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# PANELIST PAPERS

## THE ROOTS OF THE LIVING CONSTITUTION

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### INTRODUCTION: A TREE GROWS IN AMERICA

On the cover of David Strauss’s *The Living Constitution*<sup>1</sup> is a magical tree. The metaphor of a tree connotes what is living and organic; it also suggests Canada’s doctrine of a constitution as a living tree.<sup>2</sup> The tree sits above a parchment copy of the Constitution, suggesting that the real Constitution grows out of and transcends the ancient text. Branches of the tree radiate in all directions, and in place of ordinary leaves there are stars, perhaps standing for famous judicial decisions such as *Brown v. Board of Education*<sup>3</sup> or *McCulloch v. Maryland*.<sup>4</sup>

The book’s cover symbolizes important features of Strauss’s argument. Strauss believes that the real constitution in the United States is not its text, but a living, growing thing beyond the text that has evolved through common-law decision making, and that its central features and many of its proudest accomplishments are judicial decisions.<sup>5</sup>

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<sup>1</sup> DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

<sup>2</sup> *Edwards v. Canada (Attorney General)* [1930], A.C. 124 (P.C.) (appeal taken from S.C.C.) (“The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits.”).

<sup>3</sup> 347 U.S. 483 (1954).

<sup>4</sup> 17 U.S. 316 (1819).

<sup>5</sup> See STRAUSS, *supra* note 1, at 3 (“Our constitutional system, without our fully realizing

In this Essay, I will not be focusing on the branches of the tree or on its starry leaves. Instead I shall focus on what lies beneath these aspects of constitutional development and makes them possible. That is, this Essay is about the roots of the tree. Because Strauss's book is primarily about the leaves – famous Supreme Court decisions and other doctrinal developments – it is necessarily incomplete. This Essay offers supplements to his argument, emphasizing things that Strauss himself does not talk much about in the book but which I think are necessary to make his tree grow.

Strauss's goals are announced early in the book. He asks, “[D]o we have a living constitution that changes over time?”<sup>6</sup> His answer is an emphatic yes. But the problem, as Strauss sees it, is how it is possible to “have a constitution that is both living, adapting, and changing and, simultaneously, invincibly stable and impervious to human manipulation.”<sup>7</sup> The answer, Strauss believes, lies in the traditions, practices, and ideology of the English common law that was transported to American soil with American colonists. “[A]t the core of our constitutional tradition – our living constitutional tradition – [is] an approach derived from the common law and based on precedent and tradition.”<sup>8</sup> “Our constitutional system,” he explains “has become a common law system, one in which precedent and past practices are, in their own way, as important as the written U.S. Constitution itself.”<sup>9</sup> Such a “common law constitution” has distinct advantages. It “is a ‘living’ constitution, but it is also one that can protect fundamental principles against transient public opinion[,] [a]nd it is not one that judges (or anyone else) can simply manipulate to fit their own ideas.”<sup>10</sup> Attending to the common-law approach, Strauss contends, “shows how the Constitution can evolve and yet still provide the solid principles that a constitution should provide – and not become the plaything of judges.”<sup>11</sup>

Both Strauss's statement of the problem and his solution make judges and the judiciary central to living constitutionalism. He asks how we can explain constitutional adaptation outside the amendment process that (1) constrains judges so that the Constitution does not become their “plaything” but that (2) protects fundamental rights from merely “transient public opinion.” Strauss is responding to various conservative and originalist arguments about the judiciary that have been made over the years. These arguments maintain that

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it, has tapped into an ancient source of law . . . . That ancient kind of law is the common law. The common law is a system built not on an authoritative . . . text like the Constitution. Rather, the common law is built out of precedents and traditions that accumulate over time.”).

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.* at 4.

<sup>9</sup> *Id.* at 3.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 4.

in a system of living constitutionalism judges are lawless and that the very idea of a living Constitution is a license to make things up.<sup>12</sup> Strauss sees conservative originalists as his primary adversary. Yet by stating the key questions of the book in this way, he demonstrates that he actually agrees with his opponents on a central point: the central focus of constitutional interpretation is and should be judges, and the central problem that living constitutionalism faces is constraining judicial behavior.

In my view, that is not the best way to frame the question of living constitutionalism. No one denies that judges are significant players in constitutional development, but they are merely one element among many. In fact, the most important drivers of constitutional change are constitutional constructions and state building by the political branches, the judicial appointments process, litigation campaigns, political and social mobilizations, and the efforts of civil-society organizations. American constitutional development features a variety of players and institutions that continually struggle over what is reasonable and unreasonable, “on the wall” and “off the wall” in constitutional culture.

Viewed in the larger context of this struggle over constitutional culture, judges turn out to be not the reckless unconstrained tyrants of popular imagination, but institutionally embedded actors within a larger system of political and cultural power. Judicial constraint does occur within that system, but for the most part it occurs not because judges consciously follow a single correct method of interpretation, but because a host of different institutional factors limit who can become a judge, structure judicial decision making, and influence the professional and constitutional culture in which judges reason and attempt to persuade their audiences. Strauss’s book is not primarily about these features of American political institutions and constitutional culture; he refers to them, if at all, only glancingly. But no account of the living Constitution is complete without them. Indeed, perhaps a better way to describe the living Constitution is as the sum of these various processes of constitutional development.<sup>13</sup>

Strauss’s project is both descriptive and normative. His descriptive goal is to explain how the Constitution actually develops over time. His normative goal is to show why common-law decision making is superior to living constitutionalism’s primary competitor, originalism.

Strauss recognizes that contemporary originalism is not one theory but many; some versions of originalism, he points out, are hardly different from his own vision of living constitutionalism.<sup>14</sup> He opposes those forms of

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<sup>12</sup> See *id.* at 31 (observing originalist objections that “the living Constitution is infinitely flexible and has no content other than the views of the person who is doing the interpreting”).

<sup>13</sup> This is the account of living constitutionalism discussed in chapters 13 and 14 of JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

<sup>14</sup> STRAUSS, *supra* note 1, at 10-11.

originalism that claim that the correct interpretation of the words of the Constitution must be consistent with “the understandings of the people who were responsible for including those words in the first place.”<sup>15</sup> That is, “[i]f a constitutional provision was generally understood to permit or forbid something when it was adopted, then it must be understood in the same way today.”<sup>16</sup>

Most originalists since the 1980s have argued that what is binding is the original meaning of the text, not the original intentions of its drafters or the original understandings of the adopters.<sup>17</sup> In this respect, Strauss’s account is not completely accurate, because he conflates original understandings with original meanings. Nevertheless, the word “meaning” itself has many meanings. My own approach, framework originalism, argues that fidelity to “original meaning” requires fidelity to the semantic meanings of the words in the text at the time of adoption, including generally recognized terms of art. For example, it turns out that “equal protection” means the same thing today as it did in 1868, when the Fourteenth Amendment was adopted. In a few cases, however, the original semantic meanings are different from the ones we expect today. The word “magazines” in Article I, Section 8 refers to places to store ammunition, not glossy publications, and “domestic violence” in Article IV, Section 4 refers to civil unrest or insurrection, not spousal battery.<sup>18</sup> This account of original meaning is broadly consistent with Strauss’s version of living constitutionalism, because it leaves open considerable space for the construction of the Constitution’s vague, abstract, or open-ended commitments over time.

On the other hand, “original meaning” might be far thicker: it might include the original principles, purposes, expectations, or assumptions of the adopting generation. Many modern originalists – especially the conservative originalists that Strauss criticizes – adopt this thicker conception of meaning; accordingly, they treat the expectations and statements of principle made by the adopting generation either as part of original meaning or as an important guide to original meaning.<sup>19</sup> Strauss’s objection to originalism is really an objection to this thicker version of original meaning.

Strauss’s descriptive claim is that living constitutionalism is, in essence, a process of common-law decision making that relies on precedent and tradition. Strauss’s normative claim is that originalism – or at least the variety he discusses and objects to in the book – is unworkable. Common-law decision making, by contrast, is eminently practicable and strikes the right balance

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<sup>15</sup> *Id.* at 10.

<sup>16</sup> *Id.* at 11.

<sup>17</sup> BALKIN, *supra* note 13, at 100-08.

<sup>18</sup> *Id.* at 35-58.

<sup>19</sup> *Id.* at 100-08 (“[A]lthough most conservative originalists claim that they seek only to follow original meaning, they tend in practice to conflate original meaning with original expected application.”).

between the past and the present. It is flexible but not lawless, adaptable to circumstance yet constrained by long tradition. It protects fundamental rights from transient public opinion and adapts to changing times without becoming a plaything of the judges.

Thus, the common-law method, Strauss believes, simultaneously explains how the Constitution adapts to changing times and how it nevertheless constrains judges so that they aren't simply making things up. Common-law processes of precedent and tradition are America's real Constitution.

What about the constitutional text? Strauss believes that the text plays a relatively limited role in constitutional interpretation. In most cases, the text is not particularly important and not very helpful in deciding contested legal questions. Rather, it serves primarily as a focal point that settles certain questions in advance, coordinates political action, and solves collective action problems.<sup>20</sup> The constitutional text ensures that the participants in the political system do not have to fight over certain things – for example, when the President's term ends or when a new administration begins – questions that might prove very messy if they were subject to ordinary political contestation or vague standards. We are required to follow the text not because the Framers created it or because the adopters adopted it, but because failing to follow the text would destabilize politics.<sup>21</sup> (I offer various criticisms of this account in *Living Originalism*, which I will not repeat here.)<sup>22</sup>

If we want to understand constitutional interpretation in the United States, Strauss argues, we may safely ignore the text and focus instead on the practice of common-law decision making. Common-law decision making, Strauss believes, has important virtues. It combines stability with adaptability. It prevents constitutional doctrines from changing too quickly, while nevertheless allowing substantial change over time. It draws on past judgments and past wisdom. It looks to what many different people have thought valuable over long periods of time and treats this as the baseline for sound judgment. It focuses on what has worked well in the past, and it gradually adjusts current practices to changing conditions. In this way, the common-law method economizes both on virtue and wisdom.

This is a familiar justification of the common law, which Strauss adapts to the problem of constitutional development. In fact, we might say that Strauss

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<sup>20</sup> STRAUSS, *supra* note 1, at 104-05.

<sup>21</sup> *Id.* at 105-06. Strauss does not deal with the converse problem, in which the incentive effects of clear rules might destabilize politics over the long run. Mark Graber has argued, for example, that the 1787 Constitution's decision to rely exclusively on Congressmen and Senators elected from local jurisdictions (rather than at-large seats chosen nationally) made political compromise difficult in the 1850s and helped bring on the Civil War. See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 36 (2006) ("When public opinion on any bitterly contested issue is geographically concentrated, an institution staffed exclusively by persons elected by local constituencies is unlikely to be capable of reaching a middle ground.").

<sup>22</sup> See BALKIN, *supra* note 13, at 35-58.

is engaged in a sort of second-order common-law reasoning. He draws on the received wisdom of the past about the advantages of the common law and applies it to the question of constitutional method. Common-law decision making, he contends, works well in preserving what is valuable while adapting to changing times. Originalism, by contrast, is a rigid method that cannot perform this function.

That is Strauss's account of the tree. Now let us look at the roots.

#### I. COMMON-LAW EVOLUTION OR REGIME MAINTENANCE?

First, consider Strauss's descriptive account. The *Living Constitution* focuses primarily on the branches and leaves of the tree – decisions by the Supreme Court. For most of the book, the legal texts Strauss discusses are almost exclusively majority and dissenting opinions of the Supreme Court, except when he explains the common-law method through examples taken from the opinions of common-law courts.<sup>23</sup> Reading these chapters, one might well be forgiven for thinking that Strauss believes that the living Constitution is just common-law decision making by the federal courts and especially the U.S. Supreme Court. But that is not really his position, although he does not state it clearly. In the book's final chapter – on the irrelevance of constitutional amendments – the focus suddenly shifts to customary practices within the political branches, the states' elimination of property requirements for voting, the growth of presidential power, and the development of the regulatory and administrative state.<sup>24</sup> Strauss also notes how amendments sometimes ratify changes that have already occurred in social custom and legislative practices;<sup>25</sup> conversely, Strauss points out that some constitutional amendments are effectively irrelevant or have limited efficacy until public opinion "catches up" with the ideas behind the amendment.<sup>26</sup> What Strauss means by "common law decisionmaking," then, must include more than the work of the Supreme Court, or even courts in general; it must also include the work of the federal and state governments and other unspecified government actors.<sup>27</sup>

Strauss's living Constitution is what I call the Constitution-in-practice: a set of laws, institutions, doctrines, and practices that evolve over time.<sup>28</sup> Although

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<sup>23</sup> See STRAUSS, *supra* note 1, at 51-76 (tracing the development of First Amendment law); *id.* at 77-97 (discussing *Brown v. Board of Education* and *Roe v. Wade*); *id.* at 33-49 (describing common-law development in the courts).

<sup>24</sup> STRAUSS, *supra* note 1, at 118-122.

<sup>25</sup> *Id.* at 132-36 (offering the example of the Seventeenth Amendment).

<sup>26</sup> *Id.* at 126-32 (offering the examples of the Thirteenth, Fourteenth, and Fifteenth Amendments).

<sup>27</sup> See *id.* at 35 (stating that precedents of the Supreme Court and traditions and understandings that have developed outside of the courts "form an indispensable part" of our living Constitution).

<sup>28</sup> BALKIN, *supra* note 13, at 35, 49, 69 (distinguishing the Constitution from the

Strauss foregrounds Supreme Court decisions in his book, most of the Constitution-in-practice is never interpreted by the courts. It includes the hardwired parts that nobody ever litigates – for example, the length of the President's term, or the number of houses of Congress. But it also includes other shifting practices that are never litigated: the filibuster rules in the U.S. Senate, the conditions under which the President exercises his veto, and the relationship between Congress and the President. Inter-branch controversies are generally resolved through a combination of political diplomacy on the one hand and political pushing and shoving on the other. Perhaps equally important, there is the law of the executive branch, which includes the construction, over time, of the national security state and the national surveillance state.<sup>29</sup> Although some of this construction is touched on by courts, most of it never is.

Focusing on these constructions is valuable not only because they complicate the picture of constitutional development but also because they offer a different account of what courts do. The idea of common-law decision making suggests that courts simply adapt to social change through deciding a series of cases. But an equally important feature of judicial practice is regime maintenance.

At any point in time, Americans live within what political scientists call a constitutional regime.<sup>30</sup> A constitutional regime combines a range of beliefs about constitutional meaning together with a set of accepted, customs, practices, and institutions. Thus, a constitutional regime includes (1) basic principles and assumptions about constitutional rights, duties, and powers and the proper role of government and (2) the institutions and practices that grow up around these principles and assumptions.

Our current constitutional regime includes, for example, Social Security, Medicare, and other social safety-net programs; national fair labor and consumer protection standards; federal workplace safety and environmental protection regulations; a large federal bureaucracy to carry out these programs; centralized fiscal and monetary policies; an enormous peacetime defensive capability complete with elaborate intelligence programs and permanent standing armies, ships, and missiles positioned around the world; civil rights laws that limit not only the state but also reach private parties in the areas of housing, education, and public accommodations; the Voting Rights Act and

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Constitution-in-practice).

<sup>29</sup> Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1 (2008) (describing features of the national surveillance state).

<sup>30</sup> On the idea of a constitutional regime, see generally BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); MARK V. TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2009). See also STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* 50-51 (1996) (explaining regimes in terms of presidential leadership).



other regulations of democratic practice; equal rights for women; elaborate rules of criminal procedure; and robust free-speech protections. Many elements of this regime are not themselves judicial decisions. Rather they arose from state-building constructions by the political branches that were ratified or supported by the judiciary. Although Strauss tends to emphasize the holy trinity of precedents, practices, and traditions, much of the constitutional regime is institutional and was built through statute and administrative regulation. Judicial doctrines of constitutional law, which are part of the regime, largely conform to the basic assumptions of the regime and simultaneously police and legitimate existing institutions and practices.<sup>31</sup>

Successive constitutional regimes both build on and reject parts of previous regimes, so that they form a crazy quilt of practices and constructions from different eras. Our current regime cobbles together the New Deal, the national security state, and the civil rights revolution, as well as aspects of the Reagan-era transformations that came with the rise of conservative political movements in the late twentieth century. It also includes the emerging national surveillance state – which emphasizes the collection and collation of data to identify and solve problems of governance.

The federal courts are part of the existing constitutional regime. Much of what courts do is maintain the regime, legitimate it, and police it. One reason why courts play this role is that the people who get to be federal judges are selected by politicians who, on the whole, are dedicated to the regime and its basic commitments. As a result, federal judges tend to play a conservative – or rather, conserving – role. The judges who sit on the federal courts were generally appointed by the last four or five administrations, and so they tend to reflect the political assumptions – and ideological controversies – of the relatively recent past. Therefore, as a group – for there is always variation among the various members of the federal judiciary – judges tend to protect and promote the regime's basic assumptions or commitments. Nevertheless, regime theory also explains how constitutional revolutions occur. The composition of the federal judiciary is always changing, as newer judges and Justices replace older ones, thus shifting the beliefs and assumptions of the group as a whole. Politicians who successfully challenge some of the regime's commitments replace existing judges and Justices with a new set with different views.<sup>32</sup> Thus, the Reagan Administration emphasized the appointment of federal judges who would take constitutional law in more conservative directions, cutting back on and in some cases reversing earlier liberal precedents.

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<sup>31</sup> On the role of courts in regime maintenance and enforcement, see generally WHITTINGTON, *supra* note 30, at 85-86, 105-07.

<sup>32</sup> For a discussion of how “partisan entrenchment” in the judiciary leads to constitutional change, see Jack M. Balkin and Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 489 (2006).

In a constitutional regime, each branch of government plays a role. To some extent the branches compete; to some extent they cooperate, and the regime is reproduced over time as a result of these interactions. Federal courts in particular play a key role in regime maintenance because they legitimate and police the existing regime; they tend to protect the basic assumptions of the regime and enforce its commitments against political opponents (including outlier jurisdictions). They continue the work of regime maintenance until, as a result of repeated political success, new judges gradually replace old ones and begin to legitimate the resulting changes in assumptions and commitments.

Thus, during the 1930s, the Supreme Court defended the old order of assumptions about the role of the federal government and the meaning of contractual liberty until, after sustained political mobilizations and repeated electoral victories, the Democrats, led by Franklin Roosevelt, began to stock the federal courts – and especially the Supreme Court – with advocates of the New Deal and its significantly different assumptions about federal power and judicial review. The new judges and Justices began to legitimate the work of the political branches in a series of landmark decisions, which were reaffirmed repeatedly over time. Similarly, during the civil rights revolution, the Warren Court cooperated with a bipartisan coalition of liberals and moderates to uphold and legitimate new civil rights legislation. Equally important, the Warren Court repeatedly exercised judicial review to promote liberal political ideas shared by the dominant forces in national political life, overturning a series of older doctrines and enforcing liberal interpretations of the Constitution against outliers in state and local governments, particularly in the South. The Supreme Court did not always agree with the judgments of the dominant forces in national politics. Yet on the whole it ratified and legitimated political practice. Legitimation, after all, is Janus faced. It specifies what one can do by also specifying what one cannot do. In particular, courts legitimate by upholding some practices and explaining why they are legitimate and, conversely, by offering limits on the exercise of government power.

The idea of regime maintenance offers an alternative picture to Strauss's model of common-law development. Courts are not simply keeping their ears to the ground and adjusting to changing times and mores; instead they are actively participating in the construction of the dominant regime and legitimating it as well. Sustained and successful political mobilizations, such as those during the New Deal and the Civil Rights Revolution, may lead to quick shifts in doctrine – indeed, constitutional revolutions – that look very different from the common-law model of gradual adjustment.

The point is not that the doctrinal development that Strauss describes is an illusion. Rather, the point is that we must account for it differently than Strauss does. First, the nature of this development cannot be understood through an examination of judicial opinions of the kind that Strauss offers us in chapters 3 and 4 of his book. Second, and perhaps more important, although Strauss calls this species of change “common law” development, it may not

primarily concern the conservation of wisdom or past traditions. Rather, judicial development of doctrine concerns the ways that courts operate – and cooperate – within a constitutional regime.

Third, the traditional model of common-law development sees judges as responsive to something called “society,” rather than to changes in and challenges to a constitutional regime. But there may not be a single thing called “society”; rather, social life may be quite heterogeneous and differentiated into various institutions and subcultures, featuring struggles for power and recognition among many different kinds of institutions and groups. If society is heterogeneous in this way, then saying that through common-law decision making judges respond to society may not tell us very much that is helpful or interesting. What we want to know is what elements, institutions, or aspects of social life judges respond to and why. If society is heterogeneous and institutionally differentiated, its interests and values may not be unitary or even coherent; they may be competitive and fractured. Society may not have a clear or coherent set of mores, needs, or demands that common-law decision making could respond to; rather, social life may feature a complicated mixture of claims made by different groups and interests that are constantly shifting and evolving. If we argue, as Strauss does, that in common-law decision making, “precedents evolve, shaped by notions of fairness and good policy,”<sup>33</sup> the problem reasserts itself in a different way. Within a heterogeneous and differentiated society the question is *whose* conceptions of fairness and good policy the common-law process responds to, and why.

## II. COMMON-LAW DECISION MAKING OR DEMOCRATIC CONSTITUTIONALISM?

Strauss uses an idea familiar to all lawyers – the common law – to explain constitutional development. Because the idea is so comfortable and so familiar, we may assume that we understand it.

But perhaps we do not. At one point in the book, Strauss speaks of the common law as an ideology, by which he means a mode of belief, or a way of thinking.<sup>34</sup> I agree, but the common law is also an ideology in another sense: it is a mystification or disguise.

We have already seen an example of this. Regime maintenance is a key aspect of the work of federal courts. The traditional vision of the common law does not capture it. Rather, it obscures it.<sup>35</sup> Strauss offers the familiar notion

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<sup>33</sup> STRAUSS, *supra* note 1, at 36.

<sup>34</sup> *Id.* at 40-41 (arguing that the “attitudes of humility and cautious empiricism . . . taken together, make up a kind of ideology of the common law[, which was] systematically elaborated by some of the great common law judges of early modern England”).

<sup>35</sup> Moreover, the common law of eighteenth-century England might operate very differently from the way that federal judicial decision making operates in twenty-first-century America. And it might serve additional – or different – functions.

that the common law builds on and conserves the wisdom of the past.<sup>36</sup> But how this happens is not clearly explained or easily understood.

The notion that the common law generates and preserves wisdom is based on two ideas: polling and connection to custom. The first idea is that the common law polls many different decision makers' views, and through a combination of competition and consensus, it gradually selects the best ones. Multiple courts, scattered in various jurisdictions, focus on similar problems and eventually settle on the best solutions. (In fact, in the United States, with its fifty different state jurisdictions, there is no guarantee that state courts will actually agree on a single answer.) Various courts are polled through litigation and asked their opinions in a sequence of different factual situations, and eventually, it is hoped, their answers will coalesce. In this respect, the common-law method seeks the "wisdom of the crowd." If many judges in many different jurisdictions facing many different fact patterns come to believe that a particular solution to a legal question is a good one, then it probably is a pretty good idea or at the very least not a bad idea.

The second source of the common law's wisdom is that the traditional common law always had its ear to the ground, so to speak. It was connected to and informed by the customs and mores of the people, whether the English-speaking peoples or the American people or some other formula. How and why courts – who were generally drawn from the most elite levels of society – were responsive to the customs and mores of ordinary people is not always explained, but the basic idea is that the common law originated in a sort of codification of custom, and ever since common-law judges have adjusted doctrine by paying attention to changing customs. Custom, in turn, is wise because it arises from repeated social interactions. These repeated social interactions are like a repeated game that tends toward equilibrium solutions that are satisficing – good enough for present purposes – or that, over time, are likely to produce satisfactory results. If the common law was connected to custom, and if custom was wise, then the common law was wise.

By themselves, however, these arguments do not offer an adequate account of why common-law decision making would promote wisdom in American constitutional law, especially if one focuses on the work of the U.S. Supreme Court. The United States has a single federal Supreme Court and a hierarchical system of courts. Lower federal courts must follow the Supreme Court, even if they disagree. In addition, the Supreme Court employs a system of *stare decisis*, in which the Court generally follows its own precedents, just as lower courts generally follow their own precedents.

Within such a formal structure, one is unlikely to get the kind of polling that is necessary to produce wise decision making. Effective polling is unlikely because once the Supreme Court decides something, the lower courts must

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<sup>36</sup> STRAUSS, *supra* note 1, at 38, 41 (describing the common law as "the collective wisdom of other people who have tried to solve the same problem").

obey it and cannot revisit it. At most they can distinguish previous opinions, but otherwise their views that precedent is mistaken do not count.

The second justification of the common law's wisdom – that courts have their ears to the ground and are nourished by the wise customs of the people – doesn't really explain the Supreme Court's work very well. The Supreme Court doesn't take very many cases, and it controls its own docket. Moreover, if common-law judges were traditionally drawn from elite circles, that is probably even more true of the Justices of the Supreme Court. (In fact, state court judges, who are often elected, are far more likely to be connected to the values and mores of ordinary citizens than the average member of the Supreme Court.) Thus, the Supreme Court doesn't seem particularly responsive to custom – at least in comparison to other institutions – or if it is, we would have to explain its responsiveness very differently from how we explain the mystical connections between common-law courts and the customs of the English-speaking peoples.

Finally, the very idea of “custom” seems altogether too romantic and homogenous to describe a complicated modern society like the United States. Technological and demographic change is often rapid, and the country is full of different groups, institutions, and subcultures.

We can resuscitate the ideas of polling and connection to changing mores, but we have to do it in a different way.

Take the development of modern First Amendment law as an example. Strauss devotes an entire chapter to showing how, through common-law evolution, the Supreme Court moved to its modern libertarian doctrines. Not surprisingly, Strauss's graceful discussion is strongly court-centered, focusing on how dissenting opinions by Justices Brandeis and Holmes in the early part of the century were adopted by Justices in later years, albeit with temporary deviations from the evolutionary path during the McCarthy Era.<sup>37</sup> Yet with such a small sample of cases, it is very hard to figure out how this process either conserves or generates wisdom over time. Focusing on how dissents by Justice A in 1920 were picked up by Justice B in 1940 or Justice C in 1960 makes the story too much about individual judicial heroism – or individual judicial predilections. In other words, it seems to involve precisely what conservative originalists most object to about living constitutionalism.

Yet even though Strauss talks almost exclusively about Supreme Court cases in this chapter, he surely understands that much was going on outside the courts. And we can learn much more about freedom of expression in America if we look beyond the sequence of cases he elegantly describes. If we turn our attention to the political branches, political and social mobilizations, and the institutions of civil society, we can find a more powerful explanation for the development of First Amendment doctrine in the twentieth century, one that begins not in the 1920s, but at the country's founding.

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<sup>37</sup> *Id.* at 62-76 (describing the evolution of free expression law since World War I).

The ideas that Holmes and Brandeis offered in their early twentieth century dissents were not new. They had been around in American political culture for a long time. During the controversy over the Sedition Act of 1798, an emerging political party, the Jeffersonian Republicans, had argued for a new account of freedom of speech based on the theory of popular sovereignty. The English common-law rule limited freedom of speech to bans on prior restraints and protected only the statements of members of Parliament. This may have made some sense in an empire based on the doctrine of Parliamentary sovereignty. But it made no sense in a republic where the people themselves were the sovereigns. The public had to be able to discuss – and thus criticize – government officials and their policies without fear of punishment. Indeed, as actually occurred during the ratification debates, the people had to have the ability to advocate the overthrow of existing institutions (the Articles of Confederation) and their replacement by a new constitutional order.<sup>38</sup>

These ideas about freedom of expression were not well developed in federal judicial doctrines – there was very little opportunity during the nineteenth century – but they became an important part of American political culture in the new republic.<sup>39</sup> Sometimes these views were ascendant, and sometimes, as in the fights over abolitionist mailings in the South and antislavery petitions before Congress, they were honored in the breach more than the observance.<sup>40</sup> But they remained a vibrant part of the American constitutional tradition, even if sometimes as part of a dissenting tradition. They simply weren't legalized in the sense of being part of official Supreme Court doctrine. Moreover, the basic idea of a right to speak freely on a wide range of political subjects was often presumed in legal debates and was recognized in different ways in common-law and statutory decisions.<sup>41</sup>

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<sup>38</sup> See the excellent discussion in AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* (forthcoming 2012) (manuscript at 51-54) (on file with author).

<sup>39</sup> The election of 1800 played an important role in establishing the Republican view. Once he became President, Jefferson pardoned all of the people convicted under the Sedition Act, and in 1840 Congress reimbursed all of the fines, accompanying the bill with a committee report declaring that the Sedition Act was “unconstitutional, null, and void,” and adding that “[n]o question connected with the liberty of the press . . . was ever more generally understood, or so conclusively settled by the concurring opinions of all parties, after the heated political contests of the day had passed away.” See Act of July 4, 1840, c. 45, 6 Stat. 802, accompanied by H. R. Rep. No. 86, 26th Cong., 1st Sess. (1840), *CONG. GLOBE*, 26<sup>th</sup> Cong., 1<sup>st</sup> Sess. 411 (May 23, 1840); AMAR, *supra* note 38, (manuscript at 169).

<sup>40</sup> See generally MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”*: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000) (describing antebellum struggles over freedom of expression).

<sup>41</sup> DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS 2* (1997) (“Disputes over free speech had previously arisen in an enormous variety of contexts, ranging from political, labor, and sexual radicalism to commercial advertising and election reform. Judges, law professors, officials at all levels of government, activists, social thinkers, and diverse

In addition, throughout American history various social and political mobilizations adopted strong claims about freedom of expression, especially when they were making unpopular claims about slavery or the injustice of American wars or the right to form labor unions or the right to use birth control. Not surprisingly, whenever social and political movements have made unpopular or novel political claims, they have also tended to make arguments for freedom of speech. In this way, the American tradition of dissent – on any number of different subjects – has nourished the American tradition of freedom of expression.

By the time Holmes and Brandeis wrote their famous dissents, there was considerable intellectual ferment on the issue of free expression. During the beginning of the twentieth century many different groups made free speech claims, ranging from suffragists to labor activists to opponents of World War I to advocates of contraception. In addition, scholars like Zechariah Chaffee were beginning to make the intellectual case for constitutional protection of free expression.<sup>42</sup> New civil-society organizations like the ACLU and the NAACP had formed. Soon these organizations began to engage in what we would now call litigation campaigns to protect freedom of speech, either for its own sake or in the interest of social movements for other goals like the rights of workers or racial equality. During the twentieth century, newspapers and other mass media became ever more pervasive and powerful organs of public opinion. Mass media have a vested interest in promoting free speech, and thus they become an increasingly important interest group for the protection of free expression. Moreover, because the owners of mass media also control the media, they also influence public opinion about the importance of freedom of expression.

The New Deal transformation forged modern American liberalism, which merged Progressive ideas about regulation of the economy with classical liberal ideas about the protection of non-economic rights – including, for example, those listed in the Bill of Rights. Among these non-economic liberties, the First Amendment's guarantees of freedom of speech, press, and religion were seen as paradigmatic.<sup>43</sup> The emergence of these political ideas during the New Deal, in turn, helped produce judicial appointments of liberal judges and Justices during the middle of the twentieth century. Post-World

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members of the general public addressed free speech issues throughout the decades before [World War I].”)

<sup>42</sup> See, e.g., ZECHARIAH CHAFFEE, JR., FREEDOM OF SPEECH (1996) (1920); Zechariah Chaffee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919).

<sup>43</sup> See *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (“Freedom of press, freedom of speech, freedom of religion are in a preferred position.”); Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623 (1994); G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 327-42 (1996) (tracing the history of the preferred liberty idea in the 1930s and 1940s).

War II developments, including the civil rights movement and the sexual revolution, also reshaped attitudes about free expression. Courts did not always protect free speech claims – during the McCarthy era, for example, the courts largely followed the lead of the political branches, especially in the early years of the Cold War. Nevertheless, taken together, all of these various influences helped produce a legal culture that, by the 1960s, was remarkably protective of free expression. The explosion of dissent and protest during that decade helped solidify these ideas in constitutional doctrine, as many free speech cases were litigated in the federal courts. Nevertheless, developments outside of the courts are far more important than the texts of Supreme Court opinions in explaining this evolution; indeed, the Holmes and Brandeis dissents became canonized in hindsight because they resonated with the views that had won out in mid-century constitutional culture.

The same point applies to other examples of doctrinal development; if we focus primarily on common-law development within opinions, we will miss most of the story of constitutional change. Take gay rights as an example. We can hardly explain the acceptance of gay rights in 2003 by arguing that the ideas in Justice Blackmun's 1985 dissent in *Bowers v. Hardwick*<sup>44</sup> convinced a majority in *Lawrence v. Texas*<sup>45</sup> that the majority opinion in *Bowers* was "unworkable." Perhaps courts like to talk in this way, but we need not take such statements at face value. What made *Bowers* "unworkable" had little to do with doctrinal niceties. Instead, to explain the result in *Lawrence*, we have to begin the story many years before, with the sexual revolution, the rise of a gay rights movement, the creation of civil-society organizations devoted to promoting gay rights and gay acceptance, and the gradual shifts in cultural acceptance of homosexuality that took place outside of the courts. Indeed, *Bowers* turns out to be important not for what it said but because it energized the gay rights movement and gave it increasing incentives to change views about sexual orientation in popular culture, in civil society, and in local and state regulation.<sup>46</sup> Gay rights advocates also organized politically at local levels and designed litigation strategies to best promote the legal interests of homosexuals.

Behind doctrinal development is an entire political and legal culture, which in turn features a variety of competing civil society institutions, organs of public opinion, NGOs, political parties, political and social movements, interest groups, and positions of authority and power staffed by particular individuals and groups. The political and legal culture generates, debates, and modifies constitutional ideas over time, changing the parameters of what is thought reasonable and unreasonable both in the general public and in the class

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<sup>44</sup> 478 U.S. 186 (1985).

<sup>45</sup> 539 U.S. 558 (2003).

<sup>46</sup> See Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 985-89 (2011) ("[T]he *Bowers* defeat increased grassroots mobilization, fundraising, and organizational founding, all of which proved vital to a stronger LGBT-rights movement.").



of legal professionals. Legal professionals, who deal in reason and therefore want to be thought reasonable, develop these ideas further. Some of these legal ideas are taken up and championed by different groups and by people and institutions in nodal points of authority and power, including members of the state judiciary and the federal judiciary. The appearance of these ideas in legal decisions by the U.S. Supreme Court – or even the federal courts as a whole – is only the tip of the iceberg or, to return to our previous metaphor, merely the leaves of a larger tree.

Indeed, the institutions of political and legal culture not only nourish doctrinal development, they also constrain it. Theories of constitutional interpretation often see constraint of the federal judiciary as a central goal; but this is a fool's errand. In a distributed complex of federal courts, headed by a multimember Supreme Court that controls its own docket, no single theory of interpretation is likely to either explain or constrain the work of judges. Rather, the constraints on the federal judiciary are largely institutional. We must view the production of legal opinions against the background of how people get to be appointed to the federal judiciary (and especially the Supreme Court) and how ideas about the Constitution are promoted and developed in civil society. We must take into account the various political and professional constraints on judges and the cumulative effects of partisan entrenchment, social mobilizations, mass media, NGOs, and litigation campaigns. When we do this, we will see that judges are not free to make things up but in fact are limited and shaped by a wide range of institutional features.

Indeed, the best example may be Justice Scalia's majority opinion in *District of Columbia v. Heller*.<sup>47</sup> Although it is clothed in the language of originalism, *Heller* is the result of years of social and political mobilization for gun rights, reflects a wide social consensus for a basic right to bear arms in self-defense, and carefully limits the scope of the right so as not to upset contemporary values and concerns. The opinion that best represents the triumph of originalism in the Supreme Court is also the opinion that best demonstrates how the living Constitution actually works in practice, how it mines and articulates ideas in contemporary American society, and how it inevitably constrains judges and Justices in their articulations of constitutional doctrine.<sup>48</sup> *Heller* also exemplifies the important role of state courts and state legislatures in the processes of living constitutionalism. Federal courts tend to ratify views that have been adopted by a large number of different jurisdictions. By the time *Heller* was decided, over forty states recognized an individual right to bear arms in self-defense.<sup>49</sup>

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<sup>47</sup> 554 U.S. 570 (2008).

<sup>48</sup> See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192 (2008) ("*Heller*'s originalism enforces understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism.").

<sup>49</sup> See Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686

To continue our arboreal metaphor, trees don't just get up and walk around. They are fixed in place by their roots. Their roots stabilize them, nourish them, and keep them alive. In the same way, an institutional matrix of constraints and influences stabilizes, nourishes, constrains, and sustains America's living Constitution.

Moreover, this model of social influence also vindicates, in a different way, the old ideas of polling and custom that traditionally justified the English common law. Indeed, this model probably justifies the common law better than the old ideas ever did. The institutions of American political culture allow many different people to articulate and express their opinions in civil society, in the media, in NGOs, in litigation campaigns, and in state and local legislatures and courts. They express and modify these ideas repeatedly over time. The continuous development of these ideas is the equivalent of polling. Moreover, the process by which federal judges are selected in successive administrations, the effect of a multimember court with Justices appointed over long periods of time, and the constant influences of mobilizations, litigation campaigns, and elite and popular culture on the federal judiciary mean that judges do not have to keep their ears close to the ground or consciously conform their work to custom. Rather, social mores are baked into the processes by which judges are selected and their work produced. This process is imperfect and contingent and skewed toward the values of the elites from whom most federal judges are selected, but it explains the mysterious connection between the work of an unelected judiciary and changing mores.

Saying that courts are connected to "custom" does not do justice to this complex process. It would be better to say that American society is full of contrasting mores and views about mores that are perpetually evolving and competing with each other. Instead of a coherent set of customs, it would perhaps be better to describe culture – and especially political and constitutional culture – as a plain of contestation, a sort of Gramscian "war of position" between different elements and groups. Judges are not simply the passive mirrors of this contention; they are influenced by it but also influence it themselves, for good and for ill, and their decisions can become alternatively sources of legitimation or rallying points for political opposition.

### III. COMMON-LAW ADJUSTMENT AND PARTISAN ENTRENCHMENT

When Strauss describes common-law decision making in chapter 2, he emphasizes continuity and gradual transformation.<sup>50</sup> Courts work with precedents and concepts until they find that they are unworkable; then they reconceptualize the field of precedents, leading to change. Strauss's central example is the gradual abandonment of the rule of privity of contract in *Winterbottom v. Wright*,<sup>51</sup> leading to Justice Cardozo's famous decision in

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(2007) (counting forty-two states that currently recognize an individual right).

<sup>50</sup> STRAUSS, *supra* note 1, at 33-49.

<sup>51</sup> 10 M. & W. 109, 152 Eng. Rep. 402 (ex. 1842).

*MacPherson v. Buick Motor Co.*,<sup>52</sup> which held that consumers who had no contractual relationship with manufacturers could still sue for negligence. The rule of privity, Strauss explained, proved “unworkable” and became riddled with exceptions that showed a clear trend away from the doctrine.<sup>53</sup> Therefore the New York Court of Appeals was justified in abandoning it. Strauss argues that a similar progression of cases, whittling away at the separate but equal rule of *Plessy v. Ferguson*,<sup>54</sup> eventually led to *Brown v. Board of Education*.<sup>55</sup>

This model of slow, relatively gradual case-law development leading to reconceptualization and reversal is another example of the ideology of the common law. It conceals as much as it reveals. The notion that a decision becomes “unworkable” because later cases chip away at it suggests that doctrines have functions for which they are well or ill-suited and that they lose this functionality over time as they become unpredictable, weakened, or riddled with exceptions. But we cannot describe the rejection of older doctrines simply in terms of doctrine’s inability to “work” properly. Exceptions may be created because some judges – but not others – find the older rules unjust or immoral and deliberately seek to limit their scope or, in some cases, even cripple them. In that case, it is not that the doctrine has proved unworkable; it is that later judges disagreed with it and a few actually sought to undermine it, leading to a self-fulfilling prophecy.

Moreover, the idea that a precedent has been gradually weakened or made unworkable is often in the eye of the beholder. Supporters will find the doctrine perfectly workable, while opponents will see it as incoherent and teetering on the edge of extinction. Take the example of *Roe v. Wade*.<sup>56</sup> Pro-life conservatives detested the decision and sought to appoint judges who would deliberately weaken it and eventually overturn it. Their objections to *Roe* were not functional – that it did not operate properly; they were political and ideological.

To be sure, the official rhetoric of judges justifying their decisions may draw on these apolitical common-law ideas. Within a few years of being appointed by President Ronald Reagan, Justice Sandra Day O’Connor pronounced *Roe v. Wade* as “unworkable”<sup>57</sup> and “on a collision course with itself.”<sup>58</sup> In

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<sup>52</sup> 111 N.E. 1050 (N.Y. 1916).

<sup>53</sup> STRAUSS, *supra* note 1, at 84 (“The conclusion that the privity regime was unworkable and should be replaced by foreseeability was, in a sense, not just Cardozo’s alone.”).

<sup>54</sup> 163 U.S. 537 (1895).

<sup>55</sup> 347 U.S. 483 (1953); *see also* STRAUSS, *supra* note 1, at 85-92 (“*Brown* can be justified as a decision that was reached on the basis of the common law method.”). Strauss does not mention *Gong Lum v. Rice*, 275 U.S. 78 (1927), which reaffirmed separate but equal and applied it to public schools. *Id.* at 87 (holding that maintaining separate schools for “white pupils and the pupils of the yellow races . . . is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment”).

<sup>56</sup> 410 U.S. 113 (1972).

<sup>57</sup> *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 454, 459 (1983) (O’Connor, J., dissenting).

reaffirming *Roe* nine years later, the joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>59</sup> – co-authored by Justice O'Connor – argued in the opposite direction, insisting that “*Roe* is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish” the constitutional right to privacy.<sup>60</sup>

It should be obvious, though, that these anodyne accounts of common-law development conceal a considerable amount about the actual drivers of constitutional change. After *Webster v. Reproductive Health Services* in 1989,<sup>61</sup> it appeared that *Roe* would soon be overruled. But people did not conclude this because *Roe* had become riddled with exceptions and had proved “unworkable” to some unspecified, pragmatic, apolitical observer. Rather, people expected this because the Republican Party had become a pro-life party, Republican politicians kept winning elections, and Republican Presidents kept appointing conservative judges to the federal judiciary. Given practices of partisan entrenchment in the judiciary, it seemed only a matter of time before a conservative majority delivered the *coup de grace* to *Roe*. At that point, to say that *Roe* had been riddled with exceptions and therefore had become unworkable is a bit like saying that a murder victim has become unworkable because he or she has been riddled with bullets.

As we know, the Supreme Court did not overturn *Roe*. *Casey v. Planned Parenthood of Southeastern Pennsylvania* dutifully justifies this turnabout through the language of the common law. It stresses that *Roe* had not been made unworkable or undermined by later decisions: “No evolution of legal principle has left *Roe*’s doctrinal footings weaker than they were in 1973. No development of constitutional law since the case was decided has implicitly or explicitly left *Roe* behind as a mere survivor of obsolete constitutional thinking.”<sup>62</sup> While jettisoning the trimester framework, the joint opinion – again, co-written by Justice O'Connor – retained the viability standard that O'Connor herself had previously attacked, arguing that “there is no line other than viability which is more workable.”<sup>63</sup> Yet *Roe* was preserved not because the Justices believed that it reflected the wisdom of the past – indeed, they explicitly refused to say this – but because the joint opinion felt that the Court’s legitimacy would be put into question by a hasty reversal.<sup>64</sup>

Of course, if the Court had overruled *Roe*, the official explanation might look something like Strauss’s account of *Plessy* or *Winterbottom v. Wright*:

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<sup>58</sup> *Id.* at 458.

<sup>59</sup> 505 U.S. 833 (1992).

<sup>60</sup> *Id.* at 857.

<sup>61</sup> 492 U.S. 490 (1989).

<sup>62</sup> *Casey*, 505 U.S. at 857.

<sup>63</sup> *Id.* at 870.

<sup>64</sup> *Id.* at 864-69 (“[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court’s legitimacy beyond any serious question.”).

*Roe* had been undermined by later decisions (like *Webster*) and had proved unworkable. The real question, then, was not whether *Roe* was actually workable or unworkable, but who would get to decide that question and the political context in which the question would be presented.

In the years between *Webster* and *Casey*, public opinion shifted strongly toward the preservation of abortion rights. However much pro-life protesters denounced *Roe*, the country as a whole was content to leave *Roe* in place. And once it appeared that *Roe* might actually be overturned, the public signaled that it wanted abortion rights preserved.<sup>65</sup> The three Republican appointees who co-authored the joint opinion, concerned that overturning *Roe* would appear illegitimate, produced a compromise – maintaining what the joint opinion called the “central” elements of the decision,<sup>66</sup> while crafting a new doctrinal theory of “undue burden.”<sup>67</sup> They were joined by two other Republican appointees, who wanted to retain *Roe* completely.

Why did the Supreme Court behave this way? The reasons are quite complicated, due in part to the vagaries of the appointments process. Republicans had made every single Supreme Court appointment since 1969. Yet the more senior Republican Justices had been appointed long before the party became strongly pro-life, and several of them (Potter Stewart, Harry Blackmun, Lewis Powell, John Paul Stevens) actively supported abortion rights. Two of them (Blackmun and Stevens) were still on the Court in 1992.

Even after the Republican Party became decidedly pro-life in the 1980s, President Reagan and President George H.W. Bush found it remarkably difficult to ensure a Supreme Court majority to overturn *Roe*, partly because abortion rights were popular with significant segments of the public and partly because of the effects of the party system. Reagan and Bush often faced a Democratic-controlled Senate that supported abortion rights and had rejected the nomination of Robert Bork because Bork was widely thought to be the fifth vote to overturn *Roe*.

Moreover, although Reagan and Bush succeeded in appointing strongly pro-life Justices Antonin Scalia (when the Republicans controlled the Senate) and Clarence Thomas (after Thurgood Marshall’s retirement), political considerations often tempered their other appointments. Reagan had promised to appoint the first woman Justice – this limited his options, and he settled on

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<sup>65</sup> BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 328-29 (2009) (describing shift in public attitudes and mobilization of pro-choice forces in the years between *Webster* and *Casey*); Clyde Wilcox, *The Sources and Consequences of Public Attitudes Toward Abortion*, in *PERSPECTIVES ON THE POLITICS OF ABORTION* 58-60 (Ted Jensen ed., 1995) (showing that *Webster* stimulated organization and fundraising by pro-choice groups and led to the election of pro-choice politicians).

<sup>66</sup> *Casey*, 505 U.S. at 879 (“Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding.”).

<sup>67</sup> *Id.* at 876 (“In our view, the undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.”).

Sandra Day O'Connor, who ultimately proved unwilling to reverse *Roe*. In 1988, Reagan was faced with nominating a Justice during an election year after his first two nominees, Bork and Douglas Ginsburg, had been unsuccessful. George H.W. Bush, politically weakened by his decision to raise taxes in 1990, had no stomach for a repeat of the failed Bork nomination. All of these factors taken together led to three Supreme Court appointments who turned out to be moderate on abortion rights: Sandra Day O'Connor, Anthony Kennedy, and David Souter. These three Justices, it turned out, wrote the joint opinion in *Casey* that upheld *Roe*. Yet a slightly different balance of forces might have led to a different configuration of people in power, a different political context of decision, and a different result. The Court's personnel – and its work – is not simply a mirror of national politics, but it is always affected by it.<sup>68</sup>

Such explanations are always messy and complicated, but they reveal the various ways that constitutional construction remains in conversation with the national political process. By contrast, an account of the common law in which decisions are gradually overturned because judges eventually find them “unworkable” does not touch on these strongly political – and strongly contingent – features of constitutional development. Indeed, it obscures them. Yet we must pay attention to these and other institutional features of the constitutional system if we want to understand how the living Constitution actually works in practice. Such institutional factors include the success of mobilizations and countermobilizations, election results, the political demands facing presidents, the composition of the Senate, the qualified and confirmable candidates available to Presidents at the time of appointment, the role of mass media, and the investments of time and effort by civil society organizations in reshaping public opinion about constitutional issues and in staging concerted litigation campaigns.<sup>69</sup>

#### IV. COMMON-LAW GRADUALISM VS. CONSTITUTIONAL REVOLUTION

One of the strengths of Strauss's account is that he recognizes that much constitutional change does not occur through sharp breaks with the past. Many aspects – for example, inter-branch relations and the power of the Presidency –

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<sup>68</sup> Imagine, for example, that Fred Vinson had not died of a heart attack in September 1953, leading to Earl Warren's appointment as Chief Justice; that President Johnson had not attempted to make Abe Fortas Chief Justice in 1968, leading to scandal and Fortas's resignation; that President Reagan had nominated Robert Bork in 1986 – when the Republicans still controlled the Senate – and Antonin Scalia in 1987; or that President George H.W. Bush had nominated a more conservative jurist than David Souter in 1990. The list of contingencies that might have affected constitutional doctrine is virtually endless.

<sup>69</sup> See generally CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998) (showing how litigation campaigns are crucial to the protection of rights in a range of different countries); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008) (explaining the role of civil-society organizations in shaping American constitutional law).

have grown through slow accretion. Yet although much constitutional change can be explained in this way, much cannot. Sometimes constitutional development occurs through decisive breaks and shifts – even revolutions – rather than through gradual case-by-case adjustment.

If constitutional construction by federal courts is part of an existing constitutional regime, we might expect that courts will respond to significant shifts in politics, especially those that presage a new political era. Rapid and sustained political changes are likely to be followed by rapid changes in constitutional doctrine; political revolutions are likely to be accompanied by constitutional revolutions. That is because major political shifts create new problems of legitimacy for courts to solve. Such changes may not occur smoothly, and they may feature fairly sharp breaks in constitutional understandings. Changes may occur in particular areas of doctrine or in many areas of doctrine at once, as happened during the New Deal and the civil rights revolution.

These developments can't easily be explained by the common-law model. Rather, we must explain the New Deal revolution in constitutional doctrine by looking at its political underpinnings and the relationship of federal courts to the national political process. During the Great Depression the incumbent Supreme Court Justices were performing their familiar function; they sought to preserve the existing constitutional regime in the face of repeated electoral victories by Democrats. The Court's conserving function, however, ran headlong into political mobilizations for a different understanding of constitutional powers and liberties. Roosevelt's inability to appoint anyone to the Supreme Court before 1937 exacerbated the crisis. Roosevelt was forced to rethink the strategy of his New Deal after the Court struck down the National Recovery Act; this led to the Second New Deal and a new series of reforms. In this way disagreements between the courts and the political branches produced legislative and executive innovation. Nevertheless, once Roosevelt was able to appoint a series of new Justices to the Supreme Court – all of them supporters of the New Deal – the Supreme Court began to bless the new constitutional regime. Doctrines quickly shifted in many different areas at once, legitimating and explaining the new rules of the administrative and regulatory state.

In the new regime courts played a different role. Previously they had been guardians of federalism and the traditional liberties of property and contract; now they deferred to and protected the democratic process, legitimated federal intervention in the economy, and embraced judicial restraint in social and economic matters. A common-law model, which tends to view judicial practice as part of a continuous tradition of adaptation of old wisdom to new circumstances, is not well-attuned to the idea of changes in the judicial role itself, as opposed to changes in custom.

The emerging regime created its own new puzzles. Chief among them was the role of courts in protecting a series of noneconomic rights – many of them listed in the Bill of Rights and the Fourteenth Amendment – that were now

called “civil liberties” and “civil rights.” The Justices disagreed among themselves about how best to articulate these commitments in the new regime. Their disagreements, however, should be understood as the consequence of judges working out the consequences of a new constitutional regime, and not simply as an example of the common law working itself pure over time.

Similarly, the civil rights revolution, encompassing the Warren and early Burger Courts, is better explained in terms of a shift in constitutional regimes than in terms of common-law evolution. During the Warren Court years alone, the Supreme Court overturned forty-five cases, more than half the number that had been overturned in the nation’s entire history to that point.<sup>70</sup> American politics was undergoing a revolution, creating a civil rights/civil liberties regime laid atop the understandings of the New Deal. Here again, if we insist on forcing these changes into the mold of common-law judges reasoning from case to case, we will miss a great deal of what was actually going on during this period.

Earl Warren once said that the most important cases decided during his term as Chief Justice were the reapportionment decisions.<sup>71</sup> Unlike *Winterbottom v. Wright*, these cases are not the result of gradual chipping away at earlier precedents. If we attend only to the evolution of case law, they seem to come out of nowhere.<sup>72</sup> But they make considerable sense if we attend to the relationship between the Supreme Court and the liberal constitutional regime that emerged following the New Deal.<sup>73</sup>

Agricultural and rural interests had dominated American politics for many years, creating a conservative headwind against progressive legislation. The New Deal coalition made the interests of cities increasingly salient, and metropolitan areas were rapidly expanding in population, especially following World War II. People in both parties – and especially liberals in urban areas – believed that older districts drawn to benefit rural interests were unfair and unjustly hindered popular reforms.<sup>74</sup>

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<sup>70</sup> See AMAR, *supra* note 38 (manuscript at 247) (citing THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION app. at 2245-52 (Johnny H. Killian & George A. Costello eds., 1996) (appendix prepared by the Congressional Research Service, compiling “Supreme Court Decisions Overruled by Subsequent Decisions” and listing eighty-eight cases overruling precedents pre-Warren and forty-five from the Warren years)).

<sup>71</sup> EARL WARREN, THE MEMOIRS OF EARL WARREN 306 (1977).

<sup>72</sup> Indeed, in *Colegrove v. Green*, 328 U.S. 549 (1946), decided just fifteen years before *Baker*, the Court held that the federal judiciary could not interfere in state decisions about legislative apportionment.

<sup>73</sup> See WHITTINGTON, *supra* note 30, at 127-30 (arguing that the reapportionment cases are an example of regime enforcement, because “[b]oth the constitutional principle and the political consequences of judicial intervention were in line with the liberal regime”).

<sup>74</sup> The Twenty-Fourth Amendment, submitted to the states in August 1962 and ratified in January 1964, also reflected popular dissatisfaction with unfair voting procedures, in this case, poll taxes that discriminated against the poor. The civil rights movement built on these attitudes, and repeated demands for a new voting rights act further encouraged



Through its reapportionment decisions, the Court cooperated with the dominant liberal forces in the national political coalition, promoting their vision of what true democracy required. The Court enforced the constitutional commitments of the current constitutional regime, protecting the institutions of representative democracy in situations where no other institution effectively could.<sup>75</sup> Not surprisingly, the Kennedy Administration strongly encouraged the Court's intervention.<sup>76</sup> In fact, *Baker v. Carr*,<sup>77</sup> which made the issue of apportionment justiciable, was widely approved of by politicians in both parties.<sup>78</sup> Although some Republicans initially questioned the breadth and scope of the one-person-one-vote decision in *Reynolds v. Sims*,<sup>79</sup> politicians in both parties quickly adjusted to the new doctrine, and by 1968 it was taken as "unquestionable."<sup>80</sup>

The apportionment cases are a good example of decisions that make far more sense viewed through the lens of regime commitments than through the model of common-law decision making. *Reynolds v. Sims*,<sup>81</sup> *Wesberry v. Sanders*,<sup>82</sup> and their companion cases, far from reflecting common-law gradualism, were breathtaking in their reach, affecting some ninety percent of congressional districts and almost every seat in state senates and most of the seats in the states' lower chambers.<sup>83</sup> Although the reapportionment cases had little precedent in judicial reasoning, they meshed well with the new role of federal judges as defenders of democracy as opposed to defenders of property rights and federalism.

Similarly, the civil rights revolution, with its focus on the mistreatment of African-Americans, led to major changes in judge-made doctrines of criminal procedure and freedom of speech.<sup>84</sup> Decisions protecting sexual freedom

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constitutional ideas about equality in voting rights. For a history of the Twenty-Fourth Amendment and its connections to the civil rights movement and the Voting Rights Act of 1965, see Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63 (2009).

<sup>75</sup> See *id.* at 126-27 (explaining that Justice Clark decided to join the majority because he believed that only the Court could provide a remedy, given that legislatures could not reform themselves); *id.* at 129 (stating President Kennedy's conclusion to the same effect).

<sup>76</sup> *Id.* at 129.

<sup>77</sup> 369 U.S. 186 (1961).

<sup>78</sup> LUCAS A. POWE, *THE WARREN COURT IN AMERICAN POLITICS* 203-04 (2001).

<sup>79</sup> 377 U.S. 533 (1963).

<sup>80</sup> POWE, *supra* note 78, at 252-55 ("*Reynolds* went from debatable in 1964 to unquestionable in 1968.").

<sup>81</sup> 377 U.S. 533 (1963).

<sup>82</sup> 376 U.S. 1 (1963).

<sup>83</sup> POWE, *supra* note 78, at 252.

<sup>84</sup> HARRY KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* (1965) (explaining how civil rights struggles produced greater protections for freedom of speech); Michael Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000) (tracing influence of demands for racial equality on the development of constitutional rights of

quickly appeared in the 1960s due to the sexual revolution that also began in the 1960s. These examples do not fit the model of common-law gradualism; they make more sense if we view doctrinal development against the background of political and social mobilizations and changes in the constitutional regime.

#### V. COMMON-LAW DECISION MAKING AND DEMOCRATIC LEGITIMACY

So far I have focused on Strauss's descriptive account of constitutional development. Now let me turn to Strauss's normative account.

Strauss's book has carefully limited normative ambitions. Strauss hopes to demonstrate that common-law decision making is superior to originalism as a method of interpretation because common-law decision making better explains what Strauss assumes most people would agree are valuable aspects of American constitutional law. Strauss does not attempt to demonstrate the superiority of common-law decision making to other possible theories of constitutional interpretation. He does not attempt a more general justification of judicial review, and he does not attempt to show that common-law decision making promotes – or at the very least does not undermine – democratic legitimacy.

Strauss notes the potential conflict between his model of common-law decision making and democracy. Nevertheless, he argues that if there is a tension between common-law constitutionalism and democratic legitimacy, it does not arise from the use of the common-law method. Rather, it comes from the practice of judicial review itself, which he assumes the reader already accepts.<sup>85</sup>

Even if Strauss is correct, his answer still raises an important question. There are many different ways we could design the institution of judicial review and many different models of interpretation that we might ask judges to adopt. Some of these designs and methods will be more consistent with democratic legitimacy than others. Some approaches will actually further the democratic legitimacy of the entire political system as a whole, while others will be in tension with it or undermine it, and still others will have effects that are neutral or mixed. Surely we can ask whether the choice of common-law constitutionalism is more consistent with, or better promotes, the political system's democratic legitimacy than the alternatives. Strauss does not address this question in *The Living Constitution*, except by contrast with certain forms of originalism. He does not make the positive case for common-law constitutionalism's contribution to democratic legitimacy other than noting that the common law adjusts to changing mores and times.

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criminal procedure).

<sup>85</sup> STRAUSS, *supra* note 1, at 47 (“What makes our system undemocratic is [not the common-law method but] judicial review: the practice of allowing the courts to have the last word on most issues of Constitutional law.”).

Yet common-law decision making does not seem to promote democratic legitimacy very much, at least if our primary focus is the Supreme Court and the lower federal courts. Although the common law was traditionally thought to have an almost mystical connection to custom, Strauss offers no obvious mechanisms that would connect popular will or popular opinion to common-law development, much less show how common-law decision making furthers the democratic legitimacy of the entire political system. After all, a traditional objection to the common law in early America was that common-law judges are elites untethered to the mass of society, in contrast to elected representatives. (Indeed, this was one reason why some states moved to elected judiciaries.) If we add to these traditional objections the fact that federal judges enjoy life tenure and that they have the power to overturn the work of the political branches, the traditional arguments that the common law is antidemocratic seem, if anything, more powerful.<sup>86</sup>

Nevertheless, given what Strauss does say in the book and in other recent writings, perhaps we might offer the beginnings of an answer. If we attend to the roots of the tree rather than its leaves, we might begin to see how common-law decision making by federal courts promotes – or at the very least does not undermine – the democratic legitimacy of the political system. To do this, however, we must displace the judiciary as the central player in the living Constitution. The federal courts are only one actor among many. Overlapping institutional constraints cause courts to play their distinctive role in the larger national political system, while the political branches busily engage in their own state-building constructions. Through this process, courts produce doctrines that, in the long run, are responsive to the national political process and promote the democratic legitimacy of the entire system over time.<sup>87</sup>

First, as noted above, the federal judiciary is constrained by a series of institutional factors, including the judicial appointments process and the practice of partisan entrenchment. Judges are also influenced – whether consciously or unconsciously – by successive waves of social and political mobilizations, by changes in public opinion, by the efforts of civil-society institutions to introduce new ideas and alter current ones, and by legislative and litigation campaigns. In addition, the most controversial decisions on a multimember court like the Supreme Court tend to be strongly influenced by the median Justices, whose identity shifts through the sequence of presidential appointments. These median justices, in turn, tend to be closer to the middle of elite and public opinion at any time; not surprisingly, they also tend to be the primary objects of persuasion by social and political mobilizations. Because Justices and judges are usually selected from professional and political elites, they tend to reflect the views of conservative or liberal elites where those

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<sup>86</sup> See *id.* at 46-47 (canvassing but rejecting various arguments that the common law is undemocratic).

<sup>87</sup> The paragraphs that follow summarize a much longer argument in BALKIN, *supra* note 13, at chs.13 &14.

views differ from those of the general public. In the long run, however, elite and popular views tend to converge on a wide range of subjects.

Second, the federal judiciary does not simply mirror public opinion, although it is responsive to public opinion in the long run. Rather, the federal judiciary is a player in the national political process, and one of its major tasks is the legitimation and rationalization of the current constitutional regime. The federal court system, led by the Supreme Court, tends to play a conserving if not conservative role, defending existing regime commitments until sustained social and political mobilizations change the basic parameters and assumptions of national politics. At that point, federal courts begin to ratify and legitimate these changes in constitutional understandings, partly as a result of social influence by social and political mobilizations, partly as a result of litigation campaigns, and partly as a result of partisan entrenchment. The constitutional struggle over the New Deal – in which the Supreme Court defended the old constitutional regime until Franklin Roosevelt was able to appoint new Justices – is only the most obvious example of how this process occurs.

In *Living Originalism*, I argue that these processes of constitutional construction and regime maintenance – and others related to them – constitute the “living Constitution.” Living constitutionalism – at least in my view – is not a prescriptive account of how judges *should* decide cases; it does not offer advice to judges about how they should behave in order to make their work consistent with democracy. Instead it *describes* the processes by which constitutional change occurs in all of the different branches of government and in civil society, and it *explains* why these processes, in the long run, promote the democratic legitimacy of the system as a whole.<sup>88</sup> Rather than identifying the living Constitution with common-law decision making, I argue that the living Constitution is the product of constitutional construction by all branches of government over time. Some of this construction might be described as common-law decision making – by federal and state courts, by administrative agencies, and by executive officials. But this account does not tell us very much, for it simply describes change by analogy to the ancient practices of British courts without attempting to explain the engines of change in the various institutions of government and civil society.

Could Strauss accept some or all of my argument as a supplement to his own? I think he could, although my account approaches the problem of constitutional development from a somewhat different perspective. In fact, in other work, Strauss has offered two ideas that we could easily connect to this approach to living constitutionalism, although we would have to explain them in different ways.

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<sup>88</sup> BALKIN, *supra* note 13, at 278 (describing living constitutionalism as “an account . . . of the processes of constitutional decisionmaking, and their basis in democracy and in the ideals of popular sovereignty”).

Strauss calls the first idea “modernization.”<sup>89</sup> Modernization means that instead of deferring to tradition and to the wisdom of the past, courts update doctrines to take into account – or even anticipate – changes in public opinion.<sup>90</sup> According to Strauss, courts “identify areas where the laws on the books no longer reflect popular opinion.”<sup>91</sup> The gap between law and public opinion may have several different causes: because legislative reform is particularly costly, because of the blocking power of concentrated interests, “or because of jurisdictional boundaries that allow some parts of the country to continue enforcing a practice that a national majority considers unacceptable.”<sup>92</sup> Courts tend to strike down laws in outlier jurisdictions that have lagged behind a general trend. Strauss believes that in these cases “courts might invalidate statutes in the expectation that they are in fact carrying out the will of the people.”<sup>93</sup> At the same time, “courts should be prepared to retreat, if they find that they have misgauged popular sentiment – that is, if the political process reacts by reaffirming the law that has been invalidated.”<sup>94</sup>

Strauss’s concept of modernization assumes that courts may actually promote representative government when they use the power of judicial review to bring law in line with popular beliefs. Judicial review has “a more comfortable place in democratic government,”<sup>95</sup> Strauss argues, “[i]f the courts are doing no more than bringing statutes up to date, and anticipating changes that have majority support – and if they are prepared to retreat if the majority turns out not to support them.”<sup>96</sup>

Strauss’s second idea is democracy protection or representation reinforcement,<sup>97</sup> an idea taken from the famous *Carolene Products* decision<sup>98</sup> and from the work of John Hart Ely.<sup>99</sup> Courts have an independent duty to ensure the proper functioning of the democratic process, and “the courts are justified in setting laws aside only when doing so facilitates the operation of

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<sup>89</sup> David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859 (2009) [hereinafter Strauss, *Modernizing Mission*]; David A. Strauss, *Modernization and Representation Reinforcement: An Essay in Memory of John Hart Ely*, 57 STAN. L. REV. 761 (2004) [hereinafter Strauss, *Modernization and Representation Reinforcement*].

<sup>90</sup> Strauss, *Modernizing Mission*, *supra* note 89, at 860.

<sup>91</sup> Strauss, *Modernization and Representation Reinforcement*, *supra* note 89, at 762.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Strauss, *Modernizing Mission*, *supra* note 89, at 861.

<sup>96</sup> *Id.*

<sup>97</sup> David A. Strauss, *Is Carolene Products Obsolete?*, 2010 U. ILL. L. REV. 1251 [hereinafter Strauss, *Is Carolene Products Obsolete?*]; Strauss, *Modernization and Representation Reinforcement*, *supra* note 89, at 762.

<sup>98</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 & n.4 (1938).

<sup>99</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

democracy by making the political process work in the way that it should.”<sup>100</sup> Strauss is well aware of the difficulties inherent in the theory of representation reinforcement;<sup>101</sup> yet, at the end of the day, he argues, it is as good a reconciliation of judicial review with democracy as we are likely to get. “Despite all its weaknesses,” Strauss argues, the *Carolene Products* model “still gives us a way of thinking about what the courts should do”<sup>102</sup> in a democracy: “the role of the courts is to make sure that the democratic process remains open and inclusive, and that unfairly excluded minority groups are protected.”<sup>103</sup>

Strauss’s two ideas for reconciling judicial review and democracy – modernization and representation reinforcement – bring us a bit closer to the vision of living constitutionalism that I offer in *Living Originalism*. Nevertheless, there are still important differences. Both of his ideas look at the issue of democratic legitimacy from the perspective of what courts *could do* or *should do* to make their work consistent with democracy. They are normative prescriptions about how judges should behave in a democracy, drawn from an interpretation of past practices. Neither idea, however, identifies any *mechanisms* that would cause courts to act in the appropriate way. Neither idea explains why judicial actors would have incentives to modernize law or protect the political process.

Take the notion of democracy reinforcement. As Strauss well knows, many Supreme Court decisions can be seen as either promoting democracy or detracting from it, depending on one’s political priors. A good example is the 2010 *Citizens United* decision, which struck down restrictions on corporate and union advertising close to primaries and general elections.<sup>104</sup> Depending on one’s political beliefs, *Citizens United* either protects democracy by protecting freedom of speech or undermines democracy by facilitating greater corporate influence in elections. Examples could no doubt be multiplied by looking at the Court’s recent work on commercial speech, voting rights, or race relations law. There is no guarantee that political forces will generate courts that will *actually* promote democracy – at least from Strauss’s perspective. Therefore the representation reinforcement theory is only a theory about how courts might promote democracy *if they were so inclined*; it is not a theory about why they might actually do so.

By contrast, the modernization thesis has a bit more going for it in this respect. We might assume that, all other things being equal, the succession of Justices born at different periods in time will reflect very long-term changes in public opinion. In fact, however, modernization is not a promotion of democracy per se, precisely because local majorities might want to have rules

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<sup>100</sup> Strauss, *Is Carolene Products Obsolete?*, *supra* note 97, at 1255.

<sup>101</sup> *See id.* at 1262-67 (describing various problems with the theory).

<sup>102</sup> *Id.* at 1268.

<sup>103</sup> *Id.*

<sup>104</sup> *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

that are different from those in most other places in the country. Majorities in the South in the 1950s and 1960s probably would have preferred to maintain racial segregation and a greater presence of religion in public activities and the public schools. But majorities in the North – aided and abetted by federal courts staffed by a succession of racially liberal-to-moderate Presidents – insisted on imposing their values in order to protect racial and religious minorities in the South.<sup>105</sup> That is to say, Strauss's modernization story is really a story about *nationalization* – making state and local governments conform to national values – as much as it is a story about democracy or keeping up with the times.<sup>106</sup>

The ideas of modernization and representation reinforcement helpfully take us beyond the account of common-law decision making offered in *The Living Constitution*. Even so, Strauss offers no causal account of why judicial review in practice might promote the democratic legitimacy of the system as a whole. Instead, he argues that we can categorize some (but not all) past practices as examples of modernization or representation reinforcement and that these activities either promote democratic legitimacy or are not inconsistent with it. That is, he offers us a normative role that judges might play, but no reasons to think that they will play it.

For example, suppose that, as a result of successive elections and social movement mobilizations, the federal courts become stocked with opponents of policies that Strauss believes would conduce to the improvement of democracy. Strauss does not offer us good reasons to think that these judges and Justices will engage in modernization and representation reinforcement as Strauss understands them. And if nevertheless they end up doing that in some situations – say in gay rights cases – Strauss does not have a good explanation for why this happened. He can point out that in these cases – but not others – the courts performed their proper role in a democracy, but this does not explain why they managed to do so.

That is why shifting our focus to the processes of constitutional construction and to the role that judges play in regime maintenance and legitimation might be more helpful. Instead of asking how judges *should* behave in order to promote democratic legitimacy, we might ask instead how the processes of constitutional change operate in practice. Given the shifts in who staffs positions of power and authority in American government, we have no reason to believe that the processes of living constitutionalism will always promote particular kinds of policies over time, whether liberal or conservative. What we do have reason to believe is that courts will conserve and legitimate the existing constitutional regime and its commitments – whatever those may be –

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<sup>105</sup> Lucas A. Powe, Jr., *Does Carolene Products Describe?*, 11 CONST. COMMENT. 197, 209-12 (1994).

<sup>106</sup> Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1538 (2004) (“Lesson One: The Supreme Court is not Counter-majoritarian; it is Nationalist.”).

and that through the judicial appointments process and the influence of social and political mobilizations courts will gradually adjust their doctrines to accommodate the views of national political majorities, often bringing outlier jurisdictions into line. This approach reinterprets Strauss's idea of modernization: it is not a normative duty of courts, but a nationalizing effect of the processes of constitutional decision making.

From this perspective, we can also explain why courts engage in something called "representation reinforcement," although it will look a bit different from Strauss's or Ely's accounts. We must begin by recognizing that what promotes or hinders democracy is judged relative to the ideals and commitments of the existing constitutional regime. It turns out – not surprisingly – that there is no single vision of democracy reinforcement. Rather, at any point in time in American society there are competing visions of what democracy requires: some in ascendance, some in dissent, and some that are completely "off the wall." We can better explain what courts are doing over long periods of time if we attend not to our own theories of what democracy requires but to the visions of democracy implicit in the current regime.

When liberals dominated the national political process, courts offered a form of representation reinforcement that more or less corresponded to liberal ideas of democracy. This makes sense of the Warren Court's apportionment decisions, its expansion of the right to vote, its elimination of state poll taxes, and its decisions upholding expansive congressional power to regulate voting rights in the Voting Rights Act of 1965. In *Democracy and Distrust*, John Hart Ely noted some of these developments. He argued that the liberal version of democracy reinforcement was *actually* democracy reinforcing, and he concluded that this should be the central goal of judicial review.<sup>107</sup> Because Ely was himself a liberal and an admirer of the Warren Court, this interpretation should come as no surprise.

But liberals did not dominate politics forever. When conservative elites began to dominate national elections, they stocked the courts with their allies. The federal courts began to adopt a more conservative version of representation reinforcement, enforcing conservative notions of what democracy means and what democracy requires. *Citizens United*, the contemporary hostility to race-conscious affirmative action,<sup>108</sup> and the current Court's narrow construction of voting rights<sup>109</sup> are all examples of *conservative* representation reinforcement, reflecting the vision of democracy held by conservative elites.<sup>110</sup> Liberals might find these views of what

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<sup>107</sup> ELY, *supra* note 99, at 73.

<sup>108</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (striking down race-conscious plans by Seattle and Louisville school boards designed to promote racial integration).

<sup>109</sup> See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (upholding Indiana photo identification law).

<sup>110</sup> A traditional conservative concern about democracy – reflected in the views of many



democracy requires anathema, but no doubt the Warren Court's vision of representation reinforcement was viewed as hostile to democracy by conservative elites at the time.

Regardless of what we believe their true duty to be, the practice of courts is not representation reinforcement per se but the protection of democracy as imagined by the regime in place, until it is succeeded by a new regime. The shift from one regime to the next may be accompanied – or even driven – by changes in reigning ideas about what democracy means and how courts should respect and defend it. That is what happened in the New Deal revolution, with its emphasis on judicial restraint, and in the civil rights revolution that succeeded it, with its emphasis on minority rights and the promotion of the rights to vote and speak. And that is also what happened when conservatives dominated the federal judiciary beginning in the 1980s: they imposed conservative visions of racial equality, voting rights, and freedom of speech. In this respect, *Citizens United* offers the conservative version of Ely's *Democracy and Distrust*. Justice Kennedy's opinion worries that because of defects in the political process, Congress is trying to snuff out political speech by defenseless corporations. In order to protect the integrity of American democracy, corporations must be able to spend as much as they like on political advertising.

Shifts in larger political trends help us understand the Justices' conservative vision of democracy in this, America's Second Gilded Age. If we want the courts to protect our vision of democracy, we are strongly advised to use the admittedly imperfect tools of democracy available to us to change public opinion and win elections. If we succeed, the courts will eventually follow.

#### CONCLUSION

David Strauss has given us an elegant account of constitutional change seen through the lens of the common law. Yet, as Strauss himself acknowledges, the common law is an ideology, and ideologies, no matter how useful for some purposes, can also be misleading. In this case, the trope of common-law development conceals and mystifies other forces that shape the development of constitutional law. Strauss's story of the living Constitution tells us much that is interesting about the development of doctrine in courts, but these are only the leaves of the tree of living constitutionalism. If we want to understand how these leaves came to be, the story of common-law decision making needs supplementation. We must also attend to the roots of our living Constitution.

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of the Framers – is that majorities might attempt to redistribute wealth from the smaller number of haves to the larger number of have-nots. Hence the Constitution should serve as a bulwark of private property. See JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* (1994).