

Remapping Constitutional Theory

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The time has come for constitutional theory to move beyond the stale argument between originalists and living constitutionalists. The declining significance of that debate provides a motivating backdrop for this Article, but it is not the main point of the discussion. Instead, this Article focuses on the possibility of remapping constitutional disagreement in a fresher, more generative, and more descriptively accurate fashion.

The discussion begins with another familiar dichotomy – the distinction between “judicial activism” and “judicial restraint.” Unfortunately, as employed in popular discussion and in some academic literature, this distinction is also confused and unhelpful. However, we can begin to make progress if we recognize that there are subdivisions on both the activism and restraint side of the ledger.

Judicial activists are divided between libertarians and interventionists. Libertarian activists want judges to be active to force or encourage the political branches to be more passive. In contrast, interventionist activists want judges to be active to force or encourage the political branches to be more active.

There is a similar if not precisely parallel divide on the judicial restraint side of the line. Some believers in judicial restraint are rule formalists. They believe in limiting the power of judges by insisting on rules that limit judicial discretion. In contrast, other believers in judicial restraint are deferentialists. They too believe in limiting the power of judges, but for them, the worry leads them to defer to decisions made by public and private nonjudicial actors.

This new map focuses our attention on questions that should matter even if they don’t or don’t always. The future of the republic does not turn on issues about linguistics and interpretive theory, especially when it is unclear whether resolution of these issues affects the results in real cases. The future of the republic might well turn on issues relating to the nature of liberty, the appropriate role for courts when reasonable people disagree about constitutional meaning, and the boundary between a public and private sphere.

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I. INTRODUCTION: MAPPING OUR CONSTITUTIONAL DISAGREEMENTS

How should we organize our constitutional disagreements?

For at least a generation, the debate has centered around an argument between “originalists” and “living constitutionalists.” Speaking broadly, originalists hold that judges should be bound by the text of the Constitution as understood at the time of the framing.¹ Living constitutionalists usually do not deny the relevance of constitutional text but insist that it should be given a modern meaning that is formed or supplemented by prudential and moral considerations, contemporary understandings, and the gloss provided by common law-like elaboration on the text.²

The argument has gone stale.³ Advocates have staked out their positions in sometimes numbing detail, and it is unlikely that further exploration of the theoretical intricacies of each position will yield additional insight. More significantly, the approaches have been refined and complexified in ways that make the differences between them at best marginal and at worst

¹ As one of its leading defenders has explained, “originalism” is a family of constitutional theories united by the “Fixation Thesis,” which holds that the original meaning of constitutional text is fixed at the time the provision was framed and ratified and the “Constraint Principle,” which holds that constitutional actors should be constrained by the original meaning. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6–7 (2015).

For important originalist texts, see generally *id.*; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 458 (2013); Lawrence B. Solum, *The Interpretation–Construction Distinction*, 27 CONST. COMMENT. 95 (2010); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (2d ed. Amy Gutman ed., 1997); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); John McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. COLLOQUY, 68 (2007); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

² According to David Strauss, living constitutionalism’s leading proponent, a “living constitution” is one that “evolves, changes over time, and adapts to new circumstance, without being formally amended.” DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 1 (2010).

Like originalism, living constitutionalism encompasses a family of different views. For some leading examples, see generally *id.*; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 163–84 (1997); JACK M. BALKIN, *LIVING ORIGINALISM* (2011); Morton J. Horowitz, *The Supreme Court 1992 Term—Foreword: The Constitution of Change: Legal Fundamentalism without Fundamentalism*, 107 HARV. L. REV. 30 (1993); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007); JAMES FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISM* (2015).

³ See, e.g., Brannon P. Denning, *The New Doctrinalism in Constitutional Scholarship and District of Columbia v. Heller*, 75 TENN. L. REV. 789, 794 (2008) (characterizing the debate between originalists and nonoriginalists as “stalemated (and stale)”).

nonexistent and unlikely to determine the outcome of any real case.⁴ More significantly still, participants in the debate have failed to connect it to the questions about constitutional law and theory that matter. Constitutional law is not about linguistics or interpretive theory. It is about the scope of individual rights, the roles of the various branches of government, and how to resolve disputes peacefully and justly in a country riven by huge ideological, class, racial, and cultural differences. Rather than focusing on abstract questions concerning interpretive method, constitutional theory should focus on the kind of country we want to live in. For these reasons, the time has come to end the originalism/living constitutionalism debate.

The declining significance of that debate provides a motivating backdrop for the discussion that follows, but it is not the main point of the discussion. Instead, this Article focuses on the possibility of remapping constitutional disagreement in a fresher and more generative fashion.

The discussion begins with another familiar dichotomy—the distinction between “judicial activism” and “judicial restraint.” Unfortunately, as employed in popular discussion and in some academic literature, this distinction is also confused and unhelpful.⁵ However, we can begin to make progress if we recognize that there are subdivisions on both the activism and restraint side of the ledger.

Judicial activists are divided between libertarians and interventionists. Libertarian activists want judges to be active to force or encourage the political branches to be more passive. They associate freedom with a private sphere protected from government regulation and look to an active judiciary to prevent government overreach. In contrast, interventionist activists want judges to be active to force or encourage the political branches to be more active. They associate freedom with government regulation of powerful pri-

⁴ Cf. Jeremy K. Kessler & David E. Pozen, *Working Itself Impure: The Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1884–85 (2016) (noting that originalism and other prescriptive theories “balloon with exceptions, metaprocedures, and side constraints” that “fail to simplify or constrain the work of decision; they actually dramatize the value-laden conflicts that the early proponents of these theories had promised to defuse”); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L. J. 713, 749–50 (2011) (“In practice, one cannot help but be struck by the extent to which the New Originalism’s decision-making process mirrors that of its nonoriginalist rivals.”); Daniel E. Farber, *The Originalism Debate: A Guide to the Perplexed*, 49 OHIO ST. L. REV. 1085, 1087 (1989) (noting that “moderate originalists may be difficult to distinguish from nonoriginalists”); Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMMENT 411, 432 (1998) (“Once strict originalism is taken off the table . . . there are no stakes left to arguing about the originalism question.”).

⁵ For use of the term in academic literature to mean different things, see, e.g., Thomas Merrill, *Originalism, Stare Decisis, and the Promotion of Judicial Restraint*, 22 CONST. COMMENT 271, 275 (2005) (associating judicial restraint with predictability); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedent*, 87 VA. L. REV. 1, 52 (2001) (associating judicial restraint with respect for constitutional text); David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL’Y. 137, 138 (2011) (associating judicial restraint with respect for precedent).

For an example of popular confusion and controversy over the concept, see, e.g., Ruth Marcus, *Where Did All the Conservative Hand-wringing over Judicial Restraint Go?*, WASH. POST. (Apr. 29, 2022).

vate interests and government assistance for disadvantaged groups. They look to an active judiciary to goad the political branches into intervention that accomplishes these objectives.

There is a similar divide on the judicial restraint side of the line. Some believers in judicial restraint are deferentialists. They want to restrain judges by requiring them to defer to decisions made by nonjudicial public and private actors. The actors might be government officials, but they might also be private individuals making personal choices in their market and nonmarket activities. Deferentialist judges believe in restraint because they are doubtful of their own authority, wisdom, and expertise and are happy to accept judgments made by political actors or by individuals acting in their private capacity.

In contrast, other believers in judicial restraint are rule formalists. They too believe in limiting the power of judges, but for them, the worry leads them to insist on rules that limit judicial discretion. The rules might be derived from constitutional text whether understood in an originalist or living constitutional fashion, but they need not be. They might also come from respect for prior decisions, from other forces that restrict judicial power, from other systems of thought, or from self-imposed guideposts. Rule formalists differ from deferentialists because the rules that formalists insist upon do not necessarily require deference. The rules might also require judges to make independent judgments that conflict with the judgments of government officials or private actors. Whereas deferentialists believe that judges should leave important decisions to others, rule formalists are happy to allow judges to decide so long as they don't make things up as they go along.⁶

Once one understands these divisions, it becomes evident that adherents to the differing versions of judicial activism on the one hand and judicial restraint on the other are often enemies rather than allies. Moreover, adherents to one version of judicial activism may be allied with adherents to another version of judicial restraint.

The relationship between these positions is complicated, but a few simple examples illustrate how the positions interact in real cases. Consider, first, the division between judicial activists. Historically, interventionist ac-

⁶ The divide between different schools of judicial activism on the one hand and different schools of judicial restraint on the other is similar, but not precisely parallel. Both interventionist and libertarian activists are oriented toward the conduct of the other branches of government, with interventionists favoring a judiciary that prods the political branches into more activity and libertarians favoring a judicial branch that restricts activity by the political branches. In contrast, as explained below, *see infra* notes 203-25 and accompanying text, believers in restraint want to restrict the power of the judiciary, but these restrictions do not necessarily imply a particular stance toward the political branches. Deferentialists may favor deferring to political decisions, in which case they are prepared to endorse government intervention, but they may also favor deferring to private decisions, in which case they are prepared to invalidate government intervention. Rule formalists may insist on following rules that limit government, but they may also insist on following rules that require government action.

tivism has been associated with the left, but more recently, some conservatives have embraced this stance.

*Carson v. Makin*⁷ provides an example. Maine granted tuition assistance to parents living in school districts that did not operate secondary schools. Parents had considerable freedom to send their children to private or public schools, but the assistance came with the qualification that the school must be “nonsectarian.”⁸ The Supreme Court held that this discrimination violated the First Amendment’s Free Exercise Clause as incorporated in the Fourteenth Amendment.⁹

As the Court emphasized, Maine could respond to the decision by terminating the assistance program for everyone,¹⁰ but no one expected the State to choose this course. Instead, the simplest way for it to respond was by becoming more active—that is, by extending the state subsidy to additional private schools.¹¹ Moreover, the Court’s suggestions for how Maine might avoid this outcome—expanding the reach of its public school system, spending more money on transportation, providing a combination of tutoring, remote learning and partial attendance, or operating state boarding schools—all involve more government activity.¹² Maine seems to have rejected all these suggestions, but instead has responded with an even deeper invasion into the private sphere. It has provided the subsidies to children attending sectarian schools, but also vowed to extend the protection of its Human Rights Act to all private schools benefiting from the tuition benefits.¹³ The bottom line, then, is that the Court’s decision encouraged the state to intervene more forcefully than it had before the decision was rendered.

The Court’s interventionist activism of *Carson* contrasts with its libertarian activism of *Wisconsin v. Yoder*,¹⁴ another education case in which a Free Exercise Clause claim prevailed. In *Yoder*, the Court invalidated Wisconsin’s compulsory education law as applied to Amish children of high school age whose parents had a religious objection to the further education of their children.¹⁵ Like the decision in *Carson*, *Yoder* recognized a claim based on religious liberty. But this time, the decision prohibited state intervention.

⁷ 142 S. Ct. 1987 (2022).

⁸ *Id.* at 1993–94.

⁹ *Id.* at 1997.

¹⁰ *Id.* at 2000 (“Maine chose to allow some parents to direct state tuition payments to private schools; that decision was not ‘forced upon’ it.”) (quoting *id.* at 2014 (Sotomayor, J., dissenting)).

¹¹ For a more detailed discussion of use of the equality requirement to encourage government intervention, see *infra* notes 73–84 and accompanying text.

¹² See 142 S. Ct. at 2000.

¹³ See *Statement of Maine Attorney General Aaron Frey on Supreme Court Decision in Carson v. Makin*, EIN NEWS (June 21, 2022), https://www.einnews.com/pr_news/577857221/state-ment-of-maine-attorney-general-aaron-frey-on-supreme-court-decision-in-carson-v-makin [<https://perma.cc/W5CZ-AW9D>].

¹⁴ 406 U.S. 205 (1972).

¹⁵ *Id.* at 234.

The holding meant that the State could no longer regulate some decisions about the education of Amish children. Whereas *Carson* put pressure on the State to become more active by intervening in otherwise private markets, *Yoder* forced the State to become more passive by withdrawing from a private realm of choice.

Religion cases also offer examples of the division between deferentialists and rule formalists on the restraint side of the ledger. Consider, for example, the majority and dissenting opinion in *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*.¹⁶ At the height of the COVID epidemic, New York Governor Andrew Cuomo issued an executive order limiting the number of persons who could attend religious services. Plaintiffs challenged the order on free exercise grounds, and the Supreme Court granted emergency relief enjoining the order.¹⁷ The Court's majority adopted a rule formalist stance. For these justices, judicial restraint meant adhering to a constitutional rule even when members of the political branches made policy arguments pushing in the other direction. While recognizing that "[m]embers of this Court are not public health experts," the Court insisted that "even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty."¹⁸

In contrast, some of the dissenters adopted the deferentialist version of judicial restraint. Writing for himself and Justices Kagan and Sotomayor, Justice Breyer stated that:

We have previously recognized that courts must grant elected officials "broad" discretion when they "undertake to act in areas fraught with medical and scientific uncertainties." . . . That is because the "Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States." . . . The elected branches of state and national governments can marshal scientific expertise and craft specific policies in response to "changing facts on the ground." . . . And they can do so more quickly than can courts.¹⁹

As these cases illustrate, there is a complex relationship between various forms of activism and restraint. For example, formalist restraint might be coupled with interventionist activism. Perhaps the rules in place give the justices no choice but to require state intervention in an otherwise private sphere. In *Carson*, the majority argued for interventionist activism, but that stance was supported by rule formalist restraint. The Court's majority

¹⁶ 141 S. Ct. 63 (2020).

¹⁷ *Id.* at 66–67.

¹⁸ *Id.* at 68.

¹⁹ *Id.* at 78 (Breyer, J., dissenting) (quoting *South Bay United Pentecostal Church v. Newsome*, 140 S. Ct. 6113, 613 (2020) (Roberts, C.J., concurring) (alteration omitted)).

thought that constitutional text left it with no option but to grant the plaintiff's claim.²⁰

At first, it might be thought that libertarian activism is inconsistent with deferentialist restraint. By insisting that Wisconsin could not force Amish students to attend school, the *Yoder* Court necessarily discounted the State's expertise on education.²¹ But that conclusion holds only if deferentialism is limited to respect for state authority. Often, libertarians argue for protection of a private sphere on the ground that government should defer to the wisdom of private judgments about, for example, child rearing²² or the allocation of goods and services.²³ When that is true, deferentialist restraint can provide a powerful ally for libertarian activism.²⁴

But although the Justices mixed and matched various forms of restraint and activism in the opinions discussed above, none of those opinions engaged with the originalism/living constitutionalism controversy. Of course, the positions of the various justices *overlapped* with the controversy. Interventionists and libertarians might each ground their stance on either original public meaning or on a living constitutionalist method of interpretation. Similarly, rule formalists might bind themselves to constitutional text as understood in either originalist or living constitutionalist fashion. Deferentialists might ground their deference in either originalist or living constitutionalist notions of separation of powers or the autonomy of a private sphere. But in each case, the actual resolution of the dispute does not turn on adopting a particular mode of interpretation, and the opinions of the Justices barely mention interpretive methodology.

Instead, what is at stake in these arguments are older and more important controversies. The controversies are about the appropriate role for government in a free society and about the appropriate role for courts when reasonable people disagree about constitutional meaning. A remapping of constitutional theory draws our attention to these disputes and away from arcane and overly theoretical debates about interpretive methodology.

²⁰ See 142 S. Ct. at 1997 (characterizing constitutional principles involved as “unremarkable” and “basic”) (quoting *Trinity Lutheran Church of Columb. v. Comer*, 137 S. Ct. 2012, 2021 (2017)).

²¹ See *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (“[T]he Amish have introduced persuasive evidence undermining the arguments the State has advanced to support its claims in terms of the welfare of the child and society as a whole.”).

²² See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 503–04 (1977) (“It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”).

²³ See, e.g., FREDERICH A. HAYEK, *HAYEK ON HAYEK: AN AUTOBIOGRAPHICAL DIALOGUE* 69 (1994) (arguing that “[the market is] a system of the utilization of knowledge which nobody can possess as a whole, which . . . leads people to aim at the needs of people whom they do not know, make use of facilities about which they have no direct information”).

²⁴ Put differently, all deferentialists believe in limiting the power of judges, but deferentialists are divided about the implications those limits have for encouraging public or private power. Deferentialists who favor deferring to public decisions may be allied with interventionist activists, while deferentialists who favor deferring to private decisions may be allied with libertarian activists. *But see infra* notes 244–45 and accompanying text.

It does not follow that views about these controversies motivate the Justices any more than the Justices are motivated by originalism or living constitutionalism. For apparently instrumental reasons, the Justices regularly and shamelessly switch between restraint and activism and between different versions of restraint and activism.²⁵ Sorting out the actual determinates of judicial behavior is an immensely complicated, probably impossible task and is well beyond the scope of this Article.²⁶

Why, then, should we bother to remap constitutional theory? The first, and most modest answer, is that obsessive focus on the originalism/living constitutionalism divide has blinded us to other controversies that complicate any descriptive or normative account of judicial behavior. This modest claim suggests that, at a minimum, the map I propose should supplement discussions of constitutional law focusing on interpretive methodology.

A second, less modest, claim is that remapping should displace those discussions. That is because my map focuses our attention on questions that *should* matter even if they don't or don't always. The future of the Republic does not turn on issues about linguistics and interpretive theory, especially when it is unclear whether resolution of these issues affects the results in real cases. The future of the Republic might well turn on issues relating to the nature of liberty, the appropriate role for courts when reasonable people disagree about constitutional meaning, and the boundary between a public and private sphere.

A final claim, not modest at all, is that focus on the restraint/activism divide might point us toward an overlapping consensus about the role of constitutionalism and judicial review in twenty-first century America. The map that I draw emphasizes reasonable disagreement rather than a supposedly uncontroversial mediating discourse. If the map is accurate, then it suggests that we should abandon the false claim that the "right" version of constitutional law—say, originalism or living constitutionalism—settles our disagreements. Once it becomes apparent that these disagreements are reasonable and more or less permanent and that we cannot use the Constitution to bludgeon our opponents into accepting our views, we are left with the stark necessity of finding a way to share physical space with these opponents. That reality, in turn, might lead to a new agreement that we will have to live with nonsettlement. Instead of depending on authoritarian claims rooted in constitutional commands to hold us together, a remapping might nurture nonlegal norms of tolerance and restraint. We might depend less on consti-

²⁵ See *infra* notes 248–49 and accompanying text.

²⁶ For an introduction to the huge literature devoted to this problem, see generally LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUDGES MAKE* (1993); JEFFREY A. SEGAL & HAROLD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993). For a skeptical view, see generally Harry T. Edwards & Michael A. Livermore, *Pitfalls in Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decision Making*, 56 *DUKE L.J.* 1895 (2009).

tutional law and more on what Lincoln called “mystic chords of memory” and the “better angels of our nature.”²⁷

Of course, there are other alternative maps that might also describe our practices and serve these ends. One might organize our constitutional disagreements along lines that emphasize the split between classicists and realists, between consequentialists and deontologists, between populists and progressives, between egalitarians and supremacists, between advocates of natural law and advocates of natural rights, between rebels and traditionalists, or between Democrats and Republicans. Each of these maps would also temper our obsession with interpretive theory, and I am open to all of them.

Another alternative approach might emphasize the gaps in the map I draw and the confusion those gaps generate. An external critic, bent on demonstrating the incoherence of our practices could, with work, demonstrate that the categories that I discuss here, as well as the categories emphasized by alternative maps, generate contradiction rather than resolution. For example, they might argue that all private ordering ultimately depends upon government power, thereby making the libertarian project incoherent. Alternatively, they might claim that government refusal to subsidize some private conduct while subsidizing other private conduct amounts to government action rather than inaction. A judicial order requiring equal subsidies might therefore provide an example of libertarian rather than interventionist activism. On occasion, I, myself have been an external critic who has made use of arguments along these lines, so I am also sympathetic to this kind of deconstruction. I have no problem with readers who busy themselves attacking my categories and distinctions and use my argument to demonstrate the incoherence of the entire project of American constitutionalism.

It turns out, then, that other maps are possible and that all maps are vulnerable to skeptical critique. Still, for (the perhaps declining number of) people whose point of view remains within our practices, the map I draw here has meaning and helps organize thought—or, at least, that is my argument. This article engages in internalist introspection. My claim is that for those still within our practices, the map I suggest clarifies issues that have

²⁷ Abraham Lincoln, President of the United States, First Inaugural Address (Mar. 4, 1861), https://avalon.law.yale.edu/19th_century/lincoln1.asp [<https://perma.cc/U2RX-AU5D>].

Although common, invocation of Lincoln’s appeal to unity paradoxically invites controversy. His reference to our supposedly shared history and to fellowship were designed to avoid a civil war that, perhaps, needed to be fought. No one should ignore the fact that, in the same address, he indicated a willingness to tolerate the continued existence of slavery if necessary to preserve the Union. *See id.* (stating that he had no objection to passage of the “Corwin Amendment” to the Constitution, which would have permanently entrenched slavery). If one believes today, as some believed then, that the American Union is no longer worth saving, or that a civil war is required to recreate a Union that is worth saving, then the map that I suggest here has little value. *Cf.* David French, *Take Threats of ‘National Divorce’ Seriously*, N.Y. TIMES, March 5, 2023; Sanford Levinson, *Perpetual Union, ‘Free Love,’ and Secession: On the Limits of ‘Consent of the Governed’*, 39 TULSA L. REV. 457, 462 (2004) (finding that Lincoln’s argument against secession in the First Inaugural amounted to “a series of question-begging, more-than-a-bit tendentious arguments that ultimately persuade only those who wish to be persuaded in the first place”).

been muddled and suggests solutions that have been overlooked.²⁸ These are good enough reasons to try something new.

The remainder of this Article proceeds in three parts.

Part Two sets the stage by elaborating on the assertion that the originalism/living constitutionalism debate has reached a dead end.

Part Three contains the heart of my argument. It sets out in more detail the divide between activism and restraint and between various versions of activism and restraint; illustrates the ways in which that divide has played out in the context of various doctrinal disputes; and connects the approaches to broader themes in legal and political theory.

Part Four explores the conclusions that might flow from this remapping. At a minimum viewing constitutional law through this lens provides a richer and more accurate account of the issues that divide us. More broadly, the clearer lens allows us to see areas where opposing sides in our constitutional disputes might agree.

II. THE END OF THE ROAD

Given my claim that too much ink has already been wasted on the originalism/living constitutionalism debate, it would defeat my purpose to provide a lengthy summary of the debate here. Instead of delving into all the theoretical intricacies already uncovered by participants in the debate, I offer a brief explanation for why our current maps have led us to a road that dead ends. I divide the discussion into the descriptive and normative claims made by the theories.

A. Descriptive Claims

One standard move in the originalism/living constitutionalism debate is to insist that the other side's theory lacks connection to our actual practice of constitutional law. On the one hand, originalists claim that the Supreme Court never admits to disobeying constitutional text and rarely suggests that the meaning of text changes over time.²⁹ On the other hand, living constitutionalists point to the rarity of discussion of original public meaning in Su-

²⁸ I am conscious of, but do not to address here, a large meta-question: Whether an internal perspective is worthy of discussion if one thinks that our practices are hopelessly corrupt and degraded. Cf. LOUIS MICHAEL SEIDMAN, FROM PARCHMENT TO DUST: THE CASE FOR CONSTITUTIONAL SKEPTICISM (2021).

²⁹ See Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 871 (2015) (emphasis in original) ("[I]f you go into court in a constitutional case and say 'well, Judge, the original Constitution is against us, but we superseded it through an informal amendment in 1937, you will lose.');" Baude, *supra* note 1, at 2371 (arguing that when there is conflict between original or textual meaning and another source of meaning, text and original meaning prevail and that across a large run of case that do not feature explicit clash of methodologies, Supreme Court never contradicts originalism).

preme Court decisions and to the willingness of justices claiming to be originalists to depart from that meaning when it serves their purposes.³⁰

These criticisms mostly miss the mark. Of course, a theory that has no connection with our practices is of no more than—well—theoretical interest.³¹ But most theorists intend their approach to have critical bite. So long as theories have some possibility of being implemented, real world departures from them are not refutations. Instead, they provide motivation to reform our practices.

My descriptive claim is different. I will argue that *even if the theories were adopted and faithfully followed by judges*, they would still fail to grapple with key controversies about our constitutional practice.

A useful theory of constitutional law must respond to three questions. First, as a substantive matter, what is the meaning of the Constitution and how should that meaning be ascertained? Second, if there is good faith and reasonable disagreement about the meaning or about the method by which the meaning should be ascertained, which institution should have final interpretive authority? Third, once meaning is authoritatively established, should the provision bind political and judicial actors?

At best, originalists and living constitutionalists respond only to the first question.³² They provide conflicting methods by which we can determine the Constitution's meaning. But many constitutional disputes concern the second and third questions.

For example, although the Supreme Court has asserted from the beginning that it has the authority to determine “what the law is,”³³ rational basis review in some equal protection, due process, free speech, and federalism

³⁰ See, e.g., STRAUSS, *supra* note 2, at 52–62 (arguing that most of First Amendment law is not grounded in text or original understanding); Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 412 (1987) (citing many cases where Supreme Court has departed from original text and understanding); Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 91–92 (2009) (arguing that conservative position on affirmative action contradicts original understanding of Fourteenth Amendment).

³¹ See Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 549 (1999) (“A good constitutional theory must fit either the written Constitution or surrounding practice. In the absence of a fit requirement, constitutional theory would lose its anchor in law and collapse into political theory.”).

³² An originalist or living constitutionalist might try to use these methodologies to answer the second question—that is, to determine which branch has final interpretive authority. Originalists might argue that the Constitution's original meaning dictates that a particular branch has final interpretive authority. Living constitutionalists might look to a combination of text, precedent, tradition, and moral considerations to answer the same question. But if the branches themselves disagree about either the choice of methodology or the implications of that methodology, then the settlement produced by interpretive theory is illusory. Because each branch will insist on an interpretive theory that supports its own power, we need criteria outside of interpretive theory to determine which branch prevails.

Neither originalism nor living constitutionalism can answer the third question. Proponents of both theories might claim that their approach provides an interpretive method that makes the Constitution *most* worthy of our respect and obedience. But because their approaches are devoted to uncovering the meaning of the Constitution, the approaches are ill equipped to engage with the logically prior question: whether *any* version of the Constitution demands our respect and obedience.

³³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 37, 177 (1803).

cases cedes final interpretive authority to the political branches at least so long as they act “rationally.”³⁴ One version of the political question doctrine³⁵ and much of the Court’s remedial jurisprudence³⁶ recognizes that political actors are not always bound by judicially enforced constitutional commands, and the extensive political science literature demonstrating that judges are often motivated by extra-legal considerations³⁷ suggests that something other than disinterested constitutional exegesis drives some outcomes. These cases suggest that the third question is also on the table. Yet, neither living constitutionalism nor originalism has much to contribute to the understanding of these phenomena.

Moreover, even if we focus on the first question, resolution of the originalism/living constitutionalism debate makes much less difference than many suppose. Uniform adoption of at least certain versions of either approach would leave a description of the practice of constitutional law mostly or entirely unchanged. Put more succinctly, even if implemented, the theories tend toward convergence in outcomes and, therefore, don’t much matter.³⁸

Jack Balkin’s famous if controversial³⁹ claim that *Roe v. Wade*⁴⁰ was rightly decided on originalist grounds⁴¹ provides the best empirical example supporting this assertion. From the beginning, the whole point of originalism was to provide a theoretical place to stand from which “activist” decisions like *Roe* could be attacked. If *Roe* is compatible with originalism, then originalism no longer has much point.⁴²

³⁴ See generally Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

³⁵ See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (holding that although political gerrymandering may violate the Constitution, the issue is nonjusticiable); *Nixon v. United States*, 506 U.S. 224, 237–38 (1993) (holding that issues about whether impeachment proceedings met the constitutional definition of a trial are nonjusticiable).

³⁶ See, e.g., *Egbert v. Boule*, 142 S. Ct. 1793, 1799–1800 (2022) (sharply limiting availability of implied cause of action for constitutional violations by federal officials); *Stafford United School Dist. v. Redding*, 557 U.S. 364, 368 (2009) (holding that the “qualified immunity” doctrine bars suit for damages against state officials for constitutional violation).

³⁷ For a useful discussion of the range of factors motivating judges, see generally Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 AM. REV. POL. SCI. 11 (2013). See also *supra* note 26.

³⁸ My claim is different from the assertion that these approaches have no “bite”—that is that they do not require particular outcomes in contested cases; cf. William Baude & Stephen Sachs, *Originalism’s Bite*, 20 GREEN BAG 2D. 103, 105 (2016). It may well be that adherents of the theories experience them as requiring judges to reach certain conclusions. (I do not address here whether the theories in fact require these conclusions, or what “in fact” might mean when we are talking about phenomenology). Assuming *arguendo* that the theories have “bite” in this sense, my argument is that the dispute between originalists and living constitutionalists is nevertheless inconsequential because respectable reasoning premised on a respectable version of the rival theory can produce the same conclusions.

³⁹ See, e.g., Nelson Lund, *Living Originalism: The Magical Mystery Tour*, 3 TEX. A&M L. REV. 31, 35 (2015).

⁴⁰ 410 U.S. 113 (1973).

⁴¹ See BALKIN, *supra* note 2, at 214–18 (2011); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT 291 (2007).

⁴² Cf. Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 213–14 (2012) (“If originalism can validate a constitutional right to abortion . . . conservatives who

For just this reason, many originalists have made more or less frantic efforts to prove that Balkin's claim is wrong.⁴³ Without engaging with those specific efforts here, I want to suggest reasons why his claim is at least plausible and why, more broadly, no Justice need change a substantive position she currently holds if she accepts either originalist or living constitutionalist dogma.

We can start by examining the claims of living constitutionalists. Because their theory rejects the supposed constraints provided by a text with a fixed meaning, they are vulnerable to the charge of letting judicial discretion run wild.⁴⁴ And because they are sensitive to this accusation, they have gone to some lengths to mold their theory in a way that meets the charge.

Most living constitutionalists are ready to concede that text almost always matters and is sometimes dispositive. In particular, where text is unambiguous and not open textured,⁴⁵ judges are bound to follow it.⁴⁶ I know of no living constitutionalist who asserts that Congress could lawfully mandate a presidential term of five years or authorize the election of twenty-five-year-old presidents.

The area of dispute, then, is limited to constitutional text that is more open textured. But here, too, living constitutionalists argue that judicial power is constrained. Even if not restricted to original meaning, judges are limited by their own prior decisions, by tradition, by social norms, and by common-law methodology.⁴⁷

How different are these claims from the claims advanced by originalists? The short answer is, much less different than one might suppose.⁴⁸ The

seek to undermine the legacy of the Warren and Burger Courts must go back to the drawing board.”)

⁴³ See, e.g., Lund, *supra* note 39, at 214–18; John O. McGinnis & Michael Rappaport, *Original Interpretative Principles as the Core of Originalism*, 24 CONST. COMMENT 371, 381 (2007).

⁴⁴ See, e.g., Robert Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L. Q. 695, 696 (1979) (arguing that nontextual approaches to constitutional law permit judges to create any rights that they want); William Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209, 225–26 (1983) (same).

⁴⁵ A rule is “open textured” if its meaning cannot be fully articulated, but instead must be revealed by the way in which the rule is followed. See Erik Claes, Wouter Devroe, & Bert Keirsbilck, *The Limits of the Law*, in *FACING THE LIMITS OF THE LAW* 14 (Erik Claes, Wouter Devroe, & Bert Keirsbilck eds., 2009); H.L.A. HART, *THE CONCEPT OF LAW* 128–36 (2d ed. 1994).

⁴⁶ See, e.g., David A. Strauss, *Legitimacy, “Constitutional Patriotism,” and the Common Law Constitution*, 126 HARV. L. REV. F. 50, 50 (2013) (“It is a fixed point of our legal system that the text of the Constitution is binding, in the sense that no argument about constitutional law can disregard the language of the text.”).

⁴⁷ See generally STRAUSS, *supra* note 2; PHILIP CHASE BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1984); Richard H. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1989).

⁴⁸ See e.g., ERIC SEGALL, *ORIGINALISM AS FAITH* 105–12 (2018) (arguing that inclusive originalism (described below) is indistinguishable from living constitutionalism); Steven D. Smith, *That Old Time Originalism*, in *THE CHALLENGE OF ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY* (Grant Huscroft & Bradley W. Miller eds., 2011) (arguing that modern forms of originalism risk collapse into living constitutionalism). For an argument that the

starting point for the discussion is the emergence of “inclusive originalism.” Originalists insist on the binding force of original understanding. But what if that understanding itself mandates resort to nonoriginalist methodology? The logic of originalism suggests that some form of nonoriginalism should then be allowed to enter through the back door. It turns out that some originalists have embraced this logic.⁴⁹

The most obvious practical consequence of inclusive originalism is to command respect for prior, nonoriginalist decisions. Many originalists agree that stare decisis was built into the original understanding of judicial power.⁵⁰ Most modern constitutional controversies are ensnared in a complex mesh of prior decisions. Given that fact, even originalists should hardly be surprised that most opinions in constitutional cases are preoccupied with the meaning of prior, often nonoriginalist precedent and say little or nothing about the meaning of the text itself.

The Supreme Court has frequently insisted that stare decisis is not an “inexorable command.”⁵¹ Some originalists would sharply limit the force of the doctrine, perhaps on originalist grounds.⁵² But it is far from clear that the original understanding of stare decisis supports this position.⁵³ Even if it did, the huge number of important prior decisions that rest on nonoriginalist methodology means that starting over would present a daunting task—more of a revolution than a course correction.⁵⁴ For that reason, even originalist judges often turn their attention to the meaning of prior decisions rather than to the meaning of the constitutional text.⁵⁵

more general tendency of rules to collapse into standards leads to the convergence of constitutional theories, see Kessler & Pozen, *supra* note 4, at 1870. See also *infra* notes 218–20 and accompanying text (discussing the tendency of rules to collapse into standards).

⁴⁹ See, e.g., Baude, *supra* note 1; William Baude & Steven E. Sachs, *Grounding Originalism*, 113 NW. L. REV. 1455, 1457 (2019); cf. Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Samuel Alito*, 87 G. W. L. REV. 507, 531–40 (2019) (identifying Justice Alito’s approach to constitutional law with inclusive originalism).

⁵⁰ For originalist defenses of stare decisis, see John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 525–31 (2000); John O. McGinnis & Michael R. Rapaport, *Reconciling Originalism and Precedent*, 103 NW. L. REV. 803 (2009); Baude, *supra* note 1, at 2360–61.

⁵¹ See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

⁵² See, e.g., Michael Stokes Paulsen, *The Inherently Corrupting Influence of Precedent*, 22 CONST. COMMENT 289, 289, 297 n.18 (2005); Gary Lawson, *The Constitutional Case against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23 23–24 (1993).

⁵³ See note 50, *supra*.

⁵⁴ See Merrill, *supra* note 5, at 272 (noting that “[b]y some accounts, 80 percent of the justificatory arguments in Supreme Court constitutional law opinions are grounded in precedent”); cf. David A. Strauss, *Common Law Constitutionalism*, 63 U. CHI. L. REV. 877, 883 (1996) (“It is the rare constitutional case in which the text plays any significant role. Mostly the courts decide cases by looking to what the precedents say.”).

⁵⁵ For a notable example, see *McDonald v. City of Chicago*, 561 U.S. 742 (2010). The issue before the Court was whether states were bound by the second amendment command concerning the right to bear arms. Writing for the Court, Justice Alito analyzed prior precedent concerning the incorporation of bill of rights protections under the Due Process Clause of the Fourteenth Amendment. He concluded that this precedent required inclusion of the second amendment among the incorporated rights. See *id.* at 760–81. In so holding, the Court rejected an argument advanced by petitioner, see *id.* at 758, and by Justice Thomas in a concurrence, see *id.* at 805–858 (Thomas, J., concurring in part and concurring in the judgment) that

This is just the focus that living constitutionalists also favor.⁵⁶ For them, as well as for originalists, prior decisions are crucial, albeit for different reasons. For living constitutionalists who favor the common-law model, the gradual evolution of judicial doctrine through elaboration on prior authority is what constitutionalism is all about. They too are concerned about when prior precedent should be followed and some of them, like their originalist rivals, would limit the force of stare decisis.⁵⁷ Moreover, many of the criteria they would use mirror the criteria favored by originalists even if living constitutionalists do not derive the criteria from original understanding.⁵⁸ The upshot is a convergence of originalist and living constitutionalist practice in the huge number of cases where outcomes are dictated by prior decisions.

Inclusive originalism leads to other points of convergence as well. It has played a crucial role in the diminished influence of earlier forms of originalism based on original intent or original expected application.⁵⁹ Early versions of originalism focused on what the Framers intended their words to mean⁶⁰ and on how they expected the words would be applied to specific

the Court should overrule its prior holding in the *Slaughter-House Cases*, 83 U.S. (16 Wall) 36, 74–83 (1872) and hold that the bill of rights applied to the states because of the command of the Fourteenth Amendment’s Privileges and Immunities Clause. Justice Alito acknowledged that today “many legal scholars” agreed that the Privileges and Immunities Clause, rather than the Due Process Clause, incorporated the Bill of Rights, *id.* at 757, but concluded that “[f]or many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding.” *Id.* at 758.

⁵⁶ See, e.g., Strauss, *supra* note 54, at 883.

⁵⁷ For a famous example, see *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) (arguing that the Court should not “turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation.”).

⁵⁸ For a good example of the overlap between originalist and living constitutionalist criteria for respecting precedent, compare *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833, 854 (1992) (opinion of O’Connor, Kennedy, & Souter, JJ.) (examining, among other factors, workability, reliance, and compatibility of decision with other aspects of law in applying stare decisis), with *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2265 (2022) (examining, among other factors, workability, reliance, and effects on other areas of the law in applying stare decisis). As these cases illustrate, however, the fact that originalist and living constitutionalist judges use the same criteria provides no guarantee that they will reach the same outcome.

⁵⁹ See, e.g., Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375, 386 (2013) (noting that “[o]riginalist theory has now largely coalesced around original public meaning as the proper object of interpretive inquiry”); Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 *CONLAWNOW* 235, 238–40 (2018) (rejecting original intention and expected application forms of originalism).

⁶⁰ See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 13 (1971) (discussing “framers’ intent”); Richard S. Kay, *Adherence to Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 *NW. L. REV.* 226, 229–36 (1988) (defending interpretation based on intent of framers); Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 *S. TEX. L. REV.* 455, 465–66 (1986) (defending a “jurisprudence of original intention”).

controversies.⁶¹ At least some modern originalists are ready to agree that, as an initial matter, interpretation of a text should turn on the answers to these questions.⁶² But inclusive originalism once again leads originalism to double back on itself. Inclusive originalists argue that the intent of the Framers was not to have the law determined by their intent. Instead, their meta-intent was to make the “original public meaning” of the text determinative.⁶³ Oddly, then, respecting the Framers’ intent regarding interpretation means not respecting their intent regarding outcomes. The Framers themselves thought that what ought to govern was not private interpretations or expectations, but the way in which the words were understood by ordinary readers at the time the words were written.

Critics of originalism have advanced trenchant criticisms of this “original public meaning” approach,⁶⁴ but, for present purposes, what matters is how it again produces a convergence with living constitutionalism. Once interpretation is freed from the intent of the Framers and the way in which they expected the language to be applied, many of the Constitution’s capacious and Delphic commands become ambiguous, vague, and open-textured. They are “almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh,”⁶⁵ in Justice Robert Jackson’s famous formulation.

The problem is especially acute once the “original expected application” approach is abandoned. At least in principle, historians might uncover whether the Framers of the Fourteenth Amendment or the general public expected the Amendment to outlaw segregated education or whether the generation that wrote and ratified the First Amendment thought that it permitted the regulation of obscenity. But if one focuses instead on the general aims of the amendments and acknowledges the possibility that the framing generation might be mistaken as to their application or not envisioned the application in a modern context, then many legal outcomes quickly become radically indeterminate.

There are two prominent solutions to this problem, both of which lead to convergence between originalism and living constitutionalism. First, the very open-texture of phrases like “freedom of speech,” “equal protection,” “due process,” “cruel and unusual punishment” and “the privileges and im-

⁶¹ See, e.g., Bork, *supra* note 60, at 13 (“If the legislative history revealed a consensus about segregated schooling . . . I don’t see how the Court could escape the choice revealed . . . even though the words are general and conditions have changed.”).

⁶² See, e.g., Larry Alexander & Saikrishna Prakash, “*Is That English You’re Speaking?*” *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004).

⁶³ See, e.g., Solum, *supra* note 59, at 240 (emphasis in original) (“Because the drafters of the constitutional text wrote for the public, the meaning that they intended to convey was the public meaning—the original public meaning of the constitutional text.”). But cf. John O. McGinnis & Michael Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 NW. L. REV. 751, 788 (2009) (concluding that “the interpretive rules that would have been deemed applicable to the Constitution conformed to original meaning originalism, original intent originalism, or something in between”).

⁶⁴ See, e.g., Berman, *supra* note 30, at 9–10, 36, 41 n.108 (2009).

⁶⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring in the judgment and the opinion of the Court).

munities of citizens” might push toward an inclusive originalist understanding of the text. After all, more specific language might have led to a public understanding that the clauses produced only certain limited and predefined outcomes. Instead, the vaguer, more open textured language might have produced a public understanding that the meaning of the text would evolve over time to meet the needs of a changed society.⁶⁶ If that is so, then the original public meaning dictates the same outcome favored by living constitutionalists.⁶⁷

The second solution focuses on the distinction between interpretation and construction, which has become a central preoccupation for many modern originalists.⁶⁸ Interpretation involves ascertaining the semantic meaning of text. Construction involves ascertaining the text’s legal effect. When semantic meaning is clear, originalists insist, then there is no gap between interpretation and construction. But sometimes meaning runs out. When interpretation fails to yield an answer, then originalism cannot dictate legal effect, and some other technique must be used.⁶⁹

Originalists are divided about the size of this “construction zone” that exists when meaning runs out and about the techniques that might be used to determine legal effect when one is in the zone.⁷⁰ If one rejects original intent and original expected application as applied to contemporary facts then, for reasons explored above, the zone might be very large. If one thinks that cases in the zone should be resolved by resort to sources like tradition, public morality, common law methods, and public policy, then the convergence between originalism and living constitutionalism is virtually complete.

Of course, not all originalists think that the construction zone is large, or even that it exists at all.⁷¹ And among originalists who recognize that the zone poses a problem, there is disagreement about how cases within it should be resolved.⁷² This point can be generalized. Debates among originalists on this and other matters discussed in this section are ongoing and vigorous. Originalists have an obvious motive to prove that their theory

⁶⁶ See Balkin, *supra* note 41, at 305 (“[T]he fact that adopters chose text that features general and abstract concepts is normally the best evidence that they sought to embody general and abstract principles of constitutional law, whose scope, in turn, will have to be fleshed out later on by later generations.”).

⁶⁷ See generally *id.* (arguing that originalism supports the result in *Roe v. Wade*).

⁶⁸ See, e.g., RANDY BARNETT, *RESTORING THE LOST CONSTITUTION* 120–31 (2d ed. 2014); KEITH WITTINGTON, *CONSTITUTION CONSTRUCTIONS: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 3–9 (1999); Solum, *supra* note 1 [*The Interpretation-Construction Distinction*].

⁶⁹ See Solum, *supra* note 1, at 100–108 [*The Interpretation-Construction Distinction*].

⁷⁰ Compare, e.g., McGuinness & Rappaport, *supra* note 63 (the construction zone does not exist), with Solum, *supra* note 1, at 458 [*Originalism and Constitutional Construction*] (the construction zone is “ineliminable”).

⁷¹ See, e.g., McGinnes & Rappaport, *supra* note 63 (arguing that there is no construction zone).

⁷² Compare, e.g., WITTINGTON, *supra* note 1, at 204–06 (arguing that cases in the construction zone should be resolved by the political branches), with Barnett & Bernick, *supra* note 1, at 5 (arguing that cases in the construction zone should be resolved by original spirit of constitutional text).

matters, and, unsurprisingly, they try to come up with versions of the theory that do not produce complete convergence.⁷³ The upshot is that originalists have turned toward bickering among themselves. The theory has begun to lose internal coherence even as it becomes more complex.⁷⁴

Because my intent is to provide only a thumb-nail sketch of the originalism/living constitutionalist divide, I will not discuss this intramural squabbling here. It is enough to see that, at least as the debate stands now, the convergence problem has not gone away. On the one hand, living constitutionalists are prepared to concede that text with clear meaning must be obeyed. On the other, many originalists are prepared to concede that original public meaning does not resolve disputes about text without clear meaning.

Perhaps in the future, living constitutionalists and originalists will each coalesce around a version of their theories that are both widely accepted and demonstrate that they make a difference. But at least for the present, versions of each theory are available that provide justification for virtually any decision that would be reached by versions of the other theory. Both originalists and living constitutionalists can make plausible arguments to support either side in debates about abortion, affirmative action, the scope of congressional powers, issues about free speech and religious liberty, and many other constitutional questions that have divided the Supreme Court.⁷⁵ Put differently, a living constitutionalist could plausibly claim to be an

⁷³ For some examples of originalist reaction to the threat of convergence, see Andrew Kopelman, *Why Jack Balkin Is Disgusting*, 27 CONST. COMMENT 177, 184 (2010).

⁷⁴ See Berman, *supra* note 30, at 15 (“[O]riginalism is not a single thesis but a large family of theses that encompasses even greater potential variability than is generally appreciated.”).

⁷⁵ Demonstrating the truth of this proposition with respect to all these controversies would take us too far afield. As a representative example, though, consider the controversy about affirmative action. Supporters of affirmative action who make originalist arguments have pointed to strong evidence indicating that the framers of the fourteenth amendment accepted classifications based on race and color-conscious remedies. See, e.g., CASS SUNSTEIN, *RADICALS IN ROBES* 131–38 (2005); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985). But originalist opponents of affirmative action have available responses. They might argue that the historical record is not as clear as allies of affirmative action suggests. See, e.g., Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71 (2013). Moreover, even if affirmative action’s supporters have the history right, originalist opponents of affirmative action need not despair. They can contend that the original public meaning of the fourteenth amendment guaranteed equal citizenship without regard to race. Once we jettison old-fashioned intended application originalism, it is at least plausible that under modern conditions race consciousness defeats this objective. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 371–74 (2003) (Thomas J., dissenting) (arguing that affirmative action harms African American students). Alternatively, they might argue that the open texture of the fourteenth amendment leaves questions about affirmative action in the construction zone, to be resolved, perhaps, by the “spirit” of the Amendment or by interpretations of our traditions, prior precedent, and public policy considerations. Opponents will argue that these considerations point against affirmative action, while supporters will argue the opposite. That argument tracks the arguments for and against affirmative action that would be advanced by living constitutionalists. For them, the issue should be resolved by some mixture of text, public policy, morality, and tradition. It is obvious that these sources could be mobilized both to support and to oppose affirmative action.

originalist, and an originalist could plausibly claim to be a living constitutionalist without giving up anything in terms of actual results reached in cases. So long as that fact remains true, the abstract debate between originalists and living constitutionalists has little connection to actual constitutional practice.

B. Normative Claims

Suppose contrary to everything that I have said above, originalism and living constitutionalism provide distinctive and important modes of constitutional interpretation. That descriptive claim hardly matters unless one can offer convincing normative arguments for the modes of interpretation. The mere fact that the Constitution is written tells us nothing about how one should read it. Should it be read the way we read a contract or a will? The way we read a recipe or an owner's manual? The way we read a poem or novel?

To answer these questions, we need a normative theory. Demonstrating that a social practice is coherent and distinctive is a necessary first step in the argument, but proponents must also demonstrate that it is a *desirable* social practice, or at least more desirable than alternative practices.⁷⁶

On a superficial level, living constitutionalists have an obvious response to this challenge: Living constitutionalism is normatively attractive because it reaches normatively attractive outcomes. A method of interpretation responsive to modern needs and attentive to moral concerns, but that is tempered by respect for tradition and text is likely to contribute to human welfare.

This response will be completely satisfying for people who endorse the outcomes that living constitutionalism produces. The difficulty, of course, is that not everyone is satisfied with those outcomes. Living constitutionalism, like originalism, purports to be a neutral method of interpretation. But its open texture and use of a wide variety of modalities leaves it vulnerable to the charge that it can be and is manipulated so as to implement a particular and controversial political program.

Originalists face a challenge that mirrors the problem for living constitutionalists. They must explain why we should endorse their approach despite the fact that it often produces normatively unattractive results. For example, at least some forms of originalism might lead to officially segregated public schools, second class citizenship for women, and sharply limited free speech rights.⁷⁷

⁷⁶ Cf. Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1382 (1990) (arguing that "the people are entitled to ask what the benefits to them of originalism would be" and that they will "find no answers" in Robert Bork's book, *The Tempting of America* (1990))

⁷⁷ See, e.g., 100 CONG. REC. S18519 (1987) (statement of Senator Kennedy) (arguing that "Robert Bork's America" would be a place where there were "back alley abortions," segregated lunch counters, police abuse, little access to federal courts, widespread censorship, and school children unable to learn about evolution); Cass R. Sunstein, *Of Snakes and Butterflies: A Reply*,

Some originalists have tried to counter these assertions with defensive maneuvers—inventive and sometimes counterintuitive arguments supposedly derived from the original understanding that support current doctrine concerning matters like racial segregation⁷⁸ and gender equality.⁷⁹ These arguments tend to push originalism toward the convergence with living constitutionalism described above.

But originalists have available another response that might allow them to turn the tables on living constitutionalists. The response is grounded in the distinction between substantive and political justice. The problem, originalists might claim, is that Americans are divided on questions of substantive justice and will remain divided for the foreseeable future. The only hope for settling our disputes in peaceful fashion is to forsake substantive justice for political justice. Political justice entails settlement of our substantive disagreements in a fashion that is neutral and fair and that the losers are therefore bound to accept even if their substantive ambitions are thwarted.⁸⁰

If this argument is right, then objections to originalism because it sometimes produces substantively unjust outcomes unintentionally give the game away. Originalists might claim that these objections reveal living constitutionalism for what it is—a cover for giving a constitutional imprimatur to a set of predetermined substantive outcomes. In contrast, the fact that originalism sometimes produces substantive outcomes that originalists oppose is a strength of the theory.⁸¹ These departures demonstrate that originalism is truly neutral and that it therefore should be acceptable to people with different views of substantive justice.

If originalists rely on this response, it creates two problems for them. First, it is far from clear that they can maintain the discipline that the response requires. At least potentially, acceptance of the argument means swallowing without complaint the most serious sorts of substantive injustice.⁸² The very fact that many originalists attempt to slide off the implications of their theory by confessing to faintness of heart⁸³ or by adopting, shall

106 COLUM. L. REV. 2234, 2240 (exploring the possibility that originalism “would permit race and sex discrimination by the national government; eliminate the right to privacy; allow racial segregation at the state level; permit states to establish their own religions; require abolition of the administrative state; or for that matter doom most Americans to short and miserable lives”); Richard H. Fallon, Jr., *Constitutional Precedent Viewed through The Lens of Hartian Positivist Jurisprudence*, 86 N.C. REV. 1107, 1113 (2008) (noting that social security and paper money might be unconstitutional if one used an originalist approach.).

⁷⁸ See generally Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL’Y 457 (1996).

⁷⁹ See generally Steve G. Calabresi & Julia T. Richert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011).

⁸⁰ For the standard defense of this position, see JOHN RAWLS, *POLITICAL LIBERALISM* (expanded ed. 2005). For a legal version of the same idea that predates Rawls, see HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 4* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

⁸¹ Cf. Solum, *supra* note 59, at 251–68 (arguing that originalism leads to many progressive outcomes).

⁸² See *supra* note 77.

⁸³ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (confessing to being a “faint-hearted” originalist and stating that he would not vote to uphold

we say, inventive versions of the original understanding⁸⁴ demonstrates that they are reluctant to accept the full implications of their own approach.⁸⁵ But suppose counterfactually that originalists were willing to go all in.

The second problem they face is explaining why they should. Granted, we need a method for resolving our substantive disagreements. Why choose *this* method, which, after all, binds us to judgments made exclusively by relatively wealthy white men hundreds of years ago about a society radically different from our own? We might instead opt to resolve disagreement by decisions made through unfettered democracy, by wise modern statesmen (perhaps sitting on the Supreme Court), or, more fancifully, by interpretation of the French Constitution or of the teachings of Jesus, Karl Marx, Jeremy Bentham, or Oprah Winfrey.

If there were widespread acceptance of originalism as the exclusive method of resolving our constitutional disputes, that fact alone might provide an argument for the theory.⁸⁶ Perhaps occasional instances of substantive injustice are worth the price for a theory that, rightly or wrongly, all Americans or almost all Americans accept. But the very existence of the argument between originalists and living constitutionalists, the fact that Supreme Court Justices regularly utilize nonoriginalist methodology, and the vigorous disputes within each approach refute the assertion that we have reached consensus concerning constitutional methodology.⁸⁷ Instead of settling our disagreements, preoccupation with the originalist/living constitutionalist debate merely refocuses them.⁸⁸

In recent years, some originalists have tried to sidestep these difficulties by claiming that, originalism *just is* what it means to interpret a text⁸⁹ and

flogging as punishment even if this were the original meaning of the Constitution). Justice Scalia seems to have subsequently repudiated this view. See Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG (Oct. 6, 2013).

⁸⁴ See *supra* notes 78–79 and accompanying text.

⁸⁵ Cf. Posner, *supra* note 76, at 1373 (criticizing Robert Bork for “continually reassur[ing] the reader that originalism does not yield ghastly results, while at the same time denouncing judges who are ‘result-oriented.’”).

⁸⁶ Even if there were such an agreement, it does not follow that originalism would then be “our law,” that could be dislodged only through revolution. See *infra* notes 90–94 and accompanying text. Widespread acceptance of originalism, assuming it existed, would provide an argument for the practice, but it would be no more than an argument. The argument might be overcome if there were good enough reasons for abandoning the practice.

⁸⁷ See Fallon, *supra* note 31, at 547–48 (1999) (arguing that “[a]s originalists candidly admit, originalist principles cannot explain or justify much of contemporary constitutional law. Important lines of precedent diverge from original understandings. Judges frequently take other considerations into account. Moreover, the public generally accepts the courts’ non-originalist pronouncements as legitimate —not merely as final, but as properly rendered”).

⁸⁸ Cf. Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1355–60 (2017) (arguing that pervasive disagreement about interpretive method refutes claim that originalism is “our law”).

⁸⁹ See, e.g., Lino Graglia, “Interpreting” the Constitution: Posner on Bork, 44 STAN. L. REV. 1019, 1024 (1992) (emphasis in original) (“An entirely sufficient reason for originalism, is that interpreting a document means to attempt to discern the intent of the author; there is no other ‘interpretive methodology’ properly so called.”).

that, as a matter of contemporary, contingent, social fact, originalism *happens to be* our law.⁹⁰

I confess to some doubt as to what these assertions are meant to establish. At least two of the scholars who make them label their project as “positivist,”⁹¹ so perhaps they are doing no more than describing our word usage without suggesting any prescription that follows from that usage. If so, their work self-evidently does nothing to aid the normative case for originalism, and discussion of it belongs in the previous section.⁹²

I cannot escape the suspicion, though, that the claims are meant to take advantage of the favorable reputations of “interpretation” and, especially, of “the rule of law” to drive readers to a normative conclusion.⁹³ They seem to be suggesting that *because* interpretation just is originalism and *because* originalism just happens to be our law, therefore we should be originalists.

If my suspicions are correct, then these advocates have fallen into the trap of relying on what H.L.A. Hart once called “definitional stops.”⁹⁴ They attempt to resolve normative disagreement by what amounts to an undefended command embodied in a definition. There are two ways to see the problem with this effort, both of which end up in the same place.

First, one might attack the definitions themselves. Definitions are socially constructed artifacts that meet human needs. If these definitions are leading to bad outcomes, then, at least in principle, humans have the power to change them.

Second, if we leave the definitions fixed, we can decouple them from the normative conclusions said to flow from them. H.L.A. Hart himself endorsed this position regarding his definition of “law.” He thought that his formulation captured what the social practice consisted of, but he maintained that his definition provided no external reason for people to feel bound to obey the “law.”⁹⁵ The same point can be made about “interpretation.” If interpretation “just is” the recovery of original semantic meaning,

⁹⁰ See Baude, *supra* note 1; Sachs, *supra* note 29; Baude & Sachs, *supra* note 49.

⁹¹ See Baude & Sachs, *supra* note 49, at 1463 (characterizing their project as examining what our practices are).

⁹² For a careful and fully worked-out argument that interpretive prescriptions must be morally justified and that the positivist argument for originalism therefore leads to a dead end, see generally Evan D. Bernick, *Eliminating Constitutional Law*, 67 S.D. L. REV. 1 (2022); see also Jeffrey A. Pojanowski & Kevin Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 98 (2016) (arguing that “[t]o be sound and complete, a positive-law argument for constitutional originalism must also have firm conceptual and normative grounds”).

⁹³ For example, Professor Sachs writes that “To be a nonoriginalist, on this Article’s view, is to say of some new rule: ‘Maybe Rule X *wasn’t* lawfully adopted; maybe it *can’t* be defended under preexisting law; but I’m okay with that, and so is America.’” *Supra* note 29, at 822. [*Originalism as a Theory of Legal Change*]. It seems pretty clear that Professor Sachs is not “okay with that” and that he doesn’t think that America is either.

⁹⁴ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 5 (1995).

⁹⁵ See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 618 (1957) (attacking the “overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, was conclusive of the final moral question: ‘Ought this rule of law to be obeyed?’”).

then so much the worse for interpretation. If “interpretation” of the Constitution leads to evil outcomes, then we should abandon the practice or apply it to a different text.

In summary, both living constitutionalism and originalism leave crucial normative questions unresolved. Living constitutionalists must respond to the charge that their theory is gerrymandered to lead to the “right” substantive outcomes. Originalists must explain why we should accept their approach to political justice when it leads to the “wrong” substantive outcomes. Adherents of both theories try to sidestep these problems by arguing that the theories don’t require these outcomes after all. But the very effort to demonstrate that fact pushes them into the trap of descriptive convergence.

All of which leads to an obvious question: Can we do better? The next Part responds to this challenge.

III. REMAPPING CONSTITUTIONAL THEORY

In this part, I examine how our constitutional disputes would look if we remapped them along the lines that I have suggested above. I have organized the discussion by examining separately the assertions and problematics associated with the rival forms of activism and restraint. To be clear, my claim is not that any of the approaches avoids contradiction and incoherence. Those problems come with the territory that I map, and readers so inclined might choose to focus on them. Nor do I intend to take sides in the disputes among advocates of the different approaches. Instead, my claim is that these approaches respond to all three, and not just one, of the questions a constitutional theory must answer, that they better describe the concerns of actual practitioners of constitutional law, and that they better reveal what is really at stake in our constitutional disputes.

A. *Libertarian Activism*

Libertarian activism captures constitutional law’s standard story. According to that story, Supreme Court decisions enforcing constitutional rights protect against an overweening government that threatens private liberty and property.⁹⁶ Decisions defending property rights,⁹⁷ freedom of contract,⁹⁸ free speech⁹⁹ and religion rights,¹⁰⁰ the rights of minorities,¹⁰¹ the

⁹⁶ The locus classicus is JOHN LOCKE, TWO TREATISES OF GOVERNMENT 141–61 (1823), available at <https://www.yorku.ca/conninel/courses/3025pdf/Locke.pdf> [<https://perma.cc/N564-NFLK>]. For some modern elaborations from the right side of the political spectrum, see, e.g., BARNETT, *supra* note 68; RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). For a left/center account, see generally Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008).

⁹⁷ See, e.g., *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987).

⁹⁸ See, e.g., *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

⁹⁹ See, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964).

¹⁰⁰ See, e.g., *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407 (2022).

rights to reproductive freedom¹⁰² and family formation,¹⁰³ procedural due process rights,¹⁰⁴ the right to bear arms,¹⁰⁵ and rights associated with criminal prosecution like the privilege against self-incrimination,¹⁰⁶ protection against unreasonable searches and seizures,¹⁰⁷ and the right to counsel¹⁰⁸ all fit under this rubric. On at least some accounts, judicially enforced principles of federalism¹⁰⁹ and separation of powers¹¹⁰ are also rooted in libertarian activism.

The standard story is in some tension with the motives of the original Framers, who wanted to *strengthen* the power of the federal government.¹¹¹ Still, at least some of the decisions find support in the text of the Bill of Rights and the Fourteenth Amendment. They also comport with some versions of the “evolving standards”¹¹² favored by living constitutionalists.

Importantly, however, neither originalism nor living constitutionalism fully supports libertarian activism. Many rights that libertarian activists want to protect—for example, the rights to unconventional family formation,¹¹³ to protection against regulatory takings,¹¹⁴ to First Amendment protection for money spent on political speech,¹¹⁵ and to reproductive freedom¹¹⁶—are not grounded in the original understanding, at least in any obvious way. Their

¹⁰¹ See, e.g., *United States v. Carolene Products Co.*, 344 U.S. 144, 152 n. 4 (1938).

¹⁰² See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 U.S. 2228 (2022).

¹⁰³ See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

¹⁰⁴ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970).

¹⁰⁵ See, e.g., *District of Columbia v. Heller*, 554 U.S. 520 (2008).

¹⁰⁶ See, e.g., *Miranda v. Arizona*, 383 U.S. 903 (1966).

¹⁰⁷ See, e.g., *Johnson v. United States*, 333 U.S. 10 (1948).

¹⁰⁸ See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁰⁹ See generally Richard A. Epstein, *Exit Rights under Federalism*, 55 L. & CONTEMP. PROB. 147 (1992) (arguing that federalism protects individual rights).

¹¹⁰ See *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) (“The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom.”).

¹¹¹ See, e.g., MICHAEL J. KLARMAN, *THE FRAMERS’ COUP* 11–72 (2016).

¹¹² See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (holding that the Eighth Amendment to the Constitution “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society”).

¹¹³ See *Obergefell v. Hodges*, 576 U.S. 644, 690 (2015) (Roberts, C.J., dissenting) (arguing against a constitutional right to same-sex marriage on the ground that “[t]here is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way”).

¹¹⁴ See John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1290–91 & n.254 (1996) (concluding that the original understanding of the Fifth Amendment’s Takings Clause did not apply to regulatory takings); cf. Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729 749–53 (2008) (concluding that the original understanding of the Fifth Amendment did not include regulatory takings, but that the original understanding of the Fourteenth Amendment may have included them).

¹¹⁵ See *Citizens United v. Federal Election Comm’n.*, 558 U.S. 310, 428 (2010) (Stevens, J., concurring in part and dissenting in part) (arguing that protection for corporate campaign contributions was contrary to the original understanding); cf. *id.* at 385–93 (Scalia, J., concurring) (responding to Justice Stevens’s argument).

¹¹⁶ See *Dobbs v. Jackson Women’s Health Org.*, 142 U.S. 2228, 2242 (2022) (noting that “[u]ntil the latter part of the 20th century, [the right to an abortion] was entirely unknown in American law”).

existence would have come as a surprise to the drafting generation. For these reasons, libertarian support for them is in some tension with originalist methodology.¹¹⁷ At least some of the rights also pose a problem for living constitutionalists, who claim, for example, that some gun rights and property rights are inconsistent with the needs of modern America.¹¹⁸

Instead of flowing from a particular interpretive technique, libertarian activism embodies a widely held political theory. That theory emphasizes the pre-political nature of individual rights, the obligation of the government to protect them, and the risk of unconstrained government power.¹¹⁹ As the existence of unenumerated rights demonstrates, these concerns are free standing; they might be, but need not be, tied to a particular constitutional text or to a particular interpretive technique.

At one time, it seemed that our experience with *Lochner v New York*¹²⁰ in particular and substantive due process in general had permanently discredited libertarian activism. But reports of its demise were grossly premature. On the modern left, it provides important support for the rights to reproductive freedom and gender and sexual autonomy. On the modern right, it bolsters the use of free speech as a deregulatory tool, the protection of property rights, and the defanging of the administrative state.

Both sides find libertarian activism attractive in part because it skirts the normative problems with originalism and living constitutionalism. Both of these interpretive approaches purport to be substantively neutral. Their supporters must therefore convince skeptics that the theories should be accepted even when they produce “bad” outcomes. Libertarian activists avoid this problem because they are prepared to engage in normative discussion on the merits. The best argument for libertarian activism is not that the approach is “neutral” as between various political theories. Instead, the approach stands or falls on the persuasiveness of substantive, libertarian political theory, and libertarians stand ready to offer a defense for that theory. Their approach therefore directs our attention to where it belongs: to the attractiveness of libertarian theory more generally.

In this way, libertarian activism responds to not just the first, but also the second and third questions a constitutional theory should answer. Who should have interpretive authority when people reasonably disagree about constitutional meaning? The branch that is most likely to protect rights in a private sphere. Libertarian activists believe that that branch is the judiciary because courts are less subject to majoritarian constraint and, therefore, less

¹¹⁷ The tension might be softened by rejection of original expected application as the appropriate standard or by resort to constitutional construction *supra* notes 48–70 and accompanying text. But as discussed above, *id.*, *supra*, these evasive maneuvers run the risk of destroying the distinction between originalism and living constitutionalism.

¹¹⁸ See, e.g., *New York State Rifle & Pistol Assn, Inc. v. Bruen*, 142 U.S. 2111, 2164–68 (Breyer, J., dissenting) (arguing in favor of limiting right to bear arms because of contemporary problems with gun violence).

¹¹⁹ See *supra* note 96.

¹²⁰ 198 U.S. 45 (1905).

likely to hold private rights hostage to public pressure.¹²¹ But once again, libertarian activism stands or falls on the persuasiveness of this claim. If courts are not the best guarantors of rights in a private sphere, then libertarian activism fails on its own terms.

Once constitutional meaning is ascertained, should it be binding on us? Yes, libertarian activists claim, because, correctly understood, the Constitution embodies libertarian principles, and libertarian activists are prepared to defend those principles on the merits.¹²²

Of course, this answer brackets the question of how constitutional meaning is to be ascertained. But libertarian activists have a candid, substantive response to this problem as well: Meaning should be ascertained by the method most likely to make the Constitution worthy of obedience—that is by the method that is most protective of a private sphere. Some libertarian activists believe that originalism provides such a method,¹²³ while others put their faith in living constitutionalism.¹²⁴ But this disagreement is about empirics rather than fundamental principle. Libertarian activists are united in thinking that the choice between interpretive methodologies should be made instrumentally to advance the cause of libertarianism.

At first, it might seem that the most powerful challenge to libertarian activism comes from the two versions of restraint— deferential and formalist. In the sections below discussing these forms of restraint, I suggest some reasons why the argument for restraint might indeed threaten libertarian activism.¹²⁵ But for present purposes, it is important to see that the relationship between libertarian activism and restraint is complex and that there are methods for resolving the most obvious tensions between them.

1. *Libertarian activism and deferentialism.* Consider, first, the argument from deferential restraint. The argument is captured in Chief Justice Roberts' accusatory question offered in response to the Supreme Court's libertarian activism in defense of gay marriage: "Just who do we think we are?"¹²⁶ That question implicitly invokes doubt about the special wisdom or knowledge of Supreme Court Justices. It is similarly captured by Justice Scalia's response to the libertarian activist assertion of a right to die: "the point at which life becomes 'worthless,' and the point at which the means necessary

¹²¹ See, e.g., *Chambers v. Florida*, 300 U.S. 227, 241 (1940) ("Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.").

¹²² See Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611, 640 (1999) (arguing that the test for the legitimacy of the American Constitution is whether it "regulates the lawmaking powers it authorizes in such a manner as to provide an assurance that validly-made laws are necessary and will not violate rights" and that the Constitution as originally understood passes this test); cf. Pojanowski & Walsh, *supra* note 92, at 126–45 (grounding respect for the Constitution as law on its coherence with the natural law tradition of promoting the common good).

¹²³ See Barnett, *supra* note 122.

¹²⁴ See generally Horowitz, *supra* note 2.

¹²⁵ See *infra* notes 244–45 and accompanying text.

¹²⁶ *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting).

to preserve it become ‘extraordinary’ or ‘inappropriate,’ are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory.”¹²⁷

This criticism misunderstands the argument advanced by libertarian activists. The criticism would be valid if libertarian activists claimed that judges should decide whether gay marriage is desirable or when a life is no longer worth living. If that were true, then skepticism about the wisdom of judges would have bite. But in fact, the whole point of libertarian activism is to resist collective judgments of this kind, whether by the judiciary or by the political branches. Instead, libertarian activists insist that these matters should be left to individuals to decide.

When the Supreme Court upholds a religious liberty claim advanced by, say, an orthodox Jew, it is not asserting that orthodox Judaism is the “correct” religion. Instead, it leaves the matter to private choice. Similarly, a court that upheld a right to gay marriage or to determine the timing of one’s own death does not establish official government policy regarding the wisdom of these decisions. Instead, it leaves them to people “picked at random from [a] telephone directory,” albeit in their individual, rather than collective capacities.

It turns out, then, that there is a way to align libertarian activism with deferential restraint. Individual choice is appropriate precisely because courts, like the rest of government, have no special knowledge about, say, marriage or death. Because they have no special knowledge, they should defer to individual judgments on these subjects.

2. *Libertarian activism and rule formalism.* What about the argument of rule formalists? Critics of libertarian activism frequently complain that the Justices are engaged in ad hocery and making up rights with no grounding beyond their personal preferences.¹²⁸ Judges, they insist, should be restrained in the sense that they should be able to point to an external and uncontroversial source for their decisions.

Assuming arguing that this form of restraint is attractive, it does not follow that it necessarily defeats the claims of libertarian activists. On the contrary, an unwillingness to use improper discretion can force a reluctant judge into activism. Consider in this regard Justice Kennedy’s pained concurrence in *Texas v. Johnson*,¹²⁹ a case where the Court invalidated on free speech grounds a Texas statute that prohibited flag desecration. Kennedy thought that the flag encapsulated “beliefs Americans share, beliefs in law

¹²⁷ *Cruzan v. Director, Missouri Dept. of Pub. Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).

¹²⁸ See, e.g., *Obergefell*, 376 U.S. at 714 (Scalia, J., dissenting) (“This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.”).

¹²⁹ 491 U.S. 397, 420 (1989) (Kennedy, J., concurring).

and peace and that freedom which sustains the human spirit.”¹³⁰ He acknowledged that he was deciding the case in a way that he “[did] not like.”¹³¹ But, he insisted, rule formalism required libertarian activism. “[W]hether or not [Johnson] could appreciate the enormity of the offense he gave, the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution. So I agree with the Court that he must go free.”¹³²

The rule formalist argument against activism is further weakened by the implicit assumption that judicial power can be constrained only by rules embodied in the Constitution, often understood according to an originalist framework. But if one’s true concern is with judicial power, then there is no reason why limitations on that power need come from constitutional text. In fact, most Supreme Court opinions say little or nothing about text,¹³³ but they are nonetheless lengthy efforts to demonstrate that the outcome was dictated by some source of authority apart from the justices’ personal preferences.

What else might limit judicial discretion? Precedent, political forces, current norms, international practice, the constellation of economic and social forces, and a variety of philosophical systems can also constrain judges. Even when none of these sources of authority is available, judges constrain themselves by announcing sometimes arbitrary rules that bind them in the future.

Constitutional law is full of such rules, which often constrain judges far more than mere reliance on text would. For example, state legislative districting is presumptively constitutional if the maximum deviation between districts is under 10%.¹³⁴ Content regulation of speech is strictly scrutinized.¹³⁵ An invocation of *Miranda* rights wears off if the person has been freed from custody for fourteen days.¹³⁶ An arrestee can presumptively be held without a probable cause hearing for no more than forty-eight hours.¹³⁷

Many of these rules were created by Justices who present themselves as originalists. Most prominently, Justice Scalia certainly advertised himself as an originalist, but he also authored a famous article entitled “The Rule of Law as the Law of Rules.”¹³⁸ He seems not to have noticed that there is a tension between these two commitments. When original text is open-textured, nonoriginalist rules may be exactly what is needed to constrain judicial discretion. These rules might prohibit libertarian activism, but they also might require judicial intervention to protect a private sphere. When we are

¹³⁰ *Id.* at 421.

¹³¹ *Id.* at 420.

¹³² *Id.* at 421.

¹³³ See *supra* notes 30, 54.

¹³⁴ See *Brown v. Thompson*, 462 U.S. 835, 842 (1983).

¹³⁵ See, e.g., *Reed v. Town of Gilbert*, 576 U.S. 155, 159 (2015).

¹³⁶ See *Maryland v. Schatzer*, 559 U.S. 98, 110 (2010).

¹³⁷ See *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

¹³⁸ 56 U. CHI. L. REV. 1175 (1989).

in the latter situation, rule formalism supports rather than forbids libertarian activism.

For these reasons, neither deferential nor formalist restraint fully refutes the case for libertarian activism. A more serious challenge comes from the rival form of activism that argues for government intervention.

B. *Interventionist Activism*

If libertarian activism is constitutional law's standard story, then interventionist activism is its sometimes muted but nonetheless persistent and occasionally dominant counternarrative. Interventionist activists insist that the most serious threat to liberty comes not from government, but from private choices in markets and elsewhere and the combination of empowerment and disempowerment that those choices produce. On their view, government intervention is necessary to discipline these outcomes.

Standing alone, this claim is a central tenet of the modern American liberal tradition.¹³⁹ But interventionist activists make an additional assertion that has sometimes put them on the fringe of political debates. They insist that the political branches are insufficiently attentive to the risk of private power and that those branches must be goaded or forced into action by an active judiciary. The Warren Court often embodied this approach in its decisions, loosening the requirements of the "state action" doctrine,¹⁴⁰ implementing an expansive version of equal protection,¹⁴¹ and mitigating the effects of private markets regarding fundamental rights.¹⁴² More recently, conservatives have shown some interest in the approach as a means of forcing state subsidies to religious institutions and state action protecting property rights and the rights of fetuses.¹⁴³

The first assertion is rooted in classical republican thought that associates freedom with collective self-rule and public engagement.¹⁴⁴ It has found expression in, for example, Jacksonian and populist efforts to disempower private elites, progressive attacks on "the trusts," New Deal redistributive measures, and the Great Society's assault on poverty.

For much of our history, advocates for these positions have favored judicial restraint rather than activism. Andrew Jackson's confrontations with John Marshall are legendary.¹⁴⁵ Attacks on the judiciary were a central fea-

¹³⁹ For a representative statement of the position, *see generally* PAUL KRUGMAN, *THE CONSCIENCE OF A LIBERAL* (2009).

¹⁴⁰ *See infra* notes 162–72 and accompanying text.

¹⁴¹ *See infra* notes 175–85 and accompanying text.

¹⁴² *See infra* notes 176–80 and accompanying text.

¹⁴³ *See infra* notes 185–97 and accompanying text.

¹⁴⁴ For a discussion of the influence of these ideas at the time of The Founding, *see, e.g.*, GORDON WOOD, *THE CREATION OF THE AMERICAN CONSTITUTION 1776–1787*, at 46–90 (1969); Frank I. Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 4, 17–24 (1986).

¹⁴⁵ *See, e.g.*, 4 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 466 (1919) (discussing conflicts between Jackson and Marshall); RICHARD E. ELLIS, *THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES' RIGHTS, AND THE NULLIFICATION CRISIS* 18 (1987) (same).

ture of Theodore Roosevelt's fabled "bull moose" campaign for the presidency in 1912,¹⁴⁶ and a quarter century later, his cousin, Franklin Roosevelt, frontally assaulted judicial power in order to protect the New Deal.¹⁴⁷

With the advent of the Warren Court, however, supporters of the first assertion began to exhibit growing attraction to the second assertion. Indeed, for many liberals, the belief that courts have a vital role to play in forcing the political branches to confront private power became something like conventional wisdom.¹⁴⁸

The change was accompanied by a dramatic shift in the political theory that had supported the left wing's program for generations. As noted above,¹⁴⁹ historically, the democratic left embraced a version of the republican tradition that emphasized the possibilities of public mobilization by an aroused citizenry motivated by the common good. For classical republicans, human flourishing was not produced by the isolated, individual freedom prized by libertarians or by elite, paternalist intervention that left ordinary citizens as mere spectators. Instead, citizens, themselves, had to engage in political action that transcended their narrow self-interest and overcame the twin evils of faction and selfishness.¹⁵⁰

For the new activists who favored judicial intervention, this republican vision was overly romantic. They were not necessarily opponents of popular mobilization, but they doubted that mobilization alone could overcome all the obstacles to political change. They favored a supposedly more realistic, pluralist model of politics that emphasized political malfunction. At first, this critique was focused on the need for judicial protection of minority rights. *Carolene Products's* famous footnote four,¹⁵¹ as extensively elaborated by John Hart Ely,¹⁵² provided reasons why the political branches were unlikely to protect "discrete and insular minorities" from oppression.

Standing alone, Ely's version of pluralism supported only interstitial judicial intervention in cases where ordinary pluralist protections for minorities broke down. In the more usual case, Ely thought, political processes were

¹⁴⁶ See, e.g., William E. Forbath, *Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 CHI.-KENT L. REV. 967, 980 (2006); WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937*, at 138 (1994).

¹⁴⁷ See generally JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* (2010).

¹⁴⁸ For a full-throated expression of this view, see generally J. Skelly Wright, *Alexander Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

¹⁴⁹ See *supra* note 147 and accompanying text.

¹⁵⁰ See *supra* note 146. For modern work arguing for this position with respect to constitutional change, see, e.g., Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

¹⁵¹ *United States v. Carolene Products*, 364 U.S. 144, 152 n.4 (1938) (suggesting heightened scrutiny for statutes when prejudice against "discrete and insular minorities" curtail "the operation of those political processes ordinarily to be relied upon to protect minorities").

¹⁵² See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

good enough, and the case for judicial intervention was much weaker.¹⁵³ But the emergence of public choice theory raised serious doubts about this relatively sanguine view. Public choice theorists demonstrated that interest groups regularly thwarted *majority* will.¹⁵⁴ Indeed, on some versions of the theory, the very concept of democracy and majority will amount to misleading myths.¹⁵⁵

For many public choice theorists, the inevitable corruption of the political branches suggested the desirability of limiting their power—that is the desirability of libertarian activism.¹⁵⁶ But some progressives used public choice insights to support the opposite conclusion. On their view, legislative subservience to private interests meant that judges should do more to force government intervention.¹⁵⁷

Like its rival, libertarian activism, interventionism does not purport to be “neutral” as between various political theories. It, too, adopts a substantive theory about what forces threaten human freedom and promote human flourishing. To accept the theory, one must believe that collective intervention (at least of the right sort) promotes liberty and that judges, guided by some version of constitutional law, are more likely than politicians to promote the right sort of collective intervention. This focus means that interventionists, like libertarians, have responses to all three questions that a theory of constitutional law must answer. Like their libertarian rivals, they believe that the Constitution should be interpreted to require judicial activism, that judges are likely to so interpret the Constitution to support the right sort of activism, and that, as so interpreted, the Constitution should be obeyed because it is substantively just. Those assertions are doubtless controversial, but that fact only means that debate about interventionist activism will focus on the right questions.

Assuming *arguendo* that activist interventionism is attractive, how might constitutional doctrine be reformulated to accomplish its ends? One approach abandons or sharply limits the “state action” doctrine, which has long been at the core of liberal constitutional thought. The state action requirement holds that virtually all the Constitution’s commands constrain only the government and that, correlatively, the Constitution leaves private

¹⁵³ For criticism of Ely along these lines, see generally Richard Davies Parker, *The Past of Constitutional Theory—and Its Future*, 40 OHIO ST. L.J. 223 (1981); Mark Tushnet, *Darkness at the Edge of Town: The Contribution of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

¹⁵⁴ For elaborations on this point, see generally DENNIS C. MUELLER, PUBLIC CHOICE II: A REVISED EDITION OF PUBLIC CHOICE (1989); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997); Daniel A. Farber & Philip F. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987).

¹⁵⁵ See Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328 (1950) (demonstrating that when preferences are multi-peaked no voting procedure will yield an outcome supported by a majority).

¹⁵⁶ See, e.g., James M. Buchanan, *Politics without Romance: A Sketch of Public Choice Theory and Its Normative Implications*, in THE THEORY OF PUBLIC CHOICE 11 (James M. Buchanan & Robert D. Tollison eds., 1984).

¹⁵⁷ See, e.g., J. Skelly Wright, *supra* note 148; Parker, *supra* note 153.

actors free to act in contravention of what otherwise would be constitutional values.¹⁵⁸ For example, on this view the Constitution does not prevent private employers from making racially discriminatory hiring decisions or media outlets from “censoring” speakers with a particular point of view.

Standing alone, the doctrine counsels deferentialist restraint. It leaves interventionist policies in a politically discretionary zone: Courts cannot use constitutional law to countermand private choices, but the political branches are nonetheless free to intervene if they chose to do so. Libertarian activists take the argument one step further. They favor moving intervention into a prohibited zone where courts prevent the political branches from acting.¹⁵⁹

Seizing on internal weaknesses of the state action doctrine, interventionist activists turn these understandings on their head by insisting that some forms of intervention are in a constitutionally mandatory zone.¹⁶⁰ They argue that constitutional norms—especially those protecting equality and speech rights—provide protection against, as well as protection for, private actors. That protection, in turn, entails a judicially enforceable, constitutionally-rooted government obligation to intervene to control those actors when they threaten constitutional values.¹⁶¹

*Shelley v. Kramer*¹⁶² illustrates how interventionist activists were able to operationalize this theory. At issue were covenants entered by private parties that prevented racial and religious minorities from purchasing real estate.¹⁶³ On the conventional view, the Constitution did not speak to these arrangements because the government had merely failed to act. Perhaps the government had the power to prohibit these covenants (although some libertarian activists would deny even that¹⁶⁴) but it was under no constitutional obligation to do so.

Shelley rejected this understanding. According to the *Shelley* Court, the government was far from a passive bystander when restrictive covenants trapped minorities in segregated communities. Courts stood ready to en-

¹⁵⁸ See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936–37 (1982) (“Careful adherence to the ‘state action’ requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. . . . A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests.”).

¹⁵⁹ See, e.g., *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n.*, 138 S. Ct. 1719, 1741 (2018) (Thomas, J., concurring in part and concurring in the judgment) (arguing that public accommodation laws are unconstitutional when they impinge on protected speech).

¹⁶⁰ For representative arguments along these lines, see generally Charles L. Black, Jr., *The Supreme Court 1966 Term—Foreword: “State Action,” Equal Protection, and California Proposition 13*, 81 HARV. L. REV. 69 (1967); Jerre S. Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347 (1963).

¹⁶¹ See generally ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* (1994).

¹⁶² 334 U.S. 1 (1948).

¹⁶³ *Id.* at 4.

¹⁶⁴ Cf. Robert Bork, *Civil Rights—A Challenge*, NEW REPUBLIC (Aug. 31, 1963) (asserting that the effort to ban racial discrimination in public accommodations rested on a principle of “unsurpassed ugliness”).

force these “private” contracts, and that enforcement was coercive government action that the Constitution prohibited.¹⁶⁵

In *Shelley* itself, the Court stopped short of holding that the government was constitutionally obligated to intervene by outlawing “private” discrimination. It was sufficient for the government not to enforce the discrimination.¹⁶⁶ But in other cases, the Court made clear that when the state lent support of private individuals, the government was required to intervene to prevent those individuals from engaging in discrimination.¹⁶⁷ In situations where they applied, these holdings in effect made public accommodation laws mandatory, and not merely discretionary. Government action to protect minorities from private discrimination was constitutionally compelled.

During the mid-twentieth century, the Justices sporadically used *Shelley*-like reasoning to support interventionist activism.¹⁶⁸ Ultimately, though, the approach was damaged by the failure to develop principles that limited its reach. All private arrangements ultimately depend on the willingness of government to enforce the property and contract rights that support them. Taken to the limits of its logic, *Shelley* meant that there simply was no private sphere.¹⁶⁹

In the hands of radical interventionists, this insight provided a cudgel to employ against libertarianism. At its core, libertarianism rested on a false dichotomy between public and private. Because all supposedly private conduct was ultimately dependent on public power, the libertarian position was incoherent.¹⁷⁰

But as analytically powerful as this argument was, it proved too much to swallow for people unwilling to give up on the idea of a private sphere. The argument had particularly unsettling implications for advocates of judicial

¹⁶⁵ *Shelley*, 334 U.S. at 13–20.

¹⁶⁶ See *id.* at 19 (“These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.”).

¹⁶⁷ See, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726 (1961) (holding that the state was required to ban racial discrimination in private restaurant operating in state-owned parking garage).

¹⁶⁸ See, e.g., *id.*; *Marsh v. Alabama*, 326 U.S. 501, 509–10 (1946) (enforcing free speech rights against a private “company town”); *Evans v. Newton*, 382 U.S. 296, 301–02 (1966) (prohibiting racial discrimination in operation of a privately run park when the park had once been administered by city officials); *Public Utilities Comm’n. v. Pollak*, 343 U.S. 451, 453–54 (1952) (requiring public utilities commission to apply free speech principles to a privately owned bus company); cf. *Reitman v. Mulkey*, 387 U.S. 369, 371–73 (1967) (invalidating state constitutional amendment that prohibited the state from denying the “right of any person . . . to decline to sell, lease or rent . . . property to such person or persons as he, in his absolute discretion, chooses”).

¹⁶⁹ For criticism of *Shelley* along these lines, see, e.g., Herbert Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1, 29 (1959).

¹⁷⁰ See, e.g., Duncan Kennedy, *The Stages of Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1351–53 (1982).

restraint. The approach invested judges with enormous power to control the private sphere. Judges might impose constitutional restrictions on whom one married, what newspapers printed, who owned what material goods, and what religion one professed.¹⁷¹ The unwillingness of even the most fervent interventionist activists to support those conclusions meant that *Shelley* had to be limited. The failure to find limits threatened to discredit the entire enterprise.¹⁷²

Shelley's weakness did not mean that there were no other strategies to accomplish the goals of interventionist activism, however. The Equal Protection Clause as well as equality requirements that the Court read into the First Amendment¹⁷³ provide a method by which judges can encourage political action while avoiding a frontal assault on traditional state action principles. Even if the Constitution does not directly mandate government intervention, the equality requirement means that if the government protects some people from private oppression, it must provide similar protection for other, similarly situated individuals.

An equality approach provides a milder and more acceptable prod toward interventionism than a frontal assault on the state action requirement. Instead of facing a command, the political branches are offered a choice. In theory, they can respond by withdrawing the protection for the favored class—that is by being less active. In practice, however, this response will often seem impractical or undesirable. As *Carson* illustrates, the requirement therefore puts pressure on government to provide protection for the disfavored class—that is, to intervene in the private sphere more rather than less.¹⁷⁴

The Warren Court seized on the equality strategy to force government intervention in a range of cases. Most famously, it used the strategy to dismantle segregated schools and, so, to force the political branches to confront the systematic oppression of African Americans.¹⁷⁵ The strategy also enabled the use of judicial power to require some government protection for the

¹⁷¹ Cf. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982) (arguing that state action doctrine necessary to preserve a sphere of private freedom); *Columbia Broadcasting System (CBS) v. Democratic National Comm.*, 412 U.S. 94, 120–121 (1973) (Burger, C.J., plurality opinion) (noting that ignoring state action principles so as to require broadcast network to accept political advertising would contradict first amendment principles).

¹⁷² For cases disavowing the more radical implications of *Shelley*, see, e.g., *Deshaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196–97 (1989) (holding that the Constitution does not require the state to protect against private violence); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972) (holding that the Constitution does not prohibit discrimination by state-licensed fraternal organization); *Rendell-Baker v. Kohn*, 457 U.S. 830, 843 (1982) (holding that constitution does not prohibit discrimination by state-funded private school).

¹⁷³ See, e.g., *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 94–95 (1972) (arguing that free speech and equal protection principles are closely intertwined); *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam) (holding that the First Amendment's Free Exercise Clause prohibits discrimination against religion).

¹⁷⁴ For an explanation of why *Carson* is an example of interventionist activism, see *supra* notes 7–13 and accompanying text.

¹⁷⁵ See *Brown v. Board of Education*, 347 U.S. 483 (1954).

poor¹⁷⁶ and for other vulnerable groups like noncitizens,¹⁷⁷ nonmarital children,¹⁷⁸ and, in later years, for women,¹⁷⁹ and the LGBTQ community.¹⁸⁰

The equality argument, like the attack on state action, has a problem with limits. In principle, it is always possible to find one group treated more favorably than another group and therefore to insist that the Constitution required government intervention to aid the disfavored group. However, the Court was more successful in developing a constitutional architecture to limit equality-based judicial interventionism. Tiers of scrutiny based upon the status of the disadvantaged group¹⁸¹ and the importance of the interest at stake¹⁸² served to limit the force of the equality argument and preserve a broad sphere governed by political discretion.

When conservative opponents of redistribution gained control of the Supreme Court, they used this architecture to sharply limit equality based judicial interventionism. Conservative justices refused to expand the list of suspect classes¹⁸³ and more or less ended heightened scrutiny for classifications related to fundamental rights.¹⁸⁴

It turns out, though, that conservative efforts to tame interventionist activism may have been too hasty. Interventionist activism need not always have a leftist tilt. For example, as discussed above,¹⁸⁵ in recent years, conservative Justices have begun to use equality arguments to mandate government intervention designed to assist religious groups. The conservative attack on affirmative action provides another, albeit more complicated example. Strict scrutiny for government measures mandating racial “preferences”

¹⁷⁶ See, e.g., *Harper v. Virginia Board of Elections*, 383 U.S. 663, 666–67 (1966) (holding that conditioning right to vote on payment of poll tax violates equal protection clause); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (holding that denying welfare benefits to newly arrived residents violates Equal Protection Clause); *Griffin v. Illinois*, 351 U.S. 12, 17–18 (1956) (holding that Equal Protection Clause requires states to provide trial transcripts to indigent criminal defendants for use on appeal).

¹⁷⁷ See, e.g., *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (holding that discrimination against noncitizens triggers heightened scrutiny under the Equal Protection Clause).

¹⁷⁸ See, e.g., *Levy v. Louisiana*, 391 U.S. 68, 71–72 (1968) (holding that state exclusion of nonmarital children from protection of wrongful death statute violates equal protection).

¹⁷⁹ See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying heightened scrutiny to gender discrimination).

¹⁸⁰ See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 675–76 (2015) (holding that prohibition of same-sex marriage violates the Equal Protection Clause).

¹⁸¹ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 682–89 (1973) (plurality opinion) (arguing that gender classifications are inherently suspect because of disadvantaged status of women).

¹⁸² See, e.g., *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966) (“[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”).

¹⁸³ See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 435 (1985) (holding that the classifications based on mental disadvantage are not subject to strict scrutiny); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312–14 (1976) (holding that classifications based on age are not subject to strict scrutiny).

¹⁸⁴ See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973) (“[I]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.”).

¹⁸⁵ See *supra* notes 7–13 and accompanying text.

is libertarian in the sense that it limits government power.¹⁸⁶ But the Court has read this constitutional requirement into the antidiscrimination statute that governs use of affirmative action by private entities receiving government funding.¹⁸⁷ The result is a constitutionally inflected effort to rescue supposedly disadvantaged whites from harm by private actors.

The prospect of further conservative interventionism is just over the horizon. For example, it is easy to imagine a conservative court extending the reach of *Carson* to hold that the Free Exercise Clause prohibits state support of public, secular education without comparable support for private, sectarian education. The result would be a large scale, constitutionally mandated government intervention in the market for private education.

Abortion opponents also seem poised to use Warren-style equality arguments to support their cause. Until recently, abortion was in the constitutionally mandatory zone, shielded from government control by a libertarian activist reading of the Constitution.¹⁸⁸ Overruling *Roe v. Wade* did no more than place abortion in a politically discretionary zone where the political branches could, but need not, regulate the procedure.¹⁸⁹ Some opponents of abortion argue that this outcome does not go far enough and have developed equality arguments to put abortion in the constitutionally prohibited zone. True, there is no “state action” when women on their own secure abortions, but when the state permits the “killing” of fetuses but prohibits the killing of children, it violates the equality rights of fetuses. On this theory, the government could resolve the equality problem by withdrawing protection from children, but it would certainly instead solve the problem by granting protection for fetuses.¹⁹⁰ The more moderate version of this argument uses it as a constitutional basis for a federal statute, justified by section 5 of the fourteenth amendment, that would impose a nation-wide ban on abortion.¹⁹¹

¹⁸⁶ The Supreme Court has held that affirmative action measures are subject to strict scrutiny. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–95 (1989).

¹⁸⁷ See *University of California v. Bakke*, 438 U.S. 265, 285–87 (1978) (opinion of Powell, J., announcing the judgment of the Court) (asserting that Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d et. seq., incorporates the constitutional standard regarding racial discrimination); *id.* at 325 (Brennan, J., joined by White, Marshall, & Blackman, JJ, concurring in the judgment in part and dissenting in part) (agreeing with Powell, J. that Title VI goes no further than prohibiting racial discrimination violating the Equal Protection Clause).

¹⁸⁸ See *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁸⁹ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022) (“It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives.”).

¹⁹⁰ See Robert P. George & Josh Craddock, *Even if Roe Is Overturned Congress Must Act To Protect the Unborn*, WASH. POST (June 2, 2022), <https://www.washingtonpost.com/opinions/2022/06/02/roe-abortion-congress-fourteenth-amendment/> [<https://perma.cc/M223-JG5E>]. The argument might depend on the claim that fetuses are a constitutionally protected group or that abortions deprived them of a fundamental interest, thereby heightening the level of scrutiny. Cf., e.g., *Loving v. Virginia* 388 U.S. 1, 11–12 (1967) (holding that discrimination based on race is invidious, that marriage is a fundamental interest, and that, therefore a statute prohibiting marriage between members of different races must be strictly scrutinized).

¹⁹¹ See Robert P. George & Josh Craddock, note, 190, *supra*.

The more radical version insists that the equality requirement should be enforced by judges, thereby outlawing abortion by judicial fiat.¹⁹²

There are also conservative arguments for attacks on state action limitations. The *Shelley* Court insisted that seemingly private contracts discriminating against African Americans were ultimately dependent on state enforcement. Conservatives might seize on this insight to support their own goals. *Just because* contract and property rights depend upon state enforcement, *therefore* constitutional protection for these rights entail judicially mandated government intervention when they are violated. It might follow from this argument that the state's toleration of, say, private trespass on property or private refusal to abide by contract terms violates the Constitution.

Consider, for example, *Cedar Point Nursery v. Hassid*, where the Court held that a California regulation that granted labor organizers access to agricultural property to solicit union membership violated the Takings Clause.¹⁹³ The plaintiffs sought declaratory and injunctive relief prohibiting enforcement of the regulation against them,¹⁹⁴ and the Court held that they were entitled to this relief.¹⁹⁵ As a formal matter, therefore, the decision took the form of libertarian activism. It prohibited government regulation in the form of a mandate requiring the plaintiffs to provide access to their property.

But the holding would be meaningless if it allowed California merely to repeal the regulation but nonetheless to refuse to enforce its trespass laws against labor organizers. The refusal would produce the same result that the Court declared unconstitutional, albeit by means of nonenforcement without the formality of a regulation. It follows that if one looks behind the formalities, the Court in effect required government action to protect property rights. The result is a mirror reflection of *Shelley v. Kramer*. Because private rights depend on state enforcement, therefore the Constitution mandates government intervention to protect those rights.

At least in theory, the logic of this argument might switch large swaths of constitutional law from the permissive to the mandatory category in a way that advances the conservative agenda. Consider, for example, conservative opposition to liberal criminal justice reforms. Liberals have long associated themselves with the libertarian activist view that the Fourth and Fifth Amendments require these reforms.¹⁹⁶ Until now, conservatives have been satisfied with responding that the reforms are discretionary.¹⁹⁷ But *Cedar Point Nursery* suggests an argument that the reforms might actually be con-

¹⁹² See John Finnis, *Abortion Is Unconstitutional*, FIRST THINGS (Apr. 2021), <https://www.firstthings.com/article/2021/04/abortion-is-unconstitutional> [<https://perma.cc/DB2T-79GF>].

¹⁹³ 141 S. Ct. 2063, 2072 (2022).

¹⁹⁴ *Id.* at 2070.

¹⁹⁵ *Id.* at 2072.

¹⁹⁶ See, e.g., PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017).

¹⁹⁷ See, e.g., *DeShaney v. Winnebago County Dept. of Pub. Serv.*, 480 U.S. 189, 191 (1989) (opinion of Rehnquist, C.J.) (holding that the Fourteenth Amendment is not implicated by state failure to respond to private violence).

stitutionally prohibited. On this theory, the exclusionary rule or limitations on stop-and-frisk or on no-knock warrants embolden criminals, thereby making the people less secure in their “persons, houses, papers, and effects” and violating the government’s constitutional obligations.

It remains to be seen how far conservative interventionists will push this argument, but it is at least possible that we are on the threshold of a renaissance of interventionist activism. The success of these efforts will turn in part on whether interventionists can overcome the objections of advocates of the two versions of judicial restraint, a subject to which we now turn.

C. Rule Formalist Restraint

Rule formalists favor restraint in the sense of predetermined limits on judicial choice. Their concern about the political independence of judges leads them to worry about ad hoc, case-by-case decision making that might be influenced by illegitimate prejudice, value judgments or ideological preferences.

Rule formalists insist on rules, but the approach does not dictate the content of the rules they insist on. Because they are agnostic about content, their approach does not necessarily conflict with other approaches. It all depends on what the rules say.

In an earlier generation, Justice Black insisted on rule formalism when he criticized his colleagues for inserting vague “natural law” formulations into the Constitution rather than following the rules embodied in the constitutional text.¹⁹⁸ In our own generation, Justice Scalia has forcefully argued for a similar position when he has critiqued the Court for making value judgments not dictated by constitutional rules.¹⁹⁹ Unlike Black, however, Scalia insisted on the value of clear and fixed rules even when the rules derive from something other than constitutional language, especially in the area of criminal justice. For example, he claimed that an arrestee must ordinarily be afforded a probable cause hearing within twenty four hours,²⁰⁰ that *Miranda* warnings wear off after two weeks out of custody,²⁰¹ and that there was a “prohibition [that] is categorical and without exception” to “searching a person for evidence of a crime when there is no basis for believing that the person is guilty of the crime or is in possession of incriminating evidence.”²⁰² These rules are not in the constitutional text.

One might respond to rule formalists by claiming that they are attacking a straw man. No one defends random or entirely arbitrary decision mak-

¹⁹⁸ See *infra* notes 204–14 and accompanying text.

¹⁹⁹ See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 714 (2015) (Scalia, J., dissenting) (arguing that because constitutional text says nothing about same sex marriage, the Court should leave the matter to the political processes); *Cruzan v. Dir., Missouri Dept. of Pub. Health*, 497 U.S. 261, 292 (1990) (Scalia, J., concurring) (arguing that because constitutional text says nothing about assisted suicide, Court should not create a right to it).

²⁰⁰ *County of Riverside v. McLaughlin*, 500 U.S. 44, 68 (1991) (Scalia, J., dissenting).

²⁰¹ See *Maryland v. Schatzer*, 559 U.S. 98, 110 (2010) (opinion of Scalia, J.).

²⁰² *Maryland v. King*, 569 U.S. 435, 466 (2013) (Scalia, J., dissenting).

ing. Judges who utilize an “all things considered” standard, applied in case-specific fashion, are nonetheless using some sort of implicit metric to guide their decisions.²⁰³

Suppose, though, that we accept at least provisionally the formalist argument that different decision mechanisms produce different degrees of constraint and that we should choose the mechanisms that are more likely to keep judicial power in check. Even if one accepts this premise, it turns out that formalist constraint is not always inconsistent with either libertarian or interventionist activism. On the contrary, and paradoxically, sometimes formalist restraint requires activism.

Compare, for example, the positions of Justices Black and Frankfurter regarding the incorporation controversy that preoccupied constitutional scholars several generations ago.²⁰⁴ Frankfurter was a deferentialist, but he was relatively unconcerned about abuse of judicial discretion. That combination led him to oppose libertarian activism in the form of applying Bill of Rights criminal justice protections on the state level. In contrast, at least in this context, Black’s strong commitment to formalist restraint and lack of concern about deferentialism led him to endorse libertarian activism.

Both Frankfurter and Black were influenced by their recent experience with the libertarian activism of the *Lochner* era that ultimately threatened New Deal legislation. Frankfurter emerged from the experience as a deferentialist. No doubt channeling his experience as a progressive reformer who helped formulate the New Deal,²⁰⁵ he worried that a reading of the Fourteenth Amendment’s Due Process Clause that saddled local governments with the rigid prohibitions of the Bill of Rights would “deprive the States of opportunity for reforms in legal process.”²⁰⁶

It did not follow that the states were entirely unconstrained. Frankfurter thought that the Fourteenth Amendment prohibited them from “offend[ing] those canons of decency and fairness which express the notions of justice of English-speaking peoples.”²⁰⁷ He was unbothered by the discretion that these vague canons gave to judges. For him, it did not matter that “[t]hese standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia.”²⁰⁸ Moreover, when interpreted with a deferentialist sensibility, these unenumerated standards were usually elastic enough to leave states free to depart from the norms that the Bill of Rights required for the federal government.²⁰⁹ Frankfurter thus dis-

²⁰³ For an argument that standards constrain discretion as much as rules do, see Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 405 (1985).

²⁰⁴ See generally JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* (1989).

²⁰⁵ See, e.g., Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 161 (2002) (noting that Frankfurter’s belief in judicial restraint was rooted in progressivism).

²⁰⁶ *Adamson v. California*, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 68.

²⁰⁹ See, e.g., *id.*; *Bartkus v. Illinois*, 359 U.S. 121, 124 (1959) (opinion of Frankfurter, J.) (holding that states are not bound by double jeopardy requirements); *Wolf v. Colorado*, 338

counted arguments against judicial discretion and used that discretion to embrace judicial deference.

Black learned a very different lesson from the *Lochner* experience. He thought that *Lochner*-era judges were disastrously wrong to impose their own views on the rest of the country. This led him to rail against the proposition that the Supreme Court was “endowed by the Constitution with boundless power under ‘natural law’ periodically to expand and contract constitutional standards to conform to the Court’s conception of what at a particular time constitutes ‘civilized decency’ and ‘fundamental principles of liberty and justice.’”²¹⁰ He therefore favored rules embedded in constitutional text to constrain judicial discretion.²¹¹ But at least in this context,²¹² Black’s rule formalism led him to libertarian activism. He thought that a fair reading of the Fourteenth Amendment’s text left him no choice but to invalidate state measures that violated the Bill of Rights.²¹³

For Black, rule formalism was closely tied to originalism. His support for incorporation was grounded in his careful reading of the Fourteenth Amendment’s text and history.²¹⁴ But, pace Black, there is in fact no necessary connection between rule formalism and originalism.

All rule formalists share Justice Black’s worry about judicial power. Because the judicial branch is insulated from political control, they are concerned with the special risk that judges will exercise that power arbitrarily or in pursuit of an idiosyncratic program that departs from the aims of most Americans. Judges therefore need to be constrained by rules that are independent of judicial desires, whims, and political preferences.

U.S. 25, 26 (1949) (holding that states are not bound by exclusionary rule). *But see* *Rochin v. California*, 342 U.S. 165, 209–10 (1952) (opinion of Frankfurter, J.) (stomach pumping of criminal suspect violates Due Process Clause of the Fourteenth Amendment because it “shocks the conscience”).

²¹⁰ *Adamson v. California*, 332 U.S. 46, 69 (1947) (Black, J., dissenting) (quoting *Twining v. New Jersey*, 211 U.S. 78 (1908)).

²¹¹ *See, e.g.*, David A. Strauss, *Why Conservatives Shouldn’t Be Originalists*, 31 HARV. J.L. & PUB. POL’Y. 969, 975 (2008) (arguing that Black used originalism to attack what he viewed as the corrupt tradition of the pre-New Deal Supreme Court).

²¹² In other contexts, rule formalism led Black to favor judicial restraint. *See, e.g.*, *Katz v. United States*, 389 U.S. 347, 364 (1967) (Black, J., dissenting) (rejecting position that intercepting telephone conversation from public phone booth was a search under the fourth amendment because he did “not believe that it is the proper role of this Court to rewrite the Amendment in order ‘to bring it into harmony with the times’ and thus reach a result that many people believe to be desirable”); *Griswold v. Connecticut*, 381 U.S. 479, 514 (1965) (Black, J., dissenting) (rejecting the position that ban on contraceptive use by married couples was unconstitutional because “no provision of the Constitution specifically gives . . . blanket power to courts to exercise . . . a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous”).

²¹³ *See, e.g.*, *Adamson v. California*, 332 U.S. 46, 69 (1947) (Black, J., dissenting); *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963) (opinion of Black, J.) (holding that the Fourteenth Amendment incorporates the Sixth Amendment right to counsel); *Duncan v. Louisiana*, 391 U.S. 145, 162 (1968) (opinion of Black, J.) (holding that the Fourteenth Amendment incorporates the Sixth Amendment right to a jury trial).

²¹⁴ *See* cases cited in note 213, *supra*.

But Black failed to see that these rules might be derived from a variety of sources. True, judges can bind themselves to obey constitutional text, but they can also bind themselves to other systems of thought. Whether rules promote judicial activism or restraint depends on which rules govern, and rule formalism alone does not specify which rules those are. As Black's libertarianism demonstrated, rule formalism threatens judicial activism only if the binding rules inhibit, rather than mandate, use of judicial power.

Does it follow that rule formalism poses no threat to activism? It turns out that this conclusion is too simple. Things become more complicated if one focuses on meta-questions about judicial discretion concerning the choice among rules and on the way in which the chosen rules are administered.

One part of the difficulty results from our pluralist constitutional practice. Contemporary American judges have a broad menu of different rule-based systems to choose from.²¹⁵ Our practices permit them to resort to text, tradition, contemporary moral standards, administrability or public policy requirements, and more. Each of these rule-systems might constrain judicial discretion, but because the norm requiring consistency among rule-based systems is weak, judges are free to select the system that leads to the right result in the case before them. Judges can "look[] out over a crowd and pick[] out your friends," as Chief Justice Roberts observed in another context.²¹⁶ Put differently, even if the rules themselves limit judicial discretion, rule formalists might still worry about judicial discretion in choosing among rules.

Suppose that we somehow changed our practice so that judges were required to pick a rule-based system and stick with it. The requirement might help solve the problem of case-specific discretion, but that is not the only difficulty. As Robert Bork famously insisted, "neutral principles" requires not just neutrality of application but also neutrality of derivation.²¹⁷ Perhaps a particular system of rules does not unfailingly yield the right result in every case, but rule formalists might worry about judicial discretion to choose a system of rules based on whether the system yields the desired result more often over the range of cases.

In addition to these difficulties, there are two problems with the administration of rules. First, rules at least arguably limit judicial discretion but they also result in case-specific injustice. Rules only matter when they produce a result different from the result a judge would reach using a particularistic all-things-considered approach. But it is in just these cases where rules matter that they are also most problematic. It is precisely when they require

²¹⁵ See, e.g., BOBBITT, *supra* note 47, at 23–24 (1982); Fallon, *supra* note 47; Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV 1753 (1994).

²¹⁶ See 151 CONG. REC. S10.172 (daily ed., Sept. 19, 2005) (statement of then-Judge Roberts).

²¹⁷ Bork, *supra* note 60, at 7 (1971).

departure from what we would otherwise do that they seem formalistic and unjust.²¹⁸

This problem is captured by the insight advanced by some philosophers that rule utilitarianism inevitably collapses into act utilitarianism. If a rule yields a “bad” outcome in a particular case, judges always have the option of substituting a narrower rule or adding an exception to the rule that produces the “right” result in the case before them. If this process is reiterated often enough, it ultimately leads to a rule that simply requires choosing the “right” action on the particular facts before the judge.²¹⁹

This argument is of more than philosophical interest. It explains why legal rules get more complicated over time and why they often fail to constrain judges. In a mature legal system, the proliferation of subrules, exceptions to rules, and glosses placed on rules end up giving judges considerable discretion.²²⁰

Suppose, counterfactually, that we had judges who had the discipline to swallow case-specific injustice and stick with the formal rigidity of the initial rule. A second well-known problem is that even seemingly rigid rules do not always dictate outcomes in specific cases.

The point can be, and often has been, overstated. Given background facts about language and the distribution of cultural, economic, and political power, some interpretations of rules will be off the table.²²¹ No, the Constitution does not permit 24-year-old presidents or create three Houses of Congress. But many rules are open to interpretation, especially when, over time, they are applied to unanticipated facts. Is an AK-47 within the definition of “arms” protected by the Second Amendment? Are computer programs “speech” that the First Amendment tells us cannot be abridged? Even a judge ready to stick with an initial rule will have considerable discretion in interpreting this language.

Moreover, rule-makers are not unaware of the risk that rules will lead to injustice. Because they are aware of this risk, and because they often must compromise by writing language that satisfies everyone, they create rules that are open textured. These rules avoid forcing “wrong” results that would put pressure on rule-following, but they do so by enhancing judicial discretion. The Framers of the Bill of Rights therefore prohibited searches and seizures

²¹⁸ See, e.g., Larry Alexander, *The Gap*, 14 HARV. J.L. & PUB. POL’Y. 695 (1991).

²¹⁹ See J.C.C. Smart, *An Outline of a System of Utilitarian Ethics*, in UTILITARIANISM: FOR AND AGAINST (J.C.C. Smart & Bernard Williams, eds., 1973).

²²⁰ See, e.g., Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303, 312 (2003) (arguing that rules tend to collapse into standards). Schauer believes that standards also tend to turn into rules. See *id.* One might come to a similar conclusion by arguing that the seeming determinacy of rules and indeterminacy of standards is an illusion. See, e.g., Schlag, *supra* note 203, at 410–11 [*Rules and Standards*]. For present purposes, the important point is that the formalist choice of rules over standards may be insufficient to constrain judges. If that is true, then, as argued in text, rule formalism leads not to a change in the way that judges exercise power, but to a refusal to grant them power in the first place.

²²¹ See generally Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

that are “unreasonable”²²² and protected “other” unenumerated rights “retained by the people.”²²³ Provisions like these may be necessary to avoid mindless formalism, but they also open possibilities for the kind of idiosyncratic judicial choice that rule formalists fear.

If all this is correct, then rule formalism gives judicial activists quite a lot to worry about. Indeed, the formalist critique of activism goes beyond what even many formalists themselves imagine. The choice among rules, the inevitable degradation of rule-like structures, and the indeterminacy of rules inevitably produce too much judicial discretion. The critique therefore suggests that the discretion problem simply cannot be solved. If that is true, then the implication of the critique is not that judges should follow the rules, but that because rules cannot adequately constrain judges, judge should remain passive. And that conclusion means that judicial activism and formalism are not compatible.

Thinking about this conflict forces us to confront the underlying tension between activism and restraint. The rule formalist argument outlined above makes judicial activism problematic only if we think that judges will use their discretion unwisely or unjustly. Do we? Answering that question turns on empirical issues about who is likely to become a judge, normative issues about what constitutes wisdom and justice, and political theory issues about how we should resolve disagreements about wisdom and justice. In that way, thinking about rule formalism leads us away from tired questions about interpretive method and toward the questions we should care about—that is, questions about who should have final interpretive authority and about what it is that they should be interpreting.

D. *Deferentialist Restraint*

Both formalists and deferentialists are concerned about the power of judges, but whereas formalists worry about judicial discretion, deferentialists worry about judicial arrogance. For deferentialists, the problem is not that judges are unconstrained by rules laid out in advance. After all, depending on their content, the rules might give judges final authority over other public and private sources of power. Whether rule-based or not, deferentialists think that judicial power is problematic because judges have neither the legitimacy nor the expertise to exercise that power wisely. They might therefore favor deferring to government officials when they evaluate, for example, national security concerns,²²⁴ matters relating to medical or scientific uncertainty,²²⁵ or the machinery of government.²²⁶ But they might also favor def-

²²² U.S. CONST. amend. IV.

²²³ *Id.* amend. IX.

²²⁴ *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–34 (2010) (holding that executive branch officials are entitled to deference as to the means necessary to protect against terrorism).

²²⁵ *See, e.g.*, *South Bay United Pentecostal Church v. Newsome*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application from injunctive relief) (stating that

erence to private actors when they make choices about matters like family formation²²⁷ or reproductive rights.²²⁸

The next subsections explore how deferentialism intersects with the two strands of activism.

1. *Deferentialist Restraint and Interventionist Activism.* The argument for deferentialist restraint seems to stand in opposition to interventionist activism. Interventionists want courts to force the political branches to intervene in the private sphere. Believers in deferential restraint respond by asking why anyone should think that judges are better able to decide when and how to control private power than members of the political branches? This was the view that Justice Frankfurter supported when he rejected incorporation of criminal procedure Bill of Rights protections into the Fourteenth Amendment.²²⁹ Chief Justice Roberts repeated many of the same points when he resisted the Court's insistence on a right to same-sex marriage.²³⁰

On closer analysis, though, there are two separate arguments for deferential restraint that are in tension with each other: the argument from democracy, and the argument from expertise. Both arguments ultimately rest on empirical questions about the nature of political and judicial power, but depending on which argument one embraces, the case for restraint may be more or less persuasive.

The argument from democracy is associated with the leftist critique of judicial power advanced by populists in the late nineteenth and early twentieth centuries. Like an earlier generation of republicans, advocates of this position valued popular deliberation and the right of a community to determine its own destiny.²³¹ On this view, the judiciary is a “deviant institution”²³² whose power should be suspect whenever it frustrates the will of popular majorities.

elected officials should be granted broad discretion when they “undertake to act in areas fraught with medical and scientific uncertainty”).

²²⁶ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 384 (1989) (holding that when Congress and the President agree to a governmental arrangement that confronts deeply vexing national problem, court should not invalidate it only if there are compelling constitutional reasons).

²²⁷ See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 651-52 (2015) (defending the right to same-sex marriage on the ground that “[t]he Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity”).

²²⁸ See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 852 (1994) (opinion of O'Connor, Kennedy & Souter, JJ.) (arguing for the abortion right on the ground that “[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society”).

²²⁹ See *supra* notes 204-09 and accompanying text.

²³⁰ See *supra* notes 126 and accompanying text.

²³¹ See, e.g., MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* (rev. ed. 2010) (identifying populism with the democratic idea of “rule by the common people”); J.M. BALKIN, *Populism and Progressivism as Constitutional Categories*, 104 *YALE L.J.* 1935, 1946 (1995) (noting populist desire to participate in government).

²³² ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 4 (1963) (referring to judicial review as a “deviant institution”).

In contrast, the argument from expertise is associated with the leftist critique of judicial power advanced by progressives in the first third of the twentieth century. Progressives thought that public policy questions were complicated, that getting the answers “right” required deep empirical investigation, and that expert judgments were necessary to control popular ignorance and prejudice. On this view, democracy was hardly an unalloyed good. Expert administrators should be shielded from popular control.²³³ But the view also made some progressives suspicious of judicial power. Generalist judges were no match for these experts, and judges were too often influenced by ideological conviction or mindless formalism.²³⁴

This argument was at the center of the division between populists and progressives in the late nineteenth and early twentieth century, but it continues in our own time. Modern progressives insist that administrative agencies are ultimately responsible to Congress and the people and that their expertise is necessary to understand and discipline the private forces that they regulate. They support judicial doctrines like “Chevron deference”²³⁵ that limit the power of judges to upset administrative judgments.

The relationship between deferential restraint and modern populism is more complex. Populists want judges to defer to legislatures because they reflect the popular will. But their commitment to democracy also counsels against deference to administrative experts. Modern populists insist that administrative agencies operate in secret and without effective political control. They are therefore able to pursue agendas that would not withstand public scrutiny. Modern populists support the “major question doctrine,”²³⁶ the revival of the anti-delegation doctrine²³⁷ and a unified executive theory²³⁸ in order to control the administrative state.²³⁹

²³³ See KAZIN, *supra* note 231, at 52 (noting progressive “skepticism about the masses” and belief that reform was possible only when the people were “guided by a skilled, perceptive counter-elite”).

²³⁴ For an account of Theodore Roosevelt’s crusade against judicial review while running as the Progressive candidate for president, see LARRY KRAMER, *THE PEOPLE THEMSELVES* 215 (2004). For an account of Franklin Roosevelt’s epic confrontation with the Supreme Court, see SHESOL, *supra* note 147, at 22.

²³⁵ *Chevron* deference requires courts to defer to agency interpretations of an ambiguous statute that Congress delegated to the agency to administer. See *Chevron U.S.A., Inc. v. Nat. Res. Defense Council*, 468 U.S. 837 (1984).

²³⁶ See, e.g., *Alabama Assn of Realtors v. Dept. Of Health and Human Services*, 141 S. Ct. 2485, 2489 (2022) (per curiam) (“We expect Congress to speak clearly when authorizing an agency to exercise powers of ‘vast “economic and political significance.”’) (quoting *Utility Air Regulatory Group v. EPA*, 573 U. S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 160 (2000))).

²³⁷ See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) (arguing in favor of the anti-delegation doctrine on the ground that “[t]he Constitution promises that only the people’s elected representatives may adopt new federal laws restricting liberty”).

²³⁸ See, e.g., *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) (arguing that a unitary executive preserves individual rights).

²³⁹ Matters are further complicated by the possibility that agencies are more democratically accountable than courts. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019).

How might the arguments for deferential restraint premised on democracy and expertise be countered? Consider, first, refutations of deferentialist arguments grounded in democracy. Judicial interventionists might join advocates of expertise in doubting the value of untrammelled democracy. As Madison argued at the beginning of the republic, purely democratic politics leaves public policy open to factions motivated by temporary emotion or self-interests.²⁴⁰ Factions lead to an ideological echo chamber that makes compromise difficult or impossible. Highly motivated minority factions can dominate more loosely organized majority factions, thereby producing outcomes that majorities actually oppose.

A second sort of refutation endorses democracy in principle but plays off the democratic defects that infect the political branches. Building on the pluralist theories discussed above,²⁴¹ judicial activists might attack the premise that our political branches accurately reflect the popular will.

Democratic deferentialists, in turn, have responses to both these arguments. Many of them are prepared to concede that democratic majorities are not infallible and that our political systems are not fully democratic, but they insist on making comparative judgments. With all its faults, our political system is *more* democratic than our judicial system which, after all, self-consciously prides itself on resisting political pressures.²⁴² And even if in principle the polity would be better served if there were a role for wise statesmen who advanced the public good and stood above the clamor and chaos of ordinary politics, there is no reason to believe that judges are these statesmen. On the contrary, they argue, judges themselves constitute a faction. Throughout our history, they have defended the rights of the privileged and powerful against the interests of ordinary Americans.²⁴³

Interventionists might respond to deferentialist arguments grounded in respect for expertise by attacking the premise that legislatures have a systemic advantage. Judges benefit from an adversarial process, must listen to and account for all the evidence, and usually give reasons for their decisions. Are they really less able to understand the complexity of a public policy problem than a member of Congress, who is not required to read the legislation she votes on?

The expertise argument is stronger in cases involving administrative agencies (although the democratic critique is also stronger), but even there, something can be said for the value of generalist judges. Because they are generalists, judges may be less subject to capture and less likely to have

²⁴⁰ See THE FEDERALIST NO. 10 (James Madison).

²⁴¹ See *supra* note 151 and accompanying text.

²⁴² See Neil K. Komisar, *Taking Institutions Seriously: An Introduction to a Strategy for Constitutional Analysis*, 54 U. CHI. L. REV. 366, 376–77 (1983) (arguing that judicial intervention should be premised on political malfunction only if the malfunction is more severe than that exhibited by courts).

²⁴³ For my brief summary of this history, see SEIDMAN, *supra* note 28, at 54–65. For a more measured account that nonetheless supports many of the same conclusions, see generally Michael J. Klarman, *Rethinking the History of American Freedom*, 47 WM. & MARY L. REV. 55 (2000).

blinkered views that have narrowed because of too long and close an engagement with a particular problem.

All this leads back to the conclusion that the argument can only be settled through debate about the kinds of people likely to become judges, legislators, and administrators and about the value and actual workings of supposedly democratic government. Deferentialism alone does not answer these questions, but it raises them in a fashion that demands our attention.

2. *Deferentialist Restraint and Libertarian Activism.* Can deferentialist restraint and libertarian activism be reconciled? As I have argued above,²⁴⁴ there is less conflict between them than one might at first suppose. True, judges may have no special knowledge about, say, when life begins or when it should end. But for that very reason, libertarian activists want to vest the authority to make these decisions in private individuals.

But this relatively simple point does not completely resolve the conflict. One can concede that judges who remit questions to a private sphere are not making official government policy on the contested question. Saying that individual pregnant persons should decide when life begins is not the same thing as proclaiming for everyone when life begins. But that fact should not blind us from the reality that judges are making a choice. By striking down abortion laws, judges are delegating lawmaking authority to private individuals who get to decide for themselves what the “law” is. If they were to uphold abortion laws, judges would be affirming the right of putatively democratic majorities to make the choice.

When seen in this light, the question is not whether judges should be deferential, but to whom they should defer. Deferentialists therefore challenge us to provide reasons why judges should defer to individuals rather than to collective majorities.

The deferentialist point gains force with the recognition that all supposedly “private” choices produce negative externalities. In the case of abortion, the most obvious victim of these externalities is the fetus. Unfortunately, relying on this externality leads us back to questions about the ontological status of the fetus as a rights-bearer and, then, to the question whether that status should be determined individually or collectively.

Even if we put to one side “victimization” of the fetus, though, there are other groups harmed by individual abortion choices. Potential fathers, grandparents, and siblings might prefer a live birth. More broadly, abortion opponents might believe that society as a whole would be harmed by a declining population, by the inability to capture the positive externalities that a fetus would produce if the fetus survived, or by the mere knowledge that the country in which they live has become a killing field for fetuses.

Pro-choice advocates (and perhaps I should make clear here that I am one of them) will no doubt be outraged by the mere expression of these interests. But that is only because pro-choicers start with the assumption that abortion is an “individual right”—that is that the strength of these sup-

²⁴⁴ See *supra* notes 126–28 and accompanying text.

posed negative externalities should be measured solely by the person seeking an abortion. But, deferentialists ask, in a divided society where people disagree about the existence or strength of externalities, why should judges be the ultimate arbiters?

Libertarian activists have a response. After all, judges must decide one way or the other. Whether they uphold or invalidate abortion laws, they are deferring to one side or the other. Moreover, libertarians might insist, judges are uniquely well suited to mediate the struggle between public and private. Judges themselves are government officials, and their rulings come with the imprimatur of state action. But they are also at least partially shielded public pressure. They are the most private of our public officials. Because they straddle the public/private line, they are uniquely able to resolve the conflicting claims of the collective and the individual.

For these reasons, judges have the potential to wisely resolve arguments about individual rights. Have they taken advantage of that potential? Answering that question will turn on a close empirical examination of how judges have used their power together with a normative judgment about how the power ought to be used. For what it is worth, I once thought that judges used the power wisely enough often enough to justify libertarian activism.²⁴⁵ I no longer hold that view and am therefore more sympathetic to deferentialist criticism of libertarian activism. For present purposes, though, the important point is that deferentialists force us to ask whether the view is correct, and that this is the right question to ask.

IV. CONCLUSION: LOCATING ONESELF ON THE MAP

With this new map to guide them, participants in our constitutional arguments can decide where they want to go. Are they libertarians or interventionists, rule formalists or deferentialists? The map itself does not dictate the preferred destination, but it does provide information that might influence our choice. It identifies the territory that we must traverse, the obstacles we must overcome to get there, the wrong turns we might make, and the terrain we will occupy when we complete our journey.

There are, moreover, good reasons to use this map rather than its competitors. This is a map that identifies the geographic features that should matter to us. Maps that locate us regarding originalism and living constitutionalism are ultimately guides to linguistic theory and interpretation. They are about the nature of meaning and about how to read a text. Without in any way denigrating the value of pursuing those questions in other contexts, they are far removed from questions about how a polity should govern itself.

In contrast, the map I propose guides us when we consider the relationship between democratic engagement and private commitments, the choice

²⁴⁵ See generally LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF JUDICIAL REVIEW* (2001).

between elite expertise and the popular will, the actual functioning of our political and judicial branches, and the true meaning of freedom. Can there be any doubt that these are the questions we should be addressing? There are nonetheless two reasons to doubt whether this map will serve us well.

First, we should worry about whether the map has any relationship to territory that actually exists. Like other models of constitutional argument, my approach must confront a radically skeptical account of our practices. When one examines real judges and other constitutional advocates, most of them do not fit consistently or comfortably within the categories that I have defined, any more than they fit comfortably along the originalism/living constitutionalism dimension. For example, conservative justices criticize libertarianism when the subject is abortion, but support it when the subject is guns.²⁴⁶ Similarly, liberal justices who laud deferentialism concerning the scope of federal powers have no use for it when the issue is the scope of executive power to protect national security.²⁴⁷ Neither side seems much interested in exploring the reasons for these contradictions. Critics might therefore claim that instead of providing a guide to choosing a destination, my map offers no more than a menu of rhetorical tropes that participants use instrumentally to get to different places as the situation warrants.

Second, as I have already mentioned, the map I propose does not dictate a destination. It cannot be used to settle arguments. Instead, travelers must determine their destination by resolving issues concerning the relative merits of libertarianism and interventionism or concerning the relative trustworthiness of judges and politicians. These are not matters on which Americans agree. For camp counselors who want to get us all going to the same place at the same time, the map is useless.

There are available responses to these criticisms and, at the risk of ending this discussion on a defensive note, I provide them here.

²⁴⁶ Compare, e.g., *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2265 (2022) (opinion of Alito, J.) (interpreting the Due Process Clause to reject the libertarian position regarding abortion), with *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (opinion of Alito, J.) (interpreting the same Due Process Clause to endorse the libertarian position regarding guns). The two cases cannot be distinguished on textualist grounds. True, the Constitution refers to "the right to bear arms," see U.S. CONST. amend. II, but not to the right to have an abortion. But the Second Amendment does not apply to state laws like the law at issue in *McDonald*; cf. *Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet) 243, 247 (1833) (holding that the first eight amendments to the Constitution apply only to the federal government). Justice Alito was therefore forced to rely on the same, open-textured Due Process Clause to establish gun rights that he found inadequate to protect abortion rights.

²⁴⁷ Compare, e.g., *United States v. Lopez*, 514 U.S. 549, 616–17 (Breyer, J., dissenting) (arguing that "[c]ourts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce—both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy"), with *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (Breyer, J., joining plurality opinion of O'Connor, J. for the Court) (rejecting government's factual assertion that the processes ordered by the Court "will have the dire impact on the central functions of warmaking").

What are we to make of the complaint that I have mapped a kind of Never Never land that bears no relationship to the terrain occupied by participants in our constitutional practice? I have already expressed my own pessimism about the prospects of providing a complete account of the actual determinates of judicial behavior.²⁴⁸ Judges act from a baffling array of motives. They are affected by the legal materials brought to their attention, by random facts in particular cases, by the strength of the advocacy on either side, by their political and personal loyalties, by ideological views concerning power and desert, by desire for professional advancement or for acclaim, by the wish to appear consistent and principled, and, no doubt, by a host of urges and prejudices that are not consciously available to them.²⁴⁹ Empirical research can make some progress in sorting all this out, but we are kidding ourselves if we think that it will ultimately yield a simple account.

It does not follow, though, that the map I suggest here has no value. I start with a normative claim: Even if judges don't, or don't always, come to decisions based on the factors I outline here, they ought to.²⁵⁰ Because much of this article consists of a defense of this claim, I won't repeat the defense here.

Instead, I want to make a second point that takes hold even if judges ultimately reject my normative claim. My map might encourage a judge who acts inconsistently along, say, the libertarian/interventionist axis to ask why she is doing so. If these decisions are not entirely random or irrational, the judge must be following an alternative map that she prefers. Put differently, awareness of my map might force judges to engage in useful reflection about what they are doing. If they are acting inconsistently along the dimensions that I describe, they might revise their practices to make them consistent. Alternatively, they might reject my map and identify for themselves a system of thought according to which their practices are consistent. Even if social scientists can't sort out judicial behavior, judges might be able to better understand for themselves what they are doing and why they are doing it. The hope is that this reflection will produce wiser decision making.²⁵¹

Perhaps this hope is unrealistic. It may be that judges as a class have no interest in engaging in this kind of introspection or are not thoughtful or

²⁴⁸ See *supra* note 26 and accompanying text.

²⁴⁹ Cf. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEG. EDUC. 518 (1986) (detailing subjective constraints felt by judges).

²⁵⁰ For reasons that I discuss below, judges cannot use the map to definitively resolve disagreement. Instead, they should use the map to locate themselves with regard to issues of restraint and activism, to consider about critiques of those positions, and to think through the implications of their chosen view for the case before them.

²⁵¹ The process I describe bears at least a family resemblance to John Rawls' famous standard of reflective equilibrium. JOHN RAWLS, *A THEORY OF JUSTICE* 48–53 (1971); cf. RICHARD WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 16–17 (1961) (making a related argument regarding the “justification” function of judicial opinions).

insightful enough to do so. Perhaps they are ideological hacks or mindless decision machines who spit out results with no reflection at all. But even if judges are hopeless and the skeptical account is accurate, my map might provide grounds for people who are not judges to criticize judicial practices. Indeed, if the failure of judges to engage in this kind of introspection demonstrates that the skeptical account is accurate, that fact alone might go a long way toward settling disputes between believers in activism and restraint.

That brings us to the second problem. Ultimately, Americans are divided about whether we can trust judges, just as they are divided about the appropriate role of government, the nature of civil liberties, and the legitimacy of market outcomes. Locating oneself on my map requires resolving these issues for oneself, and different people will resolve the issues in different, perhaps irreconcilable ways. If one thinks that constitutional law serves as a crucial, mediating discourse that holds the country together, then an account of constitutionalism that emphasizes irreconcilable differences is worse than useless.

But although this is a familiar account of the purpose of constitutional law, it is wrong. Constitutional law never has and never can settle the differences that divide us. Throughout our history, constitutional law has provided a vocabulary that, for better or worse, we have used to describe and argue about those differences, but it has not resolved them. Neither *Roe*²⁵² nor *Dobbs*²⁵³ will “settle” the issue of abortion. Neither *Brown*²⁵⁴ nor *Plessy*²⁵⁵ has “settled” issues about race. No Supreme Court decision will permanently resolve questions about the regulatory state, the appropriate protection for minority rights, or the divisions between state and national power.

The most that we can hope for constitutional law is that it will clarify the issues that divide us, provide arguments for either side that people of good faith are bound to consider, and encourage us to listen to each other with open minds. My hope for the map that I offer here is that it will help accomplish these ends.

Oddly, though, the very fact that the map emphasizes rather than resolves our disagreements might provide the basis for an overlapping consensus concerning the question that should matter the most to us. Progress in constitutional law and theory has been stymied by the illusive belief that, if only we adopt the right interpretive approach, constitutional law will allow us to transcend the fundamental issues that divide us. Before we can try something new, we must get beyond that myth. The map that I propose helps us to do this. By emphasizing disagreement, rather than unity, it calls out for another kind of mediating discourse. That discourse cannot be based

²⁵² *Roe v. Wade*, 410 U.S. 113 (1973).

²⁵³ *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2265 (2022).

²⁵⁴ *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

²⁵⁵ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

on constitutional commands that, like it or not, must be obeyed. It certainly cannot be based on a linguistic or interpretive theory. Instead, it depends upon a willingness to acknowledge the fact of political difference and to find ways to live in a polity where the difference remains unresolved. It requires a set of norms emphasizing tolerance, restraint in the use of power, openness to disagreement, and willingness to work for shared goals like widespread prosperity, preservation of our physical environment, and justice as we best understand it.

If the map outlined here helps us to reach that destination, then it has served its purpose.