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Constitutional Historicism: An Examination of the Eighth Amendment Evolving Standards of Decency Test

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Constitutional Historicism: An Examination of the Eighth Amendment
Evolving Standards of Decency Test

CONSTITUTIONAL HISTORICISM: AN EXAMINATION OF THE EIGHTH AMENDMENT EVOLVING STANDARDS OF DECENCY TEST

WILLIAM C. HEFFERNAN*

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INTRODUCTION

The subject of constitutional historicism is best introduced by means of a thought experiment that contrasts the past with the present. Consider first a fictional table of citations in which the present rules the past:

TABLE 1

The Present as the Past—Frontloading Constitutional History

Actual Case Title	Fictional Citation	Actual Citation
<i>Brandenburg v. Ohio</i>	15 Fed. Cas. 1183 (1798)	395 U.S. 444 (1969)
<i>Brown v. Bd. of Educ.</i>	163 U.S. 537 (1896)	347 U.S. 483 (1954)
<i>Frontiero v. Richardson</i>	83 U.S. 130 (1873)	411 U.S. 677 (1973)

Brandenburg decided in 1798? Had the *Brandenburg* rule been established then, the Supreme Court almost surely would have been unable to avoid the question of the Sedition Act's constitutionality.¹ *Brown* an 1896 case? In the fictional table above, it has been given *Plessy*'s citation, thus suggesting an earlier end to American apartheid.² And *Frontiero* decided in 1873? *Frontiero* rejected stereotypes about women exactly a

1. Lower court opinions of the time sidestepped the issue of the Sedition Act's constitutionality. See *United States v. Cooper*, 25 F. Cas. 631, 639-43 (D. Pa. 1800) (No. 14,865) (focusing on the intentions of Copper's actions and not the constitutionality of the law); *United States v. Lyon*, 15 F. Cas. 1183, 1185 (D. Vt. 1798) (No. 8,646) (instructing the jury to ignore any questions of constitutionality and focus only on whether Lyon seditiously published the writing in question). During the course of his opinion for the Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), Justice Brennan made the historicist point that "[a]lthough the Sedition was never tested in this Court, the attack upon its validity has carried the day in the court of history." *Id.* at 276.

2. The Court's conclusion in *Strauder v. West Virginia*, 100 U.S. 303(1879), that the exclusion of African-Americans from service on petit juries violates the equal protection clause signaled what might have been the end of legally mandated segregation. *Id.* at 312. However, numerous cases decided in the next three decades, of which *Plessy v. Ferguson*, 163 U.S. 537 (1896), is the most prominent, made clear that *Strauder* was not the prelude to an end to racial segregation.

century after *Bradwell* endorsed them.³

Would America have been a better country if this first table were fact rather than fiction? If we indict the past from the standpoint of the present, this seems undeniably true. Certainly the reverse—a backloaded table—reminds us how disturbing the present would be if constitutional doctrine had not been altered. Thus imagine the following:

TABLE 2

The Past as the Present—Backloading Constitutional History

Actual Case Title	Fictional Citation	Actual Citation
<i>U.S. v. Matthew Lyon</i>	395 U.S. 444 (1969)	15 Fed. Cas. 1183 (1798)
<i>Plessy v. Ferguson</i>	347 U.S. 483 (1954)	163 U.S. 537 (1896)
<i>Bradwell v. Illinois</i>	411 U.S. 677 (1973)	83 U.S. 130 (1873)

Here, history is a nightmare from which we have yet to awaken.⁴ The refusal of late eighteenth century federal judges to uphold rights of political dissent persists to this day. *Plessy*'s separate but equal rule governs race relations. *Bradwell*'s exaltation of female delicacy continues to define the constitutional law of gender discrimination. Arguably, judicial failure to modify doctrine—and this of course assumes a constitutional tradition at odds with the one we actually have—would have invited legislative and executive initiative. Thomas Jefferson, for example, pardoned those convicted under the Sedition Act and then let it lapse;⁵ many northern states rejected *Plessy*'s view of race relations long before *Brown* was decided.⁶ But the opposite might also be true. Absent leadership from the

3. See *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973) (stating the plurality's argument that "gross, stereotyped distinctions between the sexes" sustained America's "long and unfortunate history of sex discrimination."); *Bradwell v. The State*, 83 U.S. 130, 141 (1873) (holding that it is not one of the privileges and immunities protected by the Fourteenth Amendment for someone to be free to practice law after meeting a state's entrance requirements for the bar).

4. "'History,' Stephen [Daedalus] said, 'is a nightmare from which I am trying to awake.'" JAMES JOYCE, *ULYSSES* 34 (Vintage 1922).

5. See *Sullivan*, 376 U.S. at 276 (reporting that Jefferson discharged those convicted under the sedition law because he considered it to be a nullity). The court added that there was a consensus that the Sedition Act was inconsistent with the First Amendment due to the restraint it imposed on criticism of the government. *Id.*; see also JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 187 (1997) (explaining that Jefferson was able to take these actions since the legislation that created the Alien and Sedition Acts lapsed early in his presidency, and he had congressional support since the Republicans had a large majority in the House and a small majority in the Senate).

6. Indeed, at the time the Fourteenth Amendment was adopted, thirteen states prohibited racial segregation in public schools. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF *Brown v. Board of Education* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY*

Court—leadership that of course is routinely challenged by coordinate branches of government,⁷ for the Court's decisions are rarely implemented on a command and control basis⁸—it is quite possible that America would be a fundamentally different country today. At the very least, it seems reasonable to suppose that some states would have held out for a substantial period of time against the rules announced in *Brown* and *Frontiero*.

To most professional historians, these “might-have-beens” do not provide a promising mode of inquiry.⁹ Historians contextualize Supreme Court decisions in the same way they examine religious practices,¹⁰ methods of childrearing,¹¹ handbooks of etiquette,¹² and even the notion of sexual deviance.¹³ Professional history, on this account of current practice, can best be understood as retrospective cultural anthropology.¹⁴ The

633 (1976).

7. A notable instance of such a challenge is to be found in Andrew Jackson's approach to Supreme Court decisions upholding the rights of Native American tribes. In the wake of the Court's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), which held Georgia's anti-Cherokee statutes unconstitutional, *id.* at 595-96, President Jackson remarked: “John Marshall has made his decision; now let him enforce it.” LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 745 (1974). Moreover, in vetoing congressional legislation renewing the charter of the Bank of the United States, President Jackson asserted that “[t]he opinion of the judges has no more authority over Congress than the opinion of Congress over judges, and on that point the President is independent of both.” Andrew Jackson, *Veto Message of July 10, 1832*, in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 576, 582 (James Richardson ed., 1897).

8. See ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 6 (1978) (noting that as far as school desegregation is concerned, Justice Frankfurter worried during oral argument in *Brown* that “[n]othing could be worse from my point of view than for this Court to make an abstract declaration that segregation is bad and then have it evaded by tricks”); see also WILLIAM KER MUIR, *The Setting*, in PRAYER IN PUBLIC SCHOOLS: LAW AND ATTITUDE CHANGE 11, 15 (1967) (discussing school prayer cases and drawing a distinction between patriotic exercises and practices of worship) (on file with the American University Law Review).

9. See, e.g., JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 105 (2000) (“Though we might wish otherwise, the history of what might have been is not really history at all, mixing together as it does the messy tangle of past experience with the clairvoyant certainty of our present preferences.”).

10. See, e.g., ALEXIS MCCROSSEN, HOLY DAY, HOLIDAY: THE AMERICAN SUNDAY (2000) (stating that the purpose of the book is to provide the history of a Sunday during the nineteenth century).

11. See, e.g., STEVEN MINTZ, HUCK'S RAFT: A HISTORY OF AMERICAN CHILDHOOD (2004) (describing methods and philosophies of child-rearing for various times and cultures, including Puritans, Eastern Indians, colonial Chesapeake, post-Revolutionary, Evangelical, scientific, during the 1950s, and among urban poor).

12. See, e.g., NORBERT ELIAS, THE CIVILIZING PROCESS: THE HISTORY OF MANNERS (Edmund Jephcott trans., 1978) (including chapters on behavior at the table, blowing one's nose, spitting, and behavior in the bedroom).

13. See, e.g., CAROL GRONEMAN, NYMPHOMANIA: A HISTORY (2000) (recounting stories of women diagnosed with nymphomania from as far back as 1841). Groneman notes that behavior diagnosed as nymphomaniacal as recently as thirty years ago is now viewed as commonplace. *Id.* at 181.

14. See, e.g., CLAUDE LEVI-STRAUSS, THE SAVAGE MIND 256 (1966) (comparing history and anthropology and explaining that the “historian strives to reconstruct the picture of

historical method requires its practitioners to identify the mentalities¹⁵ (to use Marc Bloch's evocative term) and discursive contexts¹⁶ (to use a term from contemporary practice) characteristic of a certain time and account for a given activity in light of what has been identified. Historians of constitutional law have used this approach in trying to understand past doctrine. For example, they have considered the Alien and Sedition Acts not in terms of current premises but in terms of attitudes and legal norms prevailing in the late eighteenth century.¹⁷ Given this approach, Supreme Court decisions from the distant past can be viewed as period pieces. The rules they announce and the justifications they advance are understandable in terms of a larger framework of values that has (at least partially) disappeared but that can be recaptured through the imaginative empathy central to historical inquiry.¹⁸

We can give the label "contextual historicism" to this search for historically-specific mentalities. What distinguishes the practice of modern historians—with Voltaire treated as pre-modern on this account,¹⁹ Ranke as among the earliest of the moderns,²⁰ and Dilthey as the theorist who laid

vanished societies as they were at the points which for they correspond to the present, while the ethnographer does his best to reconstruct the historical stages which temporally preceded their existing form.").

15. See CAROLE FINK, *MARC BLOCH: A LIFE IN HISTORY* 111-12 (1989) (describing how Bloch strove to discount the errors introduced into history by prejudice, fear, or other strong emotions).

16. See William W. Fisher, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 *STAN. L. REV.* 1065, 1068 (1997) (explaining that when historians write using the historical method, they mainly write about language and belief systems).

17. See, e.g., JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION LAWS* 93 (1951) (stating that the Federalist press believed that the Alien and Sedition Laws were necessary for that nation's safety); JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 94 (1956) (explaining that the Naturalization and Aliens Friends Law represented an increasing distrust of all people in general and not only of Aliens).

18. See Fisher, *supra* note 16, at 1097-98 (explaining that, while the legality of abortion is now a hot debate, an examination of what people believed in the early nineteenth century, that a fetus was not a person before "quickening," makes it easier to understand why there was no call for criminalization of early stages abortion at that time). Fisher writes that, "[history] can expand readers' awareness of alternatives simply by revealing that people in the past lived and thought in fundamentally different ways." *Id.* at 1097.

19. In emphasizing the essential invariability of human experience, Voltaire remarks that "[a]ll history . . . is little else than a long succession of useless cruelties [It] is a collection of crimes, follies, and misfortunes, among which we have now and then met with a few virtues, and some happy times" FRANCOIS VOLTAIRE, *Essay on the Manners and Spirits of Nations*, in *THE PORTABLE VOLTAIRE* 547, 549 (Ben Ray Redman ed., 1949).

20. See LEOPOLD VON RANKE, *Preface to Histories of the Latin and Germanic Nations From 1494 to 1514*, in *THE VARIETIES OF HISTORY* 55, 55-58 (Fritz Stern ed., 1973) ("To history has been assigned the office of judging the past, of instructing the present for the benefit of future ages."). Recent scholarship has established the extent to which Ranke's famous injunction to historians (to show only what actually happened [*wie es eigentlich gewesen ist*]) was mistakenly given a positivist gloss by the late nineteenth and early twentieth American historians who founded the profession in this country. DOROTHY ROSS,

the foundation for contemporary historical practice²¹—is an interest in change and an emphasis on the variability of human experience. Contextual historicism does not offer explanations for events along the lines employed by natural scientists when accounting for chemical syntheses or nuclear fission. Rather, its aim is to interpret behavior—to “read” it—and so to make sense of past experience. To do this properly, one must avoid offering a presentist account of the past.²² It is for this reason that neither of the tables mentioned earlier would be of much interest to professional historians. The first table is grounded in a brazen presentism: the past has been uprooted in favor of the present. The second is also uninteresting. It abolishes the gap separating the past from the present: it makes the present a footnote to the past.

There is, however, another sense in which the term “historicism”²³ is relevant to both tables. Normative historicism, as we can call this latter approach, accords prescriptive force to the fact of historical change—that is, it employs a transhistorical moral principle which assigns value to the trajectory that links past customs and beliefs to present ones.²⁴ Strong versions of normative historicism employ few or no other transhistorical principles.²⁵ These strong versions focus largely, or even exclusively, on

On the Misunderstanding of Ranke and the Origins of the Historical Profession in America, in LEOPOLD VON RANKE AND THE SHAPING OF THE HISTORICAL DISCIPLINE 154, 154-69 (Georg Iggers & James Powell eds., 1990).

21. See WILHELM DILTHEY, *PATTERN AND MEANING IN HISTORY: THOUGHTS ON HISTORY AND SOCIETY* 20 (H.P. Rickman ed., 1962) (referring to a common description of Dilthey as the forerunner of more recent thinkers and historicism).

22. See, e.g., HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (1931) (providing an influential critique of presentism in the study of history). Butterfield maintains that “the chief aim of the historian [should be] the elucidation of the unlikeness between past and present . . .” *Id.* at 10.

23. In recent years, the term “historicism” has been used by scholars in both normative and descriptive senses. Stephen Griffin, *Constitutional Theory Transformed*, 108 *YALE L.J.* 2115, 2116 (1999) (reasoning in an explicitly normative vein in speaking of “a historicist constitutional theory” in which “the theory of constitutional change is prior to the task of constitutional interpretation”). *But see* Jack Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 *GEO. L.J.* 173, 174 (2001) (using the term descriptively, but in a way that has distinct normative implications and maintaining that legal historicism believes that the notions of a good or bad legal argument change over time); G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 *VA. L. REV.* 485, 522 (2002) (using the term in a purely descriptive sense and speaking of a “model of historicist constitutional interpretation [that] challenged and eventually displaced the prehistoricist-inspired model of constitutional adaptivity”).

24. See Balkin & Levinson, *supra* note 23, at 174 (stating that “historical forces” influence current legal norms and shape the boundaries of what people view as good or bad legal arguments and claims).

25. See, e.g., FREDERIC JAMESON, *THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT* 9 (1981) (asserting “the absolute and we may even say ‘transhistorical’ imperative of all dialectical thought—Always historicize!”). Jameson, it must be emphasized, is discussing only epistemological problems associated with analysis of a text. “Always historicize,” however, can be viewed as a transhistorical moral principle

the trend-line connecting past and present; in doing so, they mandate the adoption of rules consistent with historical trends. Weaker versions draw on substantive transhistorical principles as well. That is, weaker versions also follow the injunction to consider changed patterns of behavior in the formulation of rules, but because they adopt substantive transhistorical principles as well (a commitment to personal freedom, for example), these weaker versions can be said to give new meaning to substantive principles in light of changed circumstances. The concept of a tradition is understandable in these terms.²⁶ In considering a tradition, one seeks to isolate the substantive transhistorical principle that informs it and then to identify the elements that have changed in light of new circumstances.

Constitutional historicism can be understood as a weak, rather than a strong, version of normative historicism. It is grounded in the historicist prescription to take seriously changes in the social and political practices of the American people. However, it also draws on transhistorical principles of political theory established by the Constitution's creators. As an empirical matter, a historicist would contend, the American constitutional tradition is best understood in terms of the interplay of historical change and enduring principles articulated in the text. As a normative matter, constitutional historicism maintains that the tradition *properly* developed along these lines. The most succinct expression of normative constitutional historicism can be found in Justice Holmes's opinion of the Court in *Missouri v. Holland*.²⁷ At stake in the case was the relevance of the Tenth Amendment²⁸ to an international treaty concerning migratory birds. Holmes's remarks, however, have an unmistakable significance beyond such specific concerns:

[W]hen we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago We must consider what this country has

along the lines mentioned above. I am not, of course, suggesting that this is Jameson's position.

26. See OWEN CHADWICK, FROM BOSSUET TO NEWMAN xvi (2d ed. 1987) (explaining that in Latin, the word "tradition" means the act of handing down).

27. 252 U.S. 416 (1920).

28. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

become in deciding what [the Tenth Amendment] has reserved.²⁹

Although many justices of the early and mid-twentieth century—among them, Justices Cardozo,³⁰ Frankfurter,³¹ and Harlan³²—endorsed some form of constitutional historicism, this mode of analysis has been employed only implicitly in most current Court opinions. There has, however, been one conspicuous exception to this trend. For half a century, the Court has declared that the Eighth Amendment’s “cruel and unusual punishments” clause³³ should not be understood in terms of the meaning ascribed to it in the eighteenth century but that it instead should be interpreted in light of “the evolving standards of decency that mark the progress of a maturing society.”³⁴ The evolving standards test can be understood, then, as an instance of *explicit* normative constitutional historicism. It treats the ratifiers’ prohibition of cruel punishment as a transhistorically valid substantive principle but assumes that the scope of this principle should be given wider range in light of changing ideas about justified punishment.

The evolving standards test is also of interest because it has provoked a strong counterattack from two members of the Court: Justices Scalia and Thomas. Justice Scalia in particular has challenged the test by advancing an originalist analysis of the Cruel and Unusual Punishments Clause [hereinafter “Punishments Clause”].³⁵ That is, Justice Scalia has, as a historical matter, sought to identify the precise scope accorded the clause by the founding generation. Furthermore, he has argued, as a matter of normative constitutional interpretation, that this scope (and no more) is what the Court should accord the clause when applying it to concrete cases. Because historicism and originalism are so often invoked in judicial debates about the Eighth Amendment, the tension between them is particularly worth examining with care.

In this Article, I advance a qualified defense of the historicist premises underlying the evolving standards test. In doing so, I treat the test as a

29. *Holland*, 252 U.S. at 433-34.

30. See BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 82-83 (1921) (asserting that notions of constitutional immunity change over time); see also *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934) (explaining that the founding fathers could not have known the changes that would occur over time, and beliefs need to be adjusted to the current time).

31. See *Rochin v. California*, 342 U.S. 165, 169-70 (1952) (stating that when a word or term in the Constitution does not have a rigid meaning the judgment regarding it will vary in different times and through different judges).

32. See *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (explaining that decisions of the Court regarding the Constitution may vary over time, although they must build on the traditions of the past and may not radically depart from past traditions).

33. U.S. CONST. amend. VIII (providing that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”).

34. *Trop v. Dulles*, 356 U.S. 86, 101 (1958); see *infra* notes 106-113 and accompanying text.

35. See *infra* notes 70-81 and accompanying text.

model for historicist jurisprudence in general. Many different interpretive methods have been proposed as alternatives to constitutional originalism. The historicist method best captures the premises of the evolving standards test; moreover, when the unique features of that test are set aside, the concept of constitutional historicism can be seen more generally to provide a cogent alternative to originalism. Other alternatives are less satisfactory on this score. Advocates of the concept of a “living constitution,” for example, reason in terms of a body of constantly remade constitutional doctrine³⁶—surely an unhelpful approach given the continuity and stability characteristic of most areas of constitutional law. The notion of “noninterpretivism”³⁷ is even less promising. To endorse “noninterpretivism” is to imply that judges may properly evade an essential part of their role: that they may *refrain from* interpreting the text. The term “constitutional historicism,” by contrast, focuses attention on the way in which textual interpretation should be informed by consideration of enduring trends in the country’s history. Indeed, the method associated with the term is satisfactory on a number of other counts: it affirms the subtle links between present and past, it signals the importance of textual interpretation informed by original values, yet it also emphasizes the way in which understandings of the text can properly be shaped by changes in the national experience.

This Article is divided into four parts. The first establishes the possibility of the historicist method by considering the Court’s Eighth

36. See, e.g., HOWARD LEE MCBAIN, *THE LIVING CONSTITUTION: A CONSIDERATION OF THE REALITIES AND LEGENDS OF OUR FUNDAMENTAL LAW* 33 (1927) (comparing a living constitution to a living skin; both are elastic, “expansile,” and constantly renewed); Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1039 (1981) (advancing the central tenet of the term living constitution when claiming that constitutional law gives expression to current values, rather than past values).

37. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1 (1980) (defining noninterpretivism as the view that, “courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document”). The term “common law constitutional interpretation,” it should be noted, is considerably more promising than either “living constitution” or “noninterpretivism.” See David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 YALE L.J. 1717, 1720 (2003) (describing the need for a common law interpretation while stressing the importance of adhering to the original understanding of the Constitution); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 878-79 (1996) (finding textualism and originalism to be inadequate, and concluding that a common law approach, evolving over time, best explains constitutional law). Professor Strauss’s terminology promisingly implies that constitutional doctrine is, and should be, subject to incremental growth in much the same way that tort and contract law have been modified during the past three hundred years. But, of course, the term “common law” also suggests a fundamental difficulty. The common law was developed by judges in the absence of an authoritative text. The Constitution, on the other hand, is understood to be just such a text. Indeed, the problem of vagueness arises precisely because the text is accorded such great respect yet yields such meager answers by way of guidance. While not quite producing a paradox, the terms “common law” and “constitution” should not be treated as the starting point for developing a systematic alternative to originalism.

Amendment jurisprudence. This method is best understood as an interpretive response to chronically vague provisions of the constitutional text. Rather than read the Constitution in light of the referential intentions of its ratifiers, the historicist propounds its meaning by considering the connection between the ratifiers' values and those of the present. The Punishments Clause provides a particularly helpful way of thinking about this interpretive method. Modern judicial interpretation of the clause posits a connection between past and present that *enlarges* on the ratifiers' values—that incorporates eighteenth century notions of cruelty but expands on these by including subsequent changes in sentiments about punishment. Enlargement on the ratifiers' values is not the only possible type of historicism. However, it is certainly the most straightforward and so provides a starting point for analysis. A parallel trend toward enlargement is discernible in the interpretation of numerous other provisions: in the Fourth Amendment's application to privacy,³⁸ the Sixth Amendment's expansion to include the right to appointed counsel for the indigent,³⁹ and the Fourteenth Amendment's Equal Protection Clause⁴⁰ as applied to gender discrimination.⁴¹ These all stand as instances of the Whig notion of social development: of "evolving standards of decency that mark the progress of a maturing society."⁴²

The second part builds on the first by noting how Punishments Clause decisions provide a model for constitutional historicism in general. In this section, I examine not only historicism's commitment to doctrinal change but also the distinction between enlargement, contraction, and transformation of constitutional doctrine. In applying this distinction, I consider the historicist commitment to a time-bound conception of individual rights and government powers. I also examine the extent to which courts have been candid when employing a historicist interpretation

38. See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

39. See U.S. CONST. amend. VI (providing that the accused must have counsel in all criminal prosecutions); see also *infra* notes 43-44 (discussing cases dealing with the Sixth Amendment).

40. See U.S. CONST. amend. XIV, § 1 (mandating that States provide equal protection to all persons under their laws).

41. See *Kirchberg v. Feenstra*, 450 U.S. 455, 455 (1981) (concluding that gender based discrimination is unconstitutional unless the government can show that its actions substantially further an important governmental interest); *Caban v. Mohammed*, 441 U.S. 380, 388 (1979) (same).

42. This quote has appeared in Supreme Court cases dealing with the Eighth Amendment's prohibition of cruel and unusual punishment in regards to the question of whether the death penalty is appropriate for persons under the age of sixteen. *Thompson v. Oklahoma*, 487 U.S. 815, 815 (1988); *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

of the text. On this point, as elsewhere, I maintain that the Court's interpretation of the Punishments Clause provides a useful guide to understanding a more general phenomenon. The Court has been notably frank in its analysis of the doctrinal changes at work in its Eighth Amendment jurisprudence. I suggest that a similar frankness is possible for judicial interpretation of other chronically vague provisions of the Constitution.

The third part ventures beyond the Eighth Amendment by considering two other clauses whose interpretation can properly be classified as historicist. My aim in this part of the section is to show that one cannot make sense of seminal cases such as *Johnson v. Zerbst*⁴³ and *Gideon v. Wainwright*⁴⁴ without a historicist guide. The latter part of the section examines recent substantive due process cases, in particular *Lawrence v. Texas*.⁴⁵ The Court's opinion in *Lawrence* is marked by a candor that is missing in the assistance of counsel cases. I consider *Lawrence* not simply because of this issue, but also because it underscores the extent to which the Court has participated in a momentous transformation of constitutional values a reordering in which privacy and private life have been given primacy as the key values of civil society. Property rights were treated as central to an understanding of civil society at the time of the framing. *Lawrence* is emblematic of a metamorphosis of values that is different from, yet understandable in light of, the enlargement characteristic of cases decided under the Punishments Clause.

The final part considers the legitimacy of historicism as a framework for interpreting the Constitution. In advancing a qualified defense for its legitimacy, I emphasize the special sense in which the Constitution functions as law. Its power to secure consent depends particularly on the way in which its general terms can be applied in a temporally-specific fashion and so be understood in light of an ongoing national narrative. The judiciary performs its function properly when it employs the Constitution's chronically vague terms in a temporally appropriate way that links them to a narrative of national change. Two cheers for constitutional historicism, I thus argue. It merits one more cheer than originalism, its chief rival, but—given the defects I note during the course of the Article—three cheers would be excessive.

43. 304 U.S. 458 (1938). The issue in *Johnson* is the Sixth Amendment right to assistance of counsel in criminal prosecutions. *Id.* at 459.

44. 372 U.S. 335 (1963). *Gideon* holds that even an indigent defendant in a criminal trial has a fundamental right to assistance of counsel. *Id.* at 344-45.

45. 539 U.S. 558 (2003). The Court in *Lawrence* held that a Texas statute criminalizing certain sexual conduct between two persons of the same sex violated the Due Process Clause. *Id.* at 564-79.

I. THE POSSIBILITY OF CONSTITUTIONAL HISTORICISM: JUDICIAL INTERPRETATION OF THE PUNISHMENTS CLAUSE

America, the first new nation,⁴⁶ has an old constitution.⁴⁷ Because the country has an old *written* constitution, courts are routinely confronted with the challenge of applying provisions enacted in a distant past to problems that arise in a substantially different present. This challenge sometimes arises because the terms of the Constitution are archaic: think, for example, about Article I's provision for "letters of marque and reprisal."⁴⁸ On other occasions, however, the challenge arises because terms that were vague when adopted remain so today. In this section, I use the Punishments Clause to consider the interpretive options open to courts when confronted with vague, though far from archaic, language. In concentrating on originalism and historicism, I treat each as an interpretive response to the chronic vagueness of general provisions contained in the Constitution.

A. *An Overview of Options for Interpreting the Punishments Clause*

To focus on judicial application of old provisions to contemporary problems is to acknowledge a basic feature of constitutional interpretation: that it is a text-based practice which takes the words of the document as the starting point for analysis. *Why* courts should start with the text is an important question, one I address later. It is enough to note here that they routinely do so, not only in Eighth Amendment cases but in others as well. Thus the significance of the Court's "we begin with [the] text" in *City of Boerne v. Flores*,⁴⁹ of its appeal to the text in *Vernonia School District v. Acton* ("The Fourth Amendment to the United States Constitution provides . . ."),⁵⁰ and of its opening sentence in *U.S. Term Limits, Inc. v. Thornton* ("The Constitution sets forth qualifications for membership in the Congress of the United States . . .").⁵¹ The meaning ascribed to many of

46. See SEYMOUR MARTIN LIPSET, *THE FIRST NEW NATION: THE UNITED STATES IN HISTORICAL AND COMPARATIVE PERSPECTIVE* 15 (1963) (asserting that the United States claims the title of the first new nation because it was the first major colony to gain independence from colonial rule).

47. See CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 105 (2004) ("The American Constitution is the oldest in force in the world."). The American Constitution is perhaps the oldest *written* one still in force for an entire nation, but unless one argues that Great Britain has had different constitutions in different eras (a seventeenth century constitution, an eighteenth century one, and so on), our Constitution cannot be classified as the oldest one in force in the world.

48. See U.S. CONST. art. I, § 8, cl. 11 (authorizing Congress to hold the power to grant Letters of Marque and Reprisal).

49. 521 U.S. 507, 519 (1997).

50. 515 U.S. 646, 652 (1995).

51. 514 U.S. 779, 782 (1995).

the words contained in the text may have varied over time, but recourse to the text as the starting point for analysis is an historical constant in constitutional interpretation.

How much is settled by an opening move that invokes the text? In some cases, a good deal. For example, if a court were confronted with a case in which someone under thirty-five were elected president or in which a new Congress convened on January 2nd, an appeal to the text would almost certainly settle matters. Article II's reference to "thirty five Years"⁵² was readily applicable in 1788; it remains applicable under unchanged standards today. The same can be said of the Twentieth Amendment's date for convening Congress.⁵³ The Gregorian calendar remains in use. Clocks operate under principles established long before the eighteenth century. Admittedly, space and time are now thought to be closely related, but this change in philosophical perspective has had no effect on *time-keeping*.⁵⁴ Provisions that employ precise measures of time thus stand at one end of a definiteness/vagueness continuum. Perhaps because these provisions have always been susceptible to straightforward application, no court cases have arisen concerning them.

At the other end are provisions that were vague when adopted and remain so today. Many of the Constitution's power- and rights-granting clauses come under this heading. At most, the words employed in these clauses have a weak denotative power; they refer to matters such as commerce, speech, searches and seizures, but provide little further guidance for interpreters. The Punishments Clause provides a particularly striking example of this. Even the Congressmen who commented on it at the time it was proposed were troubled by its vagueness. According to the *Annals of Congress*, William Smith of South Carolina "objected to the words 'nor cruel and unusual punishments,' the import of them being too indefinite."⁵⁵ Samuel Livermore of New Hampshire remarked that the provision "seems to express a great deal of humanity, on which I have no objection to it, but as it seems to have no meaning in it, I do not think it necessary."⁵⁶ Livermore's comments did not carry the day. Following his speech, the reporter for the *Annals* noted laconically, "[t]he question was put on the [Punishments Clause], and it was agreed to by a considerable

52. See U.S. CONST. art. II, § 1, cl. 5 (requiring that the President have attained the age of thirty-five years).

53. See U.S. CONST. amend. XX, § 1 (requiring that the Presidential term end on January 20th and that the terms of Senators and Representatives end on January 3rd).

54. See PETER GALISON, *EINSTEIN'S CLOCKS, POINCARÉ'S MAPS: EMPIRES OF TIME* (2003) (using a rotating map, with changes in vertical and horizontal distances doing nothing to change the actual distance between two points, to explain that transformations of space and time would still preserve ordinary space and time).

55. 1 ANNALS OF CONG. 754 (Joseph Gales ed., 1789).

56. *Id.*

majority.”⁵⁷

An appeal to the text can be decisive, then, for clauses that contain precise metrics. It is no more than a starting move in a long chain of reasoning, however, when the provision invoked is chronically vague.⁵⁸ Although not the only possible frameworks for interpreting the Constitution, originalism and historicism are of interest because they stand as the most appealing remedies for the problem of chronic vagueness, the interpretive issue at the core of most constitutional disputes. On an originalist account, chronic vagueness can be resolved by considering the ratifiers’⁵⁹ intent concerning a provision’s meaning. Historicism, by contrast, proposes to resolve chronic vagueness by examining changes in social values relevant to a clause, rejecting transient changes (advocates of a “living constitution” arguably fail to guard sufficiently against this)⁶⁰ while giving constitutional standing to enduring ones that have achieved wide consensus.⁶¹ The contrast between the two methods is particularly clear in Punishments Clause opinions.

57. *Id.*

58. For a discussion of vagueness in legal language, including the argument that legislators purposely avoid precise language and prefer to write vague laws, see Timothy Endicott, *Law is Necessarily Vague*, 7 LEGAL THEORY 379, 379 (2001). See also Dorothy Edgington, *The Philosophical Problem of Vagueness*, 7 LEGAL THEORY 371, 374 (2001) (arguing that “[v]agueness is here to stay It is not a defect of natural languages.”).

59. I speak throughout of the Constitution’s ratifiers rather than its authors because it is the former rather than the latter who made it a legally binding instrument. In this respect, I follow James Madison, who remarked that “[a]s the instrument came from [the Convention], it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions.” James Madison, Speech on the Jay Treaty in the Fourth Congress (Apr. 6, 1796), in 6 THE WRITINGS OF JAMES MADISON 263, 272 (Gaillard Hunt ed., 1906). Needless to say, the ideas of the authors of provisions and also the ideas of publicists who promoted the Constitution (in particular, the ideas of Madison and Alexander Hamilton) may sometimes provide guidance as to the ratifiers’ understandings of what they were adopting.

60. A conception of the Constitution as something that is eternally remade in the present is discernible in the comments of two prominent scholars of constitutional law at Princeton University of the early twentieth century. See Edward S. Corwin, *Constitution v. Constitutional Theory*, in AMERICAN CONSTITUTIONAL HISTORY 99, 108 (Alpheus Mason & Gerald Garvey eds., 1964) (arguing that “[t]he proper point of view from which to approach the task of interpreting the constitution is that of regarding it as a living statute, palpitating with the purpose of the hour, reenacted with every waking breath of the American people”); WOODROW WILSON, CONSTITUTIONAL GOVERNMENT 69 (1908) (maintaining that “the Constitution is . . . a vehicle of life, and its spirit is always the spirit of the age”). These comments stand in marked contrast with the historicist emphasis, defended here, on the deference due the past in constitutional interpretation.

61. See ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 167-68 (1990) (listing electronic surveillance as an enduring change in the way the Fourth Amendment prohibits unreasonable searches and seizures; emphasizing that courts may hear First Amendment cases involving television and radio broadcasting, two enduring elements of society that were not in existence at the time the Amendment was ratified).

B. Originalist Analysis of the Punishments Clause

Originalism has gained prominence through its emphasis on ratifiers' intent. This point in turn is best understood in terms of a more basic one: the premise that the distinctive characteristic of a constitutional provision is that it definitively orders legal relationships through the exercise of will by an authoritative body.⁶² In fact, this is an essential feature of any positivist analysis that treats law as a command of the sovereign;⁶³ it applies to statutes and regulations as much as it does to constitutional provisions. The key feature of constitutional originalism is that it focuses attention on "We the People"—and the institutions entitled to speak for "us"—as the sovereign body possessing the authority to enact constitutional provisions. A provision has the status of constitutional law, an originalist maintains, because at a given moment in time the people act in their sovereign capacity through appropriate institutions to adopt it.⁶⁴ The people can of course revoke or supersede the provision. In the absence of a countermand from the same sovereign source, however, a provision functions as a legally binding command.

To an originalist, this point accounts for why a president *must* be thirty-five and why Congress *must* convene on January 3rd of every odd-numbered year. These are legally binding rules; their status as such is established by the fact that they were laid down by the people in their sovereign capacity. Had the sovereign established the more open-ended rule that the president be mature, an originalist would require interpreters to consider the meaning of "mature" in eighteenth-century discourse. But nothing so complicated is required of interpreters of the age-qualification. It imposes a bright-line rule for the presidency. However much interpreters may wish to question this rule, they may not, given the binding status of the Constitution.

What about the Constitution's chronically vague terms? An originalist would maintain that provisions coming under this heading—the Due Process and Equal Protection Clauses, for example—can be brought within the method's framework provided attention is given to the ratifiers'

62. See Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 233 (1988) (arguing that the Framers' intent matters because "the force of law derives from the authority of the lawmaker").

63. See John Austin, *The Province of Jurisprudence Determined*, in *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 11-13 (H.L.A. Hart ed., 1968) (classifying one set of positive law as that set out by men in positions of political superiority to all other men, and labeling all laws or rules as commands).

64. See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 376 (1981) ("Our legal grundnorm has been that the body politic can at a specific point in time definitively order relationships, and that such an ordering is binding on all organs of government until changed by amendment.").

understandings of a clause's meaning.⁶⁵ This of course requires attention to intricate questions of historical fact.⁶⁶ It could turn out that the ratifiers approved broad language because they wanted interpreters to grapple with the subtle moral issues associated with words such as "liberty" and "equal." But the opposite is also possible. That is, the historical record might demonstrate that the ratifiers used broad language while wanting it to be narrowly applied. The Fourteenth Amendment's ratifiers, for example, may have understood that, despite the generality of the terms contained in Section 1, it would be applied only to civil and not to political rights.⁶⁷ What is needed, then, is a specific type of historical excavation: a close examination of the attitudes, values, beliefs, and intentions that informed those who adopted a given provision. It is in this sense that originalists propose their method as a cure for chronic vagueness. In doing so, they can concede the vagueness of many of the terms contained in the Constitution but still affirm that the terms can be narrowed in scope and application by identifying the specific beliefs of those who adopted them.

The contemporary Court has often been receptive to originalist analyses of the Constitution.⁶⁸ It has *not*, however, adopted originalism as a method for interpreting the Punishments Clause. Indeed, even Justice Scalia, who along with Justice Thomas has vigorously advocated originalist methodology in reading the Constitution,⁶⁹ incorporated historicist themes into one of his majority opinions analyzing the clause.⁷⁰ Scalia has taken

65. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 5-19 (1977) (insisting that the Framers' intended to introduce terms that were familiar and easily understood; they did not intend to introduce vague and unfamiliar terms that would be open to future interpretation).

66. Bork, *supra* note 61, at 150 (remarking that determining the original meaning will avoid the problem of determining the level of generality in which to interpret constitutional provisions).

67. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 126-27 (1988) (noting assertions by Senators and Congressmen during debates about Section I of the Fourteenth Amendment that it would apply to civil, and not political, rights).

68. See, e.g., *Alden v. Maine*, 527 U.S. 706, 741 (1999) ("We look first to evidence of the original understanding of the Constitution."); see also *Utah v. Evans*, 536 U.S. 452, 474 (2002) (examining the history of the constitutional phrase "actual enumeration" when determining the validity of methods currently employed in conducting the census).

69. There are occasions when each, while writing from an originalist perspective, has reached contrary conclusions. See, for example, their disagreement in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), about original understandings concerning the constitutional protection of political speech advanced in anonymous leaflets. Justice Thomas asked, "[w]hether the phrase 'freedom of speech, or of the press,' as originally understood, protected anonymous political leafleting." *Id.* at 359 (Thomas, J., concurring). He concluded that it did. Justice Scalia, on the other hand, felt that the majority's decision went against the way free speech was understood by the ratifiers of the First and Fourteenth Amendments. *Id.* at 371 (Scalia, J., dissenting).

70. See *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989) (writing that the Court has not been confined to the original meaning and intent of the Eighth Amendment, but rather has been interpreted in a "flexible and dynamic manner").

an originalist tack, though, when writing for himself or for a plurality in cases involving the clause.⁷¹ His foremost originalist opinion in this context is the one he wrote sustaining the judgment of the Court in *Harmelin v. Michigan*.⁷² Scalia's *Harmelin* conclusions rest on two familiar premises: first, that the meaning the ratifiers ascribed to the term "cruel and unusual punishments" determines its constitutionally permissible scope⁷³ and, second, that that meaning can be determined only by careful review (in *Harmelin*, Scalia's historical analysis consumes nineteen pages of the U.S. Reports)⁷⁴ of the documentary record.⁷⁵ Scalia makes no secret of his ambition in *Harmelin*; it is to identify the "most plausible" of many possible readings of the clause.⁷⁶ He heaps scorn on Justice White's dissenting argument in *Harmelin* that the Punishments Clause can "reasonably" be understood in a different way.⁷⁷ Reasonable approximation of original understandings is not enough, Scalia maintains:

[O]ur task is not merely to identify the various meanings . . . [the clause] "could reasonably" bear, and then impose the one that from a policy standpoint best pleases us. Rather, we are to strive as best we can to select from among the various "reasonable" possibilities the most plausible meaning.⁷⁸

Scalia draws on two types of originalist evidence to establish his "most plausible" reading of "cruel and unusual." One has to do with word usage. Many state constitutions adopted in the years prior to the Eighth Amendment's ratification, Scalia notes, contained provisions that included the words "cruel" and "unusual."⁷⁹ One placed the adjectives in disjunctive form ("cruel *or* unusual"), others in conjunctive form ("cruel *and* unusual").⁸⁰ The Eighth Amendment's ratifiers must have been aware of

71. When writing in dissent, Scalia has in fact openly stated his opposition to the evolving standards test: "In determining that capital punishment of offenders who committed murder before age eighteen is 'cruel and unusual' under the Eighth Amendment, the Court first considers, in accordance with our modern (*though in my view mistaken*) jurisprudence, whether there is a 'national consensus' . . . that laws allowing such executions contravene our modern standards of decency." *Roper v. Simmons*, 125 S. Ct. 1183, 1217-18 (2005) (Scalia, J., dissenting) (emphasis added).

72. 501 U.S. 957 (1991).

73. *See id.* at 975 ("[T]he ultimate question is not what 'cruel and unusual punishments' meant in the Declaration of Rights [of 1689], but what its meaning was to the Americans who adopted the Eighth Amendment.").

74. *Id.* at 966-85.

75. *Id.* at 976-78 (looking to state constitutions, floor debates in the first Congress, and state conventions, among others, to find the meaning given to the term "cruel and unusual punishment" by the ratifiers).

76. *Id.* at 976-77 n.6.

77. *Id.*

78. *Id.*

79. *Id.* at 977-78.

80. *See id.* at 977 (distinguishing the New Hampshire Constitution's disjunctive language from the Ohio Constitution's conjunctive language).

these options, Scalia suggests; they thus must have thought of the clause as establishing two independent conditions for permissible punishment.⁸¹

Where does this lead us? Unfortunately, not far, given the meaning of the word “unusual.” Citing the 1828 edition of Noah Webster’s dictionary, Scalia remarks that “unusual” meant “(as it continues to mean today) ‘such as [does not] occu[r] in ordinary practice.’”⁸² He continues: “by forbidding ‘cruel *and unusual* punishments,’ the Clause [therefore] disables the Legislature from authorizing particular forms or ‘modes’ of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed.”⁸³ But if “unusual” is an *independent* condition, then surely innovations in punishment are unconstitutional *even if they are not cruel*. The point is hardly academic. In 1890, the Court was confronted with the question of whether New York’s use of the electric chair, an innovation at the time, was unconstitutional.⁸⁴ Given Scalia’s independent-conditions reading of the clause (a punishment passes muster if it is neither cruel nor unusual), the answer would have to be yes. But the Court reached the opposite conclusion,⁸⁵ and indeed it is hard to imagine judges reasoning otherwise when confronted with an innovation that *reduces* the infliction of pain. Scalia’s word-usage analysis thus fails at the most elementary level to account for Eighth Amendment case law. Under his approach, even innovations that lessen the severity of pain are unconstitutional. It is hardly surprising that no court has taken seriously this reading of the amendment.

Scalia’s other interpretive approach avoids this pitfall; indeed, it provides a plausible reading of the clause, though whether it can be called the “most plausible” is open to serious doubt. Drawing on legislation adopted by the first Congress as well as early nineteenth century judicial interpretations of similarly worded state constitutional clauses, Scalia shows that the terms “cruel and unusual” were applied only to certain *methods* of punishment (and not to *categories* of punishment or to a comparison of punishments in an effort to determine the proportionality of a penalty) by members of the founding generation and the immediately succeeding one.⁸⁶ Was “cruel and unusual” thus a term of art at the time of ratification? Was it a phrase capable of wider application in the ordinary speech of the time but understood by its adopters to be applicable in law to a narrower class of phenomena than its roots in everyday speech suggest?

81. *Id.* at 976.

82. *Id.*

83. *Id.*

84. *In re Kemmler*, 136 U.S. 436 (1890).

85. *Id.* at 447.

86. *Harmelin*, 501 U.S. at 982-85.

Scalia's analysis suggests that it was;⁸⁷ in fact, this is what makes his approach plausible—though the very plausibility of this argument undercuts the word-usage argument, for then “cruel and unusual” cannot be interpreted as a statement of independent conditions (the crux of his word-usage argument) but instead as a kind of code phrase (“cruel and unusual”) for specific punitive practices and not others.

But if we adopt this latter approach and treat “cruel and unusual” as a term-of-art, we produce an interpretation that is plausible, but no more than plausible. This is because Scalia reaches his term-of-art conclusions by ignoring historical evidence inconsistent with his premises. True, early judicial interpretations of the phrase focused on methods of punishment. But Scalia should also have cited congressional critics of the clause such as William Smith and Samuel Livermore who emphasized its inherent vagueness.⁸⁸ Indeed, had he proceeded with the candor expected of a professional historian, Scalia could (and should) have noted that even the clause's defenders conceded that it was vague—and claimed only that such vagueness must be tolerated given the absence of a better alternative. James Iredell, for example, a future Justice of the Supreme Court, considered the vagueness objection to be fair.⁸⁹ However, Iredell further contended that an enumeration of acceptable and prohibited punishments would be even worse. Not only would such a list appear “perfectly ridiculous,” Iredell said, but it would also cause the legislature only a little more trouble given the possibility of devising new punishments not mentioned in the original list.⁹⁰ Iredell's point, it should be noted, does not intimate that “cruel and unusual” is a term of art. On the contrary, Iredell, like Smith and Livermore, took seriously the broad generality of the language contained in the clause and the interpretive problems this might later engender. He differed with the clause's opponents only in his willingness to accept this as better than the alternatives.

Needless to say, Scalia's failure to cite the remarks of Smith, Livermore, and Iredell does not demonstrate any incoherence in his originalist analysis

87. See *id.* at 982-83 (noting that early nineteenth century state courts interpreted the words “cruel and unusual punishment,” as used in state constitutions and the federal constitution, as imposing a prohibition only on certain modes of punishment).

88. See *The Congressional Register* (Aug. 17, 1789) (stating that William Smith “objected to the words ‘nor cruel and unusual punishment,’ the import of them being too indefinite” and Samuel Livermore said that the proposed amendment “seems to have no meaning in it”), reprinted in 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 1285, 1290 (Charlene B. Bickford et al. eds., 1992).

89. See James Iredell, *Answer to Mason's Objections to the New Constitution*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 360, 335, 360 (P. Ford ed., 1968) (commenting that the “expressions ‘unusual and severe’ or ‘cruel and unusual’ surely would have been too vague to have been of any consequence, since they admit of no clear and precise signification”).

90. *Id.* at 360.

of the Eighth Amendment. The *logic* of originalism is unaffected by his omission, for that logic depends not on the accuracy of historical research but on the claim that a founding generation binds later ones by its specific understanding of vague words.⁹¹ I return to this point later. Two different points need to be noted here. The first is that Scalia's omissions demonstrate that the originalist framework can be one-sidedly applied. The other is that, in acknowledging the complexity of the historical record, originalists must also accept the possibility that their method will produce inconclusive results. The results may be inconclusive either because the ratifiers could not agree on the referential scope of the terms they were employing or because they were united in their uncertainty about the possible range of application. Iredell, for one, clearly favored the uncertain-range-of-application thesis.⁹² Although it is unclear what other ratifiers thought, it is certainly possible that many of them also viewed "cruel and unusual" as no more than evocative terms, words of cultural significance in that they distinguished common law from continental jurisdictions but otherwise words without a clear point of reference.⁹³ On this account, the clause was tethered to specific punitive practices by judges of the succeeding generation not because the ratification debates justify this limitation but because later judges sought some kind of limiting construction for vague words. It is not my purpose to establish the truth of this hypothesis. It is enough to note that the hypothesis merits serious consideration, for once the hypothesis is granted at least the status of reasonableness, one then must also grant that Scalia's *Harmelin* opinion is more an act of judicial will than it is a dispassionate analysis of the historical evidence.

C. *Historicist Analysis of the Punishments Clause*

Originalism and historicism can both be understood as responses to the problems of chronic vagueness in key portions of the Constitution's text. Neither can be justified by reference to this, however. As noted, originalism's roots are in the command version of legal positivism—specifically, in the claim that the Constitution, like any other law, is to be

91. See discussion *infra* Part IV.D.

92. Iredell, *supra* note 89, at 360.

93. During the Virginia ratifying convention of 1788, for example, in the course of objecting to the absence of a Bill of Rights, Patrick Henry remarked: "What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany . . ." 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447-48 (Jonathan Elliot ed., Ayer Co. 1987) (1787); see also 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 370-71 (Univ. of Chi. Press 1979) (1769) (stating Blackstone's comparison of English and continental punitive practices).

understood as the sovereign's deliberate ordering of legal relationships. Historicism, on the other hand, treats the Constitution not as the command of previous generations to the present but as the coordinating text of the present, sovereign generation that, through ongoing consent, determines how the project of political freedom is to be conducted. The Constitution's binding force, a historicist emphasizes, is intergenerational in nature. The Constitution not only provides a coordinating device for the present generation; it also links the present to the past, making possible gradual changes in an ongoing process.

That the Constitution rests on popular acceptance while at the same time drawing on deeply ingrained understandings derived from the past is a proposition that has a venerable pedigree in American history. In a properly functioning state, John Adams contended, "[t]he great Principles of the Constitution, are intimately known . . . [I]t is scarcely extravagant to say, they are drawn in and imbibed with the Nurses [sic] Milk and first Air."⁹⁴ Oliver Ellsworth, later to be the second Chief Justice of the United States, defended the work of the Philadelphia Convention along similar lines; in doing so, it is helpful to note, he explicitly rejected the proposition that the Constitution should contain terms of art. Had the Constitution "been expressed in the scientific language of the law," Ellsworth wrote, "or [in] those terms of art which we often find in political compositions . . . the people . . . [would have] to accept it . . . [by a] leap in the dark."⁹⁵ And Joseph Story treated accessible language as essential to the American project when he remarked that constitutions "are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings."⁹⁶

The popular character of the Constitution, a historicist would maintain, justifies judicial attention to changing practices and values. In particular, historicism rests on three central theses. The first has to do with fidelity to practice. A satisfactory account of the practice of constitutional interpretation must be able to explain why readings of the text have departed fundamentally from original understandings of its meaning. Historicism is relatively successful on this score; originalism is not (indeed, originalism is properly understood as a rebuke to a great deal of contemporary constitutional doctrine). Second, historicism is designed to

94. 2 JOHN ADAMS, DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 3-4 (L.H. Butterfield ed., 1961).

95. Oliver Ellsworth, *A Landholder V*, in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 335 (John Paul Kaminski & Merrill Saladino eds., 1983).

96. JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 436-37 (1833).

provide a convincing account of the relationship between past and present in constitutional law. It treats provisions enacted long ago not as commands to the present but as vectors that have set a direction for the enterprise of collective self-government, a direction subject to subtle alteration by subsequent generations. Historicism, on this account, is concerned with the cumulative unfolding of path-dependent possibilities, not with building anew. And third, historicism holds that new values and practices achieve constitutional standing only when they (a) have gained wide acceptance over a substantial period of time and (b) are compatible with the commitment to individual liberty established at the outset. The issue of consistency with individual liberty is straightforward when new values enlarge on those of earlier generations. It is more problematic, and so requires more careful scrutiny, when the new values transform older ones.

On this analysis, historicism, like originalism, requires interpreters to begin with the text. Unlike originalism, however, it anticipates the possibility of legitimate readings that will differ from the ratifiers' understanding of what they created. In this sense, historicists think of the text as the opposite of a blackboard. A blackboard is erased and used again. For constitutional historicists, the text is never erased; rather, it is the starting-point for an ever-lengthening writing surface that contains not just the text but carefully considered modifications of original understandings. Punishments Clause jurisprudence illustrates this point in a particularly straightforward fashion. Original understandings of "cruel and unusual" have not been erased. Rather, they have been *enlarged* and *extended*. Thus the initial "writing tablet" for the clause has been extended as well; indeed, a historicist would maintain that one can grasp the true import of the Punishments Clause only by considering it in light of developments that occurred long after its adoption.

Two twentieth century opinions established the historicist framework that now guides interpretation of the clause. The first is the Court's opinion in *Weems v. United States*.⁹⁷ At issue in the case was the permissibility of a *cadena corporale* imposed under Philippine law by American authorities following the conquest of 1898.⁹⁸ Weems, who had been found guilty of falsifying records, received a twelve-year sentence to chained labor and was deprived of certain civil rights.⁹⁹

The Court might simply have rejected the punishment on cultural grounds. Because *cadena corporale* was unknown in Anglo-American

97. 217 U.S. 349 (1910).

98. *Id.* at 359.

99. *Id.* at 358.

law,¹⁰⁰ the Court could have treated it as an unacceptable cultural transplant—as “unusual,” in other words. Although the theme of cultural distance is discernible in *Weems*,¹⁰¹ the opinion did not treat this as essential. Rather, it effected a fundamental reordering of punishments jurisprudence. Previous Court opinions had asked whether certain *methods* of punishment violate the Eighth Amendment.¹⁰² In rejecting a static framework in which certain methods are deemed acceptable and others not, the *Weems* Court maintained that the amendment is not fixed by “impotent and lifeless formulas” and that it is not “confine[d] . . . to such penalties and punishment as were inflicted by the Stuarts.”¹⁰³ The Punishments Clause should be dynamically interpreted, *Weems* stated. Because the clause is “progressive” in nature, the Court maintained, it “may acquire meaning as public opinion becomes enlightened by a humane justice.”¹⁰⁴ Here, then, is the essential premise of Eighth Amendment historicism. Given the imprecise language of the Punishments Clause, *Weems* concluded, the provision’s referential scope can properly be determined in light of gradual changes in public opinion about the propriety of punitive practices.¹⁰⁵ The possibility of constitutional historicism arises out of the interplay of linguistic vagueness and changes in public values.

But how is this possibility to be translated into practice? Chief Justice Warren’s plurality opinion in *Trop v. Dulles*,¹⁰⁶ took the critical step in this regard. Echoing *Weems*, Warren stated that “the words of the [Punishments Clause] are not precise, and . . . their scope is not static.”¹⁰⁷ Warren then proposed the formula that has since informed most punishments cases. He asserted that “[t]he Amendment . . . must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹⁰⁸ Having been incorporated into numerous opinions of the Court over the last half century, this framework has been applied to issues as diverse as capital punishment,¹⁰⁹ prison overcrowding,¹¹⁰ and the

100. *See id.* at 377 (noting that the punishment “has no fellow in American legislation”).

101. *See id.* (“Let us remember that [the punishment in question] has come to us from a government of a different form and genius from ours.”).

102. *See In re Kemmler*, 136 U.S. 436, 447 (1890) (holding that execution by electric chair is not violative of the Eighth Amendment); *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1878) (holding that execution by shooting does not violate the Eighth Amendment); *see also Weems*, 217 U.S. at 370-71 (discussing *Kemmler* and *Wilkerson*).

103. *Weems*, 217 U.S. at 372-73.

104. *Id.* at 378.

105. *Id.*

106. 356 U.S. 86 (1958).

107. *Id.* at 100-01.

108. *Id.* at 101.

109. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (stating that the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society); *Coker v. Georgia*, 433 U.S. 584, 603 (1977) (holding that resolution of whether the death penalty is appropriate for the crime of rape requires inquiry

imposition of prison discipline.¹¹¹ Even Justice Scalia has appealed to it when writing for the Court,¹¹² though of course he has disdained it when writing for himself.¹¹³

In following *Trop*, the Court has added an important caveat, one that must be considered carefully before proceeding with our analysis of Eighth Amendment historicism. Post-*Trop* decisions often contain a qualification which, in effect, holds that whatever society's standards of decency may be, the Court must make an independent judgment of the constitutionality of a given type of judgment.¹¹⁴ If it were taken at face value, this qualification would make independent judicial assessment the key factor for analysis, not the evolving standards rule. But the Court's comments should not be read in this way, for in fact there is no case in which the majority's "independent judgment" has diverged from their conclusions about contemporary standards of decency. In death penalty cases, for example, when the Court has found that public sentiment does *not* support capital punishment for a given type of crime, it has always exercised its "independent judgment" *against* the death penalty.¹¹⁵ And, when the Court has found that public attitudes *support* capital punishment for a crime, its

into objective indicators of society's evolving standards of decency).

110. See, e.g., *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (concluding that courts cannot use a static test to determine whether conditions of confinement are cruel and unusual).

111. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (ruling that gratuitously allowing the beating or rape of one prisoner by another does not square with evolving standards of decency); *Hudson v. McMillian*, 501 U.S. 1, 8 (1992) (incorporating the evolving standards of decency framework when holding that excessive physical punishment where the inmate does not suffer serious injury may constitute cruel and unusual punishment).

112. See *Stanford v. Kentucky*, 492 U.S. 361, 368-77 (1989) (stating that the Court has not limited the constitutional prohibition on cruel and unusual punishment to barbarous methods generally outlawed in the eighteenth century, but has interpreted it in a dynamic manner).

113. See *Roper v. Simmons*, 125 S. Ct. 1183, 1217 (2005) (Scalia, J., dissenting) (rejecting the majority's use of the evolving standards test on the grounds that the test deviates from the original meaning of the Eighth Amendment).

114. See, e.g., *Atkins*, 536 U.S. at 312-13 (noting that the Court will first review the judgment of the legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded and then they will consider reasons for agreeing or disagreeing with their judgment); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (acknowledging that the Court has no reason to disagree with the judgment of most legislatures that a person's participation in a robbery that results in two killings does not merit the death penalty); *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (reasoning that the Constitution contemplates that the Court's own judgment will ultimately be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment).

115. See, e.g., *Roper*, 125 S. Ct. at 1183 (holding that the imposition of the death penalty on juvenile offenders under the age of eighteen is forbidden by the Eighth Amendment); *Atkins*, 536 U.S. at 304 (holding that the execution of the mentally retarded contravenes the Eighth Amendment); *Ford v. Wainwright*, 477 U.S. at 399 (1986) (holding that the Eighth Amendment prohibits the execution of the insane); *Coker*, 433 U.S. at 584 (holding that the sentence of death for the crime of rape is grossly disproportionate and excessive punishment that is forbidden by the Eighth Amendment).

“independent judgment” has provided reasons to *uphold* the death penalty.¹¹⁶ Indeed, if we examine the two death penalty opinions concerning the mentally retarded rendered within thirteen years of one another, we can see that the change in the majority’s independent judgment (*Penry*: capital punishment acceptable for the mentally retarded;¹¹⁷ *Atkins*: capital punishment unacceptable)¹¹⁸ tracked changes in public attitudes about this issue.¹¹⁹ The possibility exists, then, that judicial judgment will someday diverge from public opinion concerning punishment for given crimes. In cases decided since *Trop*, however, the public-sentiment dog has wagged the tail of independent judicial judgment.¹²⁰

Once it is granted that *Trop* provides the framework for Eighth Amendment historicism, the next question to ask has to do with the rationale that can be advanced for judicial adoption of the framework. The answer to this can be found in what might be called a “naïve textualist” reading of the Punishments Clause. On this approach the clause can be said to invite consideration of the moral sentiments of the community concerning state-sponsored punishment. The notion of a moral sentiment is particularly apt in this context. Eighteenth and nineteenth century

116. See *Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding that the Eighth Amendment does not categorically prohibit the execution of the mentally retarded).

117. *Id.*

118. *Atkins*, 536 U.S. at 304. Justice O’Connor, it should be pointed out, exercised her independent judgment in each instance consistently with the national trends discerned by the majorities in each case. *Id.*; *Penry*, 492 U.S. at 302.

119. The cases involving capital punishment of juveniles produce a slight variation on this. In *Stanford v. Kentucky*, 492 U.S. 361 (1989), Justice Scalia, writing for a plurality of the Court in upholding capital punishment for a seventeen-year-old convicted of murder, “emphatically rejected” the proposition that the Court should exercise its independent judgment as to the appropriateness of such a sanction. *Id.* at 377-78. In *Roper*, on the other hand, Justice Kennedy’s opinion for the Court followed the usual pattern of noting that national sentiment had turned against such punishment and then explained why the Court’s independent judgment confirmed such a trend. *Roper*, 125 S. Ct. at 1194-95.

120. My comments about the derivative nature of the Court’s exercise of “independent judgment” in cases decided with the *Trop* framework are sufficient to establish its relative insignificance within these cases. It should be noted, though, that Justice Scalia has questioned the very relevance of an independent judgment test under *Trop*. In *Roper*, Justice Scalia contended:

If the Eighth Amendment set forth an ordinary rule of law, it would indeed be the role of the Court to say what the law is. But the Court having pronounced that the Eighth Amendment is an ever-changing reflection of “the evolving standards of decency” of our society, it makes no sense for the Justices then to *prescribe* those standards rather than discern them from the practices of our people.

Roper, 125 S. Ct. at 1222 (Scalia, J., dissenting).

Though in some respects a caricature of the *Trop* test, there is also considerable merit in Scalia’s argument on this point. Because *Trop* speaks of the “progress of a maturing society,” *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958), it is misleading to speak of it as contemplating “an ever-changing reflection” of society, for *Trop* contemplates unidirectional change toward lenity in punishment, a point considered at greater length subsequently. See *infra* notes 133-135 and accompanying text. On the other hand, *Trop* can properly be said to preclude *separate* judicial analysis of a trend once judges have concluded that it does indeed enlarge on the original prohibition of cruelty.

commentators routinely suggested synonyms such as “fiendish” and “barbarous” to make sense of the word “cruel.”¹²¹ Blackstone approached the issue from the opposite direction by offering the antonym “humane” when contrasting English practices of punishment with those on the continent.¹²² Each of these terms refers to what in eighteenth century parlance would have been called “moral sentiments.” Scottish philosophers such as David Hume and Adam Smith provided accounts of such sentiments that influenced discussion throughout the English-speaking world.¹²³ Hume and Smith thought of moral sentiments as emotionally charged responses to the conduct of others that, through a process of sympathy and psychic distance, result in dispassionate assessment of their conduct.¹²⁴ At their point of origin, Smith believed, moral sentiments are involuntary; they are “principles of [our] nature.”¹²⁵ However, through the force of “fellow-feeling,” they are refined into more dispassionate conclusions about the merits of another person’s acts.¹²⁶ The term “cruel,” a historicist reading of the Punishments Clause would maintain, stands as a constitutional commitment to sustaining the shared moral sentiments of the community concerning the circumstances of state-sponsored punishment.

Hume and Smith seem never to have considered the possibility that the shared moral sentiments of a given community might take on an enlarged frame of reference over time. But it is easy to see how this is possible—how, to use the term employed by Annette Baier, a modern commentator on Hume, there can be “a progress of sentiments.”¹²⁷ Over time, public opinion about the appropriateness of a given type of punishment has been expressed by resort to terms such as “humane,” “compassionate,” and

121. See JAMES BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 154 (2d ed. 1840) (advancing the proposition that the Eighth Amendment prohibits “the gratification of fiendish passion”); BENJAMIN OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 186 (1832) (discussing the “various barbarous and cruel punishments” inflicted in other countries). Each passage is cited in Justice Scalia’s opinion in *Harmelin v. Michigan*, 501 U.S. 957, 981 (1991).

122. Contrasting English practices with those of continental countries, Blackstone remarked:

[T]he humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of these judgments as savour of torture or cruelty: a sledge or hurdle being usually allowed to such traitors as are condemned to be drawn; and there being very few instances (and those accidental or by negligence) of any person’s being embowelled or burned, till previously deprived of sensation by strangling.

4 BLACKSTONE, *supra* note 93, at 370.

123. DAVID HUME, ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 289 (L.A. Selby-Bigge ed., 1975) (1777); ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 49, 66 (E.G. West ed., 1969) (1759).

124. HUME, *supra* note 123, at 289; SMITH, *supra* note 123, at 49, 66.

125. SMITH, *supra* note 123, at 47.

126. *Id.* at 49.

127. See generally ANNETTE BAIER, A PROGRESS OF SENTIMENTS: REFLECTIONS ON HUME’S TREATISE (1991).

“barbarous,” with the terms remaining constant even though their frame of reference has been progressively enlarged. Consider, for example, the claim of an 1811 pamphleteer that public execution excites in spectators “emotions of pity, humanity and sympathy” and so induces in them “a temporary disaffection to the government.”¹²⁸ The gist of this claim is that public execution is counterproductive, a common argument among capital punishment opponents in the early nineteenth century. Of special interest is the author’s use of the terminology associated with moral sentiment theory in developing his position: his claim that *spectators* (Smith maintained that moral assessments are rendered by an impartial spectator) experience *emotions* such as *pity* and *sympathy*.¹²⁹ An Ohioan’s 1847 pamphlet opposing public execution provides a further example of the influence of the moral sentiment framework. “The exhibition of extreme punishment,” the pamphleteer maintained, “seems to have a natural tendency to destroy the moral sensibility, and produce a shocking depravity of the human character.”¹³⁰ Opposition to public execution was rare at the time the Eighth Amendment was adopted.¹³¹ As these examples make clear, by the early nineteenth century opponents of the practice could draw on the rhetoric of moral sentiments to further their cause. That they did not state that they were extending the referential scope of this terminology—that they talked as if moral sentiments *always* have the same scope—simply underscores the importance of the rhetoric of permanence in the advancement of moral beliefs.¹³²

Now let us turn to the term “unusual.” If “cruel” is to be understood in terms of sentiments that reject certain types of sentiments as barbaric, then “unusual” stands as a directive to consider whether those types of punishment have, by virtue of changes in public sentiment, become so rare as to warrant constitutional prohibition. The direction of public opinion is critical in this regard. On a historicist account, as moral sentiments become

128. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 148 (2002).

129. SMITH, *supra* note 123, at 66.

130. BANNER, *supra* note 128, at 149.

131. *Id.* at 27 (comparing the eighteenth century American sentiment toward attending executions to the nineteenth century sentiment where “respectable Americans” would come to feel embarrassment at the idea of attending).

132. An interesting example of this is to be found in the Court’s comment on whether the insane can be eligible for the death penalty under the Eighth Amendment. In holding that the amendment makes them ineligible, the Court remarked that “the intuition that such an execution simply offends humanity is evidently shared across this Nation.” *Ford v. Wainwright*, 477 U.S. 399, 409 (1986). The appeal to “intuition” and “humanity” plus the powerful adverb “simply” all illustrate the continuing hold of moral-sentiments rhetoric in judicial discussion of the Eighth Amendment. As used by the *Ford* majority, that rhetoric is systematically ambiguous as to the issue of evaluative change. The term “humanity” suggests an unchanging sentiment about a given practice. On the other hand, the reference to a sentiment “shared across this Nation” leaves open the possibility that it might not have been at an earlier time or that it might not be shared by the people of other nations.

more refined—as the frame of reference for “humanity” and “compassion” expands—the range of constitutionally permissible punishment diminishes. It is in this context that we can understand the appeal to progress in *Weems* and *Trop*. The term expresses an idea essential to penal reform ever since the founding of the republic. Benjamin Rush, one of the first prominent critics of capital punishment in America, appealed to the idea of progress when he remarked that “[t]he world has certainly undergone a material change for the better within the last two hundred years.”¹³³ A New Yorker writing shortly afterwards put the point in terms of progressive historicism. “If we examine history in general,” he argued, “we shall readily perceive, that as mankind became more civilized, and advanced toward refinement, punishments became less severe.”¹³⁴ *The Colored American* summarized this line of reasoning in one word while supporting an 1840 bill to abolish capital punishment in Connecticut: “PROGRESS.”¹³⁵

A historicist would not maintain that the interpretation of the text employed here—use of “cruel” and “unusual” to track changing sentiments about punishment—captures original understandings of the Eighth Amendment. In its unalloyed form, historicism makes no claim that dynamic interpretation is consistent with the ratifiers’ understandings. One must always allow for the possibility that ratifiers of a provision *intended* later generations of interpreters to enlarge on their understanding of the provision’s scope. But historicism does not insist on this. What matters here is that there is a trajectory of change, one that identifies values about which there is a broad consensus and traces these to a starting point established by the ratifiers’ original commitments.

How, then, are courts to determine whether there is a broad consensus concerning a specific punitive practice? This methodological question raises issues that have a strong parallel in originalism. In each instance, a difficult problem of fact turns out to be critical to the implementation of an interpretive framework. Moreover, in each instance, judges can inject their personal biases in deploying the methodology. Indeed, it is fair to say that concerns about personal bias in the implementation of historicism’s methods are as well-founded as they are in the case of originalism. Consider first a relatively uncontroversial instance of Eighth Amendment historicism. At issue in *Coker v. Georgia*¹³⁶ was a statutorily authorized death sentence for rape. Although rape was a capital offense in all the states at the time the Eighth Amendment was ratified, by 1977, when *Coker*

133. BANNER, *supra* note 128, at 100.

134. *Id.*

135. *Id.* at 125.

136. 433 U.S. 584 (1977).

was decided, only four states continued to employ it.¹³⁷ Using the *Trop* test, the justices concluded that death is not permissible for rape.¹³⁸ Juries routinely declined to impose the death penalty for the crime; indeed, no northern state had carried out an execution for rape since the mid-nineteenth century.¹³⁹ Even most southern states had discontinued the practice.¹⁴⁰ In *Coker*, the Court thus accorded constitutional standing to a broadly shared sentiment about punishment for rape. There had been no formal deliberation of the kind anticipated by Article V.¹⁴¹ Jury verdicts and legislative enactments, however, provide evidence of occasions for deliberation outside Article V. The *Coker* Court found that this analysis was sufficiently strong evidence of a settled consensus to justify enlarging on a value already established by the ratifiers.¹⁴²

*Atkins v. Virginia*¹⁴³ and *Roper v. Simmons*,¹⁴⁴ on the other hand, pose a more serious problem of justification for a historicist because the existence of a settled consensus relevant to each is open to challenge. Thirteen years before *Atkins* was decided, the Court, in *Penry v. Lynaugh*,¹⁴⁵ upheld capital punishment for the mentally retarded. Fifteen years before *Roper*, in *Stanford v. Kentucky*¹⁴⁶ (decided on the same day as *Penry*), the Court upheld capital punishment for those who commit murder while seventeen years of age.¹⁴⁷ Relying on trends of little more than a decade, *Roper* and *Atkins* reversed their recent precedents. Imposing a categorical prohibition in each instance, the Court noted that thirty states either prohibit capital punishment altogether or prohibit it for the relevant category (the mentally

137. *Id.* at 593-96.

138. *Id.* at 596-600.

139. BANNER, *supra* note 128, at 131-32.

140. See Richard Reifsnyder, *Capital Crimes in the States*, 45 J. CRIM. L., CRIM. & POL. SCI. 690, 691 (1955) (noting the eighteen states that, at the time, retained capital punishment for rape). By the time *Coker* was decided, this number had been reduced to four. See *supra* note 137 and accompanying text.

141. Article V provides:

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . .

U.S. CONST. art. V.

142. *Coker*, 433 U.S. at 595-96.

143. 536 U.S. 304 (2002).

144. 125 S. Ct. 1183 (2005).

145. 492 U.S. 302 (1989).

146. 492 U.S. 361 (1989).

147. See *id.* at 380 (finding neither a historical nor a modern societal consensus forbidding the imposition of the death penalty for those who murder while aged sixteen or seventeen).

retarded and juveniles).¹⁴⁸ Generalizing on the trends involving execution of the mentally retarded, *Atkins* held that the practice “has become truly unusual, and it is fair to say that a national consensus has developed against it.”¹⁴⁹ A similar premise underlies the *Roper* Court’s conclusion concerning capital punishment for homicide committed by juveniles.¹⁵⁰

But does either opinion provide evidence of a *settled* consensus? Proponents of a living constitution might be willing to accept a recently-reached consensus. Historicism, however, requires more, for otherwise constitutional doctrine could be based on trends indistinguishable from those underlying many legislative majorities. As if to signal their unease with the conclusions reached in the two cases, the *Atkins* and *Roper* majorities resorted to evidence not normally found in evolving standards cases: public opinion polls concerning execution of the mentally retarded¹⁵¹ and, in the case of juveniles, the fact that other countries have discontinued such executions.¹⁵² Dissenting in each case, Justice Scalia raised legitimate questions about whether the evolving standards test had actually been satisfied.¹⁵³ *Coker*, he noted, involved a much more decisive and long-lasting consensus concerning the execution of rapists than the Court was able to present for either of its recent decisions.¹⁵⁴ Indeed, with only thirty states and slightly more than a decade’s duration since a prior decision, each case barely exceeded majority status and certainly did not involve a period of sustained consensus.

At the very least, then, Scalia suggested, one could argue that the *Atkins* and *Roper* majorities acted prematurely; they should have waited for a more pronounced trend, one indicative of an enduring national consensus.¹⁵⁵ In *Atkins*, Scalia went even further. Ridiculing the majority’s resort to public opinion polls, he awarded a prize for “the Court’s Most Feeble Effort to fabricate a ‘national consensus.’”¹⁵⁶ Scalia

148. *Roper*, 125 S. Ct. at 1185; *Atkins*, 536 U.S. at 314-15.

149. *Atkins*, 536 U.S. at 316.

150. See *Roper*, 125 S. Ct. at 1192-94 (noting general parallel between change in public sentiment about execution of the mentally retarded and change in public sentiment about execution of adolescents).

151. *Atkins*, 536 U.S. at 316 n.21.

152. *Roper*, 125 S. Ct. at 1187.

153. See *Roper*, 125 S. Ct. at 1217 (Scalia, J., dissenting) (voicing objections to the Court proclaiming itself to be the sole arbiter of the Nation’s moral standards); *Atkins*, 536 U.S. at 341-48 (Scalia, J., dissenting) (advancing the proposition that Eighth Amendment judgments regarding the existence of social standards should not appear to be the subjective views of individual justices, but should be informed by objective factors such as statutes passed by society’s elected representatives).

154. *Roper*, 125 S. Ct. at 1218 (Scalia, J., dissenting).

155. See *Roper*, 125 S. Ct. at 1218 (Scalia, J., dissenting) (arguing that “[w]ords have no meaning if the views of less than 50% of the death penalty states can constitute a national consensus”); *Atkins*, 536 U.S. at 342-45 (Scalia, J., dissenting) (making a similar argument).

156. *Atkins*, 536 U.S. at 347 (Scalia, J., dissenting).

was of course accusing the majority of acting on personal preferences in implementing the evolving standards test. Anything goes, he implied: if a portion of the test is unsatisfied in a given case, the Justices employing it then feel free to develop other criteria to reach their desired conclusion. It would be disingenuous to argue that *only* historicism's proponents can be faulted on this score. As we have seen, originalism suffers from the same problem of determining how much evidence is enough,¹⁵⁷ but certainly Scalia's objections in *Atkins* must be taken seriously.

D. *Originalist Historicism and the Punishments Clause*

As I have suggested, unalloyed historicism makes no claim that the ratifiers of a given provision intended it to be understood differently at later times. Yet, one must certainly consider the possibility that the ratifiers entertained this assumption at the time a given provision was adopted. If the ratifiers of a provision *understood* it to have a dynamic meaning, one could then point, if only for that provision, to a satisfying synthesis between the two seemingly antithetical approaches to constitutional interpretation. Unfortunately, this is the El Dorado of constitutional law: a tantalizing prospect but one that ultimately cannot be justified. Before seeing why this is so, let us first examine briefly some arguments based on originalist historicism from modern judicial opinions.

There appears to have been only one occasion in which an opinion of the Court actually endorsed originalist historicism. In *Board of Regents of State Colleges v. Roth*,¹⁵⁸ Justice Stewart declared for the Court that the words "liberty" and "property" contained in the Fourteenth Amendment are among the constitutional terms "'purposely left to gather meaning from experience.'"¹⁵⁹ Two opinions that did not receive majority support but that sustained judgments of the Court have embraced Eighth Amendment originalist historicism. Concurring in *Furman v. Georgia*,¹⁶⁰ Justice Brennan cited Livermore to argue that the ratifiers did not intend "simply to forbid punishments considered 'cruel and unusual' at the time."¹⁶¹ More than a decade later, Justice Stevens wrote an opinion for the four-person plurality in *Thompson v. Oklahoma*¹⁶² that stands as the most ambitious endorsement to date of originalist historicism by a member of the Court. Stevens remarked:

157. See discussion *supra* Part I.B.

158. 408 U.S. 564 (1972).

159. See *id.* at 571 (citing *Nat'l Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 646 (Frankfurter, J., dissenting)).

160. 408 U.S. 238 (1972).

161. *Id.* at 263.

162. 487 U.S. 815 (1988).

The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the “evolving standards of decency that mark the progress of a maturing society.” In performing that task, the Court has reviewed the work product of state legislatures and sentencing juries, and has carefully considered why a civilized society may accept or reject the death penalty in certain types of cases.¹⁶³

Stevens’s argument, it should be noted, contains not one but two highly contestable claims. The first has to do with delegation. The Eighth Amendment’s authors, he maintains, intended later generations to define “contours” (I have used the term “scope” in this context) that they left purposely vague.¹⁶⁴ This is the essential thesis of originalist historicism. However, Stevens’ *Thompson* argument adds another: that they thought of “future generations of judges” armed with the power of judicial review (Stevens’ *Trop* framework makes sense only if this power is assumed) as their delegates.¹⁶⁵ Stevens maintains, in other words, that the amendment’s ratifiers intended a *Marbury*-type system of judicial interpretation of the Punishments Clause along historicist lines.¹⁶⁶

That *Weems* and *Trop* established such a system is of course true.¹⁶⁷ But the question that must be asked here—the question that is essential whenever an originalist claim is advanced—is whether there is substantial evidence in the historical record to demonstrate that this is what the ratifiers intended. The answer to this is no. It is not at all certain that the ratifiers even intended to introduce a *Marbury*-type system of judicial review. They may have anticipated *some type* of judicial review, particularly of state legislation, but it is open to question whether they intended the system of judicial supremacy over the state and federal legislative action that developed in the wake of *Marbury*.¹⁶⁸

This point, however, is less critical to Stevens’ position than his claim that the Eighth Amendment’s ratifiers intended to delegate to future

163. *Id.* at 821-22; see *Roper v. Simmons*, 125 S. Ct. 1183, 1205 (2005) (Stevens, J., concurring) (advancing the more cautious claim that Alexander Hamilton would have joined Kennedy’s opinion if he were serving on the current Court).

164. See *Thompson*, 487 U.S. at 822 (referencing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

165. *Id.*

166. For an analysis of *Marbury* in its historical context, see Samuel R. Olken, *The Ironies of Marbury v. Madison and John Marshall’s Judicial Statesmanship*, 37 J. MARSHALL L. REV. 391, 403-09 (2004).

167. See *supra* notes 97-113 and accompanying text.

168. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 143-44 (2004) (describing public and political sentiment in the *Marbury* era).

generations the job of defining its contours.¹⁶⁹ To support this, Stevens would have had to provide just the kind of evidence any originalist would be expected to offer—a substantial compilation of eighteenth century sources in support of his thesis plus a reasoned explanation as to why contrary evidence should be discounted. Stevens offers nothing of the sort in *Thompson*; he does not support his statement with even a single historical citation. The one piece of evidence that Stevens might have mentioned is Samuel Livermore's caustic analysis of the clause when Congress was debating it. Justice Brennan, it will be recalled, maintained in his *Furman* concurrence that Livermore's comments demonstrate an awareness of the possibility that later generations might accord greater scope to the clause than it was accorded in the eighteenth century.¹⁷⁰ This is true, but Livermore nonetheless cannot be said to provide any credible evidence on behalf of Eighth Amendment originalist historicism. He was, after all, an *opponent* of the Eighth Amendment; indeed, his remarks indicate that he favored rejection of the amendment because of his fear of what later generations might make of it.¹⁷¹ What an argument for Eighth Amendment originalist historicism needs is a cluster of statements from its *supporters* indicating that they wished it to be accorded greater scope by later generations. The historical record contains nothing of the kind.

Originalist historicism, either in a limited Eighth Amendment sense, or more broadly applied to other chronically vague constitutional provisions, is thus a tantalizing prospect. If it could be supported by the usual originalist methodology, it would heal many of the wounds of contemporary constitutional debates. But no such support is available. Unfortunately, originalist historicism is a false cure for a serious problem. In the remainder of this Article, I reason in terms of unalloyed historicism—that is, I rely on the assumption that historicism cannot be supported by originalism.

II. THE KEY COMPONENTS OF CONSTITUTIONAL HISTORICISM: THE PUNISHMENTS CLAUSE—AND BEYOND

Contemporary Punishments Clause jurisprudence is characterized by subtly calibrated, gradual modification of doctrine that tracks changes in the public's settled convictions concerning specific types of punitive practices. Historicism of this kind is a method of accommodation and adjustment, one that honors an unchanging constitutional text while applying that text to an increasingly large set of issues. This method is

169. *Thompson*, 487 U.S. at 822.

170. *Furman v. Georgia*, 408 U.S. 238, 262-63 (1972).

171. *See supra* notes 56-57 and accompanying text.

grounded in a normative premise that doctrine *ought to be* adjusted to take into account enduring, widespread changes in fundamental values when those changes are consistent with the direction charted by the framers. It is grounded in the descriptive premise that judicial interpretation of the Constitution's chronically vague clauses has usually proceeded along these lines. In this section, I consider the general characteristics of this type of historicism. Some of the points I make are specific to Eighth Amendment case law; however, I also discuss categories—for example, the notion of time-bound rights and the importance of judicial candor concerning interpretive method—that are relevant to constitutional historicism in general. In canvassing Eighth Amendment jurisprudence, I thus take a first step toward identifying the key elements of constitutional historicism as a method for interpreting other portions of the text. My aim in this section is analytic. I address questions about the legitimacy of historicist interpretation in the final part of the Article.

A. *Normative Commitment to Doctrinal Change*

Constitutional historicism rests on a descriptive claim that doctrinal change has tended to track changes in the settled convictions of the public concerning values mentioned in the text. In some instances, it is essential to back up this claim with carefully collected evidence, for the Court has often been less than candid about the extent to which it has attempted to capture shifts in settled convictions.¹⁷² Punishments cases, however, do not require such subterranean exploration. Indeed, the stated purpose of opinions that follow *Trop* is to capture accurately public attitudes toward punishment.¹⁷³ In examining legislative change and jury verdicts, a court seeks to determine whether the public's convictions have become firm concerning the acceptability of a given type of punishment. *Coker* illustrates this point quite well. The fact that all but four states prohibited execution for rape and the further fact that the trend toward this extended over decades, established that a consensus had formed concerning the practice.¹⁷⁴ It is indisputable, then, that *Coker* identified a well-settled conviction of the modern era, one that is substantially different from the convictions of the Eighth Amendment's ratifiers.

Complementing the descriptive thesis is a normative one which holds

172. For an example of this in assistance of counsel jurisprudence, see *infra* notes 307-323 and accompanying text.

173. See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183, 1195 (2005) (abolishing capital punishment for offenders who were minors at the time of the crime); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (abolishing capital punishment for offenders who are mentally retarded); *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (abolishing capital punishment in cases of rape).

174. See *supra* notes 136-142 and accompanying text.

that constitutional doctrine *should be* modified to reflect settled convictions consistent with those of the ratifiers. One argument a historicist would advance to support this has to do with the conception of the Constitution as an intergenerational project in political and social liberty. This, however, is only a general justification for historicism. In particular, as is made clear by the formula just stated, historicists insist on (a) settled convictions that (b) are consistent with value commitments of the ratifiers. The latter point makes good on the notion of the Constitution as an ongoing project. Far from advocating a “living constitution”—a body of doctrine created anew for each generation—historicists focus on values inherited from the past. The former point (about settled convictions in the present) underscores the historicist’s focus on the meaning the current generation ascribes to the text. An insistence on an enduring consensus establishes the supermajority element that, according to a historicist, justifies classifying a value as constitutional. Once such a consensus exists, it is appropriate for courts to adjust doctrine to reflect this. A historicist would justify *Coker* on these grounds. Using the same framework, a historicist would also justify the 1970s application of the Equal Protection Clause to gender discrimination¹⁷⁵ and the 1960s acceptance of the argument that the Fourth Amendment provides protection for privacy interests independently of its protection for property interests.¹⁷⁶ In each instance, earlier Supreme Court rulings had rejected claims along these lines.¹⁷⁷ A settled conviction having developed against gender discrimination and in favor of privacy, the historicist would maintain that it was proper for the Court to enlarge on the ratifiers’ commitments and so refashion constitutional doctrine.

This normative argument distinguishes historicism not only from originalism but also from a framework championed by Bruce Ackerman¹⁷⁸ that can sometimes be mistaken for historicism. Consider first the obvious difference with originalism. According to originalists, it is never proper to modify constitutional doctrine to accommodate a change in settled convictions, no matter how consistent that change may be with values mentioned in the text. Article V provides the sole acceptable way to bring this about, an originalist would contend.¹⁷⁹ There is an obvious wisdom in

175. See *infra* notes 232-234 and accompanying text.

176. See *infra* notes 217-219 and accompanying text.

177. See, e.g., *Hoyt v. Florida*, 368 U.S. 57, 59-69 (1961) (rejecting a proposed application of the Equal Protection Clause to include gender discrimination); *Olmstead v. United States*, 277 U.S. 438, 475 (1928) (rejecting the argument that the Fourth Amendment protects privacy interests independently of property interests).

178. See generally 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter *FOUNDATIONS*]; 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) [hereinafter *TRANSFORMATIONS*].

179. Compare *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 676 (1966) (Black, J., dissenting) (criticizing the Court’s willingness to freely use the Equal Protection Clause and

making Article V exclusive, an originalist would contend, for its methods encourage careful deliberation by a wide portion of the populace. If constitutional values actually are altered through Article V, the alteration will occur in such a way so that popular deliberation will precede popular consent.

Ackerman's approach stands at a mid-point between originalism and the historicism outlined in this article. On the one hand, Ackerman does not insist on Article V as the exclusive means of altering constitutional values.¹⁸⁰ He maintains that Article V was bypassed in large measure by the Reconstruction Congress of the 1860s and that it was wholly bypassed during the New Deal crisis of the 1930s.¹⁸¹ Doctrine was profoundly and *properly* modified at both times, he contends.¹⁸² This much is consistent with historicism. However, Ackerman also maintains that doctrine can be properly modified only if a "transformative agenda" is widely debated during a "substantial period for mobilized deliberation"¹⁸³—conditions satisfied during Reconstruction and the New Deal but not at other times, he suggests.¹⁸⁴ Ackerman therefore insists on a deliberative alternative to Article V: not the actual formalities mentioned in the text but a functional equivalent of them by means of widespread consideration of the possibility of constitutional change.¹⁸⁵ On his account, it is only through, and at times of, "constitutional politics" that doctrine can properly be modified.¹⁸⁶ The doctrines employed by the courts at other times—"normal politics" in Ackerman's terminology—must adhere to the changes wrought at the time of constitutional transformation.¹⁸⁷

In rejecting each of these approaches, a historicist would contend first that neither one can make a strong claim to descriptive accuracy. Originalists concede the point. As Henry Monaghan has noted, so much

the Due Process Clause to alter the original meaning of the Constitution and to question the intent of the founders), *with* TRANSFORMATIONS, *supra* note 178, at 77 (analogizing the Constitution as a machine to which repairs may be made using a variety of tools, not all of which were expressly suggested or even permitted for that purpose).

180. *See* FOUNDATIONS, *supra* note 178, at 15 (questioning whether the procedures specified in Article V are merely sufficient, but not necessary, for amending the Constitution).

181. *Cf. id.* at 195 (describing a shift in Constitutional interpretation away from pure originalism and towards greater judicial activism).

182. *See id.* (legitimizing the decisions of New Deal judges not to adhere to strict constructionism).

183. *Id.* at 263-65.

184. *See id.* at 81-130 (arguing that American constitutional history can be characterized as "on constitution, three regimes": an early, antebellum republic, a middle republic, and a post-New Deal republic).

185. *See id.* at 264 (describing the significance of engaging in a critical examination of both past and future constitutional interpretation).

186. *See id.*

187. *See id.* at 265 (defining periods of normal politics as those in which private citizens behave passively, allowing political figures to speak for them).

constitutional doctrine has departed from original understandings that any attempt to revive them all would amount to a greater revolution in constitutional law than anything experienced in the last two hundred years.¹⁸⁸

Ackerman, in contrast, makes no concession on this score; indeed, he has made a substantial effort to show that decisions such as *Brown v. Board of Education*¹⁸⁹ and *Griswold v. Connecticut*,¹⁹⁰ while concerned with issues that have no direct connection to the New Deal crisis, are nonetheless justifiable in light of Roosevelt's transformative agenda.¹⁹¹ But far more than two cases would have to be canvassed to establish this point. Since the New Deal (according to Ackerman, the most recent instance of constitutional politics),¹⁹² the Court has extended the reach of equal protection to include gays as well as women,¹⁹³ endorsed privacy as a core constitutional value,¹⁹⁴ provided substantial protection for the possession and dissemination of pornography,¹⁹⁵ reviewed aggressively the boundaries between church and state¹⁹⁶—and, of course, modified substantially the scope of the death penalty.¹⁹⁷ None of these developments can readily be placed in the framework of the New Deal agenda. By contrast, the very timing of each suggests that they can all be understood in terms of a gradualist judicial response to changes in *specific* settled convictions.

188. See Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 724-39 (1988) (concluding that originalism is a fundamental and effective method of protecting and preserving political stability).

189. 347 U.S. 483 (1954).

190. 381 U.S. 479 (1965).

191. See FOUNDATIONS, *supra* note 178, at 150-59 (describing the ideological conflict between the principles of New Deal activism and the founders' emphasis on personal liberties).

192. See *id.* at 89 (arguing that "the Constitution was revolutionized yet again in the cauldron of the Great Depression").

193. See, e.g., *Romer v. Evans*, 517 U.S. 620, 631-36 (1996) (holding invalid an amendment to the Colorado state constitution prohibiting government action that intends to protect against discrimination based on sexual orientation); *Frontiero v. Richardson*, 411 U.S. 677, 691-92 (1973) (rejecting a policy that awarded financial benefits to wives of servicemen, but not to husbands of servicewomen).

194. See, e.g., *Katz v. United States*, 389 U.S. 347, 359 (1967) (holding that the government violated the defendant's privacy rights by using a wire tap to listen to his telephone conversations).

195. See, e.g., *Miller v. California*, 413 U.S. 15, 24-25 (1973) (rejecting the "without redeeming social value" test as a constitutional standard for obscenity); *Stanley v. Georgia*, 394 U.S. 557 (1969) (prohibiting the criminalization of mere private possession of pornography).

196. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 611-25 (1971) (challenging the constitutionality of state aid to parochial schools); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 226-27 (1963) (holding that daily Bible readings in public schools violate the Establishment Clause); *Engel v. Vitale*, 370 U.S. 421, 436 (1962) (holding that public school prayer violates the Establishment Clause even if children are excused from participation if their parents object to the practice).

197. See *supra* notes 115-120 and accompanying text.

Ackerman's thesis, I suggest, stands as a special instance of the more general type of historicism I have outlined. Catastrophes of American constitutional history (Ackerman is surely right in limiting this category to the Civil War and the New Deal¹⁹⁸) can indeed exert a profound influence on doctrine. These catastrophes do not, however, determine the course of all, or perhaps even most, doctrinal change during times of "normal politics." Indeed, the gradualism of Punishments Clause jurisprudence provides a telling counterexample, for this involves no one great cataclysm but rather a series of modest shifts in public sentiment that are then registered through equally modest recalibration of doctrine.

In challenging both originalists and Ackerman-type catastrophists on normative grounds, a historicist would maintain that the method of accommodation and adjustment ensures the ongoing consent that sustains the legitimacy of the Constitution. By focusing on understandings that are increasingly remote from the present, the originalist robs the Constitution of the vitality it can (and does) possess as the organizing document for the continuous project of political liberty. And by focusing only on understandings arising out of catastrophe, Ackerman turns the Constitution into a trauma-avoiding institution rather than one that furthers the complex, subtle values associated with life during normal politics. A historicist would thus contend that it is proper for courts to consider changes in settled convictions—as evidenced, say, by substantial modification of penalties by state legislatures and juries—even though those changes are not the result of direct deliberation about whether it is desirable to alter the values of the framers. To insist on a greater degree of deliberation, the historicist would maintain, would be to ignore the extent to which the abstract values mentioned in the text permeate everyday life—and so to ignore the extent to which there are occasions for deliberation about constitutional values that do not involve formal reflection on constitutional history but that are nonetheless informed by concerns with an identifiable connection to those of the ratifiers. This point holds true, a historicist would suggest, with respect to all the instances of gradualist change mentioned earlier. It is applicable to deliberations about gender discrimination, which in turn build on discussions of race; to deliberations about privacy, which build on (while subtly modifying) older frameworks for thinking about property; and of course to deliberations about punishments, where notions about what is acceptable have been the subject of robust discussion throughout

198. See, e.g., FOUNDATIONS, *supra* note 178, at 195 (commenting about both eras and omitting references to other periods in the nation's history: "During both Reconstruction and the New Deal, the Court recognized that the People had spoken even though their political leaders refused to follow the technical legalities regulating constitutional amendment.").

the nation's history. Self-conscious reflection about the gap between past and present may be rare, the historicist would maintain, but this is not critical given the occasions routinely presented for considering the significance of the abstract values mentioned in the text.

*B. The Direction of Doctrinal Change:
Enlargement, Contraction, and Transformation*

Punishments cases involve a straightforward direction of change: they *enlarge* on understandings that prevailed at the time of the Eighth Amendment's ratification. The same can be said about some of the other examples of doctrinal change just discussed: invocations of the Equal Protection Clause to cover gender discrimination and invocations of the Fourth Amendment to accord independent standing to privacy interests also enlarge on original understandings.¹⁹⁹ But contraction is possible as well. Think, for example, about the fate of the Contracts Clause²⁰⁰ as well as the eclipse of the doctrine of freedom of contract.²⁰¹ Contraction can be combined with enlargement through a process of doctrinal transformation. Indeed, the resolution of the New Deal crisis is perhaps best understood in terms of a shift in which the Court sought to protect liberty through an enlarged conception of non-economic rights while contracting the range of protection of property and a diminished concern for federalism.²⁰²

A helpful guide to the issue of the direction of change can be found in John Henry Newman's analysis of the development of Christian doctrine, an analysis he undertook in conjunction with his conversion from Anglicanism to Roman Catholicism.²⁰³ It was Newman who introduced the distinction between enlargement and transformation (he used the term "metamorphosis") of doctrine.²⁰⁴ Enlargement, Newman suggests, starts

199. *See id.* at 196 (maintaining that these shifts in interpretation are examples of "successful constitutional politics").

200. *See* JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 115-16 (2d ed. 1998) (analyzing the declining importance of the Commerce Clause in twentieth century Supreme Court decisions).

201. *See id.* at 127 (recognizing a parallel trend in the Supreme Court's deference to freedom of contract).

202. *Compare* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 n.4 (1938) (Stone, J.) (assigning an enlarged role to non-economic rights), *with* *United States v. Darby*, 312 U.S. 100, 123-24 (1941) (Stone, J.) (assigning a limited role to the Tenth Amendment). *See also* TRANSFORMATIONS, *supra* note 178, at 361 (examining the "swing" Justices' concern for creating the appearance of "doctrinal continuity" even as the Court both expanded and limited its protection of traditional rights).

203. *See* CHARLES F. HARROLD, *JOHN HENRY NEWMAN: AN EXPOSITORY AND CRITICAL STUDY OF HIS MIND* 71-90 (1945) (analyzing the role that Newman's study of doctrinal development played in his conversion to Catholicism).

204. *Id.*

with a core commitment that is never abandoned.²⁰⁵ “Its beginnings are no measure of its capabilities, nor of its scope” Newman remarks.²⁰⁶ Gradually, a value covers more ground, remaining vital through expansion. On Newman’s account, metamorphosis involves transformation—the “recasting of doctrines into new shapes,” as he puts it.²⁰⁷ Within a body of doctrine handed down from generation to generation, this will typically be characterized by a reordering of values, with a previously subordinate value being given priority over others that had eclipsed it, and with the entire reordering characterized as an improvement on an ongoing tradition.²⁰⁸ Metamorphosis/transformation is thus marked by simultaneous enlargement and contraction. It is a considerably more complex phenomenon than enlargement or contraction when each stands alone.

Punishments Clause jurisprudence provides a helpful introduction to constitutional historicism in part because it offers an example of enlargement at its most straightforward. But while the enlargement at stake here is easy to understand, its relationship to underlying social trends is by no means so simple. It is surely not the case, after all, that public attitudes toward punishment have invariably become less severe. For example, during the last three decades or so, many jurisdictions have *increased* the

205. *Id.*

206. JOHN HENRY CARDINAL NEWMAN, AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE 40 (Longmans, Green, & Co. 1909) (1845), *available at* <http://www.newmanreader.org/works/development/>. The relevance of Newman’s essay to the study of constitutional doctrine is now commonly asserted in academic writing. *See* JAROSLAV PELIKAN, INTERPRETING THE BIBLE AND THE CONSTITUTION 120 (2004) (concluding that Newman’s theory of development of doctrine is no longer limited to the study of religious history and doctrine); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 8 n.26 (1984) (contextualizing Newman’s theories and emphasizing Newman’s belief that fundamental traditions gave meaning and weight to subsequent interpretations of Christian doctrine). It must be emphasized, however, that Newman’s approach is no more than suggestive for the study of constitutional law. This is because Newman adhered to a metaphysical distinction, which is inimical to secular thought, between true development and false (or corrupt) development. *See* NEWMAN, *supra*, at 199. True development of doctrine is possible because, on the one hand, no one human mind is capable of grasping the full import of revelation. *Id.* at 29-30. On the other hand, such developments “were of course contemplated and taken into account by [their] Author, who in designing the work designed its legitimate results.” *Id.* at 75.

207. JOHN HENRY NEWMAN, 1 ESSAYS CRITICAL AND HISTORICAL 288 n.5 (1871), *quoted in* HARROLD, *supra* note 203, at 75. Newman, it should be emphasized, does not endorse metamorphosis of doctrine; rather, he views it as a form of corruption. This is consistent with his conception of true development of doctrine as fulfillment of the “Author’s” design of “legitimate results.” *See supra* note 163. It is appropriate, however, for a secular study of the development of constitutional doctrine to use both Newman’s categories (enlargement *and* metamorphosis/transformation) and to use them without the evaluative premises Newman attached to them (enlargement as true development; metamorphosis/transformation as corrupt development). Once shorn of the metaphysical premises Newman employed, each category proves helpful in charting different patterns of doctrinal development in constitutional law.

208. *See* HARROLD, *supra* note 203, at 75-76 (praising religious doctrine as a collection of living ideas, which develops by building on its original tenets).

punishment tariff for a wide variety of crimes.²⁰⁹ The *Trop* framework, while according constitutional standing to trends towards lenity, does not, however, provide any support for this converse trend toward severity. Indeed, *Trop*-based decisions establish a baseline that can readily be raised but that can be reduced only with great difficulty. Given the Court's power under *Marbury* to override legislative choices,²¹⁰ enlargement on the scope of the Punishments Clause has functioned as a kind of ratchet within the democratic system. Absent a constitutional amendment or a decision overruling a prior one, an opinion that expands on the scope of the Punishments Clause redefines the context for democratic decision-making.²¹¹ Public sentiment concerning punishment may turn more severe, but the *Marbury* ratchet establishes a minimum (which has gradually been elevated over the course of the nation's history) below which legislatures may not go.²¹²

That so many Eighth Amendment opinions and so many opinions enlarging on the scope of other rights are nonetheless accepted as legitimate is an indication of the powerful attraction exerted by unidirectional historicism. In using the *Marbury* ratchet to mark off certain practices because they offend settled convictions, the Court has employed constitutional law to chart a national narrative of moral progress. The Whiggish invocation of progress in *Trop* thus does not appear by coincidence. The numerous decisions that have enlarged on the ratifiers' original understandings²¹³ are properly understood as instances of judicial Whiggism.²¹⁴ These decisions are premised on the notion that the national

209. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 456-63 (1993) (discussing the connection between the increasing punishment tariff and corruption and error in the criminal justice system).

210. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (stating that it is "the very essence of judicial duty" to determine whether a statute conflicts with the Constitution and concluding that when such a conflict is found to occur the statute cannot be followed).

211. See HARROLD, *supra* note 203, at 76 (grappling with Newman's concept of enlargement, and likening it to a system of "organic growth" in which the original idea is both preserved and expanded).

212. In writing for himself and Chief Justice Rehnquist in *Harmelin*, Justice Scalia asserted that "[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular type of crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions." *Harmelin v. Michigan*, 501 U.S. 957, 990 (1991). My remarks in the text indicate my disagreement on this point. I agree that the amendment should not function as a ratchet of any kind for a *temporary* consensus concerning a given type of punishment; however, I maintain that it properly functions as an almost complete ratchet once a long-lasting consensus has emerged.

213. See *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (citing Charles Warren, *The New Liberty under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926)). Justice Cardozo explicitly invoked the notion of enlargement in discussing the liberty protected by the Fourteenth Amendment. That liberty, he asserted, "has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action." *Id.*

214. See generally John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U.

narrative should be understood, at least in part, in terms of an unfolding of the domain of strongly embedded individual rights.²¹⁵ An appeal to progress does not necessarily involve an end-state of national development. Nor must it involve a uniform pace of change.²¹⁶ Rather, what is at stake here is a notion that the threshold of minimally acceptable government conduct is gradually becoming more stringent. This is the unmistakable implication of *Trop*-type cases as well as numerous other ones that enlarge on original understandings.

How, then, are we to understand clauses that, through less expansive readings, have been involved in transformative judicial decision-making? A historicist would maintain that a transformation is justified if, on balance, it has furthered the aims of individual liberty. It could be argued, for example, that the reordering of values in the wake of the New Deal crisis had this effect. The subordination of property rights and the subsequent upward valuation of privacy rights can arguably be justified in light of the development of a more egalitarian liberalism than the one that prevailed in the eighteenth century. On this account, property rights were one of the defining features of an early modern liberal individualism that not only made it possible for persons to define themselves independently of the state but also facilitated radical differences in wealth.²¹⁷ Privacy rights, it could be maintained, also make possible independent self-definition.²¹⁸ Unlike property rights, however, they do so in a more egalitarian fashion since differences in resources are less critical to privacy claims than they are to those involving property.²¹⁹ Whether this is an ultimately persuasive

CHI. L. REV. 13 (1992) (providing a (judicial) narrative constructed along these lines).

215. See *id.* at 20 (describing the development of individual rights through the gradual expansion of the Equal Protection and Due Process clauses).

216. In his *Roper* concurrence, Justice Stevens stated that “[i]n the best tradition of the common law, the pace of that evolution [under the *Trop* test] is a matter for continuing debate; but that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text.” *Roper v. Simmons*, 125 S. Ct. 1183, 1205 (2005) (Stevens, J., concurring).

217. See, e.g., JAMES MADISON, *Property*, in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 186, 186-88 (M. Meyers ed., rev. ed. 1981) (equating “rights of property” with “property in rights” and condemning a system that would value and protect the former more strictly than the latter).

218. See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“[T]he most intimate and personal choices . . . are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”).

219. See Luke M. Milligan, Note, *The Fourth Amendment Rights of Trespassers*, 50 EMORY L.J. 1357, 1371-74 (2001) (discussing instances in which state and federal courts have concluded that squatters on government-owned property have legitimate expectations of privacy in their residences). See generally *United States v. Sandoval*, 200 F.3d 659 (9th Cir. 2000) (holding that a search of a tent on land belonging to the Bureau of Land Management and near a marijuana field violated the Fourth Amendment); *Walls v. Giuliani*, 916 F. Supp. 214 (E.D.N.Y. 1996) (holding that squatters living in buildings that the city later acquired during tax foreclosure proceedings were entitled to a degree of privacy);

justification for the profound doctrinal transformation in the concept of a private sphere that occurred in the mid-twentieth century is, of course, an open question. All that needs to be noted here is that transformation (contraction of some rights and related enlargement of others) can also be placed in the historicist framework.

One other feature of transformation merits attention in this context. Because transformation requires the overruling of past doctrine and so requires rejection of rules on which at least portions of the public have come to rely, a historicist would concede that convictions in favor of change must be deeply settled before a transformation is undertaken. This concession, it should be noted, provides a helpful way to incorporate Ackerman's focus on catastrophic upheavals into the more general framework outlined here. Because Reconstruction and the New Deal crisis of the Court both involved the rejection of prevailing institutional doctrine, political institutions at each time in the country's history were particularly attentive to questions about the depth of public convictions supporting fundamental change.²²⁰ Indeed, it is in contexts such as these that self-conscious deliberation about the relationship of past values to present ones—not necessarily the precise form of deliberation outlined in Article V, but at the very least an extended public debate about the desirability of change—is essential. Enlargement does not require such extensive deliberation. It extends trends that already exist and is appropriately validated by less systematic processes—by occasions for deliberation (think, for example, about the Court's concern for legislative decisions and jury sentencing in death penalty cases)²²¹ that cumulatively affirm ongoing trends but that do not necessarily involve reflection on the relationship between those trends and past values. On this account, historical catastrophism can be viewed as a special instance, one requiring more thoroughgoing deliberation, of the more general analysis provided here.

C. *Time-Bound Rights (and Powers)*

It is an essential feature of any kind of constitutional historicism—whether the gradualist type found in Eighth Amendment case law or the transformative version emerging from the New Deal—that rights and powers are framed in time-bound terms. This is not simply a question of arranging rights and powers according to the period in which they were

People v. Schafer, 946 P.2d 938 (Colo. 1997) (guaranteeing privacy to a person camping in a tent on land that did not have postings about trespassing); State v. Dias, 609 P.2d 637 (Haw. 1980) (granting limited privacy to squatters living on government property).

220. See FOUNDATIONS, *supra* note 178, at 195 (“During both Reconstruction and the New Deal, the Court recognized that the People had spoken even though their political leaders refused to follow the technical legalities regulating constitutional amendment.”).

221. See *supra* note 166 and accompanying text.

announced. In speaking from an external perspective, one can note differences between nineteenth and twentieth century Contracts Clause cases²²² or distinctions between pre- and post-New Deal Commerce Clause decisions.²²³ The historicist, however, brings an internal perspective to bear on these issues. If doctrine *ought to be* modified, though only under the conditions just specified, then judges should endorse the modifications of doctrine that have already occurred provided they conform to the specified conditions. Judicial adoption of this approach would necessarily mean that rights and powers should be modified over time: a right that was properly denied at time A, for example, could be properly granted at time B. Once again, Punishments Clause jurisprudence provides a helpful way to consider these issues. We should begin by considering the dynamic rule established in *Trop*. After that, we can turn to the issue of premature historicist decision-making.

In his *Furman* concurrence, Justice Marshall remarked that under the *Trop* framework “a penalty that was permissible at one time in our Nation’s history is not necessarily permissible today.”²²⁴ An assumption implicit in Marshall’s claim is that new Eighth Amendment rights can be generated in the absence of a new rule. Generalizing on this, we can identify a distinction between two different methods for altering doctrine: one by resort to a dynamic rule, the other by resort to a static rule that replaces a prior static one.²²⁵ *Trop* provides an example of a dynamic rule in operation. If a certain kind of punishment is consistent with the public’s settled conviction at one time but, at a later time, becomes unacceptable, then a court can uphold it at the earlier time but reject it later while appealing on both occasions to society’s standards of decency.²²⁶ The dynamic rule itself suggests the possibility of change. Because it does, the

222. The contrast between different approaches to constitutional interpretation at different times in American history provides the basis for the first four hundred pages of PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* (4th ed. 2000). *See id.* at 104-13 for the casebook’s treatment of different approaches to the interpretation of the Contracts Clause, including a discussion of protection of property rights during the early republic, and *see id.* at 415-26 for an examination of the effect of the New Deal revolution on property rights protection.

223. In their survey of the history of Commerce Clause jurisprudence, the authors of a leading casebook entitle a section “The Evolution of Commerce Clause Doctrine: The Lessons (?) of History.” GEOFFREY STONE ET AL., *CONSTITUTIONAL LAW* 189-205 (3d ed. 1996).

224. *Furman v. Georgia*, 408 U.S. 238, 329 (1972).

225. *See supra* notes 100-105 and accompanying text.

226. Thus the significance of the Court’s remarks in *Roper*:

These considerations [an increase in the number of states prohibiting execution of individuals committing crimes while seventeen or less] mean *Stanford v. Kentucky* should no longer be controlling on this issue. To the extent *Stanford* was based on review of the objective indicia of consensus that obtained in 1989, it is sufficient to note that those indicia have changed.

Roper v. Simmons, 125 S. Ct. 1183, 1198 (2005).

rule does not have to be jettisoned in the formulation of new rights.²²⁷

Alternatively, and more commonly, new rights can emerge from the articulation of new static rules that reject prior static ones. A straightforward example of this is to be found in the Court's repudiation of its initial approach to gender discrimination. *Bradwell v. Illinois*²²⁸ was just the first of many decisions that upheld state-sponsored discrimination against women's occupational choices.²²⁹ The trend continued well into the twentieth century. In the 1948 case of *Goesaert v. Cleary*,²³⁰ for example, the Court stated that the Constitution "does not preclude the States from drawing a sharp line between the sexes" in determining which occupations women can pursue.²³¹ This is manifestly a static rule: in that it permits the states to treat gender as a criterion for regulating occupational choice.

Only a quarter of a century later, the Court decisively repudiated this approach, subjecting invidious discrimination against women to careful judicial scrutiny. The approach taken in the 1970s was also static: *all* classifications interfering with women's interests were treated as invalid unless the state could show them to be "substantially related to achievement of . . . [important government statutory] objectives."²³² But because this new rule is also static in nature, it stands in need of a dynamic justification given the fact that it supersedes a prior static one. The *Frontiero* plurality's concession that "our statute books gradually became laden with gross, stereotyped distinctions between the sexes"²³³ is not sufficient in this regard. Although a comment such as this indicates present regret about the past, it fails to acknowledge the degree to which the settled convictions of the present enlarge on those of the past. That the 1970s Court was concerned with stereotyped images of women is understandable in terms of a 1950s commitment to rectifying the effects of stereotyped concerns about African-Americans.²³⁴ A dynamic justification for the rule

227. Furthermore, there is no need to say that the meaning of the Constitution changes when the Court employs a dynamic rule such as the one contained in *Trop*. Justice Scalia is thus mistaken in asserting in *Roper* that the significance of the *Stanford/Roper* sequence of cases is that "the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision 15 years ago was *wrong*, but that the Constitution *has changed*." *Id.* at 1217 (Scalia, J., dissenting). If, as the *Trop* plurality concluded, the Eighth Amendment "draws its meaning from . . . evolving standards of decency," *Trop v. Dulles*, 356 U.S. 86, 101 (1958), then its meaning remains constant even as society's standards change, making it necessary for courts to adjust rights incrementally in response to those changing standards.

228. 83 U.S. 130 (1872).

229. *See id.* at 139 (upholding the state's decision not to grant a license to practice law to a married woman).

230. 335 U.S. 464 (1948).

231. *Id.* at 466.

232. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

233. *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973).

234. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954) (detailing current

emerging from gender discrimination cases would acknowledge how concerns about gender equality grew out of concerns about racial equality. *Bradwell* was a piece with *Plessy*. An avowedly dynamic justification for *Frontiero* would have acknowledged not only the extent to which the Court was enlarging on the premises of *Brown* but also, more generally, the extent to which a nineteenth century concern with equality had been enlarged one hundred years later.

Dynamic rules and static ones justified in light of dynamic considerations are both methods for effectuating doctrinal change. A historicist's defense of each method relies on the distinction between abstract statements of principle and concrete specifications of individual rights. Think first about this distinction as it applies to moral, rather than legal, rights. There is no doubt that moral propositions are usually propounded in atemporal terms: "avoid cruelty," for instance, or "treat like cases alike." Moral judgments about specific cases, on the other hand, are not resolved merely by resort to abstractions. Once "avoid cruelty" is considered in light of a concrete issue—how to punish rape, for example—it is entirely appropriate to consider time-bound sentiments about cruelty in determining how to resolve the issue. "Avoid cruelty" may be timelessly valid, but this can be maintained while also maintaining that a determination of what constitutes humane punishment for rape should take into account contemporary notions about the proper scope and purpose of punishment. When applied to a specific punishment, "avoid cruelty" can thus become "at present, it is believed cruel to execute rapists." As far as gender discrimination is concerned, "treat like cases alike" can become "at present, occupational discrimination based on gender is considered impermissible." Carefully qualified, specific judgments such as these concede the influence of present values in the formulation of policy while nonetheless drawing on moral principles of protean generality.

When we consider the Constitution as a legal document, we can see that historicism offers an interpretive method that mediates between abstract norms and the specific convictions of the present. In maintaining that judgments about particular practices—the punishment of rapists, for example—are properly time-bound, the historicist accepts the legally binding character of abstract principles but contends that settled convictions about the proper scope of those principles should guide courts in determining the outcome of concrete cases involving those principles. The possibility of mediating between abstraction and concreteness is of urgent importance for the interpretation of general statements of human rights. Because such statements are rarely revised, incremental adjustment

research about the effects of racial discrimination on psychological development).

of their scope provides a means of insuring their continued vitality in social and political life.²³⁵ A historicist would maintain that this is a job for which courts are particularly well suited. Judges are institutionally trained to grasp both the ratifiers' understanding of the scope of a particular statement of right and the contemporary resonance of that statement. Although other branches of government can and should perform this mediating role as well,²³⁶ a historicist would contend that courts are properly expected to take primary responsibility in this area.

What if the issue at stake is not the proper scope of an individual right but rather the scope of a government power? The transformative jurisprudence of the New Deal, for example, raised questions not only about the scope of specific rights but also about federalism and relationships between the coordinate branches of the federal government.²³⁷ In addressing this, a historicist would affirm that powers, like rights, can be time-bound in nature. The power of the presidency has properly been expanded since the New Deal,²³⁸ a historicist would maintain, and the power of the states properly reined in,²³⁹ with genuine deliberation of the

235. In this respect, though certainly not in others, Ronald Dworkin's writings on the Constitution take on overtones of historicism. Consider, for example, the weight of the adverb "now" in Dworkin's argument for the abolition of the death penalty. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 135-36 (1977) ("Can the Court, responding to the framers' appeal to the concept of cruelty, now defend a conception that does not make death cruel?"). It would be hard to make sense of Dworkin's position here without attributing to him the claim that the abstract prohibition of cruelty contained in the Eighth Amendment *now* takes a special form given current moral judgments about capital punishment. His remarks on *Plessy* and *Brown* are also understandable in this vein. See RONALD DWORKIN, *LAW'S EMPIRE* 387 (1986) (reasoning that the nineteenth century rationale for equal protection possibly "would have been adequate under tests of fairness and fit at some time in our history; perhaps it would have been adequate when *Plessy* was decided. It is not adequate now, nor was it in 1954 . . ."). The "now" in the final sentence and the specific date (the year in which *Brown* was decided) unmistakably suggest an argument framed in terms of time-bound rights.

236. How far Congress can go in interpreting the meaning of the Constitution is a matter of considerable debate. In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court stated that Congress does not have the power under Section Five of the Fourteenth Amendment to "restrict, abrogate, or dilute [its] guarantees" but implied that it has the power to enlarge on judicial interpretations of Fourteenth Amendment rights. *Id.* at 651 n.10. The Court rejected this analysis, however, in *City of Boerne v. Flores*, 521 U.S. 507, 527-28 (1998). At the very least, though, the Court has conceded the legitimacy of congressional fact-finding that identifies violations of individual rights and seeks to prevent them. See *id.* at 518 (citing numerous cases in support of this proposition).

237. See *United States v. Darby*, 312 U.S. 100, 118 (1941) (upholding Congress's authority to exclude goods from interstate commerce that were not produced in accordance with specified labor standards); see also *Wickard v. Fillburn*, 317 U.S. 111, 127-28 (1942) (expanding Congress's Commerce Clause authority to include local, noneconomic activity that has a cumulative effect on interstate commerce).

238. See Monaghan, *supra* note 188, at 737 (positing that modern presidents have appropriated the legislative power that the Constitution of 1789 intended as Congress's domain).

239. See *id.* at 732-33 (arguing that Congress increasingly compels states to comply with its policy objectives by attaching conditions to the states' receipt of federal funds).

kind Ackerman has described (deliberation nonetheless outside the scope of Article V) having preceded these momentous changes.²⁴⁰ A caveat is essential here, however, for the transformation wrought by the New Deal involved substantial contractions of rights (particularly property)²⁴¹ and powers (in particular, those of the states)²⁴² as well as enlargements of other rights (noneconomic liberties)²⁴³ and powers (those of the federal government).²⁴⁴ A historicist defense of this reshuffling would maintain that it has produced a version of liberty better suited to an age of mass communications and an era of egalitarian liberalism. Judicial opinions have sanctioned the reordering of constitutional values but have touched only superficially on the issues of political theory that must be addressed to justify them. In remarking on this here, I note only that transformation of this kind, while understandable in terms of the categories that inform Eighth Amendment historicism (enlargement and contraction, time-bound rights and powers), involves a question of assessment (concerning the overall value of the rearrangement) that does not arise when enlargement alone is at stake.

If rights and powers are properly time-bound in nature, the historicist bears a burden, which an originalist need not confront, of explaining *when* changes should occur. The burden is particularly heavy in cases where the Court is enlarging a right or power. Given the near-ratchet effect of the Court's authority under *Marbury*, judicially sponsored enlargement precludes legislative overruling of a Court decision.²⁴⁵ The Court's death

240. See TRANSFORMATIONS, *supra* note 178, at 324 (chronicling the public debate over Roosevelt's Court-packing plan that raged in assembly halls, newspaper articles, and over the popular electronic medium of the time, the radio).

241. See ELY, *supra* note 200, at 120 (ushering in a period of social welfare that rejected laissez-faire ideology and its respect for private property rights).

242. See *id.* at 128-29 (noting that Congress's Commerce Clause authority even extended to intrastate activities).

243. See WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 235 (1995) ("The Constitutional revolution of 1937 altered fundamentally the character of the Court's business After 1937, the most significant matters on the docket were civil liberties and other personal rights.").

244. In commenting on Court decisions of the late thirties and early forties, Robert G. McCloskey noted that "[i]t was now evident that Congress could reach just about any commercial subject it might want to reach and could do to that subject just about anything it was likely to want to do, whether for economic, humanitarian, or other purposes." ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 124 (4th ed. 2005). Decisions of the last ten years, in particular, *Lopez* and *Morrison*, require a qualification of this judgment. See *United States v. Morrison*, 529 U.S. 598, 618-19 (2000) (considering the link between gender-motivated violence and interstate commerce too attenuated); *United States v. Lopez*, 514 U.S. 549, 563-65 (1995) (rejection the notion that gun possession in a school-zone impacts interstate commerce). It is by no means clear how extensively it has to be qualified, however, given the extensive range of noneconomic activities Congress has previously affected through deployment of its commerce power.

245. *Mackey v. United States*, 401 U.S. 667, 678 (1971) (Harlan, J., dissenting) (recognizing the "awesome power" of judicial review that allows the Court to bind

penalty cases of the sixties and seventies illustrate how important it is to avoid premature decisions when employing a historicist framework.²⁴⁶ Whereas death had been meted out to more than one hundred people per year throughout the early part of the twentieth century, the figures for executions dropped to double digits by mid-century. Indeed, in the mid-sixties, the figures were in the single digits.²⁴⁷ On an extrapolation interpretation of *Trop*, one might have argued that the proper role of the courts was to hasten change, not simply to confirm it. This is in fact the position Justice Goldberg took in analyzing capital punishment. In a memorandum to his colleagues written during the 1963 term, Goldberg contended that the Court should not simply ratify what has already occurred, but that it should quicken the pace of change.²⁴⁸ The Court, Goldberg maintained, should “guide . . . public opinion in the process of articulating and establishing progressively civilized standards of decency.”²⁴⁹

We can call this the extrapolation version of constitutional historicism, one that views the courts as a vanguard for social change. On this account, one would maintain that if society were at point x ten years ago and is at $x + 1$ today, it is reasonable to suppose that not only will society be soon be at $x + 2$, but that judicial authority should be used to accelerate its arrival at this further point. Intriguing as this possibility is, and it is surely a model with great appeal for those who want the courts to act as catalysts for social change, the Supreme Court decisively, and properly, rejected it in the *Furman/Gregg*²⁵⁰ sequence of cases decided in the decade following Goldberg’s memorandum. In *Furman*, the Court invalidated certain procedures for imposing the death penalty but did not repudiate the penalty itself.²⁵¹ It then responded favorably in *Gregg* to legislative action by the states that adopted a bifurcated trial model for imposing the penalty.²⁵²

coordinate branches of government).

246. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 300 (1972) (Brennan, J., concurring) (concluding that the progressive decline in the number of executions reflects society’s misgivings about the death penalty).

247. See BANNER, *supra* note 133, at 244 (stating that in 1965 there were seven executions in the United States).

248. See Arthur J. Goldberg, *Memorandum to the Conference Re: Capital Punishment, October Term, 1963*, 27 S. TEX. L. REV. 493, 499 (1986) (documenting the number of countries that permit the death penalty and noting that the “worldwide trend is unmistakably in favor of abortion”).

249. *Id.* at 500.

250. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman*, 408 U.S. 238.

251. *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring) (prohibiting the death penalty in circumstances where there is an undue risk that death could be imposed “wantonly and freakishly”).

252. *Gregg*, 428 U.S. at 191 (noting that evidence that is inadmissible during the guilt phase of a trial might be helpful post-conviction in determining a rational sentence).

Justice O'Connor's comments in *Thompson v. Oklahoma*²⁵³ not only emphasize the caution with which the Court employed its *Marbury* power, but also the danger associated with extrapolation from historical trends.²⁵⁴ Her remarks are particularly worth citing because O'Connor has consistently supported *Trop's* evolving standards test.²⁵⁵ Writing as an advocate of the test, she nonetheless warned against extrapolation to a yet-to-be-reached consensus:

In 1972, when this Court heard arguments about the constitutionality of the death penalty, statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus . . . We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court declared the existence of such a consensus and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more to reject.²⁵⁶

On O'Connor's account, there must be wide and long-standing societal consensus in order to satisfy the *Trop* test. *Trop* does indeed allow for the possibility of time-bound rights, but the new rights it anticipates must emerge from settled convictions concerning the propriety of a given type of punishment. Two considerations support this cautious approach. First, it is not inevitable that social convictions will move toward greater lenity. A properly conceived constitutional historicism should not embrace a theory of inevitable change; rather, it should be concerned only with changes that have already occurred. This point suggests the second reason why the Court has properly rejected extrapolation analysis. Constitutional values can be said to change only in relation to a baseline provided by deeply rooted public convictions. A moralist might maintain that public convictions on a given issue are inconsistent with some ethical imperative the moralist has proposed. There are, for example, some commentators who maintain that capital punishment is ethically impermissible under all

253. 487 U.S. 815 (1988).

254. *See id.* at 850-51 (O'Connor, J., concurring) (arguing that that some legislative acts are not the product of "deliberate decision making" by legislators, but simply the unintended result of the interplay between statutes).

255. Even when writing in dissent, Justice O'Connor has affirmed her support for the *Trop* framework. "It is by now beyond serious dispute," she remarked in her dissent in *Roper*, "that the Eighth Amendment's prohibition of 'cruel and unusual punishments' is not a static command. Its mandate would be little than a dead letter today if it barred only those sanctions—like the execution of children under the age of seven—that civilized society had already repudiated in 1791." *Roper v. Simmons*, 125 S. Ct. 1183, 1206-07 (2005) (O'Connor, J., dissenting).

256. *Thompson*, 487 U.S. at 855 (O'Connor, J., concurring).

circumstances.²⁵⁷ But this is simply not germane to a historicism based on *society's* standards of decency. According to the model suggested by Eighth Amendment historicism, new rights emerge not from the special pleadings of *bien pensants*, but from the long-standing convictions of the populace when those convictions are consistent with values adopted by the ratifiers. On this analysis, *Coker* was rightly decided in 1977 and would have been wrongly, because prematurely, decided in 1877. *Atkins* and *Roper*, on the other hand, are contestable because they may well have been premature. In neither case was the trend among states as wide as it was in *Coker*; perhaps even more important, that trend was also not long-standing.²⁵⁸ In the paragraphs that follow, I assume for purposes of argument that *Atkins* and *Roper* were properly decided under *Trop*. I do so, however, only to consider a further issue related to time-bound rights, not because *Atkins* and *Roper* can be classified as fully satisfactory on historicist grounds.

The further issue to address here concerns the consequences for individuals of judicial enlargements on rights, and it is because this issue is so clearly at stake in the *Penry/Atkins*²⁵⁹ and *Stanford/Roper*²⁶⁰ sequence of cases that we must consider *Atkins* and *Roper* on the assumption that they were properly decided. As noted earlier, historicists must entertain the possibility that it is proper at one time to deny a party's claim and proper at a later time to grant an identical claim by a similarly situated party. Originalism is free of the difficulties historicism encounters here. Even when the Court overrules a prior decision, an originalist can maintain that her rationale for doing so is timelessly correct: that the Court rendering the first decision either misapplied originalism, or failed to apply it at all. An originalist could never agree, for example, that it was proper to reject Johnny Penry's Eighth Amendment claim in 1989 *and also proper* to grant Darryl Atkins's essentially identical claim in 2002. This is exactly what *Trop* permits. In fact, Justice O'Connor's votes in *Penry* and *Atkins*

257. See, e.g., HUGO ADAM BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* (1987) (depicting the death penalty as arbitrary and unreasonable through a series of essays).

258. See *Roper*, 125 S. Ct. at 1193 (observing that five states abolished the death penalty for juveniles between 1989 and 2004); *Atkins v. Virginia*, 536 U.S. 304, 314-15 (2002) (noting that fifteen states abolished the death penalty for the mentally retarded between 1989 and 2002); *Coker v. Georgia*, 433 U.S. 584, 594 (1977) (explaining that, post-*Furman*, only three states revised their criminal statutes to permit the death penalty for the rape of an adult woman).

259. See *Atkins*, 536 U.S. at 317-21 (reversing *Penry*); *Penry v. Lynaugh*, 492 U.S. 302, 330-35 (1989) (holding that the Eighth Amendment does not forbid the execution of the mentally retarded).

260. See *Roper*, 125 S. Ct. at 1190-1200 (prohibiting the execution of offenders under eighteen); *Stanford v. Kentucky*, 492 U.S. 361, 377-80 (1989) (upholding the execution of sixteen- or seventeen-year-old offenders).

provide a telling example of the time-bound nature of Eighth Amendment rights under *Trop*, for O'Connor wrote the opinion rejecting Penry's argument and joined the opinion accepting the one advanced by Atkins.²⁶¹

The problem of equal treatment posed by historicism is thus easily stated: two similarly situated parties may obtain diametrically opposed results for identical rights claims advanced at different points in time. Whatever the theoretical merits of historicism, a defender of its method must confront the intensely practical problem of what remedies to offer a party in Penry's position.²⁶² Justice Harlan is the member of the Court best known for wrestling with the problem of justice in the domain of changing rights. In a dissent he wrote during his final year on the bench, Harlan acknowledged that "time and growth in social capacity" can legitimately alter judicial understandings of constitutional rights.²⁶³ To illustrate his theory Harlan cited the right of the indigent to appointed counsel, which had been no right at all at the time the Sixth Amendment was adopted, but a right established for federal criminal cases in 1937 and state cases in 1963.²⁶⁴ Clearly, though, Harlan's concern can also be extended to the Punishments Clause. His proposed resolution was to grant retroactive force to all cases pending on direct review at the time a new right is announced but to deny retroactive status to most cases where final judgment has been entered. Interests of finality and federal-state comity, Harlan argued, weigh heavily in favor of a refusal to revisit cases once final judgments have been entered for them on direct review.²⁶⁵ The contemporary Court has adopted

261. *Compare Penry*, 492 U.S. at 340 (refusing to overturn a death sentence for a mentally retarded defendant), *with Atkins*, 536 U.S. at 321 (prohibiting the execution of the mentally retarded because it will not "advance the deterrent or retributive purposes of the death penalty").

262. The problem of equal treatment is critical because constitutional historicism does not necessarily presuppose a historicized sense of justice. Historicists may of course adopt a framework that historicizes morality. There is, however, no reason why they must do so given their initial commitment to a historicized approach to the Constitution's meaning. Indeed, in citing the Fourteenth Amendment's Equal Protection Clause, a historicist could maintain: (a) that it gives legal force to a timelessly valid moral principle of similar treatment for similarly situated parties, but (b) that the meaning of "similarly situated parties" has been subject to enlarged interpretation by the courts and society at large during the last century, embracing now (as it once did not) women and sexual minorities.

263. *See Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part and dissenting in part) (contending that "in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can properly demand of the adjudicatory process will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction").

264. *See id.* at 694 (Harlan, J., concurring in part and dissenting in part) (noting that *Gideon* expanded the right to counsel to state criminal cases in 1968); *see also infra* notes 307-323 and accompanying text (discussing the historicist framework underlying the Court's opinions concerning the right of indigent criminal defendants to appointed counsel).

265. *See Teague v. Lane*, 489 U.S. 288, 308 (1989) (considering the interests of "comity and finality" when determining the scope of *habeas* review); *Mackey*, 401 U.S. at 689-90 (emphasizing that finality is a fundamental goal of criminal litigation).

Harlan's position in large measure, both with respect to cases pending on direct review and with respect to collateral review via *habeas corpus*.²⁶⁶

There is much to commend about Harlan's carefully measured remedy for the problem of changing rights. In the final analysis, though, it must be deemed unsatisfactory, at least insofar as it is applied to serious punishments such as the death penalty. The *Penry/Atkins* and *Stanford/Roper* sequences demonstrate why this is so. Under Harlan's approach, Johnny Penry and Kevin Stanford could properly be executed even though *Atkins* later held execution of the mentally retarded unconstitutional. This is manifestly unacceptable. Once a party has been granted a reprieve on his life, other similarly situated parties are entitled to similar treatment despite the interests associated with finality and federalism. For litigants in Penry's position, Harlan's approach accords too little weight to "time and growth in social capacity."²⁶⁷ If these considerations—the central features of constitutional historicism—are treated as decisive in litigation in case *A*, then they should also be treated to the subsequent revision of prior cases *B* and *C*. Johnny Penry and Kevin Stanford, in other words, should not be executed now that Darryl Atkins and Christopher Simmons have prevailed.

Should this line of reasoning be applied beyond the life-and-death issues associated with capital punishment? Should it be applied, for example, to gays who were convicted of consensual sodomy now that statutes criminalizing this have been declared unconstitutional?²⁶⁸ Should it be applied to civil actions in the wake of a ruling creating a new right concerning, say, police use of deadly force?²⁶⁹ Absolute rules may well be inadvisable in this context; at some point, Harlan's insistence on considerations of finality and federalism must be given substantial weight.²⁷⁰ It is hard to see, though, why these factors should be treated as decisive in the two instances just mentioned. When any criminal conviction is at issue, the creation of a new right that would have made conviction impossible had it been in force at the time of the original trial is

266. See *United States v. Johnson*, 457 U.S. 537, 562 (1982) (applying Fourth Amendment decisions retroactively to all cases on direct review that were not yet final at the time the decision was rendered); *Teague*, 489 U.S. at 306 (refusing to apply new rules of criminal procedure retroactively to cases on collateral review).

267. *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part).

268. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (recognizing a liberty interest to engage in "sexual practices common to a homosexual lifestyle").

269. See *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (making it unconstitutional for a police officer to shoot and kill an unarmed suspect unless there is probable cause that the suspect poses a threat of serious physical harm to others).

270. See *Mackey*, 401 U.S. at 680 (Harlan, J., concurring in part and dissenting in part) (maintaining that lower courts should have discretion to apply federal constitutional concepts despite the Supreme Court's position as the ultimate arbiter of federal constitutional law).

an event of momentous importance, one that should entitle the original defendant to invalidation of his conviction. Similarly, if a civil action concerns something of life-and-death importance such as police use of deadly force, then courts should reconsider actions brought by those who were unable to benefit from a new rule. In at least these instances, and perhaps in others, the balance must be struck in favor of newly announced rights.

D. The Issue of Judicial Candor

If, as La Rochefoucauld maintained, “[h]ypocrisy is the homage that vice offers to virtue,”²⁷¹ then an *ersatz* originalism must be classified as the tribute judges pay to genuine originalism in seeking to justify nonoriginalist results. It is in this light that we can understand Justice Brandeis’s celebrated claim that the “makers of our Constitution . . . conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”²⁷² No matter that the Constitution does not refer to a “right to be let alone.” No matter that it also does not mention the word “privacy” (the key component of Brandeis’s right to be let alone). No matter that property rather than privacy dominated eighteenth century discussions of individual rights that can be asserted against the state.²⁷³ To Brandeis, what was critical was the *attribution* of intention to the “makers of our Constitution,” for Brandeis could then project onto the ratifiers the values of a later generation.

A historicist is concerned with the reverse question—that is, a historicist asks about the risk judges run in admitting that the values implemented in their opinions depart from those of the ratifiers. A few opinions of the Court have been forthright on this score. In 1934, at the prelude to the New Deal crisis, the Court in *Home Building & Loan Ass’n v. Blaisdell*²⁷⁴ openly declared:

If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.²⁷⁵

271. FRANÇOIS LA ROCHEFOUCAULD, DUC DE, MAXIMS 73 (Louis Kronenberger trans., Random House 1959) (1665) (quoting Maxim 218).

272. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

273. Arthur Lee of Virginia remarked in 1775 that “[t]he right of property is the guardian of every other right, and to deprive people of this, is in fact to deprive them of their liberty.” See ELY, *supra* note 200, at 26 (quoting Lee).

274. 290 U.S. 398 (1934).

275. *Id.* at 442-43. Responding to this, Justice Sutherland contended in his *Blaisdell*

In 1966, the *Harper v. Virginia Board of Elections*²⁷⁶ Court remarked that “[i]n determining what lines are unconstitutionally discriminatory, we have never been confined to historical notions of equality . . . [n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause *do change*.”²⁷⁷

But these are exceptions to a near-dominant pattern, one in which the Court typically ignores, or at most obliquely acknowledges, of departures from original understandings. The contrast between Chief Justice Rehnquist’s remarks in his judicial opinions and his comments in oral argument before the Court underscores the extent of the taboos. When writing for the *Lopez* majority, Rehnquist spoke only of “outer limits” in Commerce Clause power but avoided the question of how far current rules have departed from original understandings.²⁷⁸ In oral argument, on the other hand, he has been less circumspect. While addressing attorneys in *Eldred v. Ashcroft*,²⁷⁹ for example, he asserted, without any attempt at qualification, that “what is happening in the country today in the way of congressional [regulation]—under the Commerce Clause is totally different than what the Framers had in mind, but we’ve never felt that was the criterion.”²⁸⁰ The mask of originalist virtue is removed in these remarks, though of course it should be added that a historicist would maintain that no virtue is to be found in feigned adherence to the ratifiers’ intentions.

On this issue, as elsewhere, Punishments Clause opinions provide a helpful guide for historicists. *Trop*-based decisions have consistently adhered to the premise that it is permissible to enlarge on original intentions when there is a long-standing, widely shared conviction concerning a given type of punishment.²⁸¹ Such opinions have not been treated as illegitimate merely because the mask of originalism has been

dissent that a “provision of the Constitution . . . does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time.” *Id.* at 448-49 (Sutherland, J., dissenting). A historicist must, in fact, maintain such a position when discussing transformative jurisprudence. As noted in the text, however, the more common form of historicism, which enlarges on original understandings of vague provisions, holds simply that a provision can properly be accorded greater scope as public understandings of its meaning expand.

276. 383 U.S. 663 (1966).

277. *Id.* at 669 (emphasis added).

278. See *United States v. Lopez*, 514 U.S. 549, 553-59 (1995) (canvassing prior Commerce Clause jurisprudence and articulating three categories of activity which Congress may regulate under its commerce authority).

279. 537 U.S. 186 (2003).

280. Oral Argument Tr. at 20:11-15, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/01-618.pdf.

281. See, e.g., *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (“[T]he Constitution contemplates that in the end [the Court’s] judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”).

removed. On the contrary, the *Trop* framework is among the most enduring in constitutional law. In employing it, the Court has suggested that constitutional norms derive their authority from patterns and practices that are related to the text but that modify original understandings of its meaning.²⁸² This is not a proposition that has undermined respect for judicial authority. Rather, it has enhanced the sense in which constitutional interpretation is an intergenerational project, one in which judges do not make law but instead respond to social changes consistent with values established at the outset.

A textualist response to this defense of judicial candor merits special consideration, for it could be maintained that the term “unusual” provides a unique license for judicial appeals to changing convictions and practices. The absence of the word in any of the other chronically vague provisions of the Constitution, it could be contended, makes a similar approach inappropriate elsewhere. But this point is convincing only if “unusual” is placed in a naïve textualist framework and “cruel” is not, and there seems to be no strong reason why both should not be read in the same way. Assuming they are, then it is the resonance of “cruel” in public sentiments about punishment that must be treated as critical to interpretations of the clause, for it is this resonance that allows for changes in doctrine. By analogy, it is the changing resonance of “equal” that justifies extension of the Fourteenth Amendment to gender and sexual orientation discrimination, the changing resonance of “search” that justifies extension of the Search and Seizure Clause, and so on. In other words, the chronic vagueness of “cruel,” not the peculiar word “unusual,” is the bridge between Punishments Clause historicism and that of other provisions. Candor about the connection between chronically vague terms and long-standing practices is apt throughout constitutional law.

III. APPLYING THE CATEGORIES: TWO CASE STUDIES

Punishments Clause jurisprudence, I have suggested, provides a model for understanding and defending historicist interpretation of the Constitution’s chronically vague clauses. Eighth Amendment case law does not, of course, offer the only way to carry out the historicist project. It is committed to the progressive enlargement of individual rights whereas historicist interpretation can also involve contraction or transformation. Punishments Clause cases employ *Trop*’s dynamic rule whereas most historicist decisions employ static rules that are susceptible to dynamic

282. See generally *Roper v. Simmons*, 125 S. Ct. 1183, (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977).

justification.²⁸³ And punishments cases are marked by a rare degree of judicial candor concerning their historicist foundations. In this section, I examine two areas of constitutional doctrine in light of the general features of historicism just outlined: Sixth Amendment decisions concerning the right of indigent criminal defendants to the assistance of counsel and the substantive due process opinions, in particular the Court's opinion in *Lawrence* concerning the scope of private life.²⁸⁴ My aim in each instance is to show how the general points made earlier are applicable beyond the Punishments Clause. In the first part of the section, I note that assistance of counsel cases involve progressive enlargement of rights but that, unlike *Trop*-based decisions, this has been effected by means of static rules and with virtually no candor about the historicist underpinnings of the conclusions reached. *Lawrence* involves a quite different configuration of factors: a dynamic rule, an unusual degree of candor in justifying the decision, and a decision that has been built on the Court's ongoing transformation of the nature of private liberty.

A. *The Right of Indigent Criminal Defendants to Assistance of Counsel*

It is particularly helpful to begin with the Assistance of Counsel Clause because it is in this area of law that Justice Black, an outspoken opponent of what I have called historicism, can be seen nonetheless to have relied on it. Black denounced the Court for ignoring the plain language of the Fourth Amendment to create a right of privacy.²⁸⁵ He took an originalist position on the death penalty, contending that because it was in common use at the time the Eighth Amendment was adopted, it could not be judicially invalidated.²⁸⁶ And he bitterly opposed the *Harper* Court's position that notions of equal protection can properly be expanded over time.²⁸⁷ Yet in his decisions concerning the Sixth Amendment assistance of counsel guarantee, Black took the same expansionist approach he rejected elsewhere.²⁸⁸ Moreover, he did so without acknowledging the enlargement

283. See discussion *supra* Part II.C.

284. See *Lawrence v. Texas*, 539 U.S. 558, 571-72 (2003) (recognizing that adults have a liberty interest in deciding how to "conduct their private lives in matters pertaining to sex").

285. See *Katz v. United States*, 389 U.S. 347, 365 (1967) (Black, J., dissenting) (asserting that the language of an amendment is the "crucial place to look" when interpreting the Constitution).

286. See *McGautha v. California*, 402 U.S. 183, 226 (1971) (Black, J., dissenting) (positing that judges act as legislators when they attempt to keep the Constitution up-to-date through judicial interpretation).

287. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 675-76 (1966) (Black, J., dissenting) (contending that the Due Process Clause should not be construed as a "blank check" to interpret the Constitution in a manner not originally conceived by the Framers).

288. James J. Tomkovicz has provided the following summary of the trend that culminated in Black's *Johnson* and *Gideon* opinions: "One consistent trend has been evident from start to finish—the history of the right to counsel has been one of constant,

that he and his colleagues were bringing about. And of course, he provided no dynamic justification for his results. As we shall see, though, Black's conclusion in *Gideon v. Wainwright*,²⁸⁹ his most prominent assistance of counsel opinion, ratified a trend among the states in much the same way that *Coker* later was to do so with respect to the death penalty.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."²⁹⁰ This clause is not chronically vague in the sense that I have previously used this term, for it does not suggest a wide range of possible applications. Rather, it is best classified as "chronically ambiguous." It suggests not many, but two, possible conclusions concerning counsel: that a court may not deny a criminal defendant the right to *retain* counsel if the defendant wishes to do so (the retention interpretation) or that a court must *provide* counsel for a criminal defendant (the provision interpretation). An originalist would, of course, resolve this ambiguity by considering the understandings of the ratifiers as manifested by their comments on the Sixth Amendment and the practices that prevailed at the time of the Amendment's adoption. No comments have been reported concerning their understandings.²⁹¹ However, the practices of late eighteenth and early nineteenth century courts point clearly to the retention interpretation. Indeed, long after Black had succeeded in imposing the provision interpretation on constitutional doctrine, an opinion by (then) Justice Rehnquist conceded that this interpretation is historically dubious. "There is considerable doubt," Rehnquist wrote in *Scott v. Illinois*,²⁹² "that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense."²⁹³

Important evidence of this original understanding is found in the First Congress's legislation dealing with treason. As William Beane noted, "there was no common-law precedent which called for the appointment of counsel except in treason cases."²⁹⁴ Congress followed just this approach

almost relentless expansion." JAMES J. TOMKOVICZ, *THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 34 (2002).

289. 372 U.S. 335 (1963).

290. U.S. CONST. amend. VI.

291. See WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 23-24, 27 (1955) (contrasting the First Congress's lengthy debate on proposed constitutional amendments concerning the right to bear arms, freedom of speech, and religious freedom with its near-silence on the proposed Sixth Amendment permitting the right to assistance of counsel).

292. 440 U.S. 367 (1979).

293. *Id.* at 370.

294. BEANEY, *supra* note 291, at 29.

in its treason legislation, requiring provision of counsel at the request of a treason defendant but otherwise not mentioning a right to provided counsel.²⁹⁵ State court judges also endorsed the retention rather than the provision interpretation of comparable state constitutional provisions.²⁹⁶ Only in the middle of the nineteenth century did state courts start to adopt the provision interpretation for indigent defendants charged with felonies. Indiana appears to have been the first to do so,²⁹⁷ and Wisconsin followed suit soon afterwards.²⁹⁸ By the early twentieth century, many federal district courts were taking the same approach. Despite the absence of a statutory or constitutional mandate, many federal judges appointed counsel for indigent defendants who faced serious criminal charges.²⁹⁹ Indeed, when *Johnson v. Zerbst*,³⁰⁰ the case that established an indigent's constitutional right to counsel in a federal criminal trial for a felony, reached the Supreme Court, the government conceded that "the practice has become established on the part of the bench and bar to see that those defendants shall not go unrepresented who, being indigent, and not electing to defend in person, make a timely request and showing for the assignment of counsel."³⁰¹

No reference to changing practices can be found in Black's *Johnson* opinion, however. Black's nod to history was at most oblique. "Consistently with the wise policy of the Sixth Amendment," he wrote, the Court has emphasized "'the humane policy of modern criminal law,' which now provides that a defendant ' . . . if he be poor, . . . may have counsel furnished him by the state . . .'"³⁰² The adjective "modern" and the adverb "now" might be sufficient to alert the attentive reader to the expansion of practice being effectuated by Black's opinion. But Black's "consistently" at the beginning of the sentence might give pause to the reader inferring a change in practice, for the clear implication of the sentence's opening

295. See *id.* at 28 (arguing that if Congress had intended the Sixth Amendment to be a radical departure from the Judiciary Act of 1789 it would have debated the implications of the Amendment).

296. See *id.* at 21 (clarifying that the few states that made a provision for counsel did so primarily in capital cases).

297. See *Webb v. Baird*, 6 Ind. 13, 18 (1854) (stating that no defendant in a "civilized community" should be without the assistance of counsel).

298. See *Carpenter v. County of Dane*, 9 Wis. 249, 251 (1859) (observing that "it is a little like mockery" to promise an indigent defendant the right to a fair trial without providing counsel).

299. See *infra* note 301 and accompanying text. But see Alexander Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U. L.Q. Rev. 1, 8 (1944) (conceding that many federal courts did not provide counsel for defendants wishing to plead guilty).

300. 304 U.S. 458 (1938).

301. Brief for United States at 26, *Johnson v. Zerbst*, 304 U.S. 458 (1938) (No. 699), quoted in BEANEY, *supra* note 291, at 29-30.

302. *Johnson*, 304 U.S. at 463 (quoting *Patton v. United States*, 281 U.S. 276, 308 (1930)).

clause is that modern criminal law implements a humane policy established by the ratifiers. In any event, in *Johnson*, Black otherwise relied on mere assertion when dealing with the ambiguous words of the assistance clause. Writing as if the text were clear on the point—as if the clause were similar in nature to the one setting an age requirement for the presidency—Black stated that the “Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.”³⁰³ *Johnson* thus established a static rule, but failed to note its inconsistency with original understandings of the Amendment, and so, of course, did not provide a dynamic justification for the rule it announced.

Nonetheless, two different dynamic justifications are readily apparent for *Johnson*’s rule. One is specific to practices in federal courts. As noted, even the government conceded that, in the decades preceding *Johnson*, federal trial judges had increasingly tried to make sure that felony defendants were provided with the assistance of counsel.³⁰⁴ The *Johnson* rule can thus be justified as a codification of changed practice: as an adoption of the settled convictions of those implementing the “humane policy of the modern criminal law.”³⁰⁵ The other justification is more general in nature. In establishing a right to *provision* of counsel, *Johnson* posits a claim that can be advanced for affirmative government aid. Guaranteeing a right to *retain* counsel posits a claim to negative freedom—a claim to be free of government interference in this regard. In contrast, because the *Johnson* right can be implemented only by affirmative government action, it provides a judicial parallel to the social-welfare conception of the state that was central to the New Deal. To put the point in language congenial to New Dealers, *Johnson* created a system of “legal social security” for federal felony defendants.³⁰⁶ In arguing for this as a constitutional justification, a historicist could maintain that the settled convictions emerging from the New Deal crisis of the Court made legitimate an enlargement on the ratifiers’ understandings, one that endorsed the New Deal’s conception of the government as a guarantor of a limited range of positive rights designed to promote the basic needs of individuals.

303. *Id.*

304. *See supra* note 301 and accompanying text.

305. *Johnson*, 304 U.S. at 463 (quoting *Patton v. United States*, 281 U.S. 276, 308 (1930)).

306. *See* William C. Heffernan, *Social Justice/Criminal Justice*, in *FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF THE CRIMINAL LAW* 47, 59 (William C. Heffernan & John Kleinig eds., 2000) (analogizing the provision of counsel for indigent defendants to state welfare programs such as Medicaid, food stamps, and housing vouchers).

This latter point helps us understand the timing of the next stage of Sixth Amendment enlargement. Shortly after *Johnson*, in *Betts v. Brady*,³⁰⁷ the Court rejected the argument that indigent felony defendants in *state* courts are constitutionally entitled to appointed counsel.³⁰⁸ The Court reversed itself, however, two decades later in *Gideon v. Wainwright*.³⁰⁹ Black dissented in *Betts*³¹⁰ and wrote the Court's opinion in *Gideon*. In both instances, he reasoned in terms of a timeless right for the indigent, with no acknowledgement of changes in convictions about the government's role in protecting the poor.³¹¹ But the record of historical change on this is clear if one goes beyond Black's written opinions. In 1942, when *Betts* was decided, thirty states provided indigent felony defendants with the assistance of counsel.³¹² By the time *Gideon* reached the Court, this number had increased to forty-five.³¹³ Although Black's opinion makes no reference to this change, his conclusion in fact ratifies state practice in almost exactly the same way that *Coker* later would for the execution of rapists.³¹⁴ In both instances, the Court can be said to have been rounding up the strays: it was insisting that the few remaining outlier states adhere to a deep and long-standing consensus that enlarged on the ratifiers' understandings. *Gideon* is thus a historicist decision without a historicist apparatus of justification. It follows the principles of enlargement and timing noted in the discussion of punishments cases—and needs only a historicist rationale as a complement to this.

The Court extended the clause still further in *Argersinger v. Hamlin*,³¹⁵ requiring states to furnish counsel to indigent defendants in misdemeanor cases whenever imprisonment looms as a possible penalty.³¹⁶ An

307. 316 U.S. 455 (1942).

308. *Id.* at 472.

309. 372 U.S. 335 (1963).

310. *See Betts*, 316 U.S. at 477 (Black, J., dissenting) (insisting that the promise of equal justice under law is meaningless if a defendant is without the assistance of counsel).

311. *Id.* at 474 (“the Sixth Amendment makes the right to counsel inviolable by the Federal Government. I believe that the Fourteenth Amendment made the Sixth applicable to the states.”); *Gideon*, 372 U.S. at 342 (“We think that the Court in *Betts* was wrong . . . in concluding that the Sixth Amendment’s guarantee of counsel is not” a fundamental right).

312. *See Betts*, 316 U.S. at 469-70 (noting that many states provided for the appointment of counsel for certain offenses).

313. *See* LUCAS POWE, *THE WARREN COURT AND AMERICAN POLITICS* 380 (2000) (stating that “Florida could gain the amicus support of only Alabama and North Carolina for its claim that an accused could be validly convicted without the aid of counsel; Mississippi and South Carolina were the only other states not offering counsel—hardly, especially in 1963, a stellar lineup.”). It should be noted, by the way, that the lineup of states retaining the death penalty was largely similar to the lineup of states that continued to criminalize consensual sodomy. The trend toward the enlargement of rights in all three doctrinal areas has thus been forged at the expense of the South.

314. *See supra* notes 136-142 and accompanying text.

315. 407 U.S. 25 (1972).

316. *See id.* at 37 (recognizing that even a short period of imprisonment may result in serious repercussions for the accused).

Argersinger footnote canvassed state arrangements at the time of the decision, noting that “[o]verall, thirty-one States have now extended the right to defendants charged with crimes less serious than felonies”³¹⁷—not the overwhelming majority of states that supported *Gideon* and *Coker*, instead a modest majority more akin to the one that prevailed in *Atkins*.³¹⁸

Clearly, the trend was running out, a point the Court frankly discussed in its opinion for the final case in the sequence, *Scott v. Illinois*.³¹⁹ *Scott*, which held that the Sixth Amendment does not require states to provide counsel to indigent misdemeanor defendants who are not faced with the prospect of prison,³²⁰ is replete with references to trend-lines. It asks whether *Argersinger* should properly be considered “a point in a moving line”;³²¹ it notes that the problem of “constitutional line drawing becomes more difficult as the reach of the Constitution is extended further”;³²² and it openly discusses the problem of extrapolation from “an already extended line [of decisions].”³²³ Indeed, *Scott*, it seems fair to say, is grounded in a historicist rationale *against* enlargement. Perhaps a settled consensus will someday develop in favor of the right at issue in the case, but the Court correctly discerned the absence of one at the time the case was decided.

We can summarize a thirty year sequence of cases by noting how textual ambiguity is the starting point, but only that, for a cautious extension of the scope of constitutional rights. At the beginning of the sequence, in *Johnson v. Zerbst*,³²⁴ Justice Black treated the text as if it answered the question of whether to provide indigent felony defendants with counsel.³²⁵ It of course does not, but Black was nonetheless able to capitalize on the Sixth Amendment’s ambiguity to achieve his purpose. By the time the sequence was completed in *Scott*,³²⁶ the text clearly could not serve as the foundation for the Court’s conclusions, for the Sixth Amendment seems to anticipate a categorical rule when it speaks of “*all* criminal prosecutions”³²⁷ while the Court’s actual rules concerning indigent criminal defendants distinguish between those threatened with imprisonment and those who are not.³²⁸

317. *Id.* at 27 n.1.

318. *See supra* notes 155-157 and accompanying text.

319. 440 U.S. 367 (1979).

320. *Id.* at 373-74.

321. *Id.* at 369.

322. *Id.* at 372.

323. *Id.*

324. 304 U.S. 458 (1938).

325. *Id.* at 462-63 (The Sixth Amendment “embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty . . .”).

326. *Scott*, 440 U.S. at 367.

327. U.S. CONST. amend. VI (emphasis added).

328. *Scott*, 440 U.S. at 373-74.

With the text relegated to the status of starting point, we can make sense of the sequence only by focusing on a long-term trajectory of change,³²⁹ one that originates in a small number of nineteenth century state court decisions and culminates in twentieth century conceptions of the state as a guarantor of rights to affirmative aid. Because such rights impose serious financial obligations, it is a matter of particular urgency to determine their outer limits. For this reason, *Scott's* repeated references to line drawing are not surprising: once it was clear that a consensus did not exist concerning further extension of the rights of indigents, the Court reverted to the original understanding of the clause. But it did so only for those issues where a consensus was absent. Thus it drew the line only after having wrought a profound change in criminal justice. Taken together, its assistance of counsel decisions can be said to have brought about just the kind of enlargement endorsed by constitutional historicism.

B. The Reconfiguration of Private Liberty: Substantive Due Process in Contemporary Constitutional Law

The *Johnson* through *Scott* line of opinions can be understood in terms of a Whiggish trajectory of expanding liberty, one that parallels the enlargement of rights found in punishments, gender discrimination, and free speech opinions. But while this is the most familiar (and also the most comforting) version of constitutional historicism, it is not the only one possible. Constitutional rights can contract as well as expand. Indeed, because most of the rights associated with the possession of property have received less judicial support from the New Deal on, the question that must be asked in this context has nothing to do with contraction (it is clear, after all, that property rights have received diminished protection),³³⁰ rather, one must ask whether the modern Court's analysis of private liberty in noneconomic terms—in particular, its tendency to treat privacy as the axial concept of personal liberty³³¹—can be defended as a legitimate transformation (contraction of one cluster and enlargement of a related cluster) of the ratifiers' conception of the realm of personal freedom. This

329. See TOMKOVICZ, *supra* note 288, at 36 (observing that “[f]or over 300 years, the history of the right to counsel was one of consistent growth”).

330. As James Ely has noted, “[b]y separating property rights from individual freedom, the [Court] . . . instituted a double standard of constitutional review . . . [affording] a higher level of judicial protection to . . . personal rights, [while] economic rights were implicitly assigned a secondary constitutional status.” ELY, *supra* note 200, at 133.

331. See, e.g., *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (reiterating that the “law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education”); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-20 (1984) (stating that the “Bill of Rights is designed to secure individual liberty,” including the right to enter into certain types of personal relationships without state interference).

question also has Whig overtones, but it can be approached from other perspectives as well. For example, in discussing the modern ascendancy of privacy over property rights, an originalist could charge the Court with both a lack of fidelity to the ratifiers' understandings *and* a resort to raw judicial power in adopting personal preferences unrelated to those understandings.³³² On the other hand, a historicist could defend the Court's current approach to personal liberty as a modification of the original conception of individual freedom that is understandable in light of an egalitarian shift in convictions as to the nature of that freedom. This portion of the section outlines a historicist justification of the Court's position along these lines.

There can be no doubt that the founding generation viewed property rights as the touchstone of personal liberty. The Constitution's text contains no reference to privacy. The term "property," in contrast, appears twice in the Fifth Amendment.³³³ Moreover, when the adjective "private" (as distinguished from the noun "privacy") is used in the text, it is used to modify the word "property" ("nor shall private property be taken for public use without just compensation").³³⁴ But we should not concentrate simply on textual references to property, for the founding generation can also be said to have shown a concern for the concept as it is broadly understood. Consider, for example, the significance judges placed on the text's reference to "privileges and immunities"³³⁵ and its statement that contracts shall not be impaired.³³⁶ Justice Washington's widely-cited opinion in *Corfield v. Coryell*³³⁷ maintained that among the "fundamental" privileges and immunities of an individual is the "right [to] take, hold, and dispose of property."³³⁸ Justice Chase's opinion in *Calder v. Bull*³³⁹ contended, with no effort whatsoever to find a textual home for its assertions, that natural law (which Chase apparently considered enforceable in federal courts) prohibits "a law that destroys, or impairs, the *lawful private* contracts of

332. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 520-21 (1965) (Black, J., dissenting) (arguing that the Court may not invalidate laws enacted by federal and state legislatures with which it does not personally agree and that doing so undermines the separation of powers intended by the ratifiers).

333. See U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.").

334. *Id.*

335. *Id.* at art. IV, § 2, cl. 1 ("The citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States.").

336. *Id.* at art. I, § 10, cl. 1 ("No State shall . . . pass any law . . . impairing the Obligation of Contracts.").

337. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

338. *Id.* at 552.

339. 3 U.S. (3 Dall.) 386 (1798).

citizens . . . or a law that takes *property* from A and gives it to B.”³⁴⁰ The founding generation thus thought of property not simply as a reference point for a specific set of rights but as the symbol of the gulf between civil and political society. As Madison put it, the term “property” should be understood in its broadest sense to refer to individuals’ “free use of [their] faculties, and free choice of the objects on which to employ them” without interference by the government.³⁴¹

Once it is understood that property rights were seen as the bulwark for civil society against the state, one can readily grasp how it is that nineteenth century courts began to draw on the Due Process Clauses contained in state and federal constitutions to ensure the vitality of personal liberty. In 1856, for example, the New York Court of Appeals relied on the state constitution’s Due Process Clause in asserting that “the legislature cannot totally annihilate commerce in any species of property, and so condemn the property itself to extinction.”³⁴² Needless to say, due process provides a peculiar textual basis for claims of this kind. A provision that prohibits the taking of property without due process of law would appear on its face to deal only with the procedural regularity of government action. It certainly would not appear to establish an absolute barrier against legislation. But from the nineteenth century onward, due process was understood to have a substantive as well as a procedural component. Moreover, that component was understood to be concerned with rights of property as that term is broadly conceived.³⁴³

Perhaps the best-known property-based substantive due process case is *Lochner v. New York*,³⁴⁴ the Supreme Court’s 1905 decision invalidating legislation limiting a baker’s workweek to sixty hours within the state.³⁴⁵ *Lochner* is rooted in the claim (a familiar one by the early twentieth century) that due process contains a substantive component. Building on this, the majority opinion maintains that this component includes freedom of contract and that New York’s legislation unreasonably interfered with a baker’s right to regulate his hours of employment.³⁴⁶ Of special importance for our purposes, however, is the formula Justice Holmes advanced in his *Lochner* dissent for determining the scope of a substantive due process claim. Holmes did not object in principle to the idea of substantive due

340. *Id.* at 388 (emphasis added).

341. MADISON, *supra* note 217, at 186.

342. *Wynehamer v. People*, 13 N.Y. 378, 399 (1856).

343. *See* ELY, *supra* note 200, at 79-81 (elaborating that the concept of substantive due process first appeared in the *Dred Scott* decision and flourished in the late nineteenth century, especially in the fields of patent and copyright law).

344. 198 U.S. 45 (1905).

345. *Id.* at 64-65.

346. *See id.* at 64 (insisting that law bore no direct relation nor had any substantial effect upon a baker’s health which would outweigh the infringement of his freedom of contract).

process. He did not claim, as one might given the typical use of the words “substance” and “process,” that the very idea is an oxymoron. Rather, he maintained that the notion of substantive due process should be understood in light of America’s traditions. The word “liberty” contained in the Fourteenth Amendment Due Process Clause, Holmes asserted:

is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.³⁴⁷

Did Holmes thus think of substantive due process as being subject to a dynamic rule? Did he believe that traditions can change and that, in changing, fundamental principles from the past that at one time achieved constitutional standing can be modified in light of new ones? It is quite possible he did. Holmes is particularly well-known, after all, for his aphorism that the “[l]ife of the law has not been logic: it has been experience.”³⁴⁸ His comments in *Missouri v. Holland*,³⁴⁹ which I have suggested provides a helpful introduction to constitutional historicism as an interpretive method, also point in the same direction.³⁵⁰ However, it must be noted that Holmes never commented on the specific issue of whether the traditions that should be considered when determining what counts as a liberty interest under substantive due process can be dynamic or whether instead the only relevant traditions are those that are unchanged from the time of ratification. It is possible, then, that Holmes would have considered tradition as something static, at least for purposes of substantive due process analysis, in which case fundamental principles would not be reshaped over time. What is at least clear, though, is that some of Holmes’s heirs thought otherwise. Justice Harlan, for example, contended that the tradition with which substantive due process is concerned “is a living thing,” albeit one that moves by moderate steps carefully taken.³⁵¹ Justice Frankfurter, an avowed admirer of Holmes,³⁵² was equally definite. “[T]he concept of due process of law is not final and fixed,” Frankfurter asserted when writing for the Court in *Rochin v. California*.³⁵³

347. *Id.* at 76 (Holmes, J., dissenting).

348. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Boston, Little, Brown & Co. 1923) (1881).

349. 252 U.S. 416 (1920).

350. See *supra* notes 27-29 and accompanying text.

351. *Poe v. Ullman*, 367 U.S. 497, 542 (Harlan, J., dissenting).

352. See Felix Frankfurter, *Twenty Years of Mr. Justice Holmes's Constitutional Opinions*, 36 HARV. L. REV. 909, 919 (1936) (opining that Justice Holmes' decisions rose to the level of statesmanship and that he possessed “the humility of the philosopher and the imagination of the poet”).

353. 342 U.S. 165, 170 (1952).

The notion of a dynamic tradition underlying substantive due process, it must be emphasized, has contended uneasily with the notion of it as static and unchanging. It is a dynamic conception, however, that provides the key to understanding the dramatic changes that have occurred in the judicial doctrine of substantive due process over the last century. Indeed, the very notion of substantive due process appeared to have been rejected entirely during the mid-twentieth century,³⁵⁴ only to be revived in a new guise during the 1970s. In *Roe v. Wade*,³⁵⁵ the case that inaugurates the new version of the doctrine, the Court treated privacy as its central category of analysis.³⁵⁶ Although cases following *Roe* generally refrained from using the term “privacy” to describe intimate activity, it is fair to say that the contemporary Court has employed substantive due process as its chief tool for protecting a sphere of personal freedom that is defined by the values of closeness and personal expression.³⁵⁷ The Court has thus appealed, albeit often implicitly, to a dynamic tradition, one in which a constellation of rights—at one time those associated with acquisition and financial arrangements, but now those associated with emotional and expressive attachments—defines the civil sphere of personal freedom.³⁵⁸ Put differently, the Court can be said to have accepted the regulatory reach of the New Deal state in economic affairs while at the same time it has come to question the regulatory reach of the state over expressive life unrelated to acquisition and financial profit.

The contemporary Court came closest to acknowledging this shift in the 2003 case of *Lawrence v. Texas*,³⁵⁹ perhaps the most candid historicist opinion to have been rendered beyond the domain of the Punishments Clause. At issue in the case was a Texas criminal prosecution against two consenting adult males for violating a statute that prohibited sexual relations between members of the same sex.³⁶⁰ Seventeen years before

354. See *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965) (declining to apply *Lochner*'s substantive due process analysis in deciding whether married couples have the right to use contraception).

355. 410 U.S. 113 (1973).

356. *Id.* at 154 (“We therefore conclude that the right of personal privacy includes the abortion decision . . .”).

357. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (stating that whether a particular intimate activity falls into this protected sphere depends upon the size of the personal relationship, the “degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship”).

358. See, e.g., William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1, 15-19 (2001) (analyzing the transition from property- to privacy-based analysis within the Fourth Amendment); William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799, 827-42 (2000) (discussing the implications of a privacy-based analysis of the Fourth Amendment to the exclusion of evidence).

359. 539 U.S. 558 (2003).

360. *Id.* at 563.

Lawrence, in *Bowers v. Hardwick*,³⁶¹ the Court upheld a statute of somewhat broader scope against a challenge by a male homosexual couple.³⁶² *Bowers* rested on a static conception of substantive due process. It focused not on the gradual changes that were occurring in state legislation concerning sexual relations but instead on the fact that most states had not departed from the proscriptions of sodomy that had been in place since the time of the founding.³⁶³ *Lawrence*, in contrast, made an “emerging awareness” of liberty its central concept, thus giving substantial weight to present developments while still acknowledging a link to the past.³⁶⁴

In analyzing *Lawrence*, consider first the thumb that Justice Kennedy’s opinion for the Court places on the scales of history. Conceding that all thirteen of the original states criminalized sodomy,³⁶⁵ Kennedy nonetheless asserted that “‘history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.’”³⁶⁶ Important as the original understandings of liberty may have been, Kennedy maintained that “our laws and traditions *in the past half century* are of most relevance here.”³⁶⁷ Developments since the middle of the twentieth century, he argued, reveal an “emerging recognition” of gays’ liberty interest in sexual freedom.³⁶⁸ Although almost all states criminalized sodomy (either through explicit prohibitions of same-sex relations or through more general prohibitions covering heterosexual relations)³⁶⁹ at the time the Fourteenth Amendment was adopted, that number had dropped to twenty-five at the time *Bowers* was decided.³⁷⁰ In the less than two decades that followed

361. 478 U.S. 186 (1986).

362. *Id.* at 188.

363. *See id.* at 192-94 (finding that all original thirteen states had banned sodomy and that twenty-four states and the District of Columbia continued to do so by the time of the decision). Chief Justice Burger expressed his view that “[t]o hold the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.” *Id.* at 197 (Burger, C.J., concurring).

364. *See supra* note 268 and accompanying text.

365. *See Lawrence*, 539 U.S. at 568 (noting that “there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter” but also noting that “[b]eginning in colonial times there were prohibitions of sodomy [in general] derived from the English criminal laws.”).

366. *Id.* at 572 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

367. *Id.* at 571-72 (emphasis added).

368. *Id.* at 572.

369. In *Lawrence*, the *amicus* brief for professors of history et al. maintained that *Bowers* had erred in treating criminal prohibitions on sodomy in general as evidence of a longstanding tradition prohibiting same-sex sodomy. *Id.* at 567-68. The Court responded that it “need not enter this debate in the attempt to reach a definitive historical judgment.” *Id.* at 568. Its “emerging awareness” approach, with its emphasis on gradual change in the present, made it unnecessary to address directly the claims advanced in the historians’ brief.

370. *See infra* note 363 and accompanying text.

Bowers, the number further declined to thirteen.³⁷¹ Moreover, Kennedy noted, even within the states still criminalizing sodomy, there had been a “pattern of nonenforcement”³⁷² that robbed the prohibitions of much of their force. In particular, Kennedy emphasized, “[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private.”³⁷³ Whatever the original understanding of the scope of liberty, Kennedy maintained that conceptions of its proper boundaries have changed over the course of the last century. Individual liberty, he implied, is to be understood not in terms of what it was thought to consist of at the time of the founding but in terms of its trajectory from then to the present.

It is because Kennedy gave greater weight to the present than to the past that Justice Scalia’s dissenting opinion in *Lawrence* appears to argue at cross-purposes with Kennedy’s line of reasoning rather than to engage it directly. Scalia took a static view of the tradition of criminalizing sodomy.³⁷⁴ His position cannot be classified as fully originalist, for an originalist account of substantive due process (were it to accept the notion at all) must focus exclusively on understandings that prevailed at the time constitutional provisions were adopted. Scalia, in contrast, was prepared to consider pre- and post-adoption data. For example, he noted sodomy prosecutions during the colonial era.³⁷⁵ He also noted similar prosecutions during the period 1880-1995.³⁷⁶ Trends within this latter period (i.e. weakening disapproval of homosexuality) apparently were of no interest to him, however, for he spoke simply of “our long national tradition criminalizing homosexual sodomy.”³⁷⁷ Whether he would ever concede that post-adoption trends can alter a long national tradition is by no means clear. What can be said is that he did not think of the data drawn from the preceding half-century as sufficient to establish an alteration of the nation’s tradition. On Scalia’s account, *Lawrence* thus amounts to a radical break with the past.

But does it? The answer to this depends on one’s assessment of the Court’s transformation of the tradition of individual liberty. If one were to view personal liberty outside the sphere of civic engagement in the

371. See *Lawrence*, 539 U.S. at 573 (detailing that of the thirteen states that continued to enforce their sodomy laws at the time of *Lawrence*, four of them “[enforced] their laws only against homosexual conduct”).

372. *Id.*

373. *Id.* at 569.

374. *Id.* at 596 (Scalia, J., dissenting) (stating that “the only relevant point” is that homosexual sodomy was criminalized during the eighteenth and nineteenth centuries).

375. See *id.* at 596 (Scalia, J., dissenting) (emphasizing that the original thirteen states prohibited sodomy).

376. See *id.* at 597 (Scalia, J., dissenting) (noting that there have been 203 reported prosecutions for adult, consensual sodomy between 1880-1995).

377. *Id.* at 596 (Scalia, J., dissenting).

concrete terms employed by the ratifiers—as a bundle of rights associated with the acquisition of property—then *Lawrence* and the many cases that make expressive relationships the object of special solicitude surely mark a deep break with the past. Kennedy’s *Lawrence* opinion suggests a different approach, however, one that connects the present to the past by drawing on the concept of an emerging awareness of the possibilities of liberty. Kennedy asserted:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment, known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can bind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke the principles in their own search for greater freedom.³⁷⁸

An appeal of this kind to the ratifiers of the due process clause certainly stands as an attempt to link past to present, but of course it does so by suggesting, in a manner consistent with Holmes’ *Holland* opinion, that the constitutional text simply charted a direction, one whose details are properly clarified by later generations. To justify the change of direction, Kennedy would, I think, have had to mention both the alteration of substantive due process from economic to noneconomic liberty and also the background of egalitarianism in which this alteration occurred. It is this egalitarian background that provides the rationale for the alteration. Although the right to enter into contracts may be open to all, a formal opportunity of this kind can substantially skew the distribution of wealth. Egalitarian liberalism of the New Deal era and beyond is grounded in a rejection of the legal formalism associated with freedom of contract. But this egalitarianism adds another dimension to liberty, one that emphasizes the possibility that all persons—male and female, gay and straight—may form expressive ties free of government interference, thus establishing a sphere of civil society that stands as a buffer against the government but that is also open to all on roughly equal terms. On this account, Kennedy’s reference to the “manifold possibilities” of individual liberty is best understood in terms that affirm but alter the ratifiers’ approach to civil society. Where they thought of a strong commitment to property rights as essential to protecting the civil sphere, the modern Court has accorded less importance to these but has substituted, in light of the egalitarianism of current liberalism, a strong commitment to rights of expressive association. A historicist would defend this as a modification of tradition that

378. *Id.* at 578-79.

nonetheless maintains fidelity to the past.

IV. A QUESTION OF LEGITIMACY

But is it legitimate for the Court to modify doctrine in the ways just outlined? Constitutional historicism is certainly plausible. It is internally consistent. Arguably, it provides an attractive answer to the question of how to interpret chronically vague provisions of the text. However, none of these points establishes its legitimacy. That is, even if one were to accept all the arguments just advanced, they would not be sufficient to establish that judges employing historicism act properly when adopting it as an interpretive method. Originalists in particular have questioned the methods I have classified as historicist.³⁷⁹ The results of historicism—curtailment of the death penalty, extension of women's rights, acceptance of gays, diminished protection for property rights—so readily suit the agenda of today's liberals that it is surely appropriate to ask whether, as a matter of constitutional theory, historicism can generate a rationale that explains why decisions reached according to it are binding on other actors in the political system.

My answer in this section is that it can, or at least, that it can produce a more compelling rationale for legitimacy than does originalism. In advancing this argument, I consider, in increasing order of stringency, three different criteria of constitutional legitimacy. The least demanding standard is one of impersonal judgment, an issue of considerable importance in this context given the possible charge that historicism amounts to disguised liberal politics. The intermediate standard involves coherence, in particular the coherence of the decisions under a given interpretive method. The most stringent involves jurisprudential issues about the nature of law itself; in particular, the claim that historicism departs from shared understandings of what it means to interpret a legally binding text. Historicism, I contend, offers a satisfactory response to all three challenges. It is not without its flaws. The canons of legality are sufficiently wide-ranging to insure that some features of historicism seem mistaken. However, historicism should not be judged in isolation. What matters is the acceptability of a method by comparison with the competition and on this score historicism is indeed satisfactory.

379. Though not using the term "historicism," Justice Scalia caustically challenged the application of its method in *Atkins*, maintaining that, despite the majority's invocation of society's standards of decency, in the end "it is the *feelings* and *intuitions* of a majority of the Justices that count[ed]" in resolving the case. *Atkins v. Virginia*, 536 U.S. 304, 348 (2002) (Scalia, J., dissenting).

A. *The Least Stringent Test: A Demand for Impersonal Judgment*

A minimum requirement of legitimacy for a judicial decision is that it be rendered according to impersonal criteria; that it not, in other words, be infected by a judge's personal preferences. John Marshall's flat assertion that "[j]udicial power is never exercised for the purpose of giving effect to the will of the Judge"³⁸⁰ is belied by the facts: there are many instances in which it appears that the result a court has reached conforms strongly to the ideological preferences of its members. Indeed, numerous Holmes dissents were predicated on exactly this premise. This is the significance of his assertion in his *Lochner* dissent that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."³⁸¹ He made a similar point, though less pithily, twenty-five years later when he stated that

[a]s the [liberty of contract] decisions now stand I see hardly any limit but the sky to the invalidating of . . . [legislation] if . . . [it] happen[s] to strike a majority of this Court as for any reason undesirable. I cannot believe that the [Fourteenth] Amendment was intended to give us *carte blanche* to embody our economic and moral beliefs in its prohibitions.³⁸²

Holmes' comments were directed at a Court majority that consistently reached results pleasing to conservatives. Today, the disguised politics charge is more frequently advanced against Court majorities that favor liberal results. To determine whether the charge is fair, one must ask two questions: first, whether the method a judge uses allows for the injection of personal preference and second whether such a method was selected because it makes possible the furtherance of her policy goals even if it can be applied without injecting her personal preferences. It is the first question that is critical to the minimum condition of legitimacy and the answer to it must be that historicism can, when properly employed, be applied without reference to personal preference. A historicist judge, I have suggested, asks whether an asserted constitutional value is rooted in original understandings and whether there has been a widespread, long-standing change in settled convictions that either enlarges on or transforms that value. In applying this framework, a judge *ratifies* change; she does not impose it. Needless to say, a judge can *misapply* the method and so further her policy preferences. Indeed, I have noted that *Atkins* can perhaps be characterized as an instance of this.³⁸³ However, as I have also noted, originalism carries with it the same danger of manipulability. Scalia's selective analysis of the eighteenth century history of the Punishments Clause in *Harmelin* can also arguably be characterized as an exercise of

380. *Osborn v. U.S. Bank*, 22 U.S. (9 Wheat.) 738, 866 (1824).

381. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

382. *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting).

383. *See supra* notes 259-261 and accompanying text.

judicial will.³⁸⁴ What is clear, though, is that each method, when honestly applied, can lead a judge to reach conclusions that do not suit her policy agenda. A liberal judge employing historicist criteria will have to conclude that the death penalty is compatible with contemporary standards of decency. A conservative judge employing originalism will have to exclude compelled confessions of guilt despite their probative value. Each method thus has the potential for impersonal application.

But what if one were to advance a different claim? What if one were to argue that the historicist method is appealing to liberals because its results usually, though concededly not always, comport with the policy agenda of the moderate left? On this account, it is the method in general, not its potential for impersonal application in particular cases, that is open to challenge for partisanship. The point is surely worth considering, but it is hard to see why it should be viewed as decisive. Surely a direct parallel with originalism is discernible in this context, for originalists are generally conservative and they can also be said to have adopted a methodology that suits *their* policy agenda. But to make this point, whether about historicists or originalists, is to engage in unsupportable assertion. Exactly why someone adopts a complex theory is a matter for endless speculation; it is not something that can be established with precision. Assertions advanced along these lines are reductionist at best; at their worst, they are simply implausible.³⁸⁵ It is better, then, to concentrate on the simpler question of whether the method selected is capable of impersonal application. On this point, historicism is acceptable, but so too is originalism.

B. A Stricter Criterion: Achieving Coherence within Constitutional Doctrine

The same cannot be said for the second test. Here, historicism appears preferable to originalism, though for reasons that do nothing to establish historicism's inherent superiority. In considering methods of constitutional interpretation, one criterion to consider is how well a given method accounts for results currently reached by the courts. An effort to account for present practice is often relevant to normative inquiry. In thinking about ethical theory, for example, it is important to ask how extensively a given theory requires rejection of present practices. A reason commonly

384. See *supra* notes 72-93 and accompanying text.

385. Justice Scalia, for example, has sometimes reached conclusions appealing to liberals. See, e.g., *Arizona v. Hicks*, 480 U.S. 321 (1987) (holding that the "plain view doctrine" does not apply where the police lack probable cause to believe that an item has evidentiary value or is contraband); *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that the use of thermal-imaging devices directed at private homes constitutes a search under the Fourth Amendment). On the other hand, Justice Stevens, who often reaches conclusions that appeal to liberals, dissented in *Kyllo*. *Kyllo*, 533 U.S. at 41 (Stevens, J., dissenting).

advanced against utilitarianism is that it fails to account for practices and principles that respect individuals rather than collective aggregations.³⁸⁶ In like manner, a reason for rejecting an interpretive method in constitutional law is that it requires repudiation of large bodies of doctrine. We can call this a “bottom-up” (as opposed to a “top-down”) approach to normative reasoning.³⁸⁷ “Top-down” approaches identify a standard and classify practices in light of their consistency with the standard selected.³⁸⁸ “Bottom-up” approaches, in contrast, are grounded in the premise that current practices are entitled to initial respect, though on reflection it may turn out that one cluster of practices should be rejected because of their inconsistency with other clusters.³⁸⁹

When viewed in this light, originalism must be classified as deeply problematic. Indeed, originalists themselves have admitted as much. Henry Monaghan, who at one time commented sympathetically on originalism,³⁹⁰ has insisted on this concession. He stated that

no acceptable version of original understanding theory, can yield a convincing descriptive account of the major features of our “Bicentennial Constitution”: nontextual guarantees of civil liberties; a powerful, presidentially centered national government; a huge administrative apparatus; and national responsibility for what had long been conceived of either as local responsibilities or as not the responsibility of government at all.³⁹¹

386. See MARK TIMMONS, *MORAL THEORY: AN INTRODUCTION* 131-34 (2002) (demonstrating a conflict between utilitarianism and moral theory with several examples of situations where the utilitarian approach would benefit a greater number of people, but would result in an immoral outcome for an individual) (on file with the American University Law Review).

387. See generally Richard A. Posner, *Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433 (1992) (defining top-down and bottom-up legal reasoning and evaluating the strengths and limitations of both approaches in interpreting unenumerated rights in the U.S. Constitution).

388. See *id.* at 433 (

In top-down reasoning, the judge or other legal analyst invents or adopts a theory about an area of law—perhaps about all law—and uses it to organize, criticize, accept or reject, explain or explain away, distinguish or amplify the existing decisions to make them conform to the theory and generate an outcome in each new case as it arises that will be consistent with the theory and with the canonical cases, that is, the cases accepted or rejected as authoritative within the theory.

).

389. See *id.* (“In bottom-up reasoning, which encompasses such familiar lawyers’ techniques as ‘plain meaning’ and ‘reasoning by analogy,’ one starts with the words of a statute or other enactment, or with a case or a mass of cases, and moves from there—but doesn’t move far . . .”).

390. See Monaghan, *supra* note 64, at 360 (“I write from the perhaps ‘puerile’ bias that original intent is the proper mode of ascertaining constitutional meaning, although important concessions must now be made to the claims of *stare decisis*.”).

391. Monaghan, *supra* note 188, at 739.

Originalists have not only conceded that their method fails to account for the key components of modern constitutional doctrine. They have made the further concession that the Court's departures from original understandings should not be overruled. For example, Robert Bork has justified this by focusing on the expectations that have developed with respect to nonoriginalist decisions. All kinds of expectations and institutions have arisen around nonoriginalist jurisprudence, he remarked during his confirmation hearings.³⁹² "[T]oo many expectations have clustered, for . . . [these decisions] to be overruled."³⁹³ Justice Scalia, in contrast, has advanced a rationale for accepting nonoriginalist decisions that is more tactical in nature. "The demand that originalists alone 'be true to their lights' and forswear *stare decisis*," he stated, "is essentially a demand that they alone render their methodology so disruptive of the established state of things that it will be useful only as an academic exercise and not as a workable prescription for judicial governance."³⁹⁴

In this instance, Bork's rationale carries more weight than does Scalia's. The issue here is not tactical; it does not center on unilateral disarmament. Rather, attention must be focused on the extent to which adoption of an interpretive method will undermine the social and political order that has developed in response to judicial opinions. Scalia concedes this point implicitly with his reference to disruption of the established state of things, but Bork faces it more forthrightly by acknowledging the importance of expectations engendered by departures from originalism.³⁹⁵ The choice confronting originalists is thus a stark one. They can advocate their method only at the expense of upsetting expectations engendered by the past; or they can concede the value of *stare decisis*, declare that originalism should be applied only for future decisions, and so accept the prospect of a deep incoherence between past and future constitutional doctrine. It is hardly surprising that most originalists have opted for the latter course; rejection of *stare decisis* would destabilize virtually every feature of the current order.³⁹⁶ But a maxim of "go forth and sin no more" is only slightly more appealing. In adopting it, a person accepts the force of precedent only to jeopardize the coherence of constitutional law. A "sin no more" approach

392. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary*, 100th Cong. 405 (1987) [hereinafter *Nomination*], quoted in PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 98 (1991).

393. *Nomination*, *supra* note 392, at 465, quoted in BOBBITT, *supra* note 392, at 99.

394. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 139 (1997).

395. *Nomination*, *supra* note 392, at 465, quoted in BOBBITT, *supra* note 392, at 99.

396. *See id.* (noting key doctrinal areas in which nonoriginalism prevails that be overruled—among them, cases dealing with the Commerce Clause, the Equal Protection Clause, and the First Amendment).

requires a peculiar kind of line-drawing for virtually every type of doctrine. The point in time at which originalism was adopted would become the decisive criterion for analysis, a criterion that itself could be quite destabilizing and that would tend to cast doubt on the legitimacy of constitutional decision making both before and after its adoption.

It is because originalism is intended as a rebuke to the current approach to constitutional law that this problem of coherence arises. None of the points just made establishes the intrinsic superiority of historicism as an interpretive method. Rather, they remind us that the development of constitutional doctrine is an ongoing process and that adoption of a program of radical reform will necessarily disrupt that process. A historicist can perhaps take this a step further, though this extension of the historicist position cannot be said to establish conclusively that its interpretive method should be preferred. The historicist could contend that because practice has tended to conform to her interpretive approach, this stands as a sound reason to adopt her approach. Normative theories (Savonarola frameworks, one might call them)³⁹⁷ that aim at root and branch reform severely undervalue the extent to which human practices are informed by sensible strategies for the prudent management of human affairs. On this analysis, a framework that accounts for how judges actually decide cases is entitled to substantially more respect than one that rebukes them for their ways.

*C. Raising the Bar Further: Constitutional Interpretation
as a Problem in Legal Theory*

This of course is merely an argument from prudence. An originalist can properly maintain that it sidesteps the theoretical challenge posed by her approach—that because practice diverges from what theory requires, theory should prevail. Originalists have frequently asserted that their framework's strength is to be found in its conformity to broadly accepted accounts of the nature of legal reasoning. Richard Kay, for example, stated that the ratifiers' understandings matter because "the force of law derives from the authority of the lawmaker."³⁹⁸ Robert Bork contended that "[i]f the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended."³⁹⁹ And Lino Graglia asserted that "[a]n entirely sufficient reason for originalism, is

397. See THE NEW CENTURY ITALIAN RENAISSANCE ENCYCLOPEDIA 845-50 (Catherine B. Avery ed., 1972)(describing Girolamo Savonarola as a political and religious reformer who sought to rid Florence of its corruption and vanity by ordering the collection of worldly goods and burning them in a bonfire on the Piazza della Sinoria).

398. Kay, *supra* note 62, at 233.

399. BORK, *supra* note 61, at 145.

that interpreting a document *means* to attempt to discern the intent of the author”⁴⁰⁰

Clearly, these assertions vary in their generality. At their core, however, all are grounded in two positivist premises: first, that the Constitution is law because it is the product of the will of the sovereign people, and second that its status as law means that it must be interpreted in light of the understandings of those who created it. If legal interpretation were so straightforward, then of course originalism would have to be classified as theoretically sound. This, however, is an issue on which simplicity is profoundly unhelpful. To understand why, consider the implication of all the originalist formulations just quoted: that the numerous judicial interpretations that have departed from ratifiers’ understandings are *not* law. Robert Bork has put the point bluntly, characterizing decisions such as *Roe v. Wade*⁴⁰¹ as “unconstitutional” because they depart from original understandings of the document’s meaning.⁴⁰² But surely this is an implausible account of the nature of law. It may be *desirable* to interpret written laws according to their enactors’ understandings, but to suggest that interpretations that do not employ this approach lack the force of law is to fail to come to terms with the meaning of the term “law.”

Indeed, only a moment’s reflection is needed to understand that originalism relies on a highly contested version of positivism to reach its conclusions about the interpretive method courts should employ. On originalism’s account, the Constitution is law because of an act of will that continues to be binding today. But if, as positivists claim, law is a social fact,⁴⁰³ then surely what counts as law is not what people did in the past but what people accept as authoritative today. Kent Greenawalt’s application of H.L.A. Hart’s notion of a rule of recognition underscores this point. Rather than suggest that the rule of recognition in American constitutional law is that the ratifiers’ understandings determine the meaning of the text, Greenawalt has captured contemporary practice far more accurately by stating that “[o]n matters not clear from the text, the prevailing standards of interpretation used by the Supreme Court determine what the Constitution

400. Lino A. Graglia, “*Interpreting the Constitution: Posner on Bork*,” 44 STAN. L. REV. 1019, 1024 (1992).

401. 410 U.S. 113 (1973).

402. See *Hearings on a Bill to Provide That Human Life Shall Be Deemed to Exist from Conception, Before the Senate Comm. on the Judiciary*, 97th Cong. 310 (1981) (testimony of Robert Bork) (“I am convinced, as I think most legal scholars are, that *Roe v. Wade* is itself an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority.”), quoted in ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 92 (1989).

403. See Jules L. Coleman, *Incorporationism, Conventionality and the Practical Difference Thesis*, 4 LEGAL THEORY 381, 395 (1998) (“The distinctive feature of legal positivism is that it attempts to explain law in terms of *social facts*.”).

means”⁴⁰⁴ Were it not for the efforts of originalists to place themselves under the banner of legal positivism, Greenawalt’s point would seem too obvious to be worth making. It has to be made, however, once the originalist challenge is advanced, for it is essential to understand that originalism does not account for the social fact of widespread acceptance of Supreme Court decisions that depart from originalist methods of interpretation.⁴⁰⁵ As Hart himself noted, when courts decide difficult constitutional questions, “they *get* their authority to decide them accepted after the questions have arisen and the decision has been given.”⁴⁰⁶ In this context, acceptance of judicial authority does not depend on a protocol for decision making that is traceable to ratifiers’ understandings. Rather, as Hart put it, “all that succeeds is success.”⁴⁰⁷

In responding to this, an originalist might maintain that even if decisions employing historicism can properly be characterized as having legal force, if only because they are widely accepted (“all that succeeds is success”), they are nonetheless illegitimate as a matter of democratic political theory. This claim, it should be noted, relies not on a proposition about what counts as law but rather one about what *should* be counted as law in a polity that values democratic decision making. Arguing in this vein, Michael McConnell, for example, has maintained that “rule by judges is objectionable in this society because it is inconsistent with the principles of self-government.”⁴⁰⁸ And when is it permissible for judges to exercise authority under the Constitution? Only when the people have *consented* to this. As Robert Bork put it, “[s]ociety consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.”⁴⁰⁹ The consent of “we the people,” in other words, legitimates judicial invocation of the Constitution *against* democratic majorities—provided, of course, courts draw on the understandings of those who engaged in original acts of constitutional lawmaking.

This is surely the strongest argument that can be advanced on behalf of originalism, focusing as it does on the notion of consent to judicial authority within a democratic polity. The difficulty with it is to be found in

404. Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 659 (1987).

405. See generally MUIR, *supra* note 8, at 111-41 (detailing the attitude change of a specific community in the wake of the Court’s school prayer decisions where a non-separatist school board and community eventually accepted a ban on prayer in the schools).

406. H.L.A. HART, *THE CONCEPT OF LAW* 149 (1961).

407. *Id.*

408. Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1538 (1989).

409. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971).

its misplaced reliance on the notion of consent. The concept of consent provides an unassailable foundation for legitimacy in democratic theory. To establish that people *actually* agreed to general rules is to establish conclusively the legitimacy of those rules for the people who have consented to them.⁴¹⁰ Problems arise, however, when actual consent was given by one person in the name of others (consider the limited franchise for the ratification conventions of the Constitution) or when actual consent is given by (some) members of one generation to a set of rules that govern members of later generations (think of the dead hand problem in American constitutional theory).⁴¹¹ Notions of tacit or implicit consent are sometimes invoked to try to explain why those who did not actually assent should nonetheless treat as legitimate rules that were adopted by others, but these forms of quasi-consent are clearly less satisfying than actual assent.⁴¹²

Originalists are confronted with two possibilities when asked about the sense in which the people have consented to rule by reference to original understandings. On the one hand, they can claim that people tacitly consent to the Constitution on originalist grounds, but the connection between the behavior of the public and a specific version of the Constitution seems obscure indeed.⁴¹³ On the other hand, they can adopt the more promising approach of looking for evidence—which, in all likelihood will be less than conclusive—of the public’s attitude toward constitutional decision making. Polls are sometimes relevant in this context. But surely the best evidence of this is to be found in judicial confirmation hearings, particularly in those that strongly engage the public’s attention.

Unfortunately, the evidence from these hearings provides little or no support for the originalist notion of public consent to judicial interpretation

410. See John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government: Second Treatise on Civil Government*, para. 96, in *SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME AND ROUSSEAU* 57 (Sir Ernest Barker ed., 1948) (presupposing actual consent in maintaining that “when any number of men have, by the consent of every individual, made a community, they have thereby made that community one body, with a power to act as one body”) (on file with the American University Law Review).

411. See Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 *GEO. WASH. L. REV.* 1127, 1127 (1998) (defining the dead hand problem in constitutional theory as the concern that modern American society is governed by a Constitution that was drafted and ratified by a past generation).

412. See Michael Sandel, *Justice and the Good*, in *LIBERALISM AND ITS CRITICS* 172 (Michael J. Sandel ed., 1984) (defending a notion of implicit consent). Sandel continues:

[L]oyalties and convictions whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are—as members of the family or community or nation or people, as bearers of this history, . . . [and which] go beyond the obligations [we] voluntarily incur . . .

Id.

413. See *supra* notes 405-407 and accompanying text (describing the public’s acceptance of nonoriginalist Supreme Court decisions).

of the Constitution based on ratifiers' understandings. Indeed, the Bork hearings point to just the opposite conclusion. Faced with a nominee who openly endorsed original understandings, there was a groundswell of public opposition to the method Bork advocated.⁴¹⁴ Indeed, in defending Court decisions that departed from original understandings, senators routinely invoked the Whig notion of moral progress embedded in Eighth Amendment jurisprudence to challenge Bork's interpretive method.⁴¹⁵ Needless to say, confirmation hearings provide only a modest glimpse of the public's beliefs about the legitimacy of judicial authority. Hearings like Judge Bork's almost surely give disproportionate weight to liberal interest groups;⁴¹⁶ in doing so, they actually make it harder to understand public opinion about constitutional decisions. However, if we focus only on the limited question of whether confirmation hearings provide evidence of general consent for the exercise of judicial authority only under original understandings, the answer is clear: they do not.

D. Evidence of Settled Convictions, Deliberation, and Consent: A Qualified Defense of the Historicist Method

In thinking about legitimacy, it has been necessary to consider a series of negative points—that is, we have had to focus on the question of whether originalism has established the illegitimacy of historicist readings of the Constitution. To argue that originalism has failed on this score is not, of course, to demonstrate that it actually is legitimate to read the Constitution along historicist lines. But refutation has its uses. The negative points just advanced establish that historicism satisfies the conditions that can reasonably be established for selecting an interpretive method. But can it do more? In particular, does it provide a satisfactory account of the notion of ongoing consent to a legal instrument adopted by generations long since dead?

We can begin to answer this by considering remarks by Hamilton and

414. See *Nomination*, *supra* note 392, at 465 (citing Center for Media Studies statistics that eighty-nine television news "source statements" over three months were critical of Bork and only sixteen were supportive while a Louis Harris and Associates national public opinion poll, with questions somewhat weighted against the nominee, found fifty-nine percent of those polled were against Bork and twenty-seven percent were supportive of the nominee), *quoted in* BOBBITT, *supra* note 392, at 151-52.

415. See BRONNER *supra* note 402, at 217 (statement of Senator Joseph Biden) ("Will we retreat from our tradition of progress, or will we go forward, ennobling human rights and human dignity, which is the legacy of our two-century journey as a people?"); *id.* at 99 (statement of Senator Edward Kennedy) ("President Reagan . . . should not be able to . . . impose his reactionary vision of the Constitution on the Supreme Court and on the next generation of Americans.").

416. See, e.g., *id.* at 145-87 (analyzing the concerted efforts of liberal interest groups to derail Judge Bork's nomination through a media campaign, marketing techniques, and grassroots mobilization).

Jefferson about the significance of a written Constitution. In the first paragraph of the first *Federalist*, Hamilton asserts that “it seems to have been reserved to the people of this country . . . to decide the important question, whether societies of men are really capable . . . of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.”⁴¹⁷ Hamilton appeals here to the standard notion of consent as flowing from deliberative choice, contrasts this with the presumptive illegitimacy of government that results from accident and force, and then supposes without argument that one generation’s choices will be binding on later generations. A year after Hamilton published his essay, Jefferson questioned this assumption. In a letter to Madison, Jefferson stated that “[w]e seem not to have perceived that, by the law of nature, one generation is to another as one independent nation to another.”⁴¹⁸ Calculating that a generation lasts nineteen years, Jefferson asserted that “the earth belongs always to the living” and that a written constitution should expire, along with public debts and many statutes, after a generation.⁴¹⁹

But of course the American constitution has not expired: Jefferson’s vision of generational renewal is as impractical as his notion of an agrarian nation.⁴²⁰ On the other hand, to note that Hamilton went too far in the other direction, it should be emphasized that the constitutional doctrines that have emerged over time are only partly the product of reflection and choice by the founding generation. An analysis of the Constitution’s enduring legitimacy must take each of these points into account. It must respond to Jefferson’s hope that each succeeding generation will consent to the Constitution. And it can do so only by asking how deliberation and choice by later generations can influence the development of constitutional doctrine even as the text remains the same from one generation to another.

To make sense of this intergenerational project, a historicist relies on a venerable distinction between two types of constitutional provisions: rule-like ones that define with precision how government is to be conducted and chronically vague ones whose meaning, a historicist would maintain, is properly modified over time.⁴²¹ According to a historicist, the legitimacy

417. THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

418. *Letter from Thomas Jefferson to James Madison* (Sept. 6, 1789), in 5 THE WRITINGS OF THOMAS JEFFERSON 115, 120 (Paul L. Ford ed., 1895).

419. *Id.* at 121.

420. See William A. Shutkin, *Realizing the Promise of New Environmental Law*, 33 NEW ENG. L. REV. 691, 696 (1999) (explaining the rejection of Jefferson’s agrarian vision for America as the nation experienced industrialization and the growth of cities in the nineteenth century).

421. See *United States v. Lovett*, 328 U.S. 303, 321 (1946) (Frankfurter, J., concurring) (delineating two types of constitutional cases that come before the Court: the cases involving “broad standards of fairness written into the Constitution” that allow for broad

of rule-like provisions contained in the text is to be found not in the fact that the ratifiers imposed them by way of an authoritative act but instead in the framework for ongoing coordination of activity provided by those rules. Adherence to the Constitution's rule-like provisions for the conduct of political life—election of members of Congress,⁴²² the convening of Congress every year on January 3rd,⁴²³ the four-year term of office for presidents⁴²⁴—provides sufficient evidence of the public's acceptance of such provisions as binding law. It is thus ongoing acceptance of a rule as the basis for coordinated activity that is critical to characterization of it as legitimate. A historicist can point out that even precise rules can be ignored. When they are, their legitimacy is placed in doubt, no matter how lofty their provenance.⁴²⁵

A similar line of reasoning cannot be employed, however, to establish the legitimacy of historicist interpretations of chronically vague provisions. Only some of these are used in the process of collective self-government. Many more *interfere* with it—prohibiting punishments democratically decided on, limiting government's authority to regulate religiously motivated conduct, overturning rules of search and seizure adopted by legislative majorities, and so on. A justification for such sweeping interference hinges on whether there is evidence of deliberation *by post-ratification generations* as to the meaning of values suggested by the text. Once such evidence is discernible, a historicist would maintain, it is proper for courts to take it into consideration when interpreting the text. In punishments cases, for example, the Court has examined the work-product of state legislatures and sentencing juries because these are the deliberative bodies that can best express changes in public convictions about the proper scope of punishment.⁴²⁶ The Court has thus not operated as an ongoing

legal interpretation; and the cases involving specific provisions of the Constitution that do not allow for such interpretation); *see also* Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting) (maintaining that “[g]reat concepts like ‘Commerce . . . among the several States,’ ‘due process of law,’ ‘liberty,’ ‘property’ were purposely left to gather meaning from experience.”).

422. U.S. CONST. art. I, § 2, cl. 1.

423. *Id.* at amend. XX, § 2.

424. *Id.* at art. II, § 1, cl. 1.

425. *Compare* U.S. CONST. art. II, § 2, cl. 2 (establishing the process for engaging in legally binding agreements with foreign powers by providing that the president “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”), *with* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801, 801 (1995) (raising the modern practice of treating some international agreements, such as NAFTA and the World Trade Organization, as congressional-executive agreements and enacting them with a simple majority vote of both chambers of Congress). *See generally id.* (analyzing and defending the modern congressional-executive agreement).

426. *See* *Roper v. Simmons*, 125 S. Ct. 1183, 1192-93 (2005) (analyzing state legislatures' enactments regarding applicability of capital punishment to juveniles to determine a national consensus); *id.* at 1206 (O'Connor, J., dissenting) (acknowledging the

constitutional convention that alters the scope of the Eighth Amendment. Nor can it be said to have treated legislatures and juries as substitute conventions for this. They are, however, representative forums for reflection on values established in the text. Given a widespread pattern of change in sentencing for a specific type of crime, one can reasonably say, then, that the American people have altered by means of reflection and choice their response to the crime. Deliberation of this kind is adequate to register an enlargement on text-based values.⁴²⁷

And what about transformation? When enlargement alone is at issue, all that should be required is evidence that registers a widespread change in settled convictions; there need be no extra requirement of evidence that those deliberating considered the extent to which the present expanded on the past. This extra requirement is appropriate for transformation, however, given the greater degree of alteration that occurs when there is contraction of one textually prescribed value and enlargement of another. Expressed more generally, we can say that the more profound the alteration of constitutional values, the closer should be the approximation to the full model of deliberation expected of constitutional conventions. Although the New Deal involved no convention (and, indeed, no amendments), it is undeniable that public deliberation during the 1930s included reflection on values that would be lost as a result of a transformation as well as those that would be gained.⁴²⁸

“reasonable” judgment of state legislatures and capital sentencing juries in assessing a juvenile defendant’s maturity); *Atkins v. Virginia*, 536 U.S. 304, 324 (2002) (Rehnquist, C.J., dissenting) (“[T]hese two sources—the work product of legislatures and sentencing jury determinations—ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment.”).

427. The deliberation at stake here, it must be emphasized, is national, not international. It is “we the people” engaged in a less formal version of the deliberations contemplated by Article V. Because this point is critical to historicism, it is regrettable that recent historicist opinions of the Court have also cited changes in international understandings of human rights to justify alterations of domestic constitutional rights. In *Lawrence v. Texas*, 539 U.S. 558 (2003), Justice Kennedy cited decisions by the European Court of Human Rights in support of his conclusion about the impressibility of government prohibitions of consensual sodomy. *Id.* at 573. And in *Roper v. Simmons*, 125 S. Ct. 1183 (2005), he made much of the fact that by the time the case was decided the United States had become the only country to permit execution of people committing murder at ages sixteen and seventeen. *Id.* at 1198. Neither point is germane to a historicist justification of altering rights. It is the constitutional understandings of *the American people* that are critical to historicism, for only these understandings can provide a warrant for modifying the scope of rights and powers as originally understood by those ratifying them.

428. See ROBERT JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* xiv (1941) (summarizing New Deal constitutional doctrine just before his elevation to the Supreme Court: “What we demanded for our generation was the right consciously to influence the evolutionary process of constitutional law, as other generations have done. And my generation has won its fight to make its own impression on the Court’s constitutional doctrine. It has done so by marshalling the force of public opinion against the old Court through the court fight, by trying to influence the choice of forward-looking personnel, and, most of all, by persuasion of the Court itself.”).

Historicism thus maintains that because the enterprise of self-government makes it imprudent to annul a constitution with the passing of each generation, interpreters of the text must consider evidence of deliberation by post-ratification generations concerning values mentioned in chronically vague portions of the text. This approach allows for ongoing revision of constitutional doctrine, but it does so in such a way that subtly favors the past over the present. This is because it calls for judicial alteration of the scope of a constitutional provision only if there is relevant evidence of a change in settled convictions. The death penalty provides an obvious example of the conservative bias implicit in historicism. Capital punishment remains constitutionally permissible for most types of homicide;⁴²⁹ it enjoys this status because historicist jurisprudence establishes a presumption in favor of past values that must be rebutted by evidence of substantial change in the present (and, for most types of homicide, no such rebuttal is possible).⁴³⁰ Or to take another example, the values associated with economic liberties, a historicist could maintain, were properly defended by the Court during the early twentieth century.⁴³¹ Only sustained, self-conscious deliberation of the kind undertaken during the New Deal could justify the transformation that limited their scope while correspondingly enlarging protection of non-economic liberties.

On a historicist account, then, deliberation by post-ratification generations can legitimate altered understandings of the Constitution's chronically vague clauses, but the historicist method employs an inherently conservative preference for the values of past generations when it is impossible to speak of a changed consensus in the present. Moreover, historicism offers one further safeguard for its method through its concern with ongoing, virtual consent to its approach to textual interpretation. The qualifier "virtual" is necessary here because the most that can be said in this context is that the public exercises a veto over interpretive methods through the forum of judicial confirmation hearings. Twice in the twentieth century (Judge Parker in 1930,⁴³² Judge Bork in 1987),⁴³³ the full Senate actually voted down a presidential nominee for the Supreme Court.

429. See FRIEDMAN, *supra* note 209, at 319 (suggesting that recent Supreme Court cases tend to uphold the constitutionality of the death penalty).

430. See *supra* notes 245-258 and accompanying text (defending O'Connor's position and critiquing Goldberg's).

431. See FOUNDATIONS, *supra* note 178, at 66 (suggesting that the laissez-faire principles upheld by the Court in the *Lochner* era were acceptable at that time despite modern rejection of those economic values).

432. See Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1154 (1988) (noting the Senate's rejection of Judge Parker by a vote of forty-one to thirty-nine).

433. See BRONNER, *supra* note 402, at 327 (citing the Senate's rejection of Judge Bork's nomination on a vote of fifty-eight to forty-two).

On numerous other occasions, nominees have been subjected to intense questioning about their methods of reading the Constitution.⁴³⁴ If, as I have suggested, the historicist method is designed to identify settled convictions about constitutional values, then confirmation hearings offer a way of communicating the public's sense of the basic values that ought to be enforced through judicial review. Clearly, this amounts to a veto of candidates who have strayed beyond the range of values enforced at a given historical moment.⁴³⁵ In a weak sense, it can also be characterized as a proxy for public consent to the judiciary's articulation of those values.

Two features of this justification for constitutional historicism merit special emphasis. First, it should be noted that the virtues I have invoked in defending historicism—stability in self-governance, promotion of gradual change, and use of ancillary institutions (the judicial confirmation process, for instance) to monitor judicial interpretation of the Constitution—are all associated with the notion of prudence. Although the Constitution nowhere intimates that its interpreters should reason in terms of prudence, it is clear that an instrument as critical as the organizing text of a modern polity ought to be read in light of prudential principles. Not only is the Constitution *not* a suicide pact,⁴³⁶ it is also not an instrument that should be the catalyst for radical experimentation. Historicism's particular merit is that it satisfies this condition of prudence, not only in the methods it provides for extending and, occasionally, transforming constitutional values but also in its consistency with precedents that have already been established.

But what about the democratic values that inform the text? It is clear that historicism provides a justification for rejecting the decisions of democratic majorities. An important qualification is needed here, however.

434. See generally MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS* (1994) (analyzing the increasing scrutiny accorded judicial appointees in the preceding fifty years).

435. This point in particular and the historicist method in general have a special bearing on the unnecessarily stark choice that Larry D. Kramer posits in his critique of judicial review. "The question Americans must ask themselves," he writes, "is whether they are comfortable handing their Constitution over to the forces of aristocracy: whether they . . . lack[] faith in themselves and their fellow citizens, or whether they are prepared to assume once again the full responsibilities of self-government." KRAMER, *supra* note 168, at 247. If judicial review is indeed infected with an "aristocratic" (i.e. elitist) bias, then this choice would have to be confronted. However, if, as I have maintained, historicism is relatively accurate as a descriptive thesis and desirable normatively and if the judicial selection process tends to produce individuals responsive to changes in the nation's fundamental values, then Kramer's choice is alarmist and unnecessary. The historicist method insures that alterations in the nation's settled convictions will be reflected in doctrine. At the same time, the institution of judicial review provides a backstop against hasty conclusions about whether those convictions have in fact become permanent.

436. *Contra Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

Properly applied, historicism extinguishes practices that have long been in decline: the death penalty for rape, criminalization of sodomy, statutes that stereotype women as helpless creatures, and so on. In this sense, it is a sheep-dog process of judicial review, one that rounds up stray states and so creates a uniformity for liberty as it has been reconceived in the contemporary world. Historicism thus establishes a normative narrative for American history. It points to the possibility of new understandings of the nature of individual liberty while noting how these understandings grow out of the ratifiers' original values. Needless to say, this is not the only possible narrative for the nation's history; far bleaker accounts are possible. It is, however, the narrative that courts charged with interpreting the Constitution should propound. Historicism, on this account, holds that interference with the democratic process is justified to defend the enduring values that have emerged since the nation's founding.

CONCLUSION

When Alexander Hamilton suggested in the first *Federalist* that America could demonstrate to the world that a society is able to establish its political framework by reflection and choice rather than by accident and force,⁴³⁷ he was implicitly invoking an Enlightenment ideal of political science in which humans can determine their own collective destiny. The central question that has informed constitutional jurisprudence is how precise the guidance of the founding generation should be for later ones. A historicist's answer to this is that the ratifiers should be understood only to have established the general direction of political life. It is enough, as Justice Holmes put it, for the first generation to "create[] an organism"⁴³⁸—and so to let later generations work out, and modify, the details of what was originally established.

Eighth Amendment jurisprudence provides a model for understanding how historicism operates in practice. In speaking of the "evolving standards of decency that mark the progress of a maturing society,"⁴³⁹ the Court suggests that original understandings of the phrase "cruel and unusual punishments" provide a starting point that is properly enlarged in response to more expansive conceptions of what it means to be humane. The trajectory of doctrinal change is in turn understandable in terms of widespread and long-lasting changes in settled convictions about the proper scope of punishment. It is the business of the courts to discern these changes and to adjust rights incrementally so as to take the changes into

437. See THE FEDERALIST NO. 1, *supra* note 417, at 33.

438. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

439. *Trop v. Dulles*, 356 U.S. 86, 101 (1958); see *supra* notes 89-93 and accompanying text.

account. On this analysis, Eighth Amendment rights are properly time-bound in nature. Punishments Clause cases are informed by a timeless concern with cruelty, but they accept the proposition that specific rights generated by the clause must be informed by a temporal component that allows for enlargement over time.

In this Article, I have argued that the model provided by Punishments Clause jurisprudence can, when suitably modified to deal with different issues, make intelligible a wide range of decisions that have interpreted the chronically vague clauses of the Constitution. The enlargement of rights found in Punishments Clause cases is replicated in the Court's decisions dealing with speech, equal protection, and assistance of counsel. Indeed, even when the Court has transformed doctrine by contracting some rights and expanding related ones, its transformative frameworks are understandable in terms of a more generalized type of historicism. That is, changes in settled convictions and deliberation by later generations have been noted by the Court and have, in time, come to inform modifications of constitutional doctrine.

Readjustment of this kind is justified, I have argued, in light of a basic consideration of prudence. Jefferson notwithstanding, it is not possible for each generation to establish a new constitution. At the same time, it is essential that the unelected branch of government neither impose its policy preferences on the country nor engage in guesses about the country's fundamental values. Historicism relies on proxies for deliberation and consent that fall short of what would be needed to establish a new constitution but that are acceptable for the process of adjustment for an ongoing constitution. On a historicist account, the more profound the alteration of an original understanding, the more substantial must be the proxy for deliberation and consent. Punishments Clause cases provide an example of a relatively modest proxy. Because these cases are concerned with the enlargement of doctrine, they are informed by a judicial effort to discern no more than changes in settled convictions about the nature of humane punishment. By contrast, cases involving the transformation of values have necessarily required a more stringent standard. The Court's transformation of property and privacy rights doctrine—with the former being eclipsed while the latter has risen in importance—has, not surprisingly, proceeded slowly and cautiously.