁵ Some decision-makers, including many judges, invoke textualism because they wish to follow its strictures.⁶⁶ They are textualists as a matter of principle. Others may be less enthusiastic but may wish to demonstrate textualism's influence on their conclusions, or to show that their approach is compatible with textualism. Lower courts, and executive officials, might be more textualist to avoid having their readings overturned by a more textualist Supreme Court.⁶⁷ In any event, many now perceive the Constitution through the lens of textualism. Something similar can be said about originalism.

While radical change is easiest to identify when it occurs abruptly, some changes can reasonably be counted as radical even if they occur over long stretches of time. For instance, the multitude of changes to constitutional conceptions of the presidency arguably constitute a paradigm shift even though they took place over decades. We have gone from an office principally focused on law execution to a politician who can wage war⁶⁸ and wield a popular mandate to implement a policy agenda that stretches to tariffs, immigration, energy and the environment, health care, civil rights policy, and beyond (Greenland?). Similarly, over centuries, we went from a regime where Congress was the most important constitutional actor to one where the courts seem to play that role.⁶⁹ The

⁶⁵ As Justice Elena Kagan famously said, "We're all textualists now." Harvard Law School, The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes, at 08:29 (YouTube, Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> [<https://perma.cc/KU55-96AH>].

⁶⁶ See, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020). In that case, Justice Neil Gorsuch wrote an opinion that was unexpected to observers "who doubted that textualism could lead to such a progressive outcome." Tara Leigh Grove, *Which Textualism?*, 134 Harv. L. Rev. 265, 266 (2020).

⁶⁷ 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) ("[A]s 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, 824 (2019) (finding more mixed evidence of lower court compliance with Supreme Court interpretive methodologies).

⁶⁸ Saikrishna Bangalore Prakash, *The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers* 162 (2020).

⁶⁹ See Cass R. Sunstein, *The Partial Constitution*, at v–vi (1993). There are intriguing and insufficiently explored questions about how to measure the importance of various institutions over time. Note that we use the adjective "constitutional" here, pointing to authority over

Supreme Court of John Jay and the Supreme Court of John Roberts are radically different institutions.

It might seem obvious that radical change is partly a function of new personnel, and often that is true. But in fact, fresh faces are unnecessary. A Justice might move from a minimalist stance (favoring slow change) to one that favors rapid transformation. If that Justice is pivotal—in the middle of an evenly divided Court—her metamorphosis may help generate all manner of radical changes. Likewise, a member of Congress may move from a backbencher to a leadership position, a move that may make any constitutional change she favors more likely.

Even temporary change can count as radical. If a president refused to enforce judicial judgments or environmental regulations for four years but successors reverted to the traditional practice, the initial departure would count as radical change. Likewise, if the Court adopted a hostile stance toward minimum wage legislation but rejected that posture seven years later, the interim hostility would constitute a radical change followed by a reversion, itself radical, to the status quo ante.

There will be borderline cases where reasonable people disagree about whether a particular change is incremental or is instead part of a radical transformation.⁷⁰ Indeed, one might often say about a potentially transformative set of rulings what Chou En Lai said in 1972 when asked what he thought about the French Revolution: “Too early to say.”⁷¹ Sometimes we do not know whether we are in the midst of a constitutional

constitutional understandings as such; we do not say and do not believe that courts are the most important of the three branches in the American constitutional order.

⁷⁰ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021); *id.* at 2225 (Kagan, J., dissenting) (writing that “[t]he Court here transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement”).

⁷¹ Zhou Enlai (Chou En Lai) 1898–1976, *in* *Oxford Essential Quotations* (Susan Ratcliffe ed., 4th ed. 2016). Whether Mr. En Lai was referring to the 1789 Revolution or student riots of 1968 is much disputed. But one point is indisputable: people can find themselves amid a revolution and not perceive it as such until much later.

transformation until the new era is well underway.⁷² It can be hard to know what one is in when one is in it.⁷³

B. Mainstreaming and Marginalizing

In 1930, it would have been outlandish, if not unthinkable, to suggest that the Constitution completely forbids racial segregation;⁷⁴ demands equipopulous districts;⁷⁵ requires (what are now known as) *Miranda* warnings;⁷⁶ or imposes restrictions on libel law.⁷⁷ By 1970, what was once outlandish had become the law of the land. In that year, it would have been outlandish to suggest that the Constitution requires states to recognize same-sex marriage,⁷⁸ broadly protects commercial advertising, and recognizes an individual right to possess firearms. By 2015, the Court had embraced all of those propositions.⁷⁹

In the 1960s and 1970s, some prominent law professors, judges, and lawyers regarded the Warren Court as lawless.⁸⁰ Their stance reflected

⁷² A current example is the regime inaugurated by *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). For discussion, see Adrian Vermeule, *Chevron by Any Other Name*, Substack: The New Dig. (June 28, 2024), <https://thenewdigest.substack.com/p/chevron-by-any-other-name> [https://perma.cc/45XH-XS8Y] (suggesting that the decision might not inaugurate radical change); Cass R. Sunstein, *Our Marbury: Loper Bright and the Administrative State*, 74 Duke L.J. 1893 (2025). *Loper Bright* was, of course, based on the Administrative Procedure Act, specifically 5 U.S.C. § 706, but it was clearly inspired as well by Article III and *Marbury v. Madison*. See *id.* at 1895–96.

⁷³ One of us recalls a scene from an old television miniseries, *The Winds of War*, covering the start of World War II near Pearl Harbor in Hawaii, in which one character says to another, right after the Japanese attack, “What happened?” and the other exclaims, “Pearl Harbor happened!” The line is anomalous and weird because people at Pearl Harbor would hardly say, in the aftermath of the Japanese attack, “Pearl Harbor happened!” “Pearl Harbor” was just a place, and not the name of a historic attack, until long after.

⁷⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁷⁵ *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁷⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁷⁷ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁷⁸ 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).

⁷⁹ See *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015); *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975); *District of Columbia v. Heller*, 554 U.S. 570, 571–72 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (opinion of Alito, J.); *Caetano v. Massachusetts*, 577 U.S. 411, 411–12 (2016) (per curiam); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2156 (2022).

⁸⁰ See, e.g., Philip B. Kurland, *Politics, the Constitution, and the Warren Court*, at xx–xxiii (1970); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 20 (1959); Hand, *supra* note 22, at 45–55.

lessons imbibed during the New Deal. Before the New Deal, many Justices firmly believed that the Constitution embraced certain political commitments, often going by the name of “laissez-faire.” For the *Lochner* skeptics, however, the paradigm of an illegitimate judicial ruling was *Adkins v. Children’s Hospital*,⁸¹ striking down minimum wage legislation. Their model of a legitimate judicial approach was *Ferguson v. Skrupa*,⁸² upholding economic legislation under the “rational basis” test. The *Lochner* skeptics believed that the founding document allowed wide scope for democratic processes.⁸³

To the critics of the Warren Court’s constitutional paradigm, the *beau idéal* of a judge was Justice Oliver Wendell Holmes. Their model of a judicial opinion was his *Lochner* dissent:

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 whether statutes embodying them conflict with the Constitution of the United States.⁸⁴

Note that Justice Holmes’s opinion was not in the least textualist, and that it did not offer a word about the original public meaning of the Due Process Clause. Instead, it offered a broad, if modest, vision of the role of the Supreme Court in American government. For the cohort of professors, judges, and lawyers schooled in and by Holmes, the Warren Court was repeating the mistakes of the *Lochner* era—imposing radically different

⁸¹ 261 U.S. 525 (1923).

⁸² 372 U.S. 726 (1963).

⁸³ See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 152, 155–56 (1893). A valuable discussion of Thayer’s motivations, emphasizing Thayer’s political conservatism and his desire to combat ill-considered progressivism, is Mark Tushnet, *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 triumph for a spell, see generally Brad Snyder, *Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment* (2022) (detailing how Thayer triumphed through Frankfurter and others only to lose out in the Warren Court).

⁸⁴ *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting). You could argue that Justice Scalia became the new Justice Holmes in the sense that his approach to constitutionalism, and in particular his insistence on originalism, has become defining for a generation or two, and possibly more.

values, to be sure, but with the same hubris.⁸⁵ *Brown v. Board of Education*,⁸⁶ it was said, violated the necessary commitment to “neutral principles.”⁸⁷ *Roe v. Wade*,⁸⁸ it was said, was “*not* constitutional law” and displayed “almost no sense of an obligation to try to be.”⁸⁹ It is no wonder that the Warren Court’s critics experienced a sense of vertigo. They lamented that what had long been thought to be illegitimate was now somehow embraced by left-of-center judicial activists. To the detractors, what the Court was doing was lawless, made up, an assertion of will, and a naked exercise of power.

Because *Brown* has become so iconic, a fixed point for all sides, it is difficult, jarring, and keenly illuminating for moderns 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 doubted *Brown*.⁹⁰ In his view, “the question posed by state-enforced segregation is not one of discrimination at all.”⁹¹ Instead, one had to consider whether *integration* consisted of a “denial by the state of freedom to associate.”⁹² For Wechsler, “if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant.”⁹³ He then identified what he thought to be the nub: “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?”⁹⁴

Wechsler’s answer was telling: “I should like to think there is, but I confess that I have not yet written the opinion.”⁹⁵ In his account, neither he nor the Court was quite up to the task of justifying *Brown*. For Wechsler, *Brown* seemed to produce vertigo; for many modern readers, it is Wechsler’s discussion that triggers vertigo.

⁸⁵ See Snyder, *supra* note 83, at 5.

⁸⁶ 347 U.S. 483 (1954).

⁸⁷ See generally Wechsler, *supra* note 80.

⁸⁸ 410 U.S. 113 (1973).

⁸⁹ John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 947 (1973).

⁹⁰ See generally Wechsler, *supra* note 80.

⁹¹ *Id.* at 34.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

Wechsler was not an originalist, which fit the time; originalism was not a widely accepted approach. But some attacks on *Brown* were in the originalist key, and the critics were incredulous at the radical transformation. James J. Kilpatrick depicted *Brown* as utterly lawless, a judicial usurpation, and a radical shift justified by nothing but the moral views of the Justices, who understood neither the Constitution nor the South.⁹⁶ Kilpatrick noted that the Congress that proposed the Fourteenth Amendment “provided for racially [segregated] schools in the District of Columbia.”⁹⁷ He added that for “a long period of years following adoption of the amendment, States both North and South continued to operate [segregated] schools, without protest or interference of any sort from Congress.”⁹⁸ His final verdict on *Brown* was that the Justices “substitut[ed] their own notions of what was right for the plain history of what was constitutional.”⁹⁹

Judge Learned Hand, a devotee of judicial restraint, had his own objections. He saw *Brown* as a *Lochner* rerun, a “patent usurpation” of the democratic process by which the Court became “a third legislative chamber.”¹⁰⁰ One need not think that Wechsler posed the right question, that Kilpatrick got the history right, or that Hand’s call for restraint was fitting, to see our point: at the time of *Brown*, some felt that they had been gaslighted. In their view, the Court had amended the Constitution, embracing a particular view of “what was right” in place of the actual document.

Despite such criticisms, the view that segregation violated the Fourteenth Amendment moved from the margins, to the mainstream, to the regnant doctrine. *Brown* is such a central feature of our constitutional order that some have argued that any constitutional theory that rejects the rightness of *Brown* is, necessarily, mistaken. It is worth pausing over how remarkable that is. In a span of decades, constitutional understanding shifted, astonishingly, from broad support of *Plessy v. Ferguson*¹⁰¹ to a nearly universal sense that if anything in constitutional law is self-evident, it is that *Plessy* was wrong.

⁹⁶ See Kilpatrick, *supra* note 20, at 163–65. Kilpatrick’s book is essential reading for those interested in *Brown* in its time.

⁹⁷ *Id.* at 161.

⁹⁸ *Id.*

⁹⁹ *Id.* at 166.

¹⁰⁰ Hand, *supra* note 22, at 42, 55.

¹⁰¹ 163 U.S. 537 (1896).

For every instance where once unthinkable or outlandish claims join the mainstream, or become established doctrine, there is a simultaneous shift the other way, where once mainstream views are forced to the margins and beyond. This is unavoidable, for to install a new regime is to displace an old one. The mainstreaming of *Brown* caused the marginalization of *Plessy*. Consider in this light the following views:

1. The First Amendment allows states to criminalize blasphemy.¹⁰²
2. The Bill of Rights does not apply to the states.¹⁰³
3. The First Amendment permits the banning of dangerous speech.¹⁰⁴

Today, these stances count as outlandish. A nominee to the Court who favored all of them, or indeed any one of them, would have serious trouble securing the Senate's consent.¹⁰⁵ Indeed, any such person likely would not secure the president's nomination (as of now). And yet there was a time when every one of these positions was mainstream or essentially taken as a given. Perhaps one or more of them will be taken as a given again. We do not expect so. But the world is full of surprises.

C. Unthinkable, Outlandish, Extreme

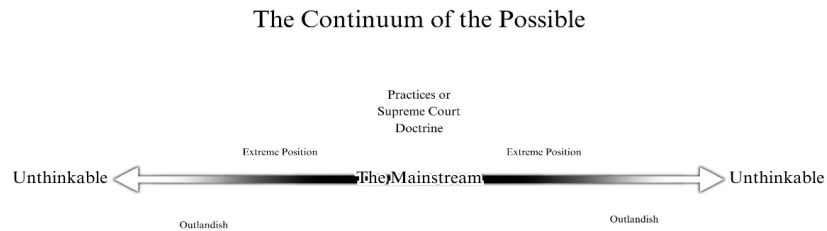
In terms of what we have in mind, there is a continuum running from unthinkable views, to outlandish views, to extreme views, to the mainstream. Figure 1 depicts this constitutional space, with areas marked unthinkable, outlandish, extreme, and mainstream. For now, we focus on the first three areas, leaving the mainstream for later.

¹⁰² See Note, Blasphemy and the Original Meaning of the First Amendment, 135 Harv. L. Rev. 689, 689 (2021).

¹⁰³ See *Barron v. Mayor of Baltimore*, 32 U.S. (2 Pet.) 243, 250 (1833) (“These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.”).

¹⁰⁴ See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

¹⁰⁵ We say “serious trouble” rather than “an impossible challenge” because members of the Senate tend to show considerable deference to the president's choice.

Figure 1

It is difficult, of course, to supply objective or agreed-upon criteria for what counts as unthinkable, outlandish, and extreme. Individual perceptions will vary. 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 Privileges or Immunities Clause guarantees an individual right to loot and pillage tony seaside towns is essentially unthinkable; if someone advanced that claim, every student of constitutional law, young and old, would think that the person had lost their mind.

Other constitutional claims have a certain mobility, or at least the potential for it. In 1950, the view that the Constitution guarantees the right to same-sex marriage was unthinkable. In 2005, that view might have been extreme, but it was far from unthinkable. Needless to say, it is no longer extreme. At present, a constitutional right to polygamous marriage might seem outlandish to most, but it is not exactly unthinkable.¹⁰⁶ Because the right to polygamous marriage has become more plausible over time, it is easier for people to envision an eventual recognition of it, whether they favor the right to polygamous marriage or not. (Revealingly, it seems less plausible now than it did fifteen years ago.) It will be far easier to say that a constitutional claim has mobility *after* it has moved from unthinkable to merely outlandish.

¹⁰⁶ Indeed, the idea of a constitutional right to polygamy is actively debated in legal scholarship. See, e.g., Mark Strasser, *Marriage, Free Exercise, and the Constitution*, 26 *Law & Ineq.* 59, 59 (2008) (“[A] strong case can be made for the proposition that polygamy is constitutionally protected.”); Ronald C. Den Otter, *Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage*, 64 *Emory L.J.* 1977, 1979 (2015) (arguing that banning polygamy is unconstitutional discrimination).

The view that birthright citizenship did not extend to the children of undocumented aliens was unthinkable (we think) in 2010. It is now hardly that, though it is extreme (we think). Where will it end up? Only time will tell (as they say).

Now consider the following views:

1. The Constitution does not allow administrative agencies to issue any regulations with the force and effect of law (a super-nondelegation doctrine).¹⁰⁷
2. The Constitution forbids the corporal punishment (spanking) of children.
3. The Constitution forbids the recognition of same-sex marriages.
4. The Constitution allows punishment of speech that is critical of the president.
5. The Constitution forbids punishment for crimes; only rehabilitation is permissible.

Currently, these positions are at least outlandish. Adoption of any of them would produce a widespread sense of vertigo. And yet two of the positions are not exactly unthinkable. Position (1) has at least one vigorous and prominent proponent.¹⁰⁸ More than a few people promote position (2).¹⁰⁹ It is now difficult, but not quite impossible, to envision the Court ultimately embracing positions (1) and (2). Imagine, if you would, a shift in the nation and 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 public favors position (2), or at least is open to it, and that position (1) also has some appeal, particularly among elite lawyers. Imagine that the Court includes some Justices who were educated in a period in which positions (1) and (2) were the subject of serious, reasoned discussions in the press, the law schools, and the law reviews. Would it be so shocking if positions

¹⁰⁷ See Philip Hamburger, *Is Administrative Law Unlawful?* 12–13 (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.

¹⁰⁸ See *id.* at 500–01.

¹⁰⁹ See, e.g., Cynthia Godsoe, *Redefining Parental Rights: The Case of Corporal Punishment*, 32 *Const. Comment.* 281, 282–84 (2017).

(1) and (2) became law? Any more shocking than what happened between 1954 and 1972, or between 1990 and 2024?

By contrast, positions (3), (4), and (5) may seem unthinkable. To our knowledge, position (3) has no advocates and hence must seem utterly bizarre. Position (4) might seem equally strange because the Court would have to reject both the prohibition on viewpoint discrimination¹¹⁰ and the clear-and-present danger test.¹¹¹ That would be vertiginous. But something like position (4) was once the law, for the 1798 Sedition Act punished “scandalous and malicious writing[s]” about the president.¹¹² Many went to jail for their criticisms of the government.¹¹³

Position (5) might seem to take us into the realm of science fiction. But it takes little creativity to sketch 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 (at least in the United States). But if the country did experience that transformation, one could imagine that the political branches and the Supreme Court could converge on position (5).¹¹⁴ 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).

In judging whether some claim is unthinkable, outlandish, or extreme, the perceptions of legal elites—lawyers, legal scholars, and federal politicians and judges—are what matter the most.¹¹⁵ We say this not because we wish to privilege that narrow cohort. Rather our point is that most of those outside the legal profession have little or no familiarity with many constitutional claims. Just as a typical baseball fan will normally find it impossible to say much about which cricketers are all-rounders,¹¹⁶ and a typical tennis fan will find it impossible to explain a flat nick in

¹¹⁰ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992).

¹¹¹ See *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (per curiam).

¹¹² Sedition Act of 1798, ch. 74, 1 Stat. 596 (expired 1801).

¹¹³ See generally Wendell Bird, *Criminal Dissent: Prosecutions Under the Alien and Sedition Acts of 1798* (2020) (detailing arrests under the Alien and Sedition Acts of 1798).

¹¹⁴ Consider that some scholars are already advocating for new approaches to regulating speech. See, e.g., Jack Goldsmith & Andrew Keane Woods, *Internet Speech Will Never Go Back to Normal*, *The Atlantic* (Apr. 25, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/what-covid-revealed-about-internet/610549/>.

¹¹⁵ Of course, those perceptions do not emerge in a vacuum; they may be influenced by others, including the general public.

¹¹⁶ An all-rounder is good at both batting and bowling.

squash,¹¹⁷ most citizens will be unfamiliar with the universe of plausible legal claims. If people do not have much sense of the universe of constitutional claims, they cannot opine about which are unthinkable, outlandish, or extreme. Further, if one does not have some sense of the opinions of legal elites, one cannot say how the latter regard a claim. Put another way, if one does not know the perspectives of legal elites—those most likely to have a stance—one cannot say much about the claim’s plausibility among those who have an opinion. (Lest one be led astray, we acknowledge that non-elites help generate radical constitutional change; we have a fair bit to say about that in Part IV.)

D. The Mainstream

By “mainstream,” we mean a range of views that many (or most) legal elites regard as within the realm of the plausible readings of the Constitution, meaning that they are not widely seen as outlandish or extreme. Again, we believe that the perceptions of legal elites matter because those outside the legal profession have little familiarity with most constitutional claims, much less a sense of what set of assertions are inside, or outside, the mainstream. (For those non-elites who favor radical change, that is a benefit; they might not know that their preferred constitutional understanding is unthinkable or outlandish and hence are unburdened by the conventional wisdom. That means that they might see, rightly, that today’s conventional wisdom, with respect to the Constitution, might be tomorrow’s abandoned foolishness.)

The claim that the Due Process Clause or the Equal Protection Clause protects same-sex sodomy was well outside the mainstream in the 1960s. But it was within the mainstream by the time of *Bowers v. Hardwick*, decided in 1986.¹¹⁸ Indeed, the assertion was in the mainstream before *Bowers*, because prominent lawyers and judges had previously voiced it.¹¹⁹ And, of course, the fact that four Justices objected to the Georgia

¹¹⁷ At least one of the present authors believes that this lack of knowledge is both tragic and horrifying. The other is a tragic victim of this horror.

¹¹⁸ 478 U.S. 186 (1986).

¹¹⁹ See, e.g., Brief of Amici Curiae American Psychological Ass’n & American Public Health Ass’n in Support of Respondents at 30, *Bowers*, 478 U.S. 186 (No. 85-140); Brief of the National Organization for Women as Amicus Curiae in Support of Respondents at 2–3, *Bowers*, 478 U.S. 186 (No. 85-140); *Hardwick v. Bowers*, 760 F.2d 1202, 1212 (11th Cir. 1985), *rev’d*, 478 U.S. 186.

anti-sodomy law on constitutional grounds confirms the point.¹²⁰ The statement that the Constitution constrains, to some degree, the congressional grant of broad discretion (to, say, the Environmental Protection Agency) in making policy might have been outside the mainstream for decades.¹²¹ But with the dissenting opinion in *Gundy v. United States*, it is in the mainstream now.¹²² (This is not the super-nondelegation doctrine of position (1) above; rather it an incarnation of the traditional nondelegation doctrine, albeit one that is more robust than longstanding doctrine.)

The mainstream will encompass divergent views because legal elites might regard such views as plausible. For instance, the view that the Constitution protects all sex between consenting adults has been in the mainstream since *Bowers*.¹²³ This view is certainly within the set of views regarded as plausible by legal elites, but notwithstanding *Lawrence v. Texas*,¹²⁴ so is the view that the government can bar certain forms of sex between consenting adults, say adultery. In other words, the current mainstream encompasses both the view that the state cannot regulate adulterous conduct and the view that the state retains an ability to do so. 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.¹²⁵ The former stance is voiced by members of Congress from time to time, and the latter reflects the stance of the executive;¹²⁶ both perspectives are within the set of views that elites would regard as plausible.

¹²⁰ See *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting, joined by Brennan, Marshall & Stevens, JJ.); *id.* at 214 (Stevens, J., dissenting, joined by Brennan & Marshall, JJ.).

¹²¹ See generally Johnathan Hall, Note, The Gorsuch Test: *Gundy v. United States*, Limiting the Administrative State, and the Future of Nondelegation, 70 Duke L.J. 175 (2020) (detailing attitudes toward nondelegation).

¹²² 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

¹²³ 478 U.S. 186 (1986).

¹²⁴ 539 U.S. 558 (2003).

¹²⁵ Cf. *Trump v. Mazars USA, LLP*, 140 S.Ct. 2019, 2026 (2020) (discussing a congressional subpoena issued to a private company that seeks a president's private information).

¹²⁶ See Todd Garvey, Cong. Rsch. Serv., R45653, Congressional Subpoenas: Enforcing Executive Branch Compliance (2019). The extent of the executive branch's duty to comply with congressional subpoenas has been especially tested when Congress has held executive officials in contempt for refusing to comply. See Josh Chafetz, Executive Branch Contempt of Congress, 76 U. Chi. L. Rev. 1083, 1141–42 (2009).

The respectful consideration of a constitutional claim is sufficient to demonstrate that it is within the mainstream. Yet the fact that some people characterize a particular claim as “outside the mainstream” does not mean that the view is, in fact, outside the mainstream. Some legal elites may have a myopic (and parochial) view, where the mainstream is composed of their perspective and rather little else. And sometimes, elites declare that some reading is outside the mainstream to cast that view as beyond the pale. For instance, the claim that the Constitution does not protect abortion rights was certainly in the legal mainstream before *Dobbs*, even as many rejected the claim as extreme or outlandish. That assertion was mainstream because many legal elites, on and off the Court, voiced it, as did tens of millions of Americans.¹²⁷ And it would have been in the mainstream even if the Court, counterfactually, had declined to overrule *Roe* and *Casey*. Again, a legal claim can be mainstream even if the Court does not endorse it and, indeed, never legitimates it. As should be obvious, the view that the Constitution protects abortion rights remains in the mainstream after *Dobbs*.

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.¹²⁸ Further, if a president says something about the Constitution, it is likely part of the mainstream (or soon will be).¹²⁹ When prominent and respected leaders say something about our Constitution, it tends to influence others, almost 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 favored policy or political movement. People who favor either the policy or the movement will gravitate toward the constitutional claim. When a president insists that some people who were born in the United States are not citizens thereof, that perspective might move, suddenly or by increments, into the mainstream. Likewise, if a Justice endorses a new and expansive reading of the Takings Clause, we suppose that many

¹²⁷ Since 1989, roughly one-third of Americans have supported overturning *Roe*. See Megan Brennan, *Steady 58% of Americans Do Not Want Roe v. Wade Overturned*, Gallup (June 2, 2022), <https://news.gallup.com/poll/393275/steady-americans-not-roe-wade-overturned.aspx> [<https://perma.cc/GT9P-RLDU>].

¹²⁸ We say “almost certainly” because a Justice might have a view that is broadly understood to be exotic. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting) (suggesting that nature itself could have legal rights that courts can protect).

¹²⁹ We say “more likely than not” because a president might advance a view that is broadly understood to be exotic, e.g., the Constitution *requires* tariffs.

property owners will applaud that reading even if it had never been voiced before. After that endorsement and that applause, the reading is almost certainly in the mainstream.

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, influence the sorts of arguments one thinks are plausible and what is seen as normatively right.¹³⁰ Each also has an anchoring effect on perceptions of which changes are plausible and which are extreme. Yet on rare occasions, existing interbranch practices or judicial doctrine poorly reflect the mainstream. For instance, in *Trump v. Hawaii* the Court's repudiation of *Korematsu v. United States* reflected the fact that the legal mainstream had abandoned *Korematsu* decades before.¹³¹ Specifically, we believe that the Justices, along with all legal elites, had long disdained *Korematsu*. 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 Court ultimately believed that the case was irrelevant.¹³²

E. The Continuum

In our earlier depiction of the continuum (see Figure 1), there is a certain symmetry around the axis. But it need not be so. Because we are mostly discussing the constitutional space in left/right terms, it is a one-dimensional line. But a more accurate representation of the space would depict multiple dimensions (for example, from more libertarian to less libertarian).

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 states cannot fund public schools because they are unconstitutional is outlandish but not

¹³⁰ See Morris R. Cohen, *The Basis of Contract*, 46 Harv. L. Rev. 553, 582 (1933) (discussing “the normative power of the actual” and its origins from the work of Georg Jellinek).

¹³¹ 585 U.S. 667, 710 (2018) (citing *Korematsu v. United States*, 323 U.S. 214 (1944)).

¹³² *Id.* at 753–54 (Sotomayor, J., dissenting); *id.* at 710 (majority opinion) (“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.” (quoting *Korematsu*, 323 U.S. at 248 (Jackson J., dissenting))).

exactly unthinkable.¹³³ Asserting that former presidents cannot be prosecuted at all seems extreme.¹³⁴ And a claim that the Constitution forbids congressional grants of rulemaking authority that are extremely open-ended is now in the mainstream, albeit on its right bank.¹³⁵

There is an array of parallel claims for progressives. Arguing that the Constitution forbids incarceration is unthinkable. Claiming that the Constitution requires Social Security, or a similar retirement scheme, is outlandish.¹³⁶ An assertion that states must subsidize the exercise of campaign speech is extreme. Declaring that Congress should face no judicially enforceable subject matter limits on its legislative powers is likely within the left side of the mainstream.

Our aim is not to supply an unquestionably accurate spatial description of various constitutional claims. While none of us is entitled to have others regard our favored positions as mainstream, much less correct, we certainly do not wish to insult any who might hold these positions. As we said earlier, reasonable and informed readers will characterize positions differently. People have diverse views about what the Constitution permits, requires, and forbids. Such stances will invariably influence their perception of the continuum. For our purposes, all that matters is that different constitutional claims have varying levels of current plausibility.

II. THE CONSTITUTION AND THEORIES OF INTERPRETING IT

We have said little about the Constitution and constitutional theories, as if they were irrelevant. But of course, they are central. The Constitution

¹³³ See Philip Hamburger, *Education Is Speech: Parental Free Speech in Education*, 101 *Tex. L. Rev.* 415, 426–27, 451 (2022).

¹³⁴ Cf. Brief of Petitioner at 10, *Trump v. United States*, 144 S. Ct. 2312 (2024) (No. 23-939) (arguing that “a former President has absolute immunity from criminal prosecution” for official acts, unless impeached by the House and removed by the Senate). The Court rejected that claim, even as it found some official immunity from prosecution. See *Trump*, 144 S. Ct. at 2326–27. We note parenthetically that *Trump v. United States* might plausibly be seen as radical change. For an argument to this general effect, see Cass R. Sunstein, *Presidential Immunity and Democratic Disorder 1* (July 16, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4896559 [<https://perma.cc/9SYJ-JJSV>]. For an argument that the Court was too protective of the presidency, see generally Saikrishna Bangalore Prakash, *The Fearless Executive, Crime, and the Separation of Powers*, 111 *Va. L. Rev.* 1 (2025).

¹³⁵ For more information on the nondelegation doctrine, see *infra* notes 218–19.

¹³⁶ Cf. Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 *Syracuse L. Rev.* 1, 3–4 (2005) (observing that other constitutions protect social welfare and exploring why the American Constitution does not, with respect to the contingency of American understandings).

and the various theories of interpretation help organize our constitutional thoughts and assist us in navigating new constitutional disputes. Whether one experiences vertigo may turn on whether the courts or the political branches are (or seem to be) discarding the constitutional theory that one has long held dear. 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.¹³⁷ Some people endorse “textualism,” understood as the view that the Constitution must be interpreted conformably to its text.¹³⁸ Other people endorse “semantic originalism,” or the view that the Constitution must be understood conformably to its original semantic meaning.¹³⁹ 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.¹⁴⁰ But textualism and semantic originalism seem to leave many questions open. One could say, consistently with textualism and semantic originalism, that mandatory school prayer is permissible or impermissible;¹⁴¹ that the Bill of Rights is or is not incorporated by the Fourteenth Amendment;¹⁴² that the First Amendment does or does not protect blasphemy;¹⁴³ that the Constitution does or does not allow agencies to issue regulations with the force and effect of law.¹⁴⁴

¹³⁷ For an argument that the Founding generation did not understand “the Constitution” that way, and that it was widely understood that the term referred to nontextual understandings, see Jonathan Gienapp, *Against Constitutional Originalism: A Historical Critique* 3, 8–12 (2024). We will be interested to see if Gienapp’s argument moves from the margins to the mainstream.

¹³⁸ See, e.g., Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 28–29 (2000); Akhil Reed Amar, *Textualism and the Bill of Rights*, 66 Geo. Wash. L. Rev. 1143, 1143 (1998).

¹³⁹ See, e.g., Lawrence B. Solum, *Semantic Originalism 2* (Ill. Pub. L. & Legal Theory Rsch. Papers Series, Working Paper No. 07-24, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 [https://perma.cc/T2EE-FCQB].

¹⁴⁰ U.S. Const. art. II, § 1.

¹⁴¹ See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1413 (1990).

¹⁴² See David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 Harv. L. Rev. 1, 47–48 (2015).

¹⁴³ See Note, *supra* note 102, at 690–91.

¹⁴⁴ See Hamburger, *supra* note 107, at 463–65.

Because textualism and semantic originalism leave open a wide space for reasonable disagreements on a host of issues, one must consider many plausible ways of mediating those disagreements. Given the considerable interpretive space, textualism and semantic originalism permit some forms of radical constitutional change in the sense that a constitutional paradigm shift can occur even if all judges embrace one or the other theory. And if current doctrines and practices pay little heed to the constitutional text, textualism and semantic originalism may call for some major constitutional changes.

Now suppose that one focuses on the original public meaning¹⁴⁵ and embraces the claim that courts and the political branches ought always to honor that original public meaning. If current practices and doctrines seem to reflect the original public meaning, then it might seem that radical constitutional movements will be foreclosed in principle.

But consider four points that complicate matters. First, public meaning originalists might well insist upon a constitutional paradigm shift if previous decisions were not in fact rooted in the original public meaning. Suppose, for example, that the edifice of doctrine concerning freedom of speech or free exercise was erected in defiance of the original public meaning. In that case, radical change might seem necessary.

Public meaning originalists have vigorously debated the question of whether original meanings should prevail over precedent.¹⁴⁶ Some 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 revamp many of its doctrines.¹⁴⁷ Other originalists prize stability and may favor the overruling of 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.¹⁴⁸ Thus there is an internal

¹⁴⁵ See, e.g., Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. Rev. 1953, 1957 (2021).

¹⁴⁶ For a 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, 1921–22 (2017); Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 Const. Comment. 257, 258–60 (2005); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 Nw. U. L. Rev. 803, 803 (2009).

¹⁴⁷ See, e.g., Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 Ave Maria L. Rev. 1, 2–4 (2007); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 Const. Comment. 289, 289–90 (2005).

¹⁴⁸ For an argument about the eighteenth-century status of demonstrably erroneous precedent, see Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1, 8–52 (2001). For another valuable discussion, see Mark Moller & Lawrence B.

dispute about whether and to what extent originalism calls for radical change.

Second, public meaning originalists must acknowledge that novel historical research might uncover surprises about original public meaning (and even a form of vertigo). We might have had a clear view in 1990 about the original public meaning of some clause, but we might be certain, now, that our previously clear view was absolutely wrong. For instance, at Time 1, suppose we thought that the original public meaning of “good behavior” forbade the removal of Article III judges by means other than impeachment.¹⁴⁹ In that era, the practice reflected that constraint. At Time 2, suppose new research establishes that good behavior has nothing to do with impeachment and that any trial, criminal or civil, may be used to establish a judge’s misbehavior and result in removal.¹⁵⁰ That shift in our conception of the original public meaning portends radical change, as Congress might enact new statutes meant to permit the removal of judges.

Third, public meaning originalism is often associated with the claim that the Constitution freezes the meaning of the Founding document. But public meaning originalists generally acknowledge the possibility that understood in terms of their 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 1880.¹⁵¹ Some originalists have argued that the Clause implicitly requires an assessment of the number of states that recognize a right.¹⁵² On some accounts, if a supermajority of states come to recognize a new right, the Clause protects

Solum, *The Article III “Party” and the Originalist Case Against Corporate Diversity Jurisdiction*, 64 Wm. & Mary L. Rev. 1345, 1438–39 (2023).

¹⁴⁹ See, e.g., Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. Cal. L. Rev. 673, 692 (1999) (noting that good behavior is a cross-reference to impeachment).

¹⁵⁰ See Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 Yale L.J. 72, 92–105 (2006) (describing how ordinary civil and criminal trials could be used in Britain and early America to remove judges who had good behavior tenure).

¹⁵¹ See Randy E. Barnett & Evan D. 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”).

¹⁵² *Id.* at 246–47 (arguing that “broad state consensus” can identify rights that fall under “privileges or immunities”).

that right in the present even if it failed to do so in the past. This originalist claim introduces a level of dynamism, and possibly radical change, into the definition of constitutional rights.

Fourth, some public meaning originalists have devoted a great deal of attention to the “construction zone.”¹⁵³ Sometimes the original public meaning leaves certain matters open, and judges engage in construction, rather than elicitation of meaning, when they decide cases. 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 or relevant values. It is possible to read *Brown v. Board of Education* in that way.¹⁵⁴ Those who believe in a broad construction zone might be prepared to tolerate, welcome, or even insist upon radical change.¹⁵⁵

Leaving originalism to one side, suppose that one embraces the view, associated with Ronald Dworkin, that judges are, and should be, “moral readers.”¹⁵⁶ Under that view, judges should fit their moral readings with the existing legal materials and also put those materials in the most attractive (moral) light.¹⁵⁷ If judges are moral readers, either some of the time or all of the time, radical constitutional change should be unsurprising. The Court’s opinion in *Brown* can be understood as a moral

¹⁵³ See generally Lawrence B. Solum, The Interpretation-Construction Distinction, 27 Const. Comment. 95, 108 (2010) (describing the zone of underdeterminacy in judicial decision-making as the “construction zone”).

¹⁵⁴ Consider this passage:

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954).

¹⁵⁵ This is one reading of Barnett & Bernick, *supra* note 151.

¹⁵⁶ See generally Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* 2 (1996).

¹⁵⁷ *Id.*

reading.¹⁵⁸ In *Obergefell v. Hodges*,¹⁵⁹ the Court seemed to embrace moral readings in explaining why the content of “liberty” can change radically over time:

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.¹⁶⁰

The Court seemed to be saying that moderns better understand the meaning of “liberty” and that the Court had embraced that revised conception.

Moral readers ought not be at all surprised by what happened in the 1950s or the 1960s, or by what is happening today. They might question some of the Court’s decisions along the dimension of fit or justification,¹⁶¹ and they might contend that some originalist opinions are really moral readings, 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 rather different from that of a left-of-center moral reader. Radical constitutional changes might occur because left-of-center moral

¹⁵⁸ Consider this passage:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown, 347 U.S. at 493.

¹⁵⁹ 576 U.S. 644 (2015).

¹⁶⁰ *Id.* at 664.

¹⁶¹ See generally Dworkin, *supra* note 156.

readers have been replaced by right-of-center moral readers, or vice versa.¹⁶²

Other approaches also accommodate radical constitutional change. If one believes in democracy-reinforcing judicial review, some Warren Court decisions may seem quite appealing, even if radical in their time.¹⁶³ In fact, some proponents of democracy-reinforcing judicial review might envision a host of other innovations that would at least be on the table, and not outlandish at all.¹⁶⁴ While one could imagine a situation in which a democracy-reinforcing approach generated a highly stable set of constitutional doctrines, that would be an exceedingly surprising outcome. There is a powerful tendency, in society and among elites, to discover new problems in representative government, to reconceptualize democracy, and to revise our understandings of the Constitution in a bid to solve those novel difficulties.¹⁶⁵

Those who embrace common law constitutionalism¹⁶⁶ tend to favor incremental, rather than radical, change. Whether they are right to disfavor significant shifts is contestable.¹⁶⁷ In any event, common law constitutionalists can implement (or endorse) repeated modest changes over time that will, in the aggregate, generate radical constitutional change. Even slow walkers can, with time, traverse vast distances and thereby generate a paradigm shift. In a series of removal cases,¹⁶⁸ the Supreme Court is slowly but surely undermining longstanding understandings of decisions like *Humphrey's Executor v. United*

¹⁶² Some might suppose that something like that has in fact happened in recent decades.

¹⁶³ See Ely, *supra* note 16, at 207 n.24.

¹⁶⁴ Such innovations include stricter anti-gerrymandering guidelines, see Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 Mich. L. Rev. 351, 354 (2017); allowing felons to vote, see Jeff Manza & Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* 11–12 (2006); and reforming campaign finance rules, see Norman Eisen & Fred Wertheimer, *How to Fix America's Broken Political System*, Politico Mag. (Jan. 7, 2019), <https://www.politico.com/magazine/story/2019/01/07/election-security-campaign-finance-bill-223758/> [https://perma.cc/5P5P-KHKU].

¹⁶⁵ Some scholars argue that current social and political conditions make Ely's approach less workable. See, e.g., Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 Vand. L. Rev. 769, 785–89 (2022).

¹⁶⁶ See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 879 (1996).

¹⁶⁷ For a discussion of the conditions that best justify a Burkean approach, see Cass R. Sunstein, *Burkean Minimalism*, 105 Mich. L. Rev. 353, 360–61 (2006).

¹⁶⁸ See *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2197–99 (2020).

States,¹⁶⁹ adopting a more robust conception of executive power to remove, and restricting Congress's ability to impose constraints on the president's removal power. A strongly or fully unitary executive may emerge sooner rather than later (as we write, that seems highly likely), but even if it does so, it will not have emerged suddenly. Similarly, the movement from *Bowers v. Hardwick*¹⁷⁰ to *Lawrence v. Texas*¹⁷¹ included a more modest, intermediate step. *Lawrence* cited *Romer v. Evans*¹⁷² as a case that had undermined *Bowers*.¹⁷³

B. Burkeanism, Vertigo, and Its Hall of Jurisprudential Shame

Edmund Burke did not like vertigo. Because he casts a long shadow over the whole topic of radical constitutional change, he merits special attention.¹⁷⁴ In his essay on the French Revolution, he opposed abstractions, born of theories, and spoke favorably of “prejudices,” born of appreciation of traditions. Here is his *cri du coeur* against revolution and in favor of legal tradition:

[T]he science of jurisprudence, the pride of the human intellect, which, with all its defects, redundancies, and errors, is the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns, as a heap of old exploded errors, would be no longer 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.¹⁷⁵

Note Burke's embrace of jurisprudence as “the pride of the human intellect” and his emphasis on the perils of rejecting it “as a heap of old exploded errors.”¹⁷⁶ On one view, the Warren Court produced a minor kind of French Revolution; it was arrogant, and it was in the grip of a theory. On another view, something similar can be said about the Roberts

¹⁶⁹ 295 U.S. 602 (1935).

¹⁷⁰ 478 U.S. 186 (1986).

¹⁷¹ 539 U.S. 558 (2003).

¹⁷² 517 U.S. 620 (1996).

¹⁷³ *Lawrence*, 539 U.S. at 573–74 (arguing that *Romer* “cast [the *Bowers*] holding into . . . doubt”).

¹⁷⁴ We are aware that Burke was a complicated character. See Richard Bourke, *Empire and Revolution: The Political Life of Edmund Burke* 1 (2015).

¹⁷⁵ Edmund Burke, *Reflections on the Revolution in France*, in *The Portable Edmund Burke* 416, 456–57 (Isaac Kramnick ed., 1999).

¹⁷⁶ *Id.* at 456.

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? Might that be what originalism, or constitutional traditionalism, is all about?

Without answering these questions, we isolate four positions. On one view, every advocate for radical change attempts to garb, or disguise, their desired transformation through citation of previous jurisprudential materials. The New Deal Court cited Chief Justice John Marshall's opinion in *Gibbons v. Ogden*¹⁷⁷ as justification for expanding the reach of the Commerce Clause.¹⁷⁸ The *Brown* Court cited *Sweatt v. Painter*¹⁷⁹ and other cases to make it clear that the doctrine of "separate but equal" required *true* equality.¹⁸⁰ The *Lawrence* Court cited "our laws and traditions in the past half century," perhaps a weak nod to Burkeanism, but a telling one nonetheless.¹⁸¹ In interring the abortion right, the Roberts Court called for due process traditionalism and cited tradition-centered cases that were inconsistent with the analysis found in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, such as *Washington v. Glucksberg* and *McDonald v. City of Chicago*.¹⁸² 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 might seem to be driven by abstractions, not by an appreciation of practice.¹⁸³ On that view, Burke really is a man for all seasons. For those who embrace that view, the Warren Court was rightly criticized on Burkean grounds. *Carolene*

¹⁷⁷ 22 U.S. (9 Wheat.) 1 (1824).

¹⁷⁸ *Wickard v. Filburn*, 317 U.S. 111, 120 (1942) ("At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded." (citing *Gibbons*, 22 U.S. (9 Wheat.) at 194–95)).

¹⁷⁹ 339 U.S. 629 (1950).

¹⁸⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

¹⁸¹ *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

¹⁸² *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242, 2245–48 (2022) (first citing *McDonald v. City of Chicago*, 561 U.S. 742 (2010); and then citing *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

¹⁸³ This is the central argument in Cass R. Sunstein, *The Invention of Colorblindness*, 2023 Sup. Ct. Rev. 67 (2024).

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. For Burkeans, 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 dislike the Roberts Court—let us call them the left—are clever to invoke Burke and Burkeanism, not because they are truly committed to them, but as a matter of strategy. Their first-best is (let us say) moral readings, but they cannot secure the moral readings they prefer. 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 to progressives, just as it appealed to the right during the Warren Court.¹⁸⁴ Is it also the right strategy? Too soon to tell.

There is 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 part of the wisdom of the ages and should be treated, by committed Burkeans, as deserving a healthy measure of respect and deference. This is something like an adverse possession rule for constitutional law. 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) the privacy or autonomy Lochnerism evident in some of the Court's opinions? Maybe these circles cannot be squared. 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.¹⁸⁵

¹⁸⁴ For vivid examples, see the account of tradition-centered conservative constitutional thought and the views of William F. Buckley Jr. in Buccola, *supra* note 27, at 4.

¹⁸⁵ It is beyond the scope of the current discussion to say what a committed Burkean would do when confronted with different traditions of different degrees of longevity.

*C. Theories of Interpretation Confront
Radical Constitutional Change*

The interplay between Burkeanism, theories of the Constitution, and radical change raises a broader question: When paradigm shifts occur, what happens to theories of constitutional interpretation? Are they obstacles that must be overcome? Are they *options* that judges choose among, selecting the one that is likely to yield the preferred set of outcomes?¹⁸⁶ One scholar has recently argued that constitutional law is suffused with options.¹⁸⁷ Perhaps the most provocative question is whether theories actually serve to facilitate, or help justify, radical change, and are chosen for that reason.

One point is self-evident: a strong theory of stare decisis is an obstacle to radical constitutional change and hence to paradigm shifts.¹⁸⁸ During periods of radical change, judges may seem to 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.¹⁸⁹ 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 playing a similar role now.¹⁹⁰ (We seem to be in

¹⁸⁶ To be sure, prioritizing outcomes 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, 916, 920 (2024). We might want to understand outcomes very broadly to include the “process reasons” emphasized by Solum.

¹⁸⁷ See Richard M. Re, Permissive Interpretation, 171 U. Pa. L. Rev. 1651, 1654 (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).

¹⁸⁸ Many 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, 141–42. Others 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: The Precedents and Principles We Live By 235 (2012) (arguing that some cases were “overrul[ed] based simply on the belief that the prior case was wrongly decided”).

¹⁸⁹ This is a possible reading of *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022).

¹⁹⁰ Some regard this rule as a contentious principle. The standard approaches depend on multiple factors, not just the egregiousness of a prior error. See *id.* at 2261–79 (discussing factors to consider when deciding whether to overrule a precedent and applying them to *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*). But let us indulge in a little legal realism down here in the footnotes: in periods of paradigm shifts, the practice approaches the Egregious Error Rule.

the Egregious Error Era in the sense that the Roberts Court not infrequently invokes the concept.) It is also plausible to speculate 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 accelerant. When proponents of living constitutionalism believe that current doctrines or practices are foolish or even evil, some of them will promote constitutional change as the cure. A constitution meant to endure for the ages must be supple enough to change with the times and to do so outside the rigid formalities of Article V, or so living constitutionalists might argue. Having said that, we emphasize that some living constitutionalists are Burkeans and hence favor only gradual change, even if that shift may become transformational as the many alterations accumulate.

In any event, consider this proposition: *people, including judges, choose a theory of interpretation at least in part by asking whether it is likely to yield a preferred set of outcomes.*¹⁹¹ It is often said that the Constitution is not a suicide pact.¹⁹² The intuition is that if a constitutional reading generates some terrible outcomes—say, the dissolution of the Union or horrific injustices—then that reading must be mistaken. The argument emphatically turns on consequences and assumes that interpreters should care about consequences. If that is true, and it seems true to us, people will reject a theory that yields constitutional suicide, or much less dramatically, a large number of terrible outcomes.¹⁹³ If the Constitution is not a suicide pact, one might also conclude that it is not a pact of moral bankruptcy or a document meant to yield immiseration. People, judges included, will adopt a theory that, from their perspective at least, is not a deal with the devil. Indeed, people, judges included, will adopt a theory that, from their perspective at least, leads to a good or wonderful constitutional order. That is one ground on which they make

¹⁹¹ A version of this view is defended in Cass R. Sunstein, *How to Interpret the Constitution* (2023) (arguing that the only way to choose a theory of interpretation is by asking whether it would produce a desirable constitutional order). The view is productively challenged, or perhaps qualified, in Solum, *supra* note 186.

¹⁹² For the origins of this saying, see *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (warning not to “convert the constitutional Bill of Rights into a suicide pact”).

¹⁹³ For some complications, see Solum, *supra* note 186, at 921–30.

their choice among plausible theories. For some, it might be the only ground.

Now turn to the constitutional theories that might be said to reflect this concern with the constitutional order that they produce (emphatically including substantive outcomes, though also including abstract values, such as self-governance and the rule of law). Consider Thayerism: the view that courts should uphold the actions of the democratic branches unless the constitutional violation is beyond dispute.¹⁹⁴ Justice Oliver Wendell Holmes embraced that view,¹⁹⁵ as did the Court for a (brief) period after the demise of *Lochner*.¹⁹⁶ For Justice Holmes and the New Deal Court, the preferred formula was more democracy and less juristocracy.¹⁹⁷ If one believes that more democracy is better and that rule by judges is highly undesirable, Thayerism is a perfect fit.

Consider *Carolene Products* footnote 4, which expresses 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.¹⁹⁸ That approach evidently spoke to, and helped organize the work of, the Warren Court.¹⁹⁹ It helped to move judicial resources away from economic rights and redirected them toward protecting (what the Court saw as) the politically marginalized. These results appealed to judges (and many others²⁰⁰) at the time.²⁰¹

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. Or consider originalism, which spoke to those who deplored the Warren Court. Originalism seemed (and

¹⁹⁴ See Thayer, *supra* note 83, at 135.

¹⁹⁵ 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.”).

¹⁹⁶ See Cass R. Sunstein, Thayerism, U. Chi. L. Rev. Online, Feb. 19, 2024, at *1, *1, <https://lawreview.uchicago.edu/online-archive/thayerism> [<https://perma.cc/QL7Y-4QX2>].

¹⁹⁷ See Snyder, *supra* note 83, at 4–5.

¹⁹⁸ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

¹⁹⁹ See Ely, *supra* note 16, at 75–76.

²⁰⁰ See *id.* at 102–03.

²⁰¹ For an interesting commentary, written in what seems like another constitutional era (or perhaps a parallel constitutional world, imagined by a science fiction writer), see Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 714–15 (1985).

to many now seems) to promise a methodology that would prevent further adventures in left-of-center constitutionalism, a foundation for overruling the worst of what had come before,²⁰² and a means of curbing judicial discretion,²⁰³ thus promoting the rule of law.

Consider traditionalism, informed by Burke, which also opposes left-of-center adventures,²⁰⁴ and which could also protect what, to traditionalists, most deserves protection, namely longstanding traditions and practices.²⁰⁵ Consider common good constitutionalism,²⁰⁶ which has risen, and found devotees, in part because of dissatisfaction with originalism's purported indifference to natural law and 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 theory.²⁰⁷

To be sure, it is possible to think that theories of interpretation should be accepted or rejected independently of their consequences.²⁰⁸ For example, judges might embrace public meaning originalism even if they deplore the results to which it leads. Justice Antonin Scalia claimed that he did not always favor the results generated by his methodology.²⁰⁹

²⁰² 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 resorted to original intent to ground their disagreement with the Court’s innovative rulings.”).

²⁰³ See William Baude, *Originalism as a Constraint on Judges*, 84 U. Chi. L. Rev. 2213, 2213–15 (2017) (describing Justice Scalia’s constraint-based justification for originalism).

²⁰⁴ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

²⁰⁵ See Cass R. Sunstein, *Due Process Traditionalism*, 106 Mich. L. Rev. 1543, 1544–45 (2008).

²⁰⁶ See Adrian Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* 30 (2022).

²⁰⁷ See *id.* at 35–36.

²⁰⁸ See Barnett & Bernick, *supra* note 151, 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 186, at 931–32.

²⁰⁹ 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, 10:03 AM), <https://www.cbsnews.com/news/justice-scalia-on-the-record> [https://perma.cc/89CT-L4X4]. On issues

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?²¹⁰ For instance, would Justice Scalia have been an originalist if he thought that the original meaning of the Constitution, on balance, was mostly worse or even horrific, but with a handful of beneficial outcomes?²¹¹ To be sure, some dedicated originalists would retain their professed views about interpretation. Some would regret a highly imperfect constitution and simultaneously retain their theoretical commitments. Of course, that must be an option.²¹² When someone admonishes, “Don’t blame the messenger,” they are implicitly suggesting that any ire ought to be directed toward the message. On one view, any discomfort, disaffection, and ire ought to be directed toward the misguided Constitution rather than the dictionary, rules of grammar, original intentions, original public meaning, and the like. Still, it is fair to question whether originalism would maintain its wide appeal if everyone agreed that it produced a deeply unappealing constitutional order.²¹³ It is fair to say that originalism is most attractive to those who find the Constitution, as originally understood, quite appealing.

Similarly, would proponents of democracy-reinforcing judicial review, like John Hart Ely, have much patience for that theory in a world where electoral majorities in a well-functioning democracy, open to all, sought

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, 184 (2005); Gary Lawson, *Confronting Crawford: Justice Scalia, the Judicial Method, and the Adjudicative Limits of Originalism*, 84 *U. Chi. L. Rev.* 2265, 2266–67 (2017).

²¹⁰ Maybe so. See Barnett & Bernick, *supra* note 151, 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 191. For a different or (better) complementary view suggesting the importance of considering process reasons and not simply outcomes, see Solum, *supra* note 186, at 920–21.

²¹¹ 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 O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution* 12–18 (2013). For a different view emphasizing “process reasons,” see Solum, *supra* note 186, at 920–21.

²¹² See, e.g., Robin Blackburn, *The American Crucible: Slavery, Emancipation and Human Rights* 298 (2011) (quoting William Lloyd Garrison as stigmatizing the Constitution as a “covenant with Hell” and a “pact with the Devil”).

²¹³ We do not mean to answer that question here.

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 veneration²¹⁴ to stances of judicial denigration and even contempt.²¹⁵ There has been a corresponding move on the right from a theory of restraint to demands for a crusading judiciary.²¹⁶ The simultaneous moves suggest that judicial veneration and judicial contempt had something to do with anticipated outcomes and were not bottomed on an abstract sense of the virtues and vices of Article III judges.

As this Article goes to press, we observe a fascinating shift. Many on the left, intensely unhappy with the Roberts Court and hence strong forms of judicial review from 2021 to 2024, seem more enthusiastic about the Roberts Court and strong forms of judicial review in 2025, for reasons that do not seem entirely disconnected from the shift from the Biden Administration to the Trump Administration. Likewise, many on the right seem extremely upset with the courts, the district courts in particular, because some district judges have thwarted President Trump's initiatives. Portions of the right seem to have no truck with any form of judicial review of executive action, at least since Trump returned to the White House. If the Supreme Court strikes down much of the President's agenda, expect parts of the right to adopt the rhetoric and tactics of the left circa 2021 to 2024. For some, veneration and contempt seem remarkably contingent.

The arc of constitutional law, the phenomenon of radical change, and human nature suggest a consistent tendency: theories of interpretation and adjudication are, in whole or in part, 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

²¹⁴ See, e.g., Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 469, 516–18 (1981).

²¹⁵ See, e.g., Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 Calif. L. Rev. 1703, 1709, 1721 (2021) (advocating for “disempowering reforms” that sharply limit the power of the courts).

²¹⁶ 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”).

lucky enough to prevail, their judgments about constitutional law shift from the margin to the mainstream, sometimes baffling and outraging members of older generations. Back to a certain Nobel Prize winner: “[S]omething is happening here,” the older cohort well knows; but they “don’t know what it is.”²¹⁷

III. VERTIGO, CRAZYLAND, AND PERCEPTIONS OF THE CONTINUUM

The idea of vertigo has surfaced over and over again, and it is time that we said something more systematic about it. Recall that by constitutional vertigo, we mean the sense that the constitutional regime is spinning, a feeling that the world is out of control. Vertigo arises due to a radical change in doctrine, theories, and practice. Although the vertigo experienced by some is often accompanied by the elation of others, the latter is unnecessary. Someone deeply committed to a discarded constitutional regime may feel vertigo even if no one feels giddy at the onset of a new regime. And elation and vertigo can be experienced at the same time (as the newly engaged can attest).

Vertigo is experienced when what once seemed to be solid and steady starts to disintegrate. The permanent, or at least the taken-for-granted, is now experienced as wholly contingent. What produces vertigo is at least partly a function of one’s professional and social spheres—one’s epistemic community. The revival of the nondelegation doctrine is utterly justified, long overdue, and perhaps imminent, at least if you are part of a relevant subset of law professors, lawyers, and judges, mostly on the right.²¹⁸ But for those skeptical of the revival, it is jarring, even disorienting, to discuss the matter with nondelegation enthusiasts. To the skeptics, the proponents of the revival seem to live in Crazyland,²¹⁹ a

²¹⁷ Dylan, *supra* note 1.

²¹⁸ See, e.g., Gary Lawson, *Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 *Geo. Wash. L. Rev.* 235, 236–37 (2005); David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* 13–21 (1993).

²¹⁹ One of us is a proud and longtime resident of this particular Crazyland. Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 *U. Chi. L. Rev.* 1297, 1298–99 (2003); Saikrishna Bangalore Prakash, *The Sky Will Not Fall: Managing the Transition to a Revitalized Nondelegation Doctrine*, in *The Administrative State Before the Supreme Court: Perspectives on the Nondelegation Doctrine* 274, 275–79 (Peter J. Wallison & John Yoo eds., 2022). The longtime resident welcomes the Justices who have taken up residence in the community. Further, as President Trump uses delegatory statutes in new and aggressive ways, the resident looks forward to more progressives becoming part of the thriving and vibrant community.

different jurisprudential world. Within the law professoriate, prison abolition may seem mainstream.²²⁰ But across government officials, and especially prosecutors, it must seem outlandish. That differing perception reflects the fact that law faculties are to the left of prosecutors.

Because of the progressive complexion of law faculties, many law professors find themselves in an isolated epistemic community, a left-of-center echo chamber.²²¹ There is an old story, we trust apocryphal, about the Yale Law faculty. After the presidential election of Ronald Reagan, one faculty member supposedly remarked to another, “I don’t know how [Ronald Reagan] could have won. I don’t know anybody who voted for him.”²²² The yarn 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 reflects faculty opinion at other schools, both in the past and today.

Within law 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 Co. v. Sullivan* was rightly decided; and affirmative action is necessary and constitutional. Yet other propositions are not taken seriously until the Court itself takes seriously or embraces what seemed, just days before, to be outlandish. Consider the claim that the Affordable Care Act’s individual mandate was beyond the scope of the Commerce Clause.²²³ Many (including one of the present

²²⁰ One scholar surveying the prison abolition literature described abolitionism’s “place in elite academic legal discourse” as “cemented.” Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 Harv. L. Rev. 135, 151 (2022). Examples of prominent discussions of prison abolition include Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 Harv. L. Rev. 1 (2019), and Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. Rev. 1156 (2015).

²²¹ On the effects of discussions among the like-minded, see generally Cass R. Sunstein, *Going to Extremes: How Like Minds Unite and Divide* (2009) (exploring how and why discussions among like-minded people frequently produce extremism).

²²² Cf. Aimee Howd, *Law Schools vs. Dissenting Views*, United Press Int’l Insight Mag. (Dec. 20, 1999) (recounting how a Yale Law professor supposedly said that Reagan’s 1980 victory was “inconceivable”); Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* 12 (2007) (describing Yale Law as in “mourning” the day after the 1980 election).

²²³ See Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & Liberty 581, 586 (2010). In *National Federation of Independent Business v. Sebelius*, 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. 567 U.S. 519, 561, 574 (2012) (opinion of Roberts, C.J.).

authors) initially regarded that assertion as extreme, even outlandish.²²⁴ Many professors derided it because they were educated in a time when most specialists supposed that the Commerce Clause permitted Congress to regulate almost anything under the sun.²²⁵ Perhaps some professors were engaged in motivated reasoning and found themselves in an echo chamber of liberal thought.²²⁶ In any event, many ideas are not taken seriously by some legal scholars even after the Court embraces them. They never are respectable.

We fear that in the current era, some number of progressive lawyers, judges, and professors 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."²²⁷ For many professors and law students, what right-of-center scholars discuss and propose seems distant, often outlandish, and 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. There is always a lot more room.

This perception not only suggests an impoverished and distorted constitutional vision on the part of some scholars; it also 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 influences how others will regard that stance. There will be some rebels who revel in embracing the unorthodox, and some (many?) people who simply follow their perception of the truth. Yet many wish to be in the mainstream. One reason is that they care about their reputations; even if they are skeptical of the mainstream, they might

²²⁴ 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 Administration 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.*

²²⁵ Many were educated in the wake of *Wickard v. Filburn*, 317 U.S. 111 (1942), which was the start of a long period of Supreme Court deference on Commerce Clause powers.

²²⁶ David A. Hyman, Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?, 2014 U. Ill. L. Rev. 805, 824–28.

²²⁷ See Saul Steinberg, View of the World from 9th Avenue, in *New Yorker*, Mar. 29, 1976, at cover.

fear some kind of reputational damage, and perhaps career damage, if they reject it. Another reason is that they think that what is in the mainstream is generally likely to be right (the “wisdom of crowds”). If most people seem to think something about the Constitution, perhaps they are right.

For these reasons, many people, including many law professors and lawyers, decline to embrace views seen by colleagues as extreme or outlandish. Given the nature of law (and human nature), that is no less true for judges. If one proclaims that some constitutional claim is extreme or outlandish, one might succeed in delegitimizing that claim and pushing it beyond the margins of respectability.²²⁸

Knowing these facts of human psychology induces some litigators and scholars to portray other perspectives as not only mistaken but also unthinkable. After the Court issued *Dobbs v. Jackson Women’s Health Organization*, one group said the decision was “[o]utrageous and [u]nthinkable.”²²⁹ Whatever one thinks of *Dobbs* as a normative matter, this was rhetoric held over from the unsuccessful attempt to shore up abortion rights, for overturning *Roe v. Wade* was hardly *unthinkable*. For decades, millions of people on both sides of the issue had been thinking about this very prospect.²³⁰ Sometimes “unthinkable” is a normative statement, an indicator of outrage or indignation, rather than a literal truth.

Given the makeup of the professoriate and the bar, both of which are progressive (the former more so),²³¹ the Roberts Court’s jurisprudence is especially vertiginous.²³² First, its principal 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 because they do not know how the game is played in that field. Second, the paradigm shift

²²⁸ See David E. Levari et al., Prevalence-Induced Concept Change in Human Judgment, 360 *Sci.* 1465, 1466 (2018).

²²⁹ Janson Wu, Outrageous and Unthinkable: GLAD Responds to Supreme Court’s Shameful Ruling Overturning *Roe v. Wade*, GLAD L. (June 24, 2022), <https://www.glad.org/outrageous-and-unthinkable-glad-responds-to-supreme-courts-ruling-overturning-roe-v-wade/> [https://perma.cc/CXV7-TYW7].

²³⁰ See Brennan, *supra* note 127 (describing how a majority favored retaining *Roe* and how a significant plurality wished it overturned).

²³¹ See Adam Bonica, Adam S. Chilton & Maya Sen, The Political Ideologies of American Lawyers, 8 *J. Legal Analysis* 277, 292 (2015) (describing the average lawyer as close to Bill Clinton’s ideology); Adam Bonica, Adam Chilton, Kyle Rozema & Maya Sen, The Legal Academy’s Ideological Uniformity, 47 *J. Legal Stud.* 1, 1 (2018) (“We find that 15 percent of law professors, compared with 35 percent of lawyers, are conservative. . . . [T]he legal academy is still 11 percentage points more liberal than the legal profession after controlling for several relevant individual characteristics.”).

²³² See, e.g., Wegman, *supra* note 2; *supra* notes 219–20.

came on the heels of the 2016 election of Donald Trump, a profound shock that yielded several conservative Justices instead of the progressive Justices, to be chosen by Hillary Clinton, as many expected. Third, progressives long saw the Court as *their* institution, full of stalwart heroes fighting for justice. To them, the heroes have become the villains.²³³ Imagine if Luke Skywalker in *Episode VI* had joined hands with the reviled Emperor to strike down Darth Vader and rule the galaxy.²³⁴ The vertigo, and the sense of betrayal, would have been incalculable.

Finally, the progressives behold a cramped space from which to operate. They must now 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 in 2016 foreseeing a welcome end to “Defensive Crouch Liberal Constitutionalism.”²³⁵ They woke up to what they took to be a dystopian world, where the crouching would continue as far as the eye could see. For progressives, the constitutional “World [Has] Turned Upside Down,” much as it did for the British after their Yorktown defeat.²³⁶ And turning things upside down is bound to generate vertigo. (Speaking of what many people experience as vertigo, we are bracketing 2025.)

In contrast, conservatives and libertarians behold a Supreme Court remarkably receptive to their views, ones that were once beyond the mainstream. If there was a Defensive Crouch Conservative

²³³ 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, 2030 (2022); Doerfler & Moyn, *supra* note 215, at 1708. Perhaps such now-extreme proposals will, in time, produce what they seek. Note, however, that things immediately became more complicated for the progressives with the election of President Trump in 2024, and a hope, in the progressive community, that even a conservative Supreme Court would be a check on him. As we have lightly suggested, the once-feared Roberts Court, perhaps consisting of Sith Lords, now looks, to some progressives, like potential Jedi Knights, or perhaps their only hope.

²³⁴ For a discussion of Star Wars and its multiple meanings, see generally Cass R. Sunstein, *The World According to Star Wars* (2016).

²³⁵ Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, Balkinization (May 6, 2016, 1:15 PM), <https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html> [<https://perma.cc/QVH8-DCYE>]. 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.

²³⁶ The British supposedly played the tune after their defeat at Yorktown. See W.J. Eccles, *The French Alliance and the American Victory*, in *The World Turned Upside Down: The American Victory in the War of Independence* 147, 158 (John Ferling ed., 1988).

Constitutionalism, it is now in the rearview mirror. Because of the current complexion of the federal courts, the handful of conservatives and libertarians on law faculties seem to have a relatively outsized influence on the judiciary. Recent decisions on privacy rights, affirmative action, standing, *Chevron* deference,²³⁷ the individual mandate, the treatment of precedent, the unitary executive, and the nondelegation doctrine cite scholarship generated on the right.²³⁸ But, of course, citation and influence are two distinct things.

Some of the right-leaning law professoriate, and their allies among public intellectuals, see almost limitless possibilities. (Something similar can be said about many in the Trump Administration, which contains right-of-center lawyers and public intellectuals.) They may be right about what they see. Or they may have a distorted sense of what this Supreme Court will do and may be envisioning their own View of the World from 9th Avenue. A portion of the current Court was educated in an era in which conservatives inveighed against a large judicial role in American society. Judges were the villains and not the heroes. But if the conservative and libertarian professoriate and their allies push the mainstream rightward, they might yet achieve some of their goals in coming years. There are reasons why some right-of-center scholars laud “judicial engagement” and downplay criticisms of “judicial activism.”²³⁹ In any case, the Roberts Court may or may not embrace central constitutional arguments from the Trump Administration, seeking either to increase judicial engagement in some areas (for example, by striking down restrictions on the removal power or on gun rights) or to decrease judicial engagement in others (say by limiting judicial review of deportations or permitting executive restrictions on academic freedom).

²³⁷ See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024).

²³⁸ For example, the Court’s invalidation of the CFPB Director’s removal protections in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (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, 1026 (2006). Similarly, Justice Gorsuch’s advocacy for a revival of the nondelegation doctrine in his dissent in *Gundy v. United States*, 139 S. Ct. 2116 (2019), reflected arguments made by conservative scholars, including Lawson, *supra* note 218.

²³⁹ See, e.g., Clark M. Neily III, *Terms of Engagement: How Our Courts Should Enforce the Constitution’s Promise of Limited Government* 2 (2013); George F. Will, *Judicial Activism Isn’t a Bad Thing*, Wash. Post (Jan. 22, 2014), https://www.washingtonpost.com/opinions/george-will-judicial-activism-isnt-a-bad-thing/2014/01/22/31b41a12-82c7-11e3-8099-9181471f7aaf_story.html.

To return (and end) with the vertigo 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, belatedly to come to grips with this Court's new paradigm. Eventually, the new paradigm will no longer be, or feel, novel. Dispirited though they may be, progressives may become accustomed to it²⁴⁰ and react only to the pleasing sensation of being surprised by unexpected triumphs.

IV. TOP-DOWN CHANGE AND TOP-DOWN RESISTANCE TO CHANGE

Many movements to change the Constitution begin from the bottom up, with members of the public demanding constitutional reform. The elites then respond to these desires and generate constitutional change. One such example, mentioned earlier, is the phenomenon of constitutional moments, where a hyper-engaged electorate endorses significant constitutional change, inside or outside of Article V.²⁴¹ 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 generated radical constitutional change. Another example is any broad popular or 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 government currently recognizes.²⁴² Here we would include gay rights, gun rights, and the pro-life movement. Others have focused on such movements and this latter mechanism of constitutional change.²⁴³

In these examples, elites seem to be supporting actors, almost bit players; massive popular movements take top billing. For Ackerman's constitutional moments, the public must participate and deliberate via presidential elections. Elites must subsequently recognize the constitutional moment but are not the ones making the change. For constitutional change via social movements, the people are the ones loudly demanding reformation. In many accounts, elites participate in a

²⁴⁰ See Tali Sharot & Cass R. Sunstein, *Look Again: The Power of Noticing What Was Always There 2* (2024).

²⁴¹ See generally 1 Ackerman, *supra* note 11 (describing the theory in detail).

²⁴² See, e.g., Siegel, *supra* note 28, at 345 ("Over the life of the Republic, social movements have played a significant role in shaping constitutional understandings"); Post & Siegel, *supra* note 28, at 1985; see also Eskridge & Riano, *supra* note 28, at 309–11 (exploring the history of the movement for marriage equality).

²⁴³ See Post & Siegel, *supra* note 28, at 1985–86, 1995–97.

limited way, by bankrolling the movements and by crafting legal arguments.

A. Elites as Instigators of Change

We focus on a third phenomenon, one little discussed and not tied to the grand theory of constitutional moments or the much-discussed constitutional change that reflects large-scale social movements. It is a top-down theory of constitutional change, where certain legal elites decide, with little or no prompting from the public, that constitutional innovation is requisite. We think that top-down change is pervasive, and that its sources are both intriguing and elusive. (How does an elite faction come to think as it does?)

For instance, the movement to revive the nondelegation doctrine, whatever its ultimate success, largely reflects an elite phenomenon rather than discontent bubbling up from the public.²⁴⁴ Advocacy groups have pressed the Court to enforce a stringent nondelegation doctrine.²⁴⁵ Their arguments are made plausible by scholarship that does not reflect much in the way of bottom-up thinking or pressures. To be sure, some citizens may be passionate about the nondelegation doctrine. They may have concerns about the administrative state or the “big government” footprint that delegations generate. But because we suppose that this public cohort is likely small, its collective passion cannot match the fervor behind the pro-choice or pro-life movements. The movement to limit delegations of lawmaking authority lacks a NARAL or an NRA. That is why we believe that the mainstreaming of the nondelegation doctrine is a top-down phenomenon.²⁴⁶

²⁴⁴ See, e.g., Lawson, *supra* note 218, at 235–38.

²⁴⁵ The advocacy organizations involved in pushing for a revived nondelegation doctrine vary from trade associations, like the National Association of Home Builders, to conservative think tanks, like the American Enterprise Institute. See, e.g., Thomas Ward, NAHB Urges Supreme Court to Revive Nondelegation Doctrine, Nat’l Ass’n of Home Builders (Mar. 7, 2024), <https://www.nahb.org/blog/2024/03/nahb-urges-supreme-court-to-revive-nondelegation-doctrine> [<https://perma.cc/2G95-6EL6>]; Peter J. Wallison, Rumors of the Non-delegation Doctrine’s Demise Are Greatly Exaggerated, Am. Enter. Inst. (June 26, 2019), <https://www.aei.org/articles/rumors-non-delegation-doctrines-demise/> [<https://perma.cc/7ZSU-KJEH>].

²⁴⁶ 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.

Similarly, consider the sea change in presidential war powers.²⁴⁷ In the eighteenth and nineteenth centuries, presidents were not understood as having the power to take the nation to war.²⁴⁸ 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 war upon the United States, Congress would have to decide how to respond.²⁴⁹ Since the Korean War, the executive has asserted that commanders-in-chief have significant constitutional authority to engage in military action without congressional authorization.²⁵⁰ Officials distinguish between engaging in military actions against foreign nations and waging war. Whatever one thinks of that elusive distinction, the alterations in practice and understanding constitute a radical change.

This transformation reflects a wholly top-down phenomenon. Citizens did not clamor for presidential aggrandizement to facilitate America's entry into a plethora of foreign conflicts. Instead, legal and policy elites concluded that in a nuclear-armed world, where America has multifarious interests and many treaty allies, the president must be able to use force without first securing the consent of Congress via a ponderous and uncertain lawmaking process. The United States' unique status as a global superpower, its role in promoting human rights, and the need to assuage an array of allies make it necessary for the president to engage in an assortment of military actions. Or so many legal elites suppose. Unlike other radical changes, this one lacks the blessing of the courts. But the lack of a judicial imprimatur does nothing to diminish the obvious paradigm shift.²⁵¹

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

²⁴⁷ See, e.g., Jack Goldsmith, *Power and Constraint: The Accountable Presidency After 9/11*, at 29–36 (2012).

²⁴⁸ See Saikrishna Bangalore Prakash, *Imperial from the Beginning: The Constitution of the Original Executive* 145–49 (2015) (presenting historical support for the view that the decision to wage war lay with Congress).

²⁴⁹ See Saikrishna Bangalore Prakash, *The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers* 162 (2020).

²⁵⁰ See *id.* at 162–69 (describing the executive branch's increasingly expansive conceptions of its war powers).

²⁵¹ See *id.* at 151 (“Since Truman, presidents have remodeled the War Constitution.”).

concessions (or score points) against the opposition.²⁵² When congressional Republicans have used the debt ceiling against Democratic presidents, some portion of the law professoriate has argued that the president may issue debt unilaterally to fund government functions at the level that Congresses have previously sanctioned.²⁵³ No president has unilaterally issued bonds. But progressive professors may have changed the terms of the debate, for an idea that was once unthinkable has become merely extreme (we think), and it is one that a president may yet seize.²⁵⁴ Even with no judicial opinion, some elites believe that the case for unilateral issuance of debt is at least plausible.

Consider the rise of standing, reviewability, and affiliated justiciability concepts during the New Deal.²⁵⁵ To be sure, there have always been constraints on the judicial power to hear cases.²⁵⁶ But in the wake of challenges to the New Deal, the Court that Franklin Delano Roosevelt built sought to reduce the judiciary's footprint.²⁵⁷ There is no reason to

²⁵² The debt ceiling has been bemoaned as a “bargaining chip” or “leverage.” Jacob J. Lew, *Managing Our National Debt Responsibly: A Better Way Forward*, 54 *Harv. J. on Legis.* 1, 2, 6 (2017). Former Treasury Secretary Jack Lew argued 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.” *Id.* at 1–2. 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.” *Id.* at 2.

²⁵³ See, e.g., Neil H. Buchanan & Michael C. Dorf, *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, *Biden Can Raise the Debt Ceiling Without Congress*, *Wash. Monthly* (Nov. 22, 2022), <https://washingtonmonthly.com/2022/11/22/biden-can-raise-the-debt-ceiling-without-congress/> [<https://perma.cc/E3AX-JGMR>] (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”).

²⁵⁴ One proponent of unilateral presidential action has said that this “seemingly fringy constitutional idea . . . journeyed like a comet from the dark reaches of space into the very center of the national debate.” Epps, *supra* note 253.

²⁵⁵ See Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 *Stan. L. Rev.* 1371, 1457–60 (1988).

²⁵⁶ See Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 *Mich. L. Rev.* 689, 691 (2004) (arguing that “the notion of standing is not an innovation”).

²⁵⁷ See Winter, *supra* note 255, at 1457; 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”).

imagine that this reflected a popular uprising for stronger non-justiciability doctrines.²⁵⁸ For most citizens, “standing” is something they do at the post office or the TSA security check. It has nothing to do with the courts. We think the shift reflected the sensibilities of the new Justices that less was more. Less judicial intervention in the economy, and otherwise, was more consistent with democratic ideals and would allow the government to fix the economy.²⁵⁹ So too, modern efforts to rethink standing, reviewability, and affiliated doctrines fueled by the right reflect top-down thinking, not bottom-up pressures.²⁶⁰

Or consider judicial deference to agency interpretations of ambiguous statutes, mandated by *Chevron v. Natural Resources Defense Council*²⁶¹ in 1984 and overruled by *Loper Bright Enterprises v. Raimondo*²⁶² in 2024. Some people think that *Chevron* was based on separation of powers thinking: the resolution of statutory ambiguities would necessarily require policy judgments, and such judgments should be made by the executive, not by courts.²⁶³ *Chevron* was plausibly associated with the Reagan Revolution,²⁶⁴ and it reflected top-down thinking by legal elites. More recently, *Chevron* came under sharp attack from legal elites, mostly on the right, with an insistence that “[i]t is emphatically the province and duty of the judicial [branch] to say what the law is.”²⁶⁵ When the Supreme Court overruled *Chevron*, it repeatedly referred to *Marbury v. Madison* and the idea that *Chevron* was fatally inconsistent with it.²⁶⁶ The rejection

²⁵⁸ One might suppose that the public opposed the judicial invalidation of the New Deal and that the Court was reacting to that. Even if that was so, the Court chose how to satisfy this public desire. The Court might have reached the merits in every case and decided that there was no constitutional violation. The choice that the Court often made—using justiciability doctrines to avoid the merits—was itself a monumental decision that has repercussions to this day.

²⁵⁹ See Winter, *supra* note 255, at 1457 (arguing that heightened standing requirements served to protect “governmental actions with many, diffuse, and indirect effects,” including “social and economic programs”).

²⁶⁰ See, e.g., *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203–07, 2214 (2021). A highly influential account is Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *Suffolk U. L. Rev.* 881 (1983).

²⁶¹ 467 U.S. 837, 843 (1984).

²⁶² 144 S. Ct. 2244, 2273 (2024).

²⁶³ See *Chevron*, 467 U.S. at 865.

²⁶⁴ See Thomas W. Merrill, *The Chevron Doctrine: Its Rise and Fall, and the Future of the Administrative State* 84 (2022).

²⁶⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); Philip Hamburger, *Chevron Bias*, 84 *Geo. Wash. L. Rev.* 1187, 1212 (2016).

²⁶⁶ See *Loper Bright*, 144 S. Ct. at 2261.

of *Chevron* may or may not be counted as radical, but it was constitutionally informed, and it was certainly a dramatic rejection of longstanding understandings. The arguments against *Chevron* and the judiciary's ultimate rejection of it were driven by elites, even if both also reflected a broader public suspicion of administrative power.

When the courts are absent, Congress has considerable influence to shift a paradigm, with or without popular support. For instance, Congress can shift constitutional thinking about what is an impeachable offense by acting on a novel understanding. 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 removal of District Court Judge Thomas Porteous, based in part on acts before he was a federal officer, reflected an important shift.²⁶⁷ Something debatable became the reality, at least for Judge Porteous, and a precedent seems to have been set. Similarly, if Congress removed an official for private conduct—e.g., tax fraud—its action would influence perceptions about the scope of “Treason, Bribery, or other high Crimes and Misdemeanors.”²⁶⁸ The chambers would be pushing the boundaries of congressional authority outward.²⁶⁹

Of course, the president can inaugurate constitutional change—the New Deal is a prominent example—and it is reasonable to think that President Roosevelt was generally responding to public demand, not only or mostly to elites. But if a president challenges the idea of independent agencies,²⁷⁰ he might well be adopting longstanding arguments, from elites, that the challenges have merit.²⁷¹ Sometimes the public provides the president with a permission slip or a green light, rather than with some kind of shove. There is a continuum from cases in which the public issues a demand, to cases in which the public offers a general sense of its preference, to cases in which the public seems neutral, to cases in which the public does not have a view at all.

²⁶⁷ 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>.

²⁶⁸ U.S. Const. art. II, § 4.

²⁶⁹ See Cass R. Sunstein, Impeachment: A Citizen's Guide 62–63 (2017) (noting that “[i]mpeachment is available for egregious abuses of official authority,” which does not include “essentially private” crimes, but does include noncriminal acts related to the office).

²⁷⁰ Ensuring Accountability for All Agencies, Exec. Order No. 14,215, 90 Fed. Reg. 10447 (Feb. 24, 2025).

²⁷¹ See generally Geoffrey P. Miller, Independent Agencies, 1986 Sup. Ct. Rev. 41 (mounting a broad constitutional challenge to the very idea of independent agencies).

The states may shift constitutional discourse as well. Their own arguments, and their own rulings, can affect the views of national institutions. In the early nineteenth century, Southern officials inveighed against high federal tariffs on imports, arguing that they were unconstitutional.²⁷² They never prevailed, but at the time, they may have succeeded in moving their claims from outlandish to extreme (if not mainstream). Or consider this counterfactual: if state courts had been using state equal protection analogs to strike down partisan gerrymandering for twenty years before *Vieth v. Jubelirer*,²⁷³ perhaps Justice Kennedy would have joined the dissenters and found the Pennsylvania gerrymander to violate the Equal Protection Clause.

Concerns about judicial administrability tend to decline in the face of real-world examples of such administrability. And if state institutions had long articulated a consistently expansive reading of “[i]nvasion” under Article IV, Section 4, that reading might have created the conditions whereby more observers would accept aggressive state responses to surging migrant crossings.²⁷⁴ As we write, Texas Governor Greg Abbott is advancing an expansive reading of invasion.²⁷⁵ The federal Executive took up the cause, adopting a capacious reading of “invasion,” both with respect to the Alien Enemies Act²⁷⁶ and, possibly, the suspension of the privilege of the writ.²⁷⁷ Whether state and federal executives succeed in mainstreaming an expansive view of “invasion” is partly a function of what other state and federal officials say and do in the years to come.

²⁷² For more information on the Nullification Crisis, see generally William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1836* (1965).

²⁷³ 541 U.S. 267 (2004).

²⁷⁴ 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 . . .”).

²⁷⁵ See Steve Vladeck, *Governor Abbott’s Perilous Effort at Constitutional Realignment*, *Lawfare* (Jan. 29, 2024, 7:45 AM), <https://www.lawfaremedia.org/article/governor-abbott-s-perilous-effort-at-constitutional-realignment> [<https://perma.cc/WP5L-983Q>].

²⁷⁶ 50 U.S.C. §§ 21–24.

²⁷⁷ Jacob Sullum, *Since Immigration Is an ‘Invasion,’ a Top Trump Adviser Says, the President Might Suspend Habeas Corpus*, *Reason* (May 13, 2025, 5:50 PM), <https://reason.com/2025/05/13/since-immigration-is-an-invasion-a-top-trump-adviser-says-the-president-might-suspend-habeas-corpus/> [<https://perma.cc/2MN3-HMGU>] (discussing and criticizing the Executive’s reading of “invasion”).

*B. The Public Can Mainstream, but Elites
Gatekeep All Constitutional Change*

We do not seek to downplay the role of bottom-up constitutional change. We agree that even relatively small-footprint social movements can mainstream previously marginal arguments. The NRA and the Human Rights Campaign altered perceptions of constitutional rights. If several million Americans come to believe something about our Constitution, that view will be more likely to join the mainstream. A portion of legal elites might well adopt such stances as their own.

So, too, if eighty or ninety percent of the people persistently hold a constitutional vision inconsistent with existing doctrines or practices, it is reasonable to imagine that elites within Congress or the executive will eventually adopt and implement that popular understanding. The courts are likely to come around too, either by changing their minds or through replacement by new judges who pledge fealty to the ascendant vision. Such responsiveness perhaps befits a republican system, though we acknowledge the complexities here.

Still, the public can do only so much. Strong and persistent public supermajorities on matters of constitutional law are exceedingly rare. The more typical situation involves movements that are barely majoritarian when they succeed in securing constitutional change. Indeed, in some instances *minoritarian* movements, perhaps on guns or abortion, help usher in constitutional change.²⁷⁸ In cases of successful constitutional change by minorities, the elites took the movement over the goal line despite the absence of a popular majority.²⁷⁹

This last point segues into a more general observation. In our view, *every* instance of *federal* constitutional change requires elite buy-in, because at the federal level, legal elites are gatekeepers. They can usher in, or obstruct, paradigm shifts. Consider the role of elites in two prominent cases of constitutional change. The end of the *Lochner* era was spurred, of course, by the Great Depression and Franklin Delano Roosevelt's New Deal, but it could not have happened unless legal elites, on and off the Court, decided that the Court had mangled the Due Process Clause. President George H.W. Bush's Department of Justice recognized the validity of the Twenty-Seventh Amendment, a hardly obvious

²⁷⁸ See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 Harv. L. Rev. 191, 241 (2008).

²⁷⁹ *Id.*

decision.²⁸⁰ Without some recognition of its validity by some elites within Congress, the executive, the courts, or the states, it is plausible to say that the proposed amendment perhaps never would have been widely seen as valid.

Even when sizable popular movements press for the recognition of rights, legal elites play a gatekeeping role and can stymie change. Legal elites can stand athwart history and yell “Stop.” Will America have gay marriage, gun rights, or both? The outcomes are hardly inevitable, even with a popular majority, for a necessary condition is some level of agreement from legal elites. Members of the legislative and executive branches take varying stances in the first instance, with the courts ultimately deciding questions of rights. We think it reasonable to assert that if Democrats at the federal level, off and on the bench, did not adopt the cause of gay rights, we may never have had *Lawrence v. Texas* or *Obergefell v. Hodges*. It is likely reasonable to say that if Republican officials at the elite level had not embraced gun rights, we would never have had *McDonald v. City of Chicago* or *District of Columbia v. Heller*. True, the public had a central role in motivating Democratic and Republican elites in both cases, but still, the elites had some decisions to make and had some freedom to choose. They chose to move (even if some of them experienced vertigo in the process).

The elite’s gatekeeping function, even for social movements, exists for an underappreciated structural reason: under received conceptions of the Constitution, members of the general public have few direct means of implementing their constitutional visions. Unlike states with constitutional initiative processes,²⁸¹ there is no Article V method by which “We the People” may amend the Constitution via a national vote.²⁸² Further, citizens cannot formally propose amendments in the way that Congress or a national convention can.²⁸³ The American people cannot even formally call for a national constitutional convention.²⁸⁴ When it comes to direct mechanisms—proposing and ratifying constitutional

²⁸⁰ Congressional Pay Amendment, 16 Op. O.L.C. 85 (1992).

²⁸¹ See, e.g., Ill. Const. art. XIV, § 3; Fla. Const. art. XI, § 3; Miss. Const. art. XV, § 273. As of 2015, a total of eighteen state constitutions provide for some form of constitutional initiative process. John Dinan, State Constitutionalism, in *The Oxford Handbook of the U.S. Constitution* 863, 876 (Mark Tushnet ed., 2015).

²⁸² See U.S. Const. art. V.

²⁸³ See id.; Dinan, *supra* note 281, at 872–73.

²⁸⁴ See U.S. Const. art. V.

amendments—We the People are (largely) impotent. Indirect involvement is another matter.²⁸⁵

We conclude by underscoring three observations. First: when it comes to matters of constitutional structure—federalism and separation of powers—legal elites have an outsized influence, as the public is less engaged with such seemingly abstract matters. The public did not raise a hue and cry against the Gun-Free School Zones Act,²⁸⁶ taxpayer standing,²⁸⁷ or removal restrictions.²⁸⁸ Whether the Senate has a role to

²⁸⁵ To be clear, citizens play a constitutional role in two limited ways. First, the people can participate in popular state bodies (“conventions”) that decide whether to ratify an amendment that emerges from Congress or a national constitutional convention. U.S. Const. art. V. But there is much less than meets the eye here. Congress decides whether to have amendments ratified by popular conventions or by state legislatures. *Id.* It has chosen the popular convention route on only one occasion, the proposed Twenty-First Amendment. Saikrishna Bangalore Prakash, *Of Synchronicity and Supreme Law*, 132 Harv. L. Rev. 1220, 1239 (2019). The choice to route almost all proposed amendments to legislatures has constrained the influence of popular movements. Furthermore, popular conventions are not that *popular*. Popular conventions are akin to representative bodies in that the public as a whole does not vote on legal proposals. Instead, citizens elect delegates who then vote on amendments at the “popular” convention, a process that approximates the public’s election of legislative representatives who then do the legislating.

Second, the public directly participates in petit and grand juries. Types of Juries, Admin. Off. of the U.S. Cts., <https://www.uscourts.gov/court-programs/jury-service/types-juries> [https://perma.cc/2J6A-5N84] (last visited June 2, 2025); Jury of One’s Peers, Cornell L. Sch. Legal Info. Inst., https://www.law.cornell.edu/wex/jury_of_one%27s_peers [https://perma.cc/G3RN-GS4G] (last visited June 2, 2025). According to some people, jurors may decide that some law is unconstitutional. See Akhil Reed Amar, *America’s Constitution: A Biography* 239–42 (2005) (arguing that under the original Constitution, juries have the right to nullify statutes on constitutional grounds). But jury outputs are infrequent and rather noisy, for we cannot discern what, if anything, a jury is saying about the Constitution when it indicts, acquits, or convicts. See Brenner M. Fissell, *Jury Nullification and the Rule of Law*, 19 Legal Theory 217, 218–20 (2013); Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying & Jennifer Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psych. Pub. Pol’y & L. 622, 700–01 (2001). Furthermore, because a jury’s outputs are noisy, they lack the lasting influence that often accompanies constitutional decisions by Congress or the president, much less the courts. For all these reasons, the elites play the primary role in generating radical constitutional change. Popular constitutionalism, as potent as it is, is hardly all-powerful. For a discussion of popular constitutionalism, see generally Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004).

²⁸⁶ Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, 104 Stat. 4844, *invalidated by* United States v. Lopez, 514 U.S. 549, 551 (1995), *amended by* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 657, 110 Stat. 3009, 3009-369 to -71.

²⁸⁷ See *Massachusetts v. Mellon*, 262 U.S. 447, 479–80 (1923).

²⁸⁸ See *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2188 (2020); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 618 (1935); *Myers v. United States*, 272 U.S. 52, 106 (1926).

play in treaty abrogation is not an issue most people care about or are likely to care about.

Second: social movements have the biggest impact on conceptions of rights. Individual liberties—abortion, guns, and free exercise—are more likely to inspire passions, either for or against. These rights seem to involve moral judgments about identity, liberty, and autonomy, each of which is accessible to ordinary citizens and more likely to energize potentially engaged citizens.

Third: although courts play a central role in mainstreaming marginalized views and marginalizing once-mainstream views, they are not the only elite institutions that serve that function. Congress, the president, and the states can help trigger constitutional paradigm shifts of various sorts. While these three can certainly facilitate shifts in constitutional rights, they often have a greater role to play in paradigm shifts related to federalism and the separation of powers.

V. SCIENCE FICTION BECOMES FACT

Previously, we spared readers even a thin account of how radical constitutional change occurs. Here we illustrate the phenomenon with two hypotheticals. Because we have largely described existing theories and doctrines, there may be a (mistaken) sense that these theories and doctrines were always mainstream. It might be difficult to fathom how seemingly reasonable contemporary understandings were, at one time, deemed outlandish or even unthinkable.

As with our discussion of what constitutes radical constitutional change, we will not supply an exhaustive list of conditions and specifications of when and how constitutional claims move from unthinkable to the mainstream. We have sketched examples with relevant (non-exhaustive) conditions and specifications. Again, we know it when we see it.

To whet your appetite, we briefly highlight a prominent example of how novel, some might say outlandish, arguments rapidly become more plausible. Two prominent originalists, Will Baude and Michael Paulsen, argued that Section 3 of the Fourteenth Amendment 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.²⁸⁹ We

²⁸⁹ See William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. Pa. L. Rev. 605, 611–12 (2024).

wonder whether such an argument had ever been expressed before, at least as to Section 3. In any event, Baude and Paulsen convinced many people that Donald Trump was barred (or could be barred) from America's ballots. In mere months, Baude and Paulsen moved claims that were once outlandish to the mainstream of legal thought.²⁹⁰

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 large segments of the legal elite and the public were highly receptive. Indeed, it may be that millions were 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.²⁹¹ That the Supreme Court rejected an element of their argument—whether states could enforce Section 3 against federal officials and office-seekers²⁹²—did nothing to undercut our sense that the Baude-Paulsen article had moved certain arguments from the margins to the mainstream.

Or return to the question of birthright citizenship. In (say) 1970, 1990, or 2010, it would have been unthinkable to assert that some people born in the United States are not citizens of the United States. Since President Trump signed Executive Order 14,160 in early 2025, that proposition has become thinkable. To be sure, it has not met a receptive audience in lower courts. But it has been defended by prominent members of the elite, and in prominent places.²⁹³ If it is not in the mainstream, it seems to be getting there.

²⁹⁰ Soon after Baude and Paulsen's article became available, other scholars and commentators endorsed their position. See, e.g., J. Michael Luttig & Laurence H. Tribe, *The Constitution Prohibits Trump from Ever Being President Again*, *The Atlantic* (Aug. 19, 2023), <https://www.theatlantic.com/ideas/archive/2023/08/donald-trump-constitutionally-prohibited-presidency/675048/>; Adam Liptak, *Conservative Case Emerges to Disqualify Trump for Role on Jan. 6*, *N.Y. Times* (Aug. 11, 2023), <https://www.nytimes.com/2023/08/10/us/trump-jan-6-insurrection-conservatives.html>. However, in *Trump v. Anderson*, 144 S. Ct. 662, 666 (2024), the Supreme Court rejected an aspect of their argument.

²⁹¹ Zach Montellaro, *Poll: Majority of Voters Would Support Disqualifying Trump Under 14th Amendment*, *Politico* (Sept. 29, 2023, 6:00 AM), <https://www.politico.com/news/2023/09/29/poll-trump-disqualified-14th-amendment-00118980> [<https://perma.cc/RBC7-PX9G>].

²⁹² See *Anderson*, 144 S. Ct. at 665–66.

²⁹³ Randy E. Barnett & Ilan Wurman, *Trump Might Have a Case on Birthright Citizenship*, *N.Y. Times* (Feb. 15, 2025), <https://www.nytimes.com/2025/02/15/opinion/trump-birthright-citizenship.html>.

A. Is Permitting Abortion Unconstitutional?

Having finally succeeded in helping to overrule *Roe v. Wade*,²⁹⁴ portions of the pro-life movement have been weathering a backlash.²⁹⁵ But in academic and other circles, a committed, vocal, energetic minority favors even more radical change.²⁹⁶ Its members would like to replace *Dobbs* with a ruling declaring that it is unconstitutional for states to permit, or tolerate, abortion.²⁹⁷ In this view, fetuses are persons, each of whom enjoys constitutional rights.²⁹⁸ 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.²⁹⁹ The state may no more refuse protection for unborn persons than it may refuse to protect racial minorities or women. While many will reject these comparisons, it

²⁹⁴ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279 (2022) (“*Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.”).

²⁹⁵ See David S. Cohen, Greer Donley & Rachel Rebouché, Rethinking Strategy After *Dobbs*, 75 Stan. L. Rev. Online 1, 6 (2022) (describing the pro-life movement’s “defensive posture” post-*Dobbs*); Mary Ziegler, Should Constitutional Rights Reflect Popular Opinion? Interpreting *Dobbs v. Jackson Women's Health Organization*, 6 Mod. Am. Hist. 88, 91 (2023) (observing the Court’s decline in popularity after *Dobbs* and noting the “emotion produced by *Dobbs*” and “ongoing marches and protests against *Dobbs*”).

²⁹⁶ See Robert M. Byrn, An American Tragedy: The Supreme Court on Abortion, 41 Fordham L. Rev. 807, 835–42 (1973); David W. Louisell, Abortion, the Practice of Medicine and the Due Process of Law, 16 UCLA L. Rev. 233, 250–53 (1969); John Finnis & Robert P. George, Equal Protection and the Unborn Child: A *Dobbs* Brief, 45 Harv. J.L. & Pub. Pol’y 927, 932, 1025–27 (2022).

²⁹⁷ See Vermeule, *supra* note 206, at 41 n.103 (“I believe 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.”).

²⁹⁸ This is known as the “fetal personhood” movement. For descriptions and critiques of the movement’s current arguments, see generally Vincent J. Samar, Personhood Under the Fourteenth Amendment, 101 Marq. L. Rev. 287 (2017); Rachel Rebouché & Mary Ziegler, Fracture: Abortion Law and Politics After *Dobbs*, 76 SMU L. Rev. 27 (2023); Aaron Tang, After *Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban, 75 Stan. L. Rev. 1091 (2023); Jeannie Suk Gersen, How Fetal Personhood Emerged as the Next Stage of the Abortion Wars, New Yorker (June 5, 2019), <https://www.newyorker.com/news/our-columnists/how-fetal-personhood-emerged-as-the-next-stage-of-the-abortion-wars>.

²⁹⁹ 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).

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 the failure to treat fetuses as persons abridges the Privileges or Immunities Clause, the Due Process Clause, the Equal Protection Clause, or all three. There is a textual problem in that the Fourteenth Amendment declares that “[a]ll 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.”³⁰⁰ 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, which states that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,” is inapplicable.³⁰¹

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”).³⁰² 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.

The above argument is almost entirely textual. But super-pro-lifers need not rest their case on a contestable reading of the text. Several other 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.³⁰³ If people who are born are protected against murder, failing to extend the

³⁰⁰ U.S. Const. amend. XIV, § 1.

³⁰¹ *Id.*

³⁰² *Id.* But see *Roe v. Wade*, 410 U.S. 113, 157 (1973) (claiming that “person[s]” as used in the Constitution has application “postnatally” and that there is little warrant for supposing it has “pre-natal application”).

³⁰³ Compare Jack M. Balkin, *Abortion and Original Meaning*, 24 *Const. Comment.* 291, 292 (2007) (arguing the Constitution protects the abortion right), with Finnis & George, *supra* note 296, at 930 (arguing the Constitution protects the unborn’s right to life), and Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 *Harv. J.L. & Pub. Pol’y* 539, 541–42 (2017) (same).

protections to the unborn may seem rather unequal. Perhaps that conclusion is mandated by, or consistent with, the original meaning; of course, historical investigation would be necessary to know.

Public meaning originalists might also argue that when a government affirmatively sanctions the killing of the unborn, that action offends the Due Process Clause. After all, some argue that the second Due Process Clause—found in the Fourteenth Amendment—contains a substantive component.³⁰⁴ Concerning the Privileges or Immunities Clause, originalists and non-originalists 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.³⁰⁵ We do not deny that all this seems a stretch, on many dimensions, and would be contested by many, including some who are pro-life.

Super-pro-lifers can draw upon other theories. Common good constitutionalists could adopt the view that allowing abortion is inconsistent with fundamental background principles, each of which forms the bedrock of sound constitutional interpretation.³⁰⁶ One can imagine pro-life devotees of *Carolene Products*’s footnote 4 arguing that fetuses are discrete and insular minorities and worthy of extrajudicial solicitude. (After all, unborn persons cannot vote.) A disciple 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.³⁰⁷

Under existing law, any super-pro-life constitutional claim³⁰⁸ must be counted as extreme. But the presence of that claim in contemporary debates suggests that it may not be outlandish. How could this super-pro-life vision move to the mainstream, and from there, to established judicial doctrine? We cannot say for certain, for as we said earlier, we do not

³⁰⁴ See, e.g., Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *Yale L.J.* 408, 415 (2010).

³⁰⁵ See, e.g., John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *Yale L.J.* 1385, 1388 (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).

³⁰⁶ See Vermeule, *supra* note 206, at 41.

³⁰⁷ See Dworkin, *supra* note 156, at 2.

³⁰⁸ See Vermeule, *supra* note 206, at 41; Finnis & George, *supra* note 296, at 967–68.

believe that there is a single path from the extreme to the constitutional status quo.

Nonetheless, because we are talking about constitutional rights, the path does seem to require changing minds and mass mobilization. With respect to abortion rights, the United States has witnessed two sets of *informational cascades*,³⁰⁹ 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.³¹⁰ The first cascade led to the establishment of the abortion right in *Roe*; the second cascade led, over many decades, to *Dobbs*.

A similar informational cascade in favor of a constitutional prohibition on abortion would be necessary. 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. At some point, the super-pro-life position would no longer be marginal at all.³¹¹

There is also the phenomenon of group polarization.³¹² Like-minded people, engaged in discussions with one another, often become more unified, more confident, and more extreme. Groups of like-minded non-specialists focused on some constitutional issue often display group polarization, as they exchange information that tends to favor the view to which they are antecedently inclined.³¹³ If like-minded people are listening to one another, they will tend to become more firmly committed to their shared view. Suppose, for example, that most people in a deliberating group tend to think that the Constitution protects the right to same-sex marriage. Their internal discussions are likely to lead them to hold that view with great confidence.

The same can happen among elites. We speculate that both bottom-up and top-down radical constitutional change is a product, in part, of group polarization, often extending over many years. This is true both for

³⁰⁹ See Sushil Bikhchandani, David Hirshleifer & Ivo Welch, A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades, 100 J. Pol. Econ. 992, 994–95 (1992).

³¹⁰ See id. at 994 (describing the mechanisms that create informational cascades); Cass R. Sunstein, Conformity: The Power of Social Influences 35–77 (2019) (exploring how informational cascades can create broad movements).

³¹¹ On some of the dynamics here, see Sunstein, *supra* note 310, at 38 (describing how informational cascades form).

³¹² See Roger Brown, Social Psychology: The Second Edition 200–48 (1986).

³¹³ See id. at 222–29 for many examples.

particular conclusions (the Constitution protects the right to same-sex marriage; the Constitution does not protect the right to choose abortion; the Constitution forbids affirmative action) and for issues of method (originalism is the right approach; originalism is the wrong approach; common good constitutionalism is the right path forward; common good constitutionalism is the wrong path backwards).

For the super-pro-life view to move from the extreme to the mainstream, some elites must adopt 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.

We rather doubt that *this* Court will be eager to embrace fetal rights. It is safe to say that 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 abortion should be left to democratic processes within the states. The Roberts Court contains such critics, which may help explain why *Dobbs* asserted that the Constitution is silent on abortion.³¹⁴

But no one knows what the future may bring. To begin with, younger pro-life elites may not be so enthusiastic about the idea of judicial restraint, taken as a broad presumption in favor of the rule of democratic majorities. They 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 state legislative choice. Further, if forty or fifty percent of the public came to adopt the now super-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 subsequently won the election, the claim would enter the legal mainstream, potentially leading some Justices to see the argument as plausible or correct. Finally, as discussed earlier, the constitutional claim would become more plausible, and could prevail, if new nominees to the

³¹⁴ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242–43 (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.”).

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 the murder of other persons. Consider in this regard the successful effort to produce a constitutional right to same-sex marriage, which followed a trajectory of very much this sort.

B. Is the Senate Unconstitutional?

Now turn to another example, one more in tune with the opposite end of the political spectrum. Some progressives believe that the Senate is anachronistic, even an abomination, and intolerably antidemocratic.³¹⁵ Importantly, they also believe that it defies fundamental constitutional principles, grounded on democracy and equality.³¹⁶ Why do small states like Delaware or Montana have the same representation in the Senate as California or Texas? More importantly, why do the peoples of Delaware and Montana have a much larger say on who makes our nation's laws? Moreover, the outsized influence of small states infects the Electoral College that chooses the president, making it more likely that a candidate can become 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, is unconstitutional, you would likely be met with some derision and awkward glances. You might receive what some people call the “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 return to that point.

³¹⁵ See, e.g., Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* 49, 60 (2006) (describing the Senate as “illegitimate” and a “travesty of the democratic ideal” (emphasis omitted)); Frances E. Lee & Bruce I. Oppenheimer, *Sizing Up the Senate: The Unequal Consequences of Equal Representation* 223–27 (1999); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1071 n.98 (1988) (“The malapportionment of the United States Senate is hardly trivial or outcome neutral; it drastically overrepresents the perspective of rural over urban America.”); Jamelle Bouie, *The Senate Is Getting Less Democratic by the Minute*, N.Y. Times (Nov. 21, 2023), <https://www.nytimes.com/2023/11/21/opinion/senate-2024-inequality-madison.html>.

³¹⁶ See Lee & Oppenheimer, *supra* note 315, at 223–27.

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 *Virginia Law Review*, *The New York Times*, 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. Furthermore, many regard the small states as having an outsized, unjustly influential voice in who becomes president.³¹⁷ These people are perhaps *primed* to say that it is unconstitutional, just as many people were primed to conclude that Section 3 of the Fourteenth Amendment disqualified Donald Trump from the presidency.

The textual argument against the disproportionate influence of small states seems an utter loser, until it belatedly assumes some plausibility, at least in some quarters. The Constitution says that the Senate “shall be composed of two Senators from each State.”³¹⁸ It also declares that no state can be denied “equal [s]uffrage” in the Senate without its consent.³¹⁹ Both provisions seem to signal that each state must have two, and only two, senators. But perhaps someone will argue that “shall” means “may,” not “must.”³²⁰

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. Further, what does “equal suffrage” require? Again, the traditional view is equality in numbers—every state must have two (and only two) senators. But

³¹⁷ See, e.g., Al From, *The Challenge to Democracy—Overcoming the Small State Bias*, Brookings Inst. (July 6, 2022), <https://www.brookings.edu/articles/the-challenge-to-democracy-overcoming-the-small-state-bias/> [<https://perma.cc/9XKW-JPPA>]; 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/>.

³¹⁸ U.S. Const. amend. XVII.

³¹⁹ *Id.* art. V.

³²⁰ See Bryan A. Garner, *Legal Writing in Plain English: A Text with Exercises* § 35, at 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.” (emphasis omitted)).

someone might say that true equality *requires* consideration of the underlying state populations. That is, equal suffrage demands that we take relative populations into account in determining the number of senators. Or so the clever arguments might go.

After sidestepping conventional readings, the argument will move to why equal state suffrage in the Senate is unconstitutional. Perhaps the equal protection component of the Fifth Amendment³²¹ makes the outsized role of the small-population states unconstitutional. And, conceivably, maybe the move to the popular election of senators³²² 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 perceptions of the requirements of democracy might render the modern Senate unconstitutional.

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.³²³ For more than a century, this assertion was unthinkable.³²⁴ But with changes in moral judgments about the sanctity of life, a focus on the arguable arbitrariness of its application, and 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*.³²⁵ 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

³²¹ See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

³²² See U.S. Const. amend. XVII (amending Article I to establish that senators "shall be . . . elected by the people").

³²³ See, e.g., John D. Bessler, *Cruel & Unusual: The American Death Penalty and the Founders' Eighth Amendment* 232–33, 250 (2012); Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 Harv. L. Rev. 1773, 1775–76 (1970); William A. Fletcher, *Madison Lecture: Our Broken Death Penalty*, 89 N.Y.U. L. Rev. 805, 806 (2014).

³²⁴ See James T. Bryan III, *An Historical Analysis of Mandatory Capital Punishment*, 7 N.C. Cent. L. Rev. 306, 306–07 (1976).

³²⁵ 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 . . .").

greater the number of people who 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.³²⁶ Nonetheless, the Supreme Court ultimately refrained from making that fateful move for multiple reasons, including a change in Supreme Court personnel³²⁷ and (perhaps) a popular clamor for getting tough on crime.³²⁸

The claim that the death penalty is unconstitutional went from the unthinkable, to the outlandish, to the extreme, to the mainstream. It now perhaps has moved back to the extreme or beyond. After all, no sitting Justice has endorsed the claim. 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 moving into, and out of, the mainstream. That the Roberts Court is rather unlikely to embrace the claim is no grounds for concluding that future Justices or Courts would perpetually reject it.

In any event, 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-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.

³²⁶ Justices Brennan and Marshall believed that the death penalty was unconstitutional. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 257, 290–91 (1972) (Brennan, J., concurring); *id.* at 370 (Marshall, J., concurring). Justices Powell, Blackmun, and Stevens eventually came to believe that the death penalty should be abolished. See Fletcher, *supra* note 323, at 828; see also *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) (describing the death penalty as having inherent constitutional deficiencies); *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring in the judgment) (arguing that the death penalty is unconstitutional but evincing a willingness to follow Court precedents).

³²⁷ See Andrew Cohen & Carol Steiker, *The Eighth Amendment, the Death Penalty, and the Supreme Court*, Brennan Ctr. for Just. (Feb. 22, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/eighth-amendment-death-penalty-and-supreme-court> [<https://perma.cc/9SDU-FEBY>] (describing how changes in Court membership affect its treatment of the death penalty).

³²⁸ For more discussion of the political and public opinion influences on the law's approach to the death penalty, see Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 *Va. L. Rev.* 283, 286–94 (2008); Ben Jones, *The Republican Party, Conservatives, and the Future of Capital Punishment*, 108 *J. Crim. L. & Criminology* 223, 225–27 (2018).

VI. WHITHER BOUND?³²⁹

Perhaps the wisest of Americans once said, “If we could first know where we are, and whither we are tending, we could better judge what to do, and how to do it.”³³⁰ Our goal has been to tell readers “where we are,” in terms of why and how radical constitutional change occurs and the vertigo that it often produces. We have emphasized that ours is a descriptive enterprise, not a normative one. It would be possible to agree with everything we have said (if so, thank you so much) while also insisting that common good constitutionalism is the best path forward, that originalists have it right, or that Ronald Dworkin is the only theorist who has ever seen things clearly.

Some readers sought more, asking us to comment on what is to be done, as if our analysis suggested that some reform was in order. That was never our point. Our goal has been to explicate radical constitutional change and vertigo without also describing what ought to be done about both. This project is not a penultimate step of an ultimate reform.

We can say that if you do not much care for the Roberts Court or for President Donald Trump, you are free to do what other reformers have done: supplant one form of radical change with another. That change can come from the public pushing the legal elites for reform or from those elites leading the reforms.

In the wake of the reelection of President Trump, we cannot say what the short term will bring. And how long the short term will last is anyone’s guess. Those favoring the existing paradigm ought to make hay while the sun shines, for every other paradigm has ended at some point. In the long run, the reigning paradigm will be discarded. There is always a new paradigm in the offing; the only uncertainties are its contours and when it will commence.

Is this a good way to run a constitutional railroad? Should we periodically experience radical constitutional change, most of it outside of Article V? We are unsure. What kind of radical change is beyond the pale? We leave that to you. All we know is how the railroad has been run for well over two centuries.

³²⁹ Yes, a president who produced radical change wrote a book with that name. See generally Franklin D. Roosevelt, *Whither Bound?* (1926).

³³⁰ Abraham Lincoln, “A House Divided” (June 16, 1858), in *Abraham Lincoln: From His Own Words and Contemporary Accounts* 13, 13 (Roy Edgar Appleman ed., 1961).

CONCLUSION

Most of the time, constitutional developments tend to be “normal science.” The foundations of constitutional law do not shake. Nobody feels vertigo. Within the Supreme Court, new rulings fill gaps by answering questions deliberately left open, by applying established principles to new domains, or by creating exceptions to old principles. Reasoning by analogy tends to be the coin of the realm. Constitutional law builds and adjusts; it does not transform.

During times of relative stasis, people might guess about the outcome, and they might be surprised; but no one is discombobulated. If Justice William Brennan disagrees with Chief Justice Warren Burger, at least they live within the same constitutional community. If Justice Lewis Powell disagrees with Chief Justice William Rehnquist, they are speaking the same language.

On some occasions, however, there is a rupture. The foundations crack. *Ferguson v. Skrupa*³³¹ is in a different constitutional universe from *Adkins v. Children’s Hospital*.³³² In the wake of *Loving v. Virginia*,³³³ with its clear disapproval of “White Supremacy,” *Plessy v. Ferguson*³³⁴ seems an inexplicable constitutional glitch. After *Brandenburg v. Ohio*,³³⁵ *Dennis v. United States*³³⁶ seems baffling, an intruder from a parallel universe. After *Dobbs*,³³⁷ *Obergefell v. Hodges*³³⁸ may come to be seen as resting on a theory of privacy that lacks constitutional moorings.

In the early stages of a transformation, some observers feel vertigo; they think that the paradigm-shifters are in the grip of something untoward, even nefarious.³³⁹ The old guard feels gaslighted. To the

³³¹ 372 U.S. 726 (1963).

³³² 261 U.S. 525 (1923).

³³³ 388 U.S. 1 (1967).

³³⁴ 163 U.S. 537 (1896).

³³⁵ 395 U.S. 444 (1969) (per curiam).

³³⁶ 341 U.S. 494 (1951).

³³⁷ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

³³⁸ 576 U.S. 644 (2015).

³³⁹ See also the incredulous dissenting opinion in *West Coast Hotel Co. v. Parrish*:

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. . . . 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

votaries of the displaced order, the agents of radical change claim to be following the law but are doing something else altogether. Consider, again, Larry Kramer's remarks about the Roberts Court: "I couldn't stand up in front of the class and pretend the students should take the court seriously in terms of legal analysis."³⁴⁰ So it was in the 1930s; so it was in the 1960s; so it is today. Each time, people find themselves in a place called vertigo.³⁴¹

The novel understandings might reflect an effort to recover something—the long-lost meaning of the Commerce 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 now call for a result for which it did not necessarily call, way back then. The new doctrines might stem from an appeal to changes in facts³⁴² or values³⁴³ that permit or require dramatic departures from past understandings.

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 the rise of newfangled methodology stems from a desire to constitutionalize a newly preferred paradigm, or the results that the methodology produces. That is,

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.

300 U.S. 379, 402–03 (1937) (Sutherland, J., dissenting).

³⁴⁰ Wegman, *supra* note 2.

³⁴¹ See U2, *Vertigo*, *on* How to Dismantle an Atomic Bomb (Island Recs. Nov. 8, 2004).

³⁴² See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 836 (1992), as well as the claim that large-scale constitutional change occurs because of new understandings of facts: *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), signaled the demise of *Lochner* by overruling *Adkins*. . . . *Adkins* [had] rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. . . . [Brown] observ[ed] 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 Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed . . . in 1896.

Id. at 861–63 (citations omitted).

³⁴³ See *Obergefell v. Hodges*, 576 U.S. 644, 669 (2015); see also Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *Yale L.J.* 221, 236 (1973) (“[W]hen a court justifies a common law . . . rule with a policy, it is proceeding in a fashion recognized as legitimate only if two conditions are met: The policy must be widely regarded as socially desirable and it must be relatively neutral.”).

the newly regnant theory of constitutional interpretation may not have prevailed because of anything highfalutin, or because of its abstract appeal; it might have triumphed precisely *because of the constitutional order that it made possible*.

Radical constitutional change often begins with a bottom-up surge where the people press for a new set of understandings, said to be part of the founding document. The issue could be abortion or what is “public use.”³⁴⁴ But much of the time, the pressure for a shift arises from the top down, where certain elites push for a new conception. The elites insist that we need a stronger executive, a deferential Court, a weaker Congress, or more powerful states. Whether the impetus is bottom-up or top-down, there is no federal constitutional change without some elite buy-in.

One implication of the rise and fall of theories of the Constitution is that some understandings, now deemed by many experts to be mad, will end up as the law, and sooner rather than later. Some judges and scholars advance what initially seems outlandish or even daft; eventually, they are deemed visionary. Some science fiction writers are prophets.³⁴⁵

³⁴⁴ For example, after *Kelo v. City of 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).

³⁴⁵ See Ursula K. Le Guin, Science Fiction as Prophecy: Philip K. Dick, New Repub., Oct. 30, 1976, at 33.