A JUDGE'S VIEW ON REFORMING CONSTITUTIONAL INTERPRETATION

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INTRODUCTION

Although probably not recognized as a budding legal philosopher, the great Ferris Bueller once remarked: "A man should not believe in an -ism, he should believe in himself."[1] Today, however, our modern constitutional interpretation is far too polluted by -isms. And the problem is not simply their pervasiveness; rather, it is that we expect judges and aspiring judges to swear fidelity to particular modes of interpretation and to apply them in almost robotic fashion on the bench. And judges are often criticized if they do not fully embrace that mandate.

A review of academic literature and Supreme Court opinions can easily convince the reader that all that matters in deciding constitutional questions is the method of interpretation selected as the lens for the inquiry. Originalism, whether the original conservative strand or the reactionary progressive version, dominates the contemporary discourse. Originalism evolved, at least in part, as a reaction to the Warren Court—the means by which we could restrain judges and ensure order in constitutional thought. After sampling various alternatives, many progressives eventually gravitated toward originalism as well, but their view of originalism often looks very different than the conservative approach. These techniques also spawned countless variants, often sparking the debate of who is being the more faithful originalist.

Now, I submit, these rigid modes of interpretation that have emerged may be worse than the condition they sought to cure in the first place. These are not simply nice, tidy academic theories for how we, as judges, might engage in constitutional thought. Instead, they have often evolved into a means for achieving a particular result, all the while the proponent insists otherwise. And they foster a "teams" mentality toward constitutional adjudication, an "us versus them" approach that is corrosive to the judiciary.[2]

The rigidity of these modes of interpretation arises in part from a desire to beat back the exercise of judicial discretion, lest some judges employ it in an imprudent manner. But no matter how much judges might try to persuade you otherwise, we cannot escape a fundamental reality: Many cases are just difficult to resolve, and ultimately principled judges can reach different results. In other words, many cases emit no "One True Answer" decreed from the legal

1. FERRIS BUELLER'S DAY OFF (Paramount Pictures 1986).

2. Raymond J. Lohier Jr. et al., *Losing Faith: Why Public Trust in the Judiciary Matters—and What Judges Can Do About It*, 106 JUDICATURE 70, 76 (2022).

gods. We should not pretend otherwise. Because when we do pretend otherwise, if our colleagues (on appellate courts) disagree with us, then it forces us to discard their views as illegitimate, or worse.

If certain difficult cases offer no "One True Answer," then what does the decision boil down to? Ultimately, judicial discretion on how to apply the facts and law at hand. And just because a judge wraps themselves in a particular interpretive methodology, they cannot obscure that fact. To the contrary, the methodological selection simply becomes the vehicle by which that judge exercises their discretion. Preordaining the decision in a case based on the selection of an interpretive methodology that dictates a particular outcome is no different than exercising that discretion on an ad hoc basis. But taking the former path necessarily chokes off honest debate, which is often lacking in contemporary constitutional discourse.

In a moment in which respect for the judiciary is ebbing, perhaps it is time to rethink our approach to constitutional interpretation. Rather than pretending that judges "must" reach a particular outcome because some methodological decision compels it, can we engage in debate about: (1) which tools or principles judges should consider in evaluating constitutional interpretation; and (2) when those considerations do not all point in favor of a particular outcome, how judges should weigh those conflicting factors?

And this isn't really a radical concept—not too long ago, courts and judges did not obsess (to the same degree, at least) over modes of interpretation. Instead, they took appropriate tools at their disposal (text, history, purpose, precedent, etc.) and applied them to the best of their ability. And majority and dissenting opinions sparred over those points.

I would also submit that I believe many appellate judges throughout this country continue to do exactly that. In rejecting the rigid confines of the extant interpretative methodologies that pervade contemporary discussions of constitutional interpretation, they apply a more eclectic version of constitutional adjudication. Tailored to the specifics of the case they are confronting, this approach identifies and weighs the various tools that guide their legal inquiry. In so doing, these judges follow in the footsteps of their judicial forebearers, invoking common law principles in their quest to reach the right result.

But these judges largely stand silent about their methodological perspectives, as the rigidity in contemporary methodological discussions absorbs all of the oxygen in the room, and they do not openly advocate for breaking free from these constraints. Rather, out of the limelight, they dutifully approach each case in a manner relatively consistent with the approach I outline in this Article. It is time to give a voice to those judges and their idiosyncratic approaches to constitutional interpretation. We may learn something valuable by introducing their wisdom into our contemporary constitutional debates.

Our current fascination with all things methodological helps keep these perspectives on the sidelines because we have come to expect a neat and tidy theory that can answer all questions. But constitutional interpretation is often messy, and difficult. If we pretend that it is always simple, we aren't being honest with ourselves. And that messiness needs an approach that is flexible and adaptable to the demands of different types of constitutional cases.

I approach these questions as an appellate judge in the trenches, not as a theorist. But I do draw on the existing theoretical backdrop, in order to set my approach in some context. I hesitate to label this approach with a name, as even that exercise seems in tension with what I am rebelling against. But for expediency's sake, I will call this approach constitutional "eclecticism," which, as I will explain below, might be another way of thinking about common law constitutionalism.

I appreciate that not many judges out there right now are openly advocating for my brand of eclecticism, and I can understand why. Against the methodological backdrop that we have experienced in the past quarter century or so, I suspect that critics would say that if we indulged my approach, when the constitutional inputs conflicted, judicial mischief could occur because it basically permits a judge to pick either side. My retort would be that if we achieve consensus on the tools, and the tools allowed the possibility of two contrary answers to the resolution of the case, then so be it—either course is defensible because no One True Answer exists. The opinion then becomes the vehicle through which the judge defends their approach by reliance and application of the permissible tools. Ultimately, for appellate decisions with majority and dissenting views, these dueling opinions then become instruments for persuasion—either to persuade other courts, or future judges or justices. A judge who exercises that discretion in a haphazard or questionable manner would eventually lose out in the judicial marketplace because others would not follow that decision.

To be sure, this approach cannot eliminate the risk of rogue judicial actors. But, of course, nor has any other approach that we've seen to date. As a result, shifting our focus away from rigid interpretative principles may allow us to focus on other considerations when evaluating potential judges, such as wisdom, experience, commitment to the rule of law, and empathy. Such attributes used to play a more prominent role, and they can again—if we let them.

I don't pretend to have the perfect answers for all of these questions, and that's not the point of this Article. Instead, it is to encourage debate on these points and hopefully to give voice to the approaches of many appellate judges who refuse to swear fidelity to a particular methodology. The common critique of judges nowadays is that they are simply "politicians in robes"; and an unhealthy reliance on rigid methodologies in constitutional interpretation reinforces that

view. We can back away from that approach and help restore the standing of the judiciary in the public's eyes, but it certainly won't be easy. The first step, I submit, is recognizing that an alternative path exists and encouraging others to speak up and join the debate.

I. THE HISTORY OF CONSTITUTIONAL INTERPRETATION[3]

We must acknowledge the recent vintage of this proliferation of methodological approaches. After all, "courts have made principled decisions—in constitutional law as well as in other areas—for centuries without the benefit" of adherence to an overarching method of constitutional interpretation.[4] To appreciate how we arrived in the modern age of constitutional adjudication, I pause to consider the various tools of interpretation that Justices of the Supreme Court emphasized as they shaped constitutional thought.

A. The Early Supreme Court

To illustrate the formation of modern methods of constitutional interpretation, as well as the disjunction between these methods and the early history of United States constitutionalism, I first explore the evolution of constitutional interpretation, beginning shortly after the dawn of the Republic.

To begin, we must appreciate that the Constitution contains no directive toward the manner in which it should be interpreted, nor do we see any conclusive evidence that the Framers agreed on or favored any particular method of constitutional interpretation.[5] The Framers probably did not dwell on the matter because the creation and interpretation of a singular written constitution was a relatively new concept at the time, so no prevailing doctrine of legal analysis offered any universal template for interpretation.[6]

Unsurprisingly, the issue of interpreting the Constitution arose during the ratification debates between Federalists and Anti-Federalists regarding the relationship between the federal

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3. Perhaps needless to say, this history is simply an overview, as many others have capably explored this history in greater depth. *See generally, e.g.*, Thomas E. Baker, *Constitutional Theory in a Nutshell*, 13 WM. & MARY BILL RTS. J. 57 (2004); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Herman Belz, *History, Theory, and the Constitution*, 11 CONST. COMMENT. 45 (1994); William A. Kaplin, *The Process of Constitutional Interpretation: A Synthesis of the Present and a Guide to the Future*, 42 RUTGERS L. REV. 983 (1990); KENNETH R. THOMAS, CONG. RSCH. SERV., R41637, SELECTED THEORIES OF CONSTITUTIONAL INTERPRETATION (2011).

4. DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 152 (2002).

5. THOMAS, *supra* note 3, at 4.

6. Powell, *supra* note 3, at 901–03.

government and the states.[7] The Anti-Federalists argued against ratifying the Constitution because they feared that the document delegated too much interpretive power to the Supreme Court, which would facilitate the federal government's growth of power at the expense of the states and individuals.[8] The Federalists, on the other hand, sought to assure the public that the Constitution's wording was appropriately limited, and its terms would be interpreted properly under the practice of discerning the "common sense" meaning of the text and the intent of the people.[9]

Following John Marshall's appointment to the Supreme Court in 1801, the Marshall Court confronted a number of constitutional cases that would play a major role in defining the character of the federal judiciary (and, indeed, the Nation). Some of these familiar decisions include *Marbury v. Madison*,[10] *McCulloch v. Maryland*,[11] and *Gibbons v. Ogden*.[12] A study of these cases reveals the varied methods of constitutional interpretation upon which Marshall relied in shaping the opinions for these influential cases.[13]

In *Marbury*, the Marshall Court recognized the power of judicial review. In determining that the federal judiciary held the power to review legislation as well as executive actions, Marshall relied on the text of the Constitution and the intent of the Framers.[14] Marshall also

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7. THOMAS, *supra* note 3, at 5–6; *see* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 159 (Jonathan Elliot ed., Washington, D.C., 2d ed. 1836).

8. *See, e.g.*, *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, PA. PACKET, Dec. 18, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 154–57 (Herbert J. Storing ed., 1981) (criticizing the Constitution for permitting Congress to assume effectively unlimited powers by construction, and suggesting that it would allow self-aggrandizement by the federal judiciary).

9. THE FEDERALIST NO. 40, at 251 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 83, at 496–97 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

10. 5 U.S. (1 Cranch) 137 (1803).

11. 17 U.S. (4 Wheat.) 316 (1819).

12. 22 U.S. (9 Wheat.) 1 (1824).

13. *See* William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1 DUKE L.J. 22, 23–24 (1969); William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 937 (1978).

14. *Marbury*, 5 U.S. (1 Cranch) at 174. He wrote:

> If it had been intended to leave it to the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial powers, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction.

referenced widely-accepted legal authority, citing to William Blackstone's *Commentaries*: There exists "a general and indisputable rule" that, where a legal right is established, a legal remedy must exist for a violation of that right.[15] In so deciding, Marshall reconciled popular will and immutable principles of law.[16]

And in deciding *McCulloch*, the Marshall Court delineated Congress's powers under the Necessary and Proper Clause,[17] with Marshall appealing to "proposition[s]" that commanded "the universal assent of mankind" and "principle[s]" upon which "all America [was] united."[18] This broad interpretation illustrates a belief that the enumerated powers of the federal government, as set forth in the Constitution, should be construed liberally in order to further the ends of the federal government. Chief Justice Marshall, of course, did not tackle this matter with a formulaic theory. Instead, he considered "history, text, usage, structure, congressional action and inaction, logic, common law reasoning, and practical considerations."[19] Pragmatism, and an expansive view of the authority of the federal government, animated much of Marshall's decision-making.

Finally, in *Gibbons*, a case about competing state and federal licensure arrangements to operate on waters between New York and neighboring states,[20] the Marshall Court considered the scope and implications of the Commerce Clause.[21] In determining that the

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Id.

15. *Id.* at 163; Nicholas Mosvick, Marbury v. Madison *and the Independent Supreme Court*, NAT'L CONST. CTR. (Feb. 24, 2022), https://perma.cc/AMG2-NEM6.

16. Nelson, *supra* note 13, at 935; THE FEDERALIST NO. 78, at 467–68 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

17. Pursuant to the Necessary and Proper Clause, Congress enjoys the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States." U.S. CONST. art. I, § 8, cl. 18. The Court found that the chartering of a national bank was an implied power contained in the Constitution, and that the national bank could not be taxed by the states. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 316 (1819).

18. *McCulloch*, 17 U.S. (4 Wheat.) at 405.

19. FARBER & SHERRY, *supra* note 4, at 162–63.

20. The State of New York granted plaintiff Aaron Ogden a monopoly to operate steamboats on the waters between New York and its neighboring states, but the federal government had issued a federal coasting license to defendant Thomas Gibbons. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 2 (1824). Ogden brought suit to enjoin Gibbons from operating his steamboats in the waters between New York and New Jersey. *Id.* After the New York courts ruled in favor of Ogden, Gibbons appealed the decision to the United States Supreme Court. *Id.* at 3.

21. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with the foreign Nations, and among the several States, and with the Indian Tribes.").

Clause endowed Congress with the sole power to regulate interstate commerce, Marshall again relied on a variety of tools. While Marshall makes various references to the Framers' intentions and textual meaning of the Constitution, he certainly does not limit himself to those considerations. For example, in deciding to define "commerce" broadly, Marshall wrote, "All America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation. It was so understood . . . when the constitution was framed,"[22] thus relying on both the original meaning *and* the contemporary meaning of the word. Marshall also invokes common sense and practical inferences to draw various conclusions, including, in cases like this, that federal law must prevail over conflicting state law in order for the federal government to operate effectively.[23] This method is also illustrated through Marshall's reasoning that the Commerce Clause does not permit the federal government to regulate purely internal commercial affairs of the state: "Such a power would be inconvenient, and is certainly unnecessary."[24]

A diligent researcher can of course find some kernels of support for originalism (or any other -ism that they might believe in) in Marshall's opinions. The point is not to deny that such considerations influenced the early Court's jurisprudence; it is to note that they were just that: considerations. Throughout the formative years of the Supreme Court, Marshall exhibited flexibility and pragmatism in constitutional interpretation and steered clear of any type of rigid interpretive methodology that purported to govern all constitutional debates.[25] The Court relied on an eclectic mix of tools, including history, Framers' intent, purpose, text-based analysis, supplemental commentary, and more, setting up future judges and Justices to carry on with the tools they found most convincing.[26]

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22. *Gibbons*, 22 U.S. (9 Wheat.) at 190.

23. *See* Nelson, *supra* note 13, at 896; *see also* FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 14 (1937) ("[While Marshall] had rooted principles, he was pragmatic in their application. No less characteristic than the realization of the opportunities presented by the commerce clause to restrain local legislatures from hampering the free play of commerce among the states, was his empiricism in not tying the Court to rigid formulas for accomplishing such restrictions.").

24. *Gibbons*, 22 U.S. (9 Wheat.) at 194.

25. Notably, Marshall's own nationalistic political views probably shaped the federal government–friendly outcomes he reached in *Marbury* and *Gibbons*, and especially *McCulloch*. *See* Nelson, *supra* note 13, at 896.

26. *See* Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 BYU J. PUB. L. 283, 288 (2014) ("In the early decades, numerous Americans—including framers, Supreme Court justices, and constitutional scholars—used an eclectic or pluralist approach to constitutional interpretation, an approach that some scholars might categorize as a flexible pragmatism. Depending on the case, an eclectic interpreter considered a shifting

B. Post-Marshall Evolution and Lochner

Late eighteenth- and early nineteenth-century jurisprudence largely followed a Marshallian path, eschewing any hard and fast rules on constitutional interpretation.[27] But in the late nineteenth and early twentieth centuries, as the United States experienced rapid social change in its transition from an agricultural economy to a more urban and industrial society, legal thinkers began to debate whether the Constitution adequately addressed these changing times.[28] The emergence of evolutionary theory began influencing the legal academy, as some scholars began to view the law as malleable according to changing circumstances.[29] But around the turn of the century, the Supreme Court squarely rejected attempts to "modernize" the Constitution, perhaps best illustrated by its infamous decision in *Lochner v. New York*.[30] Based on the notion that the Due Process Clause of the Fourteenth Amendment protected the right to freely contract, *Lochner* struck down a state law prescribing maximum working hours for bakers.[31] The Court invoked this "liberty of contract" theory to overturn close to 200 democratically adopted state laws in the wake of *Lochner*.[32]

This 1905 decision has been considered the launching pad of modern constitutional theory, highlighting the dangers of aggressive judicial meddling with legislative prerogatives.[33] Overwhelmingly, though, prior to the 1920s, judges did not rely on strict methods of constitutional interpretation to guide them or to justify the outcomes they reached.

In the 1920s, this all began to change as a deep fissure between two opposing camps of constitutional interpretation began emerging, and the tug toward basic principles that would (supposedly) offer certainty and guidance picked up steam.[34] On one side, conservatives dedicated to preserving the timeless principles of the Constitution emphasized judicial self-restraint and an unchanging Constitution.[35]

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variety of factors, including original meaning, framers' intentions, practical consequences, judicial precedent, and so forth.").

27. *See generally* D.A. Jeremy Telman, *John Marshall's Constitution: Methodological Pluralism and Second-Order* Ipse Dixit *in Constitutional Adjudication*, 24 LEWIS & CLARK L. REV. 1151 (2020).

28. *See* Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 5–6 (1993).

29. *Id.*

30. 198 U.S. 45 (1905).

31. *Id.* at 73.

32. *See* Dan Friedman, *Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland*, 71 MD. L. REV. 411, 413 (2012).

33. *Id.* at 413–14.

34. *See* G. Edward White, *The "Constitutional Revolution" as a Crisis in Adaptivity*, 48 HASTINGS L.J. 867, 876 (1997).

35. *Id.* at 876–78.

On the other, progressive modernists advocated for a "living" Constitution, viewing the law as a creation of citizens and hence adaptable to changing circumstances and evolving theories of governance that emerged alongside societal changes.[36]

The debate between these camps over the nature of constitutional interpretation played out in various Supreme Court cases of the era, especially those cases that involved the application of constitutional provisions to scenarios that the Framers could not have envisioned. In 1928's *Olmstead v. United States*,[37] for example, federal agents installed wiretaps in the basement of bootlegger Roy Olmstead's office building and in the street near his home and, exploiting the information they gathered, ultimately convicted him for violating a law that prohibited the sale or manufacture of alcohol.[38] A majority of the Court, in an opinion written by Chief Justice Taft, upheld the conviction. The majority reasoned, because the Fourth Amendment prohibits unreasonable searches and seizures of "persons, houses, papers, and effects,"[39] and no wiretaps had been installed on any of Olmstead's property, no trespass had taken place and no warrant was required.[40] In dissent, Justice Brandeis took the position that "every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."[41] While Taft's opinion maintained that his construction of the Fourth Amendment could not "justify enlargement of the language employed beyond the possible *practical meaning* of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight,"[42] Brandeis's dissent argued that the Constitution "must have a . . . capacity of *adaptation to a changing world*," and "its general language should not . . . be necessarily confined to the form that evil had . . . taken [to the Framers]."[43]

Still nascent and evolving at this point, but we can see the seeds that would ultimately grow into originalism and living constitutionalism.

C. The Warren Court

The clash between advocates of a "living" Constitution and champions of a fixed Constitution intensified during the Warren Court era. The Warren Court reshaped the landscape of

36. *Id.* at 877–79.
37. 277 U.S. 438 (1928).
38. *Id.* at 455–57.
39. U.S. CONST. amend. IV.
40. *Olmstead*, 277 U.S. at 457, 464.
41. *Id.* at 478 (Brandeis, J., dissenting).
42. *Id.* at 465 (majority opinion) (emphasis added).
43. White, *supra* note 34, at 881 (emphasis added) (quoting *Olmstead*, 277 U.S. at 472 (Brandeis, J., dissenting)).

constitutional law, largely embracing the theory of a "living" Constitution in the process. The Court felt justified in addressing developing societal values and emerging citizen demands by bringing the Constitution into the modern age.

Early during his tenure as Chief Justice, Warren faced an issue that would place the question of how to conceptualize the Constitution at the forefront. In *Brown v. Board of Education*,[44] ultimately decided in 1955,[45] the issue of whether the "separate but equal" doctrine of *Plessy v. Ferguson*[46] was unconstitutional came before the Court.[47] A unanimous Court found that "separate educational facilities are inherently unequal," rejecting the separate but equal doctrine.[48] The Court implied that the conflicting outcomes in *Brown* and *Plessy* resulted from different applications of the Equal Protection Clause to shifting societal understandings of race, psychology, and the changing public education system.[49] *Brown* received criticism from wide swaths of the population at the time, and even many of those who agreed with the outcome were concerned that the decision was not supported by the original understanding of the Constitution (the Framers approved segregated schools in the District of Columbia).[50]

Nevertheless, *Brown* set the tone for the remainder of Warren's term. Several Justices strongly endorsed the view that constitutions must adapt according to changing values and circumstances, influencing a host of decisions throughout the Warren Court era.[51] For example, the privacy decisions of *Griswold v. Connecticut*[52] and, later, post-Warren, *Roe v. Wade*[53] illustrated the Court's tendency to recognize new rights and liberties within the text of the Constitution. Justice William O. Douglas's opinion in *Griswold* drew upon "penumbras" of rights, arguing that certain provisions of the Constitution have penumbras that are "formed by emanations from those guarantees that help give them life and substance."[54] *Griswold*

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44. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954).
45. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).
46. 163 U.S. 537 (1896).
47. *Brown I*, 347 U.S. at 494–95.
48. *Id.* at 495.
49. *See* Horwitz, *supra* note 28, at 7–8.
50. *See* Friedman, *supra* note 32, at 414. Some modern scholars, however, have advanced an originalist justification for the result in *Brown*. *See* Ronald Turner, *The Problematics of the* Brown*-Is-Originalist Project*, 23 J.L. & POL'Y 591, 616–46 (2015) (collecting, summarizing, and critiquing various scholars' and judges' arguments squaring *Brown* with originalism).
51. *See* Horwitz, *supra* note 28, at 8–9.
52. 381 U.S. 479 (1965).
53. 410 U.S. 113 (1973).
54. *Griswold*, 381 U.S. at 484.

and *Roe* recognized modern fundamental rights that, like *Brown*, might not have been squarely contemplated by the Framers.[55]

Although Justice Hugo Black joined the unanimous *Brown* decision, he typically resisted the Warren Court's notion of a "living" constitution. Justice Black, from the time of his appointment to the Supreme Court in 1937 until his retirement in 1971, preached judicial restraint.[56] He especially feared "the rewriting of the Constitution by judges under the guise of interpreting it," and a recurring theme in his opinions was an emphasis on the intentions of the Framers.[57] At the outset of his tenure on the Court, he employed a version of originalism to combat the established constitutional order grounded in the pre-New Deal Court's precedent.[58]

For example, in *McGautha v. California*,[59] Black rejected the argument that the death penalty violates the Eighth Amendment's prohibition of "cruel and unusual punishment," writing:

> In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the framers intended to end capital punishment by the Amendment.[60]

And one of the first uses of the term "original meaning" can be attributed to Justice Black's dissent in *Harper v. Virginia Board of Elections*[61] in 1966: "The Court, however, overrules *Breedlove* in part, but its opinion reveals that it does so not by using its limited power to interpret the original meaning of the Equal Protection Clause, but by giving that clause a new meaning which it believes represents a better governmental policy."[62]

Justice Black's vision of progressive originalism would find a broader audience several decades later.

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55. *See* Alex Tobin, *The Warren Court and Living Constitutionalism*, 10 IND. J.L. & SOC. EQUAL. 221, 241 & n.198 (2022).

56. *See* Friedman, *supra* note 32, at 415.

57. Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 28, 30, 54 (1994); *see also* Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1034 (1981).

58. *See* David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969, 975 (2008).

59. 402 U.S. 183, 225 (1971) (Black, J., concurring).

60. *Id.* at 226; *see* Sandalow, *supra* note 57, at 1034.

61. 383 U.S. 663, 672 (1966) (Black, J., dissenting); *see* Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 14 (Grant Huscroft & Bradley W. Miller eds., 2011).

62. *Harper*, 383 U.S. at 672 (Black, J., dissenting).

D. The Birth of Originalism

In many ways consistent with Justice Black's push for judicial restraint, modern originalism was born in the 1970s in response to the Warren Court's pushing of constitutional boundaries.[63] Robert Bork's *Neutral Principles and Some First Amendment Problems* is widely considered to be the opening salvo in the development of modern originalism,[64] invoking the intentions of the Framers and relying on text and history.[65] Armed with the "Framers' intent," Bork attacked substantive due process decisions like *Griswold*, and held up originalism as the antidote to the "value-choosing" jurisprudence of the Warren Court.[66] In 1976, Justice William Rehnquist wrote *The Notion of a Living Constitution*, which "implicitly endorsed originalism" and reinforced Bork's critique of the Warren Court.[67] Over the following decade, the movement picked up steam, as professors and influential lawyers and judges gave contours to the doctrine.

But originalism faced strong criticism, predominantly from liberals. In 1980, Professor Paul Brest highlighted the difficulty of ascertaining a singular intention from the diverse body of persons involved in drafting the Constitution, as well as issues with translating the Framers' beliefs and values in light of evolutionary change in our country.[68] Shortly thereafter, Professor Jefferson Powell rejected the notion that the Framers construed the Constitution in accordance with the originalist theory of the 1970s, arguing instead that the "original 'original intent' was determined not by historical inquiry into the expectations of the individuals involved in framing and ratifying the Constitution, but by consideration of what rights and powers sovereign polities could delegate to a common agent without destroying their own essential autonomy."[69] Brest and Powell's arguments tried to shape the opposition to original intent as a workable theory of constitutional interpretation.[70]

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63. *See* Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 6 (2009); *see also* Friedman, *supra* note 32, at 415.

64. Steven G. Calabresi & Lauren Pope, *Judge Robert H. Bork and Constitutional Change: An Essay on* Ollman v Evans, 80 U. CHI. L. REV. DIALOGUE 155, 155–56 (2013), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1016&context=uclrev_online.

65. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8, 17 (1971).

66. *Id*. at 6–12.

67. Solum, *supra* note 61, at 17.

68. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 212–14, 234 (1980).

69. Powell, *supra* note 3, at 888.

70. *See* Solum, *supra* note 61, at 17–19.

In spite of this opposition, originalism continued to grow in popularity, especially among conservatives who feared judicial activism. The theory also evolved over time. The proponents of the originalist theory of original intentions set the stage for what would later be known as "New Originalism," or "Original Public Meaning" originalism. Justice Antonin Scalia played a critical role in the development of this theory. In a 1986 speech, Scalia encouraged originalists to "change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning."[71] In other words, he suggested the Constitution should be interpreted in accordance with its original meaning, drawn from the original *public meaning* of its textual provisions, rather than the subjective or internal intentions of the Framers.[72]

While originalists today generally agree that they should be guided by the original meaning of the Constitution, because of the various threads of originalism as well its ambiguities, originalists continue to disagree over how courts should exercise the power of judicial review and how originalist logic should guide members of the judiciary specifically.[73] Although typically portrayed as a monolithic theory, it is not, and the play in the joints of the concept leads to problems that I will explore below.

E. Are We "All Originalists Now"?

Progressives initially thought they could defeat originalism by mocking it, but by failing to develop a coherent interpretive theory in response, they opened themselves up to a simple conservative response—we need a consistent theory to restrain judges, and the liberals disavow that. The mantra of "judicial activism" haunted progressive justices and judges and demanded a broader response.[74]

After years of failing to adequately combat originalism, progressives essentially gravitated toward an "if you can't beat them, join them" approach, seemingly validating Justice Black's trailblazing vision.[75] They began to appreciate that originalism did not have to dictate conservative results—quite the contrary, a

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71. Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986), *in* ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 106 (U.S. Dep't of Just. ed., 1987).

72. *See* Solum, *supra* note 61, at 23.

73. *See* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 400 (2013).

74. And this response needed to be, many progressives believed, cloaked in an interpretive methodology, as they bought into the "[i]t takes a theory to beat a theory" pitch. Randy E. Barnet, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 617 (1999).

75. *See, e.g.*, Akhil Reed Amar, *Why Liberal Justices Need to Start Thinking like Conservatives*, TIME (June 30, 2022), https://perma.cc/8XXF-BHKZ; JACK M. BALKIN, LIVING ORIGINALISM 280 (2011).

thorough analysis of the constitutional text and history could readily supply progressive outcomes.[76] In an influential article, Professor James Ryan synthesized the academic strands of what he dubbed "new textualism."[77] Declaring living constitutionalism "largely dead," he described new textualism as evaluating "evidence from the text, structure, and enactment history" to ascertain "what the language in the Constitution actually means."[78]

Progressives began recognizing that the Constitution is not an inherently conservative document; they just needed a mechanism to illuminate its progressive nature.[79] New textualism helped achieve that goal and provided a ready foil to joust with conservatives. By focusing on the text, this approach helped diffuse the primary conservative critique of the more nebulous living constitutionalism. But when we turn to many of the general principles delineated in the Constitution, distilling how those principles apply to contemporary disputes can require more work, and sometimes admits of a range of permissible outcomes.[80] In other words, the text alone does not definitively answer every constitutional debate.

As progressive academics endeavored to add precision to new textualism,[81] Justice Kagan emerged on the scene and famously announced, with a nod toward Justice Scalia, that "we're all textualists now" and "we are all originalists."[82] This seemed to lend credence to the push to embrace some version of formality in interpretive principle. Justice Kagan later clarified that while she does not identify as an originalist in the "conventional understanding of the term," she believes that her "view that constitutional meaning evolves is consistent with the actual original understanding of what the [Constitution] was meant to do and how it was meant to work."[83] Justice Kagan's attempt to fit her approach into the framework of

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76. *See generally* James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523 (2011).

77. *Id.* at 1524.

78. *Id.*

79. Adam Winkler, *Originalism: It's Not Just for Conservatives Anymore*, SCOTUSBLOG (Aug. 14, 2013), https://perma.cc/4FR6-WSU9 ("Properly understood, history is not something that liberals have to run away and hide from. Indeed, given that the historical meaning of the Constitution was always to expand personal liberty and guarantee a truly republican form of government, it ought to be something liberals embrace.").

80. *See* Ryan, *supra* note 76, at 1539, 1544–45.

81. *See* Kevin Tobia et al., *Progressive Textualism*, 110 GEO. L.J. 1437 (2022).

82. Harvard Law School, *The 2015 Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 08:29 (Nov. 25, 2015), https://perma.cc/XF2C-G3AW; *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (Statement of Elena Kagan).

83. Margaret Fosmoe, *The Gist: Views from the High Court*, NOTRE DAME MAG. (Sept. 25, 2023), https://perma.cc/V783-P9FA.

originalism seems to convey the message of inevitability—that textualism and originalism are here to stay, and progressive judges should work within those frameworks rather than run from them.[84]

More recently, Justice Ketanji Brown Jackson appeared to take the reins for this latest iteration of progressive originalism. During her confirmation hearings, Justice Jackson sketched out her vision for this brand of originalism: "I look at the text to determine what it meant to those who drafted it."[85] Professor Solum described Justice Jackson as the "de facto leader" of those ushering in a "third wave of progressive originalism."[86] Although we do not yet have the benefit of many opinions from Justice Jackson to explore how she envisions implementing her vision of originalism, we can see hints of it reflected in her questioning at oral argument in *Allen v. Milligan*,[87] a case implicating the meaning of section 2 of the Voting Rights Act of 1965 with respect to Alabama's 2021 redistricting plan.[88] Justice Jackson, surveying relevant constitutional history, pushed back against the notion that the Constitution established a colorblind document:

> [I]t became clear to me that the framers themselves adopted the Equal Protection Clause, the Fourteenth Amendment, the Fifteenth Amendment, in a race conscious way. . . . So I looked at the report that was submitted by the Joint Committee on Reconstruction, which drafted the Fourteenth Amendment, and that report says that the entire point of the amendment was to secure rights of the freed former slaves. The legislator who introduced that amendment said that "unless the Constitution should restrain them, those states will all, I fear, keep up this discrimination and crush to death the hated freedmen." . . . I don't think that the historical record establishes that the Founders believed that race neutrality or race blindness was required . . . . And, importantly, when there was a concern that

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84. Dan Farber, *Liberal Judges Embrace Textualism*, LEGAL PLANET (Feb. 4, 2021), https://perma.cc/C3EJ-4C6N; Richard Re, *We're All Textualists Now . . . When It Suits Us*, RE'S JUDICATA BLOG (Aug. 17, 2022), https://perma.cc/ELX5-HASL.

85. Adam Liptak, *Justice Jackson Joins the Supreme Court, and the Debate over Originalism*, N.Y. TIMES (Oct. 10, 2022), https://www.nytimes.com/2022/10/10/us/politics/jackson-alito-kagan-supreme-court-originalism.html.

86. Lawrence B. Solum, *Progressives Need to Support Justice Ketanji Brown Jackson*, BALKIN: BALKINIZATION BLOG (Dec. 9, 2022), https://perma.cc/2YB3-YZE8.

87. Transcript of Oral Argument at 57–59, Allen v. Milligan, 599 U.S. 1 (2023) (Nos. 21-1086, 21-1087).

88. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended by 52 U.S.C. § 10301) ("No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.").

> the Civil Rights Act wouldn't have a constitutional foundation, that's when the Fourteenth Amendment came into play. It was drafted to give a foundational—a constitutional foundation for a piece of legislation that was designed to make people who had less opportunity and less rights equal to white citizens.[89]

As this example helps illustrate, Justice Jackson's perspective on originalism seemingly lends credence to a manner of applying originalism that paves the way for more progressive outcomes grounded in constitutional text, history, and original understanding.[90] Whether, and how effectively, she implements this remains to be seen and must await scrutiny of the opinions that she will draft.

Not everyone on the left, however, thinks that co-opting originalism makes strategic sense. "[T]hat's the trap," commentator Ruth Marcus complains, "Playing by originalist rules might help liberal justices gain the high ground when it comes to intellectual honesty, but it risks entrenching the assumption that originalism is the one true method of constitutional interpretation."[91]

But this inevitably tumbles to the left's problem on constitutional interpretation. If most lawyers buy into the notion (that I reject) that judges must embrace a rigid methodology for constitutional interpretation, what is the alternative? We certainly do not see many, if any, progressive judges openly advocating for "living constitutionalism" or similar approaches today. To the contrary, many seem attracted to the safety of some modified strand of originalism, particularly as Justices like Kagan and Jackson help give substance to that approach.

Other judges (conservatives and progressives alike), as I suggest, apply more eclectic methodologies but do not necessarily champion these approaches outwardly. In some respects, that silence is understandable—a judge who does not subscribe to any strict mode of constitutional interpretation might feel that she has nothing particular to advocate for. Or such judges might feel vulnerable to attack by going out on a limb to champion a new way of thinking about an old problem. But the silence does have consequences, as the gravitational pull of originalism grows stronger and stronger.

If the latter judges stand silent and the left eventually coalesces around some variation of originalism, does that solve all of the judiciary's methodological problems?

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89. Transcript of Oral Argument, *supra* note 87, at 58–59.

90. *See* Solum, *supra* note 86.

91. Ruth Marcus, *Originalism Is Bunk. Liberal Lawyers Shouldn't Fall for It.*, WASH. POST (Dec. 1, 2022), https://www.washingtonpost.com/opinions/2022/12/01/originalism-liberal-lawyers-supreme-court-trap/.

II. PROBLEMS IN MODERN CONSTITUTIONAL INTERPRETATION[92]

The emergence of originalism and all of the variants that grew up in reaction to it seems to be driven by a goal to render "constitutional interpretation simple, certain, and coherent."[93] But of course it's not. Vague terms like "due process," "equal protection," and "unreasonable" searches and seizures punctuate the Constitution and beckon interpretation and debate. With the historical backdrop in mind, it begs the question of whether the proliferation of methodological approaches has actually rendered constitutional interpretation more straightforward and less controversial.

In a word, no. The proponents and adherents of the various approaches certainly mean well enough, but these interpretive methodologies have not lived up to their billing.[94] I will delve into the "why" below, but to set the stage, interpretive methodologies might work great as theoretical models in the halls of the academy. And we can engage in epic academic debates about their various vices and virtues. But once human judges begin applying these theories in practice, particularly in difficult cases, any perceived consistency in these models breaks down, and the models themselves often become results-oriented vehicles (which is exactly what we're trying to escape!).

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92. In this Article, although I focus on constitutional interpretation, I will sometimes borrow from statutory interpretation sources and analysis. The reason for this is that the line between the two is often blurry, at best, particularly when it comes to judges, and because many of the points advanced in this Article have broader applicability. For a very thoughtful piece challenging the notion of "constitutional exceptionalism" from an interpretive perspective, see Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701, 776 (2016) ("And if we are right that the exceptionalism of constitutional argument among legal professionals is not adequately supported by any of the reasons that they would give, then they might be persuaded to treat constitutional law more like other law in interpretive argument.").

93. FARBER & SHERRY, *supra* note 4, at ix; *see also* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 146 (2018) ("Many of today's conservative justices came of age and defined themselves in opposition to what they perceived as an unrestrained Warren Court.").

94. Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1163 (2020) ("Many interpretive methods involve a certain degree of underdeterminacy. . . . Varieties of originalism and no originalism often do not offer determinate answers to questions of application but instead invite interpretive disagreements within the premises of their methods. Uncertainty and disagreement about meaning is simply in the nature of interpretation.").

A. The Kitchen Sink Problem

It is important to highlight the challenges of obtaining any sort of methodological consistency for appellate judges.[95] It is one thing to proclaim your allegiance (as a judge or justice) to a particular methodological model; it is quite another to try to apply that consistently in practice, particularly as you attempt to forge a consensus on an appellate panel for the result that you believe is correct. Judges A and B may agree with your ultimate result, but Judge A doesn't like the methodology to get there, and B doesn't agree with how you propose applying it. What is a consensus-minded judge to do in such scenarios?

To secure votes, such judges cave to the human tendency to which they are not immune—the "kitchen sink" problem. Every reasonably competent lawyer, in fashioning an argument, will invariably marshal each scrap of evidence or piece of authority that she believes furthers her argument. Why wouldn't you? After all, you never know what will ultimately persuade the judges.

But when judges do this, it can wreak methodological havoc.[96] The case that vividly illustrates the point is *Heller*.[97] Written by the dean of originalism, Justice Scalia, the opinion that recognized an individual right to bear arms secured by the Second Amendment starts where you think it might—with a deep dive into the text.[98] Bolstering that analysis are also points that you would expect a good originalist to explore, including an analysis of the original meaning and understanding of that text.[99]

But then the opinion strays into pretty strange territory—at least from an originalist perspective. Justice Scalia surveys state constitutional developments "[b]etween 1789 and 1820,"[100] post-ratification commentary from "founding-era legal scholars,"[101] post–Civil War legislative efforts and discourse,[102] and post–Civil War commentary by legal scholars.[103] It's difficult to grasp how these

95. *See* Tobia et al., *supra* note 81, at 1440 (rejecting the notion of textualism as monolithic, describing it as "inexact and amorphous," and delineating five (sometimes conflicting) principles inherent in textualism).

96. Duncan Kennedy, *Strategizing Strategic Behavior in Legal Interpretation*, 1996 UTAH L. REV. 785, 788 (1996) (noting how appellate judges "often find themselves in the position of having to produce the best argument they can for a rule choice that differs significantly from the one they regard as most in accord with interpretive fidelity").

97. District of Columbia v. Heller, 554 U.S. 570 (2008).

98. *Id.* at 578–99 ("[W]hile we will begin our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose.").

99. *Id.* at 581–98.

100. *Id.* at 602.

101. *Id.* at 605–10.

102. *Id.* at 614–15.

103. *Id.* at 616–17.

sources could authoritatively shed light on the original meaning of the Second Amendment. Indeed, this panoply of sources left Justice Stevens, who authored a pretty textualist and maybe even originalist dissent, scratching his head.[104]

Just to be clear, I don't begrudge Justice Scalia relying on any of these data points if he believed they advanced his argument—so long as we can dispense with the notion that there is any methodological purity in originalism (or whatever methodological flavor a judge applies). After all, it is difficult, if not impossible, to argue that the approach of the *Heller* majority epitomizes "originalism" in all aspects of the opinion, particularly given how far removed many of the sources Scalia marshals to support his point.

Judge Posner criticizes *Heller* in exactly this manner, calling it a failure from an originalist vantage point: "Scalia's entire analysis rests on this interpretive method," Posner argues, "which denied the legitimacy of the flexible interpretation designed to adapt the Constitution (so far as the text permits) to current conditions.[105] The irony is that the 'originalist' method would have yielded the opposite result."[106] In other words, Justice Stevens's version of originalism was more methodologically pure than that of Justice Scalia, at least according to Judge Posner. But I would perhaps refine Judge Posner's point, which seems premised on the notion of originalism as a fixed and determinate vehicle for constitutional thought. It should force any of us witnessing a debate on who is more faithfully applying a malleable concept like originalism to ask ourselves if there's a better way to decide constitutional questions.

With progressive judges now often battling conservatives on the same essential turf—some variant of textualism or originalism—we are now begging debates of methodological purity. Debates which each judge, across the spectrum, will surely lose at some point.

Because each judge will inevitably cave to the kitchen sink problem, riddling all of the approaches with methodological inconsistencies. As judges strive to draft the most persuasive opinion

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104. *Id.* at 636–80 (Stevens, J., dissenting). Justice Stevens criticized the weight afforded postenactment scholars as having "limited relevance," particularly given that "[t]heir views are not altogether clear." *Id.* at 666. And he seemed baffled that the Court considered Civil War–era legislative history since the relevant statements "were made long after the framing of the Amendment and cannot possibly supply any insight into the intent of the Framers." *Id.* at 670. The historical debates reflected in the Scalia-Stevens opinions have only accelerated since *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), creating a cottage industry of early Republic experts. Shawn Hubler, *In the Gun Law Fights of 2023, a Need for Experts on the Weapons of 1791*, N.Y. TIMES (Mar. 14, 2023), https://www.nytimes.com/2023/03/14/us/gun-law-1791-supreme-court.html.

105. Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008), https://perma.cc/7FVB-ULPS.

106. *Id.*

(particularly when some of their colleagues disagree), their reliance on kitchen sink factors can torpedo methodological certainty. In surveying federal appellate judges, Professors Gluck and Judge Posner observed widespread "eclecticism," sometimes reflected in an approach embodied by an "eagerness to grasp at whatever supports are available to reinforce a conclusion and to help to explain decisions in ways that are both acceptable to colleagues of different political persuasions, and that also sound sufficiently 'opinion-like' for the general public."[107] In other words, judges cannot resist the allure of the kitchen sink problem.

But remember—this is only a problem if you subscribe to rigidity in interpretive methodologies. An approach with greater flexibility, as I will advocate for below, respects the kitchen sink inclination and finds a seat at the table for it. As long as all of the variables in an opinion's "kitchen sink" are permissible inputs for judicial consideration, judges can and should be free to rely on them as best they can, exactly as the judges in the Gluck and Posner study do.

B. The Theory Made Me Do It

In advocating in favor of textualism, Justice Gorsuch explains that part of the virtue of this approach is that it enables judges to tell litigants: "I didn't rule against you because I disagree with your values and goals, but because the law required me to."[108] Indeed, this sentiment encapsulates why so many judges gravitate toward a particular brand of interpretive methodology; it essentially allows them to disclaim responsibility for reaching certain results.[109] And this creates an impression of judges strictly adhering to fairly rigid constraints.

But is this really accurate, and is such an approach healthy in our judicial system? I don't think that we really want aloof judges who just robotically apply a theory.[110] But maybe some do. The current

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107. Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1314 (2018).

108. NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 134 (2019). To be sure, this is simply the latest iteration of a time-honored tradition of judges seeking to disclaim any ideological motivation for their actions. Kennedy, *supra* note 96, at 785 ("[Judges] *always* aim to generate a particular rhetorical effect: that of the legal necessity of their solutions without regard to ideology.").

109. And this, needless to say, triggers criticism of this approach. *See* Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 196 (2020) ("Indeed, the ability to say 'the law required me to' would seem to embolden textualist judges to make countermajoritarian decisions of all kinds."); Richard M. Re, *Permissive Interpretation*, 171 U. PA. L. REV. 1651, 1668 (2023) ("Judges usually conceal their interpretive discretion behind a rhetoric of mandates.").

110. Or maybe we should outsource our system of justice to AI. *See generally* Richard M. Re & Alicia Solow-Niederman, *Developing Artificially Intelligent Justice*, 22 STAN. TECH. L. REV. 242 (2019).

interest in corpus linguistics might telegraph where all of this is going.[111] Though used (by those who use it) typically in the statutory interpretation context, it begs the question of whether we should be trying to cram judges into some type of robotic model. At some level, this seems to me to be the natural conclusion to our theory of judging if the modes of interpretation grow more and more rigid. But I'm not confident that even such an approach can so readily eliminate, or at least limit, judicial discretion.

First of all, that is not happening in the real world. Take a hard look at any court's decisions, or even any individual judge or justice's,[112] and you will be hard-pressed to see rigid methodological consistency across decisions.[113] Even the most scrupulous adherent to a particular methodological approach will go astray (think Justice Scalia in *Heller*), so it becomes more difficult to simply say that the "law" (at least when we are talking about a particular mode of interpretation) really commands a particular result. No matter how hard we try, we just can't completely excise judicial discretion from the calculus.[114]

And many judges would insist that they aren't purporting to apply rigid interpretive methodologies in all cases. In Professor Gluck and Judge Posner's survey of forty-two federal appellate judges on questions of statutory interpretation, not a single judge "was willing to associate himself or herself with 'textualism' without qualification."[115] This creates another conundrum—it is easy for academics, and sometimes even judges, to use a label like "textualism" as monolithic, but much harder and more nuanced to try to apply that theory to the intricacies of particular cases.[116] As a result, innate "pragmatism" often bubbles to the surface,[117] even if we want to pretend that isn't happening.

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111. *See generally* Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726 (2020).

112. Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 825–27 (2023) (drawing a distinction between a court's "institutional precedent" and the "personal precedent" of the individual justices and arguing that "personal precedent helps to shore up, inflect, or defeat institutional precedent").

113. Academic commentators and judges alike have been pointing this out for some time. *See* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. 97, 111 (2022) ("Textualism is the backbone of conservative decisions—until it isn't.").

114. Franklin, *supra* note 109, at 128 ("[T]extualism does not exclude such [extratextual] considerations from judicial decision-making, it simply makes judges' reliance on those considerations harder to see.").

115. Gluck & Posner, *supra* note 107, at 1302.

116. *See, e.g.*, Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 268, 271 (2020) (noting the "competing strands of textualism" and that current Supreme Court Justices "vacillate between the two strands" of textualism).

117. *See* Gluck & Posner, *supra* note 107, at 1302–03.

But rather than attempt to bury that, let's bring that out into the open—if not celebrate it. The point is that, notwithstanding all of the pressures on a judge (or aspiring judge) to adopt a rigid method of constitutional interpretation, many will refuse to do that, or they will tailor the methodology in their own idiosyncratic way (and in a manner that other judges would reject). I just believe we should be open and transparent about what is happening, rather than pretending that these labels actually restrict judicial action.

Second, should we really be suggesting that picking your favorite methodology isn't a product of judicial discretion? After all, "[t]he choice to insist on a thoroughly mandatory approach to interpretation is just that—a choice."[118] Although we certainly pretend that adherence to particular methodological approaches is mandatory, it's not.[119] No one's lifetime Article III appointment will be revoked if they have a change of heart and start applying a different interpretive theory (or none at all).

Perhaps more troubling, many view the methodological selection by a judge or aspiring judge as code for how that person might rule on the bench.[120] Ethical canons at both the federal and state levels typically restrict judicial speech, particularly with respect to how an individual might rule on certain cases or issues. But candidates or nominees often want to convey their perspectives on certain hot-button issues in order to assure their supporters of their reliability. Some resolve this tension by professing their loyalty to a particular interpretive approach, trusting that reference will convey reliable indicia of their jurisprudence to voters or Senators.

Take the recent Wisconsin Supreme Court election, where over $45 million of funds poured in—significantly more than any prior state supreme court race.[121] With cases featuring such divisive issues as abortion and partisan gerrymandering likely to come before the court, both candidates (Daniel Kelly and Janet Protasiewicz) and their supporters sought to tout their views and criticize opponents

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118. Re, *supra* note 109, at 1665; *see also id.* at 1668 ("Judges usually conceal their interpretive discretion behind a rhetoric of mandates."). The modern answer to Professor Kennedy's 1996 question, "How can the judge be ideological?" is perhaps now answered by picking a preferred-ism that correlates with conservative or progressive aims. *See* Kennedy, *supra* note 96, at 787.

119. *See* Gluck & Posner, *supra* note 107, at 1344 ("The lack of methodological stare decisis also dooms any formalistic enterprise in statutory interpretation because it prevents a predicable approach from taking hold.").

120. *See* Adam Rutkowski, *Constitutional Interpretation Styles of US Supreme Court Justices*, *in* 2 OPEN JUDICIAL POLITICS 495, 496–97 (Rorie Spill Solberg & Eric Waltenburg eds., 2021) (observing that constitutional interpretation style "may serve as cues for both the president and senators, helping them predict a nominee's future actions").

121. *See* Sarah Ewall-Wice, *Why Wisconsin's Supreme Court Race Was the Most Expensive Election of Its Kind Ever*, CBS NEWS (Apr. 4, 2023), https://perma.cc/2SCY-Q6TX.

through the vehicle of constitutional interpretation.[122] For example, lodging criticism about his opponent's judicial approach, Kelly claimed Protasiewicz "subscribe[d] to a judicial philosophy known as living constitutionalism . . . that the courts have the power to amend what the statutes and the constitutions say."[123] Similarly, lending support to Kelly, Wisconsin Supreme Court Justice Rebecca Grassl Bradley promoted their shared belief in originalism, which she claimed "isn't designed to achieve a politically conservative policy outcome . . . [but] seeks out the history, text, and traditions at the time laws were written."[124] When candidates (and, probably more often, their champions) use constitutional modes of interpretation in a way that it could be viewed as a proxy for ideology, the public can be forgiven if they interpret all of this as signals for how these judges might rule in divisive cases.

The notion that results in difficult cases are ordained by the great methodology in the sky is simply judicial babble. It is a rhetorical maneuver that seeks to avoid a full reckoning with the heart of a case. And it causes judges to pretend that virtually every case is easy to resolve, when we all know that is not the case.

C. Can We Just Acknowledge That There Are Really Hard Cases?

Contemporary judges don't seem to want to acknowledge what many of our forebearers have known since the beginning of time—there are just some really difficult cases that do not admit of One True Answer.[125] Then-Judge Cardozo captured the point a century ago: "the lesson that the whole subject-matter of jurisprudence is more plastic, more malleable, the molds less definitively cast, the bounds of right and wrong less preordained and constant, than most of us, without the aid of some such analysis, have been accustomed to believe."[126] Of course, this realization can be difficult for a judge to accept. As Cardozo explains, during his early years on the bench, he

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122. *See, e.g.*, Shawn Johnson, *In a Supreme Court Race Like No Other, Wisconsin's Political Future Is Up for Grabs*, NPR (Apr. 2, 2023), https://perma.cc/QNR5-24J2.

123. Frederica Freyberg, *Daniel Kelly on the 2023 Wisconsin Supreme Court Election*, PBS WIS. (Mar. 31, 2023), https://perma.cc/2946-68NB.

124. Alex Ebert, *Divisive Court Election Poised to Reshape Swing State Wisconsin*, BLOOMBERG GOV. (Mar. 17, 2023), https://about.bgov.com/insights/news/divisive-court-election-poised-to-reshape-swing-state-wisconsin/.

125. *See* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1417 (1995) ("[J]udges still typically write as if they were absolutely certain" even though "everyone (including the judges) knows that's not necessarily the case."); Ryan, *supra* note 76, at 1553 (criticizing "Justice Scalia's cheery but surely false assertion that interpretation is usually 'easy as pie' because the Constitution dictates only one correct outcome").

126. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 161 (1921).

observed "how trackless was the ocean on which I had embarked. I sought certainty. I was oppressed and disheartened when I found that the quest for it was futile."[127]

It may be simply human nature that compels judges to seek Cardozo's mythical "paradise of justice,"[128] and the modern way that we do that is by grasping onto our methodology of choice. But as he ultimately had to acknowledge, we delude ourselves in that quest.

Pondering Cardozo's message in the modern era, Canadian Judge Robert J. Sharpe explains, "Judges do not decide cases entirely based on neutral, objective principles and to pretend that they do so conceals a significant component of judicial reasoning and discourages judges from reflecting upon and questioning the values they do apply."[129] Judge Sharpe insists that we must be candid about the reality that "there are cases where the correct legal result is anything but clear" and it is a "myth" to pretend otherwise, relegating judges to "amoral and apolitical automaton[s]."[130]

It is difficult to find too many contemporary American judges echoing this sentiment (out loud, at least), and we should ask ourselves why. It certainly is not a product of the cases getting any easier—much to the contrary, modern society seems to want the courts to resolve every controversial issue presently dividing the country, presenting judges with often agonizing choices.[131] When faced with these cases, and considering vagueness or imprecision in the constitutional text, we must acknowledge that "hard cases inevitably involve judicial leeway; this is simply part of the system."[132]

What would it look like for modern judges to be more forthcoming about this point and channel some of Cardozo's angst? The public might view that as a sign of weakness, or a welcome dose of judicial humility. Perhaps I suffer from political naïveté, but I believe that

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127. *Id.* at 166.

128. *Id.*; *see* Robert J. Sharpe, *How Judges Decide*, *in* PRINCIPLES, PROCEDURE, AND JUSTICE: ESSAYS IN HONOUR OF ADRIAN ZUCKERMAN 95 (Rabeea Assy & Andrew Higgins eds., 2020) ("Some judges embrace as liberating the idea that the law is indeterminate. But others find the idea of indeterminacy unsettling and threatening.").

129. *Id.* at 94.

130. *Id.* at 96–97; *see* Ryan, *supra* note 76, at 1544 ("If that meaning is somewhat abstract or general, it follows that it might be consistent with a range of outcomes.").

131. *See* Logan Strother & Shana Kushner Gadarian, *Public Perceptions of the Supreme Court: How Policy Disagreement Affects Legitimacy*, *in* 20 FORUM 87, 87 (2022) ("The reason for this decline, many suggest, is that the Supreme Court now appears to be too mixed-up in partisan politics, routinely rendering controversial decisions in high-profile, polarizing cases . . . .").

132. DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLES AND POLITICS IN CONSTITUTIONAL LAW 35 (2009).

judges can project strength and wisdom through humility.[133] After all, we judges often roll our eyes when a lawyer refuses to grapple with a bad fact or adverse precedent rather than tackling that challenge head-on; we should not expect a different reaction from readers of our opinions.

Too often, our interpretative methodologies are wielded to promote a false sense of security and ease of judicial decisions in constitutional cases. But they don't really render the decision-making process any easier, and to the contrary, they often obscure the underlying drivers of a particular case outcome in formalities.

D. Is the Modern Brand of Originalism Any More Restrained than the Warren Court?

The conservative critique of much of the Warren Court jurisprudence is that the Justices, blinded by their subjective view of fairness or equity, simply dispensed it, free of concerns of traditional constitutional constraints.[134] Originalism, the supposed antidote to these antics, has not lived up to its billing—at least if you ask contemporary progressives. From their vantage point, conservatives wield originalism not as an apolitical guide to divine the correct answer in a case, but rather as a ticket to reach the conservative outcome.[135]

Indeed, that represents part of the thrust of the liberal attack on originalism—that even if it could be objectively applied in an ideologically neutral manner, that is not how judges in the real world apply it. Rather, they can exploit fuzziness in the details of the methodological approach to arrive at the conservative result even if they should (objectively) land elsewhere.

But aren't modern progressives, drawn by the allure of originalism, playing the same methodological game? Just as conservatives created originalism to combat Warren Court excesses, so too have some liberals built "modern originalism" or "new textualism" (or however you might label it) to defeat the conservative outcomes ordained by "old" originalism.[136] At a high level, this seems like just tweaking originalism to ensure that it points toward progressive, rather than conservative, results.

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133. As Professor Fallon argues, if judges more frankly acknowledged competing considerations, "credibility might well be gained by a careful and balanced assessment of the force of all the arguments within all of the categories prior to the pronouncement of a judgment." Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1249 (1987).

134. Richard M. Re, *A Conservative Warren Court*, WASH. POST (July 9, 2024), https://www.washingtonpost.com/opinions/2024/07/09/roberts-supreme-court-conservative-warren/.

135. *See, e.g.*, Lemley, *supra* note 113, at 111–12.

136. *See* Ryan, *supra* note 76, at 1538.

As the methodologies seem to converge,[137] one might expect for the "original" originalists to celebrate. After all, haven't they achieved what they sought—the widespread application of a methodology that would restrain judicial discretion? Maybe, maybe not.[138] Today, many conservative originalists would attack their progressive colleagues for co-opting a counterfeit brand of originalism. Progressives would retort that they are more faithfully applying original meaning, history, etc.

We frankly even see debates about the purity of originalism within "original" originalist camps.[139] This conflict has escalated with the conservative originalist's increased reliance on tradition.[140] For example, the methodological problems of originalism came into sharper focus in *United States v. Rahimi*,[141] where the Court upheld a federal statute prohibiting people under a domestic violence restraining order from possessing a firearm as consistent with the "history-and-tradition" framework for Second Amendment challenges to gun laws under *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*.[142] Under the umbrella of an 8-1 decision, five Justices wrote separately, variously commenting on the contours, workability, and efficacy of *Bruen*'s "history-and-tradition" framework as it relates to originalism and constitutional interpretation generally with several conservative Justices jockeying to define the doctrine.[143]

Writing in the most depth, Justice Kavanaugh critiqued the means-end tiers of scrutiny approach that he describes as a "policy-based approach" to interpretation and framed his preferred originalism as "relying on text, pre-ratification and post-ratification history, and precedent."[144] He admits the historical approach is imperfect but nonetheless defends it as the best tool because it "tends to narrow the range of possible meanings that may be ascribed to vague constitutional language" and "imposes a neutral and

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137. Gluck & Posner, *supra* note 107, at 1301 (noting that "many contend" that the debate between textualism and purposivism has "reached détente, with most Justices now unabashedly of the 'text-first' persuasion").

138. *See, e.g.*, Harry Litman, *Originalism, Divided*, ATLANTIC (May 25, 2021), https://www.theatlantic.com/ideas/archive/2021/05/originalism-meaning/618953/.

139. Bostock v. Clayton County, 140 S. Ct. 1731 (2020); *see also* Rutkowski, *supra* note 120, at 496–97 (describing several variations of originalism).

140. *See* Adam Liptak, *A Conservative Judge's Critique of the Supreme Court's Reliance on Tradition*, N.Y. TIMES (Feb. 26, 2024), https://www.nytimes.com/2024/02/26/us/supreme-court-originalism-tradition-conservative.html (noting that while the use of tradition ("living traditionalism") has become increasingly dominant in the jurisprudence of the originalists on the Court, there lacks any clear tie between traditionalism and originalism).

141. 144 S. Ct. 1889 (2024).

142. 142 S. Ct. 2111 (2022).

143. *Id.*

144. *Rahimi*, 144 S. Ct. at 1910 (Kavanaugh, J., concurring).

democratically infused constraint on judicial decisionmaking."[145] Still, he admits that the Court's precedents "do not supply a one-size-fits-all answer to . . . various methodological questions" about how to apply post-ratification history, sometimes described as "tradition."[146]

Justice Barrett takes this observation about "tradition" to a more-developed critique: "[G]enerally speaking, the use of postenactment history requires some justification other than originalism simpliciter."[147] And insofar as courts' historical analog analysis would focus on historical *policies* rather than the *principles* discernable from those policies, the Court diverges from core principles of originalism, particularly in its focus on a fixed historical and discoverable meaning at the time of ratification.[148] In other words, "evidence of 'tradition,'" or post-enactment history, "unmoored from original meaning is not binding law."[149]

Finally, although she generally supports the majority's attempt at clarifying the many unresolved questions left by *Bruen*, Justice Jackson takes aim at the whole history-and-tradition inquiry, arguing that it pushes legislators, parties, and judges "far outside their depths," "casting about for similar historical circumstances."[150] She argues that "whether *Bruen*'s test is satisfied in a particular case seems to depend on the suitability of whatever historical sources the parties can manage to cobble together, as well as the level of generality at which a court evaluates those sources—neither of which we have as yet adequately clarified."[151]

Justice Jackson articulates the methodological problems with interpretive tests emerging from ostensibly originalist principles. At multiple levels, the originalist Justices cannot seem to agree on the roles of pre-enactment (or "original") history, post-enactment history (or "tradition"), and precedent and on how closely currently challenged laws must resemble those historical examples.[152] Ultimately, she strikes at the heart of the problem here—insofar as originalism is positioned as the optimal theory to achieve uniformity and restraint in constitutional interpretation, it often causes more methodological problems than it solves.

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145. *Id.* at 1922.

146. *Id.* at 1960 n.4 (Kavanaugh, J., concurring).

147. *Id.* at 1924 (Barrett, J., concurring); *see also* Vidal v. Elster, 144 S. Ct. 1507, 1524–32 (2024) (Barrett, J., concurring in part) (expressing concerns with exclusively relying on history and tradition and advocating for the adoption of a standard grounded in both trademark law and First Amendment precedent).

148. *Rahimi*, 144 S. Ct. at 1908 (Gorsuch, J., concurring); *id.* at 1924 (Barrett, J., concurring).

149. *Id.* at 1925 (Barrett, J., concurring) (citing *Vidal*, 144 S. Ct. at 1531–32 (Barrett, J., concurring in part)).

150. *Id.* at 1928 n.2 (Jackson, J., concurring).

151. *Id.* at 1929.

152. *Id.*

With all of this finger-pointing going on about who deserves to wear the crown for purest originalist, it may be helpful to step back for a moment and consider our jurisprudential predicament. The promise of originalism as the "single truthmaker"[153]—the device to bound judicial discretion—has been left unfulfilled. And if some judges adopt a progressive strand of originalism while other judges apply a conservative brand, it seems to validate the realist critique that judges are just engaged in ideological decision-making, consistent with many modern attacks on the judiciary.

Amidst these efforts to cultivate judicial restraint through the mechanism of originalism, no robust discussion of "restraint" can be had without addressing the elephant in the room—whether judges wielding their methodology of choice actually want to be restrained. As the originalist movement picked up steam in the Warren Court's wake, it linked its methodological approach with a rallying cry to promote "judicial restraint." Judicial restraint became a buzzword in confirmation hearings and judicial campaigns to send the message that its advocates would proceed in a, well, restrained manner.

Usually, "judicial restraint" was synonymous with a judge who was conservative and/or an originalist, whereas "judicial activism" was meant as an attack on more liberal judges. But now, those labels are growing more nebulous and don't appear to stand for the principles they initially evoked.[154] Take a look at significant liberal dissents from the Supreme Court, from *Heller* to *Dobbs*, and you'll see a progressive cultivation of judicial restraint language targeted against conservative rulings claimed to be "activist" in the dissenters' eyes.[155]

Indeed, Professor Blackman, quoted at a Federalist Society conference, seemed to question future adherence to principles of restraint: "The norm that judges [should] be restrained and

153. William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2227 (2017).

154. *See* David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL'Y 137, 137 (2011) (noting that "judicial restraint" is often "just an all-purpose term of praise for judges who have reached decisions that the speaker likes, in the same way that 'judicial activism' is often an epithet used for decisions that the speaker dislikes").

155. *See Heller*, 128 S. Ct. at 2824 (Stevens, J., dissenting) ("Even if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself, would prevent most jurists from endorsing such a dramatic upheaval in the law." (citations omitted)); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2348 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) ("[W]eakening *stare decisis* in a hotly contested case like this one calls into question this Court's commitment to legal principle. It makes the Court appear not restrained but aggressive, not modest but grasping.").

moderate—that ship has sailed," with others echoing the point.[156] This poses significant macro concerns for the future of constitutional interpretation; some concept of judicial restraint has galvanized the development of probably every interpretative methodology that you can imagine.[157] If we jettison that backdrop, it begs serious questions for all of these theories.

To the extent that some judges are shrugging off notions of restraint, it opens the door to accuse originalism or textualism of "vastly aggrandiz[ing] judicial power"[158]—the very antithesis of its design. Critics object that when a court "falsely claim[s] its hands were tied," but proceeds to make "value-laden choices" without making those choices transparent, "democratic accountability problems" abound.[159]

A lack of democratic accountability, gross inflation of judicial power, and tossing restraint out the window . . . that is starting to sound a lot like the criticisms of the Warren Court.[160]

E. Where Does This All Leave Us?

The apparent convergence of many judges to originalism (whether "original" flavor or a "modern" variety) hasn't really solved anything. To the contrary, the percentage of the public who think Justices' decisions are motivated by politics has been steadily increasing, rising from 35% in 2019 to 54% in 2024.[161] We sit in a

156. Ian Ward, *The Federalist Society Isn't Quite Sure About Democracy Anymore*, POLITICO (Mar. 17, 2023), https://www.politico.com/news/magazine/2023/03/17/federalist-society-democracy-opinion-00087270. *See generally* Baude, *supra* note 153 (suggesting that judicial constraint is no longer an important value of originalism); Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 909 (2021) ("Justice Elena Kagan and other rueful dissenters have come perilously close to announcing—self-defeatingly?—that stare decisis has itself been overruled.").

157. For her part, in a recent concurrence, Justice Jackson advocated for judicial restraint while agreeing with the generally originalist reasoning of the majority opinion in which she joined. *See* CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 144 S. Ct. 1474, 1492 (2024) (Jackson, J., concurring); Linda Greenhouse, *Ketanji Brown Jackson Points to a Way Forward for the Court*, N.Y. TIMES (May 29, 2024), https://www.nytimes.com/2024/05/29/opinion/supreme-court-judicial-restraint.html.

158. Franklin, *supra* note 109, at 129.

159. *Id.*

160. Professor Re draws such a parallel between criticisms of the Roberts Court and the Warren Court: "Many of the criticisms that this court is enduring—particularly being too political—have been leveled before at earlier courts." Re, *supra* note 134.

161. Charles Franklin, *New Marquette Law School National Survey Finds Approval of U.S. Supreme Court at 40%, Public Split on Removal of Trump from Ballot*, MARQ. L. POLL (Feb. 20, 2024), https://perma.cc/2BZF-MZBP.

moment when the judges who would reject such methodologies should speak up and help convince others that we can find a better path.

Over two decades ago, Professors Farber and Sherry predicted the natural conclusion to an obsessive reliance on rigid methods of interpretation, which they called "grand theory."[162] Grand theory, they declared, "is worse than useless" because, no matter how it is contorted, it "cannot effectively constrain judges."[163] As a result, as judges fall into competing methodological camps, "it dramatically escalates the rhetorical stakes. The whole point of grand theory is that judges who fail to follow your theory are not just making mistakes in deciding cases. No, they are completely illegitimate, exercising raw power in a lawless way."[164] And they reasoned that when judges invoke grand theories, it paradoxically would create doctrinal "chaos rather than consensus" because of the abstract nature of the theories and the inconsistent application from judge to judge and court to court.[165] Unfortunately, their predictions proved prescient.

Indeed, we have moved well past passionate dissents that conclude with an homage to collegiality such as, "I respectfully dissent." It doesn't take too much searching to find recent opinions drawing parallels between a ruling issued by certain judges and the downfall of the Republic. One recent dissent captures the point, describing the majority opinion as "contrary to our system of government, destructive of separation of powers, and the very definition of tyranny as understood by our Founding Fathers."[166] These recent examples encapsulate the theme of judges viewing their colleagues as "exercising raw power in a lawless way."[167]

Some judges are observing this trend with alarm. Third Circuit Judge D. Brooks Smith commented on the acrimonious language seeping into judicial opinions as of late: "I'm a little disturbed by some language I see from time to time in the present day that is a bit more

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162. FARBER & SHERRY, *supra* note 4, at 140.

163. *Id.* at 141.

164. *Id.* at 159; *see also* Re, *supra* note 109, at 1665 ("On this view, interpretation is either mandatory or illegitimate.").

165. FARBER & SHERRY, *supra* note 4, at 152.

166. Hoke Cnty. Bd. of Educ. v. State, 879 S.E.2d 193, 284 (N.C. 2022) (Berger, J., dissenting); *see also* Hodes & Nauser, MDs, P.A. v. Schmidt, 440 P.3d 461, 556–57 (Kan. 2019) (Stegall, J., dissenting) ("For the majority, the settled and carefully calibrated republican structure of our government must give way, at every turn, to the favored policy. But in my considered judgment, *constitutional structure* is the very thing securing and guaranteeing the *full range* of human liberty. History and reason suggest that those who, in the name of liberty, tear down that edifice will wind up out in the political elements, unsheltered and exposed to the cold wind of every arbitrary power."); Trump v. United States, 144 S. Ct. 2312, 2372 (2024) (Sotomayor, J., dissenting) ("With fear for our democracy, I dissent.").

167. FARBER & SHERRY, *supra* note 4, at 159.

combative than what I've seen in the past . . . . It's something we judges need to keep in mind."[168]

To some judges, this may be a symptom of the social media age in which we live. Judge Stephanos Bibas expressed concern about the proclivity of some judges to "show off" in order to attract Twitter accolades and potential consideration for judicial elevation down the road.[169] And to be sure, this could be driving some of the sharper language emerging in judicial opinions (just as it has in modern political discourse).

But I posit that we must appreciate what is underlying this. Most professionals would not accuse their colleagues of nearly destroying democratic institutions simply to attract attention. Appellate judges must collaborate with their colleagues to reach decisions in the cases before them, and personality clashes or name-calling often proves an impediment to consensus-building. At core, the vitriol in some of these attacks traces directly to methodological flaws perceived by the writer, perhaps amplified given some of the rights at stake.

And these are not just anecdotal examples. Recent empirical analysis of federal appellate decisions and partisanship (between 1974 and 2017) noted fairly modest partisan differences in judges' use of precedent in the past, but recently, it documents "a sharp rise in partisan differences" with the most profound differences manifested in "the most ideological" cases.[170] Although this study does not directly explore the interpretive methodological question at the heart of this Article, the authors lend support to the centrality of methodology driving the divide between judges: "The most important part of a given majority opinion's reasoning is its articulation of the test or factors that lead the court to decide as it does."[171] That necessarily encapsulates the interpretative lens adopted by the authoring judge.[172]

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168. Avalon Zoppo, *'Disturbed by Some Language:' Judge Concerned by Rise in Combative Opinions*, NAT'L L.J. (Feb. 27, 2023), https://perma.cc/79PX-83LY.

169. Nate Raymond, *'Judges Gone Wild': Trump-Appointed Judge Says Too Many Write for Twitter*, REUTERS (Nov. 2, 2022), https://www.reuters.com/legal/government/judges-gone-wild-trump-appointed-judge-says-too-many-write-twitter-2022-11-02/.

170. Stuart Minor Benjamin et al., *Twenty-First Century Split: Partisan, Racial, and Gender Differences in Circuit Judges Following Earlier Opinions*, 49 BYU L. REV. 367, 373 (2023).

171. *Id.* at 377. Indeed, "[f]ollowing the opinion" of a like-minded judge "would be a way of supporting the colleague and the group" and the group's shared perspective. *Id.* at 402.

172. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1855 (2010) ("The norms generated through justificatory opinions form the fabric of the law, and interpretive methodology offers the 'process rules,' the language through which the opinions are written. . . . And this is why methodology matters . . . . Methodological choice sets the terms of the debate.").

Needless to say, as acerbic rhetoric infects judicial opinions, it necessarily impacts public perception of the judiciary, and not in a good way. Public perception of the courts has plummeted in recent years.[173] Many in the public would accuse judges of simply being "politicians in robes," exercising their power to further ideological ends.[174] The personal attacks surfacing in judicial opinions of late only add fuel to that fire. As these attacks attract attention, in traditional media or on Twitter, the public sees a distorted view of how the judiciary functions.

Psychologists would say that polarization in our political system arises when we dehumanize the "other" side, which enables us to treat their views as illegitimate because they, themselves, are illegitimate.[175] Applying that concept in the judicial sphere, an unduly strict adherence to a particular interpretative philosophy fails to present "an attitude conducive to judicial collegiality or constructive debate."[176] In other words, it justifies calling out your colleagues as disingenuous, or worse. And, as one can surely imagine, such language necessarily inflicts tension in any court.

Supreme Court Justices' recent sparring over methodology in several Supreme Court decisions on constitutional questions highlights the rising tension in our federal judiciary. In her dissent to the Court's decision holding race-based affirmative action programs for college admissions unconstitutional, Justice Jackson critiqued the majority's "let-them-eat-cake obliviousness" and Justice Thomas's "obsession with race consciousness" regarding their "announce[ment]" of "'colorblindness for all' by legal fiat" while advancing her own originalist argument defending affirmative action.[177] In response, Justice Thomas defended his assertion that the "Framers of the Fourteenth Amendment charted . . . a colorblind Constitution" and called Justice Jackson's dissent "a call to empower privileged elites."[178] Justice Kavanaugh and Justice Kagan engaged in a similar back-and-forth in a recent case about whether to

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173. Lohier, *supra* note 2, at 71 (exploring declining confidence in the Supreme Courts and the judiciary more broadly).

174. Professor Lemley examines this issue in the context of purported decline of the stature of the Supreme Court in *The Imperial Supreme Court*, *supra* note 113. He frames the problem as an aggrandizement of judicial power, often accumulated through strategic use of interpretive methodologies. *Id.* at 111–14.

175. *See* Austin van Loon et al., *Imagined Otherness Fuels Blatant Dehumanization of Outgroups*, 2 COMMC'N PSYCH. 1, 1–14 (2024).

176. FARBER & SHERRY, *supra* note 4, at 175.

177. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2276–77, 2277 n.103 (2023) (Jackson, J., dissenting); Mark Joseph Stern, *Ketanji Brown Jackson Has Perfected the Art of Originalism Jujitsu*, SLATE (July 28, 2023), https://slate.com/news-and-politics/2023/07/supreme-court-ketanji-brown-jackson-originalism-jujitsu.html.

178. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2177, 2204 (Thomas, J., concurring).

retroactively apply a new non-unanimous jury verdict rule (which was grounded in part on the original meaning of the Sixth Amendment), with the latter accusing the former of "treat[ing] judging as scorekeeping" for pointing to her dissent in the case establishing the rule.[179] And in their joint dissent to the Court's decision overturning *Roe v. Wade*, the three dissenting Justices charged the majority with "consign[ing] women to second-class citizenship" by digging back to thirteenth-century history and by prioritizing the constitutional ratifiers' failure to recognize women's rights over the fundamental flexibility built into the Fourteenth Amendment's concepts of equal protection and liberty.[180]

The "divisive dogmatism"[181] cultivated by an unhealthy reliance on rigid modes of interpretation has not left our court system in an enviable position.[182]

III. TOWARD A MORE PRINCIPLED APPROACH

Many academics and (as I argue, certainly not all) judges acknowledge a truism: A judge must have, and adhere to, an interpretative methodology for constitutional interpretation.

I look at the landscape of modern legal thought and the contemporary court system and conclude that these magical methodologies have not actually achieved their goal of restraining the exercise of judicial discretion in ways that most everyone would feel is appropriate. More troubling, I can't see evidence that they have actually increased public respect for the judiciary as an institution.[183]

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179. Edwards v. Vannoy, 141 S. Ct. 1547, 1581 n.8 (2021) (Kagan, J., dissenting). In the realm of statutory interpretation, Justice Kagan called out Chief Justice Roberts's "supposedly textualist method of reading statutes" in his majority decision establishing the political question doctrine, later claiming that "[t]he current Court is textualist only when being so suits it." West Virginia v. EPA, 142 S. Ct. 2587, 2630, 2641 (2022) (Kagan, J., dissenting).

180. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2325–28 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting). For its part, the majority retorts that "despite the dissent's professed fidelity to *stare decisis*, it fails to seriously engage with" precedent requiring that "unenumerated right[s] be 'deeply rooted in this Nation's history and tradition'" to be protected by the Due Process Clause. *Id.* at 2260 (majority opinion) (quoting Washington v. Glucksberg, 117 S. Ct. 2258, 2268 (1997)).

181. FARBER & SHERRY, *supra* note 4, at 183.

182. We must also remember that most people don't write articles about judges getting along and engaging in reflective debates. Wars of words and ad hominem attacks attract attention and generate media and academic articles, while leaving the public with the perception that such attacks are commonplace.

183. *See generally* Mark Tushnet, *The United States: Eclecticism in Service of Pragmatism*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 7, 54 (Jeffrey Goldsworthy ed., 2006) ("[I]t cannot go unremarked that the national courts in the United States have historically been, and remain today, among the

The tenor of language referenced above in recent opinions, coupled with data on public perception of the judiciary,[184] convinces me that we can do better.[185]

A. Drawing Inspiration from Pragmatists and the Eclectic, Common Law Tradition

To build toward my own alternative vision for constitutional interpretation, I first look to those jurists who fundamentally rejected calls to adopt a singular methodological vision. Indeed, these judges appreciated that the methodologies that some judges have adopted and espoused "are so malleable that a judge adopting any one of them could reach virtually any result."[186] And they, like perhaps most judges, did not actually believe that they must apply their approach of choice in a robotic fashion. Surveying this landscape, Professor Gluck and Judge Posner have aptly observed an "intentional eclecticism" in how federal appellate judges implement their modes of statutory interpretation.[187]

And we see that eclectic approach at work in the constitutional domain.[188] Throughout their careers, several justices and judges rejected strict adherence to rigid methodological schools of constitutional interpretation, instead opening themselves to persuasion, respecting context, and striving for pragmatism. Justice Sandra Day O'Connor, both celebrated and derided for her legacy of pragmatism, "rejected templates and formulas,"[189] viewing "Grand Unified Theor[ies]" of constitutional interpretation with healthy

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most respected institutions of government in the nation. . . . The American people have accepted judicial review as their method of updating the Constitution.").

184. *See generally* Joseph Copeland, *Favorable Views of Supreme Court Remain near Historic Low*, PEW RSCH. CTR. (Aug. 8, 2024), https://perma.cc/C67G-UCTY.

185. *See generally* Franklin, *supra* note 109, at 123 ("[T]extualism is no more capable of providing a neutral truthmaker or of cabining the influence of evolving social values than any other leading method of statutory interpretation.").

186. FARBER & SHERRY, *supra* note 4, at 8; Franklin, *supra* note 109, at 125 (arguing that textualism and originalism only offer an "illusion" of "more objectivity or determinacy").

187. Gluck & Posner, *supra* note 107, at 1302; *see also* Re, *supra* note 112, at 837–38.

188. *See* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 689 (1994) ("I want to argue, however, that a common-law model fairly describes much of what courts actually do when interpreting the Constitution, and that such interpretation would generally be more successful if the common-law model were more candidly acknowledged and more broadly employed.").

189. Lisa Kern Griffin, *Sandra Day O'Connor's "First" Principles: A Constructive Vision for an Angry Nation*, 120 COLUM. L. REV. 2017, 2027 (2020) (reviewing EVAN THOMAS, FIRST: SANDRA DAY O'CONNOR (2019)).

skepticism, or in her own words, as "neither grand nor unified."[190] The former politician in her likely appreciated that negotiating for five votes is often a challenging affair, preferring to reach a majority position for the result she believed was appropriate regardless of methodology than to stand alone wrapped in a particular interpretive lens.

Likewise, Justice Anthony Kennedy, Justice O'Connor's collaborator in their joint, compromise concurrence in *Planned Parenthood v. Casey*,[191] found himself as the frequent swing vote of the Rehnquist and Roberts Courts, certainly owed in part to his unwillingness to swear fealty to a single methodological program.[192] Although his reputation for idiosyncratic writing and theoretical opacity leaves him few champions,[193] Kennedy's legacy as a persuadable consensus-builder who advocates targeted in shaping their briefs and arguments before the Court suggests the power of judicial open-mindedness. One wonders what sort of creative, illuminating interpretive arguments might emerge from an appellate bar faced with judges more willing to approach cases with Kennedy's intellectual humility and interpretive malleability.

Similarly, Justice David Souter, another contemporary of O'Connor and Kennedy, left a legacy of common law interpretation, embodying what one author calls "holistic pragmatism."[194] Souter, who believed that constitutional text "can give no answers that fit all conflicts,"[195] embraced the role of multiple interpretive theories in

190. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 852 (1995) (O'Connor, J., concurring); *see also* Kathleen M. Sullivan, *Justice Sandra Day O'Connor*, 119 HARV. L. REV. 1251, 1252 (2006) ("She was a judge's Justice, whose common law approach to constitutional controversies led her to reject reliance upon any single grand theory or categorical interpretation.").

191. 505 U.S. 833 (1992).

192. *See* Colin Dwyer, *A Brief History of Anthony Kennedy's Swing Vote—and the Landmark Cases It Swayed*, NPR (June 27, 2018), https://perma.cc/3GYZ-SCNB; *see also* Mitchell N. Berman & David Peters, *Kennedy's Legacy: A Principled Justice*, 46 HASTINGS CONST. L.Q. 311, 315–16, 322–23 (2019) (advancing a theory of Justice Kennedy's "principled positivism"). Berman & Peters note that scholars also struggle to define Justice Ruth Bader Ginsburg as associated with any one theory of constitutional interpretation. Berman & Peters, *supra*, at 315.

193. *See* Garrett Epps, *What Is on Justice Anthony Kennedy's Mind?*, ATLANTIC (June 29, 2016), https://www.theatlantic.com/politics/archive/2016/06/what-is-on-justice-anthony-kennedys-mind/489218/ (describing Kennedy's mind as "a distant and mysterious country, with its own language and folkways beyond the ken of normal Americans"); *see also* Berman & Peters, *supra* note 192, at 315–22 (explaining the critiques of Kennedy before defending him).

194. *See* Charles L. Barzun, *Justice Souter's Common Law*, 104 VA. L. REV. 655, 663 (2018).

195. Justice David H. Souter, *Text of Justice David Souter's Speech*, HARV. GAZETTE (May 27, 2010), https://perma.cc/GNJ8-FPSZ.

building toward case resolutions in part because they all carry limitations. For instance, originalism, he said, "is fine if you don't expect too much from it," comporting with his overall view that "virtually all of constitutional interpretation is incapable of giving . . . something that can legitimately be called the right answer rather than the wrong answer."[196] Associating himself with the common law tradition of Judge Learned Hand and Justices John Marshall Harlan II and Oliver Wendell Holmes, he called for judges to "start from the bottom up" and to reach conclusions that, though they might ultimately embrace one interpretation over another, nonetheless "have great respect for fact because your first job is to decide the case, not to embody principles."[197]

And most recently, in his new book, Justice Stephen Breyer criticized the Court's overreliance on textualism and originalism, instead proposing a more flexible approach.[198] His version of pragmatism begins with the text but importantly also examines the legislative purpose and societal consequences of deciding a case in one way or another.[199] In espousing his pragmatic approach, he aligns with Chief Justice Marshall, recalling Marshall's declaration that the Constitution was written in "general terms" to be interpreted by subsequent generations through "ever-changing circumstances."[200]

At the circuit level, the preeminent, self-avowed legal pragmatist Judge Richard Posner distrusted "abstract theory and intellectual pretention" and strived for an ultimate reasonableness informed by the systemic and case-specific consequences of his decisions.[201] Perhaps in a similar vein, Judge Posner's former colleague on the Seventh Circuit, Judge Diane Wood, recently observed: "I really think we can follow the constitutional text and still have flexibility where it's needed, and not where the people who wrote the Constitution meant what they said. I don't think you've got to be completely on one side or the other."[202] And at the district court level, Southern District of Ohio Judge Edmund Sargus argues that adhering to an "-ism" would "take the judging out of judging," envisioning a place for multiple methods of constitutional interpretation depending on the

196. Justice David H. Souter, *Former Justice Souter on the Constitution Interview: With Professor Noah Feldman*, C-SPAN, at 10:00, 15:00 (Sept. 17, 2009), https://www.c-span.org/video/?288993-2/justice-souter-constitution.

197. *Id.* at 20:00.

198. *See generally* STEPHEN BREYER, READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM (2024).

199. *See generally id.*

200. *Id.* at 207.

201. RICHARD POSNER, LAW, PRAGMATISM, AND DEMOCRACY 49–50 (2003); *see* Justin Desautels-Stein, *At War with the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis*, 2007 MICH. ST. L. REV. 565, 595–99 (describing Judge Posner's "economic pragmatism").

202. Lohier et al., *supra* note 2, at 76.

language at issue.[203] In his view, originalism has its place, as does what he calls common law traditionalism, which "starts with deference to precedent, continuity being a good thing, and a break with the past only when necessary."[204] Following a common law approach, he suggests, helps "maintain respect for the legal system . . . as a system of laws, not as a system of gratuitous policymakers."[205]

The critique of, in particular, Justices O'Connor, Kennedy, and Souter, focuses on their own particular brands of jurisprudence. Many commentators' rejection of their approaches can be traced to ideological underpinnings—these Justices don't give us what we want in terms of consistent, reliable votes. But this critique seems premised on a notion of robotic (and partisan) judging that I would reject.

Instead, I submit that we should open the aperture a bit more and appreciate their approaches as something beyond their own idiosyncratic manners of answering constitutional questions. Rather, these are examples of eclectic judging. We should therefore not just consider their jurisprudence in a vacuum, but rather as part of a broader eclectic approach that rejects the prevailing rigidity in various modes of constitutional interpretation.[206] The inputs they analyze, and how they balance them, should be set in the broader context of an eclectic jurisprudential approach.

Justices and judges in this mold, who reject labels on their approaches to constitutional adjudication, have something profound to contribute to our constitutional discourse in this moment. I accordingly want to challenge judges and lawyers alike to consider this question with a fresh perspective. Can we take a step back and imagine an alternative scenario? After all, as Professor Ryan points out, "it seems fair to assume that most Americans want an understandable and persuasive explanation of what the Constitution actually means, in whole and in part."[207] It is time to move beyond the "unproductive debate" about the optimal methodology and to instead confront deeper questions about the future direction of the judiciary.[208] Difficult as that exercise may be, I would like to encourage debate and reflection on the matter.

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203. Advisory Opinions, *Originalism v. Common Law*, DISPATCH, at 33:10 (May 7, 2024), https://thedispatch.com/podcast/advisoryopinions/58065/.

204. *Id.* at 12:08.

205. *Id.* at 45:48.

206. Professor Keith Werhan described the eclectic approach as "begin[ning] with a searching analysis of text, history, and precedent." *See* Keith Werhan, *Toward an Eclectic Approach to Separation of Powers:* Morrison v. Olson *Examined*, 16 HASTINGS CONST. L.Q. 393, 450 (1989). But he noted that "[i]n difficult cases, these materials may not provide a final answer." *Id.*

207. Ryan, *supra* note 76, at 1561.

208. *See* Gluck, *supra* note 172, at 1812.

B. Alternative Visions of Constitutional Interpretation

Attentive to the legacies of those jurists discussed above (and countless others out of the limelight), I next draw from the relatively sparse landscape of those who would offer alternatives to dogmatic adherence to particular interpretative methodologies. In doing so, I recognize that those jurists' reputations for flexibility and consensus-building arose from a deeper history of incrementalism and the common law tradition. Reviewing the existing writing on the subject provides the building blocks for a new vision of constitutional interpretation.

After they held each of the "grand theories" up to the light and found them inadequate, Professors Farber and Sherry suggest a return to "common law" constitutional interpretation.[209] In other words, why don't we return to where we started? Until recently, judges "proceed[ed] incrementally, moving case by case" without "attempting to articulate a general theory from the start."[210] We see this approach at work in very important aspects of American law, from tort to contract to (at least in certain respects) criminal law.[211] Those basic principles are workable, familiar to judges, and have served the U.S. legal system well since its founding.

Acknowledging the flaws to this process, Farber and Sherry retort that "no one has yet offered a better way to decide hard cases."[212] They insist that their common law approach would not, contrary to the fears of the grand theory acolytes, throw open the doors to judicial activism or shenanigans. Rather, as judges or justices built on the framework of existing jurisprudence, they would take modest steps, and principles would emerge organically, rather than decreed from the theorists on high.[213] In response to the fear that judges would nevertheless run amuck, they note that the desire to restrain judicial discretion is an "impossible dream," and one that has proven beyond the grasp of the grand theorists themselves.[214]

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209. *See generally* FARBER & SHERRY, *supra* note 4.

210. *Id.* at 152.

211. *Id.* at 153. Other scholars have likewise advocated for common law–type approaches to constitutional interpretation. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 36 (2010) (explaining that "the common law approach provides a far better understanding of what our constitutional law actually is"); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) [hereinafter *Common Law*]; *see also* Mark S. Coven, *The Common Law as a Guide to State Constitutional Interpretation*, 54 SUFFOLK U. L. REV. 279, 281 (2021) (arguing for the use of common law principles in interpreting state constitutions).

212. FARBER & SHERRY, *supra* note 4, at 154; *see also* Ryan, *supra* note 76, at 1571 ("If judges have some principled way to decide cases in which the Constitution does not provide a clear answer, they might be less tempted to attribute an incorrect meaning to the constitutional text.").

213. *See* FARBER & SHERRY, *supra* note 4, at 154.

214. *Id.* at 155.

Part of the value in the common law approach to constitutional adjudication stems from the lack of precision in constitutional text (which also explains why "textualists" in statutory interpretation often switch hats to "originalists" in constitutional cases). No amount of textual parsing will illuminate how to apply nebulous terms like "due process" or "equal protection" in the context of a modern constitutional claim. As a result, "[w]hat matters to most constitutional debates," Professor Strauss argues, "is the doctrine the courts have created, not the text."[215] In other words, contemporary equal protection claims focus on suspect classifications and the nature of the government interest, because that is the foundation established by precedent. This precedent becomes one of the critical restraints in common law constitutional analysis as I will explore below.

Maryland Appellate Court Judge Dan Friedman likewise rejects strict adherence to any particular methodology, but he presents a novel solution, steeped in practicalities. Why not just let a judge decide, based on the particularities of a given case, which methodology to apply?[216] Echoing, to a certain extent, the gist of the Farber-Sherry attack, he concludes that "no preordained system of interpretation can answer every possible constitutional question."[217] But no need to jettison all of the interpretative guides, at least not yet. Rather, Judge Friedman posits that a judge should consider all of the tools in the judicial toolbox, such as "a reasonable reading of the text as informed by the history of the provision's adoption, subsequent judicial and scholarly interpretations, core moral values, political philosophy, and state and national traditions, to find the best possible interpretation."[218] But there's nothing wrong, according to Judge Friedman, with relying on available interpretative methodologies to serve as a guide in this quest.[219] After surveying six different modes of interpretation, Judge Friedman maintains that each of these theories "have substantial weakness; using all six together provides tools that a judge can use to successfully interpret the provision."[220] In other words, interpretative methodologies "are

215. *Common Law*, *supra* note 211, at 904 ("In practice, constitutional law is, mostly, common law.").

216. In many respects, this is what tends to happen in practice. *See* Chad M. Oldfather, *Methodological Pluralism and Constitutional Interpretation*, 80 BROOK. L. REV. 1, 50 (2014) ("We live in a world in which constitutional interpretation is characterized by methodological pluralism.").

217. Friedman, *supra* note 32, at 412.

218. *Id.*

219. *Id.* I pause to note that Judge Friedman rightly points out that there could be significant differences between federal and state constitutions that would suggest that federal constitutional methodologies may not fit well in a state constitutional context. *See id.* at 435. For further discussion, see Justice Coven's thoughtful article, at Coven, *supra* note 211, at 299–300. I also address this point at a high level in Section III.D below.

220. Friedman, *supra* note 32, at 467.

tools, each with a different function, that are to be used together. Each has a valuable function. Each can improve our understanding."[221] After all, as other scholars have pointed out, judges sometimes have a tendency to "blend all the [interpretive] factors within an eclectic analysis."[222] This would force us to acknowledge what can and does happen in the real world, even if that might give rise to some grumbling about cherry-picking.

Professor Lisa Heinzerling lends some indirect support to this approach, in her critique of originalism.[223] She points out the perils of undue reliance on one method of interpretation because it relegates the benefits of other interpretative approaches to the sidelines.[224] For example, the emerging primacy of textualism in statutory interpretation has led many avowed textualists to shun any discussion of legislative purpose or legislative history, which discourages litigants from discussing it either. "[O]ver many years, the justices had become accustomed to deciding statutory cases without having to reckon with what Congress had been trying to do or what salutary purposes would be disserved by a textualist approach."[225] In other words, stirring the interpretive pot can increase the richness of our jurisprudential landscape.

But what about the attack that methodological purists would surely make—that allowing judges to handpick or mix interpretative methodologies suited to a particular case would enable results-oriented judging? Judge Friedman answers that "professional norms," while not a perfect check, would operate to restrain judges.[226] I will return to that point below.

Professor Richard Re takes a different path, although it does bear some similarities to the positions just surveyed. Hearkening back to the English "basic rules" for deciding cases, he sketches out an approach that would consider the three primary inputs in the American legal system, "literal text, legislative goals, and pragmatic consequences," with respect to statutory interpretation.[227] In easy cases, all relevant considerations point in the same direction, whereas in harder cases—with factors pointing in conflicting directions—"formal principles of law do not dictate how to weigh or reconcile"

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221. Dan Friedman, *The Special Laws Prohibition, Maryland's Charter Counties, and the "Avoidance of Unthinkable Outcomes*," 83 MD. L. REV. ONLINE 28, 61–62 (2023).

222. Re, *supra* note 109, at 1654.

223. *See* Lisa Heinzerling, *Resisting Originalism, Even When "Done Well*," YALE J. ON REGUL. (2022), https://perma.cc/TLX4-HTLC.

224. *See id.*

225. *Id.*

226. Friedman, *supra* note 221, at 63.

227. Re, *supra* note 109, at 1654.

these competing factors, presently leaving judges adrift in a "vast and unregulated" legal ocean.[228]

The solution, according to Professor Re, is to forge consensus on "basic rules" of text, purpose, and pragmatics that provide the permissible inputs for judges to weigh.[229] Upon evaluating these considerations, if the rules diverge, "either of the resulting options is lawful."[230] After walking through their application in the realm of statutory interpretation, Professor Re extends these basic rules into the constitutional sphere. Acknowledging that the basic rules "generate a great deal of discretion in constitutional cases," he nevertheless resists any mandatory restraints on the principle and instead defends the "zone of experimentation" that it offers.[231]

In answering the question about how to restrain judges, Professor Re suggests that by reaching consensus on the three inputs, we necessarily constrain judicial discretion—up to a point. Although a judge can decide a case in either manner when the inputs point in different directions, at least we are engaging in decision-making in a more transparent manner now, rather that pretending to be under the spell of our favorite methodology.[232] This regime would better foster "judicial candor, tolerance, and humility"[233] as judges squared away on more transparent terrain and sought to persuade others in the judicial marketplace.

At bottom, Professor Re answers the restraint question by explaining that we need to be honest about what judicial discretion is and not pretend that any particular interpretative lens can really operate as a legitimate restraint.[234] The "vast," albeit "concealed,"

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228. *Id.*

229. *Id.* at 1661–62. In some respects, this approach tends to merge with the common law methodology advocated by Professor Strauss. *See Common Law*, *supra* note 211, at 899–900.

230. Re, *supra* note 109, at 1659.

231. *Id.* at 1682–83.

232. *Id.* at 1664.

233. *Id.* at 1668.

234. *Id.* at 1671 ("Discretion that cannot be defended publicly may not be as valuable as its supporters secretly believe."); *id.* at 1688 ("Rather than hiding behind a rhetoric of mandates, jurists of different stripes would openly locate themselves, and their distinctive interpretive personalities, against a backdrop of shared permissions."); *see also* Tushnet, *supra* note 183, at 48 ("[N]one of the interpretive methods actually does impose substantial constraints on a judge's decision-making. Each provides a structure for discussing the application of specific constitutional provisions to particular problems, but none forces the judge into especially narrow channels. Experience has demonstrated that talented judges who have different values and visions can deploy each interpretive method to promote their values and visions, each using the interpretive method well within the bounds set by standards of professional competence in using the method.").

discretion that judges exercise every day typically remains hidden by the shrouds of interpretive methodologies.[235]

C. Exploring a New Vision of Constitutional Interpretation

It is, in some respects, difficult to ponder a leap into the unknown, away from the false sense of security wherein judges wrap themselves with their methodology of choice. But maybe not as much as at first blush. I suspect more judges would be open to this concept than one might imagine. After all, in a survey of federal appellate judges about statutory interpretation, most "resisted the idea that their practice is driven by any organized theory. Instead, they told us that they move case by case, in almost a common law fashion."[236] In other words, some judges already resist the rigidity of precise labels, preferring to dabble and experiment. The problem is that such efforts occur in relative obscurity without much fanfare.[237]

Part of the explanation for why these approaches do not attract more attention, of course, is the U.S. Supreme Court–centric focus on all questions interpretive. Because the stakes are so high with cases before the Court, it magnifies the significance of the Justices' methodological choices. This accordingly attracts academic attention and scrutiny, prompts methodological questions during Senate confirmation hearings, and, to a certain extent, creates incentives or peer pressure for lower court judges to adopt and apply interpretive methodologies similar to the Justices (which might help increase a judge's affirmance rate). But because these methodological choices are not binding (on either the justices or lower court judges), judges are free to chart their own course.

So, what might that look like?

I would propose we largely adopt two guiding principles: (1) we reach agreement on inputs that judges can consider in deciding constitutional cases; and (2) utilizing those inputs (as applicable), a judge would build the most persuasive case that she could, either relying on common law–type reasoning or some methodological variant to marshal the argument as to how the relevant inputs should be prioritized or weighed in the case at hand. But the judge would have flexibility in how to weigh and evaluate the inputs and could even toss in the kitchen sink if needed.

This approach would not eliminate interpretative methodologies, of course, which I do not believe is realistic at this moment. But it would dilute their importance, while simultaneously elevating the significance of the inputs. Dueling majority and dissenting opinions

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235. Re, *supra* note 109, at 1697.

236. Gluck & Posner, *supra* note 107, at 1314.

237. *See* Lohier et al., *supra* note 2, at 76 (quoting Sixth Circuit Chief Judge Sutton: "It might be helpful if we judges and the law schools could cut back on the 'teams' approach to statutory and constitutional interpretation. It can be quite misleading in both directions.").

would engage in a more transparent battle over the inputs, their priority, and their weighing. And as long as a judge respected the inputs, other judges could not dismiss his opinion as illegitimate (even if they strongly disagreed with it). We would cultivate a culture of more honest and rigorous debate, which would help inspire confidence in the judiciary and perhaps even yield positive influences on the development of our constitutional jurisprudence.

1. The Inputs

The first task to consider is the level of generality of the inputs. We could adopt a high-level approach, along the lines of Professor Re's proposal, or we could get a bit more granular. While it might be easier to forge consensus around a higher-level approach, this also might make people more uneasy to trade the (false) certainty of a methodological-laden regime for the malleability of more generic inputs. But the point of this Article is not to resolve precisely what inputs we should agree upon; rather, it is to advocate for this basic structure.

As noted above, Professor Re finds a pathway for his three inputs of text, purpose, and consequences to apply in the constitutional realm, although the significance of these factors varies from the statutory to the constitutional setting.[238] Given the often broad, undefined constitutional language (such as "due process" or "equal protection"), a focus on the literal language often suggests outcomes more consistent with living constitutionalism, whereas the purpose consideration tends to trigger more originalist results.[239] The third, or "golden rule," input helps keep everything in line by allowing "pragmatic exceptions in extraordinary cases" in a manner that comports with existing constitutional jurisprudence.[240] To a certain extent, this recognition of how the inputs might look from the perspective of an interpretative methodological adherent shows some parallels with Judge Friedman's position.

Interpretive pluralists also follow the input-type approach but generally frame these inputs as mandatory rather than permissive. Writing over a generation ago, Professor Fallon proposed a theory of "constructivist coherence" as a better alternative to the existing modes of constitutional interpretation.[241] This approach would evaluate five inputs that he posited most should agree upon: (1) the constitutional text; (2) historical intent (such as the intent of the Framers); (3) constitutional theory; (4) precedent grounded in stare

238. Re, *supra* note 109, at 1654–81.

239. *Id.* at 1681; *see also* FARBER & SHERRY, *supra* note 132, at 46 (describing text, original understanding, precedent, and values as key inputs).

240. Re, *supra* note 109, at 1682.

241. Fallon, *supra* note 133, at 1192–1217 (criticizing originalism and "moderate interpretivism," which bears parallels to "living constitutionalism").

decisis; and (5) "value."[242] Although he admitted some reluctance to rank these considerations, his article ultimately arranged them in this hierarchical order.[243] Professor Bobbitt similarly sketched out a list of six key inputs, including: (1) historical; (2) textual; (3) structural; (4) doctrinal; (5) ethical; and (6) prudential.[244] Other scholars have delineated similar considerations, which often reflect more "[d]ifferences in detail" than substantive questioning of the relevant inputs.[245]

As we consider and debate what tools should be handy in the judge's toolbox, we must acknowledge that there is no effective way to completely fence out improper influences. And even if we precisely define the contours of the tools, it will not completely insulate them from ideological influence or manipulation.

For instance, some might seek refuge in the canons of construction, developed over the centuries from English common law.[246] At first blush, these seem to be neutral tools that judges can simply apply as needed in objective fashion. But empirical research suggests that simplistic reaction is wrong.[247] Judges can nudge cases toward specific results by choosing certain canons over others or by applying them in selective fashion.[248] The empirical research is now somewhat dated, but, consistent with other more recent sources discussed herein, it would be remarkable to believe that suddenly the application of canons of construction became completely objective.

Similarly, when we think about the accepted inputs in the constitutional interpretive toolbox, scholars would label these the "modalities" of constitutional argument.[249] Modalities invariably beget anti-modalities, and Professors Pozen and Samaha delineate several key anti-modalities that most lawyers would acknowledge: arguments grounded in policy, philosophy, normative beliefs, partisanship, emotion, popularity, or logrolling.[250] Just as most of us can agree that such considerations should not shape constitutional doctrine, it is difficult to dispute that reasoning emanating from these

242. *Id.* at 1244–46.

243. *Id.* Other scholars, however, "question the existence of an implicit hierarchy." Serkin & Tebbe, *supra* note 92, at 744.

244. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991).

245. *See* David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 738 (2021).

246. *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 1–8 (2005).

247. *See generally id.*

248. *Id.* at 6 ("Our findings indicate that canon usage by Justices identified as liberals tends to be linked to liberal outcomes, and canon reliance by conservative Justices to be associated with conservative outcomes."); *see also* Grove, *supra* note 116, at 287–88.

249. *See* Pozen & Samaha, *supra* note 245, at 730.

250. *Id.* at 731.

considerations "may infiltrate constitutional argument."[251] Most judges would not directly invoke such considerations in their opinions, but of course they can impact a judge's decisional calculus.[252]

This reality forces us to acknowledge that, no matter how finely we tune whatever methodology a judge would apply, it is impossible to completely exclude improper influences. But that does not mean that the exercise is ultimately futile. Our goal should be to try to minimize those influences and to encourage more transparent judging. As we debate and forge agreement on the modalities and anti-modalities, it helps bring all these considerations out into the open.

2. Stirring the Interpretive Pot

Once we achieve some consensus on inputs, either at a high level of generality or with more specificity, then judges need to know how to apply these in hard cases, where the inputs point in conflicting directions. One solution would be, as Professor Fallon suggests, to arrange the inputs in a hierarchical order.[253] But even he had misgivings about such a ranking, because—to a certain extent at least—the inputs are interrelated and interdependent.[254] In other words, as the dividing lines between the inputs blur, it spells trouble in adhering to any ranking methodology.

We also must acknowledge a problem endemic in human (and particularly judicial) nature—even if the inputs objectively pointed in conflicting directions, judges may be loath to concede this point.[255] From my perspective, this is manageable and need not be fought. For instance, in a difficult case, say the text and purpose point one direction, but the history another. Two judges disagree and think they

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251. *Id.* at 733. The temptation is so great, the authors assert, because these considerations often illuminate contemporary constitutional reasoning in arguments between nonlawyer citizens. *Id.* at 732.

252. *Id.* at 772 ("Constitutional decisionmakers often find ways to enlist anti-modal reasoning indirectly and to skirt the anti-modal line without quite crossing it.").

253. *See* Fallon, *supra* note 133, at 1243–46.

254. *Id.* at 1246, 1248; *see also* Pozen & Samaha, *supra* note 245, at 742–43 ("Sophisticated constitutional interpreters routinely disagree not only about how best to apply a given modality but also about whether a given proposition is best understood as textual, structural, historical, prudential, or ethical or as some hybrid thereof."). Professor Gluck, however, defends a hierarchical approach in the context of statutory interpretation. *See* Gluck, *supra* note 172, at 1856–57 ("Ranking interpretive tools and limiting the number of tools that may be used in the successive steps of the inquiry is probably the way most likely to offer clarity to lower courts . . . .").

255. Fallon, *supra* note 133, at 1193 ("[W]ithin our legal culture, it is the rare judicial opinion . . . that describes the relevant kinds of arguments as pointing in different directions.").

all point in the same direction; although for one judge that translates into affirmance, for the other it translates into reversal. At the end of the day, if both judges fully analyze those inputs and marshal their best arguments to support their position, that is the behavior that we want to encourage.

If we reject any rigid ranking of the inputs (as I would), then how should a judge be guided in applying them when they seemingly point in different directions? One solution would be to borrow Judge Friedman's concept of finding the optimal interpretative lens to apply to each particular hard case or perhaps we could borrow aspects of different theories and integrate them.[256] If we think about the approach as integrating aspects of contrasting modes of interpretation in a given case, it may not differ too significantly from Professor Re's permissive balancing or the general common law approach advocated by Professors Farber and Sherry.[257]

These approaches preach flexibility given the nuance demanded by constitutional adjudication. No single interpretive theory applies neatly to every constitutional case. We do our jurisprudence and the public a disservice when we pretend otherwise and simply brush these flaws in methodological application under the rug.

Ultimately, no matter how we try to structure the interpretive approach, I believe it inevitably collapses into some version of common law constitutional adjudication. The common law approach embodies the flexibility needed to respond to a diverse array of constitutional questions. And that is how judges are accustomed to tackling all sorts of common law questions and is typically how judges approached constitutional matters before the grand theories took over. It's past time to recognize the wisdom in that path and return to incremental, measured judging in constitutional cases.

As Professor Strauss maintains, American constitutional law "represents a flowering of the common law tradition,"[258] particularly as judges and justices build on the foundations of their predecessors. Each new test or principle that emerges from constitutional adjudication is tested, applied, and interpreted and then expanded, reduced, or modified in future cases. We are not writing on a blank slate but rather on over 200 years of precedent that has shaped and breathed life into our national charter.

The common law approach offers a sensible manner for evaluating and weighing the acceptable inputs in hard cases. Anchored in text and precedent, it also provides a "centuries-long record of restraining judges"[259] that I will explore in Section E below.

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256. *See* Friedman, *supra* note 32, at 467.

257. *See* Re, *supra* note 109, at 1654–55; FARBER & SHERRY, *supra* note 4, at 141, 152.

258. *Common Law*, *supra* note 211, at 887–88.

259. *Id.* at 927.

D. Possibilities in State Constitutional Interpretation

Before I discuss restraints, it is worth pausing for a moment to consider some contrasts between state and federal constitutional interpretation. Most of the discussion herein focuses on federal constitutional principles, but there is good reason to distinguish state constitutional interpretation from that of our federal charter. An underlying premise of federal constitutional interpretation is that the U.S. Constitution is nearly impossible to amend, so judges and justices must tread carefully because their constitutional decisions cannot, as a practical matter, be undone. Similarly, federal judges have no real accountability to the general public by virtue of life tenure. The lack of accountability animates much of the discussion regarding the need to restrain federal judges through methodological adherence.

But these twin considerations look very different in most states. Consider amendments—states have amended their constitutions *thousands* of times.[260] Most states have relatively straightforward means for amending their constitutions, and many also allow citizen-led initiatives.[261] So if a state supreme court starts handing down bizarre interpretations of a state constitution, it is much easier for the state to course-correct and overrule flawed constitutional interpretation via amendments.

Similarly, states generally have much more accountability over judges, through traditional campaigns, retention elections, set terms, and/or age limits. If a particular judge or justice engages in head-scratching constitutional interpretation, therefore, the public often has the ability to rein that person in.[262]

Given the fundamentally different nature of judicial accountability in the states (as compared to federal judges), state constitutions provide us an opportunity to lower the stakes of constitutional debates and lower the temperature in the room. One might accordingly expect to see very different methods of constitutional interpretation than those used in federal court. To be sure, there is a wide variety of experimentation on interpretive methodology in the states, but many justices and judges nevertheless feel beholden to borrow the interpretative methodologies utilized by their federal colleagues.

State judges and justices, with the twin accountability of constitutional amendment and election/recall, should feel perhaps even more free than their federal colleagues to experiment with

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260. Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1519–20 (2009).

261. *See id.* at 1523–24.

262. Lohier et al., *supra* note 2, at 71, 74 (quoting Sixth Circuit Chief Judge Jeff Sutton: "The people [in a state] can far more readily correct flawed decisions with constitutional amendments. And the people nearly always have the option of not reappointing or reelecting judges with whom they disagree.").

modes of constitutional interpretation. They just need to think about their roles differently because their roles (and the constraints on them) *are* very different than those for federal judges.

Perhaps state judges will ultimately conclude that they like the federal interpretative guidelines just fine and see no need to deviate. But that conclusion should be reached only deliberatively and after creatively exploring the alternatives supported by their respective states' histories, constitutions, and jurisprudence.

E. Can We Actually Restrain Judges?

I touched on the predicament of judicial restraint above in the context of these methodological constructs. To be sure, that problem represents a valid consideration that must be explored, but I also think we should acknowledge, at some level, the futility of the quest. Just as smart judges can wriggle out of various modes of interpretation to reach results-oriented decisions, so too can a judge operating without a strict compass.[263] No matter what structure some theorist dreams up, it cannot completely cabin judicial discretion. It's time that we're honest about that point, and this has ramifications as we consider judicial selection (explored below).

Although by no means perfect, I would submit that we can and should rely on the following to effectively restrict judicial discretion: (1) Judge Friedman's "professional norms" concept, which I would broaden to include essentially the judicial marketplace; (2) historic realities and a meaningful application of stare decisis; and (3) a basic consensus on the inputs for judicial decision-making.

1. The Judicial Marketplace

Judge Friedman maintains that a well-informed judge, cognizant of the permissible range of legal options in a case will be "sufficiently constrained by our professional norms."[264] In other words, most rational judges will not pick an interpretive theory simply because it matches their subjective brand of equity. For most judges, this will probably operate as a significant restraint. But as we witness examples of judges arguably going beyond professional norms in some contemporary caustic opinions, maybe we need something a little more rigorous than professional discretion alone.[265]

I would accordingly broaden this concept to include the judicial marketplace. Professor Re makes a similar point in discussing "plaudits," in that "treating certain choices as legally praiseworthy

263. *See* Grove, *supra* note 116, at 304 ("To be sure, no interpretive method can fully cabin judicial discretion.").

264. Friedman, *supra* note 221, at 63.

265. *See supra* Part II.

(but not required) might encourage desirable decisionmaking."[266] Judges are certainly human, and they appreciate being told that they're doing a good job. But praise alone is a bit of a double-edged sword, as noted above when discussing Twitter infamy.[267]

Therefore, it is important to consider this question in terms of who judges generally like to impress, and the answer is, of course, other judges. When a state or federal intermediate appellate judge drafts an opinion, he needs to persuade at least one of his colleagues and probably hopes that the state supreme court (or the U.S. Supreme Court) will agree if it reviews the matter.[268] But beyond that, judges like to see other courts following or building on their analyses.

If we consider a hypothetical judge who (as I suggest) shuns any rigid interpretive methodology and adopts something along the lines of the approach I outline in this Article, we can accordingly expect that the judicial marketplace will constrain that judge from exercising her discretion in an unwarranted way. She will want to ensure that her opinion is followed, and the way to accomplish that is through rigorous analytical reasoning and analysis.

Sometimes we might make the mistake of taking analytical rigor in opinions as a given, but I do believe that's an important consideration.[269] After all, this is the key to persuasion in the judicial marketplace—most judges won't follow a sloppy opinion. The public will also expect analytical rigor in opinions, and the transparency encouraged by my approach will help show them how courts are actually reaching their decisions.

2. History

History, as I consider it here, works in two directions—both restraining judges based on concerns of future persuasiveness of their opinions and limiting them based on existing precedent.

On the first point, any judge who appreciates history should understand the cautionary tale of the Warren Court. While no one can dispute how profound an impact the Warren Court's jurisprudence had in the area of individual rights, its longer-term effects are more debatable, as it induced a pendulum swing in the other direction. Take *Mapp v. Ohio*,[270] which nationalized the exclusionary rule as a remedy for unlawful searches and seizures.[271] Chief Judge Sutton describes *Mapp* as a "methodological disaster," and Justice Kagan (long before she assumed the "Justice" title) criticized the opinion as "spectacularly confused," "flout[ing] judicial convention," and leaving

266. Re, *supra* note 109, at 1677–78; *see also* Ezra Goldschlager, *Praise and the Law*, 49 CREIGHTON L. REV. 353 (2016).

267. *See supra* note 169 and accompanying text.

268. *See* FARBER & SHERRY, *supra* note 132, at 56–57, 89.

269. *See id.* at 45, 56–57.

270. 367 U.S. 643 (1961).

271. *Id.* at 657.

"the primary basis of the exclusionary rule in doubt."[272] Without precision in its reasoning, subsequent U.S. Supreme Court precedent declared "deterrence" as the primary rationale of *Mapp*, which began the carving of so many exceptions to the exclusionary rule that they now nearly swallow it whole.[273]

One can certainly argue (and many have) that the Fourth Amendment right has been so whittled away that it is on life support now. Cases like *Mapp* cast a long shadow because they illustrate the perils in haphazard judicial decision-making. Any judge or justice who simply wishes to stamp their subjective meaning on the Constitution would do well to heed the historical lesson of *Mapp*. If the judge truly wants the decision to endure, and not in skeletal form, he must write to persuade future generations of judges. And that requires analytical rigor and attention, not "know-it-when-you-see-it" hunches.

Of course, our timeline consideration cannot be limited to what lies on the horizon; we must also consider the history on which we build jurisprudence, and this runs headlong into stare decisis. Stare decisis, in this moment, sits in flux.[274] As certain justices have cast doubt on the view of stare decisis that most of us learned in law school,[275] it threatens to open Pandora's box.[276] This trend has prompted some scholars to try to fashion new and innovative ways of thinking about stare decisis.[277]

I submit that stare decisis, whether factored in as an input or viewed as a restraint, serves an important role here. As noted above, stare decisis represents the foundational restraint envisioned by the common law approach because courts build constitutional doctrine on the shoulders of their predecessors.[278] If we jettison or undermine the

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272. SUTTON, *supra* note 93, at 70.

273. *See* United States v. Leon, 468 U.S. 897, 898 (1984). Of course, it didn't have to be this way. Some state courts have picked up the ball largely dropped by the Supreme Court and developed a robust body of precedent protecting their citizens against unreasonable search and seizures.

274. Serkin & Tebbe, *supra* note 92, at 739 (noting that the role of precedent in constitutional cases is "slippery" because "the role of precedent remains an ongoing source of high-stakes controversy").

275. *See* Nicholas Iacono, *Stare (In)decisis: The Elusive Role of Precedent in Originalist Theory & Practice*, 20 GEO. J.L. & PUB. POL'Y 389, 408–13 (2022).

276. *See* CARDOZO, *supra* note 126, at 149 ("The labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case . . . .").

277. *See, e.g.*, Re, *supra* note 156, at 910–11 (arguing for a permissive model of stare decisis (rather than mandatory) that would be pragmatic and ultimately "help strengthen stare decisis").

278. *See Common Law*, *supra* note 211, at 926–27. Professor Strauss argues that "the common law method has a centuries-long record of restraining judges," and it confronts the question of judicial restraint "more directly and candidly than other theories do." *Id.* at 927.

binding nature of precedent, it causes the entire structure of our jurisprudence to wobble, if not collapse.

To be sure, the role of precedent in constitutional cases might provoke a different reaction than in non-constitutional areas of the law. This point is often made to water down the effects of stare decisis in constitutional cases. But because many areas of constitutional law depend on standards, balancing tests, and interpretations handed down over the years, respect for precedent should remain high, and this can operate as a significant restraint on judicial discretion. Indeed, I believe folks on both sides of the ideological spectrum would fear a completely diluted version of stare decisis.

Moreover, when we think about the importance of constitutional text as a restraint on judges, it only makes sense "if one assumes a background of highly developed precedent."[279] Even those who advocate a diluted view of stare decisis should appreciate the threat that poses to the rule of law.[280] If our Constitution only means what any shifting majority of the Supreme Court says it means, then we will be unable to rehabilitate the stature of the judiciary.

3. Input Consensus

Finally, the consensus on inputs would, combined with these other considerations, operate to restrain judges. After all, that remains the central point of the inputs—to set guardrails around acceptable tools for constitutional interpretation.

Of course, no amount of careful planning will completely prevent inappropriate considerations from "infiltrat[ing] constitutional argument,"[281] but nor can any recognized methodology of constitutional interpretation deliver on that promise. To the contrary, forging consensus on the inputs will restrain and confine judicial discretion "as well as or better than" existing adherence to various interpretative methodologies.[282]

F. What Might the Future Look Like?

Accepting some version of the proposal I present here could yield several salutary effects. First, if we believe—as I do, and commentators have suggested—that "most judges are methodologically eclectic,"[283] then we empower them to come forward and more vocally share their perspectives on constitutional interpretation. These judges may have additional, or better, ideas than those I offer herein. At a minimum, we will all benefit from considering their views as an important counterweight to the

279. *Id.* at 926.
280. FARBER & SHERRY, *supra* note 132, at 64–69.
281. Pozen & Samaha, *supra* note 245, at 733.
282. Re, *supra* note 109, at 1665.
283. *Id.* at 1666.

mainstream methodological mantra that currently pervades legal thought.

The views of these judges will add an important diversification to present legal thought and doctrine. Significantly, they will also help illuminate how the decision-making process in which they engage works and how they believe it operates to restrain judges. Maybe many of them follow some variant of the common law approach; maybe not. Regardless, it is important for lawyers, academics, and judges to understand how these judges apply their craft.

Second, if we can move past the interpretive quibbling that will never be solved, we can embark on more transparent judging. Rather than hiding behind theory, we can engage more fully in the substantive debate at hand.[284] As opinions become more open and honest, we force judges to wrestle with the truly difficult issues before them rather than abdicating to a methodology in the sky. Transparency thus emerges as an important check on judges, creating positive peer pressure as more judges adopt some version of this approach.[285]

Many contemporary judges are also using a writing style more oriented to lay readers—this type of approach helps make their opinions accessible to a wider audience. But think about combining a more accessible writing style with a substance that strips away much of the formalism compelled by our interpretative methodologies. The public might be able to better understand how we reach decisions in difficult cases, which might build broader public support even when they disagree with certain opinions.[286] And maybe they will get a glimpse of the Cardozian struggle as judges wrestle with the challenging cases before them.

Third, it is worth pondering how this approach might change judicial appointments (or even elections). If we dilute the significance of the interpretative methodologies, we might curtail them as an ideological proxy to be flashed in confirmation proceedings or judicial campaigns. And those confirmation hearings often inflict lasting damage on public respect for the judiciary because that is the sensationalized account that many members of the public internalize.[287] Chief Justice Roberts famously remarked that there

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284. FARBER & SHERRY, *supra* note 132, at 97–104 (devoting an entire chapter to "Transparency").

285. *See* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987).

286. Judge Leben's great work on procedural fairness helps lay the foundation for this point. *See generally* Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4 (2007).

287. *See* Lohier et al., *supra* note 2, at 72 (quoting Seventh Circuit Judge Diane Wood: "I would say the primary place they learn about the Supreme Court is in the confirmation process. And the confirmation process is portrayed, in the

are no Obama judges or Bush judges,[288] but that's often exactly how the public sees these judges because of the (perceived, at least) heavy influence of ideology in judicial selection.

Given the prevalence of ideological considerations driving many Article III appointments, some argue that a "nominee's political views matter more than his or her legal acuity or judicial temperament" but that this partisan fixation likely "lead[s] to poorer judicial performance."[289] Would the converse hold true—that a lessened role for ideology might spark better judicial performance? I believe that to be the case.

As aspiring judges reflect on how they might approach constitutional interpretation (in either the confirmation or election process), they might be forced to more deeply reflect on the question of "how will you approach difficult constitutional questions" if they cannot simply answer "I am a [fill-in-the-blank]-ist." I don't suggest that this will necessarily be easy, particularly for those who have never served as a judge, but rather this is a potential means of making the judicial selection process more transparent and open. If we were less concerned with ideological proxies for judicial nominees, the focus could shift from ideology to experience, wisdom, moderation, humility, and open-mindedness.[290] And then we could debate matters like the inputs and their weighing, rather than code for liberal or conservative orthodoxy.

CONCLUSION

I can appreciate how many people, seeped in the rigid interpretative methodology mindset, will reject my approach out of hand. But before they do, I would challenge them to ask themselves why. I suspect many would say that we need to better restrain judges, and we want assurances that judges will decide cases consistently (or reliably).

My fundamental point is that the approach I delineate in this Article, while by no means perfect, will perform as well, if not better, than the extant alternatives in both restraining judges and fostering consistency (and moderation) in a court's jurisprudence. But it also provides and encourages greater openness and transparency in the debates on the challenging constitutional questions of our time.

More importantly, by encouraging practitioners of this type of approach to be more vocal, we can enrich our understanding and

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press at least, as this grand fight between Camp A and Camp B, between liberals and conservatives, and who's going to get this pre-ordained result.").

288. Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge,'* N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html.

289. FARBER & SHERRY, *supra* note 132, at 116–17.

290. *See id.*

appreciation of constitutional interpretation. We will all lose if constitutional interpretation becomes simply a battle between conservative originalists and progressive originalists. The Constitution, and its history, have much more to offer us.

These are challenging times for judges who can find themselves personally attacked nowadays unlike any time in recent memory. We must be mindful of the inherent constraints on the judicial branch and the need to ensure public trust in it, and we can never allow ourselves to serve as a mirror for the intense partisanship of our times.

Restoring trust and confidence in our judiciary will not happen overnight. We must think creatively and deliberately about measures we can take to contribute to a more accessible, vibrant judiciary. The interpretative method that I have set forth in this Article represents a small step in the direction of a more responsive and transparent court system. It is certainly not the only tool to help achieve that end, but I look forward to the debates ahead.