Buffalo Law Review

Volume 42 | Number 2 Article 2

4-1-1994

Can American Constitutional Law Be Postmodern?

Robert Justin Lipkin
Widener University School of Law

BUFFALO LAW REVIEW

Volume 42 Spring 1994 Number 2

Can American Constitutional Law Be Postmodern?*

ROBERT JUSTIN LIPKIN**

CONTENTS

** Professor of Law, Widener University School of Law. B.A., 1965, Brooklyn College, M.A., 1971, Ph.D. (Philosophy), 1974, Princeton University, J.D., 1984, UCLA School of Law. I wish to thank the members of the Ohio Legal Theory Workshop, especially Ned Foley, Sandy Caust-Ellennbogen, Robert Kagan, and Tim Lytton for a stimulating critique of an earlier draft of this article. A more finished draft of this article was presented as a work-in-progress at the Association of American Law Schools Conference on Constitutional Law in Ann Arbor in June 1993. Bruce Ackerman, Alan Howard, and Sandy Levinson deserve thanks for their thought-provoking comments on that occasion. I also thank Marc Hess for contributing critical commentary to the final draft of this Article and Aaron Shapiro for his proofreading. Lastly, but in no sense least, I gratefully acknowledge Rodney K. Smith's daily critical and historical comments during the theory of constitutional revolutions' formative stages.

INTRODUCTION

For over a generation American constitutional law has been in a state of crisis challenging the very foundations of American constitutional government.[1] It is a crisis that manifests itself in widespread disagreement over the proper interpretation of the United States Constitution.[2] This crisis ultimately affects every person subject to the laws of the United States, jeopardizing the rights, liberties, and responsibilities that individuals enjoy in the world's oldest and most resilient constitutional democracy. It also implicates the authority of the state and federal governments as well as the general question of the government's role in solving the nation's social and economic problems. Since the very idea of constitutional government is at stake, we must determine whether this crisis in American constitutionalism can be resolved, or whether instead we should seek new ways of understanding our most cherished political text.

The crisis in American constitutionalism reflects a broader crisis in intellectual inquiry. The landscape of intellectual inquiry, once ensconced securely in modernity,[3] is now emerging into a postmodern era.[4] Constitutional theory, traditionally understood as champi-

---

1. Sanford Levinson, *Law as Literature*, *in* INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 155, 157 (Sanford Levinson & Steven Mailloux eds., 1988) (examining "the malaise that afflicts all contemporary legal analysis, nowhere more severely than in constitutional theory"). I discuss possible responses to this crisis in the following: Robert J. Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 CORNELL L. REV. 811 (1990) [hereinafter Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness*]; Robert J. Lipkin, *Kibitzers, Fuzzies and Apes Without Tails: Pragmatism and the Art of Conversation in Legal Theory*, 66 TUL. L. REV. 69 (1991) [hereinafter Lipkin, *Kibitzers, Fuzzies and Apes Without Tails*]; Robert J. Lipkin, *Indeterminacy, Justification and Truth in Constitutional Theory*, 60 FORDHAM L. REV. 595 (1992) [hereinafter Lipkin, *Indeterminacy, Justification and Truth in Constitutional Theory*]; and Robert J. Lipkin, *Pragmatism—The Unfinished Revolution: Doctrinaire and Reflective Pragmatism in Rorty's Social Thought*, 67 TUL. L. REV. 1561 (1993) [hereinafter Lipkin, *Pragmatism*].

2. LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 2 (1991). Additionally, this crisis involves disagreement over substantive constitutional values, and the right connection between the Constitution and moral and political values.

3. Consider the divergence of constitutional theories over the last twenty or thirty years. Although there is much agreement over a host of significant issues, there also appears to be irreconcilable differences over such issues as abortion, gay and lesbian rights, free speech, pornography, racism, the role of the government, and poverty, among others. These differences have been tested and refined through reflection and confrontation, yet they still remain divisive. This suggests that the modernist ideal of reducing or eliminating disagreement is implausible.

4. Postmodernity rejects metanarratives, or meta-discourses, that allegedly legitimize or validate primary discourses. Such a meta-discourse, or meta-language, is a second-order discourse which takes as its object, not the ordinary objects of first-order discourses such as science, ethics and common sense, but rather, the first-order discourses

oning objectivity and legitimacy, must now seek new structures in postmodernity, or continue to founder and abdicate its unique role in American culture.[5] This Article characterizes the crisis of American constitutionalism as a problem of postmodernity.[6] Postmodernity poses a special problem for constitutionalism as it does for any discipline that counts legitimacy and truth among its primary virtues. Part I of this Article sketches the postmodern challenge and contends that pragmatism represents the best postmodern approach to intellectual inquiry generally and constitutional theory in particular. Part II, the Article's critical centerpiece, examines Bruce

---

themselves. This second-order discourse allegedly provides the rational justification of the primary discourse. For the postmodernist, no such second-order discourses exist, or, what amounts to the same thing, if they do exist, they serve no legitimizing function. *See* JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE at xxiv (Geoff Bennington & Brian Massumi trans., 1984) [hereinafter LYOTARD, THE POSTMODERN CONDITION] (defining postmodernity "as incredulity toward metanarratives").

Metanarratives "subordinate, organize and account for other narratives; so that every other local narrative . . . is given meaning by the way it echoes and confirms the grand narratives . . . ." STEVEN CONNOR, POSTMODERNIST CULTURE: AN INTRODUCTION TO THEORIES OF THE CONTEMPORARY 30 (1989) [hereinafter CONNOR, POSTMODERNIST CULTURE]. Losing faith in metanarratives implies that philosophy, the metanarrative of metanarratives, can never be the Queen of the sciences. LYOTARD, THE POSTMODERN CONDITION, *supra*, at 41 ("Speculative or humanistic philosophy is forced to relinquish its legitimation duties . . . in arrogating such functions and is reduced to the study of systems of logic or the history of ideas where it has been realistic enough to surrender them."). We should avoid the temptation to describe the failure of the great narratives as "the great narrative of the decline of great narratives." Jean-François Lyotard, *Universal History and Cultural Differences*, *in* THE LYOTARD READER 314, 318 (Andrew Benjamin ed., 1989) [hereinafter Lyotard, *Universal History and Cultural Differences*]; Instead, we should abandon our commitment to legitimacy. *See* SEYLA BENHABIB, SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS 224 (1992) (discussing what philosophy becomes when it ceases aspiring to a metadiscourse of legitimation); Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505 (1992) (discussing postmodernity and its implications for statutory interpretation). In addition to its rejection of metanarratives, postmodernity also rejects the notion of a true or an essential self.

5. In American democracy, many controversial social issues have a constitutional dimension and Americans take constitutional criticism seriously. Many Americans believe that unethical policies are also unconstitutional even though technically, it might be impossible for that objection to stick due to the absence of state action or some other triggering device.

6. Not everyone is equally enthusiastic about the notion of postmodernity. *See, e.g.*, Fred Dallmayr, *Postmetaphysics and Democracy*, 21 POL. THEORY 101, 101 (1993) ("While fashionable, the meaning of [postmodernity] is baffling or elusive."). Constitutional scholars in particular may have special reservations about the use of this term in constitutional theory. I am sympathetic to their concerns, but urge these scholars to tolerate my use of "modern" and "postmodern" for the present. I propose an account of American constitutionalism that can be articulated independently of these exotic postmodernist terms. However, my account of constitutionalism explains the attractiveness of postmodernity, because American constitutionalism was paradoxically "postmodern" long before the dawning of postmodernity.

Ackerman's theory of dualistic constitutional change. In a nutshell, Ackerman's theory must be rejected because it suffers from an identity crisis. Dualism's downfall is its failure to distinguish and integrate two very different kinds of constitutional theories: modernist constitutional theory and postmodern constitutional theory.[7] Shorn of its modernist features,[8] Ackerman's theory exemplifies a postmodern concern for context, detail and perspective.[9] In the spirit of postmodernity, Ackerman creates an interpretive history of American constitutionalism, but gives insufficient attention to the problems of adjudication, namely, the problem of how judges decide cases. What is needed to resolve this problem is an unambiguous *jurisprudential* theory of constitutional change and judicial reasoning, an account tied to conceptual change and theories of reasoning in other areas of intellectual inquiry. Part III describes and defends such a theory, namely, "the theory of constitutional revolutions," a jurisprudential theory which accurately depicts American constitutional practice and the paradigm of judicial reasoning upon which this practice depends.

I. CONSTITUTIONAL LAW IN THE POSTMODERN AGE

A. *The Crisis of American Constitutionalism*

The crisis of American constitutionalism involves two opposing approaches to constitutional reasoning. The first approach contends that judges must use legitimate constitutional methodologies in deciding cases, based on reason, objectivity, and truth. When judges adopt alternative methods their lawlessness weakens the government's constitutional authority over its citizens. According to this modernist approach, inappropriate constitutional methodologies threaten the legitimacy of constitutional law. The modernist solution is to discover the correct constitutional methodology, a methodology that is sanctioned by the United States Constitution itself or

---

7. Ackerman fails to recognize that his theory exhibits both modern and postmodern characteristics. *See generally* BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS (1991).

8. Two deeply entrenched modernist presuppositions of Ackerman's dualistic politics are his concern over the countermajoritarian problem and his insistence that judges integrate the constitutional values of preceding constitutional regimes. *See* discussion *infra* part II. The countermajoritarian problem cannot be a serious problem for the postmodern constitutionalist for two salient reasons. First, postmodernist theories are anti-perfectionist. Just because every feature of American constitutionalism is not itself majoritarian does not mean that the system taken as a whole suffers from a democratic deficiency. Second, postmodern constitutionalism permits a wide array of democratic systems, some having judicial review, some not.

9. Perspectivalism insists that all human beings perceive the world from their own viewpoint, implying that judging or reasoning from a general perspective is an impossible modernist myth.

some authoritative feature of American Constitutional practice.

The second approach makes no claims to legitimacy, nor does it seek to determine once and forever the appropriate constitutional methodology. Instead, this postmodern approach sees constitutional law as a search for appropriate values suitable to contemporary society. Rather than first requiring a theoretical justification of constitutional methodology, this approach insists that we leave *a priori* questions of legitimacy and methodology aside. The sole criterion for the acceptability of constitutional methodology is its efficacy in resolving constitutional crises, or, failing that, in explaining why resolution is impossible.

The crisis of American constitutionalism implicates broader values now under siege in American culture. It asks a question as old as the American Republic, namely: How is it possible for a constitutional democracy to serve two masters: the master of orthodoxy and the master of progressive change? This question goes to the heart of constitutionalism and its role in our culture wars.[10] Questions of this sort seek to determine whether our constitutional democracy can survive when large scale disagreement about central values poisons the well of public life. Though this question has roots in the founding of the nation, it has special importance now that America is undergoing diverse and radical demographic changes. Shortly, the majority of Americans will not be white or European. The problem of how to maintain America's traditions (which traditions?) in the midst of diversity, thus becomes a critical problem affecting both American culture and American constitutionalism.

The present crisis of American constitutionalism is more than mere disagreement over constitutional values or constitutional methodologies. Americans have always been divided over which values the United States Constitution protects and which methodologies the Constitution sanctions.[11] The contemporary crisis exists be-

10. *See* JAMES D. HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 250-71 (1991) (describing the extent of the culture wars in American society); *see also* GERALD GRAFF, BEYOND THE CULTURE WARS 171-96 (1992) (suggesting that by teaching the conflicts we can move beyond the culture wars). American constitutionalism is a form of cultural criticism and as such constitutes a process of constitutional and cultural change. *See* Robert J. Lipkin, *Pragmatism, Cultural Criticism and the Idea of the Postmodern University*, *in* ETHICS AND THE UNIVERSITY: COMMUNITY, DIVERSITY AND MORALITY IN THE AMERICAN ACADEMY (M.N.S. Sellers ed., forthcoming 1994).

11. Since the text of the Constitution does not specify a prescribed methodology, it is difficult to see how one could argue that the Constitution sanctions any particular methodology of constitutional interpretation. Moreover, the records of the Constitution's ratification do not unambiguously reveal the Founders' intentions on this matter. Moreover, it is not obvious why (or how) these intentions should control, except in the most trivial sense. Surprisingly, there is a conceptual problem involved here. Even if the Constitution specified a particular methodology, that provision alone could never be ultimate in requir-

cause the present disagreement is so fundamental and irresolvable, pellucidly revealing the great cultural divisions in our nation. No longer do we take seriously our opponents' point of view. No longer do we seek bridges between polarized extremes.[12]

The crisis of American constitutionalism is also a crisis of Western civilization and the epistemology and metaphysics Western civilization defends. The crisis of American constitutionalism therefore reflects a broader crisis in intellectual inquiry. Western intellectual inquiry is experiencing a sea change away from grand narratives canonizing and legitimizing primary discourses. This move away from foundationalist epistemology and metaphysics is an indictment of the Enlightenment and the modernist spirit that created it. Postmodern antifoundationalism challenges the role of reason in intellectual inquiry and in foundationalist conceptual schemes as well as the prominence of the notions of truth and objectivity endemic to such schemes. Essentially, this challenge denigrates the viability of key foundationalist dichotomies such as the objective and the subjective; the real and the ideal; truth and justification; mind and body; altruism and egoism; the public and the private, and so forth. In the context of constitutional inquiry, this challenge denigrates the role of reason, normativity[13] and methodology.[14] To meet

---

ing our allegiance. Such a provision could never be ultimate, because we need an independent reason for adopting it, that is, a reason requiring that we follow the Constitution's text in this matter. If the Constitution's text concerning the proper methodology of constitutional interpretation controls, then it does so because of extra-constitutional reasons, that is, it does so because it is not ultimate. And absent such a reason, the provision would be ultimate, but would not control, because it is circular to say that X is the correct way of understanding the Constitution, because the Constitution says it is. So either the provision controls but is not ultimate, or it is ultimate, but does not control.

12. When the Supreme Court "settles" a constitutional controversy by a five-to-four vote, no one can reasonably conclude, after examining American constitutional history, that the Court's decision is *uniquely correct* and principled. If it were, there would be no way to explain satisfactorily the existence of the dissenting opinion(s). Whether apparent or not, the Court must decide controversial social issues more contextually and pragmatically than by so-called reasoned, principled, or faithful constitutional arguments.

13. *See* Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990) (challenging the significance of creating normative legal theories). *But see* Mark V. Tushnet, *The Left Critique of Normativity: A Comment*, 90 MICH. L. REV. 2325 (1992) (criticizing the anti-normativity movement).

14. American constitutionalism, like any field of inquiry, depends on methods for discovering and validating its claims. These methods are either unique to American constitutionalism or apply equally across several fields of inquiry. American constitutionalism depends upon several disparate levels of meaning and, therefore, discoveries in constitutional theory may have unexpected effects. The methods of constitutional reasoning may be applicable to other fields of law, as well as to other practical domains. Consequently, a theory of American constitutionalism may contribute to a general theory of human intellectual and practical inquiry, typically conceived of as a modernist enterprise, but one which can be reborn in postmodernist terms. An interesting conceptual question,

this challenge we must rethink constitutional law and theory.

The challenge compels us *ab initio* to engage in comprehensive, candid investigations of how American constitutionalism *actually* works, and resist, if only temporarily, how constitutional theorists say it *should* work. We are challenged, in short, to bracket *a priori*, normative conceptions of American constitutionalism until we truly understand in much greater detail the patterns and movements in constitutional practice.[15]

Determining the actual character of American constitutional law is the first step in reconstructing constitutional law and theory in the postmodern era. The crisis of American constitutionalism can then be described as posing the following question: Can American constitutional law be postmodern? This Article affirmatively answers this question.[16] The Article's *leitmotif* insists that theories of constitutional transformation and adjudication precede interpretive histories of American constitutionalism. Historical evidence, of course, is relevant to both these inquiries. However, an interpretive history shows the substantive character of American constitutionalism, while a theory of constitutional transformation and adjudication discovers how courts transform constitutional law and how judges decide cases irrespective of the interpretive histories of American constitutionalism to which the judges are committed. It is this dual problem of transformation and adjudication that this Article addresses.

For the postmodern constitutionalist, the discussion of the problem of transformation and adjudication must necessarily begin with a discussion of the crisis of postmodernity. The characterization I offer is not intended as a complete account of the postmodern condition;[17] nor do I think that such a characterization is possible.[18]

---

now having special contemporary relevance, is the relationship of American constitutionalism to other emerging conceptions of constitutionalism. Are there many irreconcilably different forms of constitutionalism, or does constitutionalism signify in nontrivial terms a common conceptual structure?

15. I do not mean to suggest that we should seek a neutral, value free perspective in order to understand constitutional practice. No such perspective exists. But some perspectives are *intrusively* value-laden, while others embody values we accept without question. I do, however, believe in authenticity in investigating social practices. Investigations are authentic when they produce a more comprehensive account of the practice than other investigations. Consequently, what I urge here is to seek an authentic depiction of constitutional law and theory.

16. This article is part of a longer work on the possibility of postmodern, pragmatic American constitutionalism.

17. Postmodernity represents a diverse tapestry of intellectual, artistic, and practical perspectives. *See generally* CONNOR, POSTMODERNIST CULTURE, *supra* note 4. Postmodern intellectual inquiry might not have the same meaning as postmodern art or other postmodern social practices. Further, regarding postmodernity as a description of an historical era will not always work, because some contend (ironically?) that postmodernity

Instead, I offer an account of postmodernity that is designed to identify the crisis of American constitutionalism in Anglo-American terms. The crisis of postmodernity is typically described in terms of poststructuralism,[19] but the former is broader than the latter.[20] The crisis of American constitutionalism is an American crisis created, in part, by the philosophical temperament in American intellectual inquiry. The crisis' resolution, therefore, might require conspicuously American remedies. Accordingly, it will be helpful to restrict this discussion of postmodernity to the crisis of postmodernity in the American philosophical, or more generally, American intellectual tradition.[21] Consequently, I am restricting the discussion of postmodernity to the postmodern intellectual condition in American culture. The lessons learned from the American constitutional con-

---

precedes modernity. *See* Stan Smith, *The origins of 'postmodernism'* (letter to editor), TIMES LITERARY SUPPLEMENT (London), Feb. 5, 1993, at 15 ("It now appears that 'postmodernism' might well predate 'modernism'. . . ."). There are hints of this in Lyotard. *See* LYOTARD, THE POSTMODERN CONDITION, *supra* note 4, at 79. Moreover, in one sense, the postmodern temperament surely precedes the modern era. Premodernity, modernity and postmodernity are all deep psychological attitudes that exist in people to varying degrees from the time a person is able to engage in the sophisticated use of language. But the modern *age* antedates the postmodern *age*, and so understanding postmodernity historically helps to define and refine postmodernity as a deep psychological attitude.

18. Postmodern inquiries typically "criticize the ideals of representation, truth, rationality, system, foundation, certainty and coherence typical of much modern theory, as well as the concepts of the subject, meaning, and causality." STEVEN BEST & DOUGLAS KELLNER, POSTMODERN THEORY: CRITICAL INTERROGATIONS 256 (1991). Despite this common core of objections, postmodern inquiries "can be deployed for quite different theoretical and political ends." *Id.* And, indeed, two general approaches to postmodernity exist: a radical approach and a reconstructive approach. *Id.* at 257. The radical approach seeks an abrupt break with modernity and modern theories, while the reconstructive approach uses both modern and postmodern elements in their attempt to reconstruct critical social theory. *Id.*

19. Postructuralism is, *inter alia*, a rejection of modern philosophy's commitment to foundationalism. *Id.* at 21. As a form of postmodernism, the poststructuralist critique of modernity derives, though not exclusively, from the works of such French theorists as Derrida, Foucault, Lyotard and Barthes. *See id.* at 16, 20.

20. *Id.* at 25.

21. Interestingly, the American philosophical tradition, as practiced in the graduate departments of America's great universities, scarcely appreciates the crisis of postmodernity. Indeed, philosophers trained in the Anglo-American, analytic tradition—of which I am one—appear to be oblivious to postmodernity as a cultural issue. Instead, these philosophers are still trying to flesh out the philosophical promise of modernity without identifying their project in these terms. There is nothing wrong with doing so; however, these modernist, mainstream philosophers seemingly want to silence analytic philosophers having an interest in the postmodernity problem. Since most mainstream analytic philosophers categorically reject the great skeptical moments that, in part, mark the seeds of postmodernity in Western philosophy, seeds that can be found from Plato to Wittgenstein, they are opposed to the idea that the concept of postmodernity could be worthwhile.

text, in turn, might be applicable in understanding postmodernity generally. However, nothing in the postmodern mind either requires or eschews the general application of the concept of postmodernity.

B. *The Evolution From Premodernity to Modernity*

Postmodernity is a response to the failure of modernity.[22] Postmodernity challenges intellectual inquiry to recognize the failure of western metaphysics and epistemology. It rejects the modernist notions of realism, objectivity, and truth. Modernity, in turn, was a response to an earlier era in which institutionalized authority reigned over intellectual and social life. During this "pre-modern" era, human intellectual development tied the authority of knowledge to tradition and social role. One had the right to proclaim knowledge only when one's position in society so permitted. The word of the Pope or King, or their representatives was law. Everyone else was condemned to silence or worse. Mere citizenship in the human community did not itself afford the right to proclaim knowledge anymore than it afforded any political or social rights. In fact, the notion of "mere" citizenship in the human community was empty rhetoric since one's epistemic and moral status derived from one's membership in particular groups, such as the church, the crown, the aristocracy, guilds, and other associations.

During the pre-modern era, reason did not control a person's beliefs and values. Individualistic intellectual inquiry had not yet emerged as a cultural given, as something an unencumbered self could use to understand the world. With the dawning of modernity, the epistemic values of traditional society were called into question. Western culture no longer appeared to be sanctioned simply by God and the King, or, at least, society was much less certain that this could be demonstrated. Something deeper than theological or secular authority seemed necessary to validate claims to knowledge and value.

Modernity promised that reason would provide a permanent process for understanding the world.[23] Rationality and science "promised freedom from scarcity, want, and the arbitrariness of

---

22. Postmodernity is neither necessarily continuous with modernity, nor is modernity continuous with feudal society. Indeed, "[t]he modern world is born out of discontinuity with what went before rather than continuity with it." ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY 239 (1984).

23. *See generally* ALBRECHT WELLMER, THE PERSISTENCE OF MODERNITY (1991) (arguing that postmodernity is nothing more than a modernistic critique of modernity). This is modernity's ultimate hubris that the modern age is ubiquitous and permanent, and perhaps even that foundational reason is a necessary feature of future intellectual inquiry.

natural calamity."[24] With the rise of modernity, reason became ensconced as a cultural given, a neutral vision of criticism and validation.[25] Reason provided an ahistorical standard for understanding the world, a vantage point operating *on* the world, but ultimately not one *of* the world.[26] This intellectual scheme created a foundational framework within which beliefs and values could be grounded. Foundationalism—the view that reason can conclusively validate beliefs and values—promises principles of truth and justification which can be brought to bear in critically examining and revising our current social practices.

The glorification of reason and the need for foundationalism are both products of the modern spirit. Modernity is the intoxicating—perhaps arrogant—view that reasoning human beings can create and order their lives and the life of society. Modernity is also concerned with the question of legitimacy. Human inquiry has always been concerned with solving problems. As civilization evolved, however, it also became concerned with solving problems about solving problems. Although this second-order practice was rooted in antiquity, it matured during the modern age. Modernity announced once and for all that even when two disciplines arrive at the same answer to a question, both disciplines may not be equally valid. The modern view, of course, denied that both disciplines, one legitimate and the other not, would systematically arrive at the same correct answers. But the issue here was not what substantive answer a discipline generated, as much as the what method of inquiry it deployed. Only those methods which conformed to the requirements of reason were acceptable to the modern mind. Counterfeit methodologies, such as astrology or alchemy were mere frauds.[27]

The hallmark of the modern age was the commitment to reason, science, ethics, and, more generally, the conviction that these

---

24. DAVID HARVEY, THE CONDITION OF POSTMODERNITY 12 (1989).

25. The modernist conception of reason as a neutral arbiter becomes a concern over neutral discourse for philosophers taking the linguistic turn. Such philosophers seek a neutral *discourse* through which to evaluate all non-neutral discourse.

26. In divorcing itself from concrete circumstances and in denigrating actual situations, reason sows the seeds of its own demise. The crisis of reason is "the danger menacing reason and meaning under the rubric of objectivism, of the forgetting of origins, of the blanketing of origins by the rationalist and transcendental unveiling itself. Danger as the movement of reason menaced by its own security, etc." JACQUES DERRIDA, WRITING AND DIFFERENCE 62 (Alan Bass trans., 1978) (1967).

27. The authority of knowledge and value has been threatened simultaneously by a failure of foundationalism and by an evolving culture which has produced disparate, even sometimes incompatible, values. Rather than having stable models to carry out one's investigations, various fields of inquiry must establish that they are legitimate in the first place. In an elementary sense, this instability can be characterized as a salient feature of postmodernity.

disciplines reflected the existence of an independent reality. The more these intellectual disciplines develop, the closer society comes to ultimate truth. The story of human knowledge and value is a story of human progress, of science and ethics coming closer to ultimate reality. This progressive conception of human knowledge and value typifies the modern age. The progressive view promises one day to reveal the complete truth about physical and moral reality. Reason and science are, therefore, vehicles in this quest to understand the nature of reality. When the present view of this reality falters and it is replaced with a new, more correct perspective, what was true in the old perspective is incorporated into the new one. Scientific and ethical change, therefore, must be understood as increasing the store of human intellectual and practical truths.

The progressive view of knowledge and value typically includes a realist conception of intellectual inquiry. Physical and moral reality provide a foundation for our conceptual scheme because such a scheme reflects an independent objective reality. The progressive view of knowledge and value embraces foundationalist metaphysics and epistemology. Mainstream skeptics accept this foundationalist framework since they believe that foundationalists ask all the right questions, but give all the wrong answers. Both foundationalists and skeptics endorse the same presupposition, namely: for knowledge and value to be authoritative, something like the progressive view must be true. Foundationalists believe that the progressive view is true, while skeptics demur. Thus, a foundationalist conceptual scheme is any framework that makes the authority of knowledge and value depend upon the progressive view. Consequently, since both realism and skepticism accept the progressive view, they are both committed to the foundationalist conceptual scheme.[28] However, if this scheme itself is not necessary, the realism/skepticism controversy can be rejected.

Surprisingly, in attempting to determine the scope of the foundationalist conceptual scheme, reason turned on itself with the same blinding fury with which it confronted premodernity.[29] Reason's con-

28. The foundationalist conceptual scheme defines the modern era throughout Western culture. All the important conceptual and practical conflicts in Western cultural inquiry are defined through this scheme. The foundationalist framework is designed to answer two general questions about knowledge and value: one metaphysical and the other epistemic. The metaphysical question deals with the nature of existence or reality, while the epistemic question deals with how we come to know this reality. All other issues pertaining to the authority of the foundationalist framework revolve around these questions. Both realism and skepticism about knowledge and value assumes the intelligibility of these basic metaphysical and epistemic questions in the foundationalist conceptual scheme. We must have either foundational knowledge or we must embrace skepticism. *See infra* note 60 and accompanying text.

29. DERRIDA, *supra* note 26, at 62.

frontation with itself, through skepticism became the dawning of a new historical era. Postmodernity was born and with it a multitude of voices in areas as diverse as philosophy, art, law, architecture, and engineering.[30]

C. *The Problem of Postmodernity*

The problem of postmodernity consists of a negative and positive thesis. The negative thesis rejects foundationalism, the notion that rationally compelling premises entail epistemically impeccable conclusions in science and values.[31] Postmodernity challenges the possibility of grounding reason in anything other than actual social practices.[32] It refuses "enlightenment reason a privileged status in the definition of the eternal and immutable essence of human nature."[33] Instead, postmodernity regards the Enlightenment as "a failed rationalist project which has run its course but which continues to encumber contemporary thought with illusions of a rational route to knowledge."[34] Postmodernity is committed to "anti-foundationalism, immanence, historicity, and epistemic political struggle."[35] Consequently, postmodernity poses a problem for modernity's grand program of rational inquiry.

Postmodernity challenges the authority of reason and reason's

---

30. This proliferation of new voices represents a challenge to both the modern and postmodern mind. If one is a modernist it is difficult to make sense of this diversity. If one has a postmodern temperament, one may not desire to make sense of it.

31. The rejection of the foundationalist framework is the first step toward embracing postmodernity. The rejection occurs because the foundationalist framework is experientially and practically unworkable. We no more know how to live as foundationalists than we do as skeptics. Neither position depicts a viable mode of living in the world. At most, we can say that foundationalists accept some propositions wholeheartedly, while skeptics reserve *some* doubt about all propositions. No one wholeheartedly embraces every proposition she claims to know; and no one doubts all propositions completely. Yet, we can still distinguish the foundationalist and the antifoundationalist on pragmatic grounds. The foundationalist believes that foundationalist discourse has better results pragmatically than antifoundationalist discourse. Essentially, the entire debate about foundationalism can be replicated in pragmatic discourse by distinguishing between doctrinaire and reflective pragmatism. Lipkin, *Pragmatism*, *supra* note 1, at 1576-82.

32. This entails that no uniquely right answers exist for most theoretical and practical questions. I say "most," because at least this question, "Are there uniquely right answers for most theoretical and practical questions?" has a uniquely right answer, namely: "No!" This is inconsistent only if one's need for simplicity and uniformity belies a modernist temperament.

33. HARVEY, *supra* note 24, at 18. Nietzsche had a special role in this process by "placing aesthetics above science." *Id.*

34. Alan Hunt, *The Big Fear: Law Confronts Postmodernism*, 35 MCGILL L.J. 507, 515 (1990).

35. Margaret J. Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1024 n.30 (1991).

philosophical expression in foundationalist conceptual schemes. The problem of postmodernity arises when faith in reason wanes, and dissensus over the most important questions of human existence appear ineradicable.[36] Postmodernists find it impossible to ignore the perennial and irreconcilable disagreement endemic to philosophy, ethics, law, politics, and social science.[37] Indeed, postmodernity insists that one source of this disagreement is the indeterminacy of the very language with which we conduct inquiry. Postmodern inquiry stresses the "heterogeneity, multiplicity, and difference[s]" in cultural and intellectual icons, and therefore welcomes indeterminacy.[38]

One possible reply is that history shows only that these controversial questions have *not* been settled, not that they *cannot* be settled. This argument scoffs at the view that disagreement implies the inefficacy or limits of reason. But, the argument from dissensus contends that disagreement exists even in circumstances that are most epistemically favorable to achieving consensus, such as circumstances in which opponents exhibit good faith, confront each other's best argument, are in the right frame of mind, and so forth. Further, the argument from dissensus provides an explanation of disagreement over a host of controversial questions such as abortion, affirmative action, capital punishment, and gay and lesbian rights. This explanation states that people arrive at different conclusions in circumstances epistemically favorable to agreement because their perspectives are different. In short, people's perspectives are infused with different values, or the same values ranked differently. Since it is never possible to evaluate all one's values at the same time, some values will always be beyond the realm of argument. Unless these values are the same, people are likely to reach different conclusions even in circumstances epistemically favorable to agreement.[39]

Foundationalists are fond of admonishing us to look to the future for the solution to our conceptual and practical controversies.

---

36. Postmodernity often denigrates the importance of consensus. *See* LYOTARD, THE POSTMODERN CONDITION, *supra* note 4, at 60-61.

37. Although the failure to resolve theoretical or practical conflicts does not preclude a solution, this perennial failure, however, should give us pause. The non-skeptic must explain why the best minds of Western civilization have failed to achieve consensus on a host of controversial issues. Further, the non-skeptic must describe possible circumstances in which these conflicts can be rationally eliminated. If not, her position is tautological and therefore uninteresting.

38. JANE FLAX, THINKING FRAGMENTS: PSYCHOANALYSIS, FEMINISM AND POSTMODERNISM IN THE CONTEMPORARY WEST 188 (1990); *see also* LINDA HUTCHEON, THE POLITICS OF POSTMODERNISM 1 (1989) ("Postmodernism's distinctive character lies in . . . [a] kind of wholesale 'nudging' commitment to doubleness, or duplicity.").

39. Proponents of the dissensus argument also point out that what counts as "the same value" is itself indeterminate and therefore is subject to disagreement.

Some genius or new intellectual movement will certainly show us the light. If you are not certain what this "light" can possibly be; if you believe, instead, that the Enlightenment's aspiration to progress, unification, and rationality fundamentally distort human experience, you may be a skeptic. If your skepticism is meliorated by liberation from foundationalism, you might be entering the postmodern age.

In fact, skepticism concerning truth and justification can be the stepping stone to postmodernity. Postmodernists lack faith in the possibility of giving general answers to certain questions about knowledge and values. Three conspicuously important problems arise in the context of values: (1) identifying ultimate values; (2) ranking these values; and (3) determining the value's scope.[40] The problem of ultimate values contends that no one has ever accurately devised a process for determining ultimate values. Assuming values can be identified, one must rank those values and determine what the ranking actually means. For example, one must consider if the highest-ranked value always prevails or if it only prevails in a certain kind of case. Further, the value's scope or degree of generality must be determined. If, for example, one chooses "equality" as a value, it must be determined if the value applies to racial, ethnic, or gender equality.

If one believes that these problems have a right answer that in principle can be found, one is a metaphysical and epistemic foundationalist. If one believes that these problems have a right answer, but one that will not in principle be found, one is a metaphysical foundationalist and an epistemic skeptic. If one believes that in principle these problems have no right answers, one is both a metaphysical and an epistemic skeptic. A person has a choice to remain a skeptic or to take the postmodern turn by abandoning the framework in which skepticism flourishes. Mainstream theorists deny the possibility of making this choice. In their view, the foundationalism/skepticism framework is at the center of human intellection. However, their view is plausible only if they show that this framework is indispensable to coherent thought.

Postmodernity, as understood here, is both a conceptual attitude and a stage in historical human development.[41] One might assert that postmodernity is the conceptual attitude most appropriate to the contemporary age. But such a judgment is a contingent judg-

---

40. Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness*, *supra* note 1, at 825-26.

41. This also applies to modernity and pre-modernity. Lyotard elaborates: "Modernity is not an era in thought, but rather a mode . . . of thought, of utterances, of sensibility." Lyotard, *Universal History and Cultural Differences*, *supra* note 4, at 314.

ment. Nothing about the present age necessarily makes it conducive to the postmodern attitude. The present age is contingently regarded by many as the age of postmodernity. But the postmodern attitude is one that has existed from the inception of intellectual inquiry. And the present age need not be understood exclusively in terms of the postmodern conceptual attitude. Despite being independent of any particular historical epoch, the postmodern conceptual attitude flourishes best in an age conducive to postmodernism, and the postmodern age will realize its full potential only when the postmodern conceptual attitude is the dominant cultural attitude of the age.

D. *Antifoundationalist Responses to the Problem of Postmodernity*

The postmodernist vision rejects both foundationalism and the progressive view of knowledge and value. Postmodernism denies that something legitimizes our social practices beyond other social practices. The postmodernist vision gives up the quest for the grand narrative that was the hope of foundationalism.[42]

In addition to its negative thesis, postmodernity has a positive thesis, although there is little agreement as to just what this positive thesis is. Generally, the positive thesis insists that if solutions to social conflicts are possible, they must be found in the context of human society. We must look to ourselves to solve our problems; seeking answers beyond human society is illusory. The following are possible articulations of postmodernity's positive thesis.

1. *Nihilism.* Rejecting modernity, and the foundationalism to which it aspires, nihilism embraces the view that the world is bereft of metaphysical, epistemic or moral significance, and therefore, no constraints exist on human reasoning and inquiry.[43] The nihilist salvages the mantle of skepticism from the ashes of foundational-

42. This should not be cause for alarm; abandoning grand narratives does not entail disaster. Consider Lyotard's remarks: "Most people have lost the nostalgia for the lost narrative. It in no way follows that they are reduced to barbarity. What saves them from it is their knowledge that legitimation can only spring from their own linguistic practice and communicational interaction." LYOTARD, THE POSTMODERN CONDITION, *supra* note 4, at 41.

43. The nihilist contends that we cannot attach any univocal metaphysical sense to our claims to knowledge and value. Moreover, the nihilist maintains that even if knowledge and value had such meaning, we can never determine what that meaning is. Finally, the nihilist insists that without metaphysical and epistemic meaning, moral conceptions have no meaning either. We are left without any structures for settling epistemic or moral conflicts. The nihilist's thesis is critically destructive, insisting that political decisions are merely epiphenomenal entities reflecting nothing real or important about the world or about our lives.

ism. She then contends that our beliefs and values have no independent significance; nor is it obvious that they have any significance at all. Even if they do have meaning, we will never know it. According to nihilism, we are truly alone in the world with nothing greater than ourselves to guarantee meaning in our lives.[44]

The nihilist's position can be construed in two different ways. The first way contends that although life requires meaning to be livable, it denies that anything can give it meaning. Call this "meaning-dependent nihilism." There also exists a "meaning-independent" form of nihilism which insists that nothing can give life meaning, but denies that life needs meaning to be livable. Instead, meaning-independent nihilism washes its hands of the tenor of mind that seeks meaning or worries about its absence or loss.

Meaning-dependent nihilism contends that even if foundationalism were true and even if there exists an external guarantor of our beliefs and values, one must conclude that human inquiry, indeed human life itself, is meaningless.[45] This type of nihilism differs from skepticism in denying that foundationalism, even if it were true, matters in the first place. These nihilists deny that the truth of foundationalism could possibly dispel nihilism or obviate the need for its invention. The nihilist chides the skeptic for wanting an external guarantor of our beliefs and values. Neither foundationalism nor skepticism explains how such guarantees are possible. Even discovering an omniscient person or deity shouting guarantees, no more validates beliefs and values, or gives life meaning, than shouting such guarantees ourselves.

Reason's empire promises an Archimedean perspective from which to understand the world, but instead leaves one with the realization that no such perspective is possible. Every perspective from which we view the world is a view from somewhere.[46] Hence, it

---

44. Nihilism need not bring despair; it can also bring about carefree liberation from the burdens of morality. Consider the architect Philip Johnson's remarks concerning morality: "It's feudal and futile. I think it is much better to be nihilistic and forget it all. I mean, I know I'm attacked by my moral friends . . . but really don't they shake themselves up over nothing?" CHARLES JENCKS, MODERN MOVEMENTS IN ARCHITECTURE 209 (1973) (quoting Philip Johnson).

45. External guarantors are supposed to confer meaning on human existence. If your beliefs and values derive from reason or God, so the story goes, they are meaningful. But what confers meaning on reason or God? In this context, reason is supposed to be independent of human inquiry and social practices, for only then can it confer meaning on them. But what is the source of reason's meaning? Either reason gets its meaning from elsewhere or from itself. If the former, how do we stop the regress? If the latter, why can't ordinary human activities similarly have meaning in themselves? We must conclude, therefore, that either reason is impossible or it is superfluous.

46. *See* THOMAS NAGEL, THE VIEW FROM NOWHERE (1986) (arguing that the subjective and objective perspectives are mutually irreducible).

makes no sense to speculate about a perspective—from which to evaluate other perspectives—that is not itself just another perspective. It makes no sense to look outside for the meaning of human existence because human existence has no independent meaning. In fact, it has no meaning at all. Thus, nihilism leaves one in a state of incomprehension concerning meaning, knowledge and value.

Nihilism cannot be refuted. However, we know that no one advocating nihilism is in fact a nihilist, because she cannot explain the point of her proselytizing. If human existence is indeed meaningless, the proselytizing "nihilist" is the last person on earth to know it.[47] Fortunately, nihilism is not the only articulation of postmodernity's positive thesis.

2. *Anarchic Pluralism.* Postmodernist anarchic pluralism shares with nihilism the rejection of the independent significance of our beliefs and values, as well as the independent significance of our convictions.[48] For the anarchic pluralist, this means that individuals are free to give their life meaning because each person is free to create her own values. Ironically, it is foundationalism that should cause us to despair because it constrains the human spirit by insisting that the only authority for human decisions comes from reason. Anarchic pluralism celebrates the demise of modernity and foundationalism as the liberation of the human spirit. This postmodernist view valorizes the imagination and the creation of a plurality of human values. According to this view, human life and society are so intrinsically rich that liberation (from foundationalism) brings forth a multiplicity of new and potentially gratifying values. Human flourishing is not restricted to *a priori* conceptions of value; instead, each individual must go abroad in the world and find her own authenticity, her own sense of self, her own language of self-de-

47. The proselytizing "nihilist" might respond that nihilism entails no reasons for *doing* anything or for *not doing* anything. So, if one "finds" oneself proselytizing, there are equally good reasons for continuing as well as for not continuing to proselytize. Nevertheless, the nihilist's rejection of reasons for action cannot be sustained, not even by the nihilist herself.

48. Anarchic pluralism differs from pragmatic pluralism in that there are no constraints on anarchic pluralism. Pragmatic pluralism, on the other hand, depends on the collective natural and cultural history of the species. Anarchic pluralism places no limits on choice, because the anarchic pluralist believes any such constraints are indefensible. The pragmatist, on the other hand, believes that the appropriate constraints are those imposed by the relevant linguistic community, and that these constraints are always subject to reevaluation. According to the anarchic pluralist, "anything goes" as long as you're "doing your own thing." The pragmatic pluralist looks to our collective cultural history to determine which constraints to adopt, if only temporarily. Many such constraints are uncontroversial and provide the context for inter-subjective agreement and disagreement.

scription, her own values.[49]

Anarchic pluralism, however, fails to explain why individuals tend to criticize their own values as well as the values of others. We do not just find ourselves with a set of values that we embrace without scrutiny, evaluation, and criticism. Nor do we respond to the values of others with natural or automatic credulity. A defender of anarchic pluralism cannot respond that the only criterion of criticism is whether a value or set of values turns you on. Since the notion of something "turning you on" must have critical meaning, it is impossible to sustain anarchic pluralism. Moreover, if this criterion has critical meaning, it still fails to explain the experience we have of our own values and the values of others. This experience includes the critical scrutiny of accepting and rejecting values as well as ranking them and arguing about their scope. These facts of human experience suggest that anarchic pluralism is too impoverished a criterion to account for the creation of human values.

3. *Postmodern Pragmatism.* A third postmodern response to the demise of foundationalism is the turn toward pragmatism. Pragmatism, as understood here, is an anti-foundationalist conception of human inquiry.[50] It eschews the big philosophical controversies over realism or antirealism, the objective versus the subjective, reason versus desire and so forth. Pragmatism exhorts us to seek new ways to understand human life and society, and new ways to reinterpret the old and integrate it with the new.[51] Postmodern pragmatism re-

---

49. CHARLES TAYLOR, THE ETHICS OF AUTHENTICITY 40 (1992) (arguing that while the pursuit of authenticity is to be praised, "doing one's own thing" will not get you there since authenticity is possible only against a background of self-transcendent values).

50. Pragmatism rejects realism, but not by endorsing antirealism. One must be careful not to conflate a rejection *of* the foundationalist framework with taking sides *within* this framework. Pragmatists might use skeptical arguments against realism, but this does not entail that they are skeptics. You use skeptical arguments either because you are a skeptic or because you want to show the futility of certain presuppositions and frameworks of thought. Michael Moore fails to appreciate the significance of this distinction. Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 903 (1989) (arguing against Rorty that "[o]ne hardly shows the senselessness of some debate . . . by participating in one well-defined side of it"). *But see* Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness*, *supra* note 1, at 856-59 (arguing that Moore's criticism of Rorty is "off the mark"). Professor Daniel Chow also fails to appreciate the distinction between taking a stand within a conceptual framework and advocating a rejection of the framework itself. Daniel C.K. Chow, *Trashing Nihilism*, 65 TUL. L. REV. 221 (1990) (criticizing Singer and other critical legal theorists for taking sides in a controversy they think is pointless). Moore's and Chow's objection is persuasive only if it can be shown that the foundationalist framework is indispensable.

51. One way of achieving these new ways of understanding and re-interpretation is to scrutinize the postmodern intellectual landscape for failed modernist conceptions of

jects nihilism and anarchic pluralism. It rejects nihilism for two reasons. The first reason has to do with nihilism's impracticability. No one is ever a nihilist, at least not in practice. Meaning-dependent nihilism, if taken seriously, is a recipe for disaster, or at least, for mental illness and thus has nothing to be said in its favor. Postmodern pragmatism spurns the notion that our final *general* view of life can recommend insanity. The second reason for rejecting nihilism is that meaning-independent nihilism is an incomplete version of some other unnamed view. Because the meaning-independent nihilist doesn't counsel despair or inaction, she must decide how to conduct her life like anyone else. She must decide how and when to act. Doing so means that she faces all the same choices open to non-nihilists. Only by dying do we obviate the necessity of choosing. Pragmatism rejects anarchic pluralism because anarchic pluralism rejects the wisdom of the ages, including, of course, what this wisdom tells us about unspeakable evil. Consequently, anarchic pluralism fails to take seriously humanity's collective natural and cultural history, and how this history informs present choices. Postmodern pragmatism, in one way or another, embraces this history. It devises new ways of understanding ourselves and the world we inhabit against a background of our common history and sees whether we can derive conceptions of inquiry and justification to help resolve the problems of humanity.[52]

Pragmatism accepts the condition of postmodernity, that no metanarratives exist to legitimize our local practices. Even if coherent metanarratives exist, their force, if not their substance, becomes operative only after culture embraces them. Embracing a metadiscourse, the experiential commitment to follow a grand narrative, cannot be controlled by an even grander narrative. What controls this commitment, if anything, are the pragmatic benefits of living one's life accordingly. Taken in its own terms, foundationalism is unrealizable; but we need not understand foundationalism in its own terms. Instead, we can embrace (or not embrace) foundationalism for its pragmatic benefits. When pragmatists argue against foundationalism, their point is that foundationalism is pragmatically deficient. This, however, is an empirical question that must be taken seriously; foundationalism should not be rejected *a priori* or in general terms. Understanding that foundationalism is simply a certain type of postmodern pragmatic practice is to appreciate foundationalism's significance pragmatically.[53]

---

justification that can be revivified in postmodern terms.

52. These new conceptions may reflect practices that are already deeply embedded in contemporary life.

53. *See generally* Lipkin, *Pragmatism*, *supra* note 1.

Postmodern pragmatism tells us that we can avoid both foundationalism and skepticism by rejecting the foundationalist framework. The pragmatist gladly concedes that although we have only our culture through which to justify narratives or language games, this does not mean that justification is impossible.[54] After all, culture does not provide a homogeneous standard. Rather, since "cultures and traditions are more like competing sets of narratives and incoherent tapestries of meaning, . . . the social critic must herself construct out of these conflictual and incoherent accounts the set of criteria in the name of which she speaks."[55] Postmodern pragmatism rises from the ashes of modernity and devises narrative judgments that are more like aesthetic judgments than rational apprehensions of the truth. These edifices, these systems, these pictures are coherent attempts to understand the culture in which they inhere, or to reform this culture and make it more attractive. Ultimately, the choice of perspective is a pragmatic-aesthetic choice. It says look at our common culture *my* way, or *this* way. Let's say everything we can in defense of this perspective and everything against it. And then decide which values to embrace. That is all postmodern pragmatism can offer: a way to view the world coherently, a way that you offer as a candidate for inter-subjective consensus. But you cannot *rationally* compel anyone to embrace your values, or even the "correct" values. This pragmatic characterization of contemporary intellectual-political life will trouble critics for permitting the normative dimension to drop out. Without a strong normative component, so the argument goes, pragmatism has little to offer. However, it is these critics who have abandoned normativity. The postmodern pragmatist contends that once you select the appropriate justificatory strategy from your cultural legacy, once you apply that strategy to your substantive views, once you critically compare the results with other such strategies, you have done all you can descriptively and normatively to justify your perspective or make it attractive. Reason provides no further justification or vindication of your perspective.

Pragmatism is pluralistic in both its methodology and substantive values. It considers language the repository of human culture, and critically scrutinizes language so that language may help to formulate and to satisfy our desires and aspirations. At times this takes the form of severely denigrating the language of modernity or foundationalism for failing to honor its promise. But such denigration need not entail the abandonment of such languages entirely.

---

54. JEFFREY STOUT, ETHICS AFTER BABEL 265 (1988) (arguing that pragmatism "leave[s] the notion of . . . justified moral belief intact").

55. BENHABIB, *supra* note 4, at 228.

Indeed, a reflective pragmatist may seek to retain all such languages, giving some a much less prominent role in cultural inquiry.[56] Indeed, reflective pragmatism can demonstrate its anti-essentialist, anti-foundationalist commitment by allowing the possibility that modernity might someday, however unlikely, vindicate itself.[57]

Pragmatism approaches a field, such as constitutional law, without the presuppositions of modernity or the blinders associated with many of the present models of constitutional interpretation. Instead, it reflects on constitutional practice in a candid, fresh attempt to understand how it actually works, knowing that no one conception is necessary or certain.[58] Pragmatism endeavors to help us understand how constitutional transformation and judicial reasoning actually occur.

E. *Constitutionalism as a Modernist Enterprise*

Like postmodernism generally, the meaning of postmodernist constitutionalism varies from scholar to scholar.[59] My focus will be

---

56. *See generally* Lipkin, *Pragmatism*, *supra* note 1.

57. Consider these musings:

> Sometimes I imagine a new Kant, come out of Königsberg, spirited through the Iron Curtain. In his hand he holds the "fourth critique," which he calls *The Critique of Practical Judgement*. It is a masterwork, resolving all the contradictions of theory and praxis, ethics and aesthetics, metaphysical reason and historical life. I reach for the sublime treatise; the illustrious ghost disappears. Sadly, I turn to my bookshelf and pick out Williams James's *The Will to Believe*.

IHAB HASSAN, THE POSTMODERN TURN: ESSAYS IN POSTMODERN THEORY AND CULTURE 180 (1987).

58. Postmodernity requires consideration of what is left once modernity and foundationalism are rejected. First, one can embrace nihilism and despair of coming up with any interesting reflective or theoretical accounts of American constitutionalism or of any other area of intellectual inquiry. Some critical legal scholars take this route. Second, we can try to make good modernity's promise by trying to create a new postmodern conception of foundationalism. In legal theory, contemporary conventionalist, natural law, and coherentist theorists take this approach. Third, one can embrace a skeptical approach, showing how traditional legal theory fails to achieve the goals it sets for itself. Some critical legal theorists endorse this approach. Fourth, we can devise new models for constitutional adjudication that are designed to include traditionally excluded groups and, by doing so, revise our conception of constitutional theory. Critical feminist and critical race theorists endorse this perspective. Finally, we can take the pragmatic turn, seeking to determine if we can recombine some traditional approaches to exemplify both the pragmatic and postmodern spirit.

59. Most legal scholars treat postmodernity primarily as a metaphysical and epistemic conception. According to these scholars postmodernity is antifoundationalist, antitheoretical, contextual, and perspectivalist. As such, it is a position most relevant to the interpretive dimension of legal reasoning. J.M. Balkin rejects the notion that postmodern constitutionalism is primarily involved with the problem of interpreting the Constitution:

> A postmodern constitutionalism . . . must ask how postmodern culture and technology have affected law as an institution: the way that the courts, Congress, and the executive interact with each other, and the way that law is un-

on postmodern pragmatism. I view pragmatism as a postmodern response to the decline of modernity. Alternatively stated, in my estimation, pragmatism is the best response to the demise of foundationalism. It is better than "new foundationalism,"[60] skepticism, or nihilism. Since American constitutionalism is so heavily laden with modernistic and foundationalist elements, postmodern pragmatic constitutionalism is a rejection of both modernity and foundationalism: seeking new ways to reconceive constitutional transformation and judicial reasoning. The cynic might argue that this constitutes a rejection of constitutionalism altogether. Although, I take such cynicism seriously, my goal is to show why we need not embrace it.

1. *Modernism and Legitimacy.* Constitutional theory is typically concerned with the problem of legitimacy.[61] Legitimacy is a general problem in political theory, especially in democratic political theory. Any society committed to liberty and independence as fundamental values must regard coercion as presumptively invalid. Consequently, democratic political theory must explain how state coercion is justified. In the judicial context, the problem of legitimacy focuses on the Court's authority to strike down legislative acts by the majoritarian branches of government.[62] What justifies the

---

derstood, promulgated, argued about, experienced, and assimilated. How is information about constitutional rights distributed and spread? What changes have occurred in the ways in which politics is organized, and in the ways in which laws are debated publicly or within government institutions? How have advances in technology changed the possible forms of power, control, and surveillance? What effect has mediations wrought on the practice of American democracy? These are the key questions for a postmodern constitutionalist.

J.M. Balkin, *What is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1978 (1992). *But see* Francis J. Mootz III, *Postmodern Constitutionalism as Materialism*, 91 MICH. L. REV. 515, 524 n.26 (1992) (arguing that "Balkin's postmodern constitutionalism fails because it presumes that we can stand back and describe our condition as a prelude to formulating normative commitments, when in fact our descriptions are always symptomatic of normative commitments").

60. New foundationalism is my term for mainstream legal theorists who argue that the traditional foundationalist scheme fails to delineate a third possibility or middle road between foundationalism and skepticism. This middle road, while not achieving certainty, nevertheless contains sufficient metaphysical and epistemic strength, to make good reason's promise. I crtically examine the possibility of a middle road in Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness*, *supra* note 1, at 826-49.

61. Additionally, constitutional theory must be concerned with the question of competence. How do constitutional conventions generate answers to constitutional questions? The question of competence is conceptually prior to the question of legitimacy. We must know how to generate constitutional conclusions before addressing the question of whether these conclusions are legitimate. *See id.* at 834-36. It is this question of competence that survives the demise of modernity's foundationalist hold on constitutionalism.

62. *But see* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 9 (1992) (arguing that the question of legitimacy in constitutional contexts is spurious).

Court in creating constitutional rights and principles not explicitly mentioned in the Constitution? Whether courts should creatively *interpret* the Constitution or whether should they merely *apply* the Constitution to concrete situations is a question at the heart of the contemporary controversy over constitutional legitimacy. The question of legitimacy compels us to address the problem of adjudication, namely, how should judges decide cases?

The answer is not obvious. Any worthwhile theory of constitutional interpretation, however, should maintain that correct judicial decisions must reflect favorably on the practice of which it is a part.[63] In deciding what past practice entails for a given case, the answer should be the best possible one that practice offers. Of course, there is no doubt that "best" will depend upon the interpretive values—judicial and moral—the judge embraces. Hence, it is quixotic to assume that all judges will interpret the same case in the same way, using the same interpretive values, the same methods of judging and the same moral values. This does not commit us to radical skepticism if judges usually agree in easy cases, and, if, in hard cases, most possible answers are ruled out for each judge, and each judge's values enable her to endorse one answer as the best.

We can now understand better the confusion on the part of Dworkin and his critics in the controversy over the one right answer thesis.[64] This thesis maintains that each judge will conclude her reasoning with one right answer. So most answers are ruled out on each judge's list. Dworkin may correctly insist that one right answer always exists even in hard cases, if that means that no judge will be unable to embrace one right answer. Typically, no judge will say "any answer you give is correct." On the other hand, Dworkin's critics are correct to argue that when we inspect the conclusions of several judges, each judge thinking her answer is best, there will remain *different* answers and no way to adjudicate between them. Hence, in these circumstances, there will be more than one "right" answer in that the answers of equally qualified judges, after consid-

63. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1987) (arguing that explanatory and justificatory factors represent different levels of constitutional interpretation). Such an interpretation must allow a hypothetical judge, unfamiliar with the cases, to replicate the decisions actually made sight unseen. What counts as "favorably" is a knotty question that must be explicated for this position to be plausible. Of course, one could argue that the principle of charity entails showing the decision in the most favorable light unless sufficient reason exists to do otherwise. *See* David Hoy, *Is Legal Originalism Compatible with Philosophical Pragmatism?*, *in* PRAGMATISM IN LAW AND SOCIETY 343 (Michael Brint & William Weaver eds., 1991).

64. *See* Lipkin, *Pragmatism*, *supra* note 1, at 1625-28.

ering all the evidence, will not be the same.[65] This reflective dissensus should in honest, non-dogmatic observers suggest that, despite the individual judge's phenomenological sense that only her answer is correct, no uniquely right answer exists. I am perfectly willing to concede that the one right answer thesis is only selectively true. In substantive legal controversies I believe that the uniquely right answer thesis is false because there are no such answers. But whether there is a uniquely right answer about the uniquely right answer thesis, the answer is yes; there is such an answer, and I have just given it.

2. *The Problem of Constitutional Change.* Appreciating judicial reasoning in this manner illuminates the problem of constitutional change: How is it possible for constitutional practice to be bound by the Constitution, yet still change significantly over the course of American history? Can we detect any systematic trends or structural phases of constitutional change that contributes to our understanding of this problem? In my estimation, there exists such an account that focuses on constitutional revolutions.[66]

Most constitutional theorists attempt to answer the question of constitutional change by first determining what constitutional law *is*, and then determining how it *becomes* something else.[67] This effort is misguided, because constitutional law never just *is*. Instead, constitutional law is a *process* by which constitutional practitioners—judges, lawyers, and citizens—express the constitutional

65. This is paradigmatic of denying the existence epistemically of one right answer. If qualified observers, after considering all the evidence, and confronting the arguments of their opponents, disagree, it makes no sense to say that we can know one and only one right answer. Taking the pragmatic turn, epistemic disagreement means that for practical purposes, no one right answer exists. Lipkin, *Indeterminacy, Justification and Truth in Constitutional Theory*, *supra* note 1, at 599-619.

66. My goal is to provide a theory whose centerpiece is constitutional change. In order to accomplish this, we must stress *actual* practice. We must avoid ideological commitments to *a priori* conceptions of constitutional interpretation such as textualism, originalism, structuralism or essentialism. Instead, we must take a good hard look at actual constitutional practice. We may put this point in the following way. Learn what the nature of adjudication is before practicing it. And the best way to learn the nature of adjudication is by attempting to see it from an engaged but uncommitted perspective. Should there be an interesting conception of constitutional adjudication from that perspective, it just might be helpful to you, Ms. Justice, when you confront a constitutional crisis which your court must resolve. Finally, in trying to understand the nature of constitutional adjudication, concentrating on the question of constitutional change is indispensable. It is only by appreciating the interrelationships between and among the different levels of change that one can draw an informed opinion concerning what American constitutional practice entails in a given case.

67. This standard view contends that the Equal Protection Clause, for example, applies only to race, but through judicial interpretation can be extended to gender and other classifications. Instead, constitutional meaning is going through a metamorphosis at this very moment in a myriad of moral, cultural, and political decisions occurring daily.

meaning implicit in the great conflicts of the day.[68] American constitutional life has three interrelated levels of meaning: legal, cultural, and ethical. The legal level is most closely related to the Constitution and judicial decisions. The cultural level involves broader cultural contexts upon which our cultural wars are fought.[69] The ethical level reflects abstract moral and political considerations and their implications for both cultural and legal meaning.[70] Ignoring these levels of meaning dooms us to having only a skewed conception of constitutional law.

3. *The Fallacy of Unitary Constitutional Adjudication.* Most conceptions of constitutional change are committed to what I call "the fallacy of unitary constitutional adjudication" or "the unitaristic fallacy" for short.[71] One commits the unitaristic fallacy when one maintains that either conventionalism, pragmatism, naturalism or coherentism alone is the paradigm through which we explain and justify constitutional change. This fallacy results from a commitment to modernity and its hallmark, foundationalism. Modernity worships simplicity and elegance as meta-theoretical values; the more complex an explanation, the less reason for relying on it to understand the world.

The unitaristic fallacy insists that any acceptable theory of constitutional meaning must be unitary. Its account of change must rely on only one type of jurisprudential theory. This modernistic conception of constitutional interpretation eschews dualism, because dualism always risks a commensurability problem. If an explanatory theory consists of several irreducible factors, one must determine which factor is dominant. Moreover, how do we understand the interdependence of these factors? These issues are exactly the type that the modern mind seeks to avoid.

4. *Metaphysical Realism and Modern Constitutionalism.* The unitaristic fallacy also derives from a second modernist assumption

---

68. Constitutional meaning is continually being created through social and cultural interaction. *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983).

69. *See generally* HUNTER, *supra* note 10; GRAFF, *supra* note 10.

70. In my view, all three levels of meaning are levels of *constitutional* meaning, but for expository reasons I will call the first, legal meaning, the second, cultural meaning, and the third, abstract moral and political meaning. Robert J. Lipkin, *The Anatomy of Constitutional Revolutions*, 68 NEB. L. REV. 701, 720-23 (1989) [hereinafter Lipkin, *The Anatomy of Constitutional Revolutions*].

71. *See id.*; Robert J. Lipkin, *Conventionalism, Pragmatism and Constitutional Revolutions*, 21 U.C. DAVIS L. REV. 645 (1988) [hereinafter Lipkin, *Conventionalism, Pragmatism and Constitutional Revolutions*]; Lipkin, *Indeterminacy, Justification and Truth in Constitutional Theory*, *supra* note 1.

that reality—in this case—constitutional transformative reality, is a single, uniform phenomenon. If a non-unitaristic theory of constitutional transformation is acceptable, then the phenomena involved might be multifaceted. For the modern constitutionalist, such a complex reality presents enormous metaphysical and epistemological problems. How do we identify and individuate different instances of the phenomena? How do we recognize whether the dominant form of the phenomena is *X* or *Y*, or some combination of *X* and *Y*? Although this modernist assumption does not reject non-unitaristic conceptions outright, it seeks to avoid them as much as possible. In my opinion, the unitaristic fallacy precludes our understanding constitutional change. What is needed, consequently, is some dualistic conception of the evolution of constitutional law and theory. But what type of dualist account is appropriate?

F. *The Priority of Jurisprudence Over History*

The appropriate type of constitutional dualism requires the priority of the jurisprudential over the historical. No purely historical characterization of American constitutional reality is possible without a jurisprudential account of how judges reason. Whereas an historical account seeks to identify critical historical trends that can provide explanations of different constitutional moments, a jurisprudential account of constitutional change focuses on the manner in which judges translate unstructured, constitutional meaning into formal constitutional law. The jurisprudential account focuses on how courts transform constitutional doctrine and how judges adjudicate constitutional cases. Without the jurisprudential account, historical explanation remains radically incomplete. Thus, the problem of adjudication is the central jurisprudential question upon which an historical account depends. In addition to an historical conception of American constitutionalism, one needs a theory explaining how judges translate history and culture into constitutional law. History might have priority over the jurisprudential only if translating history and culture into constitutional law were relative to one's particular historical conception. Making jurisprudence relative to historical accounts of American constitutionalism, however, has devastating implications. For example, making jurisprudence relative in this manner, one has no way to compare and integrate the different jurisprudential conceptions in different epochs. Moreover, how do judges translate the jurisprudential questions of one epoch into another? Additionally, the question of how judges transform history and culture into constitutional structures as an independent problem would effectively drop out of the picture. Whatever the historical account of the translation process, no matter how

impoverished or insignificant the judicial role, that account prevails; there is no independent conception of adjudication. In this regard, jurisprudence must have priority over history for it to be significant at all.

Part II of this Article explores Ackerman's ingenious interpretive history of constitutional change. The final part of this Article describes the kind of jurisprudential theory that I believe to be at the heart of American constitutional change.

II. ACKERMAN'S DUALIST POLITICS

A. *Ackerman's Postmodern Pragmatism*

Although Ackerman never publicly endorses pragmatism,[72] his theory of constitutional moments exhibits features that are arguably pragmatic and postmodern. Ackerman's pragmatism concentrates on the actual social practices upon which American constitutionalism depends. Interpreting these historical social practices depends on interpreting the concrete features of a particular historical period or periods; it rejects, as pragmatism should, descriptive or normative theories which have insufficient currency in the American experience. For the pragmatist, the correct theory of constitutional moments and judicial reasoning is one that reflects actual constitutional practice.[73] Constitutional pragmatism eschews "big picture" theories of American constitutional transformation and, in their place, seeks the details of change. Ackerman's depiction of the tripartite division of the New Deal resting on the Reconstruction and Founding is an almost visual portrayal of our constitutional history.

As a postmodernist, Ackerman attempts to stretch the limits of our constitutional imagination. In Ackerman's view, American constitutional practice incorporates three distinct constitutional regimes.[74] The multiplication of constitutional regimes suggests a con-

---

72. Although Ackerman places his political theory of neutral dialogue in the pragmatist camp in at least one place, I do not mean to suggest that Ackerman is a self-described pragmatist. Bruce Ackerman, *Why Dialogue?*, 86 J. PHIL. 5, 10 (1989) (answering the question of how different groups can reasonably achieve mutual coexistence as "the supreme pragmatic imperative").

73. I ignore whether pragmatism needs or is permitted to have a *theory*. Since formalism and rationalism have been largely abandoned in legal theory, the question of whether to retain the term *theory* no longer occupies a central place in jurisprudential disputes. Theory-talk is a social practice that must be evaluated pragmatically. Were we to do so, I believe we would find some types of formalistic or rationalistic theories to be unacceptable while pragmatic theories would turn out to be acceptable. Let's characterize the former as "white collar" theories and the latter as "blue collar" theories. Blue collar theories are social practices that reflect and organize other social practices.

74. ACKERMAN, *supra* note 7. One problem that Ackerman recognizes only dimly is the problem of identity. If American constitutional practice consists of three different re-

cern for context and perspective. A postmodern constitutional theorist will be more daring and adventuresome than her modernist counterpart. A postmodern constitutional theorist seeks novel constitutional stories to explain our constitutional practice.

B. *Interpretive History and the Countermajoritarian Problem*

Unfortunately, Ackerman's postmodern pragmatism is limited by his modernistic constitutional commitments.[75] These commitments, the countermajoritarian problem and the role of consent in American constitutionalism, structure Ackerman's entire approach to dualistic politics.[76] Moreover, his belief in the legitimacy of dualist constitutionalism will be difficult for modernists to accept.[77] Surely, Ackerman aims to convince the modern constitutional mind. Instead, Ackerman should aim to convince modernists to abandon their foundationalism and embrace postmodern pragmatist constitutionalism, which, as a result of abandoning the concern with legitimacy, will be more susceptible to Ackerman's interpretive his-

---

gimes in what sense are these regimes part of the same constitutional system? Indeed, they may be three incommensurate regimes. If not, what is the appropriate method for integrating these regimes?

75. Ackerman fails to recognize that his theory exhibits both modern and postmodern features existing in an uneasy tension with one another. Shorn of its modernist features, Ackerman's theory exemplifies a postmodern concern for context, detail and perspective. Ackerman's postmodern proclivities generate an interpretive history of American constitutionalism that emphasizes perspectivalism. Perspectivalism insists on taking seriously the obvious fact that all human beings perceive the world from their own perspectives, implying that judging or reasoning from a general perspective is an impossible modernist ideal. Ackerman must decide whether he intends his theory to be modern or postmodern, foundationalist or antifoundationalist. Combining features of each unwittingly leads Ackerman to embrace several untenable positions.

76. We must await the third volume of this multi-volume work for Ackerman to unveil his theory of constitutional interpretation, since nothing in his chapter *The Possibility of Interpretation* reveals such a theory. *See* ACKERMAN, *supra* note 7, at 131. If Ackerman's theory of interpretation is originalist it is difficult to see how he can succeed in overcoming the majoritarian problem without a theory of interpretation that clearly reveals the intent of the mobilized citizenry. No originalist theory has ever succeeded in achieving this, and nothing in the present volume suggests that it can be done. The problem is that Ackerman's postmodernist aspirations outstrip his modernist constraints. Ackerman's theory of constitutional moments seems much more closely tied to nonoriginalist theories of constitutional interpretation than originalist ones.

77. How can a founding and a civil war be paradigmatic of higher constitutional politics? At best, the modern constitutional mind will regard these events as atypical just because they were so cataclysmic. Great paradigms of constitutional politics cannot be modeled after periods of radical instability and war. For example, the Civil War was a great test of the nation's power of survival. Nothing should be made of this event, except the constitutional text which was indeed revolutionary and monumentally important. Should we follow Ackerman's lead in looking to factors other than text? We have absolutely no parameters to guide us here. Hence, we have no way to answer this question.

tory. Therefore, by classifying Ackerman's theory, one can see that its strengths are postmodernist, while its weaknesses are modernist.

Ackerman's theory of constitutional moments contains an intriguing interpretive history of constitutional change.[78] Like most modernist theorists, Ackerman is concerned with the legitimacy of judicial review. Hence, Ackerman's theory is designed to resolve or dissolve the "countermajoritarian problem."[79] Since Supreme Court Justices are unelected and have life tenure, their authority to strike down acts of the elected branches of government demands justification.[80] How can a democratic polity permit the judiciary to trump the will of the majority?[81] In short, how is judicial review possible in a

---

78. I call Ackerman's dualism an "interpretive history" because it is an historical account of American constitutional transformation which is designed to reflect favorably on American constitutionalism. It is, so to speak, a committed history dedicated to showing the positive political character of American constitutionalism. It does not follow that such an interpretive theory answers every normative question concerning American constitutionalism.

79. Alexander Bickel is credited with formulating the countermajoritarian difficulty in contemporary scholarship:

> The root difficulty is that judicial review is a counter-majoritarian force in our system.... [W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of the representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.

ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (1962).

80. The label "countermajoritarian problem" might be a misnomer. If taken seriously, the label suggests an easy solution to the problem of judicial review, namely, call for the election of federal judges, including the Justices of the U.S. Supreme Court. If you are not satisfied by that solution, your concern over the countermajoritarianism might have nothing to do with democracy. Instead, it might reveal an epistemic skepticism about ethics. You might believe that no one, elected or unelected, can know what rights and liberties we have. Or it might express a cynicism about trusting others, elected or not, to decide matters of political morality. But the countermajoritarian difficulty, as Bickel expresses it, is neither a skeptical issue nor a cynical complaint. Can it be that—in following Bickel—we have gotten this problem wrong for all these years?

81. How is it justifiable for a prior majority to control all subsequent majorities? The obvious answer is that the subsequent majorities can change the Constitution through Article V, and thereby free themselves of the prior majority control. Given the difficulty in formally amending the Constitution through Article V, however, this answer appears to be disingenuous. Arguably, the very nature of law—especially democratic law—entails the possibility of prior majorities controlling subsequent ones. Indeed, the very idea of democratic constitutionalism requires it. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 170-71 (1989). Accordingly, one way for prior majorities to control subsequent ones is through judicial review. Consequently, judicial review is not countermajoritarian regarding prior majorities. But having a constitution or any written law in the first place is countermajoritarian with respect to present majorities. Thus, countermajoritarianism is an ineluctable feature of democratic constitutionalism. A corollary of this conclusion is that it is misleading to think that the Constitution reflects the will of the people *tout court*. Instead, it reflects, at best, the will of certain people in the past. Indeed, the notion of "the people" or "the will of the people" is a

democracy?[82]

The standard theories of constitutional interpretation,[83] are attempts at resolving the countermajoritarian problem.[84] Picking the right theory of interpretation enables justices to correctly interpret the Constitution. Thus, the correct constitutional methodology must be consistent with democratic values if the countermajoritarian problem is to be overcome. The Court's legitimacy is challenged whenever its opinion cannot be explained democratically, and the modern mind is compelled to seek legitimacy.

Ackerman's overarching aim is to dissolve the countermajoritarian problem without embracing the standard versions of originalism or any of the other traditional constitutional theories. According to Ackerman's interpretive history, American constitutionalism rests on a unique form of dualistic politics which effectively dissolves the countermajoritarian problem. Once we appreciate how American constitutionalism actually works, the countermajoritarian problem no longer threatens the legitimacy of judicial review. In short, Ackerman promises that American constitutional practice, once understood as the dualistic system it is, shorn of formalistic, *a priori*

---

metaphor. In fact, such locutions refer to different, sometimes fractionated, groups of people. *See* Edward S. Morgan, *The Fiction of 'The People'*, N.Y. REV. BOOKS, Apr. 23, 1992, at 46-48 (stating that the instances of constitutional politics Ackerman stresses may not have come by the will of the people).

Along different lines, Akhil Reed Amar makes the interesting observation that the notion of popular sovereignty precludes a prior majority from abrogating the present majority's right to amend the Constitution even outside of Article V. *See* Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988). Amar, like Ackerman, endorses the possibility of amending the Constitution outside the constraints of Article V. *Id.*

82. The skeptical argument insists that since no one has any rights or liberties, or since no one knows what rights and liberties we have, the legislature should decide. But this is question begging in the extreme. If we have no rights and liberties, or no one knows what our rights and liberties are, why should the legislature decide this? How can their decision be superior to anyone else's? Of course the skeptic might reply that *in the context* of a *democratic* society, when in doubt let the legislature decide. But this assumes a particular conception of "democracy" which is precisely the issue in dispute. Alternatively, the pro-legislature point might have nothing to do with the existence or knowledge of rights and liberties. Instead, it might simply mean that since we cannot agree in advance on what these rights and liberties are it is fairer to have the legislature decide than the courts. But if we cannot agree about these rights and liberties, how is it that we can agree on the appropriate notion of "fairness" required to make this last argument work?

83. The main players in this game are textualism, originalism or intentionalism, structuralism, passivism, and essentialism. *See* Lipkin, *The Anatomy of Constitutional Revolutions*, *supra* note 70, at 703-05 nn.3-7.

84. On the contrary, David Dow argues that the countermajoritarian problem is not resolvable. Instead, we must learn to accept the competing values of majoritarianism and the judicial protection of minorities. These conflicting values are both important political values. We do not desire to renounce either one. David Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 10 (1990).

conceptions of constitutional change, has no greater a countermajoritarian problem than democratic law has generally, and, therefore, is no less legitimate.[85]

C. *Monism and Rights Foundationalism in Constitutional Theory*

Constitutional democracies can be monistic or rights foundationalist. A monist democracy "requires the grant of plenary lawmaking authority to the winners of the last general election—so long, at least, as the election was conducted under free and fair ground rules, and the winners don't try to prevent the next scheduled round of electoral challenges."[86] The British parliamentary system is an example of a monist democracy. American monists such as Robert Bork insist that in a democracy the majority has the right to rule simply because it is the majority.[87] Consequently, "when the Supreme Court, or anybody else, invalidates a statute, it suffers from a 'countermajoritarian difficulty' which must be overcome before a good democrat can profess satisfaction with this extraordinary action."[88] Ackerman argues that, in the American context, monistic constitutionalism contrasts with rights foundationalism since rights foundationalists contend that rights trump majority decisions.[89] Rights foundationalist believe the Constitution's authority is grounded in human rights, while monists believe its authority derives from the will of the people.[90]

Monists are suspicious of judicial intervention. By contrast, rights foundationalists see a more expansive role for the Constitution and the courts. In their view, the Constitution protects, among other things, fundamental rights.[91] Though rights foundationalists

---

85. No theorist attempts to demonstrate the constitutional authority of her favored constitutional methodology. Wherein does the authority of constitutional methodology reside? The constitutional authority cannot come from the Constitution directly, since the document contains no obvious provisions on methodology. In this formal sense, every constitutional methodology is non-originalist, since their authority necessarily depends on constitutionally extrinsic factors.

86. ACKERMAN, *supra* note 7, at 8.

87. BORK, *supra* note 81, at 139. *But see* Dow, *supra* note 84, at 15-16 ("[D]espite our general commitment to majority rule, we also believe, we believe passionately, that mere majorities may not do whatever they want simply because they are majorities."). Even Bork concedes that this majoritarian perogative is constrained by rights set out in the text of the Constitution. Therefore, no one can accept the United States Constitution as it is written and be a monist in Ackerman's sense of the term.

88. ACKERMAN, *supra* note 7, at 8 (footnote omitted).

89. *Id.* at 11.

90. *Id.* at 10-11.

91. A rights foundationalist may adopt substantive rights, such as the right to religious freedom, as well as processual rights, such as the right to self-government. *See infra* note 128.

differ concerning which rights are fundamental, all agree that "[w]hatever rights are Right, . . . the American constitution is concerned, first and foremost, with their protection. Indeed, the whole point of having rights is to trump decisions rendered by democratic institutions that may otherwise legislate for the collective welfare."[92] For the rights foundationalist, the countermajoritarian nature of judicial review is not the great obstacle it is for the monist.

When a majority violates a favored right, the rights foundationalist has no reluctance to exhort the Court to remedy the violation. More strongly, "[w]hen such violations occur, the foundationalist demands judicial intervention despite the breach of democratic principle."[93] For rights foundationalists, "[r]ights trump democracy—provided, of course, that they're the Right rights."[94] Majoritarian rule is acceptable, according to rights foundationalists, only when the majority is constrained by the preferred rights.

Ackerman contends that neither monism nor rights foundationalism adequately explains American constitutionalism. Monism cannot explain those abrupt constitutional transformations that mark our constitutional tradition. If monism is correct, then the Founding, the Reconstruction and the New Deal have no constitutional legitimacy.[95] If rights foundationalism is correct, then these constitutional moments may be legitimate—because the transformations may be justified by foundationalist rights—but then our constitutional system is fundamentally countermajoritarian. Either choice yields an undesirable account of American constitutionalism. Either our constitutional system is legitimate, but not democratic, or it is democratic, but illegitimate. Is there a way out of this dilemma?

D. *Dualism in Constitutional Theory*

1. *Normal Politics and Constitutional Politics.* In response to this dilemma, Ackerman notes that our democracy is dualist, combining the best of monism and rights foundationalism. A dualist democracy is driven by two different types of politics. The first, "normal politics," consists of the ordinary self-interested haggling and interest group pluralism which politicians engage in routinely. Normal politics, in the American context, is government *by the politicians*. The *private* citizen need not pay more than casual

92. ACKERMAN, *supra* note 7, at 11.

93. *Id.* at 12.

94. *Id.*

95. More seriously, these critical constitutional moments are inexplicable. Monism provides no insight into how American citizens create these seminal episodes in our constitutional history.

attention to the vicissitudes of normal politics. There are, however, higher lawmaking moments when the private *citizen* must band together with other concerned citizens as well as with political and social leaders to change the course of American constitutional law. This extraordinary involvement on the part of the citizenry in constitutional politics is, according to Ackerman, what determines the structure of American constitutionalism. The result is constitutional dualism, the two track system of normal and constitutional politics.

Ackerman's grand integration of monism and rights foundationalism has several benefits. Monism contributes the majoritarianism of normal politics which is necessary to the ordinary operation of a complex liberal democracy, while rights foundationalism contributes the higher lawmaking of constitutional politics.[96] Ackerman's dualism tries to integrate monism and rights foundationalism into one comprehensive conception of democracy by "offering a framework which allows both sides to accommodate some—if not all—of their concerns."[97] According to Ackerman, "[t]he basic mediating device is the dualist's two-track system of democratic lawmaking."[98] This two track system "allows an important place for the foundationalist's view of 'rights as trumps' without violating the monist's deeper commitment to the primacy of democracy."[99]

---

96. Ackerman endorses liberalism, the principle that people are rational, autonomous and morally independent individuals, who have rights that government should protect. He also endorses republicanism, however, the view that people are essentially political creatures capable of the inherently valuable activity of deliberating about the common good. Ackerman's dualism promises to achieve both liberal and republican visions. First, normal politics allows people freely to pursue independent ends, while constitutional politics permits dualists to engage the higher lawmaking that is at the heart of our constitutional democracy. Ackerman, *supra* note 7, at 31. More importantly, Ackerman's liberalism

> insists that the foundation of personal liberty is a certain kind of political life—one requiring the ongoing exertions of a special kind of citizenry. Rather than grounding personal freedom on some putatively prepolitical "state of nature," this kind of liberalism makes the cultivation of *liberal citizenship* central to its enterprise. Since this is the view of people like John Stuart Mill and John Dewey and John Rawls, it seems odd to define liberalism in a way that makes the very possibility of liberal republicanism seem a contradiction in terms.

Id. at 30 (footnote omitted). *But see* Harold J. Berman, *The Impact of the Enlightenment on American Constitutional Law*, 4 YALE J.L. & HUMAN. 311, 332 (1992) (arguing against conflating liberalism and republicanism).

97. ACKERMAN, *supra* note 7, at 12.

98. *Id.*

99. *Id.* This does not render dualism conceptually equivalent to either monism or rights foundationalism. The dualist is a democrat, though only a *majoritarian* democrat, during normal politics. Dualism embraces two different kinds of democratic values which sometimes conflict. Consequently, when dualists and monists each embrace normal poli-

Constitutional politics or higher lawmaking is genuinely government *by the people.* The nation's founding was just one sort of constitutional moment. If the Founding is understood in terms of monism, its legitimacy is questionable because no existing law sanctioned the creation of a new charter. In fact, the Constitution amended the Articles of Confederation. But while the Articles of Confederation required a unanimous vote to amend it, the Constitution requires only a three-fourths vote of the states for ratification. In reality then, the Constitution never amended the Articles of Confederation, and, therefore, the Constitution is illegal.[100] For monists, the question is how did we ever legally get from the Articles of Confederation to the Constitution? If politics were only normal politics, there is no way to make the transition.

Rights foundationalism explains the adoption of the Constitution as the failure to recognize certain rights. When a regime fails to protect such fundamental rights as the right to private property, or free speech, or the free exercise of religion, then a new constitutional order is warranted. Yet, the rights foundationalist cannot explain such a transition when no foundational rights are implicated as was surely the case in the transition from the Articles of Confederation to the Constitution.[101] In this instance, the rights foundationalist must appeal to a general right of the people to abolish existing law and create law anew. But what justifies such a right? Does this right permit revolution now? And is such a right an individual right? Or a collective right? If it is an individual right of revolution, it potentially subverts the right of the majority to make and enforce law. If it is a collective right, how can we make such a right intelligible? And what can possibly justify it?

More importantly, if constitutional politics were driven by

---

tics, the convergence is an extensional, not a conceptual, equivalence. The conceptual difference remains because monism, in Ackerman's conception, countenances only normal politics, while the dualist countenances monism and higher lawmaking. Similarly, the dualist embraces "rights as trumps" when doing so protects prior higher lawmaking. When no such democratic processes exist, the dualist cannot embrace rights unless they can be explicated in terms of democratic values. She cannot, in short, embrace rights for the sake of justice alone. A rights foundationalist, on the other hand, can embrace such rights, and therefore the convergence of dualism and rights foundationalism in embracing "rights as trumps" is similarly an extensional equivalence.

100. This suggests that we must look at the Constitution, in some sense, as continuous with the Articles of Confederation. The more appropriate view, however, would be that the Constitution was a fresh start.

101. Like the original United States Constitution, the Articles of Confederation contained no Bill of Rights. However, the absence of a Bill of Rights was not the *raison d'etre* of the Founding. The Articles of Confederation failed primarily because the fledgling nation had no effective central control over commerce. Rights foundationalism cannot explain or justify such a transition.

rights foundationalism, then it is difficult to explain the primary role of the people in determining the character of the American government. What happens when majority values conflict with individual rights? According to rights foundationalism, rights trump majority will. It is then difficult to appreciate the democratic character associated with our nation's founding.

If politics were exclusively normal politics, the legality of the Civil War Amendments is also questionable. In these circumstances, the process of amending the Constitution set out in Article V was abrogated. The southern states were permitted to reenter the Union only if they first ratified the Fourteenth Amendment. Consequently, the Framers forged a new conception of amending the Constitution.[102] Article V is an essentially state driven process, whereas the Civil War Amendments were proposed and ratified by an essentially congressionally driven process. Finally, the New Deal Revolution, which changed the constitutionality of government regulations over the economy, also occurred outside of Article V and therefore was illegal.[103] Neither monism nor rights foundationalism explain any of these transitions.

Only by positing the existence of a two track system of normal and higher lawmaking can we understand these constitutional revolutions and both the substantive and procedural changes they created. At the time of the Founding, a critical economic crisis over commerce struck the fledgling nation. Instead of a natural, legal transition from the Articles of Confederation, the Founding was an instance of abrupt higher law making that ignored legal formalities. Moreover, the Founders meant to indicate their approval of mobilizing *We the People* for revolutionary changes through constitutional politics.

This higher lawmaking capacity similarly enabled the Reconstruction Congress to procure the ratification of constitutional amendments outside the usual process of Article V. Again, the Framers looked to extra-constitutional means of altering the Constitution in critical circumstances.[104] Perhaps, more radically, the New

102. It is unclear why a simpler explanation is inappropriate here. Why not say that the aftermath of the Civil War marked an extraordinary period in which legal formalities could not apply? Thus, though the Fourteenth Amendment was ratified in an atypical manner, it would be foolish to canonize this event by making it an exemplar of future informal amendments. Nothing should follow from these extraordinary circumstances, certainly not a change in the procedure for Amending the Constitution.

103. In one sense, the New Deal is the least problematic, since its constitutional implications are due to a *judicial* reinterpretation of the Constitution. There is nothing illegal or unusual about that. In another sense, the New Deal is the most problematic since its judicial decisions amended the Constitution without the benefit of new constitutional text.

104. An alternative view is that Reconstruction did not represent an alternative pro-

Deal revolutionaries thought it unnecessary for a new constitutional text to be an integral feature of constitutional politics.[105] Instead, New Deal legislation was declared constitutional after a series of events, including a presidential election and a court packing challenge, which ultimately forced the Court to reverse its hostility toward the New Deal. This "switch in time," according to Ackerman, was the functional equivalent of a formal constitutional amendment.[106]

The general argument for these extraordinary changes goes like this: In extraordinary moments, we need not be tied to business as usual, the orderly, strictly legal, method of constitutional transformation. Rather, American government needs an alternative method to express the deliberative will of the people in creating new constitutional structures for the benefit of the American democracy. Constitutional politics is an example of higher lawmaking in order to adapt our government to emergency circumstances that the Founders could not have foreseen.[107]

2. *The Role of the Supreme Court in Dualist Law Making.* Dualistic constitutionalism requires a reconceptualization of the role of the Supreme Court. In contrast to the traditional view that the Supreme Court is, at times, forward-looking, Ackerman depicts the Court as preservationist, protecting the higher lawmaking processes from erosion during normal politics.[108] If normal politics could overturn the results of higher lawmaking, there would be no incentive for the people to engage in the onerous process of higher lawmak-

---

cedure for amending the Constitution outside Article V. Rather, the Guaranty Clause enabled Congress to make ratification of the Fourteenth Amendment a condition of reentering the Union, not for the purpose of ratifying the amendment, but for making certain that the secessionists did not seize permanent control of the state government. Richard Aynes generously suggested this alternative explanation in correspondence. *See also* DAVID A.J. RICHARDS, CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS 136 (1993).

105. The constitutional moments associated with the Founding and the Reconstruction created new constitutional text. Thus, even one sympathetic to Ackerman's theory might be reluctant to embrace the New Deal as an instance of higher lawmaking because new constitutional text is required for constitutional politics. In this view, the New Deal might simply be an especially dramatic instance of normal politics.

106. ACKERMAN, *supra* note 7, at 120.

107. But even conceding this, it still does not follow that we should institutionalize constitutional politics in this manner. Instead, it might be more prudent to restrict these forays into informal constitutional politics to only these circumstances. Historically, many more instances of higher lawmaking outside of Article V are required before we can begin to claim that this informal process of amending the Constitution is even remotely legitimate.

108. ACKERMAN, *supra* note 7, at 86.

ing.[109] In order "[t]o maintain the integrity of higher lawmaking, all dualist constitutions must provide for one or more institutions to discharge a preservationist function."[110] Dualist democracy explains the role of the Supreme Court in ways unavailable to democratic monism. Similarly, although rights foundationalism can more readily embrace judicial intervention in a democracy when rights are violated, it cannot justify judicial review by appealing to democratic factors. The dualist, however, can embrace judicial review because it is needed to protect the democratic results of constitutional politics from the intrusion of normal politics.

Monists always regard the Supreme Court suspiciously as a potential threat to democracy, while "the dualist sees the discharge of the preservationist function by the courts as an essential part of a well-ordered democratic regime."[111] Without some institution performing this potent preservationist role, the hard fought gains of constitutional politics could be lost through normal politics. Ackerman argues that the monist is wrong to presume that the Court's invalidation of normal statutes is antidemocratic. The Court's "ongoing judicial effort to look backward and interpret the meaning of the great achievements of the past is an indispensable part of the larger project of distinguishing the will of *We the People* from the acts of *We the Politicians*."[112]

Ackerman's dualism concentrates on the role of *We the People* and the three branches of the federal government in both normal and constitutional politics. Unlike recent constitutional jurisprudence, Ackerman intends a relatively minor role for the judiciary. In Ackerman's view, judges are not truly lawmakers. Instead, Ackerman insists:

> The critical higher lawmaking precedents were established during moments of crisis by leaders like Madison, Lincoln, and Roosevelt—who, in complex interaction with other institutions and the people at large, finally

---

109. *Id.* at 9.

110. *Id.* at 9-10.

111. *Id.* at 10.

112. *Id.* Ackerman's railroad train metaphor is the culprit here. Ackerman views the Supreme Court as the caboose of a train, engineered by the executive and legislative branches. The majoritarian branches determine the train's direction, while the Court tries to understand where the train has been.

No interpretive methodology exists, however, that focuses exclusively on past events. To interpret the past, one must interpret it in terms of the present and the future. Failure to do so results in a totally skewed vision of history. Consequently, Ackerman's train better allow the justices to see what's coming down the track. The train analogy is intended to show that justices do not function in a leadership capacity by driving the train. Instead, the engineers must be the president and congress. But insofar as Supreme Court interpretations constrain normal politics, the Court constrains the train's engineers, and in that sense it helps drive the train.

> gain democratic authority to make fundamental changes in our higher law. While courts play a secondary role in the evolving higher lawmaking process, we cannot narrowly focus on judges if we hope to describe, and reflect upon, the constitutional practice of popular sovereignty in American history."[113]

If Ackerman is right, the internecine struggles within the judiciary and the academy are pointless. One need not decide whether textualism, originalism, or the other standard methodologies should prevail. A dualist judge should simply look to the last constitutional moment, synthesize it with other moments, and decide the case before her. In short, Ackerman implies that the traditional interpretive questions[114] disappear within the dualist, tripartite regime.[115] Yet he never explains how this occurs.

The critical undermining of an activist constitutionalism is brought about by rejecting the Court's prophetic role.[116] Once great constitutional moments occur, the Court's role "is [to] preserve the achievements of popular sovereignty during the long periods of our public existence when the citizenry is not mobilized for great constitutional achievements."[117] Doubtlessly, it "sometimes happens that a preservationist Court may help spark a new forward-looking movement."[118] However, this "top-down" constitutional transformation is atypical and undesirable since courts are ill-equipped to lead the people to better constitutional values. American constitutionalism, according to Ackerman, derives its power and authority from the people, and "although judges are in a unique position to preserve the past constitutional achievements of the American people, many other citizens are in better positions to lead the People onward to a better constitutional future."[119]

E. *The Perils of Dualism*

The importance of Ackerman's dualism is its comprehensiveness and originality; it integrates two important constitutional vi-

---

113. *Id.* at 22.

114. These questions include, but are not limited to, the following: Should a judge interpret law or just apply it? Must a judge be faithful to the text of the Constitution? What is the role of the Framers' intentions in constructing the Constitution? Must a judge's opinion be stated in terms of general and neutral principles? Is there a significant difference between legislating and adjudicating? What is the role of ethics and politics in constitutional interpretation? Is judicial supremacy countermajoritarian?

115. Ackerman's project aims at making traditional questions of constitutional methodology superfluous. Yet the traditional questions are replicated in the regime approach.

116. ACKERMAN, *supra* note 7, at 139.

117. *Id.*

118. *Id.*

119. *Id.* at 139-40.

sions: monism and rights foundationalism. There are, however, a number of perils associated with dualistic constitutionalism which might be dispositive grounds for rejecting it.

1. *The Mischaracterization of Monism and Rights Foundationalism.* One serious problem with Ackerman's characterization of monistic democracy is that no American constitutionalist can embrace it.[120] American constitutionalism, of course, creates and sustains a dualistic democracy.[121] The Constitution itself sets out the distinction between normal politics, laws passed by the elected branches of government, and constitutional or supernormal politics as specified by the amendment process in Article V.[122] Ackerman's point should not be that constitutional monism is inadequate. Of course monism is inadequate, because it is inadequate to the explicit text. Rather, Ackerman's point should be that there is a third track of constitutional lawmaking which permits amending the Constitution outside the constraints of Article V.[123] It is this third track of constitutional politics which we must address. The distinction between constitutional monism and dualism obscures this issue.

Ackerman's conception of monism is also flawed because no American constitutionalist believes that the winners of the last election have plenary law making power. Everyone believes that the Constitution, especially the Bill of Rights, constrains their power. Ackerman rejects this criticism. Instead, Ackerman distinguishes between the symbolic Constitution and the effective Constitution.[124] While no one is a constitutional monist regarding the symbolic Constitution, several important scholars such as Alexander Bickel, John Ely, Jesse Choper, and Robert Bork are indeed monists regard-

120. *See* Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 924 n.19 (1992) (reviewing BRUCE ACKERMAN, WE THE PEOPLE (1991)) ("Does anyone really believe . . . that '[d]emocracy requires the grant of plenary lawmaking authority to the winners of the last general election' . . . ?"). Since even monists concede that the Constitution constrains majority will, Ackerman's conception of constitutional monism is radically distorted. Ackerman should concede that calling American constitutionalism "monistic" is hyperbole. Instead, he should simply say that American constitutional monism insists on majoritarian supremacy in all cases not proscribed by contextual text. True monism, as in England, is not so qualified, "because the Parliament of the United Kingdom is truly a continuously functioning constitutional convention." J. Noel Ryan, *The Central Fallacy of Canadian Constitutional Law*, 22 MCGILL L.J. 40, 42 (1976).

121. Sherry, *supra* note 120, at 923.

122. *Id.* at 927.

123. Ackerman's position should be that monism and the Article V amendment process fail to explain constitutional change. Instead, such an explanation needs Ackerman's informal amendment process outside of the confines of Article V.

124. Ackerman made these remarks specifically in reply to my criticism at the Association of American Law Schools Conference on Constitutional Law, June 13, 1993.

ing the effective Constitution.[125] This distinction permits Ackerman to discount textual evidence from these writers, demonstrating that they are far from monists.[126] But this distinction itself is specifically

125. Ackerman also mentions Woodrow Wilson, James Thayer, Charles Beard, Oliver Wendell Holmes, and Robert Jackson as "monistic democrats." ACKERMAN, *supra* note 7, at 7. Ackerman's evidence must be scrutinized. For example, it is unclear in Woodrow Wilson's case that the label "monist" applies. In contrasting our constitutional system with the British, Wilson maintains that the English courts do not restrict Parliament, but in the United States "[t]he powers of our law-making bodies are, on the contrary, very definitely defined and circumscribed in documents which are themselves part of the body of our law, and the decisions of the courts interpreting those documents set those law-making bodies their limits." WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 145 (Columbia University Press 1961) (1907). Consequently, it is difficult to see how Wilson advocates plenary power for the majoritarian branches of government in normal politics.

126. The textual evidence is plentiful, but limitations on space prevent an exhaustive demonstration. Ackerman's case is best supported by John Hart Ely. JOHN HART ELY, DEMOCRACY AND DISTRUST 105 (1980). One way to demonstrate that a theorist is committed to monism is to show that he avoids interpreting the Constitution as containing substantive, as opposed to procedural, values. Ely argues that "[t]he general strategy [of the constitutional design] has . . . not been to root in the document a set of substantive rights entitled to permanent protection." *Id.* at 100. Ely, however, does recognize "a few provisions that do not comfortably conform to this pattern." *Id.* at 101.

> But they're an odd assortment, the understandable products of particular historical circumstances—guns, religion, contract, and so on—and in any event they are few and far between. To represent them as a dominant theme of our constitutional document one would have to concentrate quite single-mindedly on hopping from stone to stone and averting one's eyes from the mainstream.

Id. Interestingly, Ely ends this observation with the above metaphor. The obvious rejoinder is, given the origination of the American Republic, who sees the stones for the stream. In short, even if Ely is a monist, he ought not to be one.

Another way to prove the charge of monism is to show that a theorist embraces the present majority as the final authority over constitutional interpretation. However, no one embraces this, certainly not Ely. Even Ely argues that present majoritarian decisions should be thwarted when restricting democratic values such as free speech and the right to vote.

Similarly, Ackerman's inclusion of Jesse Choper as a paradigmatic monist is unwarranted. While Choper concerns himself with antimajoritarian elements of the Supreme Court, he is concerned equally with antimajoritarian elements of Congress and even the Presidency. JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980). Choper, though a parliamentarian, is no monist. Rather, Choper insists that "the essential role of judicial review in our society is to guard against certain constitutional transgressions which popular majorities specifically seek to impose." *Id.* at 59. Choper insists that "[t]he great task . . . for the Court . . . is how best to reject majority will when it must . . . ." *Id.* Finally, Choper suggests that "if judicial review were nonexistent for popularly frustrated minorities, the fight, already lost in the legislative halls, would have only one remaining battleground—the streets." *Id.* at 128. He concluded that without judicial review, "violence and decadence" are the only viable alternatives. *Id.*

The case of Robert H. Jackson is ambiguous at best. While Jackson wants courts to defer unless the law is clearly wrong, he also believes that "[t]he Supreme Court is . . . the voice of the Constitution in vindicating the rights of the individual under the federal

designed to assist Ackerman's topology, and thus is question begging in the extreme. Ackerman's monist cannot truly be a monist if she concedes that the symbolic Constitution is committed to the judicial protection of rights in normal politics, and the supermajoritarian process of amendment through Article V. Ackerman's argument should then be recast to emphasize that this limited conception of dualism fails to fit constitutional practice or is unacceptable on normative grounds. He should not embrace a dichotomy between monism and dualism giving the impression that we are concerned with qualitative differences. Instead, he should point out that limited dualism is inadequate. Ackerman's reluctance to embrace this conclusion is understandable. His argument becomes much less interesting cast in terms of a stronger and weaker dualism in contradistinction to dualism and something qualitatively different.[127]

Similarly, Ackerman's characterization of rights foundationalism is radically distorted. In his view, rights foundationalism appears antithetical to democratic rights. Most American rights foundationalists, however, hold no such view. For most rights foundationalists, the importance of rights plays a substantial part in

---

Constitution against both the national and state governments." ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 22, 323 (1941). Consequently, Ackerman needs to provide additional evidence that Jackson was a monist.

Robert Bork's *The Tempting of America* is replete with references to the legitimacy of judicial review understood as review committed to the original understanding of the Constitution. For example in his introduction, Bork writes:

> The judiciary's greatest office is to preserve the constitutional design. It does this not only by confining Congress and the President to the powers granted them by the Constitution and seeing that the powers granted are not used to invade the freedoms guaranteed by the Bill of Rights, but also, and equally important, by ensuring that the democratic authority of the people is maintained in the full scope given by the Constitution.

BORK, *supra* note 81, at 4. Moreover, according to Bork, "we retain the institution of judicial review because we have found that it does much good." *Id.* at 11. It is true that Bork contends that the first principle of a Madisonian system is the principle of self-government, "which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities." *Id.* at 139. But the second principle of the Madisonian system "is that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule." *Id.* Further, the Bill of Rights "directly addresses the specific liberties minorities are to have." *Id.* Moreover, even Bork the majoritarian believes that "there should be a presumption that individuals are free, and to justify coercion by [the majority] a case must be made that overcomes that presumption." *Id.* at 79-80.

127. Perhaps the limited dualist, or Ackerman's monist, should be characterized as a constitutional parliamentarian. A constitutional parliamentarian contends that political change is generally indistinguishable from constitutional change, and that political change should occur through a majoritarian process. But even parliamentarians believe that *there are some things the majority cannot do.* They further believe that higher lawmaking or constitutional politics occurs through Article V of the Constitution.

satisfying the requirements of a truly effective democracy.[128] In order for democracy to flourish people must have certain rights, such as freedom of speech, to protect against distorted majorities as well as overreaching minorities. Consequently, Ackerman's description of monism and rights foundationalism triggers the response that neither position has ever been held by any American constitutionalist. If that charge can be sustained, the foundation of Ackerman's argument is flawed.

2. *Judicial Conservativism.* A second objection to Ackerman's theory concerns the role of the Supreme Court. One might wonder why the Court should always try to preserve the higher lawmaking of past generations from all attempts—normal or otherwise—to reverse it. It seems that Ackerman's dualism compels the Court to take a conservative position in the face of incipient mass mobilization. Since the Court's role is to preserve, the Court was right to forestall New Deal legislation. But then whenever a court perceives an attempt at constitutional politics it should do everything it can to quash it.[129] Isn't this an anomalous result?

This preservationist function, however, is rife with internal tension. The Court must simultaneously try to preserve yesterday's constitutional moment and prevent tomorrow's constitutional moment.[130] In short, until the people speak through constitutional poli-

---

128. Ackerman fails to consider the rights foundationalist who believes that the right to self-government is the principle right the Constitution protects. In that event, no conflict exists between monism and rights foundationalism. Concerning rights of this kind, the countermajoritarian problem cannot even arise. If judicial review is predicated on protecting rights of self-government, the Court acts democratically when it exercises judicial review. Similarly, Cass Sunstein writes:

> [T]he much-vaunted opposition between constitutionalism and democracy, or between rights and democracy, tends . . . to dissolve entirely. Many rights are indispensable to democracy and to democratic deliberation. If we protect such rights through the Constitution, we do not compromise self-governments at all. On the contrary, self-government depends for its existence on firmly protected democratic rights. Constitutionalism can thus guarantee the preconditions for democracy by limiting the power of majorities to eliminate those preconditions.
>
> Moreover, rights-based constraints on the political process are necessary for a well-functioning democracy; they are not antithetical to it. Unchecked majoritarianism should not be identified with democracy. A system in which majorities are allowed to repress the views of those who disagree could hardly be described as democratic.

CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 142 (1993) (footnotes omitted).

129. Curiously, Ackerman embraces substantively liberal positions in contemporary constitutional law. However, this should not quiet the charge of conservativism. Ackerman's *theory* is much more conservative than his substantive views suggest, and, indeed, it is not clear that these views follow from his theory.

130. Conservative constitutionalists argue that the Court should not alter the past constitutional moment in the absence of a constitutional amendment. But, in this in-

tics, today's constitutional moment is sacrosanct and tomorrow's constitutional moment is blasphemous. The Court must be hostile to what eventually might become a remarkable constitutional revolution in American society, creating more rights and liberties that result in a better expression of American democracy than the constitutional law that the Court preserves. In other words, in Ackerman's conception, the Supreme Court should never make an independent judgment in terms of democratic factors concerning a budding movement of constitutional politics that ultimately achieves better democratic results than the present system. There should be a more flexible means of responding to mass movements. Mustn't the Court's role be more forward-looking than this? Moreover, should the Court reverse itself even when the present mass mobilization has antidemocratic implications?

Ackerman's position is troubling, *inter alia*, because it assumes that judges can readily identify the precise moment when the people have spoken. Moreover, it assumes that the Court can easily distinguish between a normal political attempt to reverse the past constitutional moment from a normal political attempt to articulate more fully, through legislation, the content of the past constitutional paradigm. Under this theory, it is difficult for a judge to know when a piece of normal legislation is anathema to the most recent constitutional moment, or when it more fully expresses the new constitutional paradigm.

3. *The Validity of the Distinction Between Normal and Constitutional Politics.* Ackerman might respond that the preservationist role applies only to normal politics, not to constitutional politics.[131] But this response presupposes that the Court can identify when an attempt to overturn a prior constitutional moment is a normal political attempt, or when it is the inchoate beginnings of a new movement of constitutional politics. In Ackerman's conception, there cer-

---

stance, the Court does nothing to *prevent* the majoritarian forces from formally amending the Constitution. In Ackerman's theoretical universe, the Court should prevent the very movement which *is* the future constitutional moment. This is a deeply anomalous result.

131. Suzanna Sherry argues that Ackerman fails to show that judges have any incentive to preserve the higher lawmaking processes. Sherry, *supra* note 120, at 927. But surely Ackerman's theory provides incentives for judges to resist "acquiescing to popular passions." *Id.* The judiciary should be the primary preservationist branch because it is the only fully non-majoritarian branch of government. If all governmental officials accept Ackerman's story, then they all might have reason to support the dualist democracy in the appropriate circumstances, but judges are the only officials who have an obligation to engage in systemic defense of higher law making. For it is judges alone, whose very *raison d'etre* is to protect constitutional politics. Nevertheless, it is true that Ackerman's "identification of the judiciary as the primary preservationist branch still does not take us beyond simple judicial review to a dualist Constitution." *Id.*

tainly must come a time when the Court should capitulate. Here Ackerman tells us that the time for capitulation comes when,

> [i]n the light of the sustained popular support for President and Congress, a majority of the Justices have concluded that it would be counterproductive to continue the constitutional crisis until the new movement ratifies formal constitutional amendments. Instead, they uphold the last wave of transformative statutes in a series of landmark opinions, which inaugurate the radical revision of pre-existing doctrine.[132]

These comments are truly remarkable.[133] Can it be that Justice Roberts' New Deal "switch in time" is the foundation of this third constitutional moment? What if Justice Roberts had no views on the counterproductiveness of persistent conflict, but feared Court-packing or Congressional control over the Court's appellate jurisdiction? When a single player is the basis of a constitutional re-conceptualization there is a need to know more about his motivation. Future justices need to be able to identify when resistance is counterproductive. Is it conceivable that Ackerman can base a theory of constitutional change on so slender a basis? Nothing in Ackerman's theory provides future justices with a reliable guide for knowing when higher lawmaking occurs.[134] Indeed, there are two problems here: one conceptual and the other epistemic. The conceptual problem questions the meaning of normal politics as contrasted with constitutional politics: What truth conditions must exist for politics to be normal or constitutional? Given Ackerman's description of the road from normal to constitutional politics,[135] it is never clear exactly what "constitutional politics" means.[136]

---

132. ACKERMAN, *supra* note 7, at 289.

133. What if the Court genuinely agreed with the new higher law making? The term "counterproductive" suggests that the Justices do not really believe that the change is constitutional or good for the country, but that they should defer to the majoritarian branches. But this means that Ackerman's judges are always monists. Rights foundationalists would never defer in this manner.

134. Ackerman fails to delineate the parameters of internal dualist debate. How are two dualists to resolve a conflict over the dualist process? Suppose one dualist, following Ackerman, contends that a presidential election must be a part of a new constitutional moment, while another dualist says it does not. How does dualist theory resolve this conflict? Because Ackerman's theory appears so ad hoc, it is difficult to perceive parameters of internal dualist debate.

135. According to Ackerman, the transition from normal politics to higher lawmaking includes the processes of signaling, proposing, deliberating, and codifying. ACKERMAN, *supra* note 7, at 266-68. For a detailed elaboration of these processes, see *id.* at 266-94. Additionally, the support for a movement must have "depth, breadth and decisiveness." *Id.* at 272.

136. If the Court self-consciously acts dualistically, it should always be on the side of the last constitutional moment to the very end of the present higher lawmaking process. If the Court is initially on the side of the contemporary proponents of constitutional politics, then the Court has not acted dualistically; it has not preserved the past constitu-

Even if we can specify the truth conditions of higher lawmaking, there is still an epistemic problem. The epistemic question challenges us to explain how we know when such conditions occur. One is hard pressed to know when a movement sincerely appeals to constitutional politics, or when it does so merely to win a normal political gain. How does one know when the movement or its adversaries are deliberating in good faith? Abstractly, even if one can draw a semantic distinction between normal and constitutional politics, it may still be practically impossible to detect when this distinction applies to concrete circumstances.

Although Ackerman is aware of these difficulties, he appears not to take them very seriously.[137] Instead, he believes that these skeptical concerns "are quite healthy if they are kept within reasonable bounds."[138] But what constitutes reasonable bounds? Ackerman insists that

> [t]here is simply no escaping the fact that the fate of the Constitution is in our hands—as voters, representatives, justices. If we allow ourselves to abuse the tradition of higher lawmaking, the very idea that the Constitution can be viewed as the culminating expression of a mobilized citizenry will disintegrate.[139]

This assertion misses the point. Certainly, nothing guarantees successful higher lawmaking. But with regard to the Court's role in higher lawmaking, the formal process in Article V eliminates any conceptual or epistemic problems in determining when the People intend to engage in higher law making. Finally, Ackerman's use of *We the People* suffers from the same conceptual and epistemic problems. How does the Court identify when a movement has the potential of speaking for *We the People*, as opposed to *We the Political Faction*?[140]

4. *The Functional Equivalence Argument.* Ackerman contends that "transformative opinions" such as *Carolene Products*[141] are functionally equivalent to such textual guarantees as free speech and equal protection. This functional equivalent argument is one of Ackerman's strongest points.[142] If a judicial decision has the same

---

tional moment, but abandoned it for its own non-dualistic reasons.

137. *See* ACKERMAN, *supra* note 7, at 291.

138. *Id.*

139. *Id.*

140. Ackerman fails to explore whether *We the People* of the Founding were genuinely *We the People*. Failing to establish this point entails that the American dualist democracy might be based not on *We the People*, but instead is based on *We the Elite*, or *We the Special Interest*.

141. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

142. ACKERMAN, *supra* note 7, at 120.

consequences as a formal amendment, then it *is* a formal amendment except in name only. However, upon closer inspection this argument fails for two important reasons. If functional equivalence is sufficient to effectively amend the Constitution, then all the Court's revolutionary decisions are amendments to the Constitution. Therefore, the decision in *Brown*[143] is the functional equivalence of a formal amendment desegregating the schools. In other words, the functional equivalence argument can be deployed to show that informally amending the Constitution is an integral feature of all judicial decision making, and not just a product of Ackerman's theory of constitutional moments. Consequently, the Court amends the Constitution in three types of circumstances: the formal amendment process as specified in Article V, Ackerman's informal process, and judicial decisions generally.[144]

Ackerman would reply that *Brown* is not a constitutional revolution, or, at least, it is only a derivative constitutional revolution, since it follows from integrating the Fourteenth Amendment's Equal Protection Clause with the New Deal revolution. Leaving aside the question of how a judge is to know this, there is a greater problem with the functional equivalence argument. If the *Carolene Products* reinterpretation of the Fourteenth Amendment is the functional equivalence of constitutional text, it would seem to follow that nothing can amend this reinterpretation other than formal amendment, or Ackerman's process of informally amending the Constitution. Normal politics is definitely prohibited from producing a functionally equivalent amendment of the Constitution.

However consider the following hypothetical. Suppose in 1984, Ronald Reagan had pledged, if reelected, to revamp New Deal legislation and to appoint only judges who are sympathetic to this revision. The Republicans capture both houses of Congress and Richard Epstein is nominated and confirmed as an Associate Justice of the United States Supreme Court. As a result, President Reagan radically reduces the government's role in regulating the economy, reversing much of the New Deal. Suppose further that Congress passes and President Reagan signs into law a *Lochner*-like[145] conception of the role of government in the economy.[146] Justice Epstein then persuades the Court to reject a challenge to this law. In effect, this process of normal politics amends the Constitution by supporting legislation that is the functional equivalence of both formal and

143. Brown v. Board of Education, 347 U.S. 483 (1954).

144. The jurisprudential problem takes precedence because ultimately a theory of adjudication must undergird Ackerman's process of constitutional transformation.

145. Lochner v. New York, 198 U.S. 45 (1905). Such a conception advocates a laissez-faire system of government.

146. In this hypothetical all three branches of government favor change.

informal amendments rejecting the New Deal. This constitutional change, it should be noted, came about without formal amendment and without invoking Ackerman's informal amendment process, but by normal politics alone.[147]

Ackerman might reply that in the above circumstances, the Court errs by failing to appreciate the implications of dualism in these circumstances.[148] According to dualism, the Court should

---

147. To make this hypothetical stronger, suppose this particular presidential election, due to increased media technology and public interest, frames the central issues in the most reflective, clear, and relevant manner conceivable. Even suppose seventy-five to ninety (one hundred?) percent of eligible voters vote for Reagan. In short, suppose, by anyone's standard, this election exemplified the highest form of mobilization, reflection, and deliberation ever engaged in by an American electorate. In Ackerman's view, the Court acts illegitimately because a dualist Court should preserve the New Deal revolution against the *Lochner*-like statute. But why isn't this an example of constitutional politics?

148. The presence of only one presidential election is one reason for insisting that this scenario is not an instance of constitutional politics. While Article V focuses on assembly-driven constitutional politics, the modern form of amending the Constitution focuses on presidentially-driven informal amendment processes. Consider Ackerman's reasoning here:

> While the Article's narrow focus blinds us to the importance modern Americans attach to presidential elections as a forum in which we debate our constitutional future, it would be a mistake to go to the opposite extreme and suppose that *every* presidential election has catalyzed an effort by the victor to use the appointment power to make a decisive break with the constitutional achievements of the past generation. Instead, transformative nominations have been seriously considered only after a President has won decisive reelection on the basis of a political program advocating fundamental change in reigning constitutional principle.

Bruce Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1172-73 (1988). Presumably, two elections are required because Ackerman believes that the will of the people is determined and known only after mobilization, reflection and deliberation. But why are these virtues wedded to the two-elections requirement? Isn't it likely that other constitutional moments will require more than two elections in order to ensure the appropriate level of mobilization, reflection and deliberation? If so, mobilizations, reflection and deliberation cannot be equated with two elections. Ackerman himself proposes an amendment to Article V that requires a total of three presidential elections including a referendum on the second and third ballots requiring a supermajority for ratification. *Id.* at 1182. Consequently, how can he suggest that a less severe process—the New Deal revolution—already exists as an informal method of amending the Constitution?

Ackerman contends that "a decisive majority of Americans had voted for the New Deal *with their eyes open to the practical and constitutional implications of their collective decision.*" *Id.* at 1175 (emphasis added). But what exactly does this mean? Skeptics might challenge the claim that this majority clearly saw the practical implications of their decision. Yet, even granting that they did, it cannot be seriously argued that the majority understood the *constitutional* implications of their decision. More importantly, even if we can attribute meaning to this contention, how do we ever know that a majority understands a decision's constitutional implications? Finally, even if we overlook the difficulty in assigning truth conditions to this claim, and even if we overlook the difficulty in ever knowing that these conditions obtain, Ackerman cannot seriously contend that this collective majority intended that *Brown* and Griswold v. Connecticut, 381 U.S. 479 (1965),

strike down the new *Lochner* legislation. If the Court strikes down the legislation in order to preserve the constitutional politics of the New Deal, we are left with the astonishing conclusion that the Supreme Court may overturn the overwhelming wishes of the majoritarian branches of government, even absent a formal amendment, without specific constitutional language requiring them to do so.[149] Why not say that the next presidential election is required to ratify the *Lochner* amendments? This will enable the people to ratify Reagan's *Lochner* revolution. History certainly supports the claim that judicial appointments are designed to affect the philosophy of the Supreme Court. Ackerman is not, however, similarly enamoured with the idea of transformative appointments serving as the principal means of constitutional politics. Given the role the New Deal plays in Ackerman's dualism, it is difficult to understand why.

The critical point here is that a conservative constitutionalist can argue as persuasively as does Ackerman that, in the above circumstances, the party favoring constitutional change has functionally met the conditions of Ackerman's informal amendment process. Hence, Ackerman's criteria for constitutional politics can exist coextensively with normal politics. Alternatively, a conservative constitutionalist can argue that in the above hypothetical, normal politics *is* constitutional politics. The conservative contends that when there is overwhelming popular and governmental support for change, normal politics becomes constitutional politics. And, in essence, that is the genius of American constitutionalism. In short, the conservative has a different criterion for distinguishing between normal and constitutional politics. In order to decide between two competing sets of criteria, Ackerman's theory must limit the multiplication of informal conceptions of constitutional amendments ad nauseam. It is difficult to imagine a non-arbitrary way to do so.

In this case, it might be argued that the functional difference

---

follow from the New Deal. Ackerman fails to describe how his theory overcomes these conceptual and epistemic problems.

Ackerman further contends that "[i]f ever there was a time that the People could be said to have endorsed a sharp break with their constitutional past, it was when Roosevelt and the Senate self-consciously began to make transformative Supreme Court appointments." *Id.* Does this mean the appointments were evidence of the sharp break, or that the sharp break occurs when the appointments took place? If it is the former, how does Ackerman know this? And if it is the latter, the argument is circular. The President is warranted, according to dualistic politics, in making such appointments only when he knows the people intend such a break. Therefore, making the appointments cannot be the truth conditions of the intent.

149. Recognizing that courts do this all the time suggests that what is more fundamental than Ackerman's conception of constitutional moments is a jurisprudential theory explaining transformative judicial decisions and the type of reasoning upon which these transformative decisions depend.

between new constitutional text and Ackerman's informal process of amending the Constitution is that the former requires a formal amendment to transform it, while the latter can be performed through constitutional politics or even perhaps through normal politics alone. Consequently, there is an important functional difference between overturning the results of actual constitutional text, and Ackerman's informal amendment of the Constitution.[150] The former requires constitutional politics, while the latter requires only normal politics.[151] In short, functional equivalence involves not merely how a judicial interpretation *becomes* part of the constitutional text, but also how such an interpretation is *overturned.* If a "functionally equivalent" amendment can be overturned in a manner different from an Article V amendment, then it is not truly a functional equivalent after all.

If the Court, in the hypothetical, upholds the anti-New Deal legislation, then one must conclude that in the face of an overwhelming majority seeking to overturn the results of past constitutional politics through normal politics, the Court should relinquish its preservationist duties and join the present majority. Ackerman's theory fails to explain this instance of constitutional change. Further, what happened to the Court's preservationist function? We must then conclude that constitutional change can occur independently of Ackerman's informal procedures for amending the Constitution as well as outside the purview of Article V.

Similarly, what should a judge do when she detects the beginnings of a movement which she predicts will succeed as the genuine expression of the will of *We the People*? In Ackerman's view, the judge should still *preserve* the will of a past *We the People.*[152] But why shouldn't the judge, instead, *encourage* the implementation of the present majority's will? Ackerman's model seems to suggest that the judiciary should preserve only the past instance of higher law making without explaining why. Perhaps the judge should join the ranks of the new higher law making movement against the past, if on substantive grounds it is superior.[153] Although doing so may even

150. In the above hypothetical the Court is right to reject the New Deal revolution expressed in footnote four of *Carolene Products.* United States v. Carolene Products Co., 304 U.S. 144 n.4 (1938). However, it would not be justified had the Court formally amended the Constitution, thereby constitutionalizing the footnote.

151. The meaning of a particular provision of the Constitution may be changed through judicial reinterpretation. This just emphasizes that there is an underlying jurisprudential process of amending the Constitution that has nothing to do with Article V or with Ackerman's theory of constitutional moments. And that this jurisprudential process occurs during both normal politics and higher law making. Identifying this process is critical, because such a process is likely to exist in any constitutional setting.

152. ACKERMAN, *supra* note 7, at 139.

153. An even stronger counterexample can be framed. What if everyone agreed on

be necessary for the new movement's success, it abandons Ackerman's process of informal amendment outside of Article V. Moreover, in these circumstances preserving the will of the past flies in the face of common sense. More importantly perhaps, preservation of past higher law making at the expense of present and future higher law making is extremely countermajoritarian. At best, one protects three moments of higher law making against an infinite number of higher law making possibilities. The judiciary should not systematically permit past higher law making to trump subsequent expressions of *We the People*.

5. *Dualism and Originalism*. The crux of Ackerman's problem is his assumption that originalism is self-evident. Isn't this assumption question-begging? In fact, Ackerman seems to create a type of originalism never before contemplated, namely, once the people create a new paradigm, its scope and content is pellucid.[154] A justice simply needs to apply the new paradigm without any need to explain how this originalism works. What is so surprising about this assumption is that Ackerman nowhere defends originalism against other theories of constitutional interpretation. Moreover, Ackerman expects dualist judges to draw conceptually complex conclusions from the new constitutional paradigm; for example, that *Brown* and *Griswold* follow from the New Deal together with the remains of the Reconstruction and the Founding respectively. How then can we avoid setting out his theory of interpretation in the present volume?[155] Since, Ackerman takes the regime as the basic unit of constitutional analysis,[156] he must explain how his originalism operates in such a constitutional universe.[157]

---

the propriety of a particular constitutional change? Suppose tomorrow everyone awakes agreeing that the Fourteenth Amendment requires affirmative action, or prohibits abortion. Why should an Ackermanian Court prevent the people from making the constitutional change through judicial interpretation? Moreover, why must we describe this situation as normal politics? The problem here is that the distinction between normal and constitutional politics does not explain the myriad ways the constitution is altered.

154. Ackerman fails to show that the meaning of new constitutional paradigms do not require traditional interpretation, and, therefore, requires a thorough examination of the traditional theories of constitutional interpretation. Hopefully, volume three of Ackerman's trilogy will address this issue.

155. All the problems that plague judicial reasoning presently are replicated in Ackerman's dualistic account of American constitutionalism. Unless we can identify, through a theory of interpretation, who speaks for the people and how we determine what the people say, a judge's preservationist role is impossible.

156. ACKERMAN, *supra* note 7, at 59.

157. Ackerman need not contend that the Framers intended constitutional amendment outside the purview of Article V if dualist democracy is the best explanatory and justificatory account of what they did, despite their intentions. However, Ackerman seems to think that he must ground dualism on the Framers' intentions. Is there histori-

Ackerman's originalism fails to explain the regime conception of constitutional change. Assuming it could, one is left to wonder if the Framers intended the three regimes Ackerman describes. Further, what is the relationship between the Framers of the different regimes in a dualist democracy? Must each set of Framers intend the same series of regimes? If the most we can say about the Framers' intentions is that they intended Americans to engage in non-Article V higher lawmaking during the founding, it is a *non sequitur* to assume this authorizes the particular set of regimes Ackerman describes. Moreover, what did the different sets of Framers intend concerning the problem of multigenerational synthesis?[158] Ackerman's theory must address these issues before it can be assessed fairly.[159]

---

cal evidence to support this contention? Further, are conscious (or unconscious) intentions the appropriate evidentiary base upon which to support originalism? What does it mean to say that the Framers intended *X* or that the new constitutional paradigm *means X*? And further how do we *know* what the Framers intended or what the new constitutional paradigm means? Ackerman's problem is akin to those who look to the Constitution's text or to the Framers intentions as a relatively automatic process for discovering a univocal determinate constitutional meaning. *See* Terrance Sandalow, *Abstract Democracy: A Review of Ackerman's WE THE PEOPLE*, 9 CONST. COMM. 309, 324 (1992) (book review) ("[I]n attempting to codify [the meaning of constitutional moments], Ackerman falls into the same error as those who seek to fix the meaning of the written Constitution by the way it was understood at the time of its adoption."); Sherry, *supra* note 120, at 923 (characterizing Ackerman's theory as a type of originalist theory). *But see* Sandalow, *supra*, at 315 ("Ackerman's thesis is certain to be rejected out of hand by 'originalists' of every stripe."). For important discussions of the inadequacies of originalism, see Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

158. ACKERMAN, *supra* note 7, at 88.

159. According to Suzanna Sherry: "[Ackerman's] argument that we are absolutely bound by the popular intent underlying constitutional moments of the past suffers from all the problems that beset originalists generally." Sherry, *supra* note 120, at 923. One such general objection is that originalists fail to justify originalism. What justifies originalism as the uniquely correct constitutional methodology? The Constitution is silent on this issue. If originalism contends that it is the correct methodology because the Framers intended it to be, the argument is circular. It amounts to nothing more than an unsupported assertion. If there exists a further nontextual reason why the Framers' intentions should control, then it is necessarily a nonoriginalist one. Hence, the originalist's argument is either circular or nonoriginalist. Either way, originalism fails as a normative theory of constitutional interpretation.

Even if the Constitution included a provision stating that the Framers' intent should control in matters of constitutional interpretation, it ultimately would be inconclusive concerning the originalism/nonorigianlism controversy. This provision would itself be subject to either an originalist or nonoriginalist interpretation. Deciding between these interpretations necessarily requires an additional, nontextual argument in terms of the correct political theory. Originalism is correct only when the correct political theory explains why the Framers' intentions should control. *See* Amar, *supra* note 81, at 1072. Consequently, originalism, like any other constitutional methodology, must appeal to a

Ackerman's view fails to acknowledge that most judicial decisions occur during normal politics, and these decisions must be, in part, forward-looking. Often these decisions do produce interpretations of the Constitution that are functionally equivalent to formal amendments. Moreover, the normal branches of government, though primarily concerned with normal politics, also must be prepared to preserve higher lawmaking. Although the distinction between normal and higher lawmaking might survive, there is no evidence that the judiciary is the only preservationist institution.[160] Questions concerning the Court's role abound in this context. What is the Court's responsibility when a relevant constitutional issue arises in normal politics that was never addressed by the most recent constitutional moment? Should the Court abstain? Should it defer? What if the constitutional issue involved is neither constitutionally prescribed nor prohibited by the most recent regime, but was prescribed or prohibited by a prior regime? How does the synthesis work in these circumstances?

Ackerman's basic problem is his desire to combine originalism and majoritarianism, on the one hand, with progressive change, on the other. Thus, Ackerman attempts to show the legitimacy of *Brown* and *Griswold* by appealing to the Founding, the Reconstruction and the New Deal.[161] Although Ackerman grounds these deci-

---

nonoriginalist reason for its justification. If nonoriginalism is required to justify a constitutional methodology, it cannot be excluded from defining the substantive values such a methodology discovers.

160. It could be argued that the Congress and the President never established a tradition of passing on the constitutionality of proposed legislation. Instead, these branches defend their positions in terms of what they believe is best for the nation. Indeed, it would seem disingenuous if they started appealing to the Constitution in support of legislation. Even when acting in good faith, these branches typically have purely political (in the best sense of the term) reasons for supporting legislation. Thus, reasons may exist for considering the courts as the main constitutional player. Ackerman's dualism appears to reject this possibility in advance.

Courts are specifically called upon to determine the constitutionality of legislation, and they are supposed to ignore their political commitments (in the best sense of the term). No doubt constitutional choices are in some important sense political, but they are not political in the sense that proposing new policy is political. The political choices courts make are concerned with more permanent political features of our constitutional democracy. They are political to be sure, but political in the sense of political theory, not in the sense of political dealing.

161. Ackerman argues that the Court in *Plessy* decided the case on the ground that the stigma accompanying segregation was part of social reality, not legal or constitutional reality, and therefore the government could do nothing about it. In *Brown*, however, that argument was no longer available because the New Deal definitively established that the government had a role in creating social reality. Consequently, the government could act on the stigma in *Brown* as a result of the New Deal. I think this argument is ingenious but implausible. Justice Brown did not say that the stigma in segregation was part of social reality, but the government could do nothing about it. His opinion was more

sions in instances of higher lawmaking, he permits wide latitude in judicial interpretations reflecting changing social and cultural circumstances. In Ackerman's view, *Brown* and *Griswold* are not themselves constitutional revolutions, but rather follow in part from the New Deal.

Although assigning the courts a preservationist function diminishes the role of the Court in Ackerman's dualistic democracy, nevertheless "the Court continues in its starring role."[162] Ultimately, "responsibility for determining the shape and direction of constitutional law does not rest with the people—and surely not with the . . . people and their elected representatives but with the justices."[163] Indeed, justices must find a way to infer constitutional norms from the new constitutional paradigms. In fact, according to Ackerman's theory, normal politics depicts a time when "the Court is the only player on the constitutional stage."[164] The Court must evaluate the constitutionality of legislation throughout normal and constitutional politics. The Court has no way of knowing, however, whether a particular decision is part of normal or constitutional politics.[165]

6. *The Jurisprudential Problem.* The fundamental weakness in Ackerman's theory is jurisprudential. Assuming he is correct in assigning the regime as the basic unit of constitutional analysis, all the problems of constitutional adjudication remain. Whether the Court should go beyond the Constitution's text, the Framers' intentions, the structure, logic, or history of the Constitution, remain unanswered. These issues are merely transposed, substituting the regime's paradigm for the Constitution's. The question of which judicial strategy should be used applies now to the constitutional regime not the Constitution. Ackerman implies that by requiring the Court

---

cynical. He said that

> [w]e consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, *but solely because the colored race chooses to put that construction upon it.*

Plessy v. Ferguson, 163 U.S. 537, 550 (1896) (emphasis added). Consequently, in *Plessy*, the stigma resided in the victim's mind and was not part of an objective social reality at all. Thus, the blame for feeling stigmatized was laid upon the victims.

162. Sandalow, *supra* note 157, at 331.

163. *Id.*

164. *Id.*

165. Ackerman's theory needs to address other areas of constitutional law more comprehensively, such as the religion clause of the First Amendment. For example, how do we evaluate Justice Scalia's opinion in *Smith* according to Ackerman's theory of constitutional change? *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

to preserve the results of constitutional politics, these questions become superfluous. They do not. We must still ask which strategy better preserves the higher lawmaking of the most recent constitutional moment. What precisely does "preserve" mean? Does it mean preserve intact? Perhaps, it means preserve in the context of changed circumstances. The conflict between judicial activism and restraint replicates itself within Ackerman's notion of a constitutional regime. Moreover, these different styles of judicial reasons complicate the controversy further. Must the same interpretive strategy be used in each of the three regimes? Or can each regime have its own method of interpretation? If so, how do we synthesize the substantive results of the three constitutional regimes when different jurisprudential methodologies are employed to achieve these results?

These same questions must now be reformulated as to whether the Court should go beyond the regime's paradigm. Ackerman's theory tells us nothing about what following the paradigm entails, or even how to recognize the paradigm, its scope and content.[166] Justices adhering to their preservationist function will give varying answers to these questions. Indeed, Ackerman's use of *Brown* and *Griswold* as articulations of a synthesis of the Founding, the Reconstruction, and the New Deal show these decisions to be only permissible under the New Deal, not required. If so, presumably other decisions are possible.[167] How does a justice know which decision to adopt or what the content and scope of the revolutionary paradigm are?[168] Moreover, what explains and justifies intergenerational synthesis in the first place? Ackerman's regime analysis is not likely to avoid the contestability of Supreme Court decisions.[169] This failing in his analysis highlights the need for a theory of adjudication to explain constitutional change.

---

166. The question of whether judges should make law or only apply law, as well as the countermajoritarian problem, are not resolved by Ackerman's theory. Judges need to determine how far they can go in interpreting the new constitutional paradigm. If a judge merely interprets the latest constitutional moment, she may still act contrary to the present majority. If she adheres to the wishes of the present majority, she acts contrary to the past majority.

167. William Fischer III, *The Defects of Dualism*, 59 U. CHI. L. REV. 955, 971 (1992) (reviewing BRUCE ACKERMAN, WE THE PEOPLE (1991)).

168. Knowing that a constitutional moment has occurred does not establish the content of the revolutionary paradigm. *See* Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 770 (1992) (reviewing BRUCE ACKERMAN, WE THE PEOPLE (1991)).

169. *Id.* at 771. For example, the Reagan Democrats generally supported the economic expansion of the New Deal, but rejected later civil rights legislation. This poses a critical problem for Ackerman, since he contends that *Brown* was an articulation of the New Deal.

Thus, Ackerman's conception of a preservationist Court begs the question against what he calls the prophetic conception of the judiciary. No one has ever specified a methodology that sufficiently defines the scope and content of a constitutional paradigm. Similarly, the distinction between creating and preserving is less than obvious. Sometimes it is necessary to create in order to preserve. Sometimes preserving means encouraging present constitutional politics. Should the Court preserve the new constitutional paradigm intact? Suppose the new pradigm has a significant, though not fatal, flaw. Should the Court extirpate this flaw without consulting the people? Are individual liberties sufficiently protected without extensive protection of privacy? If so, was privacy contained somewhere in the penumbra of the Bill of Rights as Justice Douglas proclaimed, or did privacy become inseparable from individual liberty only after the New Deal?

Ackerman answers this last question in the affirmative. Privacy became especially important after the New Deal because the New Deal denigrated the Founders' conception of property.[170] Something must take the place of property in protecting individual rights. But why privacy? Why not religion? Why not collective or communitarian rights? The privacy associated with *Griswold* is merely one type of privacy among many. It is not obvious that the type of privacy in *Griswold* is the most effective means to ensure individual rights.[171]

The key to Ackerman's dualism is the concept of intergenerational synthesis. According to Ackerman's conception of interpretation, a Reconstruction justice or a New Deal justice must integrate the results of the latest constitutional moment with the preserved results of the earlier regimes. The problem with Ackerman's argument here is similar to the problem of interpretation discussed earlier. How does a justice know how to synthesize? Ackerman does not explain why a New Deal justice should replace property and contract rights with anything at all. Or if she should replace property and contract with something why it should be privacy. Ackerman assumes that individual rights or governmental powers contain a formal component and substantive value. The substantive value can be changed, while the formal component remains. But why should this be the case? How does a justice distinguish between changing the contents of the right, and getting rid of the right entirely? Ackerman needs a meta-theoretical construct to explain this.[172]

---

170. ACKERMAN *supra* note 7, at 159 (citations omitted).

171. An alternative explanation of *Griswold* and its progeny simply appeals to the changes in personal and sexual morality during that period in American history.

172. In another context, Ackerman tries to prove this point by appealing to abstrac-

Ackerman also needs a meta-theoretical construct for ranking or integrating the paradigms of two different constitutional regimes. Suppose the Founding paradigm includes individual rights, and the New Deal paradigm includes a strong majoritarian control over the economy. Which should be ranked higher? Notice that the way this question is resolved has enormous implications because if the Founding is ranked first, the New Deal might be effectively overturned or modified drastically, and so with ranking the New Deal first.[173]

The problem of intergenerational synthesis, therefore, is a problem of interpretation that Ackerman needs to explain in much greater detail. Ackerman may assert that the later paradigm must be ranked first on the grounds that the more recent mobilization of *We the People* entails that the people self-consciously changed the earlier paradigm. But how do we know this? And is this necessarily the case?

It is then the preservationist justice's job to reflect on several possibilities of constitutional change, and choose the one she thinks best fulfills the intergenerational synthesis of the Founding moment and the New Deal. Her choice cannot be explained by appealing only to factors intrinsic to the Constitution and to the current constitutional regime. A justice must appeal to factors extrinsic to the constitutional regime, and by doing so will be creating constitutional revolutions within the context of the regime.[174] Consequently,

---

tion. He suggests that both property and privacy are instances of liberty or non-interference.

> The core of both "privacy" and "property" involves the same abstract right: the right to exclude unwanted interference by third parties. The only real difference between the two concepts is the kind of relationship that is protected from interference—"property" principally protects market relationships while "privacy" protects more spiritual ones. Yet surely this fact should not prevent recognition of "privacy" as a dimension of constitutional "property in its widest sense."

Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 347 (1993). But what *constitutionally* permits us to replace property with privacy? Perhaps, the appropriate conclusion to draw regarding the New Deal is that we read constitutional rights narrowly consistent with the revolution in federal governmental power brought about by the New Deal. Thus, the governmental activism of the New Deal does not extirpate "property" from the Constitution; it merely restricts it content and scope. And why not say privacy and other individual rights are similarly restricted?

173. In fact, a proper reading of *Carolene Products*,. footnote four obviates the necessity to answer this question. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). But it also disallows Ackerman's solution through abstraction.

174. Disagreement will doubtlessly occur over the meaning of the constitutional paradigm, over what the voice of the people says. But why should one particular interpretation win out as the people's voice just because one justice, the deciding vote in a five-to-four decision, thinks this is what the people intend. *See* Jeremy Waldron, Book Review, 90 J. PHIL. 149, 153 (1993) (reviewing BRUCE ACKERMAN, WE THE PEOPLE (1991)).

Ackerman must explain why these constitutional revolutions occur independently of his dualistic interpretation of constitutional change.[175]

This point is fatal to Ackerman's attempt to define the democratic foundations of constitutional change. Even if we accept the utility of Ackerman's three regime conception of constitutional change, the countermajoritarian question is not resolved by appealing to the preservationist function of the Court. As long as more than one answer is possible to the question of what the paradigm means, the countermajoritarian problem is in no way resolved or dissolved, but instead, it is replicated within the regime system. Ackerman's conception of constitutional change, though an interesting and illuminating conception of some of the principal elements in our constitutional culture, fails to come to terms with the countermajoritarian problem anymore than it ultimately explains how constitutional change occurs. The explanation of these failures is the same in both cases. Since Ackerman fails to provide an unambiguous answer to the problem of adjudication, the countermajoritarian problem persists unabated, and constitutional change, as a modernistic phenomenon, remains as illusory as ever. Moreover, Ackerman's theory provides little guidance to judges trying to interpret the Constitution fairly and honestly. For such guidance, judges must turn elsewhere.

7. *Dualism and the Is/Ought Problem.* Before leaving Ackerman's conception of constitutional moments, let me defend one feature of his project. Ackerman's theory is designed to depict the distinctively American features of constitutional theory. Ackerman exhorts us to appreciate American constitutional law as it actually is, not as seen through the lens of European political theories.[176] But Ackerman gives little reason for this restriction. Why not borrow from European thinkers in examining and defining our constitutional norms? If constitutional theory is normative and European normative theory is superior to our own, it is irrational not to borrow normative concepts from them.

However, if Ackerman's point is that constitutional theory is

175. If these intra-regime constitutional revolutions are inevitable, as I insist they are in Part III of this Article, it is then possible to combine Ackerman's theory of constitutional moments with the theory of constitutional revolutions. The theory of constitutional revolutions pertains to the interpretive method of constitutional reasoning or decision making, while Ackerman's theory of constitutional moments provides the substantive content of the seminal constitutional revolutions. Ackerman's theory of constitutional moments requires the theory of constitutional revolutions, but revolutionary adjudication occurs independently of Ackerman's theory.

176. ACKERMAN, *supra* note 7, at 3-5.

not normative, but interpretive,[177] he speaks against generations of scholars who insist that "is" does not imply "ought,"[178] or, alternatively, descriptive statements cannot entail normative ones.[179] But there is no reason why an interpretive history of American constitutionalism, one that fits and reflects favorably on constitutional practice, fails to constitute a normative reason in favor of that practice unless, of course, a sufficient reason exists to alter that practice.

In other words, an adequate interpretive history of actual constitutional change is itself a normative argument in favor of that process. A true interpretive history shows the practice to be normatively attractive and, at least, shifts the burden to those opposing the normative attractiveness of the practice. Given the validity of the interpretive history, we can normatively endorse the practice barring reasons indicating otherwise.

The move from *is* to *ought* ultimately requires a political theory justifying the interpretive history. But even absent such a theory, if the interpretive history satisfies our theoretical and political goals, then it might be sufficient to establish its normative force at least for the present. Thus, if Ackerman is correct in his interpretive account of constitutional practice,[180] the normative burden is partially lifted. Unless normative reasons exist against this practice, it is irrational to give it up. An interpretive history which accurately depicts our constitutional universe, absent normative reasons against it, is normatively valuable *just because* it describes and explains *our* practice.[181]

---

177. Although Ackerman insists that dualism accurately depicts American constitutional practice, it is not clear how he conceives the relationship between normative and descriptive discourse. While depicting actual practice goes a long way in discovering the appropriate constitutional methodology, we are never bound normatively by what history tells us. *Id.* at 296. I interpret Ackerman's conception pragmatically. If dualism accurately depicts American constitutional transformations, then baring reasons otherwise, why is it unworthy of being *the* theory of American constitutionalism?

178. Frederick Schauer trenchantly states this objection: "Even apart from whether [Ackerman] gives us good history or not, . . . he certainly does not give us an account of why *our* history and *our* traditions should be the normative starting point for how we now see our Constitution." Frederick Schauer, *Deliberating About Deliberation*, 90 MICH. L. REV. 1187, 1201 (1992) (reviewing BRUCE ACKERMAN, WE THE PEOPLE (1991)).

179. This, of course, is logically correct, since descriptive statements and normative statements are different logical types. The real world, however, is more complex than logic. The dichotomy between descriptive and normative statements is the subject of this dispute. Moreover, whether a statement is descriptive or normative depends on context as well as our purpose in uttering the statement.

180. *See generally* Klarman, *supra* note 168, at 771 (arguing that Ackerman's historical account is erroneous).

181. This perspective is no more conservative than it should be. Moral arguments must start somewhere and it is better to describe accurately this starting point than not. This does not mean that one cannot be critical of one's culture; it merely means that the

This defense of Ackerman's theory applies equally to the theory of constitutional revolutions.[182] If the theory accurately depicts constitutional practice, then absent reasons to the contrary, constitutional practice is normatively acceptable.[183] In the final section, this Article presents the theory of constitutional revolutions, a theory that contributes to a systematic understanding of how judges transform constitutional law. Postmodern pragmatic constitutionalism finds value in the actual social practice of constitutional change, because this practice is the vantage point from which we begin our political evaluations. Since pragmatism counsels us to begin, though not necessarily to end, our evaluations from our perspective in history, actual social practices identify the character of that perspective, and help one to begin the fallibilist process of reasoning which typifies pragmatic constitutionalism.

III. THE THEORY OF CONSTITUTIONAL REVOLUTIONS

The theory of constitutional revolutions condemns all normative constitutional theories—prescribing one exclusive method of constitutional interpretation—as unfaithful to actual constitutional practice. If the theory of constitutional revolutions is correct, all other theories of constitutional interpretation are wrong. However, the theory does not reject a role for textualism, originalism, structuralism, or non-originalism, or any other middle-level theoretical device. In fact, it integrates these devices while explaining their appropriate place in constitutional change. The theory rejects the notion that any one of these paradigms alone can provide an accurate theoretical account of American constitutional practice.

Like any other constitutional jurisprudence, the theory of constitutional revolutions addresses the process of deciding constitutional cases, the constraints American constitutionalism places on judges, and the degree of discretion judges have in resolving important political controversies. It is a theory of what judges and courts actually do, not what judges say they do, nor what academic lawyers say the judges *should* do.

The theory of constitutional revolutions is a theory of *judicial* revolutions. This does not mean, however, that the theory is unconcerned with revolutions that occur in the legislative or executive

---

only way to begin this criticism is through our present cultural values. Indeed, I would argue that many deeply entrenched social practices in our society are morally bankrupt, and that compelling normative reasons exist for abandoning them. What we cannot do is abandon all social practices at once.

182. *See infra* part III.

183. This argument is spelled out in greater detail *infra* notes 248-60 and accompanying text.

branches of government.[184] On the contrary, as Ackerman suggests, fundamental legislative and executive changes as well as political, societal, and moral changes often have implications for constitutional jurisprudence.[185] Although these implications can sometimes define a constitutional problem for judges, they cannot resolve the problem. Judges must have a conception of constitutional methodology that translates the revolutionary politics of society into workable judicial paradigms. Consequently, one must ascertain whether constitutional history suggests a uniquely American form of pragmatic constitutionalism. The theory of constitutional revolutions is just such a theory.

A. *Normal and Revolutionary Adjudication as the Theory's Constructive Centerpiece*

The theory of constitutional revolutions integrates external and internal constitutional perspectives. Viewed from an external perspective, the theory of constitutional revolutions is a theory of constitutional moments, an interpretation of how courts transform American constitutional law. Viewed from the internal perspective, the theory is a theory of judicial reasoning, delineating the actual processes judges use when deciding the cases. This section addresses the theory of constitutional moments, leaving the discussion of the theory of judicial reasoning to section B below.

The theory of constitutional revolutions rejects the conventional wisdom concerning constitutional change. According to the conventional view, constitutional law is *evolutionary*, each stage of development adds to the preceding stage. Some versions of the conventional wisdom regard constitutional law as a coherent representation of an ideal constitutional democracy, which though unattainable, guides our constitutional development.[186] The conventional view regards constitutional change as continuous and incremental; abrupt discontinuous change is almost certain to be a mistake. Accordingly, constitutional change is evolutionary, just like modernist conceptions of history and knowledge generally. The story of American constitutionalism is "one of continuous and . . . upward growth," a growth that is "only occasionally interrupted by plateaus

184. This does not mean that the interpretive methodology that produces constitutional revolutions is the same irrespective of the interpreter. *See generally* Frederick Schauer, *The Occasions of Constitutional Interpretation,* 72 B.U. L. REV. 729 (1992).

185. *See generally* ACKERMAN, *supra* note 7.

186. Similarly, Ernest Gellner characterizes this evolutionary conception of history as a "[w]orld-growth [s]tory." ERNEST GELLNER, THOUGHT AND CHANGE 12-14 (1964). Instead, human history is marked by abrupt transformations.

or even retrogressions."[187] In rejecting evolutionary change, the theory of constitutional revolutions is not abandoning theory. Rather, it embraces a postmodern conception of theory as a form of rhetoric, a social practice, that produces pragmatic benefits.

1. *Normal Adjudication.* The theory of constitutional revolutions distinguishes between two kinds of constitutional adjudication: normal and revolutionary adjudication.[188] Normal adjudication occurs when an area of constitutional law contains a well-defined constitutional paradigm,[189] a set of instructions for settling particular kinds of constitutional conflicts. In these situations, judicial actors appeal to the paradigm to resolve the conflict.[190] Two types of normal adjudication exist: normal adjudication *proper* and routine adjudication. Normal adjudication proper occurs when a court, by closing a gap in existing law, resolves a minor question of law.[191] In normal adjudication proper, closing the gap does not alter the paradigm's basic character.[192] Routine adjudication addresses questions of relatively mechanical applications of the Constitution.[193] Often in routine adjudication, the dispute never gets litigated or, if it does, is treated summarily by the Court.[194]

2. *Constitutional Crises.* When a constitutional paradigm fails to resolve the problems or conflicts it was designed to resolve, normal adjudication breaks down. In these circumstances, judges and practitioners face a crisis.[195] At such times, a judge should consider revolutionary adjudication.[196] When a crisis occurs in constitutional

187. *Id.* at 12 (characterizing Western history).

188. *See supra* notes 208-22 and accompanying text.

189. Lipkin, *The Anatomy of Constitutional Revolutions*, *supra* note 70, at 739-40.

190. The term "judicial actors" includes citizens, attorneys, and judges, anyone having a stake in the outcome of a constitutional question.

191. The distinction between a minor question of law and a major question of law cannot be drawn mechanically.

192. If it does alter the paradigm, the alteration is relatively trivial.

193. For example, such examples include deciding not to run for political office, because one is too young, or claiming the right to a jury trial in a criminal case. Schauer, *supra* note 184, at 739. And, following Schauer, I believe that these decisions qualify as interpretations of the Constitution.

194. Adjudication, or litigation, starts at the time of the injury and continues through selecting a lawyer and going to court. Thus, when a lawyer convinces her client that the client has no case, the lawyer and the client are engaged in normal adjudication.

195. A constitutional crisis is a paradigm's conceptual or practical inability to resolve social and political problems when those problems implicate constitutional rights, liberties and powers.

196. I do not suggest that a crisis always announces itself in terms everyone understands. But you can bet a crisis exists when one judge thinks an important decision should go one way, while another judge thinks it should not. Reflective, perennial dis-

law, the first thing courts try to do is to defuse it.[197] This reflects a perfectly natural prudence not to alter the present course unless it is necessary. In constitutional law, this prudence sometimes succumbs to the necessity of dealing with a crisis when the crisis cannot be defused.

Crises occur for several reasons. First, constitutional crises typically occur during the formative stages of a constitutional practice.[198] Such inevitable crises force the Court to construct the meaning of a constitutional provision for the first time. Typically, formative decisions force the Court to engage in revolutionary adjudication.[199] In these circumstances, courts cannot engage in normal adjudication until the constitutional paradigm is specified in greater detail than the actual document states. American constitutionalism clearly rejects the possibility of constructing a constitution with "the prolixity of a legal code."[200] If it did, the Constitution "could scarcely be embraced by the human mind."[201] Instead, American constitutionalism "requires that only [the Constitution's] great outlines [be] marked."[202] One could argue that the very idea of American constitutionalism makes revolutionary adjudication necessary.

Second, and more typically, a constitutional paradigm fails when social and cultural forces combine to render its resolution of some human conflict no longer palatable. Sometimes the paradigm is found in the document, but altered by case law. In these circumstances, a change in paradigm involves the reversal of a prior constitutional decision. A surprising example of this situation concerned the clause regulating the admission of new states.[203] The Founders did not choose to bind future congresses by requiring states to be admitted on an equal basis with the original states. Yet years later, the Court interpreted the clause in precisely this manner. The Court's decision directly conflicted with the Founders' intent.[204] Such a decision is an example of what has been called "contraconsti-

---

agreement between and among competent judges is evidence that a crisis exists and may further indicate that the modernist goal of univocally correct answers will remain unattainable.

197. See *infra* notes 264-67 and accompanying text for a further discussion of crises.

198. In some cases, constitutional revolutions arise only after the occurrence of precursors to these revolutions. Precursors to revolutions can be described as occurring during pre-revolutionary adjudication. *See* Lipkin, *The Anatomy of Constitutional Revolutions*, *supra* note 70, at 743-44.

199. Ackerman's notion of intergenerational synthesis also creates a constitutional crisis.

200. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

201. *Id.*

202. *Id.*

203. U.S. CONST. art. IV, § 3, cl. 2.

204. *See* CHARLES P. CURTIS, JR., LIONS UNDER THE THRONE 4-7 (1947).

tutional" interpretation, interpreting a constitutional provision in a way contrary to its original understanding.[205] Third, a paradigm can fail because it conflicts with another paradigm, and thus a choice between or integration of two paradigms is required.[206] Fourth, a crisis occurs when no paradigm exists governing a particular area of constitutional law.[207]

In a crisis, normal adjudication—which appeals to ordinary constitutional conventions, such as the constitutional text, the intent of the Framers, and the Constitution's structure, logic, and history—fails to resolve the conflict. In these circumstances, the area of law involved cannot be normalized. When these standard conventions fail, courts begin to contemplate revolutionary adjudication.

3. *Revolutionary Adjudication.* Revolutionary constitutional decisions are judicial decisions composed of extraconstitutional, sometimes contraconstitutional, factors. Revolutionary decisions are the result of adjudication where the judge is acting like a legislator, though a legislator of a unique kind.

Revolutionary adjudication consists of three phases: pre-revolutionary, revolutionary *proper* and post-revolutionary adjudication. Pre-revolutionary adjudication occurs when some member of the constitutional community becomes disenchanted with the current constitutional paradigm. This disenchantment may express itself through a social movement or the efforts of independent judges trying to normalize or keep normal a particular area of constitutional law. Often, in these circumstances, precursors to revolutionary adjudication occur that try to repair the defect in the current paradigm by delicately altering its structure.[208] Sometimes the precursors resolve the crisis and normal adjudication can be revived. Other times, only revolutionary adjudication proper can resolve the crisis.[209]

Revolutionary adjudication proper involves decisions that can-

---

205. Contraconstitutional interpretation contrasts with extraconstitutional interpretation which permits the Court to breathe new (but not conflicting) life into a constitutional provision. *See* Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution"*, 72 IOWA L. REV. 1177, 1265 (1987); *see also* MICHAEL J. PERRY, THE CONSTITUTION, THE COURT AND HUMAN RIGHTS 20 (1982).

206. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (overruling National League of Cities v. Usery, 426 U.S. 833 (1976)).

207. A case of first impression illustrates this type of crisis. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

208. For example, several precursors to *Brown* attempted to repair the paradigm in *Plessy*. *See* Lipkin, *The Anatomy of Constitutional Revolutions*, *supra* note 70, at 742 n.172, 743-44.

209. This process is not always forward-looking. Sometimes precursors can be identified only after the revolution. Korematsu v. United States, 323 U.S. 214 (1944), was a precursor to *Brown*, but it was also revolutionary in its own right.

not be explained by reference to ordinary constitutional conventions, such as constitutional text, structure, logic, and history, or by the intentions of the Framers. Rather, through revolutionary adjudication, political meaning and value that develop in the wider community are given constitutional significance by the Court. American constitutionalism has always relied upon revolutionary adjudication in interpreting the Constitution.[210] The formative revolutions, *Marbury v. Madison*,[211] *Martin's v. Hunter's Lessee*,[212] *McCulloch v. Maryland*,[213] and *Gibbons v. Ogden*[214] gave content to the structure of the American government.[215] The New Deal revolution transformed the content of the Fourteenth Amendment's Due Process and Equal Protection Clauses as applied to economic regulations; it also continued to centralize power and authority in the federal government. The Civil Rights revolution similarly reversed the apartheid conception of equal protection enunciated in *Plessy v. Ferguson*.[216] The privacy cases subsequently recognized additional fundamental rights as well as revolutionized our conception of constitutional methodology.[217]

After revolutionary adjudication proper, a post-revolutionary stage occurs with the task of *refining*, *perfecting*, and *stabilizing* the new constitutional paradigm in order to permit normal adjudication

---

210. Revolutionary decisions have been a critical feature of every stage of American constitutional change. Aside from the formative cases, discussed *infra*, some notable revolutionary decisions are: Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Reynolds v. Sims, 377 U.S. 533 (1964); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Brown v. Board of Educ., 347 U.S. 483 (1954); United States v. Carolene Products Co., 304 U.S. 144 (1938); Nebbia v. New York, 291 U.S. 502 (1934); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); Lochner v. New York, 198 U.S. 45 (1905); Plessy v. Ferguson, 163 U.S. 537 (1896); Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873); and Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857). Bolling v. Sharpe, 347 U.S. 497 (1954), is an especially interesting case. Here the Court read an "equal protection component" into the Fifth Amendment's Due Process Clause. This suggests that the Fourteenth Amendment's equal protection clause is redundant. Such a revolutionary decision might embarrass even some ardent supporters of revolutionary adjudication. On the other hand, it could be argued that a right against discrimination by a state implies a similar right against the federal government unless a compelling reason indicates otherwise. *See* MICHAEL PERRY, THE CONSTITUTION IN THE COURT: LAW OR POLITICS 147 (1993) (arguing that the Ninth Amendment warrants the right in *Bolling*).

211. 5 U.S. (1 Cranch) 137 (1803).

212. 14 U.S. (1 Wheat.) 304 (1816).

213. 17 U.S. (4 Wheat.) 316 (1819).

214. 22 U.S. (9 Wheat.) 1 (1824).

215. A potentially significant individual rights revolution was quelled in Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (holding that the federal Bill of Rights do not apply to the states).

216. 163 U.S. 537 (1896).

217. For a discussion of these revolutions, see Lipkin, *The Anatomy of Constitutional Revolutions*, *supra* note 70, at 777-80.

in that area of law. The privacy cases following *Griswold*[218] clearly exemplify the post-revolutionary phase of constitutional adjudication.[219] Post-revolutionary adjudication compels courts to determine the new paradigm's content and scope. In this phase, the Court integrates the newly minted paradigm with contemporary cultural values to explicate the paradigm fully. Of course, this does not mean that *Griswold* was rightly decided. Indeed, an argument against *Griswold*, according to the theory of constitutional revolutions, might be that the privacy paradigm is so amorphous as to be of little use in post-revolutionary adjudication. The paradigm, therefore, threatens the possibility of normal adjudication in this area. When the paradigm is inadequate in this way, refining, perfecting, and stabilizing the paradigm in order to achieve normal adjudication is thwarted. But this argument is different from the originalist argument invoking considerations of legitimacy.[220]

American constitutionalism looks to revolutionary adjudication to extend or retract the Constitution's reach.[221] Constitutional law also seeks normal adjudication because the daily operation of courts require explicit paradigms for resolving conflicts. It is doubtful, however, that any legal system could operate with only normal adjudication; but American constitutionalism certainly could not. Pragmatic constitutionalism permits use of an explicit paradigm just until the paradigm can no longer resolve the problems it was designed to resolve.[222]

4. *Constitutional Paradigms.* A constitutional paradigm is an analytic structure exhibiting several features. First, it states those facts under which a law triggers adjudication. Second, it states the appropriate standard for reviewing the law. Third, it shows how the

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

219. Zablocki v. Redhail, 434 U.S. 374 (1978); Moore v. East Cleveland, 431 U.S. 494 (1977); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972). The precursors to *Griswold* are an interesting line of cases. *See, e.g.,* Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). One could argue that this area of law was never stabilized. The conservative position is that the notion of privacy does not lend itself to stabilization. On pragmatic grounds, it is not obvious that we can know this in advance.

220. This originalist argument, however, is outweighed by the political and moral value in constitutionalizing the substantive right of privacy.

221. McCulloch v. Maryland, 14 U.S. (Wheat) 304 (1816).

222. The different phases of constitutional adjudication are interrelated and are driven by a single principle: democratic pragmatism. The ultimate goal of a democratic, pragmatic system of adjudication is that justices have the power and prerogative to correct mistakes in constitutional practice. Although correcting the mistake sometimes requires formal amendment, most often it requires the informal amending power that is an integral part of textual interpretation. The Court's corrective role enables democratic pragmatism to operate more efficiently than majoritarianism.

standard applies to the law under review. Fourth, the paradigm determines the available remedies.

Equal protection analysis is a example of such a constitutional paradigm. A legislative classification distinguishing between two groups of people triggers adjudication under the Equal Protection Clause. The standard of review includes three levels of scrutiny: strict, intermediate and rational basis scrutiny. Typically, the law will stand or fall depending upon the level of scrutiny. The Court then provides a remedy such as desegregation, busing, or compensatory hiring depending upon the particular facts of the case.[223]

The theory of constitutional revolutions provides a comprehensive account of constitutional adjudication.[224] It opposes any unitary conception of constitutional change or conceptions that deny the creative role of judges in making constitutional law. While the theory of constitutional revolutions distinguishes between the institutional roles of courts and legislatures, it rejects any constraining dichotomy between making and applying law. The theory further rejects the notions that constitutional law is objective in any non-trivial sense or that constitutional adjudication operates with neutral principles. Thus, the theory of constitutional revolutions insists that we have perpetuated an enormous myth about the operation of constitutional change. While myths are not necessarily pernicious, this one is because it prevents understanding of the actual workings of our constitutional system, and instead, insists we fight battles over legitimacy that none of the contestants can win. Although the theory of constitutional revolutions does not reject institutional arguments out of hand, its salient predilection is toward substantive, moral and political arguments, designed either to win assent or to understand why our substantive disagreements are unresolvable.[225]

---

223. Constitutional paradigms can be procedural, substantive, or both. For example, the different levels of review in equal protection analysis include both substantive and procedural elements. They are procedural because they provide an analytic device for conceptualizing a case. But they also are substantive because they recognize that certain kinds of governmental burdens constitutionally and morally require greater scrutiny than others. For a more detailed discussion of constitutional paradigms, see Lipkin, *The Anatomy of Constitutional Revolutions*, *supra* note 70, at 734-36.

224. This theory is concerned primarily with revolutionary constitutional *adjudication*, but constitutional revolutions occur also in the executive and legislative branches of government. Moreover, the theory of constitutional revolutions is concerned primarily with *constitutional* revolutions, though revolutionary adjudication occurs in both the common law and statutory law.

225. The American concern with fidelity to the Constitution is non-existent in England. Instead, "debate in England centers on the right or wrong of a particular bill, not on its fidelity to a presumptively authoritative text that stands above parliamentary activity." Levinson, *supra* note 1, at 156.

5. *Constitutional Interpretive Communities.* Constitutional interpretation occurs in an interpretive community that regards the Constitution as the primary element in our constitutional scheme. Case law is the second most important element in this scheme. According to this theory, judges determine what the Constitution and constitutional practice imply for the resolution of a particular case. When these elements are inconclusive, the courts must interpret them through the wider political culture.

Constitutional interpretation includes analyzing constitutional practice in terms of foundational constitutional decisions. A foundational constitutional decision is a Supreme Court decision concerning the meaning of a fundamental provision of the Constitution, such as the Necessary and Proper Clause, or the Equal Protection Clause. When interpreted, such a provision is foundational in the sense that it supplies the meaning of the relevant constitutional provision throughout the entire legal system. Together with the Constitution, foundational constitutional decisions constitute the key elements of constitutional practice. These decisions are also the basis of constitutional background theories.

The constitutional interpretive community analyzes constitutional practice against a background of interpretive theories. There are two general categories—intrinsic and extrinsic—of constitutional background theories. Intrinsic theories contain principles that constitutional practice directly entails. Extrinsic theories are theories that in addition to intrinsic factors appeal to considerations not directly contained in the Constitution or case law. Constitutional background theories are moral and political theories that are necessary for understanding the Constitution and constitutional reasoning. These theories reflect the legal, cultural, and ethical level of constitutional meaning discussed earlier.

6. *Intrinsic and Extrinsic Theories.* Three such constitutional background theories are relevant to the theory of constitutional revolutions. The "relativized constitutional background theory," is a theory of actual constitutional practice. This first type of theory systematizes and generalizes particular foundational constitutional decisions in the American constitutional scheme. Consequently, if the Equal Protection Clause rejects segregation, and no other foundational provision permits segregation, then this constitutional background theory similarly must reject segregation. Thus, the relativized constitutional theory is a theory tied to particular circumstances and a particular constitutional practice.

The other two background theories are extrinsic theories since they include principles and factors not necessarily contained in constitutional practice. The first such extrinsic theory is a critical

cultural theory of American constitutionalism. This theory is more accurately a narrative that contains a critical account of the structural principles of our constitutional culture.[226] The critical cultural theory must include the constitutional values contained in the Constitution, constitutional practice as well as in the relativized constitutional theory but also includes cultural values independent of, yet closely associated with, intrinsic constitutional factors. Consequently, the critical cultural theory is not equivalent to the relativized theory. When one argues for a proposed constitutional right, for example, health care, welfare, or education, one appeals to a critical theory of American constitutional culture—of what this culture entails. Such rights may or may not be contained explicitly in the relativized theory.

The second extrinsic background theory is an abstract moral and political theory. Although this theory ideally explains and justifies the principles contained in constitutional practice, it is concerned much more with justification than explanation. While the relativized constitutional background theory, the critical cultural theory, and the abstract moral and political theory each contain a theory of mistakes, the abstract moral and political theory permits greater latitude in condemning Supreme Court decisions as mistaken than does either the critical cultural theory or the revitalized theory.[227] This should not be surprising, since the abstract theory is as close to ideal theory as the theory of constitutional revolutions permits.

B. *The Theory of Judicial Reasoning*

As stated in the last section, the theory of constitutional revolutions has two theoretical components. The first component is a theory of constitutional moments, a theory of how courts transform American constitutional law. The second component, a theory of judicial reasoning, describes how judges decide cases. In joining the theory of constitutional moments and the theory of judicial reasoning, the theory of constitutional revolutions becomes a syncretic conception of postmodern constitutionalism. Let us now sketch the theory of judicial reasoning implicit in this conception.

1. *Wide Reflective Equilibrium.* Judicial reasoning is a species of wide reflective equilibrium,[228] a pragmatic process through which

226. A critical cultural theory seeks a coherent perspective about American culture held by a reasonable person. When no single perspective is found, a critical cultural theory seeks to identify the conflicting perspectives involved in our cultural wars.

227. A theory of adjudication includes a theory of mistakes which is a method for determining when constitutional decisions are erroneous. DWORKIN, *supra* note 63, at 355-57.

228. This pragmatic methodology was popularized by John Rawls. *See* JOHN RAWLS,

we reflect on our constitutional intuitions.[229] These intuitions are rudimentary, atheoretical beliefs about constitutional propriety. Reflection enables one to achieve a less idiosyncratic perspective. This perspective is more general and enables one to evaluate intuitions and achieve the fallibilist goal that is the hallmark of pragmatic constitutionalism. This pragmatic process helps to criticize and correct our constitutional intuitions. Some engage in these practices intuitively; other people need to reflect on the process in order to learn how to "engage in these practices intuitively." The goal here is to create a new perspective for evaluating our intuitions which becomes our own, not to discover an "other worldly" perspective. Certainly, this new perspective is a perspective in the world. But it is not just another perspective. It is a pragmatic perspective more likely than others to result in defensible judgments.[230] When one achieves this perspective one can then consider various principles and theories which provide a rationale for our intuitions.

Once one holds one's considered intuitions and one's theory in wide reflective equilibrium, one can then use the theory to resolve constitutional conflicts.[231] This perspective helps achieve a balance between one's constitutional intuitions and more generalized principles or theories. Where no balance is possible, the perspective helps explain why. One's considered intuitions and theories are never fixed or closed. Rather, both can be stabilized only temporarily in order to achieve equilibrium.

Wide reflective equilibrium provides a solution when one's intuitions and theories collide. Wide reflective equilibrium can have one of three dimensions: (1) intuitionist, (2) coherentist, or (3) formalist. Intuitionism embraces considered intuitions over theories in times of conflict, while formalism prefers rich, deeply-layered theories over our intuitions. Coherentism seeks a balance between intuitions and theories. Rather than reconcile these dimensions, or

---

A THEORY OF JUSTICE 20, 48-50 (1970). But its origins go back to the work of Willard van Orman Quine and Nelson Goodman if not as far back as Socrates.

229. I do not contrast the process of generating legal intuitions and reflecting upon this process by saying the first process constitutes practice, while the second process constitutes theory. In my view, both practice and theory are different kinds of social practices. This hardly means, however, that distinguishing between them is pointless.

230. One must be careful here not to beg a number of questions. I do not claim that the description of this perspective is uncontestable; nor do I claim that this perspective guarantees consensus. Rather, I suggest that certain perspectives are better than others for generating our favored judgments.

231. For a more extensive discussion of wide reflective equilibrium, see Lipkin, *The Anatomy of Constitutional Revolutions*, *supra* note 70, at 726 n.96; Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness*, *supra* note 1, at 865-77; Lipkin, *Indeterminacy, Justification and Truth*, *supra* note 1, at 638-42; Lipkin, *Kibitzers, Fuzzies and Apes Without Tails*, *supra* note 1, at 111-30.

choose one over the others, the theory of judicial reasoning regards them as part of a single process of practical reasoning.[232]

2. *Wide Reflective Equilibrium and Constitutional Change.* The theory of judicial reasoning applies to constitutional change. When a proposed change makes a minor change to constitutional practice, a judge, like a good intuitionist, should prefer well-settled constitutional conventions. Similarly, when a minor change is warranted in normal adjudication, intuitionism has a minimal coherentist dimension and helps achieve the pragmatic result. In doing so, a judge engages in normal adjudication. However, when a proposed change helps resolve a constitutional crisis, a judge, like any formalist, should embrace the change, knowing it may have sweeping ramifications. In this context the judge will choose revolutionary adjudication. Ordinarily, when a judge engages in post-revolutionary adjudication, she seeks a coherentist articulation of her intuitions in light of the new constitutional paradigm. The theory of constitutional moments and the theory of judicial reasoning, combine the external perspective of how courts transform constitutional law with the internal perspective of how judges reason.[233] Consequently, these theories together constitute a syncretic conception of constitutional transformation and adjudication.

C. *The Theory of Constitutional Revolutions and Political Theory*

The relationship between the theory of constitutional revolutions and political philosophy is a complicated question that cannot be examined adequately here. Nevertheless, a brief discussion is necessary for the purposes of this Article.

---

232. Law expresses each of these dimensions in different circumstances. The intuitionist dimension typifies most adjudication. Stability, notice, and predictability associated with intuitionism generate a presumption in favor of the legal status quo. This presumption is required for the intelligibility and validity of our legal judgments. In the standard case, this presumption requires accepting the most obvious interpretation of a legal provision all things being equal. But since all things are rarely equal, something more than intuitionism is required. Typically, a coherentist dimension helps fill in gaps in normal adjudication as well as in post-revolutionary adjudication, and when the past fails to resolve a novel problem, formalist change is required.

233. How would a judge write a judicial opinion according to the theory of constitutional revolutions? Would she write a homily? A story? In my estimation, a revolutionary judicial opinion has four salient parts. Part one should be a comprehensive statement of the relevant principles of law. Part two should show why the answer that follows from those legal principles is morally, politically, or practically wrong. Part three should be a coherent statement of political philosophy in support of the most plausible response to the crisis. Finally, part four should translate the political philosophical result into a workable constitutional rule.

The theory of constitutional revolutions is pragmatic.[234] Pragmatism drives the processes of constitutional change. This view recognizes that judges sometimes have positive reasons to adhere closely to a constitutional paradigm, but other times, have little or no reason to do so. On the other hand, pragmatism recognizes the importance, and in the American context, the inevitability of constitutional revolutions. The processes of change—of refining, perfecting, and stabilizing the paradigm to reach normalization—efficiently helps translate cultural, ethical, and political meaning into constitutional law, and thereby contributes to the vigor and health of our constitutional democracy.

The theory of constitutional revolutions exploits the strengths of conventionalism, coherentism, pragmatism, and naturalism.[235] Conventionalism corresponds most closely to normal adjudication. Pragmatism and naturalism correspond to revolutionary adjudication proper; while coherentism corresponds most closely to post-revolutionary adjudication.[236] Exploiting traditional theories in this manner gives the theory of constitutional revolutions its pragmatic punch. Why would any constitutional democracy choose not to incorporate the strengths of each of these theories into a unified jurisprudential account of constitutional practice? Even if our constitutional practice were different, we would have an affirmative reason to reform it according to the theory of constitutional revolutions.

The manner in which the theory of constitutional revolutions integrates standard jurisprudential theories is by no means the only reason for adopting it. The theory also is appealing because it reflects actual constitutional practice. Constitutional law is a product of the Constitution and revolutionary interpretations of its text. These interpretations reveal paradigms which then become refined, perfected, and stabilized with the ultimate goal of quelling crisis and reaching normalization. It is difficult to understand actual constitutional practice without employing this theory.

These undulating patterns of constitutional practice are best captured by a pragmatic judicial philosophy, one that favors concrete results over theory. A pragmatic judicial philosophy is designed to overcome crisis. It eschews overtly ideological factors.

---

234. Elsewhere I have described this judicial philosophy as "superpragmatism." Lipkin, *Conventionalism, Pragmatism, and Constitutional Revolutions*, *supra* note 71, at 729. Superpragmatism maintains that adjudication is justified in terms of its effect on the nation's future and leaves open the substantive nature of this effect. *Id.*

235. For stylistic reasons, the term "naturalism" is used throughout the Article instead of "natural law."

236. Coherentism has two distinct functions in American constitutional law. Its primary function is to refine, perfect, and stabilize a novel constitutional paradigm. Less dramatic, however, is the coherentist function of filling in gaps in normal adjudication.

Pragmatic judicial philosophy tolerates experimental solutions to difficult questions. It avoids the quest for foundational constitutional principles which definitively lay down univocal constitutional methodologies. The theory of constitutional revolutions is closely allied to progressive constitutional values such as equality, community, and liberty. An examination of human history suggests that these values typically involve revolutionary change, while the status quo usually is represented by authority, hierarchy, and domination. Progressives usually seek to implement these values, while conservatives typically try to defend the status quo. Further, progressives must be vigilant in protecting the values of equality, community, and liberty from erosion, and in ensuring that such values be properly realized. Consequently, the possibility of revolutionary constitutional change is vital to this vigilance.

At one time or another, every constitutionalist has endorsed such revolutionary adjudication.[237] The theory of constitutional

237. Anyone supporting *Brown*, for example, supports revolutionary constitutional change, although sometimes the reasoning in support of such change appears disingenuous. Robert Bork, for example, rejects revolutionary adjudication, yet endorses *Brown*. BORK, *supra* note 81, at 75. Indeed, in Bork's view, *Brown* was correct because the Court picked one of the two intentions possessed by the Framers of the Fourteenth Amendment. The Framers believed in equality, but did not believe that school desegregation was violative of equality. Since it would be an administrative nightmare for the Court to supervise "separate but equal" regimes in a variety of public facilities, the *Brown* Court was correct to reject the constitutional permissibility of equal, but segregated schools. Bork presents this argument without irony, although he is surely aware that the Supreme Court's difficulty in integrating the schools was no less of an administrative nightmare than judicial enforcement of equal, but segregated schools would have been. Administrative nightmare aside, Bork never explains whether there exists a general answer to the question of which intention prevails when the Framers have two incompatible intentions relevant to a constitutional question. I believe that Dworkin's general answer to this question fares no better than Bork's. DWORKIN, *supra* note 63, at 329-33. *But see* Lipkin, *Conventionalism, Pragmatism and Constitutional Revolutions*, *supra* note 71, at 713-21.

Bork adds a second argument that crudely echoes Dworkin's. Bork argues that the Framers of the Fourteenth Amendment valued equality and segregation but

> [s]ince equality and segregation were mutually inconsistent, though the ratifiers did not understand that, both could not be honored. When that is seen, it is obvious the Court must choose equality and prohibit state-imposed segregation. The purpose that brought the fourteenth amendment into being was equality before the law, and equality, not separation, was written into the text.

BORK, *supra* note 81, at 82. But the notion that equality and segregation are "mutually inconsistent" is question begging, surprisingly, against "originalism." For an originalist understanding of "equality" as it appears in the Fourteenth Amendment, we must consult the Framers' understanding of "equality." Their understanding renders equality and segregation compatible. The fact that the amendment contains the word equality, not segregation, might be persuasive for a textualist, but not a true originalist. For an originalist, textual evidence is one form of evidence of original intent, but it is in no way necessarily dispositive.

revolutions is antithetical only to a Burkean conception of change.[238] A constitutional Burkean sees constitutional change as incremental and occurring not so much from individual choice and utopian reform as from the multiplicity of choices made every day in social interaction. Consequently, for the Burkean, the theory of constitutional revolutions is anathema.

I do not want to suggest that conservatives cannot embrace the theory of constitutional revolutions. Indeed, my contention that the theory of constitutional revolutions is *the* theory of our constitutional change precludes denying its role in conservative adjudication.[239] Rather, there is a greater connection between the theory of constitutional revolutions and progressive political theory. As a thoroughly pragmatic theory, progressive political theory denies that any value is necessarily sacrosanct.[240] It therefore requires a pragmatic theory of constitutional adjudication, one that does not reject the pragmatic benefits associated with conventionalism, coherenterism, pragmatism, and naturalism. Thus, since the theory of constitutional revolutions is the only theory that integrates these jurisprudential paradigms in a unified manner, any pragmatic progressive political theory naturally is connected to the theory of constitutional revolutions. Progressives committed to equality, community, and liberty will seek a theory of constitutional adjudication that permits extending these values in order to vigilantly protect them.

According to the theory of constitutional revolutions, a judge must determine how the history of the nation's political values bears on the decision. This is always her own conception of these values. Nevertheless, in this context, the *object* of the judge's inquiry must

---

238. ACKERMAN, *supra* note 7, at 17-18.

239. According to the theory of constitutional revolutions, the difference between judicial conservatives and judicial progressives is that for the former, normal adjudication occupies a larger piece of the judicial landscape. The differences between conservatives and progressives are made more intelligible when seen through the lens of the theory of constitutional revolutions. No longer should one ask whether the Constitution's text, intent, structure, history and logic are appropriate methods of interpretation. They *are* in the appropriate circumstances. Instead, we must ask whether a case before the Court requires normal, revolutionary, or post-revolutionary adjudication. In normal adjudication, for example, text and intent are perfectly legitimate and exclusive methods of interpretation. In revolutionary adjudication, however, they are not exclusive, and typically not relevant at all.

240. Pragmatism implies that no value is immune from criticism, and any value may be abandoned in the appropriate circumstances. Of course, it may be inconceivable to reject a value under certain descriptions. Murder, for example, is defined as unjustifiable, unexcused homicide. No one can seriously endorse murder without committing a semantic mistake. But that is a trivial result. The real test is whether certain forms of behavior must be described always as murder. Pragmatism denies that linguistic descriptions are necessarily related to certain forms of behavior and not others.

be *the nation's fundamental political values*, not her own. Generally, when the answer to this question is clear, the judge's pursuit of fundamental values is complete. When it is unclear, the judge must consult her own fundamental values, not because her values are sacrosanct, but because her values are the nation's *best* values from *her* perspective. We ask an impossible task of a judge when we forbid her from appealing to the nation's best values from her perspective. More importantly, we set the stage for judicial self-deception in the name of what "the law" commands.

D. *Defending the Theory of Constitutional Revolutions*

This section critically evaluates important objections to the theory of constitutional revolutions.[241] Some objections can be handled with relative ease. Other objections might require us to reformulate the theory in a more plausible form.

1. *Legislative and Adjudicative Dimensions of Law.* First, the pragmatic dimension of both the theory of constitutional revolutions and progressive political theory may be criticized for conflating the legislative and adjudicative dimensions of government. According to this objection, the appropriate place for "revolutionary" change is the legislature, not the courts.[242] Consequently, the theory of constitutional revolutions founders by seeking to usurp the legislative role.[243]

This objection fails to distinguish between two kinds of change: change in policy and change in principle. A change in policy is a change from one constitutionally permissible course of action to another. A change in principle alters the meaning of an existing constitutional provision, affording greater or lesser protection of constitutional rights and liberties.[244] According to the theory of constitu-

241. For a discussion of other objections, see Lipkin, *The Anatomy of Constitutional Revolutions*, *supra* note 70, at 780-88.

242. Robert Bork is the most prominent advocate of this approach. *See supra* note 81.

243. The theory of constitutional revolutions recognizes the United States Supreme Court to be a "super-legislature." If the Court evaluates the constitutionality of statutes, what else can it be? After all, the Court ratifies legislative and executive acts. The dichotomy between legislation and adjudication is a modernist dichotomy that should be dropped rather than embraced as a constraint on adjudication. Rejecting this dichotomy does not entail denying differences between legislatures and courts, but simply recognizes that these activities are not mutually exclusive. Imagine a governmental entity whose sole function is to pass on the constitutionality of newly enacted legislation. To which branch of the government, the legislative or the judiciary, does this entity definitively belong? There is no general answer to the question of whether this entity is the "upper" house of a legislature or a constitutional court. Any answer will be arbitrary.

244. I do not offer this distinction between policy and principle in a mechanical way.

tional revolutions, courts change principles, not policies. Although judicial alterations of constitutional principles might be held illegitimate on other grounds, the theory of constitutional revolutions cannot be faulted for abolishing the distinction between legislative and adjudicative changes. The former are changes in policy while the latter are changes in principle or governmental perogatives.[245]

Legislatures are concerned with addressing general problems, which typically involve balancing competing interests. Courts are more concerned with the individual's permanent rights and liberties as well as the constitutional authority of federal and state governments. Consequently, courts might alter constitutional principles without trespassing on legitimate legislative authority to make changes in policy.

However, the critic might persist that no governmental branch should alter constitutional principles, or replace one constitutional principle with another not found in the Constitution. In one sense, this objection is absolutely right. If the Court were to interpret a provision of the Constitution to require or even permit theocracy, monarchy, fascism, or communism, the Court would be overstepping its bounds. No American Court has even come close to such interpretations. Yet, every branch of government has altered, sometimes radically, some constitutional principles. The original constitutional principle of limited government was altered through both the Marshall Court and the New Deal Court decisions. The principle of the original role of the presidency has been altered drastically in the twentieth century. Other examples abound. The advent of the administrative state as a fourth branch of governmental authority is not in the original Constitution. So the objection is right that courts should be unable to add concepts to the Constitution, concepts which have no purchase in our constitutional and cultural theories of political life. But it does not follow that courts should be unable to alter constitutional principles which are relevant to our constitutional

---

Whether a change is one in a policy or principle is itself an interpretive problem and in some cases, will be contestable. My only point here is that a justice does not awake in the morning, for example, declaring that it would be a good thing for people to have comprehensive, government funded health care, and so rules. Moreover, constitutional politics are conflicts of important human values and fundamental commitments to different ways of living. On pragmatic grounds concepts and principles must be revised or reinterpreted with the passage of time and new circumstances. Otherwise, we may forego a better version of that concept or principle or lose it entirely.

245. The present objection is tied conceptually to the objection that courts be restrained, not activist. I have discussed this second objection elsewhere. Lipkin, *The Anatomy of Constitutional Revolutions*, *supra* note 70, at 784-86. For now, let me add that restraint in the face of constitutional crisis is no virtue and activism in pursuit of democracy and fundamental rights is no vice.

and cultural practice.[246]

A corollary of this objection is that the theory of constitutional revolutions fails to preserve the distinction between law and politics. When one understands law to involve principles and politics to involve strategy and special interest, the theory of constitutional revolutions preserves the distinction between law and politics. If law means neutral principles and politics means substantive principles, then the theory rejects this distinction. The theory recognizes no neutral principles. Even if it did, neutral principles would not be useful in constitutional law. The best of law translates the best of politics into legal form. Indeed, the best of law and the best of politics amount to the same thing, reflective responses about how to structure the good society.[247]

2. *Descriptive and Normative Features of the Theory.* A second criticism of the theory of constitutional revolutions is that it is, at best, only descriptively, not normatively accurate.[248] If the theory is only descriptively accurate, then it is an open question whether it has any normative value.[249] This argument has been the centerpiece of analytic ethics for much of this century.[250] The argument is that there exist two different levels of discourse, descriptive and normative, and that it is a logical mistake to infer a normative judgment from a descriptive statement.

Upon closer inspection, there is nothing wrong with regarding descriptive discourse (which after all at least contains yesterday's norms) as presumptively (normatively) valid, unless a compelling moral or political reason exists for disregarding it. The fact that it is

---

246. Remember, Ackerman argues that constitutional practice sanctions non-Article V amendments to the Constitution. *See* ACKERMAN, *supra* note 7, at 54; *see also* Amar, *supra* note 81, at 1044 (arguing that the Constitution may be amended in ways not specifically set forth in Article V, namely, "by direct appeal to, and ratification by . . . the People of the United States").

247. This does not mean that no distinction exists between law and revolutionary politics. In other words, revolutionary constitutional change within a legal system is different from revolutionary political change *of* that legal system.

248. *See supra* note 176-83 and accompanying text.

249. The open question argument, among other techniques, is used to challenge the normative authority of any factual account of human value. *See* GEORGE E. MOORE, PRINCIPIA ETHICA § 134 (1903). The open question argument says: Consider any naturalistic or metaphysical property, like pleasure, as a definition of 'good.' If good is defined as pleasure, the sentence "Pleasure is good, but is it really good?" would not make sense. However, since it does make sense, pleasure cannot be the definition of good. A related issue is "Hume's dictum," namely that *ought* cannot be derived from *is*. DAVID HUME, A TREATISE OF HUMAN NATURE 469 (1967). Consequently, the theory of constitutional revolutions might describe what American constitutionalism *is*, but does not entail how it *ought* to be.

250. *See generally* WILLIAM FRANKENA, ETHICS (2d ed. 1973); HUME, *supra* note 249.

descriptively correct should count strongly in its favor.[251] Indeed, it is a feature of pragmatic evaluation, as I understand it, to reject the dichotomy between descriptive and normative discourse. In different contexts, language functions in different ways. Permanently labeling certain types of discourse as descriptive or normative based on their logical or syntactical structures cannot be persuasive on pragmatic grounds.[252]

The issue of the relationship between descriptive and normative discourse implicates a much broader issue of the proper method of philosophical inquiry. There are, at least, two ways to approach philosophically and theoretically interesting controversies. The first, "the Platonic approach," denigrates practice with all its infirmities. Instead, it continually asks the normative question: What is the ideal nature of the practice? The second approach, "the Humean approach," seeks empirically to understand human society and its conventions. The first approach valorizes the normative dimension; the second approach embraces the descriptive and the explanatory dimensions of discourse.[253] Neither approach is compelling. A third view, "the Wittgensteinian approach" seeks to integrate the normative and the descriptive. Normative evaluation is possible, but not by invoking transcendental principles.[254] Normative evaluation is a human, cultural practice, used to present other practices in a favorable light.[255] When a practice is significantly defective, we must

---

251. *See* Lipkin, *The Anatomy of Constitutional Revolutions*, *supra* note 70, at 782-84. This position does not entail a pernicious relativism; it simply maintains, on pragmatic grounds, that the starting point for legal and moral evaluation must be one's own community. Without transcendent ideals, the starting point must subsequently begin with the legal and moral conceptual scheme into which one is born. No matter how much we depart from this scheme, it is necessarily our starting point. Consequently, barring a reason otherwise, our social practices are *prima facie* good. Of course, American history is replete with practices that should be criticized and abandoned, such as racism and sexism, among others.

252. For example, the statement "There's a Mack truck." is descriptive when one wants to identify the vehicle, but exhortative when one wants to warn someone crossing the street about an oncoming truck.

253. Indeed, the normative dimension of the Platonic approach does not denigrate the descriptive dimension completely; nor does the Humean approach entirely eliminate the normative dimension.

254. This does not mean that we are all restricted to our own idiosyncratic or solipsistic perspectives. If we were, human communication would be impossible. In the appropriate circumstances, we can and should achieve a more general, self-critical perspective from which to make decisions. But we must realize that the more general vantage point is still a perspective in the world. In short, it is a view from somewhere. The Platonic approach, however, like so many philosophical conceptions of normativity, does not contrast my idiosyncratic and self-critical perspectives. Rather, it contrasts both of these perspectives with a perspective neither located in space and time, nor occupied by any actual human being. Pragmatism denies this later perspective.

255. Pragmatists reject the possibility of a non-circular, ultimate justification of so-

change it; but when no compelling reason for abandoning a practice exists, what is, *is* what ought to be.[256] Rejecting this argument is tantamount to embracing the possibility that all human practices can be normatively defective, a view that borders on incoherence.

The Wittgensteinian approach suggests that normativity is internal to social practices. Normative questions can arise only within a language. Consequently, we cannot ask normative questions about an ultimate description of human society. Within that description, we will discover normative arguments which have force within a language-game, within a social practice. But to ask if the total description is normatively attractive is to ask an unanswerable question. In these circumstances, we would do well to heed Wittgenstein's remarks: "The danger here . . . is one of giving a justification of our procedure where there is no such thing as a justification and we ought simply to have said: *that's how we do it.*"[257]

In the context of the theory of constitutional revolutions, overturning revolutionary practice ironically requires embracing the theory of constitutional revolutions. If the theory accurately depicts constitutional practice, then a compelling reason is needed for abandoning it. The theory also requires that one accept the spirit of the theory of constitutional revolutions because only a theory of this sort justifies abandoning constitutional practice.[258] If the theory of constitutional revolutions accurately describes practice, then abandoning the practice calls for a constitutional revolution of monumental proportions.[259]

A critic might charge that since actual constitutional practice is normatively invalid, altering the practice may require revolution. In

---

cial practices. If one does not think the present practices of justification useful, one may demonstrate how it might be improved. But no inescapable foundation exists grounding the practice of justification.

256. Alternatively, the level of description captures, for the most part, past attempts at justification, past attempts at normative world construction. Consequently, the descriptive should stand normatively unless there is a reason for it to be reformed in a particular situation.

257. LUDWIG WITTGENSTEIN, REMARKS ON THE FOUNDATION OF MATHEMATICS pt. III, § 74, at 74 (G.H. von Wright et al. eds., & G.E.M. Anscombe trans., MIT Press Paperback 1983) (1956).

258. Revolutionary adjudication is necessary to ensure that law is a vibrant discourse adaptable to various contexts through the force of its own spirit. Otherwise, law becomes mechanical and encrusted, more suitable to tyrannical regimes than constitutional democracies.

259. One could argue that calling for a rejection of the theory of constitutional revolutions might be a call for a return to the "correct" jurisprudence. But in what sense is it correct, if practice doesn't embody it? The theory of constitutional revolutions rejects the notion that there could be a correct, "original jurisprudence," outside of actual practice. Pragmatism cannot tolerate divorcing correctness from actual practice in this manner.

this situation, such a revolution is limited simply to rectifying the normative invalidity of actual practice. Once we return constitutional adjudication to its conventionalist, coherentist, naturalist, or pragmatic essence, we are done with revolution, and thus do not tacitly embrace the theory of constitutional revolutions.

Two responses are in order here. First, the rejoinder begs the question in favor of the normative dimension of practice. Why should the normative take precedence over the descriptive?[260] Second, this criticism relies on metaphysical essentialism. Why does the normative reflect the essential nature of a practice better than the descriptive? Further, why bother about the dichotomy between descriptive and normative discourse? Instead, let's go about our business giving reasons for or against social practices and worry less about the status—descriptive, normative, explanatory, or motivational—of these reasons.

Most conventionalist conceptions of constitutional law, such as textualism and originalism are normative theories of constitutionalism. But no one asks why the constitutional text or the Framers' intentions should control constitutional interpretation. Although one could argue that these conceptions are normatively based on other legal and non-legal practices, why should these practices be imported into constitutional law, especially when actual practice is driven by something other than authorial meaning?

Second, it is unclear how use of the theory of constitutional revolutions can be limited to only one occasion. If constitutional practice can be returned to its essential nature by revolutionary adjudication, it is unclear why the same cannot be done in the future. In other words, engaging in revolutionary adjudication for remedial purposes legitimizes it. Finally, if the theory of constitutional revolutions is descriptively accurate, we should look askance at suggestions to alter the practice now. Indeed, if revolutionary practice were to be abolished, American constitutional law would so radically change that no serious attempt to do so would succeed.

3. *Traditional Constitutional Methodologies and the Theory of Constitutional Revolutions.* What role do the traditional constitutional methodologies have in the theory of constitutional revolutions? Regarding textualism and originalism, certain constitutional provisions are almost exclusively determined by the text or the Framers' intentions. Although textualism and originalism play a

260. A pragmatic judicial philosophy rejects descriptive-normative dichotomies. The problem with such dichotomies in justificatory contexts is that choosing one branch over the other risks begging the question against one's opponent. The pragmatist's response is, "Why bother?"

significant role in normal adjudication, they play a much less significant role in revolutionary adjudication. When no more attractive principle is at stake, the constitutional text and the Framers' intentions control constitutional interpretation. Structuralism also operates in normal adjudication, but some deployments of structuralism might also exist in revolutionary and post-revolutionary adjudication. Nonoriginalism is clearly more appropriate to revolutionary adjudication.

The constitutional text and the Framers' intentions determine which political concepts constitute the appropriate objects of interpretation. These and other constitutional conventions constitute normal adjudication which functions as a default mode in constitutional law. Unless there is a reason to change modes, the Constitution should be understood in terms of its default mode. Conceptually, there is always the possibility of switching, but practically, the default mode of normal adjudication determines many constitutional issues. However, we should not forget that American constitutionalism has also repeatedly embraced revolutionary adjudication. Indeed, a legal system would be radically deficient were revolutionary adjudication impossible.

4. *The Theory of Constitutional Revolutions and the Rule of Law.* A telling criticism of the theory of constitutional revolutions is that it fails to explain the rule of law. A constitutional system in which judges are permitted, if not required, to engage in revolutionary adjudication fails to achieve the impartial and neutral administration of the law. It also fails to preserve notice, predictability, and stability. According to this objection, courts cannot decide like cases alike because judges always can engage in revolutionary adjudication and, therefore, overturn precedents.[261] Deciding like cases alike appears to be an elementary requirement that any adequate constitutional theory must satisfy. Hence, since the theory of constitutional revolutions cannot satisfy this requirement, it must be rejected as an adequate constitutional theory.

The conception of the rule of law as consistency is ambiguous. It might refer to some elementary conception of consistency. Or it might refer to a deeper sense of consistency which would insist that each person be treated with equal dignity and compassion, even if that means violating elementary consistency in a revolutionary case. In normal adjudication, the rule of law is satisfied by elementary consistency. In revolutionary adjudication, however, the rule of law is satisfied better by this deeper sense of consistency than unitary

261. This objection also should apply to any theory that permits reversing precedent.

theories that adhere to elementary consistency. For example, *Brown* fails to satisfy the rule of law as elementary consistency, but succeeds in satisfying the rule of law in the deeper sense of consistency. The Court treated Ms. Brown with equal dignity and compassion by not treating her with elementary consistency. Consequently, unlike unitary conceptions, the theory of constitutional revolutions provides a more comprehensive approach to the rule of law, one that permits both elementary consistency in normal conditions and deep consistency in revolutionary circumstances.[262]

A corollary to this objection suggests that the theory of constitutional revolutions abandons reliance as an important legal value. According to this objection, law is designed to satisfy people's legitimate expectations and enable them to rely on the law in structuring their lives. Revolutionary adjudication is antithetical to reliance and, therefore, inadequate. But no one believes that reliance is absolutely dispositive in all cases. Especially in constitutional law, the value of reliance, though important, is not fundamental. In constitutional law, we do not want people to rely on unconstitutional statutes, or erroneous interpretations of the Constitution, or even currently accepted principles that are unjust. Instead, conservatives and progressives alike want the Court to correct mistakes of this sort. This is the reason *stare decisis* does not have the same significance in constitutional cases as it does in the common law. Overcoming constitutional crises is more important than reliance.[263]

5. *How Do Judges Identify Revolutionary Adjudication?* One might object to the theory of constitutional revolutions on the ground that it fails to provide judges with a procedure for identifying the need for revolutionary adjudication. According to this objection, if the appropriate adjudication always is contestable, then the theory of constitutional revolutions has limited value.

However, the theory of constitutional revolution provides a means of identifying the need for revolutionary adjudication. A judge can recognize the need for revolutionary adjudication when confronting a constitutional *crisis*. One type of constitutional crisis occurs when the Constitution and existing constitutional practice fail to resolve a social or political conflict. Systemic, prolonged con-

262. In revolutionary circumstances, deep consistency does not always occur, and when it does, it usually is contestable. *Brown*'s antidiscrimination principle, for example, arguably is consistent with American constitutional ideals and aspirations not with actual statutes or judicial decisions. These ideals and aspirations typically are contestable, and therefore the question whether *Brown* is deeply consistent with them is largely indeterminate.

263. Moreover, the theory of constitutional revolutions takes reliance seriously in normal adjudication.

troversy is sufficient evidence of crisis. Crises come in different sizes and shapes. A social or political controversy involving foundational political provisions can precipitate a crisis. Consequently, if a constitutional provision, such as the Due Process Clause is implicated by proposed legislation, and systemic, prolonged controversy occurs over how the provision should apply to the statute, then a constitutional crisis exists.[264] The Court then must engage in revolutionary adjudication; it must decide the issue despite having only limited explicit guidance from the Constitution itself or from constitutional practice.[265] After refining, perfecting, and stabilizing a revolution, normal adjudication returns to this area of law.[266]

A second type of constitutional crisis occurs when a conflict exists between different provisions of the Constitution, or when one or more judicial decisions conflict with other decisions or the Constitution itself. Usually, in these cases, there also must be some sort of extrinsic problem forcing the resolution of the constitutional crisis. A third type of constitutional crisis exists when a constitutional paradigm is *practically* indeterminate.[267]

Post-revolutionary adjudication occurs when a revolutionary decision is rendered and the scope and content of the decision is not obvious, or when additional social and political factors must be taken into account to determine the precise meaning of the revolutionary paradigm. In such cases, the revolutionary paradigm must be refined, perfected, and stabilized. There is no mechanical procedure for completing post-revolutionary adjudication. Depending upon a justice's political theory, the relevant paradigm will be expanded or restricted. When all justices agree, erroneously or not, that the revolutionary paradigm has been taken as far as it can or

264. The theory of constitutional revolutions might include a theory of judicial deference to the legislature. However, the larger the scope of such a theory, the less compatible it is with the theory of constitutional revolutions.

265. Sometimes deciding that a constitutional provision does not implicate a statute is just as revolutionary as deciding that it does.

266. *Griswold* and its progeny are paradigmatic examples of this phenomenon.

267. In my view, a constitutional paradigm is always *conceptually* indeterminate; in the appropriate circumstances, it can take on a meaning significantly different from its normal or default meaning. However, some paradigms are also *practically* indeterminate. For instance, many provisions of the Constitution, such as the Necessary and Proper Clause, the Commerce Clause, the Due Process Clause, and Equal Protection Clause, are conceptually and practically indeterminate. On the other hand, the requirement that a president be thirty-five years of age, is conceptually indeterminate, but practically determinate. One can imagine circumstances in which the presidential age requirement could be interpreted as "sufficient maturity," but because these circumstances probably will never occur, one can treat the age requirement as if it were conceptually determinate. For a discussion of constitutional indeterminacy, see Lipkin, *Indeterminacy, Justification and Truth in Constitutional Theory*, *supra* note 1, at 599-619.

should be taken, the paradigm will be settled and stabilized.[268]

As a postmodern constitutional theory, the theory of constitutional revolutions does not pretend to be systematic or algorithmic; nor does it pretend to guarantee a consensus as to controversial constitutional issues. However, the theory does provide a conceptualization—an aesthetic, a postmodern vision of American constitutionalism. This conceptualization enables us to understand the perennial competing constitutional positions better in order to achieve consensus when possible, and better understand our disagreements when consensus is not likely.

6. *The Banality of the Theory.* A final sweeping objection is that the theory of constitutional revolutions is banal because it merely describes what we must do anyway.[269] According to the banality objection, the theory of constitutional revolutions requires that sometimes we make conservative decisions, sometimes progressive, and sometimes we make decisions which attempt to make law coherent. Only if there exists a choice in the matter could this platitude prove illuminating. But since the theory of constitutional revolutions accurately describes constitutional change, we have reason enough to ignore the theory. The theory adds nothing of value to the practice. Consequently, it is illusory to think that revolutionary constitutional practice can be abandoned; the theory is an inevitable feature of human inquiry, and therefore, it is pointless to offer it as a competing theory which practitioners may or may not adopt.

The banality objection must be evaluated carefully. If the objection suggests that constitutional practice cannot function according to one paradigm alone, it merely reiterates the position of the theory of constitutional revolutions. But that doesn't mean practitioners cannot *believe* that they can adhere to one paradigm alone; and this belief may cause them to distort constitutional practice. It is doubtful that any legal practice can exclusively reflect only one jurisprudential conception, but the *belief* that it can entails using normal adjudication to decide some cases that should be decided by revolutionary adjudication, such as those involving a constitutional

---

268. *See, e.g.,* Bowers v. Hardwick, 478 U.S. 186 (1986).

Although the distinction between normal adjudication and revolutionary adjudication cannot be drawn mechanically, it is a useful analytic device for understanding American constitutional transformations. A constitutional law professor should try thinking of most lead cases in a case book as revolutionary cases, and subsequent cases in that section, including the note cases, as the product of post-revolutionary adjudication. This taxonomic distinction alone, I submit, illuminates the development of constitutional law for most students.

269. This is a version of an argument that Stanley Fish has made prominent. *See generally* STANLEY FISH, DOING WHAT COMES NATURALLY (1989).

crisis. Consequently, though the theory of constitutional revolutions describes how American constitutionalism functions, its value lies in encouraging self-conscious adherence to the practice described. When a judge views American constitutionalism through the lens of the theory of constitutional revolutions, she may perfect the revolutionary dimension of our practice more effectively than if she were to adopt an alternative theory.[270] Hence, it is not pointless to endorse the theory of constitutional revolutions. Although we cannot avoid revolutionary adjudication, we can do it much better when we do it self-consciously.

E. *How Constitutional Law Can Be Postmodern*

Constitutional law can be postmodern when it accounts for the complexity of constitutional paradigms and values. This complexity is best expressed by the theory of constitutional revolutions since the theory captures the dualist basis of constitutional adjudication from its inception. Thus, postmodern constitutionalism is designed to accommodate the proliferation of competing constitutional paradigms.[271] Postmodern constitutionalism is a form of inquiry that permits each practitioner to push forward with her own vision, while welcoming others with competing visions. It encourages the very sort of "discord" or "tower of Babel" that some commentators decry. Our constitutional culture is embarking on a new age in which certainty and necessity will cease being taken seriously, though the rhetoric of certainty and necessity, as well as other formalistic rationalistic devices, might persist in some quarters. This new age will take its myths less seriously than prior ages, and will insist that everything is *initially* an equally plausible myth.

We must not fail to enter this era of pluralism out of fear that humanity will not survive if confronted with diversity. Though no external guarantor exists to protect us, constitutional culture will not end if judges and practitioners no longer find the question of legitimacy interesting. The courts will not self-destruct if no one argues or writes books on the so-called "correct way" to read the Con-

---

270. One might argue that the theory of constitutional revolutions is correct only from an external perspective, and, therefore, permits, even requires, judges and other judicial actors to retain their traditional rhetoric. Thus, revolutionary adjudication can continue, even though justices think that they are doing something else, even retaining traditional conventions, concerning text or original intent. But the theory of constitutional revolutions is not merely a description of constitutional practice. Instead, it is an interpretive characterization of how constitutional law develops. As such, it is a *non sequitur* to insist that its goals can be met as well by retaining traditional terminology as by embracing the theory's alternative descriptions.

271. I have in mind movements such as critical legal studies, critical race theory, critical feminism, law and literature, law and economics, and so forth.

stitution,[272] or on combatting the countermajoritarian problem. Instead, both will continue, finding substantive controversies and perhaps substantive compromise to be the most important issues in postmodern constitutionalism.

CONCLUSION

The theory of constitutional revolutions can explain the development of American constitutional law. It also can instruct a judge on how to evaluate the competing claims of precedent and constitutional change. Further, the theory of constitutional revolutions, though not limited to progressive political theory, is more compatible with such theory than with conservative political theory. As such, the theory of constitutional revolutions provides an analytic device for explaining and justifying Supreme Court decisions. This analytic device also shows how judges of all political ideologies may use the same constitutional methodology and still arrive at very different substantive conclusions. When judges have different substantive values, the theory of constitutional revolutions explains why the same judicial methodology yields different constitutional conclusions.

The theory of constitutional revolutions exhorts us to end the internecine bickering over proper constitutional methodology. Instead, substantive battles should be waged without permitting methodology to restrict or expand the possible answers. Given the state of American constitutionalism, constitutional battles inevitably will reflect the syncretic conception of constitutional change incorporated into the theory of constitutional revolutions.

Judges should cease the interminable disputes over methodology which no one can win anyway, and instead fashion a public discourse reflecting the substantive values expressed in American co-

272. I am convinced that Robert Bork is an example of the perennial modernist. Bork still believes that a "[j]udicial philosophy is either correct or incorrect" with nothing more to say, as if such a belief settles some important issue, or has relevance to our practical deliberations over constitutional matters. *Crossfire* (CNN television broadcast, Mar. 26, 1993). It is difficult to understand why Bork persists in advancing this position when *he* is the first to insist that we cannot know or prove which *substantive* values are correct. Even if Bork's distinction between correct and incorrect judicial philosophies is conceptually sound, how can he believe that one can know or prove with any reliability when a judicial philosophy is correct or when a constitutional methodology is incorrect? Lastly, what can it mean in postmodern constitutionalism for a judicial philosophy to be correct or incorrect. Postmodern pragmatic constitutionalism advocates abandoning such notions and, instead, advocates the delineation of a rich suggestive picture of American constitutionalism that includes competing paradigms. The postmodern constitutionalist seeks to transcend the modernist framework, fixated on truth and method, and instead seek critical consensus and respectful compromise; and failing that, a delineation of the obstacles keeping these noble postmodern virtues beyond our reach.

nstitutionalism. Judges also should appreciate the fact that when this public discourse fails to resolve a constitutional issue, as it most certainly will in some cases, then at that point they must exercise creative judicial insight and decide the case according to their best conception of the ideals of American constitutional law. The theory of constitutional revolutions maintains that such revolutionary decisions are a fundamental feature of American constitutionalism and that judges do more harm than good when they insist otherwise.

This essay's central purpose has been to dispel a myth that constitutional interpretation is or should be restricted to a narrow range of constitutional conventions. Both traditional constitutional theory and Ackerman's interpretive history of constitutional moments perpetuate this myth in different ways. Instead, postmodern constitutionalism must seek new vistas, new ways of providing insight into the creation of constitutional meaning. The theory of constitutional revolutions is one such attempt of providing a constitutional aesthetic—a way of feeling critically comfortable with constitutional theory. Postmodern constitutionalism need not be a chaotic free-for-all. Instead, it can be an opportunity for integrating disparate values in order to confront the problems American constitutionalism will face in the next millennium.[273]

273. *See* Levinson, *supra* note 1, at 173.