

Self-Government and the Judicial Function

COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE. By J. Harvie Wilkinson III. New York, New York: Oxford University Press, 2012. 151 pages. \$21.95.

Reviewed by David Rudenstine *

In the wake of the liberalism of the Warren Court, judicial and political conservatives pursued two opposing courses of action. The first emphasized the need to curtail Supreme Court authority by means of an interpretative theory that became known as Originalism.¹ The second prized judicial expansiveness but urged that such judicial authority promote constitutional outcomes that protect states' rights,² property rights,³ corporations,⁴ and gun owners.⁵

It is into this intellectual thicket⁶ structured by the defenders and critics of the Warren Court legacy that J. Harvie Wilkinson III submits *Cosmic Constitutional Theory: Why Americans are Losing Their Inalienable Right*

* David Rudenstine is the Sheldon H. Solow Professor of Law at Benjamin N. Cardozo School of Law, Yeshiva University. I wish to thank Benjamin Cooper, Cardozo, Class of 2014, for his exceptional research assistance in preparing this essay.

1. See generally ROBERT H. BORK, THE TEMPTING OF AMERICA 143–60 (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

2. See, e.g., *Printz v. United States*, 521 U.S. 898, 902, 935 (1997) (holding that the Brady Handgun Violence Prevention Act imposed an unconstitutional obligation on state officers to carry out federal laws); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that the Gun-Free School Zones Act exceeded Congress's Commerce Clause authority and infringed on the general police power retained by the states).

3. See, e.g., *Lloyd Corp. v. Tanner*, 407 U.S. 551, 570 (1972) (upholding the right of a shopping center owner to prohibit the distribution of antiwar handbills on his property).

4. See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 347 (2010) (“[T]he First Amendment does not allow political speech restrictions based on a speaker's corporate identity.”); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 324 (1978) (requiring warrants to make Occupational Safety and Health Administration (OSHA) inspections of employment facilities); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 564 n.1, 576 (1977) (holding that the Double Jeopardy Clause barred the government's appeal from judgments of acquittal in criminal contempt proceedings brought to enforce the terms of an antitrust consent decree).

5. See, e.g., *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3050 (2010) (holding that the Second Amendment right to keep and bear arms applies to the states by virtue of the Fourteenth Amendment); *Dist. of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (holding that a District of Columbia prohibition on the possession of usable handguns in the home violated the Second Amendment).

6. The literature on constitutional interpretation is voluminous. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 465–506 (2012) (containing a forty-page bibliography including about 1,600 citations on the subject, and even including a disclaimer that only books or articles that influenced the authors are listed).

to *Self-Government*.⁷ Wilkinson in effect wishes a plague on all of these houses. He thinks that liberal Warren Court-type activism undermines self-government. He is heartbroken that Originalism fails its promise and merely disguises robust, conservative judicial activism. And as for conservatives who embrace what Wilkinson would consider an “activist” judicial philosophy in favor of conservative values, he thinks they are as much of a danger to self-government as is Living Constitutionalism, which he considers a politically left-leaning approach to interpreting the Constitution that promotes judicial hegemony. In contrast to these various positions, Wilkinson argues that the central value requiring protection and strengthening is self-government itself, and, because he thinks grand constitutional theories result in judicial hegemony, he seeks to decapitate such theories and in their place to resurrect the tradition of judicial restraint.

Wilkinson’s book is noteworthy—though that is true not because what Wilkinson states is novel or not hinted at in his previous writings.⁸ Rather, it is true for three reasons. Wilkinson is a nationally prominent, highly conservative federal judge who was considered by President George W. Bush for possible appointment to be Chief Justice of the Supreme Court.⁹ Nonetheless, Wilkinson is highly critical of Originalism,¹⁰ an interpretative theory of the Constitution that is the darling of judicial and political conservatives.¹¹ His critique of Originalism may signal that its heyday has passed.

Second, Wilkinson argues that what he terms cosmic theories—“Originalism,” “Living Constitutionalism,” “Political Process Theory,” and “Pragmatism,” among others—are all inherently flawed, encourage

7. J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* (2012). Wilkinson’s 2012 book is one in a series entitled *Inalienable Rights Series*, published by Oxford University Press. *Id.* at iii–iv.

8. In a 2009 law review article, Wilkinson set out his objections to the Supreme Court’s decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and argued that, as a matter of interpretative methodology, the Court’s method in *Heller* was similar to the Court’s method in *Roe v. Wade*, 410 U.S. 113 (1973), which he condemns. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009). For other articles in which Wilkinson expounds upon his notions of judicial restraint, see generally J. Harvie Wilkinson III, *Essay, Gay Rights and American Constitutionalism: What’s A Constitution For?*, 56 DUKE L.J. 545 (2006); J. Harvie Wilkinson III, *If It Ain’t Broke . . .*, 119 YALE L.J. ONLINE 67 (2010), <http://yalelawjournal.org/2010/01/07/wilkinson.html>; J. Harvie Wilkinson III, *Toward One America: A Vision in Law*, 83 N.Y.U. L. REV. 323 (2008).

9. Elisabeth Bumiller, *An Interview by, Not with, the President*, N.Y. TIMES, July 21, 2005, http://www.nytimes.com/2005/07/21/politics/21bush.html?pagewanted=print&_r=0.

10. See WILKINSON, *supra* note 7, at 46–59 (discussing what he calls the “Vices of Originalism”).

11. See Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 51 (2011) (discussing a recent study concluding that Originalism “is strongly favored by individuals who are conservative”).

dangerous judicial activism, and are unable to contain judicial power so that it does not threaten the fundamental value of self-governance.¹² Wilkinson's critique is useful, often persuasive, and succinctly presented, and his passionate effort emphasizing the importance of protecting self-governance and corollary claim for judicial restraint are appealing.

Wilkinson's assertion that judicial restraint—elegantly captured by one of Justice Holmes's epigrams, “[t]he first duty of a judge is to remember that he is not God”¹³—is the only defensible way forward for the Supreme Court if self-governance is to be protected continues a tradition represented by James B. Thayer,¹⁴ Oliver Wendell Holmes,¹⁵ Felix Frankfurter,¹⁶ Alexander M. Bickel,¹⁷ John Marshall Harlan,¹⁸ and Lewis F. Powell, Jr.¹⁹ That tradition emphasizes the right of majorities to make policy through legislatures, as opposed to having public choices frozen via constitutional decisions that may only be undone by amending the Constitution²⁰ or by

12. WILKINSON, *supra* note 7, at 3–10.

13. Felix Frankfurter, *Calvert Magruder*, 72 HARV. L. REV. 1201, 1202 (1959).

14. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (explaining that judges, unlike legislators, must sometimes pronounce that legislation is constitutional even when they do not support it).

15. See *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting) (stating that when determining whether a law is constitutional, “my agreement or disagreement has nothing to do with [it]”).

16. See *Trop v. Dulles*, 356 U.S. 86, 120 (1958) (Frankfurter, J., dissenting) (stating that the only restraint upon judicial power is self-restraint). See generally Sanford V. Levinson, Note, *The Democratic Faith of Felix Frankfurter*, 25 STAN. L. REV. 430 (1973) (discussing the underpinnings of Frankfurter's theory of judicial restraint).

17. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 239 (1962) (“The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own.”).

18. See *Baker v. Carr*, 369 U.S. 186, 333 (1962) (Harlan, J., dissenting) (“I would think it all the more compelling for us to follow this principle of self-restraint when what is involved is the freedom of a State to deal with so intimate a concern as the structure of its own legislative branch.”); *Griffin v. Illinois*, 351 U.S. 12, 33 (1956) (Harlan, J., dissenting) (“[T]he Court should refrain from deciding the broad question urged upon us until the necessity for such a decision becomes manifest.”).

19. See Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 288 (1990) (“[T]he Court's function is to decide cases involving specific issues and particular parties. The Court does not sit to make announcements of abstract principles or to give advisory opinions.”).

20. Amending the Constitution to protect an individual right is exceedingly difficult. Thus, apart from Amendments One through Eight, adopted in 1791, and the three post-Civil War Amendments—the Thirteenth (1865), the Fourteenth (1868), and the Fifteenth (1870)—the Constitution has been amended only three other times to protect an individual right, and each of those regulate the franchise. Thus, the Nineteenth Amendment (1920) guaranteed to women the right to vote, U.S. CONST. amend. XIX; the Twenty-Fourth Amendment (1964) outlawed the poll tax or any other tax “in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress,” *id.* amend. XXIV, § 1; and the Twenty-Sixth Amendment (1971) barred the United States or any state from denying the franchise to anyone eighteen years of age or older on account of age, *id.* amend. XXVI, § 1.

being overruled by a subsequent Supreme Court decision.²¹ Thus, Wilkinson becomes a self-appointed son advocating an idea that has many respected fathers, but in a contemporary context and by reference to recent Supreme Court decisions.²²

As noteworthy as Wilkinson's book is, he ultimately fails in his mission. Try as he might, he will not likely put an end to the development and promotion of grand theories.²³ And ultimately, his appeal for judicial

21. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overruling the Court's holding in *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986), that Georgia's sodomy statute did not violate homosexuals' fundamental rights); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (overruling *Nat'l League of Cities v. Usery*, 426 U.S. 833, 834, 852 (1976), in which the Court held that Congress could not extend certain portions of the Fair Labor Standards Act to traditional state government functions); *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (overruling the Court's holding in *Whitney v. California*, 274 U.S. 357, 371-72 (1927), that the punishment of certain types of association did not violate the Due Process Clause or the Fourteenth Amendment); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954) (overruling the Court's infamous holding in *Plessy v. Ferguson*, 163 U.S. 537 (1896)); *United States v. Darby*, 312 U.S. 100, 116-17 (1941) (overruling *Hammer v. Dagenhart*, 247 U.S. 251, 276-77 (1918), in which the Court held that the Commerce Clause did not extend to allow Congress to regulate items made using child labor).

22. See, e.g., WILKINSON, *supra* note 7, at 28, 57-58 (commenting on *Roe v. Wade*, 410 U.S. 113 (1973) and *District of Columbia v. Heller*, 554 U.S. 570 (2008)).

23. There is nothing new about these debates. Thus, debates over Supreme Court constructions of the Constitution were evident as early as 1793 when, in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 479 (1793), the Court ruled in favor of the complainants against the state of Georgia, prompting the Georgia House of Representatives to pass a bill making it a felony for a federal marshal to enforce the judgment and imposing the punishment of death by hanging "without benefit of clergy." Paul A. Freund, *Storm Over the American Supreme Court*, 21 MOD. L. REV. 345, 346 (1958). Five years later, the debate broke out again when Justice Iredell criticized the majority in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), because it based its decision on "principles of natural justice," which Iredell maintained "are regulated by no fixed standard." *Id.* at 399 (Iredell, J., concurring in part). A quarter of a century after that, Thomas Jefferson took Iredell's concerns over cabining judicial discretion a step further when he claimed that the Constitution was "a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please." Letter from Thomas Jefferson to Judge Spencer Roane of the Va. Supreme Court of Appeals (Sept. 6, 1819), in THE PORTABLE THOMAS JEFFERSON 561, 563 (Merrill D. Peterson ed., 1975). As is well known, Roane was a prominent opponent of John Marshall; he wrote that Marshall's decision in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), was "[a] most monstrous and unexampled decision . . . [that] can only be accounted for from that love of power which all history informs us infects and corrupts all who possess it, and from which even the upright and eminent Judges are not exempt." 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 555-56 (rev. ed. 1926) (internal quotation marks omitted). And when those historical moments are viewed from Tocqueville's perspective that "[t]here is almost no political question in the United States that is not resolved sooner or later into a judicial question," 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, 257 (Harvey C. Mansfield & Delba Winthrop eds., Univ. of Chi. Press 2000) (1835), it is hardly a wonder that fierce debate, so often characterized by widely divergent, passionately expressed views over the Constitution's meaning, streaks through the entire course of American history. But still, the contemporary debate over how to interpret the Constitution took on its current character only after 165 years had passed since the Constitution became effective. See generally LEARNED HAND, THE BILL OF RIGHTS (1958); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Felix Frankfurter, *John Marshall and the Judicial Function*, 69

restraint is unpersuasive and will have no enduring impact on what judges think or how they act. Instead, there will continue to be a vigorous debate over constitutional meaning, as there has been, and, as is argued below,²⁴ such public debates are likely, over the long term, to influence constitutional meaning, thus demonstrating the democratic character of the judicial function and diminishing the tension between the values of self-government and an independent judiciary.

I. Wilkinson's Thesis

Wilkinson makes the following set of claims. In recent decades, there has been an "explosion" of "grand and unifying"²⁵ constitutional visions "that purport to unlock the mysteries of our founding document."²⁶ Wilkinson states that these theories have "value"²⁷ in that they have "imparted important insights."²⁸ He identifies some of the "cosmic" theorists he has most in mind as Robert Bork, who advocated for "originalism," Richard Posner, who urged a "cost-benefit pragmatism," John Hart Ely, who trumpeted the values of "political process theory," and William Brennan, who espoused a "living constitutionalism."²⁹

Wilkinson speculates that the theories have different intellectual origins. Some attempted to "coordinate constitutional law with the novel rights that surfaced in the 1960s";³⁰ others constituted a reaction to the initiatives of the Warren Court and "sought to stem the tide" of doctrinal developments generated by the Warren Court;³¹ still others were "an effort to mediate among the more absolute theoretical positions";³² and other efforts ironically attempted to "stake out an antitheoretical position."³³

Despite all of the ways that these theories differ from one another, Wilkinson contends that they have two things in common: they have "enhanced" our understanding of the United States Constitution and of the world's "most powerful court," and they have "fallen very short" of their "ultimate quest,"³⁴ which he describes as an effort to "unlock the mysteries

HARV. L. REV. 217 (1955); Freund, *supra*; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

24. See *infra* notes 283–87 and accompanying text; see also *infra* Part IV.

25. WILKINSON, *supra* note 7, at 3.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 5. For Wilkinson's comments on Cass Sunstein, see *id.* at 5, 92, 97–100, and for his comments on Ronald Dworkin, see *id.* at 5, 30.

30. *Id.* at 3.

31. *Id.* at 3, 61–63.

32. *Id.* at 3.

33. *Id.* at 3–4.

34. *Id.* at 6.

of our founding document much as Freud proposed to lay bare all of human behavior and Einstein attempted to explain the universe.”³⁵

Wilkinson suggests that the quest for a grand, all-encompassing theory has failed for two quite different reasons. Most theorists—though not all—are legal scholars sheltered in academic institutions away from the pragmatism of governing, which includes judging.³⁶ These legal scholars live in a world of abstraction and do not concern themselves with the practical and concrete problems of governance.³⁷ In contrast, Wilkinson claims that the Constitution “is not at bottom an abstraction”³⁸ and that it is “less amenable to theory than to the experience that ground-level governance represents.”³⁹ In short, judges govern, and governing requires a dose of pragmatism that may not influence the scholar’s outlook.

Wilkinson also claims that the grand theory fails because it is grand, or as he puts it, “constructing cosmic theory is itself too great.”⁴⁰ He contends that the very enterprise blinds the theorist “to humble thoughts,” which in turn results in the “subordination of the most basic and honorable of all judicial traditions, that republican virtue of judicial restraint.”⁴¹ The immediate consequence of pushing judicial restraint to the margin, Wilkinson argues, is that “theorists have paid little more than lip service to the notion that judges should refrain from promoting their personal views of what is right and good.”⁴² Although Wilkinson’s prime examples of theorists who want judges to enforce, via the Constitution, their “personal views”⁴³ are the “living constitutional[ist]” theorists,⁴⁴ he ultimately concludes that even though the other theorists all have a “measure of restraint in mind,” they have “failed in their announced purpose and at worst left [judicial] restraint in an even more embattled state.”⁴⁵

According to Wilkinson, the collective failure of the grand theorists has caused two injuries. The grand theories are partially responsible for contemporary judges being willing, if not eager, to sacrifice a fair measure of judicial restraint in the name of imposing on the nation’s peoples “their personal vision of the proper good,”⁴⁶ a pattern that threatens to supplant the capacity of the politically accountable branches of government at the state

35. *Id.* at 3.

36. *Id.* at 8.

37. *Id.*

38. *Id.* at 6.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *See id.* at 6, 19.

45. *Id.* at 7.

46. *Id.* at 8.

and federal levels to exercise a dominant influence on so many important areas of American life. As Wilkinson puts it, the “grand quest”⁴⁷ of cosmic theorists, who have combined to create what he terms an “Age of Theory,”⁴⁸ has left judicial restraint “by the wayside and placed the inalienable right of Americans to self-governance at unprecedented risk.”⁴⁹ Wilkinson charges that this practice of making, instead of interpreting, the law has “strip[ped] the courts of their mantle” and leaves them in “what is frankly a more nakedly political state.”⁵⁰ Moreover, the theories “are taking us down the road to judicial hegemony where the self-governance at the heart of our political order cannot thrive.”⁵¹ As he repeats only a few pages later: “If we flunk that test—if we fail to exercise restraint—then we forsake the rule of law, embody only our own preferences and prejudices, and deal the people and their democratic institutions a staggering blow.”⁵² Or as he sums up: “The great casualty of cosmic constitutional theory has been our inalienable right of self-governance.”⁵³

Wilkinson denies harboring his own grand theory: “I make no pretense in this book of having a theory of my own with which to do the trick”;⁵⁴ or as he states on the last page: “I have no theory.”⁵⁵ Instead, Wilkinson urges that we “escape from theorizing”⁵⁶ and restore the “bedrock principle”⁵⁷ of judicial restraint. To guide that restraint, Wilkinson states that: “[J]udges should pay attention to the text, structure, and history of the Constitution and not go creating rights out of whole cloth. . . . [J]udges should appreciate ‘otherness’—the other branches of government, the other sovereign that is state government, the other institutions, professions, and trades that comprise the private sector.”⁵⁸ Wilkinson denies that there is anything surprising by his assertion that “liberty is best safeguarded when the allocation of authority to those others is respected by the courts,” and he does not think that the idea is startling that “life tenure provides the occasion not for expanding power but for appreciating its limitations.”⁵⁹ Finally, he argues that there is nothing remarkable in believing that judges should restrict themselves to enforcing only rights “unambiguously

47. *Id.* at 114.

48. *Id.* at 115.

49. *Id.* at 114.

50. *Id.* at 7.

51. *Id.* at 4.

52. *Id.* at 7.

53. *Id.* at 9.

54. *Id.* at 5.

55. *Id.* at 116.

56. *Id.* at 115.

57. *Id.* at 105.

58. *Id.* at 116.

59. *Id.*

committed”⁶⁰ to their care and that the “highest virtues of judging—and of life—are a measure of self-denial and restraint.”⁶¹

Thus, what Wilkinson wants in place of liberal and conservative activists are judges with a modest view of their authority and who respect democratic self-government.⁶² Although Wilkinson concedes that there was no golden age of judicial restraint, he does cite Justices Holmes, Brandeis, Frankfurter, Harlan, and Powell as individual justices “who took the habit of deference seriously.”⁶³ Wilkinson does so even though he also acknowledges that “[n]o judge is robotic”⁶⁴ and that even some of his Hall of Fame Justices occasionally signed on to an opinion that was no paragon of judicial restraint.⁶⁵

Wilkinson’s overall argument is unpersuasive. His conception of judicial restraint is without substance. Wilkinson has no substantive constitutional theory of powers and rights, and he presents no theory of the role of courts under the Constitution. Consequently, his appeal for judicial restraint boils down to a set of familiar but unexamined admonitions that judicial restraint will advance majoritarian preferences, strengthen self-government, and guard the legitimacy of the Court. In setting forth his appeal, Wilkinson exaggerates the challenge the Supreme Court presents to self-government and fails to appreciate the democratic legitimacy of judicial review; he minimizes the importance of Supreme Court protection of individuals, especially those in the political minority, from discrimination or oppression by the states; and he refuses to acknowledge the fact that when the Supreme Court construes the spacious provisions of the Constitution, it is, in any realistic sense, doing far more than merely discovering specific and concrete rules of law buried in such words as life, liberty, and property. Indeed, the Court is doing nothing less than making law, at least as that phrase would be generally understood. Wilkinson’s failure to face up to the reality of judicial review means that he not only fails to provide useful and meaningful guidelines for the exercise of judicial authority, but that he also fails to provide any set of reasons that would legitimate how the Supreme Court functions in fact.

60. *Id.* at 109. Wilkinson’s phrase “unambiguously committed” brings to mind Justice Iredell’s comment in *Calder v. Bull* that “the Court will never resort to that authority [to declare a congressional or state statute unconstitutional], but in a clear and urgent case.” 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J., concurring in part).

61. WILKINSON, *supra* note 7, at 116.

62. *See id.* at 4, 105–09 (“It would thus take an extreme blindness not to discern that judicial restraint is a bedrock principle of America’s founding and that the faith of the Framers lay at the end of the day with the organs of government more proximate to the people.”).

63. *Id.* at 110.

64. *Id.* at 109.

65. *Id.* at 109–10.

II. Four Cosmic Theories

Wilkinson is an apostle of judicial restraint and self-government,⁶⁶ but he embraces judicial restraint only after he concludes that there is no coherent constitutional interpretative theory that is compatible with self-government—one that contains judicial discretion so that judges do not trespass upon the values of self-government.⁶⁷ If there were, then presumably Wilkinson would advocate adherence to that interpretative theory as a means of legitimating judicial review while simultaneously protecting democratic values. Thus, to understand Wilkinson's embrace of judicial restraint, we must review his arguments as to why the grand theories fail to restrain judicial power.

A. *Three Judicial Restraint Theories*

Although Wilkinson eventually dismisses all four theories as fundamentally flawed, he is at least sympathetic to Originalism, Pragmatism, and Political Process Theory because they aspire to contain judicial power,⁶⁸ whereas he has only disdain for Living Constitutionalism, a theory that does not make containing judicial authority a pivotal premise.⁶⁹

1. Originalism.—For several interrelated reasons, Wilkinson's heart belongs to Originalism. Originalism promises a coherent judicial approach to interpreting the Constitution that responds to the perceived need to limit judicial power.⁷⁰ By imposing limits on judicial authority, the theory presumably minimizes the countermajoritarian tensions that politically unaccountable judicial power presents to a democratic society.⁷¹ It offers an approach to resolving the Madisonian paradigm that emphasizes the requirement of a sphere of freedom for the majority and the minority by delegating to the courts the responsibility for fixing the boundary between them while simultaneously curtailing judicial powers.⁷² And it offers the possibility that a properly conducted investigation into original meaning

66. See *id.* at 104–10; Wilkinson sources cited *supra* note 8.

67. See WILKINSON, *supra* note 7, at 3–10 (arguing that judicial restraint is necessary because “normal constraints on the exercise of [judicial] power are lacking”).

68. See *infra* sections II(A)(1)–(3).

69. See *infra* subpart II(B).

70. See WILKINSON, *supra* note 7, at 36–39.

71. See *id.* at 41–45 (contending that Originalism results in judicial deference to democratic processes in areas where the Constitution is silent).

72. *Id.* at 36–39.

will result in an answer to a question that can be defended as the only appropriate answer.⁷³

Although Wilkinson ultimately finds serious faults with Originalism and charges that it shares the “all-too-common infirmity of cosmic constitutional theory: a lack of judicial restraint,”⁷⁴ Wilkinson considers Originalism’s fall from grace to be “almost [of] tragic dimension” because “it tried so earnestly and so hard to be an exemplar of the modest virtues.”⁷⁵

Wilkinson states that Originalism “has been around, in one form or another, since the first days of the Constitution”⁷⁶ and that Chief Justice John Marshall “routinely displayed originalist tendencies.”⁷⁷ But Wilkinson does not claim that the drafters, ratifiers, or the public at the time the Constitution was adopted intended that their specific understanding of the meaning of constitutional words, phrases, or concepts should bind subsequent generations, nor does he claim that Marshall endorsed such a perspective. Instead, Wilkinson only claims that Originalism “has been around . . . since the first days of the Constitution,” and that the fourth Chief Justice “displayed originalist tendencies.”⁷⁸

For the period since the end of the Warren Court,⁷⁹ Wilkinson credits Robert Bork as setting forth his “most complete statement and defense”⁸⁰ of

73. See *id.* (recognizing that some scholars believe that Originalism is the only “theory capable of [the] triplicate neutrality” of “deriving, defining, and applying principle” (internal quotation marks omitted)).

74. *Id.* at 33.

75. *Id.* Thirteen pages later Wilkinson lets his deep attraction to Originalism shine through again when he states: “A *sad fact* nonetheless lies at originalism’s heart.” *Id.* at 46 (emphasis added). And then another thirteen pages later, pathos slips once more into Wilkinson’s tone as he ends his chapter on Originalism: “Originalism’s lethal combination of equivocal evidence and emboldening confidence is all the more dispiriting because the hope that it was something different had originally burned so bright.” *Id.* at 59.

76. *Id.* at 34.

77. *Id.* Felix Frankfurter observed that Marshall had no choice but to turn to the text and the debates over the Constitution when he decided constitutional questions because when he “came to the Supreme Court, the Constitution was still essentially a virgin document.” Frankfurter, *supra* note 23, at 218.

78. WILKINSON, *supra* note 7, at 34.

79. What is frequently overlooked is that the initial wellspring of the contemporary debate over how to interpret the Constitution was *Brown v. Board of Education*, 347 U.S. 483 (1954), a decision that put the idea of a Living Constitution on the contemporary modern scholarly map while simultaneously setting out a basis for undermining the legitimacy of Originalism. When the Supreme Court carried the *Brown* case over from the 1952 term to the 1953 term, it requested that the parties brief the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868,” especially the debates in Congress and the ratifying states, the “then existing practices in racial segregation, and the views of proponents and opponents of the Amendment.” *Id.* at 488–89. By so doing, the Court put the importance of the historical understanding surrounding the Fourteenth Amendment at center stage. But after reviewing the submitted material and concluding that, although the historical “sources cast some light” on the issues before the Court, that light was insufficient to “resolve the problem with which we are faced,” the Court determined that the historical sources were “inconclusive.” *Id.* at 489. It was at that point that the Court, in the most celebrated Supreme Court opinion of the twentieth century, put its prestige behind the

Originalism in his book *The Tempting of America: The Political Seduction of the Law*.⁸¹ Wilkinson distills Bork's Originalism to five claims.

The Constitution is premised on respecting the power of the majority and the freedom of the minority.⁸² It seeks to balance these competing considerations by dividing power between federal and state authorities; allocating power among the executive, legislative, and judicial branches; and further limiting the reach of government power by the constitutional provisions, including the Bill of Rights, that seek to guarantee to individuals certain rights.⁸³

Courts are charged with the responsibility of policing the boundary between the majority and the minority to assure that neither tyrannizes the other.⁸⁴ In disposing of this responsibility, courts must "decide cases on the basis of principles that they are willing to apply neutrally, regardless of

idea of a Living Constitution and insisted that in deciding the case, the Court "cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written," but must consider the issue of mandatory segregation in public schools "in the light of its full development and its present place in American life throughout the Nation." *Id.* at 492–93.

80. WILKINSON, *supra* note 7, at 33.

81. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (Touchstone 1991). Wilkinson does not credit Bork as starting "originalism on its ascent to prominence" in the "modern era"; that accolade he gives to Hugo Black, whom he describes as more of a Textualist than an Originalist because for Black the "font of interpretation was nothing more—or less—than the actual words of the Constitution." WILKINSON, *supra* note 7, at 34. Wilkinson concedes that Black "certainly tried to make textualism sound like a theory of restraint," but he concludes that "Black's pure textualism ultimately came up short" because the text of a constitution that raises more questions than it can answer "can hardly be the linchpin of any theory of restraint." *Id.* at 35–36. To Wilkinson, an interpretative approach to a Constitution laced with ambiguity and pregnant with silences must look beyond the wording of the document to discern its meaning. Going beyond the four corners of the document will provide "ample opportunity" to a judge to "pour his or her own values into the Constitution," which is what Wilkinson concludes the "Black-Douglas wing of the Supreme Court" did for many years by presenting itself as restrained by the text, and thus humble and modest, to use Wilkinson's terms, as it pursued a "result-oriented approach of 'disguised activism.'" *Id.* at 36 (quoting BORK, *supra*, at 70). Although there is no faulting Wilkinson for associating Black with the origins of modern Originalism, his brief treatment of the subject overlooks the roots of Black's own thinking on the subject, which was a powerful reaction to the conflict between President Roosevelt and his New Deal agenda, *see* BORK, *supra*, at 55–56 (describing that Black was appointed to the Court shortly after leading the fight in the Senate to pack the Court in order to save the New Deal), and the insistence of the so-called "Four Horsemen" (Justices Van Devanter, Butler, Southerland, and McReynolds) to construe the Constitution as if it embodied a particular economic theory, *see* WILKINSON, *supra* note 7, at 113 & 151 n.35. For the most famous admonishment against the Court formulating a decision upon a particular "economic theory which a large part of the country does not entertain," *see* *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

82. WILKINSON, *supra* note 7, at 36.

83. *See id.* at 36–37 (arguing that, to prevent tyranny, the Framers imposed structural and substantive tools to balance the competing principles of majority rule and minority freedom).

84. *Id.* at 37.

their personal preferences,”⁸⁵ which Wilkinson asserts will constitute a “bulwark against political judging.”⁸⁶

In defining the boundary between “majority rule and minority freedom,”⁸⁷ contemporary judges must enforce “the original public understanding of the Constitution”⁸⁸ because “[i]t is the founding generation, not the contemporary judge, who strikes the balance between majority rule and minority freedom.”⁸⁹ That is so because it is “the only way to ensure” that the tension between the majority and the minority “is resolved in a principled manner, instead of according to the political preferences of the justices.”⁹⁰

In determining what the “original public understanding” of the Constitution was in the founding generation, Wilkinson notes that Bork wrote: “All that counts is how the words used in the Constitution would have been understood at the time”⁹¹ and then, drawing from this, that the words must be understood “at the level of generality that the text and historical evidence warrant.”⁹²

Finally, because the imposition of Originalism constitutes the imposition of a new interpretative methodology after two hundred years of constitutional developments, the “correct constitutional interpretation” must on occasion yield to precedent.⁹³ However, that yielding must be limited to “only [where] the previous decision has ‘become so embedded in the life of the nation, so accepted by the society, so fundamental to the private and public expectations of individuals and institutions, that the result should not be changed now.’”⁹⁴

When Wilkinson turns to Originalism’s limitations, he strikes at its heart and claims that the theory of Originalism fails—as opposed to the failings of its practitioners—to constrain judges who “sincerely strive to discover and apply the Constitution’s original understanding.”⁹⁵ As a result, “personal preferences and original understandings seemingly manage to converge.”⁹⁶ For Wilkinson the “fault lies with the theory itself,”⁹⁷ which

85. *Id.*

86. *Id.*

87. *Id.* at 38.

88. *Id.* at 37.

89. *Id.* at 38.

90. *Id.* at 37.

91. *Id.* at 38 (quoting BORK, *supra* note 81, at 144).

92. *Id.* (quoting BORK, *supra* note 81, at 149).

93. *Id.* at 39.

94. *Id.* (quoting BORK, *supra* note 81, at 158).

95. *Id.* at 46.

96. *Id.*

97. *Id.*

“is incapable of constraining judges on its own.”⁹⁸ And then, repeating a criticism of Originalist judges offered by Brennan, Wilkinson criticizes judges who claim to adhere to Originalism for not only failing to acknowledge this fundamental flaw, but also for aggravating it by brandishing “a new breed of judicial activism masquerading as humble obedience to the Constitution.”⁹⁹

From these opening comments, Wilkinson then proceeds to identify four reasons why the theory of Originalism is beset with deadly infirmities. First, he maintains that with “respect to a vast number of controversial constitutional questions, originalism offers only ambiguous historical evidence, if any at all.”¹⁰⁰ The consequence of the limitations of historical evidence to provide sufficiently concrete and unambiguous answers to important constitutional questions results in what Wilkinson claims are “such loose analytical boundaries”¹⁰¹ that the methodology of Originalism “can be used to support a variety of outcomes on thorny constitutional disputes.”¹⁰² And to underline his point, he writes: “No one is immune to the perils of the muddled historical record,”¹⁰³ not “[e]ven the estimable Justice Clarence Thomas[, who] has fallen prey to originalist activism.”¹⁰⁴

Next, Wilkinson asserts that Originalism requires judges to be historians, which they are not, and it assumes that the judicial system is compatible with the historical enterprise, which it is not.¹⁰⁵ Three times in this relatively short discussion, Wilkinson refers to judges as “amateur” historians¹⁰⁶ who lack the education and experience of a skilled historian and do not have the time, given their overall responsibilities, to discharge the duties thrust upon them by the theory of Originalism.¹⁰⁷ Moreover,

98. *Id.*

99. *Id.* In making this criticism of Originalist judges, Wilkinson follows in Brennan’s footsteps. “With characteristic rhetorical force,” Wilkinson writes, Brennan “criticized the use of original intent as ‘arrogance cloaked as humility’ because the relevant evidence is too ‘sparse or ambiguous’ to support any reliable conclusions.” *Id.* at 13 (quoting William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 435 (1986)). Later, Wilkinson repeats this criticism and refers to Justice Scalia’s opinion in *Heller* to illustrate his point. *Id.* at 57–58.

100. *Id.* at 46.

101. *Id.* at 46–47.

102. *Id.* at 47.

103. *Id.* at 49.

104. *Id.*

105. *Id.* at 50.

106. *See id.* (“amateur historian”); *id.* at 51 (“amateur originalist”); *id.* at 52 (“amateur historian”).

107. In illustrating his point that judges are incompetent historians, Wilkinson cites two opinions written by “liberal justices,” *id.* at 51 & nn.96–97, Justice Black’s opinion in *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting), and Justice Brennan’s opinion in *Fay v. Noia*, 372 U.S. 391 (1963). Wilkinson also claims that conservatives will have to do “heavy judicial lift[ing]” to invalidate the 2010 health care reform bill on the ground that Congress lacks authority under the Commerce Clause to regulate “activity affecting one-sixth of the national

Wilkinson understands that what he terms “true history”¹⁰⁸ is “often tentative and qualified”¹⁰⁹ and that the demands of deciding a dispute require a degree of “judicial certitude”¹¹⁰ that “will do a disservice to both the judicial and historical crafts.”¹¹¹

Wilkinson’s third arrow takes Originalism to task because the original public understanding of the text is “meaningless”¹¹² unless the interpreter knows “at what level of generality that understanding took place,”¹¹³ and that level of generality is not knowable.¹¹⁴ Wilkinson illustrates his point by asking if the Equal Protection Clause “forbid[s] discrimination on the basis of race” or only prohibits “discrimination against African Americans?”¹¹⁵ Wilkinson claims that “debates rage” over the question and suggests that there is no agreed-upon principle to employ to settle the debate.¹¹⁶ Wilkinson recognizes that Bork proposed a solution to the problem—that judges should “assign whatever level of generality the history supports,”¹¹⁷—but he dismisses Bork’s solution by stating that it “doubles down on the infirmities of originalist inquiries.”¹¹⁸

Wilkinson’s last criticism reflects the fact that Originalism is offered by its proponents not only as the Holy Grail of constitutional law, but as an interpretative theory that must now be imposed on two centuries of constitutional developments frequently inconsistent with the theory.¹¹⁹ How to resolve this matter? One approach might be to expect the resolute devotees of Originalism to simply discard past case law and to correct these

economy.” WILKINSON, *supra* note 7, at 51. Indeed, Wilkinson asserts that any opinion that so concludes and that is anything less than “bulletproof[,] will be seen as a purely political undertaking.” *Id.* at 51–52. As is well known, five justices—Chief Justice Roberts and Associate Justices Scalia, Kennedy, Thomas, and Alito—did conclude that Congress lacked power under the Commerce Clause to pass the 2010 health care law. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591, 2642 (2012) (Roberts, C.J.) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). But because Chief Justice Roberts concluded that Congress had power under the taxing power to pass the health law, the law was mainly sustained, *id.* at 2600 (Roberts, C.J.), though the provisions pertaining to Medicaid were struck down on the ground that Congress had exceeded its authority under the spending clause, *id.* at 2608–09.

108. WILKINSON, *supra* note 7, at 51.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 52.

113. *Id.*

114. *See id.* at 52–53 (recognizing that judicial attempts to define the appropriate level of generality for the original understanding of a principle can lead to uncertainty, which in turn increases the appeal of judicial activism).

115. *Id.* at 52.

116. *Id.*

117. *Id.*

118. *Id.*

119. *See id.* at 54 (“Opportunities for personal preference abound when judges must balance the correct result under originalism against existing precedent.”).

illegitimate outcomes one case at a time as the issues arise. But even Justice Antonin Scalia, who rarely displays a gracious forbearance for what he perceives as a failure to adhere to the logic of an argument, rejects such a wholesale approach as “medicine” that is “too strong to swallow,”¹²⁰ which in turn has caused him to label himself a “faint-hearted originalist” who “tempers the theory with a respect for precedent and a refusal to reach outcomes too far afield of the public’s sensibilities.”¹²¹

For Wilkinson, the “folly”¹²² of a restrained application of Originalism across the entire terrain of American constitutional law not only forces Originalist judges to pick and choose the precedents they will respect and those that they will discard, but to do so by reference to “pragmatic, consequentialist considerations”¹²³—a task which vests the Originalist with broad discretion that Wilkinson argues “dilutes originalism’s constraining power.”¹²⁴

Originalism may have been born in innocence, but for all its pretense, Originalism is fundamentally faulty, and prominent Originalist judges, in the wake of the *District of Columbia v. Heller*¹²⁵ and *McDonald v. City of Chicago*¹²⁶ decisions, which Wilkinson ranks with *Roe v. Wade*¹²⁷ as representing the “zenith of judicial activism,”¹²⁸ are no innocents and cannot “claim the high ground in debates about judicial restraint.”¹²⁹ Wilkinson understands Originalism to be the hoax it is, and by being so devastating with his criticism, he may shorten the time that Originalism is a theory worthy of consideration.¹³⁰

120. Scalia, *supra* note 1, at 861. To illustrate Scalia’s faintheartedness, Wilkinson quotes him: “Even if it could be demonstrated unequivocally that [public flogging and hand branding] were not cruel and unusual measures in 1791 . . . I doubt whether any federal judge—even among the many who consider themselves originalists—would sustain them against an eighth amendment challenge.” WILKINSON, *supra* note 7, at 55 (alterations in original) (quoting Scalia, *supra* note 1, at 861).

121. See WILKINSON, *supra* note 7, at 54. Scalia’s effort to reconcile the demands of Originalism with American constitutional law history is an imitation of Bork’s more elegant effort. See *supra* notes 80–81 and accompanying text.

122. WILKINSON, *supra* note 7, at 55.

123. *Id.*

124. *Id.* at 56.

125. 554 U.S. 570 (2008).

126. 130 S. Ct. 3020 (2010).

127. 410 U.S. 113 (1973).

128. WILKINSON, *supra* note 7, at 68.

129. *Id.*

130. For another recent and powerful critique of Originalism, see Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC, Aug. 24, 2012 (book review), <http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism>.

2. *Pragmatism.*—Wilkinson respects Richard Posner as a wise Pragmatist¹³¹ and as an “intellect for all seasons”¹³² who he thinks correctly argues that existing constitutional metatheories “cannot do the difficult work of constraining the judiciary.”¹³³ And, Wilkinson would seem to agree with Posner’s claim that we are “fated . . . to an ‘interminab[le],’ irreconcilable constitutional debate”¹³⁴ because “there are no mutually accepted principles for choosing among theories, leaving us unable to sift the theoretical wheat from the chaff to find the truth.”¹³⁵

Wilkinson notes that Posner’s Pragmatism “prides itself upon being anything but” a “successful cosmic constitutional theory.”¹³⁶ Pragmatism is simply not a “machine for grinding out certifiably correct answers to legal questions.”¹³⁷ Indeed, Wilkinson notes that judicial decisions adhering to Posner’s Pragmatism may, within certain parameters, decide an issue different ways without either result necessarily being “right or wrong.”¹³⁸ Instead of Pragmatism promising a methodology that curtails judicial discretion and yields a “right” answer, it emphasizes the impact a decision is likely to have on the broader society and goes so far as to urge that the wording of a particular statute, case, or pre-existing legal rule be disregarded if that is required to accomplish a pragmatic result.¹³⁹ Wilkinson notes that Posner defends his conception of Pragmatism against the charge that it allows a judge to impose his own policy preferences by claiming that a pragmatic judge is constrained because “departures”¹⁴⁰ from legal texts and precedents may undermine the perceived legitimacy of judicial decisions¹⁴¹ and that reliance “upon predictable legal rules . . . counsels caution” so that courts do not erode their “political capital.”¹⁴² These considerations prompt a “[w]ise pragmatist[.]” to “refrain from transferring the bulk of lawmaking authority to unelected judges.”¹⁴³

Wilkinson perceives three main strengths in Pragmatism. First, Pragmatism avoids the “pitfalls”¹⁴⁴ of theory rigidity, which Wilkinson

131. WILKINSON, *supra* note 7, at 83.

132. *Id.* at 80.

133. *Id.*

134. *Id.* at 81 (alteration in original) (quoting Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 41 (2005)).

135. *Id.*

136. *Id.* at 83.

137. *Id.* (quoting RICHARD A. POSNER, HOW JUDGES THINK 249 (2008)).

138. *Id.* at 83–84 (internal quotation marks omitted).

139. *Id.* at 82.

140. *Id.* at 83.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 84.

associates with the “dogged unwillingness”¹⁴⁵ of Originalism to consider the “practical differences”¹⁴⁶ between the eighteenth and twenty-first centuries, a blindness that might turn the Constitution into a “suicide pact.”¹⁴⁷ This flexibility of Pragmatism permits judges to defer deciding the merits of a case by utilizing a justiciability doctrine—such as standing, political question, or abstention—and urges judges to define rights “to create workable solutions”¹⁴⁸ so that rights are protected without handcuffing government functions. Second, Pragmatism prompts judges to recognize their own limitations by encouraging judges to confront the “complicated but potentially enormous effects of their decisions.”¹⁴⁹ This quality sets a pragmatic judge apart from a “theory-driven”¹⁵⁰ jurist, such as a “diehard originalist,”¹⁵¹ who Wilkinson speculates “might do originalist justice even if the heavens were to fall.”¹⁵² Third, Pragmatism generally encourages a judge to “bring the whole process” of judging “into the open” and to make evident the value judgments shaping the decision rather than pretend that “their pragmatic or ideologically driven decisions stem from some supposedly neutral theoretical model.”¹⁵³ That stated, Wilkinson observes that Pragmatists “tell the truth,” but that they do only if “honesty is the best policy.”¹⁵⁴

Wilkinson’s “most important criticism” of Posner’s Pragmatism “is that it puts great power in judge’s hands and tells them precious little about what to do with it.”¹⁵⁵ Moreover, it “provides generous incentives, excuses, and cover for judges to turn away from their duty of restraint and toward the role of aggressive junior varsity legislator.”¹⁵⁶ More specifically, Wilkinson cites several failures of Pragmatism, the first being whether a judge should or should not engage in a “balancing of costs and benefits” in deciding a case.¹⁵⁷ According to Posner, if traditional legal materials resolve the case, the pragmatist judge does not inquire into “whether the rule applied is pragmatically a good one.”¹⁵⁸ A pragmatic judge will do that only if the legal materials do not resolve the case.¹⁵⁹ But Wilkinson claims

145. *Id.*

146. *Id.*

147. *Id.* at 85 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)).

148. *Id.*

149. *Id.* at 86.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 87.

154. *Id.*

155. *Id.* at 87–88.

156. *Id.* at 88.

157. *Id.*

158. *Id.*

159. *Id.*

that the restraint of this binary analysis is an illusion, especially in constitutional cases, in which a really able judge is almost always able to identify ambiguities and uncertainties that warrant a pragmatic judge to “embark on the essentially legislative task of creating a desirable solution, with all the balancing of costs and benefits such problem solving involves.”¹⁶⁰

The problem of deciding when a judge should balance costs and benefits is compounded by *how* to strike such a balance. Balancing costs and benefits requires an agreement on what the actual costs and benefits are that need to be balanced, which is hardly a given and, according to Wilkinson, likely to be debated.¹⁶¹ Even assuming there was agreement on all of the relevant factors, Wilkinson thinks Posner is naïve in thinking that there would be a consensus about how to balance the relevant variables, and as evidence of his claim, Wilkinson cites to what he terms the “cottage industry devoted to disagreeing” with Posner’s own balancing on certain matters.¹⁶²

Wilkinson also argues that the pragmatic judge’s commitment to empirical evidence will prompt a judge to supplant a legislative assessment with a judicial one once the judge gets mired in the “facts.”¹⁶³ Moreover, a judicial recitation of the so-called “facts” in an opinion that replaces a legislative balance will coat the decision with the veneer of objectivity, thus allowing the interventionist and aggressive pragmatic judge to cloak judicial intervention with an appearance of disinterest and neutrality.¹⁶⁴

After setting forth his critique of Posner’s Pragmatism, Wilkinson suddenly appears to retreat and states that “it is unfair to portray Judge Posner as insufficiently attentive to the need for judicial restraint”¹⁶⁵ because his “writings are replete with calls for courts, especially the Supreme Court, to recognize their limitations and defer to other institutional actors.”¹⁶⁶ But it then turns out that Wilkinson is merely getting ready to unload his roundhouse punch: “Lip service to restraint is one thing. The elements of the theory are something else. And the elements of Posner’s view systematically undercut restraint.”¹⁶⁷

But that is not the end of Wilkinson’s assault on Posner. For Wilkinson, “[p]ragmatic judges are ‘forward-looking’ and future-oriented,”¹⁶⁸ and thus are in “a very real sense” not “really judges after all”

160. *Id.* at 88–89.

161. *See id.* at 90–94.

162. *Id.* at 92.

163. *Id.* at 92–93.

164. *Id.* at 93.

165. *Id.* at 94.

166. *Id.*

167. *Id.* at 95.

168. *Id.*

because real judges “look to the past not just because it is a source of practical insight but because the document to be interpreted was enacted in the past, and looking to it is their job.”¹⁶⁹ Once Wilkinson goes that far, he cannot resist going the next step by claiming that “Pragmatism cuts the bonds to representative institutions by making adherence to enacted law a matter of practical convenience rather than democratic obligation”¹⁷⁰ and “weakens courts by telling judges that their task” is to second guess legislative judgments.¹⁷¹ In the end, Wilkinson argues that Pragmatism parallels Living Constitutionalism by undermining democratic government and is similar to Originalism and Political Process Theory by placing “in the hands of judges a methodology at once deceptively objective and impossible to deploy.”¹⁷²

3. *Political Process Theory.*—Wilkinson’s third cosmic theory is John Hart Ely’s Political Process Theory set forth in his seminal book *Democracy and Distrust*.¹⁷³ Wilkinson summarizes Ely’s approach as follows: “Under Ely’s theory, judges should simply stop scrutinizing the substantive outcomes of the legislative process and instead focus solely on the process itself, invalidating laws that clog the arteries of political change or discriminate against minorities without enough political clout to make their voices heard.”¹⁷⁴

As is well known, Ely took as his starting point the most famous footnote in American constitutional law, Footnote Four in *United States v. Carolene Products Co.*,¹⁷⁵ which suggested that judges should scrutinize carefully legislation that “‘appears on its face to be within a specific prohibition of the Constitution,’ ‘restricts those political processes which

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 97.

173. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Laurence H. Tribe describes Ely’s book as “[p]robably the most influential, and certainly the most elegant, effort to find a unitary purpose beneath virtually the entire Constitution.” LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 190 (2008). Tribe also states that Ely’s “mentor” was Alexander Bickel, who “famously described . . . ‘the counter-majoritarian difficulty,’” a difficulty that Footnote Four in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), sought to minimize. *Id.* at 152 n.4; TRIBE, *supra*, at 191. In turn, Bickel admired Felix Frankfurter: “It was their fate, wished on them by the great men, chief among them, over a career of fifty years, Felix Frankfurter, who gave us an age of reason in American law, who disestablished an old faith and made room for a new [one].” ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 39 (1978). Frankfurter placed himself in the tradition of James Bradley Thayer, who recognized that the Supreme Court needed limits in his warning that “[t]he checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent.” Thayer, *supra* note 14, at 156.

174. WILKINSON, *supra* note 7, at 61.

175. 304 U.S. 144 (1938).

can ordinarily be expected to bring about repeal of undesirable legislation,' or exemplifies 'prejudice against discrete and insular minorities.'"¹⁷⁶ This approach, as Wilkinson summarizes it, counsels judges to "focus their attention on process rather than outcomes, ensuring both that our democratic government functions openly and transparently and that majorities adequately consider the interests of minorities."¹⁷⁷ The result is that a court may reach conclusions it finds distasteful but which it nonetheless reaches "out of a respect for the democratic process."¹⁷⁸

Wilkinson states that Ely's "fundamental insight . . . is that process matters."¹⁷⁹ The very legitimacy of the democratic process "depends on the openness and fairness of its methods,"¹⁸⁰ and while "[e]very election or piece of legislation will produce winners and losers,"¹⁸¹ the losers at any particular moment must have a basis to expect that they will be winners sometime in the future.¹⁸² Thus, Wilkinson notes that underlying Ely's thinking is a "fierce faith in democratic governance,"¹⁸³ which Wilkinson says is a "breath of fresh air,"¹⁸⁴ and which provides the basis for Ely being able to "talk[] the talk of judicial restraint."¹⁸⁵

Having taken a respectful bow towards Ely, Wilkinson then argues that Ely's Political Process Theory is riddled with defects that invite judges to let their "own values . . . drive the outcome."¹⁸⁶ Although Wilkinson claims that Ely "promises to cabin judicial review to a few discrete situations,"¹⁸⁷ Wilkinson asserts that Ely "leaves one big question unanswered: which processes should the courts in fact police?"¹⁸⁸ To illustrate his criticism, Wilkinson offers as examples rules governing U.S. Senate processes;¹⁸⁹

176. WILKINSON, *supra* note 7, at 63 (quoting *Carolene Prods. Co.*, 304 U.S. at 152 n.4).

177. *Id.*

178. *Id.* at 64–68.

179. *Id.* at 65.

180. *Id.*

181. *Id.* (internal quotation marks omitted).

182. *Id.* at 65–66.

183. *Id.* at 67.

184. *Id.*

185. *Id.* at 69.

186. *Id.* at 74.

187. *Id.* at 70.

188. *Id.*

189. *Id.* at 70–71. Wilkinson argues that if the bellwether of democracy is that the majority should rule, then the Senate is gravely infirm. For example, the Senate requires sixty votes to cut off debate, a single senator may place a hold on a presidential nomination, and Congress awards powerful committee chairmanships based on seniority. *Id.* at 71. All of these procedures would seem to satisfy Ely's standard, as quoted by Wilkinson, of processes that "chok[e] off the channels of political change" and thus are ripe for judicial revision in the name of clearing the path of democratic processes so that people may meaningfully govern. *Id.* (alteration in original). And yet for courts to meddle with Senate internal processes would seem to decimate the meaning of separation of powers while also raising the fundamental question of exactly which

gerrymandering;¹⁹⁰ excessive legislative delegation to administrative agencies;¹⁹¹ and restrictions on “corporations and unions from spending general treasury funds on ‘electioneering communication[s].’”¹⁹²

Wilkinson’s next charge against Ely is that he disguises substantive legal decisions as process ones.¹⁹³ In making this point, Wilkinson acknowledges that Ely begins with an “agreeable premise” that “legislative acts motivated by out-and-out prejudice are at least constitutionally suspect, if not downright unconstitutional”¹⁹⁴ because a fundamental goal is to assure that “‘a different set of rules’ [are] not ‘being applied to the comparatively powerless.’”¹⁹⁵ But Wilkinson claims that Ely’s approach to advancing this goal “opens the floodgates”¹⁹⁶ to an almost endless list of claimants. Where legislators “seiz[e] upon the positive myths about the groups to which they belong and the negative myths about those to which they don’t,”¹⁹⁷ Ely urges a demanding form of judicial scrutiny, which

antimajoritarian processes are the processes that courts should deem appropriate for close judicial scrutiny.

190. *See id.* Wilkinson concedes that gerrymandering is “no one’s idea of a saintly exercise,” but he argues that judicial reform of gerrymandering “raises the question of when and under what criteria courts should overturn gerrymandered districts” and that Ely’s “[p]rocess theory solves none of these problems.” *Id.*

191. *Id.* at 72. Wilkinson cites legislative delegation to administrative agencies as another lethal problem that haunts the modern democratic state. *Id.* Substantial legislative delegation to agencies cannot be avoided and in a complex society is useful and advantageous. *See id.* (countering Ely’s criticism of delegation by arguing that it has advantages and is not “especially undemocratic when Congress can restrict or even retract its delegation”). But Ely asserts that excessive delegation to agencies “allows legislators to avoid accountability for their actions” and smacks of a “paternalism” that saps the vitality out of democracy. *Id.* Thus, the critical question is raised of, “[W]hen is delegation too much?” *Id.* To that all-important question Ely provides no answer, the absence of which “invites judges to serve as a roving commission second-guessing the legislature’s policy decisions.” *Id.*

192. *Id.* at 73 (alteration in original). As for the contentious and controversial Supreme Court decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), invalidating the legislative ban on corporations and unions spending general treasury funds on electioneering communications, *id.* at 372, Wilkinson thinks that Ely’s Political Process Theory could favor invalidating the ban on the ground that democratic processes are enriched by more speech, or it could favor upholding the ban on the ground that wealthy voices will smother other voices, WILKINSON, *supra* note 7, at 73–74. Wilkinson emphasizes that his point is not to second-guess the Court’s decision or the result Ely might have favored, but to “stress that political process theory is not a neutral form of adjudication that removes value-laden discretion from judging.” *Id.* at 74. And given that Ely’s theory “provides justification for completely contradictory results,” Wilkinson maintains that Ely’s theory does nothing more than provide “just a cover for the justice’s own beliefs.” *Id.*

193. WILKINSON, *supra* note 7, at 74–77.

194. *Id.* at 74.

195. *Id.* at 74–75 (quoting ELY, *supra* note 173, at 177).

196. *Id.* at 75.

197. *Id.* (alteration in original) (quoting ELY, *supra* note 173, at 159).

prompts Wilkinson to assert that if such guidance is “[r]ead aggressively, this idea could undo almost every legislative classification on the books.”¹⁹⁸

From Wilkinson’s perspective, Ely’s approach “makes it all too easy for disenchanting plaintiffs to change their verboten substantive rights claims . . . into political process claims”¹⁹⁹ by changing the claim that a person was wrongly denied a certain substantive right into a claim that legislation drew an improper distinction based on some stereotypical difference between a group that was favored and a group that was not.²⁰⁰ Apart from the floodgates charge that Wilkinson levels at Ely, he also states without explanation that “Ely’s formulation presages a constitutional law of class warfare.”²⁰¹

For Wilkinson, perhaps the most telling example of the fundamental problems embedded in Ely’s Political Process Theory is best illustrated by the interaction of Ely’s Political Process Theory and same-sex marriage. Wilkinson claims that the “laws that decline to recognize same-sex marriage are presumably constitutionally infirm”²⁰² because, as Wilkinson states, “it seems quite wrong for this country to accept the enormous contributions of gays and lesbians to our civic and communal life and then to deny those same citizens the satisfactions and fulfillments of matrimony.”²⁰³ At the same time, Wilkinson maintains that the debate over same-sex marriage is “too profound”²⁰⁴ and that the “serious arguments on both sides of it too weighty” to be entrusted to politically unaccountable judges making a decision guided by a process theory.²⁰⁵ Wilkinson believes that “progress from this hurtful state requires democratic assent to be enduring”²⁰⁶ and that it is “[f]ar better”²⁰⁷ for this profound change to occur through democratic processes rather than judicial pronouncements.²⁰⁸

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 76.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 76–77. Wilkinson presents a second case, *Bush v. Gore*, 531 U.S. 98 (2000), as evidence of his assertion that Political Process Theory undermines democratic self-government. WILKINSON, *supra* note 7, at 79. “I suspect,” Wilkinson writes, “the apogee of process arbitration is in some respects the case of *Bush v. Gore*. Whatever one’s view of whether the Florida recount process went awry, the Court’s decision to cut short that recount on contestable equal protection grounds cannot be hailed as a model of judicial restraint.” *Id.* (footnote omitted). He then states: “And if process theory encourages courts to weigh in on such matters as who should be our next president, that theory is no friend of self-governance.” *Id.*

Wilkinson declares that Ely's "process theory is no different from any of its competitors"²⁰⁹ in that it fails to make judges "impartial umpires" and more or less requires that they decide cases in accordance with nothing more than their "own sense of propriety."²¹⁰ Indeed, Wilkinson ends his chapter on Ely's Political Process Theory in a harsh tone: "In short, process theory can be viewed as exactly the opposite of what it is advertised to be. It is a prescription for an emboldened judicial role unsupported by the Constitution and covered by little more than a fig leaf of restraint."²¹¹ This conclusion is no surprise given that Wilkinson begins his analysis of Ely's book with the statement that it was the Warren Court, "which was hardly the foremost exemplar of judicial restraint,"²¹² that "inspired"²¹³ Ely's work and that the "overall mission" of the book is to "justify and expand" on the Warren Court's endeavors.²¹⁴ Indeed, by this point, Wilkinson cannot restrain his sarcasm any more: "So Ely ends up promising the sun, the moon, and the stars: he suggests that we can have Warren Court results from judges who exemplify restraint."²¹⁵ And for Wilkinson, such an assertion is plain ridiculous.

B. *Living Constitutionalism*

Wilkinson abhors Living Constitutionalism. From Wilkinson's perspective, Living Constitutionalism is "one of the most significant encouragements to free-wheeling judging that has yet been devised," and because "free-wheeling judging" intolerably undermines self-governance, Living Constitutionalism presents a deadly threat to the people and their democratic institutions.²¹⁶ Thus, he rejects the theory as even a plausible interpretative approach to the Constitution.²¹⁷

Living Constitutionalism emphasizes the "adaptability" of the Constitution's "great principles" to permit it to cope "with current problems and current needs."²¹⁸ Thus, Wilkinson quotes Justice William Brennan, who he cites as a leading exponent of Living Constitutionalism, asking "[w]hat do the words of the text mean in our time?"²¹⁹ Then, with startling

209. WILKINSON, *supra* note 7, at 77.

210. *Id.*

211. *Id.* at 79. Perhaps the source of Wilkinson's harshness is less Wilkinson's view of Ely than Wilkinson's disdain for the Warren Court and his conclusion that Ely's "overall mission is to justify and expand" the Warren Court's jurisprudential project. *Id.* at 61.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 61–62.

216. *Id.* at 16.

217. *See id.* at 19–32.

218. *Id.* at 12 (quoting Brennan, *supra* note 99, at 438).

219. *Id.*

disdain, Wilkinson ridicules the “heart of Brennan’s theory,”²²⁰ claiming that he aims to ensure merely that the substance of the Constitution is kept “up to date,” a claim that Wilkinson repeats again and again.²²¹

Wilkinson claims that Brennan “consistently located the key to democratic legitimacy not so much in the decisions of majorities long ago—as the originalists would have it—as in the implementation of contemporary American values in constitutional cases.”²²² By so doing, Wilkinson claims that Brennan reframes a judicial decision that would otherwise be considered an “antidemocratic aberration” into a “triumph of the will of the people.”²²³

Wilkinson states that the “most obvious strength of living constitutionalism is its descriptive force” in detailing “where American constitutional law is and how it got there.”²²⁴ As “landmarks”²²⁵ illustrating his point, Wilkinson cites to “an expansive congressional commerce power, a broad role for regulatory agencies, and a vibrant stable of unenumerated individual rights.”²²⁶ He also credits Living Constitutionalism with getting the “ball rolling in the elimination of overt discrimination on the basis of immutable characteristics—most importantly race.”²²⁷ And Wilkinson partially credits Living Constitutionalism with doctrinal stability,²²⁸ in that

220. *Id.*

221. *See, e.g., id.* at 22 (claiming that Living Constitutionalists call for an “evolutionary ‘updating’ of the Constitution” and asserting that legislatures, not courts, should “update social norms”); *id.* at 24 (explaining why individuals should be wary “of *judges* as constitutional updaters”); *id.* at 26 (enunciating some of the risks inherent in “judges tak[ing] it upon themselves to update the Constitution”). Although Wilkinson sneers at Brennan for keeping the Constitution up to date, he includes Frankfurter in his list of judges “who took the habit of deference seriously.” *Id.* at 110. He even states that Frankfurter’s commitment “was, if anything, too severe,” *id.* at 109, and that is true even though it is quite plain that Frankfurter thought that the Court must interpret the Constitution in light of history and changing circumstances. As an example of Frankfurter’s emphasis on the importance of historical developments in interpreting the Constitution, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring). Of course, Wilkinson finds Frankfurter acceptable because he advocated judicial restraint, deferred to legislative preferences, and narrowly construed the rights enumerated in the Constitution, whereas Brennan is objectionable because he thought the Court had an important function to perform in assessing legislative preferences and defining and protecting constitutional rights.

222. WILKINSON, *supra* note 7, at 13.

223. *Id.*

224. *Id.* at 13–14. In contrast to Living Constitutionalism, Originalism fails to explain the past. Although Wilkinson quickly skips by this observation, it is important because the failure of a theory to describe and to explain over two hundred years of constitutional history would seem to render such a theory—no matter how internally compelling it may seem in the abstract—unrealistic or unworkable or irrelevant, or all three, at least as a theory that describes how a governing institution, such as the Supreme Court, does and should decide cases.

225. *Id.* at 14.

226. *Id.* (footnotes omitted).

227. *Id.* at 17.

228. *Id.* at 14.

U.S. constitutional history has been a history of incremental change as one precedent leads to the next, just as the common law evolves incrementally over time.²²⁹ Because the impulse of Living Constitutionalism is to construe the Constitution in light of past cases, historical developments, and contemporary circumstances, constitutional meaning generally evolves slowly.²³⁰ This pattern has produced an admirable stability while avoiding the pitfalls of having the meaning of the Constitution frozen in the late eighteenth century.²³¹

Nonetheless, Wilkinson's main focus is on the fundamental faults of Living Constitutionalism. As he writes: "Perhaps more than any other cosmic constitutional theory, living constitutionalism, both in theory and in practice, has elevated judicial hubris over humility, boldness over modesty, and intervention over restraint."²³² The theory is "anti-democratic"²³³ in that it "charges judges with the task of creating a better world"²³⁴ and "turns the Constitution's foremost premise of popular governance on its head"²³⁵ by imposing a judicially created constitutional rule that freezes the political process of the nation. And from Wilkinson's viewpoint, Justices Douglas, Brennan, and Marshall are the prime examples of judges who elevated hubris over humility and intervention over restraint.²³⁶

There is a deep irony buried in Wilkinson's contempt for Living Constitutionalism. One key to the Living Constitutionalist methodology is that a judge, in construing the spacious terms of the Constitution, will consult not just the text itself and its original meaning, but subsequent constructions, the history of the evolving meaning of the term or clause, the contemporary context, and the pragmatic issues of implementation.²³⁷ From all the evidence, Wilkinson accepts such a methodology.²³⁸ Thus, as noted above, Wilkinson uncouples the contemporary meaning of the Constitution from the past as insisted upon in Originalism, washes his hands of Posner's Pragmatism, and steps outside of the boundaries established by *Carolene Product's* Footnote Four and Political Process Theory. In their place,

229. *Id.* at 14–16. See generally DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

230. WILKINSON, *supra* note 7, at 14–16.

231. Wilkinson cannot contain his contempt for Living Constitutionalism. Thus, even as he reviews what he terms the virtues of Living Constitutionalism, he speculates that Living Constitutionals present themselves as "stabilizers, perhaps in order to consolidate their gains," *id.* at 14, and he snipes that "[l]iving constitutionalists can sound very soothing when they wish to," *id.* at 15 (emphasis added).

232. *Id.* at 19.

233. *Id.* at 20.

234. *Id.*

235. *Id.*

236. See *id.* at 28, 113.

237. *Id.* at 11–19.

238. For Wilkinson's critique of Originalism, Pragmatism, and Political Process Theory, see *supra* subpart II(A).

Wilkinson seems to favor the approach just defined as Living Constitutionalism. Or to put the matter slightly differently, Wilkinson's approach to interpreting the Constitution mirrors that of a Living Constitutionalist, and that is true even though it is too plain for words that Wilkinson's Living Constitutionalism is extremely crabbed by comparison to Brennan's, his favorite foil.

Wilkinson should not be repulsed by the idea that his approach to interpreting the Constitution overlaps with that of a Living Constitutionalist. Not only does that conclusion follow from his analysis of the theories, but some of the judges that Wilkinson identifies as models of judicial restraint are guilty of the same charge. For example, Justice Felix Frankfurter certainly thought that the Court must not only interpret the Constitution in light of its text and original meaning, but also by reference to its meaning across the course of American history, the context at the time of decision, and the pragmatic considerations that arise for judges engaged in the process of governing.²³⁹ Indeed, Frankfurter thought that one "strength" of the Constitution was that its meaning was not frozen "to give permanent legal sanction merely to the social arrangements and beliefs of a particular epoch."²⁴⁰ And while Frankfurter was surely "[d]ubious" about judicial enforcement of the Constitution's spacious clauses out of concern that an aggressive approach to interpreting the Constitution would "make of the Court a third chamber with drastic veto power,"²⁴¹ he on occasion endorsed such enforcement, as he did in *Brown v. Board of Education*.²⁴²

Frankfurter is not the only judge Wilkinson admires who eschews the Originalist idea that the dead hand of the past should exercise ironfisted control over the contemporary meaning of the Constitution. For example, Justice Harlan's concurrence in *Griswold v. Connecticut*,²⁴³ and Justice Powell's vote in *Roe v. Wade*,²⁴⁴ as well as Powell's expressed regret over his vote in *Bowers v. Hardwick*,²⁴⁵ indicate that they uncoupled the contemporary meaning of the Constitution from its Originalist meaning.²⁴⁶

239. See *supra* note 221; *infra* note 275.

240. Frankfurter, *supra* note 23, at 229.

241. *Id.*

242. 347 U.S. 483 (1954); Frankfurter, *supra* note 23, at 228–29.

243. 381 U.S. 479 (1965).

244. 410 U.S. 113 (1973).

245. 478 U.S. 186 (1986). Wilkinson acknowledges that these and other decisions of Harlan and Powell undermine his claims. WILKINSON, *supra* note 7, at 109–10.

246. WILKINSON, *supra* note 7, at 109–10; see also *Bowers*, 478 U.S. at 197–98 (Powell, J., concurring) (agreeing that there is no substantive right to sodomy under the Due Process Clause but expressing his view that "a prison sentence for such conduct . . . would create a serious Eighth Amendment issue"); *Roe*, 410 U.S. at 116–17, 152 (voting with the majority, which based its decision on the right to privacy, despite the Constitution's failure to "explicitly mention" such a right); *Griswold*, 381 U.S. at 499, 501–02 (Harlan, J., concurring) (purporting to adhere to judicial self-restraint while nonetheless finding a right to privacy in the Constitution).

The result is that Wilkinson is part of one side of the Living Constitutionalist family—the Frankfurter and Harlan side—even though he disdains the other side—that of Black, Douglas, Marshall, and Brennan.

III. Wilkinson and the Judicial Function

For Wilkinson, the essential overriding responsibility of the judiciary is to restrain the use of its power. Such restraint is important because it is essential to the fundamental political commitments of the constitutional scheme, which elevate self-governance above all other considerations. These are an appealing set of considerations, and Judge Learned Hand memorably distilled them when he gave a lecture in the late 1950s, in which he asserted that he would find it “most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.”²⁴⁷

But the problem confronting anyone advocating judicial restraint, as a core value to guide the exercise of judicial power, is to set out some guidelines for when a court should and should not exercise the authority given to it by the Constitution. Taken for all that they may be worth, the considerations favoring judicial restraint might warrant always deferring to the legislature and employing the “hands-off” approach represented by *Railway Express Agency v. New York*²⁴⁸ and *Williamson v. Lee Optical, Inc.*²⁴⁹ in all individual rights cases. But such an approach would be drastically out of step with the history of American constitutional developments and leave many other important values and considerations unprotected.²⁵⁰ Such an aggressive form of judicial restraint would itself potentially undermine judicial legitimacy and likely inflict its own serious wound upon the vitality of self-government.

247. HAND, *supra* note 23, at 73.

248. 336 U.S. 106 (1949).

249. 348 U.S. 483 (1955).

250. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (extending the protection of the right of privacy to homosexual relationships); *M.L.B. v. S.L.J. ex rel. S.L.J. & M.L.J.*, 519 U.S. 102, 106–07 (1996) (overturning a Mississippi statute that required a parent to pay record preparation fees in order to appeal the termination of her parental rights as inconsistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment); *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (per curiam) (recognizing a broader First Amendment right to free speech by striking down an Ohio statute); *Griswold*, 381 U.S. at 486 (finding a right to privacy in marriage despite the fact that the right is not mentioned in the Constitution); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283–84 (1964) (“We hold today that the Constitution delimits a State’s power to award damages for libel in actions brought by public officials against critics of their official conduct.”); *Baker v. Carr*, 369 U.S. 186, 187, 237 (1962) (striking down a Tennessee gerrymandering statute as violative of the Fourteenth Amendment); *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–95 (1954) (proclaiming that the “separate but equal” doctrine did not offer adequate equal protection under the Fourteenth Amendment); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (striking down a state school board’s mandatory flag salute policy on First Amendment grounds).

The challenge for any advocate of judicial restraint is to set forth some discrete considerations to guide the exercise of judicial power so that the value of judicial restraint does not obliterate the historic function of the Court in the governing scheme. Wilkinson makes no such offer. He urges judges to “pay attention to the text, structure, and history of the Constitution and not go creating rights out of whole cloth.”²⁵¹ He is against judges “creating constitutional rights with only the slightest semblance of a textual hook”²⁵² because such declarations may well constitute no more than judicial imposition of a judge’s own values on the nation in the name of construing the Constitution. He wants judges to restrict judicially defined constitutional rights to enumerated rights.²⁵³ But that is as far as he goes, and ultimately that is not very far at all.

Nonetheless, these few words may seem plausible—at least to someone who is uninitiated in the debates over constitutional meaning—in that they emphasize that a judge must pay attention to the Constitution’s text, its history, and the values that may be discerned as basic to the structure of the Constitution.²⁵⁴ But to the initiated, such guidance embodies in fact very little guidance, and, in Wilkinson’s case, such platitudes mask the incoherence and radical nature of his concept of judicial restraint.

Wilkinson’s incoherence and radicalism are disclosed in his own assessment of modern constitutional developments. For example, Wilkinson refers to six decisions—*Brown v. Board of Education*,²⁵⁵ *Gideon v. Wainwright*,²⁵⁶ *Mapp v. Ohio*,²⁵⁷ *Reynolds v. Sims*,²⁵⁸ *Frontiero v. Richardson*,²⁵⁹ and *Miranda v. Arizona*²⁶⁰—that he terms “[m]ajor activist decisions.”²⁶¹ In each case, Wilkinson accepts the decision because it has now attained an “untouchable status”²⁶² and has “stood the test of time, and . . . [is] now unassailable,”²⁶³ or, alternatively, because each “represent

251. WILKINSON, *supra* note 7, at 116.

252. *Id.* at 41.

253. *See id.* at 3–10, 104–16.

254. On the issue of the importance of constitutional structure, see generally *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 43–46 (1867), *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 323–26 (1819), and CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

255. 347 U.S. 483 (1954).

256. 372 U.S. 335 (1963).

257. 367 U.S. 643 (1961).

258. 377 U.S. 533 (1964).

259. 411 U.S. 677 (1973).

260. 384 U.S. 436 (1966).

261. WILKINSON, *supra* note 7, at 55, 111.

262. *Id.* at 55.

263. *Id.*

success stories because they vindicated foundational principles essential to the functioning of our nation.”²⁶⁴

A quick glance at Wilkinson’s statements might suggest that Wilkinson’s conception of judicial self-restraint would have permitted him, if he were a judge in any one of these six cases when each was actually decided, to uphold the asserted individual right at issue. But such a conclusion is unwarranted. Wilkinson never states that his conception of judicial restraint would have actually permitted him as a judge to uphold the contested individual right in these cases. Indeed, because Wilkinson does state that the concurrences and dissents in *Mapp*, *Reynolds*, and *Frontiero* gave a “sense of the novelty of the new rights created by these rulings,”²⁶⁵ and that the decisions in *Brown*, *Gideon*, and *Miranda* constituted a “new form of intervention”²⁶⁶ by the Court in American life, there is every reason to think that Wilkinson would have rejected the rights asserted in each of these cases. Moreover, because Wilkinson considers these cases legitimate only because they have “stood the test of time,”²⁶⁷ or because they constitute “success stories,”²⁶⁸ Wilkinson seems accepting of these cases not because he would have judged them as rightly decided at the time, but because their outcomes have been vindicated by history, and the American people have come to accept these outcomes as proper. In other words, Wilkinson’s conception of the proper scope of judicial power is so narrow that even six cases he now considers “unassailable”²⁶⁹ and “success stories”²⁷⁰ he would have condemned as improper at the time they were decided.²⁷¹

264. *Id.* at 111.

265. *Id.* at 55.

266. *Id.* at 110–11.

267. *Id.* at 55.

268. *Id.* at 111.

269. *Id.* at 55.

270. *Id.* at 111.

271. The fact that Wilkinson’s idea of judicial restraint would have prevented him from upholding the individual claims in these cases is illustrated by *Brown v. Board of Education*. As Professor Lucas Powe, Jr., has noted, it is only in retrospect that the outcome in *Brown* seems like a foregone conclusion. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 23 (2000). Thus, Powe writes “[d]ecades after *Brown*, all constitutional commentators, whether on the left or the right, agree *Brown* was correctly decided, and any theory to the contrary is impossible to sustain. Most commentators also believe *Brown*, a unanimous opinion, was an easy case. That is ahistorical; it wasn’t.” *Id.* As Justice Frankfurter remarked at the time, the Supreme Court does not set aside ten hours for oral argument in a case that is self-evident. *Id.* And Frankfurter was not alone in his suggestion that one need not support the “vituperative” Southern Manifesto to consider the unanimous decision in *Brown* as not self-evident. See Freund, *supra* note 23, at 345 (explaining that the Court’s decision came in the middle of a political storm of resistance both to the Court’s decision and its jurisdiction). During the same decade, Judge Learned Hand was critical of Warren Court decisions, see HAND, *supra* note 23, at 54–55 (criticizing the Court for overruling legislative judgment), and Professor Herbert Wechsler asked whether there was a “basis in neutral principles for holding that the Constitution” demands that the

A careful review of Wilkinson's comments on *Brown* and *Reynolds* reveals an Achilles' heel, which deserves emphasis. Wilkinson states that he is alert to the importance of protecting minority rights against a tyranny of the majority,²⁷² and he accepts that the courts have primary responsibility for "maintaining the balance between majority rule and minority rights."²⁷³ At the same time he shudders at the thought that the courts would use their authority to undermine self-governance and supplant majoritarian preferences by "creating rights out of whole cloth."²⁷⁴ Acknowledging this conflict in values is not to resolve it, and that is the problem.²⁷⁵ As

right of freedom of association of those opposed to mandatory race segregation in the public schools should prevail over the same right of those favoring race segregation, Wechsler, *supra* note 23, at 34. Thus, if Wilkinson had been a judge on the *Brown* case, and if he followed through with his commitment to judicial restraint he sets out in his book, he would almost certainly have voted to affirm *Plessey v. Ferguson*, 163 U.S. 537 (1896).

272. WILKINSON, *supra* note 7, at 36–37.

273. *Id.* at 37.

274. *Id.* at 116.

275. Felix Frankfurter certainly wrestled with this problem in many of his writings. Consider his discussion in his well-known essay, *John Marshall and the Judicial Function*, Frankfurter, *supra* note 23, an article worthy of review given Wilkinson's respect for Frankfurter and Frankfurter's vote in *Brown*. It is in this article that Frankfurter states that Marshall's brief claim in *McCulloch v. Maryland*, that "it is a constitution we are expounding," 17 U.S. (4 Wheat.) 316, 407 (1819), is the "single most important utterance in the literature of constitutional law—most important because most comprehensive and comprehending." Frankfurter, *supra* note 23, at 218–19. And then as a follow-up to this high praise, which seemed to invite the Supreme Court to be expansive in construing the Constitution, Frankfurter states that there can be "little doubt that Marshall saw and seized his opportunities to educate the country to a spacious view of the Constitution, to accustom the public mind to broad national powers, to counteract the commercial and political self-centeredness of states." *Id.* at 221. But then to counter any surmise that he was licensing broad judicial power over American life, Frankfurter refers to James Bradley Thayer—"echoes of whom were still resounding in this very building in my student days"—and asserts that he, similar to Thayer, is committed to a conception "of the limits within which the Supreme Court should move." *Id.* at 225. At the same time, Frankfurter readily concedes that the "line is often very thin between the cases in which the Court felt compelled to abstain from adjudication because of their 'political' nature, and the cases that so frequently arise in applying the concepts of 'liberty' and 'equality.'" *Id.* at 227–28. Because "judicial review is a deliberate check upon democracy through an organ of government not subject to popular control," *id.* at 228, and because judicial decisions "release contagious consequences," judges should scorn the idea that they are "preachers," or "shapers of policy," and avoid exceeding "the professional demands of a particular decision," *id.* at 238. Simultaneously, Frankfurter emphasized the thinness of the line—a line that Bork stated was nonexistent, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 12 (1971)—separating cases in which the Court should abstain from upsetting majoritarian preferences from others when he stated—and he did so surely with *Brown* in mind—that "[o]nly for those who have not the responsibility of decision can it be easy to decide the grave and complex problems they raise, especially in controversies that excite public interest." Frankfurter, *supra* note 23, at 228. And then to add fuel to the fire raging over the scope of judicial power, Frankfurter added that the Due Process and Equal Protection Clauses of the Fourteenth Amendments "are precisely defined neither by history nor in terms," *id.*, and that similar to "all legal provisions without a fixed technical meaning, they are ambulant, adaptable to the changes of time," *id.* at 229. To make certain he was understood to be the realist he was, Frankfurter acknowledged that in deciding complicated constitutional cases implicating spacious clauses, "individual judgment and feeling cannot be wholly shut out of the judicial

reviewed above, Wilkinson's commitment to the idea of judicial restraint out of respect for democratic values is so powerful that he seems to leave little to no breathing space for judicial definition and enforcement of minority rights. Thus, Wilkinson never addresses the problem of how a political minority would bring about political change over the objections of a political majority, and more specifically he offers no solution to the gross inequalities in Tennessee that were described in *Baker v. Carr*,²⁷⁶ to the fundamental unfairness of depriving an indigent accused of a felony of a lawyer remedied in *Gideon v. Wainwright*, and to the historic injustice of mandatory race segregation in public schools abolished by *Brown v. Board of Education*.²⁷⁷

Wilkinson's incoherence results from his being caught in a spider's web woven by his own intellectual commitments. He is drawn to Originalism but rejects it as inherently faulty. He dismisses Living Constitutionalism as failing to contain judicial authority, but he interprets the Constitution by reference to its text, its original meaning, its history, contemporary circumstances, and the pragmatic considerations of governing, similar to a Living Constitutionalist. He is a harsh critic of the Warren Court, but is unwilling to follow through on his analysis and criticize a handful of Warren Court decisions he considers expressions of the Court's most virulent activism because he considers these decisions

process," *id.*, and that "[n]o matter how often the Court insists that it is not passing on policy when determining constitutionality, the emphasis on constitutionality and its fascination for the American public seriously confound problems of constitutionality with the merits of a policy," *id.* at 231–32. As if to apologize for his vote in *Brown*, Frankfurter asserted that the Supreme Court comes "into virulent conflict with public opinion" when its decisions "disregard[] its settled tradition against needlessly pronouncing on constitutional issues," *id.* at 234–35, and that he personally favored a "humane and gradualist tradition in dealing with refractory social and political problems, recognizing them to be fractious because of their complexity and not amenable to quick and propitious solutions without resort to methods which deny law as the instrument and offspring of reason," *id.* at 237.

276. 369 U.S. 186 (1962).

277. This is a complicated question and the various scenarios that might have followed if the Supreme Court in *Brown* had merely affirmed *Plessey* are highly subjective and questionable. And given the contemporary Court's attitude toward Congress's power under the Commerce Clause, see *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591 (2012) (finding that a federal mandate requiring individuals to purchase and maintain a minimum level of insurance coverage exceeded Congress's power under the Commerce Clause); *United States v. Morrison*, 529 U.S. 598, 605, 627 (2000) (holding that the Commerce Clause did not provide Congress with authority to enact the civil remedy provision of the Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (declaring an act making it a federal offense to possess a firearm in a school zone unconstitutional for exceeding Congress's Commerce Clause authority), the Spending Clause, see *NFIB*, 132 S. Ct. at 2606–07 (declaring that a provision granting the Executive Branch the power to penalize states that chose not to participate in the expansion of the Medicaid program was unconstitutional for exceeding Congress's Spending Clause authority), and Section Five of the Fourteenth Amendment, see *City of Boerne v. Flores*, 521 U.S. 507, 511, 536 (1997) (holding that Congress's enactment of the Religious Freedom Restoration Act exceeded the scope of its enforcement power under Section Five of the Fourteenth Amendment), it is hardly certain that this Court would permit Congress to remedy mandatory race segregation.

now unassailable. He is passionately in favor of judicial restraint, but he fails to explain when a court should exercise self-restraint and when it should decide a case, probably out of fear that explicit considerations would frighten off any possible converts.

Wilkinson's appeal for judicial restraint will not likely win any converts, and that is true, not only because it is so extreme,²⁷⁸ but because it rests on several faulty premises. Wilkinson ignores the undemocratic nature of the governmental scheme,²⁷⁹ both in theory and the degree to which political structures at the state and federal level are undemocratic in action. As a result, his argument is dependent upon mythologizing the idea of self-government in the United States so that it is not only unrealistic, but dangerously so, because he uses his myth-making to argue for a drastically diminished role for courts in the governing scheme.

Wilkinson repeatedly complains that judges abuse their authority by making law out of whole cloth by imposing their own values on the nation's

278. Wilkinson disguises his radicalism very effectively. Thus, he states that *Brown* is the "most potent and enduring symbol of the Court's stand against such invidious discrimination," WILKINSON, *supra* note 7, at 17, and even suggests that it is "debatable" whether *Brown* or *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), is the Court's most important decision. WILKINSON, *supra* note 7, at 17. In an early book, Wilkinson wrote of *Brown*: "*Brown* may be the most important political, social, and legal event in America's twentieth-century history. Its greatness lay in the enormity of injustice it condemned, in the entrenched sentiment it challenged, in the immensity of law it both created and overthrew." J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 6 (1979). But a close reading of Wilkinson indicates, as already noted, that he endorses *Brown* only because it is now unassailable and a success story. See *supra* notes 255-71 and accompanying text. If, from what Wilkinson writes in *Cosmic Constitutional Theory*, he were to decide *Brown* in 1954, he would have approached *Brown* then as he now approaches same-sex marriage. Thus, on the role of courts in same-sex marriage cases, Wilkinson claims that courts should stay their hand in this legal dispute and leave it to the politically accountable branches of government to resolve because it would be highly improper for judges to sweep aside the tradition that limited marriage to a woman and a man. WILKINSON, *supra* note 7, at 76-77. From Wilkinson's perspective, it would be "[f]ar better for Americans . . . through their many votes and voices [to resolve the issue] . . . than for judges to decree" what they consider to be a just outcome. *Id.* The radicalism of Wilkinson's position comes into focus when it is compared to the position taken in the infamous Southern Manifesto:

The unwarranted decision of the Supreme Court in the public school cases is now bearing the fruit always produced when men substitute naked power for established law. . . .

. . . .

We regard the decision of the Supreme Court in the school cases as a clear abuse of judicial power. It climaxes a trend in the Federal judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people.

102 CONG. REC. 4515 (1956).

279. The undemocratic nature of the constitutional scheme is familiar to any student of the subject. Thus, in addition to judicial review, consider the composition of the Senate, the Electoral College, and the fact that only one-third of Senators are re-elected every two years.

people under the guise of interpreting the Constitution.²⁸⁰ Here, Wilkinson aims his fire at decisions favored by liberals as well as conservatives.²⁸¹ His assumption is that there is a boundary that distinguishes between a realm of constitutional decision making that is proper, legitimate, and appropriate and a realm that is not. Judges occupy the proper realm when they interpret and apply the law. Conversely, they occupy the improper realm when they make the law. When judges are in the proper realm, their decisions are legitimate and consistent with democratic processes; when they are in the improper realm, they torpedo self-government. Although it is paramount to his critique, Wilkinson never offers any meaningful insight into how we are to decide when a court is construing the Constitution as opposed to making law. He never explores or defines this boundary and, as a result, the boundary seems, in Wilkinson's mind, to be almost mysterious.

Tradition has bequeathed us several admonitions that support a disposition of judicial restraint. Judicial restraint emphasizes that judges should defer to legislative judgments, decide legal questions on narrow grounds, abstain from deciding complex legal questions prematurely, and use legal doctrines to defer legal questions so that their complexity may be defined with clarity over time by legal scholars, commentators, and lower courts.²⁸² However, there is nothing in these admonitions to guide a court in determining the substantive content of the "enumerated" rights—rights that even Wilkinson accepts fall within the judicial province to enforce.²⁸³ The result is that Wilkinson's appeal for judicial restraint may direct a judge not to recognize the "right of privacy" because it is not mentioned in

280. See, e.g., WILKINSON, *supra* note 7, at 26–32 (arguing that Living Constitutionalists recognize few if any restraints on the judiciary); *id.* at 57–59 (contending that even Originalism allows enormous judicial discretion, which has been used for activist ends); *id.* at 78–79 (positing that Political Process Theory overly encourages judges to referee disputes between the Legislative and Executive Branches); *id.* at 94–97 (arguing that Pragmatism bestows the Court with powers similar to that of the legislature in that they can review and weigh the consequences of enacted laws).

281. See *id.* at 26–32 (noting that both conservative and liberal judges have aggressively utilized the Fourteenth Amendment's guarantee of due process to create substantive rights); *id.* at 57–59 (contending that Originalist decisions have given the Second Amendment too much weight).

282. See generally *Rescue Army v. Mun. Court of L.A.*, 331 U.S. 549, 568–75 (1947) (cataloging reasons for judicial restraint and declining to rule on constitutional issues because the matters of state law were ambiguous).

283. See WILKINSON, *supra* note 7, at 109 (noting that the protection of unambiguous constitutional rights continues to be within the jurisdiction of the courts).

the Constitution,²⁸⁴ but at the same time it does not offer guidance to a judge defining the scope of a right that is expressed in the Constitution.²⁸⁵

But it cannot be that a circuit judge as seasoned as Wilkinson is so naïve that he is not alert to this. What is more likely is that Wilkinson is fully aware that the concepts of applying and making law are inextricably intertwined and cannot be meaningfully severed from one another, and, as a result, he concluded that emphasizing the distinction between applying and making law serves his purpose of pushing judges to narrowly construe individual rights so that they may protect themselves from charges that they are making law.²⁸⁶

The result of Wilkinson's failure to concede that judges must "make" law when they construe the Constitution is that he refrains from offering any justification for what courts do in fact. Thus, because part of Wilkinson's concern is to protect the legitimacy of the courts, it is ironic that his commitments to a restrained judiciary result in his failure to set forth a justification for what the courts actually do, which would have contributed to the very thing Wilkinson is most eager to bestow upon them—legitimacy.

Wilkinson does not acknowledge the democratic impulses on the judiciary in general and the Supreme Court in particular. Thus, although it is common to emphasize that Supreme Court decisions freeze the political

284. Wilkinson would no doubt endorse Justice Stewart, when, dissenting in *Griswold v. Connecticut*, he wrote "I can find no such general right of privacy in the Bill of Rights," 381 U.S. 479, 530 (1965) (Stewart, J., dissenting).

285. Such as the right not to be subject to cruel and unusual punishment, U.S. CONST. amend. VIII, the right of freedom of speech, *id.* amend. I, the right to the free exercise of religion, *id.*, the right not to have life, liberty or property denied without due process of law, *id.* amend. V, or the right not to be denied equal protection under the law, *id.* amend. XIV, § 1.

286. In drawing this distinction and in leveling the incendiary charge that a judge is making law and imposing nothing more than personal views on the nation in the guise of interpreting the Constitution, Wilkinson does nothing more than utilize the weapon employed by Originalists when they attack a Supreme Court decision. That weapon presupposes that there is one right answer to a complex constitutional question and that that answer can be discovered by a judge if a judge employs the proper interpretative theory—in this case Originalism—in deciding the case. Because there is often no single right answer to most complex constitutional questions that would be endorsed by most judges and the legal academy, the majority of judges in these circumstances are caught between two poles: on the one hand, they cannot adequately explain a result as a consequence of interpreting or applying the law and, on the other hand, they do not want to concede that they are making law, even though that is in fact what they do, at least in any realistic description of the judicial function in such matters. Wilkinson's willingness to use this strategy in bolstering his claim for restraint points to the asymmetry of Originalism. Originalism provides a powerful vehicle for attacking a decision. But as is evident in the *Heller* decision, it provides a vulnerable basis for shaping a majority opinion on a complex matter such as the authority of the state to regulate guns. See *District of Columbia v. Heller*, 554 U.S. 570, 590–91 (2008) (relying on Originalist sources to reach a decision and making judgments that disagree with other Originalist sources that the dissent relies on). Recognizing the asymmetry of Originalism underlines its utility in the hands of a dissenter and helps explain its dramatic shortcomings when used as a basis for a majority opinion.

process and leave dissenting citizens without political recourse, the course of American history suggests otherwise.²⁸⁷ Time and again during the twentieth century, protesting citizens made Supreme Court decisions a topic of national conversation, which, in turn, influenced appointments to the high court, and those appointments in turn altered the development of legal doctrine.²⁸⁸ Moreover, such citizens' protests have on occasion prompted Congress to consider contracting the Supreme Court's jurisdiction.²⁸⁹ Furthermore, the legitimacy of judicial decisions is always tested by the willingness of the Executive to enforce a decision and by the willingness of citizens across the country to comply.²⁹⁰ And lastly, it seems very likely that citizen protests, news commentary, and legal scholarly analysis do have some influence on the justices.²⁹¹ Of course, the change stirred by citizen protests may be incremental and may take years, but there is no denying the fact that public protests over time may have a powerful impact on the law's direction.

IV. A Quiet Storm Center

A century ago, Justice Holmes observed of the Court that "[w]e are very quiet [here], but it is the quiet of a storm centre."²⁹² And a little more than a half century ago, Paul Freund wrote: "Resistance to the court has been a persistent strain in American life from the beginning."²⁹³

287. For example, compare *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (upholding a ban on partial-birth abortions), with *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992) (reaffirming a women's right to choose an abortion before fetal viability), and *Roe v. Wade*, 410 U.S. 113, 162–66 (1973) (holding unconstitutional a statute banning all abortions except to save the life of the mother); *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (holding unconstitutional a state statute making it a crime for two persons of the same sex to engage in certain sexual conduct), with *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding a statute prohibiting sodomy); *Brown v. Board of Education*, 347 U.S. 483, 495–96 (1954) (holding unconstitutional the segregation of children in public schools on the basis of race), with *Plessy v. Ferguson*, 163 U.S. 537, 548–52 (1896) (upholding a law permitting the segregation of races if the facilities were of equal quality); *United States v. Darby*, 312 U.S. 100, 124–26 (1941) (upholding an act regulating the hours and wages of employees), with *Hammer v. Dagenhart*, 247 U.S. 251, 275–77 (1918) (holding unconstitutional a law regulating child labor).

288. For example, see the historical context set forth in 2 STEPHEN E. AMBROSE, *NIXON: THE TRIUMPH OF A POLITICIAN 1962-1972* (1989), of President Richard M. Nixon's nominations to the Supreme Court of Clement F. Haynsworth, G. Harold Carswell, Warren E. Burger, Harry Blackmun, Lewis Powell, and William Rehnquist. *Id.* at 274–75, 315–17, 330, 337–38, 470–71.

289. See, e.g., Freund, *supra* note 23, at 345.

290. An example of the President's willingness to enforce a judicial order hanging in the balance is President Eisenhower's reaction to the school desegregation struggle in Little Rock, Arkansas. For a discussion of President Eisenhower's reaction, see 1 STEPHEN E. AMBROSE, *NIXON: THE EDUCATION OF A POLITICIAN, 1913-1962*, at 436–38 (1987).

291. For a discussion of how judges may be influenced by public opinion, see William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768–69 (1986).

292. OLIVER WENDELL HOLMES, *Holdsworth's English Law*, in COLLECTED LEGAL PAPERS 285, 292 (1921).

293. Freund, *supra* note 23, at 346.

Holmes and Freund were obviously right. There is no escaping the fact that Supreme Court decisions agitate citizens and stir dissent. No matter what one's disposition is or what one's value preferences are, there is no doubt that the Supreme Court reports contain many irksome and vexing decisions that one is tempted to dismiss as nothing more than the preaching of a Platonic Guardian.

But how could it be otherwise given the Court's authority to invalidate federal and state statutes as inconsistent with the Constitution? In making these decisions, the Court has decided fundamental issues such as laws regulating abortion, gun possession, or national health care over which citizens differ fundamentally. Thus, citizens protest because they believe that they are entitled to not merely "order but good order,"²⁹⁴ and they disagree over what constitutes good order.

Instead of viewing such acrimony over judicial decisions as a reason why the courts should get out of the line of fire, the fierce debates over Supreme Court interpretations of the Constitution should be appreciated as not only inevitable, but reflective of legitimate dissent over value choices in a diverse society in which such disagreements are inevitable. And although it is common to emphasize that Supreme Court decisions freeze the political process and leave dissenting citizens without political recourse, the course of American history suggests otherwise.

Public protests over Supreme Court decisions will not end so long as the Supreme Court remains a robust governing authority. Nor should they end. What the Supreme Court decides is important and powerfully affects the lives of individual Americans. And in the end, those protests, if durable and powerful, will influence the substance and the direction of constitutional law.

This is an imperfect arrangement of powers and responsibility. Judicial power may often result in a tense coexistence between the executive and legislative branches and may stir a public firestorm as in *Brown* and *Roe*. But this imperfect arrangement is the arrangement we have had for over two hundred years, and no cogent reason is presented—at least in Wilkinson's book—to warrant changing it.

294. *Id.* at 358.