Triangulating Constitutional Theory: Power, Time, and Everyman

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I. INTRODUCTION

American constitutional law contemplates three basic values: the exercise of power by both government and private actors;¹ the commitment of our nation to a written constitution and a process of judicial review that involves respecting, interpreting, and applying decisions of prior generations in order to provide structure and insight to current government policies;² and the commitment of our nation to a democracy that takes account of the values and interests of all individuals in the face of inevitable political conflicts about these values and interests.³ Modern constitutional law and constitutional theory reflect these values in varying degrees. This article argues that understanding and elaborating the three fundamental values of constitutional law can generate a meta-theory, or synthesis of theory, against which particular theories of constitutional law can and should be measured.

These three values of power, time and everyman are or should be in constant tension, interdependence and balance.

¹ Professor of Law, University of Kansas School of Law. My colleagues Rick Levy and Tom Stacy made helpful comments on a draft of this article, and Andrew Marino provided excellent research assistance.


with each other in arguing, deciding and justifying important constitutional cases. Sometimes these values support each other and at other times they will be in conflict or competition. The prominence of these values is justified on two grounds. First, each value is embedded in the practice of constitutional law. The values thus fit and help explain constitutional law and, at some level of abstraction, they constitute "points of agreement" within American legal culture upon which constitutional theory and law can be constructed.\(^4\) Secondly, these three values, suitably elaborated, help justify constitutional law as a matter of democratic theory. Constitutional law that is grounded in these values supports an attractive conception of representative democracy that respects and promotes the flourishing of individual lives.\(^5\)

The general nature and implications of these fundamental values may be outlined preliminarily as follows. The value of power concerns sensitivity to the exercise of power by government agencies, for the constitution's first purpose was to establish and empower three branches of a new national government and relate this new government to state governments. Power also concerns sensitivity to our ideas about limited government, including appropriate restraints upon the judicial power and state governments, for the original constitution and Bill of Rights were intended to create a national government of "limited powers" and the Civil War Amendments, especially the Fourteenth Amendment, may be viewed similarly as limiting the powers of state governments.\(^6\) The consideration of power must also be sensitive to relationships between public power and private power, for the flip side or consequence of limited government power is the exercise of private power, and surely justifiable limits on government power should consider the consequences of expansive, unregulated private powers. These different aspects of constitutional power, of


\(^5\) Cf. Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535 (1999) (constitutional theories should be judged based on their capacity to promote democracy, maintain the rule of law, and protect morally and politically acceptable substantive rights).

\(^6\) See PHILIP BOBBITT, CONSTITUTIONAL FATE 147-56 (1982).
course, raise complicated questions of interpretation and constitutional theory, especially because the references to powers in the constitutional text are abstract or open-ended and because the different powers at stake are often in competition with each other or with other constitutional values. The differences among constitutional theories thus begin with disagreements about how to interpret and apply the multi-faceted and ambiguous nature of constitutional powers.

The value of time or history in constitutional law is similarly multi-faceted and ambiguous. This value, when considered to its fullest extent, requires sensitivity to the constitutional text and its historical contexts, to precedents, to other government practices and their historical contexts, and, most broadly, to other constitutionally relevant institutions and practices that are "deeply rooted in this Nation's history and tradition."7 While the value of time looks forward to the possible consequences of judicial decisions, the primary commitment of this value is to establishing well-founded connections between new constitutional decisions and decisions by prior generations of Americans that provide light or wisdom for the resolution of current issues. Constitutional theories differ in important ways in the treatment of time.

The constitutional value of everyman demands sensitivity to universal human rights but also demands more than this, for universal rights in constitutional law might easily be limited to rights that have been established by some exercise of the majority will—either in the writing of the constitutional text (for example, rights to free speech and the free exercise of religion) or in adopting constitutionally valid legislation that creates statutory rights (for example, civil rights). Limiting the rights of everyman to only those favored in some sense by "a majority" can leave individuals and groups outside the realm of democratic

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7. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977); see also BOBBITT, supra note 6, at 25-58, 93-119 (discussing textual and doctrinal arguments as well as "ethical" arguments that are based on the American "constitutional ethos"); RUBENFELD, supra note 2 (on the importance of our written constitution that is embedded in American history); David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877 (1996) (on the importance of text, Framers' intent and precedent to constitutional law).
government, especially individuals and groups whose rights and interests are politically unpopular or too small in scale to attract the attention of legislative bodies. Moreover, such a limited notion of rights fails to justify much of constitutional law that is aimed at protecting racial minorities, women, and homosexuals from unreasonably restrictive or oppressive legislation. The constitutional value of everyman, then, requires sensitivity to and respect for the human dignity of all individuals, and this value pays special attention to human interests and values that are likely to be unfairly discounted or dismissed by legislative and other kinds of majoritarian processes. Needless to say, constitutional theories divide significantly in their treatment of this value.

It may be noted that other significant values, especially those of liberty rights, the separation-of-powers and federalism, are subsumed within the three basic values that have just been outlined. Many liberty rights of individuals are included within the everyman value, and other liberty rights—of both individuals and organizations—are derived from the consideration of limited government powers and consequent recognition of private powers. More obviously, separation of powers issues and questions of federalism, or the allocation of power between national and state governments, are subsumed within the power value, although this does not mean that such constitutional issues involve only power—the values of time and everyman are and should be present in the decision of these issues as well.

Today there are diverse theories of how constitutional law should be interpreted and constitutional issues resolved by the courts. There has been a proliferation of constitutional theories in the past two decades, and they offer judges a broad range of choices. Among the prominent theories are the different originalist theories of Antonin


Scalia and Robert Bork, the pragmatic approach of Richard Posner, the case-by-case or common law approaches of Cass Sunstein and David Strauss, John Hart Ely's "representation-reinforcing" theory, the "moral theories" of Michael Perry, Ronald Dworkin, and Christopher Eisgruber, to say nothing of the theories, most from the "Yale School" of constitutional law, that might be described as "complex originalist" theories. In view of this variety, how should one organize and choose among competing theories of constitutional law?


18. See Eisgruber, supra note 3.

19. See, e.g., Bruce Ackerman, 1 We the People, Foundations (1991); Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction (1998); Rubenfeld, supra note 2; Lawrence Lessig, Fidelity in Translation, 71 TEX. L. REV. 1165 (1993); Lawrence Lessig, Fidelity and Constraint, 65 FORD. L. REV. 1365 (1997).

20. See also Fallon, supra note 5. Professor Fallon provides "a framework within which readers can determine how various constitutional theories should be assessed in light of their own views about the rule of law, political democracy, and the individual rights necessary for substantive justice." Id. at 551 (emphasis in original). Fallon however does not "attempt . . . to advance substantive arguments about the best understanding of the rule of law, political democracy, or individual rights." Id. But cf. Richard A. Posner, Against Constitutional Theory, 73 N.Y.U. L. REV. 1 (1998) (arguing that modern
This article has five sections. Each of the first three sections elaborates one of the basic values or dimensions of American constitutional law. In the aggregate, the analysis in these sections develops a meta-theory or synthesis of theory about how constitutional law does or should function. The fourth section assesses prominent contemporary theories of constitutional law in light of this meta-theory. This assessment reveals that some influential theories of constitutional law are concerned primarily or exclusively with power; that there are also two-dimensional theories which take seriously either power and time or power and everyman; and that other constitutional theories deal in significant ways with all three fundamental dimensions: power, time and everyman. The final section of this article provides several reasons for choosing a theory of constitutional law that is grounded in all three values.

II. Power

Power is not a dirty word or an unfortunate feature of the world. It is the core of politics. Power is the ability to effect outcomes in the world.21

All theories of constitutional law recognize the value of power. But there are two sources of major disagreement among the theories. The general, abstract and open-ended provisions in the constitutional text that refer or allude to power create many opportunities for interpretive disagreements about the substantive meaning of particular provisions and about the nature of the judicial role, or judicial power, in making these interpretations. These two opportu-
nities, in turn, invite constitutional theorists to take substantially different positions on the significance of time and everyman as equivalent constitutional values. This section of the article surveys the sources of theoretical disagreement about power, leaving the specification of differences among theories to section four of the article.

Article I of the United States Constitution vests “all legislative Powers” in the Congress; section 8 then provides a list of Congress’ powers, which include several abstract or open-ended powers such as the power “to regulate Commerce . . . among the several States” and, in paragraph 18, the power “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States.” Article II vests “the executive Power” in the President, and defines this power in certain open-ended terms, most particularly that “he shall take Care that the Laws be faithfully executed.” Article III vests “the judicial Power” in the Supreme Court and such lower courts as Congress chooses to establish, and section 2 defines the “Judicial Power” to “extend to” a variety of “Cases” and “Controversies,” including “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” Article VI and the Tenth Amendment recognize state government powers in general and their relationship to national powers. Article VI declares the supremacy of the constitution, federal statutes adopted “pursuant to the constitution” and treaties “adopted under the constitution” over state law, and the Tenth Amendment’s states that “powers not delegated to the national government by the constitution are reserved to the States and their people.”

The constitutional text’s recognition of government powers has always been understood to create a national

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23. Id. at art. II, § 3.
24. Id. at art. III, § 2.
25. Id. at art. VI.
26. Id. at amend. X.
government of “enumerated” or “limited” powers. Other provisions in the text, most prominently those in the Bill of Rights and Fourteenth Amendment, expressly limit the powers of both the national and state governments by creating rights for persons or citizens and (by interpretation) organizations. Thus when American courts interpret the constitutional powers of government and constitutional rights that limit these powers, they must engage with complex questions about the appropriate exercise of power by both public and private agencies. Moreover, in this engagement judges necessarily confront a basic threshold question. The conflict of powers, between national and state governments, between the legislative or executive power and the judicial power, and between public and private power, would seem on first impression to invite political judgments or political answers. But judges appear to be a special kind of political animal, neither trained nor particularly authorized to make straightforward political judgments about these conflicts. What role, in other words, should time, history and everyman play in making judicial decisions about these conflicts—that is the stuff of constitutional theory, or so shall I argue in the rest of this article.

The presence of power in constitutional law is recognized by the constitutional text in another significant way as well. The President “by and with the Advice and Consent of the Senate” is given the power to appoint federal judges. This divided or shared power of appointment introduces considerations of power and politics into the selection of federal judges. Presidents often nominate judges, especially Supreme Court Justices, because of their particular interpretive theories or constitutional ideology, or as a reward to political constituencies, or in return for

27. See, e.g., McCulloch v. Maryland, 17 U.S. 316, 405 (1819).

28. See, e.g., the First Amendment ("Congress shall make no law... abridging the freedom of speech); the Fourth Amendment ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated"); the Fourteenth Amendment ("nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

29. See U.S. CONST., art. II, § 2, cl. 2 ("The President... shall nominate, and by and with the Advice and Consent of the Senate, shall appoint... Judges of the supreme Court, and all other Officers...").
political favors provided by the nominee. The Senate must then confirm or reject a President's nominees, and Senators typically act on the basis of partisan political factors such as a nominee's judicial theory or ideology or their views about how best to obtain favor with the electorate by supporting or resisting particular nominees.

This nomination and confirmation process, to be sure, is infused by a rhetoric (which often may be sincerely motivated) claiming that the President and Senators only wish to appoint "the best qualified" legal or judicial "experts" as federal judges, implying that the appointment process is based on some sort of politically neutral criteria of legal merit that are beyond politics and power. But the political nature of judicial appointments and constitutional law guarantees that ideas of political power, of how government should operate, will influence the appointment of judges and their interpretations of constitutional law, at least tacitly if not expressly. Furthermore, having obtained their positions as a matter of political power, it should not be surprising if many or most judges quietly view their roles, at least in part, as the exercise of political power, and that most or all judges would be influenced, at least tacitly, by ideas of political power when they engage in constitutional decisionmaking.

Judges, of course, like the politicians who appoint them, tend to talk about their commitment to "the rule of law" and deciding cases "only in accordance with the law." Moreover, constitutional opinions are written in the language of conventional legal argument about the meaning of the constitutional text, any evidence of Framers' intent and the


31. See Terri Jennings Peretti, In Defense of a Political Court 90 (1999) ("The consensus remains . . . that Senate confirmation voting is primarily determined by political factors."); see also Laurence H. Tribe, God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History (1985).

32. See, e.g., Peretti, supra note 31, at 12-73; Seidman, supra note 8. See generally Duncan Kennedy, A Critique of Adjudication (Fin de Siecle) (1999) (arguing that political ideology plays a significant role in judging).

precedents, and this language is quite consistent with the rule of law idea and apparent absence of politics. But such beliefs and practices do not preclude the integration of political power or political ideology with constitutional interpretation. The rule of law concept is an abstract, open-ended “essentially contested concept” that generates divergent or competing conceptions of what “the law” requires, and in hard cases persuasive arguments from constitutional authorities can usually be constructed on both sides of any difficult constitutional issue. In addition, appellate judges must often interpret complicated factual situations, especially the “legislative facts” that pertain to constitutional issues, and these factual interpretations can diverge in ways that influence different judicial interpretations of legal rules. Thus conflicting legal and factual interpretations create plenty of room for political factors to enter judging, either tacitly or consciously, as judges interpret complex constitutional authorities and apply these authorities to complex or ambiguous factual situations. Some judges go further and declare their theories of constitutional interpretation, and any choice of a theory of interpretation,


37. See, e.g., Kissam, supra note 35, at 100-01 (describing interpretive choices in Roe v. Wade), 103-05 (describing interpretive choices related to free speech and tobacco advertising regulations), 113-14 (describing interpretive choices related to the Second Amendment’s “right to guns”). See also Kennedy, supra note 32.

whether explicit or tacit, is surely an act of both law and politics. And constitutional theories can govern judicial decisions, or at least these theories can justify particular ways in which an important part of our government, the judicial branch, should function in making and justifying its decisions. 39

The political process by which federal judges are appointed has yet another important implication for constitutional law. The political process for the appointment of judges appears to constitute the judge as some kind of "representative of the people," different from, to be sure, but not totally unlike representatives who are elected by popular voting. Judges are only selected by the people indirectly, and they are not politically accountable in the sense that they cannot be removed by subsequent elections. But federal judges obtain political authorization from the appointment process to represent the people, or the people's law, by making legal decisions in accordance with appointing politicians' views about how such decisions should be made. 40 At the same time, federal judges, who are always lawyers and who are insulated from immediate political pressures by life-time appointments, may be viewed as representatives of the prior generations of American people by means of their judicial interpretations of the constitutional text, Framers' intent, precedents, historical contexts and constitutional ethos. 41 Judges, then, may be characterized as politically authorized representatives of our constitutional decisionmaking is the best approach to constitutional law); Scalia, Originalism: The Lesser Evil, supra note 10 (arguing that an originalist theory of constitutional interpretation is the best approach to constitutional law).

39. On whether theory can govern specific constitutional decisions, compare Strauss, supra note 4 (arguing that theory can govern or influence constitutional decisions), with Michael C. Dorf, Create Your Own Constitutional Theory, 87 CAL. L. REV. 593 (1999) (arguing that judges and scholars choose their theories to fit and justify the results they want, not vice versa). Professor Dorf, however, does not seem to deny that theories chosen to fit particular results may influence a judge's decisionmaking in the future, at least if a judge wishes to be consistent in her decisionmaking and justifications. Furthermore, even if theory does not govern judicial decisions, theory at least can serve the function of justifying different judicial approaches to constitutional law that may be taken for other reasons. See infra Part IV.

40. See EISGRUBER, supra note 3, at 64-66; PERETTI, supra note 31, at 84-85.

41. See BOBBITT, supra note 6; RUBENFELD, supra note 2.
country's foundational history and law, and not merely as representatives of the current political majorities that have selected them. In this light, federal judges have “democratic legitimacy” that authorizes them to impose constitutional constraints on other branches of government.

This representative role of federal judges may also implicate the values of morality and everyman in addition to power and time. It seems relevant, from both an originalist point of view and otherwise, that James Madison believed that a great virtue of the “extended” or “enlarged” republic created by the American constitution would be a “filtering” of the public’s immediate political desires by several indirect processes for selecting many important public officials: U.S. Senators, who originally were selected by state legislators, the President, who still is selected by the electors of the electoral college or, failing a majority, the House of Representatives, and federal judges as well. This filtering process, Madison believed, would “refine and enlarge the public views” or “public voice” about the common good. In this Madisonian perspective, we might say that federal judges are selected to represent “the people’s law” or “the public’s law” of the constitution in a way that promotes the common good as a value that is independent of immediate political desires of the majority will. This “common good,” in turn, might be defined either by a utilitarian calculus of the greatest good for the greatest number, or by applying the moral values or moral principles of everyman. This is another choice for constitutional theory.

In sum, if judges are representatives of the people, the question of how they should represent the people is fundamental to constitutional law. Are judges in constitutional law expected to use only the same conventional tools of legal reasoning that they use in statutory law and common law decisionmaking? Or alternatively, should judges incorporate aspects of politics, of the common good, of the people’s fundamental interests or values, into interpretations of constitutional law and, if so, what aspects should be incorporated and how should they be incorporated? Should such values be integrated with, or substituted for, the con-

42. See The Federalist No. 68 (Alexander Hamilton), Nos. 10, 39 (James Madison); Garry Wills, Explaining America: The Federalist 223-28 (1982).
vential forms of legal reasoning? If judges are representatives of the American people, questions like these are fundamental to the judge’s role in constitutional law and constitutional theory is the field in which these questions are openly addressed.

Beyond the constitutional text, judges are engaged in the exercise of power in other significant ways. In justifying decisions and writing precedents to govern subsequent decisions, judges have the power to choose between relatively fact specific justifications, general but relatively concrete rules, and more open-ended standards like balancing tests, principles or other constitutional standards that invite an implicit weighing of the circumstances in new cases. At least Supreme Court Justices, if not other judges, also have the power to articulate in opinions or otherwise their own theories of how constitutional law should be interpreted and applied, and we have seen that such theories necessarily integrate law and politics. If, then, American judges must engage with the exercise of power in these several ways, how should individual judges choose their theories of constitutional interpretation and decisionmaking? How should a judge choose to act as “a representative of the people?” These are the basic questions to be considered in this article.

III. Time

Constitutional theory is the discipline that reflects upon the relation between the idea of self-government and the problem of temporality.

The American constitution is embedded in time, or history, in complex and important ways. This grounding of constitutional law in time or the ongoing flow of history invites if not demands that past constitutional practices and

44. See, e.g., supra note 38 and accompanying text.
45. See supra text accompanying notes 30-39.
traditions of our government and society be interpreted by judges as a basis for justifying constitutional decisions. The commitment to time, however, is treated quite differently by different theories of constitutional law; for example, the commitment to time may be treated as defeasible or defined narrowly, perhaps as a commitment only to the framing of the constitutional text and any long-standing precedents that are consistent with the clear meaning of the text or Framers' intent about such meaning. This section of the article surveys the ways in which constitutional law is embedded in time and argues as a matter of both practice and democracy for an expansive commitment to the value of time, a commitment that establishes a countervailing check on the mere exercise of power and a basis for recognizing the values of everyman in a way that transcends the mere conflict of contemporary values.

Consider first the specific provisions or rules in the constitutional text, for example, those that establish rules for constituting and operating the three branches of the national government, those that require juries in federal criminal and civil proceedings, and the Supremacy Clause's mandate that valid federal law invalidates conflicting state laws. Our nation's acceptance and application of these rules over time have been necessary to establish a stable and productive form of representative democracy. Similarly, the regular practice and acceptance of the power of judicial review over time have established judicial review as an essential part of American government even though the constitutional text does not expressly authorize this power. The Supreme Court's decision in Bush v. Gore illustrates these historical dimensions of constitutional law, first by the concerns expressed before the decision that the

47. See supra text accompanying notes 144-51 (describing open-ended pragmatism).
48. See supra text accompanying notes 119-43 (describing strict originalist theories).
49. See U.S. Const., art. I, II, III, VI § 2, amend. V, VI & VII.
50. See Rubenfeld, supra note 2, at 11-12, 74-87.
51. See, e.g., Marbury v. Madison, 5 U.S. 137 (1803) (justifying the power of judicial review on the basis of political principles); Farber, supra note 12, at 1347-48 (on the acceptance of judicial review as a matter of practice).
constitution might not provide an effective process for electing the next President, and then by the widespread public and professional acceptance of (if not agreement with) the Supreme Court’s decision, which resolved the uncertainty and provided for the timely selection of a new President.

Consider next the abstract provisions or rules in the constitutional text, those that state powers of the different branches of government and the rights that limit American governments. These provisions are also embedded in time, in the historical process, especially if we attend to the “semantic intentions” of the Framers instead of their “political intentions.” Abstract terms like “commerce . . . among the several States,” “freedom of speech,” and “equal protection of the laws” require interpretation if they are to provide justification for specific constitutional decisions, and if the Framers gave us these abstract provisions, they must have intended future generations of Americans to use time or history to interpret and apply these provisions to the new situations that would occur over time. What else could the Framers’ use of abstract language, of concepts that yield different conceptions, have signified?

Originalists, by contrast, want to interpret and thus constrain abstract provisions in the constitutional text by means of the Framers’ “clear” or “specific political intentions” for these provisions. This approach runs into significant problems. First, it is anti-time in the sense that this approach essentially forecloses consideration of our country’s history between the time the constitutional text was adopted and the current issues to be resolved. Originalism thus ignores many precedents interpreting the constitution.

53. See supra notes 22-28 and accompanying text.


55. See id.

56. See, e.g., RAOUl BERGER, GOVERNMENT BY JUDICIARY (1977) (interpreting the meaning of “equal protection” by relying on specific intentions of Framers of the Fourteenth Amendment concerning the legality of segregated public schools); Bork, Neutral Principles and Some First Amendment Problems, supra note 11 (searching for “clear, specific” evidence of the Framers’ intent about the nature and protection of free speech rights and finding only an intent to protect political speech that advocates legal change).
that have given specific meanings to abstract concepts expressed in the constitutional text, changes in the conceptual thinking of American society and the legal profession, and the evolving traditions of American government and society. The use of the Framers' political intentions by originalists attempts to freeze constitutional law, not to interpret constitutional law, and to limit the authority of judicial review to the exercise of power by the Framers. Importantly, this approach privileges present time over past time because originalism's search for the "clear" or "specific" political values of the Framers tends to minimize constitutional limits upon the actions of the present government.57

Secondly, originalism runs into notorious analytical difficulties when it searches for original meaning in terms of either the textual language of the constitution or external evidence of the Framers' intent. These difficulties include: trying to determine the "clear" or "plain" meaning of abstract constitutional terms; who the authoritative Framers are (should they be the proposers or ratifiers of the constitutional text, or the "electorate" or "people" as a whole who selected the ratifiers by sending them to ratifying conventions or ratifying legislatures?); what a collective assembly of persons intended when there was no vote on a question of specific intent and only a few members of the collective may have expressed specific opinions; and what the Framers "interpretive intent" was or, in other words, what interpretive methods the Framers intended for the practice of constitutional law.58

If we turn, however, to the semantic intentions of the Framers and take seriously the language they provided by majority or supra-majority votes, several methods of interpreting abstract constitutional provisions suggest themselves, and at least two of these methods are embedded quite fully in time or the historical process. As Jed Rubenfeld argues, one may take "paradigm cases" that the Framers were obviously concerned about and argue from them by analogy and distinction to new instant cases in order to translate abstract constitutional language into

57. See RUBENFELD, supra note 2, at 45-73.
more specific meanings. A simple instance of this method would take the Framers' intent to permit Congress to regulate ships in interstate commerce and, by analogy, permit Congress to regulate internet sales. A more difficult and controversial instance of this reasoning would take the paradigm of official discrimination against blacks, which informed the adoption of the equal protection clause, and apply this paradigm by analogy, or distinction, to the contested constitutional issue of affirmative action policies under the equal protection clause. 59

Another historical method for interpreting abstract constitutional provisions would be to search for the best general purposes or principles that may reasonably be said to underlie, explain and justify the textual provision in question, any related textual provisions, and any relevant precedents that have interpreted these provisions, and to use these "moral/legal" purposes or principles to give concrete meaning to the constitution in particular cases. 60 These purposes or principles may be "discovered" in evidence of Framers' intent or the rationales of prior cases, but they also may be "constructed" as a matter of the most plausible or best justification of relevant constitutional provisions and precedents. 61 Under this method, for example, Justice Douglas' famous or infamous "penumbras" rationale for recognizing a fundamental constitutional right of privacy in Griswold v. Connecticut 62 may be understood as constructing a general principle of privacy that best justifies not only several provisions in the Bill of Rights 63 but also a group of seemingly disparate precedents decided

59. See Rubenfeld, supra note 2, at 178-95, 201-20.

60. See generally Dworkin Law's Empire, supra note 17 (arguing that legal reasoning is an exercise in constructive interpretation); Dworkin, Hard Cases, 88 Harv. L. Rev. 1057 (1975) (arguing that judicial decisions not clearly dictated by statute or precedent should be based on principle); see also Brest, supra note 58, at 204-24 (describing a theory of "Moderate Originalism" that relies on general purposes or values to help interpret the abstract provisions of the constitutional text).

61. See Dworkin, Law's Empire, supra note 17, at 45-73, 176-275.


63. For example, the First Amendment (rights to religion and speech); the Third Amendment (rights against the quartering of soldiers in houses); and the Fourth Amendment (the right against unreasonable searches).
under the Fourteenth Amendment that recognized the constitutional rights to educate one's children in foreign languages, to send one's children to private schools, and to avoid compulsory sterilization for criminal activity without compelling evidence of a genetic basis for criminal activity. As another example, apply this method to affirmative action. Is the fundamental moral/legal principle underlying the Fourteenth Amendment and relevant equal protection cases (1) a principle against caste legislation, which would not prohibit genuine affirmative action policies, or (2) a "color-blind" principle against the public use of any racial classifications, which would ban all affirmative action programs?

The method of embedded principles is relatively inclusive, for it incorporates not only Jed Rubenfeld's paradigm method but also other forms of constitutional argument, even including the political intentions of the Framers. Originalists wish to treat the clear, specific political intentions of the Framers as dispositive of constitutional issues, but within the method of embedded principles these intentions can be treated flexibly as one principle or argument among a set of competing principles or arguments. Thus, if the Framers' views on a particular issue are thought wise, say as Alexander Hamilton's views about the justification for judicial review were deemed wise by Justice Marshall and the Supreme Court in *Marbury v. Madison*, these

64. See Meyer v. Nebraska, 262 U.S. 390 (1923).
68. Rubenfeld's paradigm method at its heart involves extracting or determining the principles that are involved in paradigm cases and applying them to instant cases. See RUBENFELD, supra note 2, at 178-95; supra text accompanying note 59.
views should be given respect and weight in deciding a hard case just as principles embedded in precedents are given respect and weight in hard cases. Similarly, if the Framers' views have helped to articulate and form a significant historical tradition in American law, say as the Framers' views about church-state relationships have generally been perceived, these views should be given respect and weight. Moreover, in the method of principles, arguments from Framers' intent do not have to represent the views of a collective majority of the Framers, for if they function like arguments from precedent it is enough to treat them as a kind of "persuasive authority" from particular public officials rather than as "binding authority." In this approach, Framers' intent arguments avoid many of the evidentiary problems of originalist arguments. Treating these arguments as persuasive rather than binding also mitigates the objection that Framers' intent arguments unfairly impose "the dead hand of the past" (the values of white, property-owning males) upon modern constitutional law.

There is a third interpretive method that takes the semantic intentions of the Framers seriously, but this method primarily looks forward in time and leaves the relevance of past events to the discretion of individual judges. Michael Perry and Christopher Eisgruber have argued that abstract provisions in the constitutional text should be given "moral interpretations" by the judiciary, interpretations that are based on a judge's own moral convictions and look forward to creating a more just society and government. Eisgruber recognizes that some judges probably would appeal to history or legal precedents for guidance in

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70. See, e.g., Everson v. Bd. of Educ., 330 U.S. 1 (1947) (relying on evidence of Framers' intent to help define the parameters of the establishment clause). Michael Dorf has named this type of argument "ancestral originalism." See Dorf, supra note 69, at 1801.

71. Cf. Dworkin, Law's Empire, supra note 17, at 313-54, esp. 345-46 (arguing that in cases of statutory interpretation legislators' statements of "legislative intent" about the meaning of statutes should be treated much like common law precedents that constitute "persuasive" rather than "binding" authority).

72. See Perry, supra note 16.

73. See Eisgruber, supra note 3.
shaping and applying their moral convictions about what is just in particular cases, but this use of time is only optional in Eisgruber's theory, or merely a question of style, for judges may choose to rely on philosophy or their instincts instead of history.\textsuperscript{74} Political accountability for such moral interpretations is provided, according to Perry, by a "dialogue" between Congress and the courts through the Congress's powers to appoint justices, to impeach justices, and to control the jurisdiction of the courts, particularly the appellate jurisdiction of the Supreme Court.\textsuperscript{75} Eisgruber depends more on the politics of the selection process for Supreme Court Justices to provide political authorization for the moral interpretations of judges.\textsuperscript{76} This third method accounts for time only in a partial or mostly forward-looking way, however, unlike the paradigm method and method of embedded principles that look both backwards and forwards in significant ways.

The dimension of time also appears in basic constitutional practices that help constitute the previous methods: the doctrine of \textit{stare decisis}, the broader doctrine that precedents should guide decisions by analogy and distinction, the use of government practices as a kind of special precedent—especially in separation-of-powers cases,\textsuperscript{77} and the use of arguments from America's "constitutional ethos" or, that is, arguments which are based on our society's historical traditions such as the reliance on and respect for values of the extended family.\textsuperscript{78} Each of these practices engages with our social, political and legal history, and each provides a distinct perspective on how history or time should guide constitutional law and shape or constrain power.

\textsuperscript{74} See id. at 109-67.
\textsuperscript{75} See Perry, supra note 16, at 125-45.
\textsuperscript{76} See Eisgruber, supra note 3, at 64-68.
\textsuperscript{77} See, e.g., McCulloch v. Maryland, 17 U.S. 316, 400-02 (1819); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-13 (1952) (Frankfurter, J., concurring).
\textsuperscript{78} See, e.g., Moore v. City of E. Cleveland, 431 U.S. 494 (1977). For a description and justification for such arguments from the American constitutional ethos, see Bobbitt, supra note 6, at 93-177.
The doctrine of *stare decisis* has independent meaning or bite only when judges follow prior judicial decisions even though they would decide the issue before them differently, or might decide the issue differently, if they wished to entertain arguments. Yet *stare decisis* does not freeze particular points in constitutional law either, and both conservative and liberal judges have recognized that constitutional law tolerates and deserves considerable judicial willingness to overrule precedents.79 Judges, of course, also have the power to draw narrow distinctions between prior and instant cases and decide the instant case as one of "first impression." Applications of *stare decisis* thus engage judges in comparing governmental decisions over time and assessing which historical decisions should continue to govern and which should not.80

The broader doctrine of precedent, attending to arguments from prior cases by analogy and distinction, engages courts in a similar but more intricate involvement with history and the guidance or constraints that can be obtained from prior government decisions. Analogies and distinctions are commonly based upon factual similarities and differences between cases, but the basic justification for this reasoning, that like cases should be treated alike, is grounded in the identification of common principles that underlie the analogies.81 Moreover, the analogies that are relevant to an instant case can always be broadened by locating and arguing for common principles that underlie seemingly disparate factual situations. Justice Douglas appeared to do this in *Griswold* by suggesting that a principle of protecting intimate familial decisions as a constitutional right could be drawn from an analogy between a married couple's right to contraceptives, the issue in *Griswold*, and a parent's right to educate her children in


81. *See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 30-50 (1921); Dworkin, Hard Cases, supra note 60, at 1083, 1090-97.*
private schools or a foreign language as recognized by prior cases. Thus the broader doctrine of precedent engages constitutional judges in a complex assessment of American time or history as it appears in prior cases—in Griswold, for instance, by connecting the protection of a parent’s right to educate her children from nativist anti-foreign regulations in the 1920s with the protection of reproductive rights in the era of women’s liberation in the 1960s.

The commitment of constitutional law to the historical process is also furthered by the practice, relatively rare but significant, of Supreme Court Justices relying on America’s broader historical traditions to argue for or justify particular constitutional decisions. Philip Bobbitt calls this type of argument an “ethical argument” or, in other words, an argument from the American constitutional ethos of limiting governments to enumerated or specific powers in order to provide substantial room for individual freedom beyond those rights named in the constitutional text. This type of argument, for example, seems to have played a significant role in the Supreme Court’s decisions on privacy rights and in Plyler v. Doe, where the Court held that children who are undocumented aliens are not responsible for their presence in the United States and thus cannot be denied a free public education. Although arguments from historical tradition usually find some reflection or support in constitutional texts, statutory practices or precedents, with these arguments judges become fully engaged with the historical process in a way that carries them effectively beyond the text, evidence of Framers’ intent and precedents.

82. See supra text accompanying notes 60-66.
83. See BOBBITT, supra note 6, at 93-119.
84. See, e.g., Moore v. City of E. Cleveland, 431 U.S. 494, 503-06 (1977) (relying on America’s traditional respect for the extended family to justify a grandmother’s privacy right to live in a “one family house” with grandchildren who are cousins); Griswold v. Connecticut, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring) (relying on “the traditions and [collective] conscience of our people” to determine that a constitutional right of privacy is “so rooted [there] ... as to be ranked as fundamental”); see also BOBBITT, supra note 6, at 159-65 (arguing that a right to control one’s body free of governmental interference can be found in America’s constitutional ethos and justifies the decision in Roe v. Wade to recognize the right to obtain an abortion).
As a matter of practice, then, the commitment of constitutional law to time or history is rather extensive, ranging beyond both the limited appeal to text and Framers' intent in origionalist theories and the broader appeal to text, Framers' intent and precedents in common law theories. As a matter of democracy, this extensive commitment to time seems right for a government that would respect the human dignity, values and interests of all persons. The extensive commitment to time is more likely to take account, inclusively and pluralistically, of the different human values and interests that have been expressed throughout America's complex and rich history. Furthermore, if the method of embedded moral/legal principles is employed to interpret America's legal and social history, the extensive commitment to time will provide some significant support to the third basic constitutional value: the values of everyman.

IV. EVERYMAN

"Hermes asked Zeus how he should impart justice and reverence among men:—Should he distribute them as the arts are distributed; that is to say, to a favored few only [or] . . . to all? "To all," said Zeus; "I should like them all to have a share; for cities cannot exist, if a few share only in the virtues, as in the arts . . . ." 86

The constitutional text establishes some kind of representative democracy. But what sort of representative democracy? Are "representatives of the people" only elected officials, or may they include judges and other appointed officials? Moreover, how should different public officials "represent" the public? More particularly, should American representative democracy be thought of as merely a majoritarian process, where voters by majority votes elect public officials who in turn make policy decisions by majority votes (or executive orders)? In this view, constitutional constraints should be aimed only at making the majoritarian process work more effectively, for example, by ensuring rights to free speech to enhance majoritarian decisions and

86. PLATO, PROTAGORAS 321-25 (Benjamin Jowett, trans., New York, C. Scribner's Sons 1897) (quoted in SHELDON S. WOLIN, POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT 10 (1960)).
rights to fair adjudicative procedures to guard against official abuses of power. Alternatively, should representative democracy be thought of instead as a more complex mixture of majority voting, executive actions and the judicial protection of constitutional rights that are deemed to promote the life chances and flourishing of all persons, including those whose interests are ignored by or unfairly discounted in majoritarian elective and legislative processes?

The constitutional text does not provide a clear answer to these questions. On the one hand, most provisions in the constitutional text are designed to establish a majoritarian governmental process together with limitations at the margins of the process to protect free speech rights, religious rights and the rights to fair adjudicative procedures. These provisions suggest on balance that the constitution is designed to promote democracy as majority rule.

On the other hand, there are significant provisions in the constitutional text that speak beyond and against democracy as majority rule and suggest a broader purpose for American democracy, to promote and respect everyman's rights and interests as a matter of both rights and the majoritarian process. There is, first of all, the Preamble, which states that "We the People of the United States" have established this constitution in order to, among other things, "establish justice, . . . promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." Consent of all the people to a constitutional regime implies, does it not, consent to a government that respects the rights of all persons, not just majority interests? Second, the original constitutional text provided for the indirect selection of Senators by state legislatures and indirect selection of the President by electors to be appointed "in such manner as the Legislature (of each state) may direct." This indirect selection process, which is

87. See, e.g., EISGRUBER, supra note 3; SEIDMAN, supra note 8; SHAPIRO, supra note 20.
89. U.S. CONST. pmbl.
90. Id. art. I, § 3, cl. 1., amended by U.S. CONST. amend. XVII.
91. Id. art. II, § 1, cl. 2.
not dissimilar to the selection of federal judges, suggests that Senators, the President and federal judges were thought to be public officials who should "represent" the interests of the people in different ways from those employed by the popularly elected members of the House of Representatives.\footnote{92} Moreover, Senators are elected for six year terms and by different numbers of voters depending on whether they represent large or small states. These anti-majoritarian factors surely loosen the political accountability of Senators to their electorates by comparison to the political accountability of Representatives, who are elected by roughly equal numbers of voters and who stand for election every two years. Perhaps representation by Senators and by federal judges, to take two leading examples, should be more deliberative and more focused upon the public good than upon the desires of immediate majorities. Third, broadly defined universal rights are provided for every person in several of the constitution's abstract clauses. Consider the due process clauses, that "no person" shall be deprived of "life, liberty or property, without due process of law;"\footnote{93} the equal protection clause, that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws;"\footnote{94} the Fourteenth Amendment's forgotten privileges and immunities clause, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;"\footnote{95} and the Ninth Amendment, that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."\footnote{96} Each of these provisions, like the Preamble and indirect selection of public officials, supports an inclusive conception of democracy that takes account of everyman's values as well as the majority will.

\footnote{92. See supra text accompanying notes 40-42.}
\footnote{93. U.S. Const. amends. V, XIV, § 1.}
\footnote{94. Id. amend. XIV, § 1.}
\footnote{95. Id. On why this clause became a "forgotten" one and whether it should be, compare The Slaughter-House Cases, 83 U.S. 36 (1872) with John Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L.J. 1385 (1992).}
\footnote{96. U.S. Const. amend. IX.}
In the absence of authoritative guidance from the constitutional text, one might turn to the theory of democracy, or of representative democracy, to help choose a constitutional theory.\textsuperscript{97} Democracy, however, is another “essentially contested concept,” much like the rule of law idea. Some theories of democracy focus rather exclusively upon popular voting.\textsuperscript{98} But other theories pay attention to democracy’s purpose of promoting the life chances of all individuals.\textsuperscript{99} So theories of democracy, like our constitutional text, at least on first impression, appear to support either the inclusion or exclusion of everyman as a fundamental constitutional value.

Nonetheless, when Presidents and Senators select judges, and when judges choose among different theories of constitutional interpretation, they would be wise to contemplate the relevance of different democratic theories to American society and constitutional law. All democratic theories incorporate the idea of collective self-rule and majority voting. But theories that would characterize democracy as essentially majority voting, first by voters for representatives and then by representatives for policies, appear to be in the thrall of the ideas of democracy in Greek city-states and the New England town meeting. In these

\textsuperscript{97} See Fallon, supra note 5 (suggesting that this methodology, in part, is how constitutional theories are and should be chosen). But see Dorf, supra note 39 (arguing that the concept of political democracy is too general to provide any guidance in choosing a constitutional theory).

\textsuperscript{98} See, e.g., DAVID HELD, MODELS OF DEMOCRACY (1987) (describing the models of “classical democracy” in ancient Greek city-states, where voting occurred among citizens in small, relatively homogenous communities, and “elite democracy,” which emphasizes voters choosing among members of a society’s elite, who are then relatively free to pursue their public or private interests); see also IAN SHAPIRO, DEMOCRATIC JUSTICE (1999) (arguing that democracy implies two fundamental principles: collective self-rule and prohibitions against arbitrary actions by individual public officials).

\textsuperscript{99} See, e.g., Held, supra note 98 (describing models of “protective democracy,” which can be associated with the theories of John Locke, liberalism and individual liberty rights; “developmental democracy,” which can be associated with the theories of Jean Jacques Rousseau and social democracy that encourage governments to promote the flourishing of all individuals; and “participatory democracy,” which captures modern theories that focus on the need of democratic government to promote the practical direct participation of citizens in “key institutions of society, including the workplace and local community”).
situations, the citizens of the community were (or are) relatively homogenous in their backgrounds and interests, likely to share customs, capable of participating effectively in influencing or making public policy decisions, and perhaps likely on balance to consider the interests of all or most persons in the community fairly when deciding governmental issues.\(^1\) Today, however, in relatively massive large-scale representative democracies, can one be confident that majority voting by the electorate and by elected representatives, at either the national or state level, is likely to be inclusive of all persons' interests? Why should those with majority power pursuing their interests as electors or legislators necessarily include the interests of others outside the majority in policymaking decisions? Moreover, why would the diverse citizens of modern America ever consent to democracy as mere majority rule? Wouldn't they want a system of constitutional rights that limits the majoritarian process by recognizing rights that provide equal respect for everyman? Wouldn't a diverse citizenry, to ensure impartial treatment by governments, wish for constitutional institutions like the abstract language in our constitutional text and a judiciary that employs the method of embedded principles, or some similar method, to recognize constitutional rights that protect the fundamental interests or values of all persons against the sheer power of those who wield majority power in legislatures?\(^2\) A theory of representative democracy and constitutional law that includes the basic substantive value of respect for everyman would seem to fit the constitutional text just as well as

\(^{100}\) Alexis de Tocqueville famously observed that democracy as majority will work best in local governments like the New England township, where such conditions are most likely to pertain. See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 56-79 (Harvey C. Mansfield & Delba Winthrop eds., 2000).

\(^{101}\) The claim for individual rights based on hypothetical consent to government rests, of course, on the “original position” argument for the principles of political justice in JOHN RAWLS, A THEORY OF JUSTICE (1971). But non-contractarian political theories that are based on existing political culture rather than consent may also justify protecting individual rights against oppressive majoritarianism. See, e.g., TOCQUEVILLE, supra note 100 (arguing that the “equality of conditions” in America will flourish best under a moderate democracy that combines majority rule with substantial individual rights); cf. SHAPIRO, supra note 20 (arguing from an historical conception of democracy that entails both collective self-rule and an opposition to unjustifiable hierarchies).
procedural theories of democracy. Furthermore, such a theory justifies constitutional law in the light of our contemporary multi-cultural society better than the theory of representative democracy as simple majority voting. Respecting the values of everyman would also enhance the legitimacy of any constitutional regime in a modern democracy. The values of everyman thus deserve recognition as a basic dimension of constitutional law.\textsuperscript{102}

When one turns from theory to practice, there are additional justifications for recognizing the interests of all persons as a fundamental constitutional value. For one thing, this is mostly what the constitutional jurisprudence of the Supreme Court has been about for the past sixty years or so, and this is true for both "liberal" and "conservative" decisions of the Court. The Warren Court's expansion of equal protection rights against race discrimination\textsuperscript{103} and procedural rights of criminal defendants,\textsuperscript{104} and the more conservative Burger Court's expansion of equal protection rights against gender discrimination,\textsuperscript{105} and the due process right of privacy, most prominently to include the right to abortions,\textsuperscript{106} illustrate the values of everyman in constitutional practice. But so do the Rehnquist Court's contemporary interpretations of the religion, speech and equal protection clauses that recognize the rights of religious persons, notwithstanding the establishment clause, to practice free religious speech in public forums\textsuperscript{107} and to obtain

\begin{itemize}
\item \textsuperscript{102} Cf. Edward L. Rubin, \textit{Getting Past Democracy}, 149 U. Pa. L. Rev. 711 (2001) (arguing that in modern governments citizens depend more on the different kinds of interactions they have with the administrative state for their security, welfare and protection of rights than they depend upon elections and legislation).
\item \textsuperscript{105} See Craig v. Boren, 429 U.S. 190 (1976).
\item \textsuperscript{106} See Roe v. Wade, 410 U.S. 113 (1973).
\item \textsuperscript{107} See, e.g., Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (upholding the Ku Klux Klan's right to post a cross in a public square).
\end{itemize}
equal government funding for religious and secular educational programs.\textsuperscript{108}

The values of everyman are also embedded in two more general constitutional practices. One is the judicial practice of deciding cases by analogy, which in constitutional law promotes the morally important idea of requiring governments to treat persons similarly situated in the same way. By this reasoning, individual rights that were or have become "popular," as for example the right to contraceptives recognized in \textit{Griswold v. Connecticut},\textsuperscript{109} can become the constitutional basis for recognizing analogous rights that are less popular and more controversial such as the right to an abortion recognized in \textit{Roe v. Wade}\textsuperscript{110} and subsequently affirmed in \textit{Planned Parenthood v. Casey}.\textsuperscript{111} The second practice involves the sensitive interpretation of complicated factual situations, which seemingly can influence the judicial interpretations of relevant law.\textsuperscript{112} These interpretations can engage judicial empathy for the interests and rights of individual persons who bring or are affected by constitutional challenges to government policies. Consider, for example, the balanced consideration of affirmative action admissions policies and their possible social effects by Justice Lewis Powell in \textit{Regents of the University of California v. Bakke},\textsuperscript{113} who went on to reason that equal protection law limited but did not ban all affirmative action programs. Consider also the Court's interpretation of abortions and the meaning of abortions for women and their families in \textit{Casey},\textsuperscript{114} as there the Court affirmed a woman's constitutional right to an abortion. One does not have to agree with these particular interpretations to recognize them as genuine attempts by Justices to resolve difficult issues by


\textsuperscript{109} 381 U.S. 479 (1965).

\textsuperscript{110} 410 U.S. 113 (1973).

\textsuperscript{111} 505 U.S. 833 (1992).

\textsuperscript{112} See \textit{SCHEPPELE, supra} note 36 and accompanying text.

\textsuperscript{113} 438 U.S. 265, 315-20 (1978).

\textsuperscript{114} 505 U.S. at 862-53.
considering the interests and values of all persons, especially those whose values and interests tend to be ignored by the majoritarian legislative process.

In summary, a strong case can be made as a matter of both practice and democracy to consider the values of power, time and everyman as fundamental to American constitutional law. The next section analyzes particular theories of constitutional law by means of these values. Which values ground particular theories? And how does each theory take the basic values into account in interpreting constitutional sources and resolving hard cases of constitutional law?

V. CONTEMPORARY CONSTITUTIONAL THEORIES

A normative constitutional theory attempts to govern, guide or at least justify a judge's constitutional decisions, and most theories also prescribe ways or methods of interpreting and using constitutional authorities as justifications for particular decisions. Constitutional theories may not explain judicial differences in all difficult cases, for judges with the same theory may divide in their interpretations of constitutional authority, say of precedents or Framers' intent, or they may divide in interpreting a factual situation in ways that influence their application of the same legal standard.115 But in many pivotal cases, for example, cases that have involved abortion rights, other privacy rights, death penalty issues and the power of Congress to regulate interstate commerce, normative constitutional theories appear to be a decisive factor.116

A normative constitutional theory will present some kind of justification for the theory's methods of interpreta-

115. See Kissam, supra note 35, at 107-08 (describing division over a hypothetical case of tobacco regulation and free speech as a possible matter of conflicting judicial interpretations about the nature of smoking and cigarette advertising), 113-14 (describing division over the second amendment right to bear arms issue as a possible matter of conflicting judicial interpretations about Framers' intent or the nature of guns and gun regulations).

tion or decisionmaking. This justification often rests at least in part on some conception of American democracy or representative democracy. But normative theories also can be grounded merely in the practice of constitutional law and the idea that practice itself justifies the use of particular methods. The values of power, time and everyman appear both in constitutional practice and as components of different conceptions of representative democracy, and thus these values can help us articulate both the methods and justifications for different constitutional theories.

All constitutional theories are concerned with power, especially the comparative powers of legislatures, the executive and courts and the comparative powers of national and state governments. But some theories are concerned primarily or only with power. Other theories are two dimensional, focusing on either time or everyman in addition to the value of power. Still other theories are grounded in the three constitutional values of power, time and everyman. Let us consider these four basic categories of constitutional theory in this order.

A. Power Theories

Two categories or types of normative constitutional theory focus primarily upon power. One category consists of the theories of basic or strict originalism, and the other category I shall refer to as theories of open-ended or straightforward pragmatism. These two kinds of theory differ substantially between themselves in the treatment of power, and neither requires that attention must be paid to the independent values of time and everyman. To be sure, these values can appear as incidents to the application of the originalist or pragmatic approaches, but the fundamental commitment in these two kinds of constitutional theory is to power alone.

117. See Fallon, supra note 5, at 537.

118. See, e.g., BOBBITT, supra note 6 (eschewing formal justification and describing constitutional law as a practice consisting of six modes or methods of argument); Farber, supra note 12, at 1332 (seeming to rest his case for a pragmatic theory of constitutional law on practice); Strauss, supra note 7 (describing and justifying "common law constitutionalism" as a sound workable practice).
Strict originalism, of the kind promoted by Antonin Scalia\textsuperscript{119} and Robert Bork,\textsuperscript{120} argues essentially that judges may invalidate acts by other branches of government only if judges can rest their decisions on some relatively clear and specific constitutional value that represents the "original meaning" of the constitutional text. These values may be found in constitutional text, sometimes in Framers' intent,\textsuperscript{121} and sometimes in long-standing or well-recognized precedents that throw light upon the original meaning or political intentions of the constitutional text.\textsuperscript{122} Specific and long-standing traditional practices of American governments may also throw light on the original meaning of the constitution for originalists, for such practices provide a kind of precedent and context from which one may infer original meaning or political intentions.\textsuperscript{123} But otherwise, under the abstract provisions of the constitutional text, courts should defer to any reasonable act by a present legislature notwithstanding that more persuasive arguments can be made from the text, precedents, \textit{stare decisis} or other constitutional sources that the legislative act should be held unconstitutional.\textsuperscript{124}

\textsuperscript{119}See sources cited \textit{supra} note 10.

\textsuperscript{120}See sources cited \textit{supra} note 11.

\textsuperscript{121}For example, Justice Scalia seems willing to use evidence of Framers' intent only as a supporting aid in interpreting the constitutional text's original meaning, see Scalia, \textit{Originalism, supra} note 10, at 856, while Judge Bork is apparently willing to rely on evidence of Framers' intent as an independent value when the text is quite unclear or even leans the other way. See Bork, \textit{Neutral Principles, supra} note 11, at 13 (arguing from Framers' intent to justify the desegregation of public schools under the equal protection clause), 17-35 (arguing from Framers' intent that "free speech" should mean only political speech that advocates legal change).


When a strict originalist faces precedents that are not justified by "original meaning," either one of two moves is prescribed by originalist theory. Such precedents may be ripe for overruling, especially if one can argue that the "clear and specific" values of text or Framers' intent not only fail to support the precedent but support an opposite result. On the other hand, if such precedent is sufficiently well-established to have gained support among a majority of contemporary judges, or is not directly on point, it should be interpreted as narrowly as possible to avoid expanding constitutional law by analogy or principle where such a decision would have "little or no cognizable roots in the language or design of the Constitution." 

Strict originalism is justified as a matter of power and democracy in either of two ways. First, the Framers of the constitutional text are recognized by some theorists as having exercised the power of a "supra-majoritarian" political decision to establish the fundamental rules of American government by means of extraordinary supra-majoritarian procedures and standards or, in other words, by the special constitutional convention and state ratifying conventions that established the original constitution or by a two-thirds vote in both houses of Congress and approval by three-quarters of the state legislatures that have approved the amendments to the constitutional text. Thus, the special political power of the Framers, and only this power, justifies judicial invalidation of present acts by the "political" branches of government. Alternatively, the reliance of originalists upon the original meaning of the constitution is justified by the claim that this provides the only "objective" ground for establishing "neutral" rules and values that allow constitutional cases to be decided without judges employing their personal preferences. In other words, judges should be limited to using original meaning because this source, and only this source, provides a "neutral" stan-


127. See, e.g., BERGER, supra note 56.
dard that restrains or prevents the exercise of illegitimate judicial power.128

In both justifications then, the idea of democracy as majority rule by decisions of elected officials and considerations of power play a decisive role. In the first justification, the special authority or power of the Framers to limit today’s legislatures and courts by adopting the constitutional text is perceived as “democratic” because of the supra-majoritarian standards that the Framers followed in adopting constitutional provisions (notwithstanding the very limited electorates in the late eighteenth and mid-nineteenth centuries that selected the Framers). In the second justification, non-elected judges are perceived to be “undemocratic” when imposing constitutional restraints on elected officials unless they rely on some “neutral standard” of original meaning (notwithstanding the limited electorates in the late eighteenth and mid-nineteenth centuries, the many difficulties in establishing original meaning, and the very real possibility that judicial precedents constrain the preferences of judges more effectively than ideas about the original meaning of the constitutional text129). In strict originalist theory, then, only decisions by elected representatives or the Framers are “democratic decisions,” and any judicial constraints upon elected representatives are suspect or at least “morally regrettable” because of their “anti-democratic” nature.130 As a result, strict originalist theories tend to give substantial deference to elected representatives in many interpretations and applications of abstract constitutional provisions. To be sure, this principle of deference has been undercut by the ease with which strict originalists have discovered “clear” principles of federalism in the Framers’ intent that, in their view, should limit Congress’ powers to regulate interstate commerce131 and authorize suits against state governments as part of

128. See, e.g., Bork, Neutral Principles, supra note 11; Scalia, supra note 33.
130. See Dworkin, Freedom’s Law, supra note 17, at 16-17.
federal regulatory programs. The principle of deference has been similarly undercut by the ease with which strict originalists have discovered a "clear" color-blind principle that would forbid affirmative action programs. These contested discoveries, of course, illustrate that neither the language of the constitutional text nor evidence of Framers' intent constrain the power of judges nearly as much as originalists claim. Something else must be going on.

In any event, strict originalist theories are theories of power. They focus on the Framers' power, the "democratic" powers of elected officials, and a need to limit judicial power. Time, the time and historical development of complex precedents and the time and history of fundamental political and social developments in America, is essentially discounted or ignored. For example, Justice Clarence Thomas seems willing to overrule the leading precedents of the 1930s and 1940s that recognize Congress' power to regulate local aspects of interstate commerce that may have "substantial effects" upon this commerce, and to return to his vision of divided national and state powers to regulate the economy which is based on a late eighteenth, early nineteenth century perspective on the national government's power to regulate interstate commerce. Similarly, the values of everyman, of all persons in contemporary America, are discounted by strict originalist theories unless these values are "clearly" incorporated in the constitutional text as might be said, say, for the right to free exercise of religion or right to free speech. Thus, for example, strict


134. For some thoughts about judicial psychology and what may motivate originalist judges and theorists, see Kissam, supra note 35, at 118-23. See also KENNEDY, supra note 32 (arguing that political ideology is a primary unconscious, half conscious or conscious motivation of both liberal and conservative judges).

originalists struggle to justify the decision in Brown v. Board of Education\textsuperscript{136} that racially segregated public schools violated the Equal Protection Clause,\textsuperscript{137} or they find Brown to be illegitimate as a matter of law.\textsuperscript{138} The Framers of the Fourteenth Amendment clearly were not concerned with desegregating public institutions and may in fact have not wanted the Equal Protection Clause to ban segregated schools.\textsuperscript{139} Furthermore, in Plessy v. Ferguson,\textsuperscript{140} which was much closer in time to the framing of the Fourteenth Amendment, the Supreme Court had held that segregated public facilities could be "separate but equal" as long as "equal facilities" were provided to both races, and the Plessy Court relied expressly on an argument from Framers' intent. So the Brown decision, a paradigm of modern constitutional law and exemplar of protecting everyman, must be condemned by strict originalists as a wrong decision,\textsuperscript{141} recognized as a "faint-hearted," "pragmatic" or "political" exception to originalist theory,\textsuperscript{142} or justified by strained interpretations of the "clear meaning" of the Equal Protection Clause or by relying on selected Framers' ideas about racial discrimination in the nineteenth century.\textsuperscript{143}

Strict originalism has become popular among conservative jurists today, perhaps because it justifies desired

\begin{footnotes}
\item[136] 347 U.S. 483 (1954).
\item[138] \textit{See} BERGER, \textit{supra} note 56, at 245.
\item[139] \textit{See id.} at 100-01, 117-33.
\item[140] 163 U.S. 537 (1896).
\item[141] \textit{See} BERGER, \textit{supra} note 56, at 131-33, 245, 327-28.
\item[142] \textit{See} Scalia, \textit{Originalism}, \textit{supra} note 10, at 861-62 (describing "faint-hearted" originalist judges who are occasionally willing to depart from originalist principles to follow their instincts for justice).
\item[143] \textit{E.g.}, Bork, \textit{Neutral Principles}, \textit{supra} note 11, at 13-15 (claiming that Brown was justified as a matter of original meaning because of the Framers' intent to eliminate "a large measure" of official racial discrimination by means of the Fourteenth Amendment, an argument which ignores Plessy and most scholarship on what Framers' of the Fourteenth Amendment were in fact talking about). \textit{Compare} Michael W. McConnell, \textit{Originalism and the Desegregation Decisions}, 81 Va. L. Rev. 947 (1995), \textit{with} Michael J. Klarman, Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell, 81 Va. L. Rev. 1881 (1995) (debating whether originalist arguments can support Brown).
\end{footnotes}
results such as opposition to the abortion rights decisions and perhaps more fundamentally because its focus on power is consistent with the increasing celebration of unconstrained American power in the post-Cold War era. In any event, this approach has contributed to contemporary constitutional debate in two significant ways: by emphasizing the need to justify judicial methods of interpretation and by emphasizing the potential value of paying attention to both the language of the constitutional text and evidence of Framers' intent. Other constitutional theories must respond to these emphases.

The second category of power theories consists of open-ended pragmatic approaches to constitutional decision-making. These approaches display considerable variation, especially in the nature of their commitments to the interpretation and use of conventional constitutional authorities, especially precedents. As Richard Posner has said, however, the pragmatic approach to adjudication may be characterized as "instrumental, forward-looking, activist, empirical, skeptical, antidogmatic, experimental." In this approach the pragmatic judge should strive to be neutral between persons in deciding the disputes before her, but she will not discover neutral standards within the complex maze of legal authorities. Arguments from text, Framers' intent and precedents may be useful as rules-of-thumb or guidelines, at least to some pragmatists, or as rebuttable presumptions to others. But in difficult cases, the pragmatic judge should ultimately be guided by her understanding of the facts, both adjudicative and legislative facts, by her understanding of consequences, and by her instincts or preferences for fashioning good results in particular cases and good rules for contemporary society.

144. Compare Posner, Overcoming Law, supra note 12 (little if any commitment to arguments from conventional constitutional sources or "history"), with Farber, supra note 12 (claiming a substantial but indeterminate commitment of pragmatists to arguments from text, Framers' intent, and precedents).

145. Posner, Overcoming Law, supra note 12, at 11. See also Brest, supra note 58, at 228; Farber, supra note 12, at 1344 (making the same point).

146. See Farber, supra note 12, at 1332-53.

147. See Brest, supra note 58, at 228-37.

148. See Posner, Law, Pragmatism and Democracy, supra note 12, at 59-
Straightforward pragmatism thus turns away from interpretation as a central aspect of decision-making and from grounding constitutional decisions in time or history, and it considers the values of everyman only in a rudimentary or general sense—to the extent that individual judges may wish to rely on these values as justifications for their results. The pragmatic approach to constitutional theory focuses instead on the active aspects of judicial power, as it may assist good government, and invites judges to engage in careful positive or empirical analysis of the facts of cases, the consequences of rules, and both the significance and consequences of particular interactions between judicial, executive, legislative and private powers.

Judge Posner's analysis of Griswold v. Connecticut illustrates the pragmatic approach to constitutional law. In deciding to invalidate or uphold Connecticut's ban on the use of contraceptives, the pragmatic judge would not attempt to recognize or reject a general right of privacy based on abstract provisions of the constitutional text or on precedents decided under these provisions, as the Supreme Court Justices in Griswold endeavored to do. Instead, the pragmatic judge would focus on pertinent adjudicative and legislative facts concerning Connecticut's statute, and she might reasonably decide to invalidate the contraceptive ban on the facts that (1) most nineteenth century bans on contraceptives had been repealed by state legislatures in the twentieth century and only Connecticut and Massachusetts retained these bans; (2) repeated attempts to repeal Connecticut's statute "had been blocked by the vigorous lobbying of the Catholic Church working on the [state's] large Catholic population"; and (3) the only enforcement of Connecticut's statute had been against birth control clinics, thus disadvantaging poor and uneducated women who relied on such clinics for contraceptive advice and devices. Thus, a pragmatic decision in Griswold would have employed the judicial power to invalidate a state's legislative power on narrow grounds without creat-

64; Posner, Overcoming Law, supra note 12, at 12, 191-97; Brest, supra note 58, at 228-29.

149. 381 U.S. 479 (1965).
150. See supra text accompanying notes 60-66.
ing any broad precedent, rule, principle or doctrine that would have consequences for other kinds of "privacy" cases. A pragmatic decision might have relied on the exercise of legislative power by the majority of states that had repealed their bans on contraceptives in order to justify invalidating statutes in two states. A pragmatic judge, at least one of Judge Posner's intrepid nature, might also have based her decision on perceived flaws in the "democratic process" in Connecticut, where sectarian and class-based interests appear to have ignored the needs of poor and uneducated women. This, of course, would be to apply the values of everyman—but only if an individual judge is inclined to make this sort of sensitive political judgment.

The justification for the pragmatic approach to constitutional decision-making seems to be based on three claims. First, in hard cases authoritative materials like the constitutional text, Framers' intent, and precedents provide no guarantee of supporting constitutional decisions that are useful to society. Second, in difficult constitutional decisions the "democratic" power of the elected branches of government should be respected except where there are demonstrable flaws in the exercise of such power that favor special interests and ignore democratic values of the kind Judge Posner perceives in Griswold. Third, a judge's instincts or preferences for justice and good results are reliable guides to good decisions in hard cases, or at least they are more reliable than arguments from the rules, principles, and analogies of constitutional sources. Thus constitutional time, other than in an instrumental sense, and the values of everyman are not necessary or independent aspects of straightforward judicial pragmatism.

In comparison to strict originalist theories, pragmatic theories cast a refreshing light upon the actual exercise of constitutional powers. They also have the considerable merit of pointing to the values of positive analysis and sensitive interpretation of the relevant legislative facts in a case and to the consequences of actual and potential legal rules. At the same time, one wonders about the freedom that is granted by this approach for judges to exercise their own instincts for good results uncabined by any necessary connections to relevant decisions by earlier government officials and unrelated to any theory of everyman's values in representative democracy. With time and everyman discounted or dismissed, are pragmatic judges likely to have
“representative” instincts and preferences for justice? Judges are a professional caste of their own, and perhaps more likely to represent in their instincts, preferences or tastes the interests of property, wealth and government power that they have learned to protect and promote in their careers as successful lawyers and as successful politicians who have obtained judicial appointments. Theories which make time or everyman necessary components of constitutional decisions may be more promising normative theories to guide constitutional law in our representative democracy.

B. Power and Time Theories

There are two categories of normative constitutional theories that attempt to incorporate both power and time in an integrated fashion. One category consists of “common law” theories of constitutional interpretation, theories which modify originalism substantially by granting independent weight to constitutional precedents and the common law tradition of deciding cases by reasoning from precedents as well as from text and Framers’ intent. The second category consists of “complex originalist” theories that attempt in various ways to reconcile the constitutional text and Framers’ intent with the dramatically changing conditions in American history. Both types of theory improve upon the theories of strict originalism and open-ended pragmatism. These theories, in their different ways, allow constitutional law to evolve over time (unlike strict originalism), and they insist upon establishing some kind of necessary connection between contemporary constitutional decisions and the past constitutional decisions of American public officials (unlike straightforward or open-ended pragmatism).

The common law approach to constitutional law has five distinct features. First, judges should concentrate on deciding the specific factual disputes before the court and providing sound reasons for these decisions and be less concerned with establishing, recognizing and maintaining a system of general rules. Narrow case holdings rather than

152. The following summary is drawn from Sunstein, supra note 13, and Strauss, supra note 7.
broader rules constitute the essence of constitutional law in this approach, and each decision in a hard case leaves much room for future decisionmaking in similar situations. Second, reasoning from prior cases emphasizes not only arguments by factual analogies from the "holdings" of prior cases but also arguments from the "principles" in the rationales of prior decisions, or even principles that might have been used to justify a prior decision in a more satisfactory manner. Because any difficult case usually presents competing analogies and principles, however, the reasoning in common law constitutional decisions may be said to be "incompletely theorized,"\textsuperscript{153} or still open to argument, by comparison to the more confident and apparently dispositive type of rationale that is provided by other theories such as strict originalism. Third, the independent weight given to precedents requires an important role for the doctrine of \textit{stare decisis}, which protects at least "principled" prior decisions from overruling even if a prior decision is thought to be a "mistake" as the best interpretation of the text, Framers' intent and precedents.\textsuperscript{154} Fourth, the common law approach does not deny the authority of arguments from text and Framers' intent but treats these arguments more flexibly than strict originalism does. This flexibility is obtained either by following the concept of "moderate originalism," which interprets the text and Framers' intent only by means of general purposes,\textsuperscript{155} or by relying only on originalist ideas that are considered to be wise or have become part of the American constitutional ethos.\textsuperscript{156} Finally, many common law theorists may recognize the power of judges in exceptional cases to rely on pragmatic or moral judgments that in their opinion outweigh the best


\textsuperscript{154} See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 853 (1992) (maintaining \textit{Roe v. Wade}'s holding of a woman's constitutional right to an abortion on the basic ground that "reservations any of us may have in reaffirming the central holding of \textit{Roe} are outweighed by the explication of individual liberty we have given combined with the force of \textit{stare decisis}"); Kissam, supra note 35, at 114-16.

\textsuperscript{155} Brest, supra note 58, at 204-24.

\textsuperscript{156} See Dorf, supra note 69, at 1801-03; see \textit{supra} text accompanying notes 69-70.
argument from constitutional authorities. 157 This move approaches open-ended pragmatism, but common law theory is differentiated by its insistent commitment to precedents, with pragmatic or moral judgments admitted only as a last resort. This is a difference of degree, perhaps, but an important one.

The common law approach to constitutional law is manifest in many constitutional decisions, 158 and this approach’s fit with and ability to explain most constitutional decisions and practices constitute a basic justification for the approach. 159 Two other justifications are also available. As a matter of Framers’ intent, the common law approach is quite probably how the Framers of the constitution expected judges to exercise judicial power, by doing what eighteenth century judges did—deciding common law cases. There is also the pragmatic argument of Cass Sunstein and others that the common law approach has worked tolerably well for America, especially in view of its ability to sustain a dialogue of reasonable disagreements about what the constitution means by focusing on relatively narrow reasoning that leaves continued opportunities for debates and for fashioning new agreements as conditions change. 160

Common law theories of constitutional law are, however, fundamentally conservative. They can capture the values of everyman but only through the happenstance of prior decisions that may be relied on for arguments by analogy, principle and the doctrine of stare decisis. Compare, for example, the Supreme Court’s 1986 decision

157. See, e.g., Strauss, supra note 7, at 900-03.


159. See Strauss, supra note 7, at 888.

160. See SUNSTEIN, supra note 13, at 10-14; Sunstein, supra note 153; Strauss, supra note 7.
in *Bowers v. Hardwick*,\(^{161}\) which upheld application of Georgia's ban on sodomy to homosexuals when the only privacy rights precedents concerned marriage, reproductive rights and families, with the Court's recent decision in *Lawrence v. Texas*\(^{162}\) that overruled *Bowers* and invalidated sodomy statutes. By 2003, the *Lawrence* Court could justify its decision by relying on privacy rights and other precedents that had applied equal protection's anti-caste principle to regulations discriminating against homosexuals,\(^{163}\) had assumed a privacy or liberty right to refuse or withdraw from life-support systems,\(^{164}\) and had reaffirmed on quality of life grounds the right to an abortion.\(^{165}\)

The common law approach also relies heavily on technical arguments from precedents that can fail to provide persuasive public justifications in controversial cases. For example, Justice Blackmun's much-criticized opinion for the Court in *Roe v. Wade*\(^{166}\) seems to rely in critical places upon unconvincing arguments from precedent.\(^{167}\) Justice Scalia's opinion in *Employment Division v. Smith*,\(^{168}\) which relaxed the standard for judicial protection of the right to free exercise of religion and triggered passage of the Religious Freedom Restoration Act\(^{169}\) by overwhelming majorities in both houses of Congress, similarly relies on technical arguments from precedent. Perhaps additional sources and methods of constitutional law and argument are needed to address these weaknesses in common law theory.

Complex originalist theories may be viewed as attempts to improve upon weaknesses in both strict originalism (a fixed constitution, which fails to account for changing social

\(^{161}\) 478 U.S. 186 (1986).

\(^{162}\) 539 U.S. 558 (2003).


\(^{166}\) 410 U.S. 113 (1973).

\(^{167}\) See id. at 158-59 (relying on cases that refuse to recognize the rights of fetuses as persons).


conditions and concepts) and common law theories (inadequate justifications of constitutional principle). These new and innovative theories attempt to integrate power and time in constitutional law by introducing strong concepts of literary, political or philosophical thought into the methods and practice of constitutional interpretation. Although these theories differ significantly among themselves, they share a common commitment to the general idea of originalism as the fundamental source of constitutional law and they bring insightful concepts of interpretation to both the constitutional text and constitutional history.

The most modest of these theories is Lawrence Lessig's concept that the original meaning of text and Framers' intent has to be "translated" from its linguistic and social contexts in the eighteenth and nineteenth centuries into modern linguistic and social contexts if the text and Framers' intent are to be rationally understood and applied to contemporary constitutional issues. Of course, strict originalists and common law theorists admit to a limited kind of translation, especially the use of factual analogies to help apply the constitutional text to modern situations. These theorists, for example, would have no trouble accepting an analogy between ships (which were in the minds of Framers) and trains or airplanes (which were not) in order to uphold modern Congressional regulation of the newer forms of interstate transportation. But Lessig's translation theory has broader implications, for it also takes into account changing concepts in political, social and legal discourse that help one understand and interpret new factual situations. Thus, for example, translation theory can justify expansive interpretations of the commerce power by relying on contemporary concepts and discourse about what constitutes "commerce among the several States" and what constitutes "necessary and proper" laws to implement the regulations of modern interstate commerce, and it can also justify an expansive scope for free speech rights by relying on our expansive modern concepts about "the individual," "politics" and "free speech."

170. See Lessig, Fidelity and Constraint, supra note 19; Lessig, Fidelity in Translation, supra note 19.

171. See, e.g., Lessig, Fidelity and Constraint, supra note 19, at 1369-71.
Bruce Ackerman’s “dualist” theory of constitutional law would integrate power and time by making certain bold interpretations of America’s political and constitutional history. Ackerman divides the politics of law-making into two fundamentally different stages: moments of “constitutional politics,” when “We the People” by the exercise of appropriate procedures are focused and generally agreed upon establishing particular constitutional principles, and the everyday conduct of “normal politics,” when elected representatives adopt laws that are subject to the principles established by constitutional moments. Importantly, Ackerman perceives three co-equal constitutional moments in American history when “We the People” acted by different but analogous extra-legal procedures to establish constitutional principles of different purpose. In Ackerman’s account, the writing of the original constitution (which was written by a constitutional convention organized by the states to propose amendments to the Articles of Confederation) and the Bill of Rights was designed to promote fundamental liberties by means of protecting liberty rights directly, by separating the powers of national and state governments, and by creating the three “co-equal” or “independent” branches of a new national government. The Civil War Amendments were adopted (again by extra-legal procedures, since Southern States were coerced into approving the Thirteenth and Fourteenth Amendments) to protect the fundamental right of equality. Then, in the 1930s, the election of 1936 resolved the crisis of a basic conflict between President Roosevelt and Congress, on the one hand, and the New Deal-limiting Supreme Court on the other, by establishing widespread popular approval of the modern administrative state. In this dualist view of the constitution and constitutional moments, the basic task of the Supreme Court is to preserve the fundamental principles established by these moments and, in difficult cases, to "synthesize" or "reconcile" conflicts between the different principles of the three moments. Thus, Ackerman explains and justifies Brown v. Board of Education as an "intergenerational synthesis" of the second constitutional moment, the principle of equality, with the third constitu-

172. See generally ACKERMAN, supra note 19.
tional moment, the principle of the modern administrative state as manifest in public schools. Similarly, he explains and justifies Griswold v. Connecticut as the synthesis of the first constitutional moment, the principle of liberty, with the third constitutional moment, the principle of the administrative state. These concepts in Ackerman's dualist theory are only a framework for interpretation, not a recipe, and Ackerman has promised us more specific details about how such interpretations should be done in the forthcoming third volume of his trilogy.

Akhil Amar more recently has advanced a "holistic" approach to interpreting the constitutional text and its history. Amar's theory appears to remain closer to specific terms of the constitutional text and specific constitutional history than Ackerman's, but Amar's theory too incorporates insightful interpretive methods. Amar's "intratextualism" is a method that looks closely and imaginatively at any other provisions in the constitutional text that might provide possible assistance to determining the meaning of a particular constitutional term. More significantly, Amar interprets the eighteenth century Bill of Rights through the prism of the Fourteenth Amendment, intratextualism and the Framers' intent underlying the Fourteenth Amendment. He argues that the Bill of Rights was originally intended to promote federalism (for example, by keeping Congress from regulating speech or religion) and popular collective rights (for example, the right to assemble for political protest), but by the 1860s the Bill of Rights was understood to protect personal rights against majorities as well and intended to define individual rights protected against states by the Fourteenth Amendment. On this account, expansive "originalist" readings of textual provisions like the speech and religion clauses of the First Amendment

174. See ACKERMAN, supra note 19, at 142-50.
175. 381 U.S. 479 (1965).
176. ACKERMAN, supra note 19, at 150-58.
179. See AMAR, supra note 19, at 163-283.
become possible.\footnote{See id. at 231-57.} Amar's holistic interpretations produce specific results that may strike some readers as old-fashioned, such as his preference for an individual right to guns under the Second Amendment.\footnote{See id. at 257-66; Akhil Reed Amar, The Second Amendment: A Case Study in Constitutional Interpretation, 2001 Utah L. Rev. 889, 896-900.} But in general Amar's theory modifies and expands eighteenth and nineteenth century meanings to justify a thoroughly modern constitutional law, especially by his argument that the Fourteenth Amendment transformed the basic nature of constitutional rights from the eighteenth century idea of popular rights (or rights of the majority) against arbitrary government actions into the more modern idea of individual rights against unreasonable exercises of the majority will.

A fourth complex originalist theory is Jed Rubenfeld's, which is presented in his book, *Freedom and Time*.\footnote{RUBENFELD, supra note 2.} Much of Rubenfeld's argument is devoted to establishing the proposition that a stable, productive, flourishing constitutional democracy requires a commitment to interpreting and using "the people's" inheritance of a written constitution that necessarily exists (in any large representative democracy) and must be adapted to changing conditions.\footnote{See id. at 91-195.} Given the United States' reliance upon the power of judicial review as a major part of this commitment, Rubenfeld then outlines a "paradigm method" of constitutional interpretation by which courts should reason from the principles of the paradigm situations that provisions in the constitutional text were designed to address. For example, Rubenfeld argues that *Brown v. Board of Education*\footnote{347 U.S. 483 (1954).} and, more tentatively, the constitutionality of affirmative action programs are justified by reasoning from the core purpose of the Fourteenth Amendment in the 1860s: to redress instances of public discrimination against African-Americans by authorizing Congress to pass civil rights laws.\footnote{RUBENFELD, supra note 2, at 178-220.} Rubenfeld never clarifies, however, why courts may not also rely upon arguments from the general language in
constitutional provisions, the "semantic intentions" of the Framers as it were, or upon arguments from precedents that were not based on paradigm situations, or upon arguments from the American constitutional ethos. Such arguments also seem to be part of the American people's inheritance of a written constitution that requires interpretation over time. In essence, Rubenfeld provides a powerful argument for the commitment to constitutional time and for adjusting constitutional law over time, but he fails to distinguish his paradigm method from other methods of interpretation or to explain why the paradigm method should be the exclusive or primary method of constitutional interpretation in hard cases.\textsuperscript{186}

Common law and complex originalist theories are thus fully committed to time in their different ways, although complex originalism in general appears to be more flexible, less technical and less conservative than the common law approach. These theories provide for constitutional interpretations that are guided by constitutional authority but capable of making adjustments to modern conditions. Pragmatically speaking, we might say that both types of theory provide useful methods of constitutional interpretation. Neither type of theory, however, is committed to the values and interests of all persons in a democracy except as particular constitutional authorities and methods of interpretation happen to provide such commitment. We turn, then, to consider constitutional theories that incorporate an overt commitment to everyman.

C. Power and Everyman Theories

Several recent theories of constitutional law respect constitutional powers and at the same time emphasize the constitutional role of courts in facilitating democracy by recognizing the individual rights of all persons to certain liberties and equal treatment, especially the rights of persons who tend to be losers in the majoritarian processes of voting for and by elected officials. These theories display different methods and justifications but they also share

common features. Most significantly, each of the theories is based on a broad conception of democracy, that a healthy democratic government should be a government for all persons and not merely for the winners in voting for elected officials and the winners in the legislative process. At the same time, these theories are not committed to the value of constitutional time. These theories make variable use of the constitutional text, Framers’ intent and precedents as guidelines or possible sources for decisions or justifications. But in each theory any argument from constitutional authority may be overcome by political or moral judgments that promote everyman.

Political scientist Terri Peretti and law professor Louis Seidman have recently advanced theories of constitutional law that might be called theories of “liberal pragmatism.” Like other pragmatic theorists, Peretti and Seidman are skeptical of the value or binding quality of arguments from constitutional authority, and they perceive constitutional decision-making to be essentially a political task that is or should be informed by the political judgment of judges. Unlike straightforward pragmatists, however, Peretti and Seidman argue that the proper role of constitutional courts in a democracy is to offer losers in the majoritarian process opportunities to make persuasive arguments to the courts that may simply outweigh the brute results of majority voting that have imposed unfair burdens on the losers. These theorists, in their different ways, call for judges to be (or describe them as) pragmatic decision-makers who can improve the chances to make constitu-

187. Needless to say, these two groups of winners are not identical. Voters don’t have to have policy preferences. Moreover, the legislative process may favor small constituencies with particularly intense desires, say, the gun lobby or anti-abortion groups, or special interests with the wealth to support candidates and buy access to legislators, or their own particular interests in getting re-elected. See, e.g., Shapiro, supra note 20, at 30-42 (discussing the ways in which public choice theory has demonstrated deficiencies in the ability of legislatures to represent the majority will). In general, the legislative process today might be said to favor “powerful interest groups whose constituencies are the major corporations and wealthiest Americans.” Sheldon Wolin, Inverted Totalitarianism, The Nation, May 19, 2003, at 13.

188. PERETTI, supra note 31.

189. See, e.g., SEIDMAN, supra note 8.

190. See, e.g., PERETTI, supra note 31, at 80-160; SEIDMAN, supra note 8.
Both Peretti and Seidman discount the role of interpretation in constitutional law and they do not prescribe special methods for judicial decisionmaking. Peretti counsels paying careful attention to factual situations and the possible consequences of particular rules or, in other words, exercising wise political judgment, and she relies on the political selection of judges to adequately ensure their political wisdom. Seidman has less faith in the political wisdom or virtues of American judges but argues nonetheless that the structure and "unsettling" quality of constitutional arguments provide opportunities to make imaginative constitutional arguments on behalf of the losers in the majoritarian process. Both theories have the considerable merit of fitting or providing loosely constructed justifications for the many inconsistencies and contingencies that seem to inform constitutional law.

But one wonders why a judicial selection process that is driven by the will and interests of political calculations by elected officials would ever be likely to produce pragmatic judges with wisdom sufficient to assess the fairness to all individuals of majoritarian results. Perhaps judges instead should obtain guidance from the decisions of others in comparable situations as represented by the constitutional sources of text, Framers' intent and precedent—to ensure at least a broader background on deliberations about individ-

191. See PERETTI, supra note 31, at 189-225; SEIDMAN, supra note 8, at 54-86. Neither Peretti nor Seidman, it should be noted, argue for an absolute preference for the losers in the majoritarian process; they argue rather for an appreciation of an open-ended judicial decisionmaking process that will provide opportunities for the losers to make persuasive arguments against the majority's position. See also ROBERT JUSTIN LIPKIN, CONSTITUTIONAL REVOLUTIONS: PRAGMATISM AND THE ROLE OF JUDICIAL REVIEW IN AMERICAN CONSTITUTIONALISM (2000) (arguing for a theory of "paradigm shifts" in constitutional decisionmaking by the courts that in his view tends to respect the interests and rights of those who are outsiders or excluded from current majoritarian processes).

192. See PERETTI, supra note 31, at 133-60.
193. See id. at 80-132.
194. See SEIDMAN, supra note 8, at 87.
195. See id. at 86-172.
196. See supra text accompanying notes 29-39.
ual rights. To be sure, a political judgment represents a form of judging, but is this what American judges are expected to deliver either by the politicians who select them or by the people they represent? Liberal pragmatism may fit and seem to justify many controversial results in constitutional law, but this kind of constitutional theory neither fits with nor justifies our traditional constitutional methods or our traditional political expectations about what judges are supposed to do.

Michael Perry and, more recently, Christopher Eisgruber have advanced theories of constitutional decision-making that depend upon the moral judgments or convictions of judges rather than their political or legal judgments. Since moral reasoning and judgment focus on the rights of persons, Perry’s and Eisgruber’s theories are clearly aimed at promoting the values of everyman in constitutional law. Both theories also take account of constitutional power. Perry reserves moral judgments for issues of individual rights, since he encourages courts to defer to the policy judgments of one or more elected branches of government on most structural issues that concern the allocation of power between different branches of government. Eisgruber distinguishes the relative complexity of moral judgments that are involved in structural issues and issues of economic regulation from the more straightforward or “direct” moral questions of individual rights, and on the former issues courts should in his view generally (but not always) defer to reasonable judgments by the elected branches. On issues of human rights, however, Eisgruber argues that courts are the better government institution to consider and decide moral/constitutional issues. He also argues that the courts, because of the political selection of judges, are likely to decide these issues in ways that will

197. See e.g., PERRY, supra note 16.
198. See e.g., EISGRUBER, supra note 3.
199. See generally PERRY, supra note 16, at 37-60 (arguing that “non-interpretive review” is not justified in federalism and separation-of-powers cases except when the federal executive and legislature are in conflict).
200. See EISGRUBER, supra note 3, at 169-74.
201. See id. at 161-204.
202. See id. at 109-61.
have or at least ultimately will generate popular appeal. Like Peretti then, Eisgruber relies on the judicial selection process to ensure that judges will exercise their moral convictions in ways that are likely to satisfy the American public that constitutional judgments are legitimate.

Both Perry and Eisgruber rely to an extent on the presence of abstract moral concepts in the constitutional text to justify their theories of moral decision-making in rights cases. In addition, both would allow judges to consider the constitutional sources of text, Framers' intent, and precedent for guidance in making moral judgments about individual rights. But in each theory, judges are free to disregard the results supported by constitutional authorities if in their considered moral judgment the law should be otherwise. Neither theorist or theory is particularly committed to the value of constitutional time.

The most intriguing and problematic aspects of these theories, in my view, lie in the justifications that Perry and Eisgruber provide for moral decisionmaking by judges in difficult constitutional cases of individual or human rights. Perry argues that the American people are committed to a concept of "moral evolution," a concept that involves resolving fundamental moral-political problems by moral reasoning and prophecy rather than moral conventions. Perry also argues, in the alternative, that the American people are at least committed to the possibility of discovering "the truth" about moral-political problems even if they are not committed to moral evolution. In Perry's view, the courts are the government institution best designed to carry out either of these functions because of their deliberative process, their focus on adjudicative facts, and their application of standards to resolve disputes. Eisgruber, in contrast, argues from a broad conception of democracy, that a democratic government should display "impartiality" to all persons in the sense that government must take seriously the interests and values of all persons, not just the winners in the majoritarian process. He then argues that

203. See id. at 64-66.
204. See id. at 109-35; Perry, supra note 16, at 91-165.
205. See id. at 97-102.
courts are the best institution to promote this impartiality by making moral judgments about the specific meaning of the abstract rights provisions in the constitutional text.\textsuperscript{207} But similar to Perry, Eisgruber grounds his argument in a claim that the American people recognize and value the distinction between decisions of policy or expediency, which usually are better made by the elected branches of government, and decisions of moral principle, which can be made better by the courts in individual rights cases.\textsuperscript{208} He also claims that American judges deploying their own moral convictions are likely to arrive at judgments that will ultimately have popular appeal.\textsuperscript{209}

Whether Perry’s or Eisgruber’s claims about the American people’s expectations and understandings are sufficient to justify moral decision-making by judges unconstrained by constitutional authorities, or time, is an interesting but difficult question. As normative claims about what the American people and constitutional law should be, these claims may be attractive. But they reach well beyond our traditional sources of constitutional justification and, more importantly, they seem to ignore more specific popular expectations about judges – that the judge’s task is to decide cases in accordance with “legal standards” or “the law.” As empirical claims about what the American people may expect or accept about constitutional law, these claims are controversial at best and unpersuasive at worst. While public controversies over prayer in the public schools and abortion rights might illustrate Michael Perry’s claim of American desires for moral evolution, or for moral truth, do not the sharp moral divisions about these and similar issues and the lack of moral desire about most political issues in contemporary America suggest instead popular acceptance of moral relativism? Similarly, public resistance to the Supreme Court’s prayer and abortion decisions would appear to contradict Christopher Eisgruber’s claim that the public is likely to accept moral judgments by the Supreme Court. Much of this resistance also argues for the exercise of legislative powers rather than judicial resolution, thus

\textsuperscript{207} See id. at 136-67.
\textsuperscript{208} See id. at 53.
\textsuperscript{209} See id. at 64-66.
seeming to contradict Eisgruber's claim that the American
people accept or cherish the distinction between decisions of
policy and decisions of moral principle.

Attractive as liberal pragmatic and moral theories may
be, perhaps constitutional judging would benefit from the
added dimension of a full commitment to constitutional
time. This value represents an important part of our inheri-
tance, and managed appropriately our constitutional
history can be a rich source of methods and insights into the
values of power and everyman. We turn then to consider
three theories that are committed to power, time and
everyman.

D. Three-Dimensional Theories

In the past 25 years, three theories of constitutional law
have emerged that can fairly be characterized as committed
to the three basic constitutional values. There are differ-
ences between these theories, particularly in their different
perspectives about the point of constitutional law, their
balancing of the basic values, and the results they support
in particular cases. But each theory offers rich insights into
the nature of American constitutional law, and each is
relatively comprehensive in terms of its interdependent
commitments to power, time, and everyman.

John Hart Ely's representation-reinforcing theory of
judicial review justifies much of modern constitutional law
while attempting to limit judicial power to ensure that its
exercise against the power of elected branches is consistent
with a majoritarian concept of democracy.210 Ely argues
that judicial interpretation of the abstract constitutional
rights provisions should be guided by the idea that the
constitutional role of the courts in a democracy is to protect
"process writ large" against arbitrary and oppressive acts
by the elected branches of government. This role includes
correcting flaws in the "representational process," when
elected representatives restrict speech or the political proc-
есс to protect their own interests in reelection and when
majorities of voters and their representatives effectively or
permanently exclude the interests of outsiders or, as Chief

210. See, e.g., Ely, supra note 15.
Justice Stone put it, when "prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." 211 In Ely's view, the special role of the judiciary in interpreting constitutional authorities is committed to only certain values of everyman, to the values for all persons of an ideal majoritarian process. Ely's theory, however, does not support the more robust commitment to the values of everyman that are represented by the recognition of "substantive" or "fundamental" rights of privacy under the Due Process clauses, 212 which have been applied to protect families, 213 reproductive rights, 214 and, most recently, sexual orientation 215 from restrictive majoritarian legislation. This kind of constitutional decisionmaking, in Ely's view, constitutes the imposition of personal judicial views on the majority will and is anti-democratic.

Ely's theory is also committed to the value of constitutional time in two particular ways. First, he relies on certain historical developments such as the emergence and growth of political parties, the gradual expansion of the franchise including adoption of the representation-expanding constitutional amendments (the Fifteenth, Seventeenth, Nineteenth, and Twenty-Sixth Amendments), and many leading decisions of the Supreme Court to justify his theory that the basic point of constitutional law has been, and should be, to perfect the representational process. 216

Second, a primary motivation for Ely's theory is to provide a sound constitutional justification for controversial Warren Court interpretations of the Equal Protection clause such as the one-person, one-vote decision in Reynolds v. Sims 217 and the application of heightened or strict judi-

212. See Ely, supra note 15, at 43-72.
216. See Ely, supra note 15, at 73-101. See also id. at 101-79.
cial scrutiny to legislation that disadvantages racial minorities.\textsuperscript{218} But Ely's theory does not embrace or explain all significant constitutional precedents, since it would allow majority voting for and by elected officials to restrict or prohibit the exercise of the substantive privacy rights of reproduction, familial development and sexual orientation that have been recognized as Due Process rights.\textsuperscript{219}

Philip Bobbitt makes no attempt to ground his practice-based theory of constitutional law in some underlying foundational theory of the constitution or democracy.\textsuperscript{220} Instead, he describes six modes or methods of constitutional argument that he perceives in constitutional law,\textsuperscript{221} and several "constitutional functions" that the different modes serve when they are employed in Supreme Court argument.\textsuperscript{222} Judges choose their arguments to justify results in particular cases, but these choices will reflect or be guided by the individual styles of judges and the constitutional functions at stake in particular cases.\textsuperscript{223} Bobbitt's basic claim is that this complex matrix of methods and functions has become an important and accepted practice that legitimates itself and provides diverse grounds for justifying the practice of judicial review.\textsuperscript{224}

Considerations of public and private power are embedded in several, if not all, of Bobbitt's six methods. The method of history or Framers' intent respects the supramajoritarian power of the Framers of the constitutional text.\textsuperscript{225} The doctrinal method, of constructing and applying precedential rules,\textsuperscript{226} and the textual method, by which judges can sweep away precedents by giving fresh, contem-
porary meaning to words in the constitutional text,\textsuperscript{227} are both exercises of the judicial power to make ultimate interpretations of the constitution. The structural method of inferring values from the different institutional structures created by the constitution such as the different branches of government and national and state governments invites courts to consider the relative balance of power between different government agencies.\textsuperscript{228} So does the prudential method, which requires courts to carefully balance the circumstances of and competing values involved in particular situations.\textsuperscript{229} Finally, the latter two methods and the "ethical method," or argument from the American "constitutional ethos,"\textsuperscript{230} each in their different ways invite courts to consider relative balances of power between government and private actors.

Bobbitt's methods in the aggregate are also committed to the value of constitutional time. The variable use of the six methods of argument, where none is essentially privileged over the others, can explain and justify many complicated and seemingly inconsistent precedents that the Supreme Court has decided over time. In addition, the doctrinal, historical and ethical modes of argument are clearly arguments from time, or constitutional history.

It is with regard to the values of everyman that Bobbitt's theory may seem to fall somewhat short, especially because Bobbitt argues against the use of moral arguments in constitutional law.\textsuperscript{231} But Bobbitt views the concept of limited government, which was established for the national government by the original constitution and Bill of Rights, as applicable to the states by the Fourteenth Amendment and therefore as central to the development of arguments from the American constitutional ethos.\textsuperscript{232} This powerful claim in Bobbitt's hands makes the ethical mode of argument capable of justifying many personal rights of everyman against majoritarian restrictions such as the

\textsuperscript{227} See id. at 25-38.
\textsuperscript{228} See id. at 72-92.
\textsuperscript{229} See id. at 59-73.
\textsuperscript{230} See id. at 93-119.
\textsuperscript{231} See id. at 94-95, 137-41.
\textsuperscript{232} See id. at 147-56.
rights to reproduction and familial development and the establishment clause right to the separation of religion and public schools.

Bobbitt does not provide the same kind of detailed map for constitutional functions as for constitutional arguments. But his discussion of constitutional functions is sufficient to indicate that the values of power, time and everyman are present as well in the functions that help guide constitutional argument. The primary function of judicial review is "making constitutional doctrine, and deciding cases by means of those doctrines," and this function is served by all six methods of constitutional argument, which in the aggregate implicate the three fundamental constitutional values. But in some cases, Bobbitt argues, the courts are less concerned with making and applying doctrine and more concerned with serving other constitutional functions.

These functions include "legitimating" particular exercises of government power, "checking" abusive uses of government power, "referring" non-justiciable issues to other branches of government, "cueing" other branches of government to take seriously their constitutional obligations as, for example, might be said of some of the Supreme Court's federalism decisions that have invalidated Congressional acts without establishing clear doctrinal guidelines, and finally, the "expressive function" of

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233. See id. at 93-167 (developing ethical arguments to support the Supreme Court's decisions in cases like Griswold v. Connecticut, Roe v. Wade, and Moore v. City of East Cleveland).

234. See id. at 196-219.

235. Id. at 176.

236. See id. at 176-77, 190-95.

237. This function may be foremost when the Court feels a need to legitimate the national government's exercise of the war and foreign affairs powers. See, e.g., Dames & Moore v. Regan, 453 U.S. 654 (1981); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).


characterizing the kind of society and its rules that America is or is becoming. Serving these other functions, of course, will involve significant exercise of judicial power as well as respect for other government powers. Moreover, to the extent that the expressive function is often well-served by ethical arguments, the values of everyman are especially implicated by the expressive function as well as the doctrinal function.

The variable use of six different methods of argument, including the prudential method, may suggest that Bobbitt’s theory is close to pragmatism and that a Bobbittian judge would be or could be free to operate like an open-ended or liberal pragmatist. On the other hand, a judge who takes seriously all the possibilities in Bobbitt’s theory of different methods and constitutional functions would be more constrained than pragmatic theory prescribes and would often be committed to arguments from authorities that involve time and everyman. Also, Bobbitt’s account of the prudential mode, as practiced by the Supreme Court and as argued for by Alexander Bickel, emphasizes its negative or passive use in justifying the refusal to decide a “non-justiciable” cases. If Bobbitt is a pragmatist, his theory is a complex and unique one.

Ronald Dworkin’s theory of constitutional “integrity” or “the moral reading” of the constitution is also a three-dimensional theory. Dworkin’s theory at times has been misunderstood or mischaracterized as a kind of “foundational” theory that privileges liberalism over democracy or as a theory that privileges unencumbered reasoning from moral principles over arguments that are grounded in constitutional authorities. This type of criticism usually

U.S. 598 (2000), as similar instances of the cueing function in that they certainly warn Congress to respect the federal allocation of powers while providing rather fuzzy doctrinal guidelines for future decisions.

241. See BOBBITT, supra note 6, at 177, 184-89, 209-23.

242. Cf. id. at 223 (“I would not like to tie ethical argument and the expressive function too closely.”).

243. See id. at 59-73.

244. See DWORKIN, LAW’S EMPIRE, supra note 17, at 176-275, 355-99.

245. See DWORKIN, FREEDOM’S LAW, supra note 17, at 1-38.

246. See, e.g., ACKERMAN, supra note 19, at 11-12; ELY, supra note 15, at 58;
seems to be aimed at only a part of Dworkin's work on constitutional law, and fails to appreciate the continuity and interrelationships between different statements of his theory that have appeared over the past 25 years.\textsuperscript{247} When Dworkin's oeuvre is considered as a whole,\textsuperscript{248} his theory may be seen to constitute a nuanced integration of constitutional authorities and moral principles or, in other words, a very thorough integration of power, time, and everyman.

Dworkin begins by taking seriously the abstract language in the phrases of the constitutional text that usually frame controversial constitutional litigation.\textsuperscript{249} This language constitutes the foundational rules for American government and also the "semantic intentions" of the Framers, and this language embodies general moral principles such as the First Amendment prohibitions against government abridging speech or the free exercise of religion and the Fourteenth Amendment prohibitions against government denying individuals due process or equal protection. These principles, however, are relatively abstract "concepts" of appropriate relationships between government and individuals and they generate more specific or concrete "competing conceptions:" some kind of interpretation or choice between the competing conceptions is necessary to apply the abstract phrases of constitutional text to particular cases.\textsuperscript{250} For instance, does the concept "equal

\begin{footnotesize}
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\item \textsuperscript{247} One senses that this kind of criticism of Ronald Dworkin's constitutional theory is often motivated by some insistent eagerness in the critic to make the case for his preferred theory of constitutional law by dramatically distancing or separating his own theory from Dworkin's. See, e.g., sources cited supra note 246. This, of course, may not be unsurprising when a scholar's desire to advocate legal change is combined, as it often is, with the desire for recognition of the originality of one's work—a situation that plagues many of us in legal scholarship.
\item \textsuperscript{248} See DWORKIN, LAW'S EMPIRE, supra note 17; DWORKIN, FREEDOM'S LAW, supra note 17; Dworkin, Hard Cases, supra note 60; Dworkin, The Arduous Virtue of Fidelity, supra note 54.
\item \textsuperscript{249} See DWORKIN, FREEDOM'S LAW, supra note 17, at 7-12; Dworkin, Hard Cases, supra note 60, at 1082-85; Dworkin, The Arduous Virtue of Fidelity, supra note 54, at 1252-56.
\item \textsuperscript{250} See DWORKIN, LAW'S EMPIRE, supra note 17, at 70-72, 90-96; Dworkin, Hard Cases, supra note 60, at 1070, 1075-77.
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protection of the laws” mean the more concrete conception of an anti-caste principle or a color-blind principle in the case of affirmative action?

In Dworkin's view, the interpretation of abstract language like “equal protection of the laws” must necessarily be a “constructive interpretation” rather than the decoding of an objective or consensus truth as is the case with the Morse Code. The basic procedure for constructive interpretation of law is the articulation of moral principles that are embedded in the constitutional authorities of text, history and precedent, that establish a coherence or “integrity” among these authorities, and that make constitutional law as it appears in the sources “the best it can be.”

Constitutional interpretation, in other words, relies on embedded moral principles that satisfy two criteria: a standard of satisfactory “fit” with existing constitutional sources or authorities, and a standard of “justification” that makes constitutional law the best it can be. Of course, in difficult cases advocates will often claim that different moral principles are embedded in the constitutional authorities and would serve to make constitutional law “the best it can be.” Constitutional interpretation is thus “pervasively contestable,” and in hard cases a judge must come to her own decision about which principles provide the best fit and best justification for the decision. She will be aided in this decision, however, by the relative “weights” that society and the legal profession have given to the competing sets of principles in previous instances of adjudication and legislation. So even in the deepest throes of moral choice, the Dworkinian judge, Hercules or Hercula, can make connections to the value of time as well as everyman.

This theory of constitutional integrity or moral reading clearly recognizes power. It takes seriously the power of the Framers, who established the abstract language in the

251. See Dworkin, Law's Empire, supra note 17, at 49-53. See also id. at 45-86.
252. See id. at 225-58, 410-13; Dworkin, Hard Cases, supra note 60.
254. Id. at 411.
constitutional text, and it recognizes the power of both the judiciary and the elected branches of government, for if a claim of constitutional right against the government cannot be established by embedded principles that fit and justify constitutional sources, the power of the majority should prevail.256 This theory’s respect for the fit of moral principles with precedents and other constitutional sources commits the theory to time as well, and its reliance upon embedded moral principles clearly serves the values of everyman. Moreover, Dworkin has emphasized in his recent writing that his theory of constitutional integrity encompasses both “conservative” and “liberal” moral readings of constitutional sources.257 For example, at the time of Roe v. Wade,258 conservative jurists might plausibly have perceived the privacy principle of Griswold v. Connecticut259 to protect persons from government interventions only in private places, under a Fourth Amendment reading of Griswold, and not to protect the intimate decisions of women concerning reproduction as the Roe majority did.260 Or, in affirmative action cases, conservatives might perceive the best embedded moral principle of equal protection to be a requirement of “color-blind” government decisions, which would ban most or all affirmative action programs, while liberals perceive the best embedded principle to be the anti-caste principle that proscribes regulations which disadvantage racial minorities but would allow the constitutionality of genuine affirmative action programs.261

One may wonder whether there are many practical differences between Philip Bobbitt’s practice-based theory and Ronald Dworkin’s theory of constitutional integrity in view of the relatively comprehensive scope of the two theories and each theory’s apparent ability to fit, explain and

256. See Dworkin, Hard Cases, supra note 60, at 1061.
257. See DWORKIN, FREEDOM’S LAW, supra note 17, at 2-3, 7-8, 37-38.
259. 381 U.S. 479 (1965).
261. See, e.g., DWORKIN, LAW’S EMPIRE, supra note 17, at 379-97; supra text accompanying notes 59-67.
justify most leading constitutional precedents. Indeed, Bobbitt's methods might be viewed as specific pathways to follow in the search for the embedded moral principles that best fit constitutional authorities and best justify constitutional decisions in Dworkin's theory.

Bobbitt nonetheless goes to some length to distinguish his mode of "ethical argument" from "moral arguments," and he argues against the latter kind of argument as unlawerly and non-objective.262 In addition, Bobbitt's theory on its face appears to be more eclectic and more open to pragmatic or prudential arguments than Dworkin's theory is. In the end, however, the major difference between these theories may be one of attitude, nuance and general perspective. Bobbitt's theory appears more "realist" or "lawyer-like" in its emphasis on trying to describe legal practices as they really are.263 Dworkin's theory seems more "idealist" or "philosophical" in its emphasis on justifying constitutional law as the best it can be and providing a philosophical justification for what judges do rather than describing the literal performance of judges.264 While differences in attitude, nuance and perspective may not dictate different results in many cases, they still may be of significance in affecting judicial choices in some important decisions. The constitutional values of time and everyman are firmly embodied in Dworkin's concepts of embedded moral principles and constitutional integrity, but these values are central to only a few of Bobbitt's modes of argument (time in doctrinal, historical, and ethical arguments, and everyman in ethical argument).265. This difference could lead judges working with Bobbitt's theory to slight the values of time or everyman in particular cases when they consider themselves free to follow one of the other modes of constitutional argument.

262. See Bobbitt, supra note 6, at 94-95, 137-41.

263. Interestingly, Philip Bobbitt's new book on international relations, The Shield of Achilles, is grounded in the "realist" or "Machiavellian" school of political science and international relations. See Philip Bobbitt, The Shield of Achilles: War, Peace, and the Course of History (2002).

264. See Dworkin, Hard Cases, supra note 60, at 1058-60, 1063-65.

265. See supra text accompanying notes 225-34.
VI. CHOOSING A CONSTITUTIONAL THEORY

This section has two purposes. The first is to clarify some relationships between different constitutional theories and different conceptions of the rule of law and democracy. The second is to offer reasons for choosing a three-dimensional theory as the best theory of constitutional law. Readers, of course, should be alert to the possibility that my interest in advocating a particular type of constitutional theory may taint my prior analysis of the relationships between different theories, democracy, and the rule of law.

A. Clarifications

In general, the power theories of constitutional law rest on relatively narrow conceptions of the rule of law and democracy. For strict originalist theories, which attempt to integrate the power of the Framers with contemporary governmental power, the idea of "the rule of law" consists of relatively clear, specific and fixed rules that allegedly can provide clarity and stability in constitutional law. Such rules are important because they would, on the account of the strict originalists, impede or prohibit judicial value choices in constitutional law and leave maximum discretion to the elected branches of government to pursue majoritarian policies. For strict originalists, then, the idea of democracy is closely associated with majority voting for and by elected representatives. Individuals only have rights against the majority will of the present government if they can find support for these rights "clearly" in the eighteenth and nineteenth century meanings of particular constitutional provisions.

Open-ended pragmatic theories of constitutional law appear on their face to grant more discretionary power to judges, but these theories too rest on relatively narrow conceptions of the rule of law and democracy. In the pragmatic perspective, any rule of law concern is satisfied by resolving constitutional disputes by means of the wisdom or prudence of politically-selected, law-trained judges who

266. See supra text accompanying notes 119-43.
267. See supra text accompanying notes 144-51.
presumably should, as a result of their experiences, have respect for (pragmatically) following rules and precedents in most cases as well as for the power of the elected branches of government.\textsuperscript{268} The conception of democracy in open-ended pragmatic theories is thus largely majoritarian in nature, although it includes assisting the elected branches of government by the wise judgments and power of politically-selected legal experts.

Two-dimensional theories of constitutional law, those of power and time or power and everyman, rest on more complex conceptions of the rule of law and democracy, which have something of an intermediate scope by comparison to other theories. Common law and complex originalist theories, which attempt to integrate the constitutional values of power and time, recognize a broader power of judges to impose constitutional constraints on elected branches of government as long as judges wield their expertise in interpreting constitutional materials.\textsuperscript{269} In these theories, the rule of law is less definite, more committed to decisions of the prior generations of the American people, and more flexible with regard to current social conditions than strict originalism. The commitment of common law and complex originalist theories to the decisions of prior generations of the American people distinguishes these theories from open-ended pragmatism as well. The underlying conceptions of democracy embodied in these theories are similarly richer, more historical and more inclined to recognize strong individual rights against government than the theories of strict originalism and open-ended pragmatism.

The two-dimensional theories that integrate power and everyman, by comparison, discount the interpretive expertise of judges and would replace this with political or moral judgments by politically-selected judges that promote the values of all persons in balance with the purportedly majoritarian decisions of elected officials.\textsuperscript{270} This makes for a rule of law notion that is similar that of open-ended pragmatism: the rule of law consists of resolving constitui-

\textsuperscript{268} See, e.g., Farber, supra note 12, at 1337-38.
\textsuperscript{269} See supra text accompanying notes 152-86.
\textsuperscript{270} See supra text accompanying notes 187-209.
tional disputes by relying on politically-selected judges as experts—although in this case judges become experts in the values of everyman rather than empirical studies and policy. These theories are also based on rich, complex conceptions of democracy, for they point towards representing the values of everyman as an essential feature of democratic government. They would do this by means of wise political judgments by politically-selected judges in liberal pragmatic theories, or candid moral judgments by politically-selected judges in the moral theories of constitutional decisionmaking.

The three-dimensional theories of Ely, Bobbitt and Dworkin that integrate power, time and everyman rest on the broadest conceptions of the rule of law and democracy. The complexity of integrating these fundamental values of constitutional law means that to many observers or judges such a process is likely to produce in American constitutional law more indefiniteness than is tolerable, or more demands for “Herculean” judgments than is possible. But why is indefiniteness about predictions of how difficult constitutional cases will be decided so intolerable? Constitutional law is not contract law in the sense of a system of rules upon which private decision-makers frequently rely, and while government efficiency is a value, so are the values of everyman as recognized in American history. In addition, three dimensional theories may be viewed as philosophical justifications for what judges in fact accomplish by cruder or more practical measures, such as relying on their instincts together with the conventional methods of legal interpretation. Furthermore, three-dimensional theories are grounded in a relatively comprehensive conception of American democracy: that democracy consists not only of majoritarian decisions by elected officials but also of the individual rights of everyman as these rights have been shaped over the course of American history by constitu-

271. See, e.g., PERETTI, supra note 31; SEIDMAN, supra note 8.
272. See, e.g., EISGRUBER, supra note 3; PERRY, supra note 16.
273. See supra text accompanying notes 210-65.
274. See Dworkin, Hard Cases, supra note 60, at 1083, 1083-1101 (describing how a “philosophical judge” of “superhuman skill, learning, patience and acumen” might construct his or her theories of legislative purpose and legal principles).
tional developments, constitutional precedents and our constitutional ethos. These considerations suggest that the rich, complex conceptions of democracy and rule of law in which three-dimensional theories are grounded may make these theories the most attractive.

B. Towards Three-Dimensional Theory

There are three reasons for choosing a three-dimensional theory, especially a theory like Bobbitt's or Dworkin's, as a preferred theory of constitutional law. First, such a theory would encompass the three attractive fundamental constitutional values: the need to balance different kinds of power that exist in our complex society, the need to take account of our constitutional inheritance from prior generations of Americans and public officials, and the need to take account of the values and interests of all persons in the context of majoritarian decision-making by legislatures and executive officials.275 Second, three-dimensional theories, because of their relatively comprehensive view of constitutional decision-making, promise to provide the best fit of any constitutional theory with existing constitutional law and practices, and this should be an attractive feature to any practicing judge or lawyer. Third, if judges are to check the excesses of elected officials, as called for by American constitutional democracy, obligating judges to rely upon the values embedded in constitutional authorities (the value of time) and embedded values that have moral qualities that serve the rights of all persons (the value of everyman) would appear to be the best way to restrain judges from imposing their own values upon elected officials. As we have seen, one and two-dimensional theories grant various kinds of discretion to judges that allow considerable room for judges to rely on their own values, expressly or tacitly, to limit the values expressed by the actions of elected officials.276 But obligating judges to concentrate on both the values of everyman and the values of constitutional time would seem to be good device for displacing any judicial concern with personal values. In summary, three-dimensional constitutional theories pro-

275. See supra Parts I-III.
276. See supra Part V.A-C.
mote good substantive values, the value of fit, and certain procedural qualities that should make them a preferred type of theory.

Currently, the best candidates for a three-dimensional theory of constitutional law would appear to be those of John Hart Ely, Philip Bobbitt, and Ronald Dworkin. As I have suggested, Ely’s theory is less comprehensive in two related ways: it denies certain values of everyman and thus has only a limited fit with modern constitutional law. The choice between Bobbitt’s and Dworkin’s more comprehensive theories, in the end, may come down to a choice between “realism” (doing things the way they have been done) and “idealism” (making constitutional law the best it can be within the constraint of existing authorities). In my view, the aspirations and aesthetics of idealism are preferable to Machiavellian realism. But perhaps constitutional law, especially if practiced in a three-dimensional way, would benefit in the long run from a continuing vigorous dialogue or even oscillation between idealism and realism.

Of course, a second-best choice of constitutional theory should also be considered, for theories like Bobbitt’s and Dworkin’s may be “too theoretical” for a practical profession. In this view, why not choose common law constitutionalism? Or a moderate form of complex originalism, such as either Akhil Amar’s “holistic” approach or Jed Rubenfeld’s “paradigm” approach to constitutional interpretation? These two-dimensional theories

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277. See supra text accompanying notes 212-15.
278. See supra text accompanying notes 262-65.
279. Following Pierre Schlag, I understand aesthetics to include the forms and images one deploys to comprehend social practices like law, and as evident in this article, my preference (in Schlag’s terms) is for the “aesthetics of energy” and “aesthetics of perspectivism” (or pluralism) rather than the “aesthetics of the grid” (or legal order) and “disassociative aesthetics” (or relativism and postmodernism). See Pierre Schlag, The Aesthetics of American Law, 115 Harv. L. Rev. 1047 (2002). Strict originalists, of course, may prefer the aesthetics of the grid and pragmatists may prefer disassociative aesthetics. So it goes.
280. See Strauss, supra note 7; supra text accompanying notes 152-65.
281. See AMAR, supra note 19; Amar, Intratextualism, supra note 178; supra text accompanying notes 177-81.
282. See RUBENFELD, supra note 2; supra text accompanying notes 182-86.
comfortably espouse the lawyer's traditional qualities of respecting both power and time. But at the same time, the flexibility of these theories in interpreting abstract constitutional provisions in ways that encompass America's full constitutional history would appear to generate or at least permit significant constitutional recognition of the values of everyman. Some kind of power and time theory would seem to make a good second-best choice of constitutional theory.

283. See, for example, the "liberal surprises" from the Supreme Court in the summer of 2003 that seem to come largely from the "common law" justices on the Supreme Court, or, in other words, the "swing" and "moderate" justices who often are unfairly characterized or bashed as "liberals." Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding individualized affirmative action admissions programs); Lawrence v. Texas, 539 U.S. 558 (2003) (invalidating anti-sodomy laws); Wiggins v. Smith, 539 U.S. 510 (2003) (finding ineffective assistance of counsel where counsel failed to conduct more than a superficial investigation of mitigating evidence relating to the defendant's personal history in a death penalty case).