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THE TRADITION OF THE WRITTEN CONSTITUTION: TEXT, PRECEDENT, AND BURKE

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It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not [sic] assent. Mere precedent is a dangerous source of authority,

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and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled.¹

I. INTRODUCTION

Most conservative law professors, judges, and lawyers are either committed to following the text of the Constitution, as it was originally understood, or to following the demands of precedent. Leading originalists like Gary Lawson and Michael Stokes Paulsen claim that judges should look to the objective public meaning of key words and clauses as they were understood in 1787 or 1868 in all constitutional cases.² Leading textualists like Akhil Amar and Martin Redish make the same point, and they sometimes argue that the constitutional text is normatively better and more appealing than the doctrine or caselaw that the Court has developed to interpret it.³

In contrast, certain Burkean law professors like Thomas Merrill,⁴ Barry Friedman,⁵ and Ernie Young⁶ claim it is wrong to elevate the understandings of 1787 or 1868 above the understandings of all of the generations and justices that have lived under and construed the Constitution since the Founding.⁷ Some self-professed Burkeans take the even more radical step of arguing not just for tradition and practice as the well-spring of constitutional law but for Supreme Court doctrine and caselaw as being the only valid source of constitutional law.⁸ These scholars claim supremacy for Court doctrine and caselaw, even when that caselaw flies in the face of tradition as it does today with respect to abortion and gay rights.⁹ This theory of so-called common law constitutionalism has been most ably set forth by Pro-

1. President Andrew Jackson rejected *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and vetoed the renewal of the Bank of the United States more than forty years after President Washington held the Bank constitutional. See Andrew Jackson, Veto Message to the Senate (July 10, 1832), reprinted in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 576, 581-82 (James D. Richardson ed., 1896).

2. See, e.g., Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Non-delegation Doctrine*, 73 GEO. WASH. L. REV. 235, 239 (2005).

3. See, e.g., Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 26 (2000).

4. See Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509 (1996); Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 23 CONST. COMMENT. (forthcoming 2006) [hereinafter *Judicial Restraint*].

5. See Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 5-6 (1998). Unlike Professors Merrill and Strauss, Professor Friedman does not describe himself as a Burkean, but it seems an apt label for what he advocates in *The Sedimentary Constitution*. See *id.*; see also Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2598-2600 (2003).

6. See Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 620-23 (1994).

7. See, e.g., Friedman & Smith, *supra* note 5, at 5-6.

8. See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 885 (1996).

9. See, e.g., *id.* at 934-35.

fessor David Strauss.¹⁰ Richard Fallon has offered a sophisticated variant on this theory and,¹¹ most recently, former Solicitor General Charles Fried has written that the Supreme Court is and ought to be controlled by its doctrine or precedent.¹²

I want in this Article to lay out an argument as to why the Supreme Court ought often to follow the text of the Constitution, as originally understood, rather than its own precedents. Specifically, I want to defend the textualism of Amar, Lawson, and Paulsen by arguing that in our constitutional culture there is actually a well-established Burkean practice and tradition of venerating the text and first principles of the Constitution and of appealing to it to trump both contrary caselaw and contrary practices and traditions. I will discuss below ten famous examples, since 1937, of instances where the Court opted for constitutional text and first principles over doctrine, and will argue that our constitutional tradition, unlike Britain's, is one where we venerate the document above all else. In discussing these ten instances from the last sixty-five years, where we have let text or first principles trump caselaw or practice, I mean to argue that when one of these big issues arises it is the text and not abstract first principles that should control.

I claim that, in the United States, all good Burkeans ought to be textualists rather than followers of first principles but that in no event will the Supreme Court actually follow precedent on any important matter that counts. I claim that American Burkeans who are not textualists are actually secret Anglophiles who mistake the American Constitution for the British Constitution—where islands of text float in a sea of tradition, instead of the other way around.

I engage in a somewhat lengthy discussion of the ten big explicit or implicit overrulings since 1937 because I really want to show that our practice on big constitutional issues is to not give decisive weight to stare decisis concerns. I will therefore argue that it is the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹³ that is the true outlier and that all recent big constitutional issues, except for abortion and the continuation of Miranda rights,¹⁴ have been resolved based on differing interpretations of the constitutional text and first principles without reliance upon precedent. The discussion in the *Casey* plurality opinion of stare decisis does not conform to our actual settled practice¹⁵ it does not in fact actually follow the doctrine of *Roe v. Wade*,¹⁶ and it ought to be overruled,

10. See *id.* at 877-80.

11. See Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 582-85 (2001); see also Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1240 (1987).

12. CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 2 (2004).

13. 505 U.S. 833 (1992).

14. See generally *Dickerson v. United States*, 530 U.S. 428 (2000) (reviewing the constitutionality of Miranda rights).

15. *Casey*, 505 U.S. at 861-64.

16. 410 U.S. 113 (1973).

because our actual Burkean common law practice in this country is one of letting the document and first principles trump the doctrine with respect to important and controversial constitutional issues.

In discussing these ten famous examples of cases where I believe the document triumphed over the doctrine, I do not mean to claim that these cases only make textualist arguments or arguments from first principles while overruling precedents. To be sure, even in the top ten overrulings, the Court discusses doctrine at great length as well as citing the constitutional text.¹⁷ My claim instead is that the Court in these cases leads with the document and first principles, not the doctrine, and it is the textual and first principle arguments that really underpin and explain these cases.¹⁸ These ten famous cases thus show, as I read them, that text is more important than precedent as a matter of the actual Burkean common law practice of the Supreme Court. Burkeanism, or as Professor Merrill sometimes calls it, conventionalism,¹⁹ is thus a doctrine at war with itself. In this country, our tradition and conventional practice is to revert to constitutional text and first principles on important matters and not to follow precedent.

II. SUPREME COURT PRACTICE ON OVERRULING FROM 1937 TO 2005

My claim in this Article is that in the United States we have a tradition of venerating the written Constitution and resorting to first principles. This tradition is evident from the outset in *Marbury v. Madison*,²⁰ where Chief Justice John Marshall repeatedly appeals to the written nature of the Constitution in arguing for the power of judicial review.²¹ Thus, Marshall says that to ensure that the government does not exceed its enumerated powers, “the constitution is written”²² and that the primacy of the Constitution over a contrary statute is a theory “essentially attached to a written constitution.”²³ Marshall adds that “[c]ertainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation.”²⁴ For good measure, he adds that the contrary view would render “written constitutions . . . absurd attempts, on the part of the people, to limit a power in its own nature illimitable.”²⁵

In short, all those who venerate *Marbury*—and that means all of us at least to some extent—must also venerate the primacy of the written Constitution and its foundational role in the development of the argument for judi-

17. See, e.g., *W. Coast Hotel Co. v. Parish*, 300 U.S. 379, 392-93 (1937).

18. See, e.g., *id.*

19. Merrill, *Bork v. Burke*, *supra* note 4, at 509.

20. 5 U.S. (1 Cranch) 137 (1803).

21. *Id.* at 176-77.

22. *Id.* at 176.

23. *Id.* at 177.

24. *Id.*

25. *Id.*

cial review. Likewise, the *Marbury* opinion points the way toward textualism and away from a strong theory of the doctrine of stare decisis.²⁶

Looking beyond *Marbury*, it is evident from even a cursory awareness of American culture that we have a tradition in the United States of venerating the written Constitution. First, we have a virtual shrine, the National Archives, where the original copy of the Constitution is kept on public display for all Americans to see, almost as if it were a revered Biblical text. There is no such similar display of leading Supreme Court cases, like *Brown v. Board of Education*,²⁷ or of leading statutes like the Civil Rights Act of 1964.²⁸ Second, Americans, like former Justice Hugo Black, are famous for carrying copies of a pocket Constitution around with them and brandishing those copies whenever a constitutional controversy arises. Once again, there are no pocket copies of leading precedents or statutes. Third, there is a long-standing tradition in high school civics classes of teaching the rules of the constitutional text as a part of our general civic education. While such classes may touch on a few leading constitutional cases or statutes, they do not venerate or discuss such cases and statutes above the text of the Constitution.

My argument in this Part is that the American tradition of venerating the written Constitution is also evident in the decisions of the U.S. Supreme Court over the last sixty-eight years. There are at least ten major instances in the last sixty-eight years where the Court has abandoned even deeply seated precedents because it became persuaded they were unfaithful to the best reading of our constitutional text, of its structure, or of the first principles embodied in that text.²⁹ Review of these ten big examples where the Court chooses text over precedent may seem somewhat mundane to the reader, but it is critical that I go through them because they conclusively show that on every major constitutional issue of the last sixty-eight years the Court has followed the document, not the doctrine. This is not to say that these ten cases offer no doctrinal arguments. Obviously, many of these cases include more paragraphs discussing caselaw than text, in part, because there is a lot more caselaw than text to discuss.³⁰

My point is that the textual arguments always come first, ahead of the doctrinal arguments, and it is the textual arguments, or sometimes arguments from the first principles, that are, in my judgment, doing the real work of justifying an overruling. For this reason, my discussion below focuses on the textual arguments made in these ten cases. In doing so, I mean to show that the actual Burkean practice of the Supreme Court is to rely on the constitutional text or first principles, rather than on precedent in a pinch.

26. See *id.* at 176-77.

27. 347 U.S. 483 (1954).

28. Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000 (2000)).

29. See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397-98 (1937).

30. See *id.* at 388-400.

The two exceptions to this consistent practice of textualism are *Planned Parenthood of Southeastern Pennsylvania v. Casey*³¹ and *Dickerson v. United States*,³² where the Court inexplicably lapsed into a common law constitutionalist mode. I will argue that the paean to stare decisis in *Casey* is itself inconsistent with our practice, that as a doctrinal matter it is inconsistent with *Roe v. Wade*,³³ and that for these reasons alone the plurality opinion in *Casey* ought to be overruled.

A. *The New Deal Revolution*

The first big overruling in my list of ten between 1937 and 2005 came with the New Deal Constitutional Revolution—which began in the early 1930s, achieved success in 1937, and was finally codified by leading cases in the 1940s and thereafter.³⁴ As is well known, the first key step in the overrulings of that year came with *West Coast Hotel Co. v. Parrish*,³⁵ which explicitly overruled *Adkins v. Children's Hospital*³⁶ and implicitly displaced the whole line of economic substantive due process decisions that dated back to the paradigm case of *Lochner v. New York*.³⁷ The New Dealers' critique of economic substantive due process grew out of Justice Holmes's dissent in *Lochner*, which claimed that the text of the Constitution protected liberty, not freedom of contract,³⁸ and that it did not protect liberty absolutely but protected it only against deprivations without due process of law.³⁹ The New Dealers claimed that rational regulations depriving individuals of liberty were indeed deprivations, but the deprivations were constitutional because they were made with due process of law.⁴⁰

Chief Justice Hughes's opinion for the Court begins its substantive analysis by making exactly these textual arguments. Hughes wrote:

The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the States, as the due process clause invoked in the *Adkins* Case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due

31. 505 U.S. 833, 845-46 (1992).

32. 530 U.S. 428, 432 (2000).

33. 410 U.S. 113, 152-54 (1973).

34. William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 166 (2001).

35. *W. Coast Hotel Co.*, 300 U.S. at 400.

36. 261 U.S. 525 (1923), overruled by *W. Coast Hotel Co.*, 300 U.S. at 400.

37. 198 U.S. 45 (1905), overruled in part by *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952).

38. *See id.* at 75-76.

39. *W. Coast Hotel Co.*, 300 U.S. at 391.

40. *See* Forbath, *supra* note 34, at 166-71.

process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.⁴¹

Hughes's opinion in *West Coast Hotel* then goes on to discuss the economic substantive due process caselaw at great length but, critically, he starts his analysis with the constitutional text.⁴² He points out that, contrary to *Lochner*, the text protects liberty, not freedom of contract, and protects it not absolutely but only against irrational deprivations—only those deprivations made without due process of law.⁴³

*West Coast Hotel v. Parrish*⁴⁴ was a clear-cut overruling of *Adkins* and its place in a constitutional revolution was confirmed the very next year in the new leading case of *United States v. Carolene Products*,⁴⁵ which set out a highly deferential standard of review for all economic regulations—a standard which replaced the more aggressive *Lochner*-era inquiry.⁴⁶ Essentially, *Lochner*-style review of the reasonableness of state economic and social legislation was replaced with review under a highly deferential rational basis test, except in a few narrow categories of cases discussed in Footnote 4 of the *Carolene Products*⁴⁷ opinion. General use of the rational basis test was later confirmed in *Williamson v. Lee Optical*,⁴⁸ which remains the leading opinion to this day on substantive due process review of economic legislation.

That the New Dealers' textual criticism of economic substantive due process had its roots in originalism is suggested by four later opinions by leading New Deal Justice Hugo Black who, as a Senator, championed Franklin Roosevelt's court-packing plan. In his majority opinion in *Ferguson v. Skrupa*,⁴⁹ and in his dissenting opinions in *Adamson v. California*,⁵⁰ *Griswold v. Connecticut*,⁵¹ and in *In re Winship*,⁵² Justice Black laid out the

41. *W. Coast Hotel*, 300 U.S. at 391.

42. *Id.* at 392.

43. *Id.* at 391.

44. 300 U.S. 379.

45. 304 U.S. 144 (1938).

46. Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087-88 (1982).

47. *Carolene Prods.*, 304 U.S. at 153 n.4.

48. 348 U.S. 483 (1955).

49. 372 U.S. 726, 731-32 (1963).

50. 332 U.S. 46, 89-90 (1947) (Black, J., dissenting), *overruled by* *Malloy v. Hogah*, 378 U.S. 1 (1964).

51. 381 U.S. 479, 510-13 (1965).

52. 397 U.S. 358, 377-79 (1970).

New Deal view that substantive due process is always illegitimate and that only those rights textually enumerated in the Constitution are protected.⁵³

Black's originalist view of the Due Process Clauses eventually inspired the originalism in the 1980s of Judge Robert H. Bork⁵⁴ and of Attorney General Edwin Meese III. Thus, the triumph of the New Dealers in the 1930s, with respect to economic substantive due process, was a triumph of the constitutional text, as originally understood, over contrary precedents like *Lochner*⁵⁵ and *Adkins v. Children's Hospital*.⁵⁶ The New Dealers appealed to the text of the Due Process Clauses to displace these governing precedents.

The New Dealers also were influenced in their rejection of substantive due process by the pro-judicial restraint writings of James Bradley Thayer, whose 1893 *Harvard Law Review* article arguing for a Rule of Clear Mistake in American constitutional law⁵⁷ inspired Holmes's dissent in *Lochner* and the eventual adoption of the rational basis test in *Carolene Products*⁵⁸ and *Williamson v. Lee Optical*.⁵⁹ Thayer's argument rested on the textual observation that, because no judicial review clause gives the federal courts the power to interpret the Constitution, all three branches of government should be considered constitutional interpreters.⁶⁰ Thayer said that the federal courts should invalidate federal or state laws only if the political branches made a clear mistake in interpreting the Constitution.⁶¹ Thayer's textualist argument for judicial restraint was a direct inspiration for the New Dealers' adoption of a highly deferential rational basis test.

The other key element of the New Deal constitutional revolution was its vindication of a much broader understanding of the scope of national power under the Commerce and Necessary and Proper Clauses. Here, again, the New Dealers appealed to the constitutional text, as construed early on in landmark Marshall Court opinions such as *Gibbons v. Ogden*⁶² and *McCulloch v. Maryland*.⁶³ The basic New Deal claim was that Chief Justice Marshall had construed the Commerce and Necessary and Proper Clauses correctly at the time of the founding, but that in the late nineteenth century and early twentieth century the Supreme Court had erred by limiting na-

53. See, e.g., *Ferguson*, 372 U.S. at 730-33.

54. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990) (providing an example of Bork's judicial philosophy).

55. 198 U.S. 45 (1905), *overruled in part by Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952).

56. 261 U.S. 525 (1923); TONY FREYER, *HUGO BLACK AND THE DILEMMA OF AMERICAN LIBERALISM* 66 (1990).

57. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

58. 323 U.S. 18, 31-32 (1944).

59. 348 U.S. 483, 487-88 (1955).

60. Thayer, *supra* note 57, at 130.

61. *Id.* at 140-44.

62. 22 U.S. (9 Wheat.) 1, 20-22 (1824).

63. 17 U.S. (4 Wheat.) 316, 324-25 (1819).

tional power in such cases as *United States v. E.C. Knight Co.*⁶⁴ and *Hammer v. Dagenhart*.⁶⁵

The New Deal Revolution, begun in 1937 with cases like *NLRB v. Jones & Laughlin Steel Corp.*⁶⁶ and completed in the 1940s with cases like *United States v. Darby*⁶⁷ and *Wickard v. Filburn*,⁶⁸ restored Marshall's original, correct reading of the Commerce and Necessary and Proper Clauses. This was the thesis of Columbia University law professor Noel Dowling's constitutional law casebook,⁶⁹ first published in 1937 and continued in recent times by Gerald Gunther and now Kathleen Sullivan.⁷⁰ The Commerce Clause story in the Gunther and Sullivan casebook⁷¹ is one of the founding, the laissez faire fall from grace, and the New Deal restoration.

Personally, I doubt, as an original matter, the correctness of the New Deal Supreme Court's reading of the Commerce and Necessary and Proper Clauses, but the issue here is not whether those readings were correct as an original matter. The issue, instead, is this: did the Court try to engage in textualist originalism, resort to first principles, decline to follow and indeed overrule key precedents, and sell its holdings to the public as being consistent with textualist originalism? The answer to all four of these questions is indubitably "yes."

The two leading New Deal cases on national power illustrate the New Dealers' appeal to the constitutional text, as construed at the beginning of our history by John Marshall. Let's start with *United States v. Darby*.⁷² Solicitor General Biddle begins his argument for the United States in *Darby* by saying:

[T]he phrase ["interstate commerce"] at [the time of the adoption of the Constitution] had a meaning equivalent to "the interrelated business transactions of the several states." Lexicographers, economists, and authors used the term "commerce" to refer not only to the narrow concept of sale or exchange, but to include the entire moneyed economy, embracing production and manufacture as well as exchange. . . .

64. 156 U.S. 1 (1895).

65. 247 U.S. 251 (1918).

66. 301 U.S. 1 (1937).

67. 312 U.S. 100 (1941).

68. 317 U.S. 111 (1942).

69. NOEL T. DOWLING, CASES ON AMERICAN CONSTITUTIONAL LAW (1937).

70. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (14th ed. 2001).

71. *Id.* at 120-37.

72. 312 U.S. 100 (1941).

The decisions of this Court, from their very beginning, have recognized that the commerce clause gives Congress power to meet the economic problems of the nation, whatever they may be.⁷³

In his opinion, Justice Stone picks up on Biddle's themes and continues in the same vein:

While manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed."⁷⁴

Stone goes on to say the following about the leading precedent on point:

Hammer v. Dagenhart has not been followed. The distinction on which the decision was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned. . . .

The conclusion is inescapable that *Hammer v. Dagenhart*, was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.⁷⁵

Stone then addresses the question of congressional power to regulate wholly intrastate activities that substantially affect interstate commerce:

There remains the question whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power. The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legiti-

73. Brief for the Petitioner at 11, *United States v. Darby*, 312 U.S. 657 (1941) (No. 1017) (citations omitted).

74. *Darby*, 312 U.S. at 113 (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 196).

75. *Id.* at 116-17.

mate end, the exercise of the granted power of Congress to regulate interstate commerce.⁷⁶

With this concluding cite to Marshall's opinion in *McCulloch*,⁷⁷ Justice Stone makes clear that *Darby* rests on that case's broad construction of the Necessary and Proper Clause as well as on Marshall's broad reading of the Commerce Clause in *Gibbons*.⁷⁸ Again, I am not saying Justice Stone's originalist reading of the Necessary and Proper Clause was correct. All I would argue is that Justice Stone did claim to have an originalist reading of the Clause, and his opinion sells itself to the reader in that way.

Finally, Justice Stone adds the following additional textual interpretation and exegesis, construing another key part of the relevant constitutional texts:

Our conclusion is unaffected by the Tenth Amendment which provides: "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". [sic] The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adopted to the permitted end.⁷⁹

Note the emphasis in Justice Stone's opinion on how "[t]here is nothing in the history of [the Tenth Amendment's] adoption to suggest that it was

76. *Id.* at 118-19 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

77. The *McCulloch* paragraph that Stone seems to be citing says:

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

McCulloch, 17 U.S. (4 Wheat.) at 420.

78. *Darby*, 312 U.S. at 118-19.

79. *Id.* at 123-24 (citations omitted).

more than declaratory of the relationship between the national and state governments.”⁸⁰

In sum, Justice Stone’s opinion in *Darby* is plainly grounded in the text and original history of the Constitution and the Tenth Amendment, and, while one can disagree with Stone’s Marshallian reading of text and history, there can be no doubt that he relies on text and history as the authority for *Darby*. Marshall may have been wrong about the original meaning of the Commerce and Necessary and Proper Clauses, but his opinions in *Gibbons* and *McCulloch* were an attempt at a textual and originalist interpretation of those clauses.

The other great New Deal case expanding the scope of national power hews to the same line as does *Darby*. In *Wickard v. Filburn*,⁸¹ Justice Jackson observes that the United States “argues that the statute regulates neither production nor consumption, but only marketing; and, in the alternative, that if the Act does go beyond the regulation of marketing it is sustainable as a ‘necessary and proper’ implementation of the power of Congress over interstate commerce.”⁸² Having established that the federal statute in *Wickard* might be supported by both the Commerce and Necessary and Proper Clauses, Jackson then launches into a six-page New Dealers’ account of the history of the commerce power, including the following passages, which I would describe as faux New Deal Originalism (a form of Art Deco, if you will):

At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes.

For nearly a century, however, decisions of this Court under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce. . . . In discussion and decision the point of reference instead of being what was “necessary and proper” to the exercise by Congress of its granted power, was often some concept of sovereignty thought to be implicit in the status of statehood. Certain activities such as “production,” “manufacturing,” and “mining” were occasionally said to be within the province of state governments and beyond the power of Congress under the Commerce Clause.

80. *Id.* at 124.

81. 317 U.S. 111 (1942).

82. *Id.* at 119.

...

Even while important opinions in this line of restrictive authority were being written, however, other cases called forth broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden*.⁸³

After discussing *Swift & Co. v. United States*⁸⁴ and the *Shreveport Rate Cases*,⁸⁵ Justice Jackson quotes Chief Justice Stone as describing the present state of the law:

The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end⁸⁶

The reference here to “appropriate means” seems to rest the current doctrine on the textual foundation of the Necessary and Proper Clause as well as the Commerce Clause. This is further confirmed at the end of Jackson’s discussion of the scope of national power issue, where he writes, “The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process.”⁸⁷

In sum, the New Deal Constitutional Revolution rested firmly on textualist and originalist foundations both in its rejection of economic substantive due process and in its faux originalist defense of broad national power. In *West Coast Hotel*⁸⁸ and in *Darby*, President Franklin D. Roosevelt succeeded, in his own words, in finding a way to appeal from the Supreme Court to the Constitution.⁸⁹ Roosevelt did not bother memorializing his victories in *West Coast Hotel* and *Darby* by trying to amend the text of the Constitution because he already thought the text was on his side.⁹⁰ These victories were constitutional restorations of the original meaning of the Due Process Clause and of the Commerce and Necessary and Proper Clauses, as originally construed by Chief Justice Marshall—the New Dealers’ preferred Framer of the original Constitution.

83. *Id.* at 120-22 (citations omitted).

84. 196 U.S. 375 (1905).

85. 234 U.S. 342 (1914).

86. *Wickard*, 317 U.S. at 124 (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)).

87. *Id.* at 129.

88. 300 U.S. 379 (1937).

89. See ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 211 (1941).

90. *Id.*

B. Erie and Swift

The second big overruling on the list of big overrulings between 1937 and 2005 was *Erie Railroad Co. v. Tompkins*,⁹¹ which held that there is no general federal common law, thus overruling the contrary doctrine of *Swift v. Tyson*.⁹² The *Swift* doctrine was almost one hundred years old when *Erie* overruled it, and *Swift* came from the pen of one of the most distinguished early American jurists, Justice Joseph Story.

Scores of business interests may have had reliance interests affected by the overruling of *Swift*, and there was no push from either Congress or the President to ditch the *Swift* precedent. Nonetheless, the Supreme Court became convinced that the *Swift* doctrine led federal judges to substitute their own policy choices on litigants in diversity suits instead of applying state common law. Furthermore, the Court also felt that the rule of *Swift* led to unacceptable forum shopping.⁹³ Like a knife through hot butter, the Court unhesitatingly cut through 100 years of settled commercial law precedent, and the *Swift v. Tyson* regime vanished. As Justice Brandeis said in his opinion for the Court in *Erie*, “[T]he doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, ‘an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.’”⁹⁴

Justice Brandeis’s opinion in *Erie* is a textualist, originalist dream. The opinion contains four parts, with the following argument about the original meaning of the Rules of Decision Act appearing in the first part of Brandeis’s opinion—before any discussion about how experience in applying the *Swift* doctrine had led to difficulty in practice:

But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written.⁹⁵

This originalist, historical argument for overruling the century-old *Swift* doctrine is Professor Strauss’s and Professor Merrill’s worst nightmare about what textualist, originalist judges might do. A decision like *Swift*—handed down by a giant like Justice Story and lasting for a hundred years—

91. 304 U.S. 64 (1938).

92. 41 U.S. (16 Pet.) 1 (1842), overruled by *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

93. *Erie*, 304 U.S. at 75-77.

94. *Id.* at 79.

95. *Id.* at 72-73 (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51-52, 81-88, 108 (1923)).

controls until Charles Warren writes a law review article showing that new historical evidence suggests that the decision was wrong and so, presto, the century-old precedent gets overruled. *Erie* is plainly inconsistent with Strauss's and Merrill's common law constitutionalism and is an example of textualist originalism.

In *Erie*, Justice Brandeis provides several additional arguments that help my thesis. He observes: "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so."⁹⁶ Brandeis elaborates:

Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. As stated by Mr. Justice Field [in a case about the legitimacy of federal common law,] . . . "[n]otwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states,—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States."⁹⁷

Brandeis concludes by saying, "In disapproving th[e] doctrine [of *Swift*] we do not hold unconstitutional section 34 of the Federal Judiciary Act of 1789 or any other act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states."⁹⁸

Erie, then, is a second major example of the Supreme Court overruling a very longstanding and entrenched precedent while saying it is doing so for explicitly textualist, originalist reasons. Like the New Dealers' rejection of substantive due process, the rejection of *Swift v. Tyson* was indisputably correct as an originalist matter.

96. *Id.* at 77-78 (footnote omitted).

97. *Id.* at 78-79.

98. *Id.* at 79-80.

C. *The Flag Salute Cases*

The third big overruling on the list of ten big overrulings between 1937 and 2005 came with the Flag Salute Cases in the early 1940s.⁹⁹ The issue in these cases was the constitutionality of various state statutes requiring Jehovah's Witnesses to salute the flag and recite the Pledge of Allegiance.¹⁰⁰ The litigants challenged these laws as commanding them to worship graven images in violation of their faith and in contravention of the Free Exercise and Free Speech Clauses of the First Amendment.¹⁰¹ In the first Flag Salute Case, *Minersville School District v. Gobitis*,¹⁰² the Court upheld the flag salute requirement, finding no First Amendment violation.¹⁰³ A mere three years later, however, in *West Virginia State Board of Education v. Barnette*,¹⁰⁴ the Court reversed direction, explicitly overruling *Gobitis* and striking down the flag salute requirement on free speech and free exercise grounds.¹⁰⁵ Justice Jackson's opinion in *Barnette* appeals to the first principles and purposes animating the First Amendment¹⁰⁶ and the Bill of Rights itself¹⁰⁷ over mere contrary Supreme Court precedent. Jackson's opinion calls to mind his authorship in 1941 of *The Struggle for Judicial Supremacy*,¹⁰⁸ a paean to New Deal originalist constitutionalism. Indeed, in *Barnette*, Justice Jackson says the First Amendment was "designed" to avoid results like those a compulsory flag salute would produce, and he explains point-by-point why, after resorting to first principles, *Gobitis* is wrong and must be overruled.¹⁰⁹

Justice Jackson's opinion contains many references to constitutional text and history. He begins with an observation that is central to my thesis: "This case calls upon us to reconsider a precedent decision, as the Court throughout its history often has been required to do."¹¹⁰ He then goes on to object to the flag salute on the originalist grounds that "[o]bjection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights."¹¹¹ Justice Jackson supports this observation with the following footnote, proving that the Framers of the Bill of Rights were familiar with the problem of compulsory loyalty oaths:

99. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled by Barnette*, 319 U.S. 624.

100. *Barnette*, 319 U.S. at 625-29; *Gobitis*, 310 U.S. at 591-93.

101. *Barnette*, 319 U.S. at 629-30; *Gobitis*, 310 U.S. at 593.

102. *Gobitis*, 310 U.S. at 586.

103. *Id.* at 599-600.

104. *Barnette*, 319 U.S. at 624.

105. *Id.* at 642.

106. *Id.*

107. *Id.* at 638.

108. JACKSON, *supra* note 89.

109. *Barnette*, 319 U.S. at 636-42.

110. *Id.* at 630.

111. *Id.* at 633.

Early Christians were frequently persecuted for their refusal to participate in ceremonies before the statue of the emperor or other symbol of imperial authority. The story of William Tell's sentence to shoot an apple off his son's head for refusal to salute a bailiff's hat is an ancient one. The Quakers, William Penn included, suffered punishment rather than uncover their heads in deference to any civil authority.¹¹²

Justice Jackson further describes the issue in *Barnette* as whether "a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind,"¹¹³ and he goes on to describe the case as arising under "the First Amendment."¹¹⁴ Thus, Justice Jackson makes repeated references to the text of the Bill of Rights, the First Amendment, and the first principles that he says those texts embody in overruling *Gobitis*.

Justice Jackson's argument in *Barnette* may or may not be right as an originalist matter, but he cites the constitutional text and the purposes that animated it as the basis for his authority to rule as he did. The holding of *Barnette* is based on text and first principles and not on precedent which it rejects.

Justice Jackson's opinion turns originalist again in the following several passages that call to mind the faux originalism of *Darby* and *Wickard*:

Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.¹¹⁵

Justice Jackson continues with this argument:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship

112. *Id.* at 633 n.13 (citations omitted).

113. *Id.* at 634.

114. *Id.*

115. *Id.* at 636-37.

and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.¹¹⁶

Justice Jackson then makes the explicitly textualist claim that

[i]n weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard.¹¹⁷

Justice Jackson explains this point further by emphasizing that the rational basis test would apply in cases involving the Fourteenth Amendment and the regulation of a public utility,¹¹⁸ but here there is also the text of the First Amendment. Thus, Justice Jackson explicitly says, “It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.”¹¹⁹ He then ends by conceding that

the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. . . . These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.¹²⁰

Thus, Justice Jackson’s opinion in *Barnette* is a triumph of the constitutional text, first principles, history, and original purposes over the *Gobitis* precedent and conventionalism. While Justice Jackson concedes, as any good originalist (including Robert Bork) would do, that it is hard to “translate” an eighteenth-century text and apply it to modern problems, he con-

116. *Id.* at 638.

117. *Id.* at 639.

118. *Id.*

119. *Id.*

120. *Id.* at 639-40.

cludes with the strikingly originalist claim that history compels the Court to enforce the constitutional text and the first principles it embodies, notwithstanding modest estimates of judicial competence.¹²¹

Strikingly, while Justice Jackson cites the First Amendment and the Bill of Rights over and over again in his *Barnette* opinion, he cites only three precedents other than *Gobitis* in the entire opinion, and one of these precedents, *Helvering v. Griffiths*,¹²² is cited for the proposition that the Court frequently reconsiders its own precedents.¹²³

In sum, there can be absolutely no doubt that the *Barnette* Court followed the text of the Constitution and the first principles it saw as being embodied in prevailing Supreme Court doctrine. *Barnette* is not a common law, constitutionalist, or conventionalist opinion.

D. *Brown v. Board of Education*

The fourth big overruling of the last sixty-five years came with *Brown v. Board of Education*,¹²⁴ which did not explicitly overrule *Plessy v. Ferguson*¹²⁵ but sharply limited and distinguished it.¹²⁶ Thus, Chief Justice Warren's opinion in *Brown* clearly stated that "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected."¹²⁷ Subsequent per curiam orders of the Supreme Court made it clear that *Brown* had overruled *Plessy* with respect to all forms of government-sponsored segregation.¹²⁸ Finally, in *Loving v. Virginia*,¹²⁹ the Court came out and clearly stated that all invidious governmental racial classifications would be subjected to strict scrutiny and almost always struck down.¹³⁰

There is no question that the Court in *Brown* rejected fifty-eight years of caselaw following the *Plessy* decision, finding that separate but equal accommodations were now constitutionally impermissible. Thus, *Brown* is a tough case for constitutional common law advocates or conventionalists to explain. It is perhaps less clear that *Brown* represents a triumph of constitutional text and originalism over precedent since the factors that the Court stressed in *Brown* were (1) the increased importance of public education

121. *Id.*

122. 318 U.S. 371 (1943).

123. *Barnette*, 319 U.S. at 630.

124. 347 U.S. 483 (1954).

125. 163 U.S. 537 (1896), *Brown* 347 U.S. 483.

126. *Brown*, 347 U.S. at 494-95.

127. *Id.* (footnote omitted).

128. *See, e.g.*, *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (per curiam) (public parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (buses); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (per curiam) (golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam) (beaches).

129. 388 U.S. 1 (1967).

130. *Id.* at 11.

established between 1868 and 1954, and (2) social science work showing that segregation harmed those to whom it applied.¹³¹ Nonetheless, constitutional, common law lawyers must concede that, in *Brown*, the Court abandoned any form of conventional interpretation and used the Equal Protection Clause as a vast engine for imposing social change on the nation.¹³²

The *Brown* opinion does contain explicitly non-originalist language saying that the original sources the Court had consulted “cast some light” on the problem raised by the case but “not enough to resolve the problem with which we are faced.”¹³³ The Court also made the explicitly non-originalist comment that “[i]n approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.”¹³⁴ Nonetheless, when Chief Justice Warren reached the grand culmination of his opinion and announced the Court’s holding in *Brown*, here is what he said:

We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.¹³⁵

It is striking that for all the non-originalism in Chief Justice Warren’s opinion, the sentence stating *Brown*’s holding relies squarely upon the text of the Equal Protection Clause and not on the sociological studies cited in Footnote 11 or on anything else.¹³⁶ According to Chief Justice Warren, segregation falls, not because it is inconsistent with constitutional common law or

131. *Brown*, 347 U.S. 492-95.

132. In defending his Burkean approach to constitutional law (which he calls “conventionalism”), Professor Merrill argues for a “presentist” understanding of contested issues of meaning, and he specifically argues against using the Supreme Court as an engine of social change. Merrill, *Bork v. Burke*, *supra* note 4, at 511. Thus, it appears that under Professor Merrill’s conventionalist approach, *Brown* would be hard to explain. Professor Merrill could try to point to straws in the wind like *Sweatt v. Painter*, 339 U.S. 629 (1950), to argue that *Plessy* had been destabilized, but public opinion polls when *Brown* was decided showed that almost half the public favored school segregation. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty* (pt. 5), 112 *YALE L.J.* 153, 186 n.132 (2002). Beyond that, there can be no doubt but that *Brown* led to the sort of sweeping social change that Merrill thinks ought not to come from the Court. In this symposium issue, Professor Merrill says, “In a democracy, innovation in law and policy is supposed to come from officials elected by the People, not from unelected judges.” Merrill, *Judicial Restraint*, *supra* note 4 (manuscript at 6, on file with author). In *Brown*, however, innovation came precisely from judges, not elected politicians. See Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 *CAL. L. REV.* 959, 965-66 (2004).

133. *Brown*, 347 U.S. at 489.

134. *Id.* at 492.

135. *Id.* at 495 (citing *Bolling v. Sharpe*, 347 U.S. 497, 497 (1954)).

136. *Id.*

with sociological studies or with conventionalism, but because it is inconsistent with the text of the Constitution. *Brown* is thus another triumph of text and first principles over precedent.

Admittedly, scholars continue arguing whether *Brown* is consistent with the original meaning of the Fourteenth Amendment.¹³⁷ But for my purposes here I do not think it matters whether *Brown* can be squared with originalism, although I believe it can be and am writing a law review article explaining why.¹³⁸ What matters here is that *Brown* is a case involving a Supreme Court appeal to the written Constitution and the first principles embodied in the text to impose massive (almost revolutionary) social transformation on the nation and especially the South.¹³⁹ This is ultimately a case of the Constitution triumphing over contrary precedent and practice, and there can be no question that the line of cases *Brown* started constituted a major overruling.¹⁴⁰

This is quickly shown by reference to *Brown*'s most important progeny, *Loving v. Virginia*,¹⁴¹ which held anti-miscegenation laws unconstitutional. Once again, Chief Justice Warren writes, and once again his opinion rests squarely on the constitutional text and first principles. Warren begins *Loving* by defining the issue as whether anti-miscegenation laws "violate[] the Equal Protection and Due Process Clauses of the Fourteenth Amendment," which he then quotes.¹⁴² Warren continues, saying, "For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment."¹⁴³ After again referring to "the Fourteenth Amendment's proscription of all invidious racial discriminations,"¹⁴⁴ Warren says:

[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States. . . .

137. Compare Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995), with Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995). I am working on an originalist defense of *Brown* that builds on Professor McConnell's defense and argues that McConnell is right.

138. For the record, I am working on an article arguing that *Brown* was rightly decided based on the correct original understanding of the Fourteenth Amendment. See Steven G. Calabresi & Michael W. Perl, *New Originalist Justification of Brown v. Board of Education* (unpublished manuscript, on file with the author).

139. *Brown*, 347 U.S. 483.

140. The plurality opinion in *Casey* concedes that *Brown* was a big overruling and attempts to distinguish *Brown* from the abortion controversy. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 863 (1992).

141. 388 U.S. 1 (1967).

142. *Id.* at 2.

143. *Id.*

144. *Id.* at 8.

. . . At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the “most rigid scrutiny.” . . .

. . . There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.¹⁴⁵

Warren concludes with another appeal to constitutional text by saying that anti-miscegenation laws also violate the Due Process Clause of the Fourteenth Amendment.¹⁴⁶ He then argues textually that “[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not [to] marry, a person of another race resides with the individual and cannot be infringed by the State.”¹⁴⁷

Loving v. Virginia then is another pure triumph of constitutional text and first principles over centuries of Burkean practice and conventionalism. Few things were rarer or more unconventional in 1967 than black-white interracial marriages. Nonetheless, the Court, in striking interracial marriage bans, cites the text of the Constitution and bases its authority on first principles.¹⁴⁸ Warren’s opinion in *Loving* hews more closely to the constitutional text than his opinion in *Brown*—possibly as result of the heavy professional criticisms that were made of his opinion in *Brown*.¹⁴⁹ Common law constitutionalism and conventionalism cannot explain or justify *Brown* and *Loving*, but textualism (and, in my view, originalism) can. That is why both opinions ultimately rest on the constitutional text.

E. The School Prayer Decisions

The fifth big triumph of original text over long-established contrary practice and convention came with the decision of the school prayer cases in the early 1960s.¹⁵⁰ These cases did not technically involve the overruling of a precedent, but they clearly rejected the conventionalism of Professor Merrill or the moderate Burkean evolution of Professor Strauss. Just as *Brown* revolutionized social practice on race relations, the school prayer decisions revolutionized social practice in terms of government-sanctioned prayer in schools. For 171 years, government-led prayer in schools had been commonplace in the United States, and it was and remains to this day tremendously popular.¹⁵¹

145. *Id.* at 10-12.

146. *Id.* at 12.

147. *Id.*

148. *Id.* at 2.

149. G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 179-82 (1982).

150. *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

151. See Phi Delta Kappa/Gallup Poll, *The 30th Annual Phi Delta Kappa/Gallup Poll of the Public's*

In 1962, that deep-seated conventional practice or tradition came to an abrupt end because of Justice Black's strikingly originalist reading of the Establishment Clause in *Engel v. Vitale*.¹⁵² Justice Black's opinion in *Engel* discusses the history of government-sponsored prayer from sixteenth-century England up through the founding period.¹⁵³ He plainly appeals to the original meaning of the religion clauses to displace 171 years of what he views as wayward practice saying, for example, that "[t]he Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."¹⁵⁴

Justice Black *does not cite a single precedent* in support of his breathtaking ruling in *Engel*. The opinion is from start to finish an originalist opinion, and no Supreme Court precedent whatsoever is discussed. In fact, other than the lower court decision in *Engel* and the Supreme Court's order granting certiorari, Justice Black cites only one case (*Everson v. Board of Education*)¹⁵⁵ in his extraordinary opinion.

I should note at the outset that Justice Black's originalist scholarship in *Engel* may very well have led him to the wrong answer as an original matter. There are powerful originalist arguments that can be made in defense of the constitutionality of school prayer and in opposition to the incorporation of the Establishment Clause by the Fourteenth Amendment.¹⁵⁶ (The case for incorporation of the Free Exercise Clause is, however, much stronger, and *Engel* raised Free Exercise as well as Establishment Clause issues). For purposes of this Article, however, it does not matter whether Justice Black's originalist reading was correct or not. The fact of the matter is that Justice Black's opinion is a wholly originalist opinion in its mode of reasoning. Justice Black relies exclusively on originalist arguments in justifying his decision to strike down school prayer as unconstitutional. He does not rely at all on caselaw or convention nor could he. Thus, *Engel* is an impossible case for Professors Strauss and Merrill to explain. They would have to say, I think, that *Engel* was wrongly decided, which would be a real body blow for common law constitutional or conventionalist positive theories of the judicial role.

Justice Black's opinion begins by making the obligatory textual reference to the First and Fourteenth Amendments and the Establishment Clause.¹⁵⁷ He then launches into a lengthy and detailed historical essay

Attitudes Toward the Public Schools, PHI DELTA KAPPA INT'L (1998) (indicating strong public support in 1984, 1994, and 1998 for a constitutional amendment that would allow prayer in public schools), available at <http://www.pdkintl.org/kappan/kp9809-2c.htm>; *N.Y. Times/CBS News Poll*, N.Y. TIMES, May 26, 1987, at A20 (showing strong public support for school prayer).

152. *Engel*, 370 U.S. 421.

153. *Id.* at 426.

154. *Id.* at 431-32.

155. 330 U.S. 355 (1947).

156. See, e.g., PHILIP HAMBURGER, *THE SEPARATION OF CHURCH AND STATE* (2002); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

157. *Engel*, 370 U.S. at 423-24.

about the religious controversies that gave rise to the Establishment Clause. He says, "It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America."¹⁵⁸ After discussing the bitter fights in England over the contents of the Book of Common Prayer in the sixteenth century, he again says,

It is an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies.¹⁵⁹

After discussing the existence of established churches in eight of the thirteen former colonies following the Revolutionary War, Justice Black notes that "the successful Revolution against English political domination was shortly followed by intense opposition to the practice of establishing religion by law."¹⁶⁰ Justice Black discusses this strong opposition to established churches in the newly freed colonies and observes:

By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power. The Constitution was intended to avert a part of this danger by leaving the government of this country in the hands of the people rather than in the hands of any monarch. But this safeguard was not enough. Our Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs. The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Gov-

158. *Id.* at 425.

159. *Id.* at 427.

160. *Id.* at 428.

ernment would be used to control, support or influence the kinds of prayer the American people can say—that the people’s religions must not be subjected to the pressures of government for change each time a new political administration is elected to office. Under that Amendment’s prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.¹⁶¹

It bears noting that the entire passage from Justice Black’s opinion just quoted is full of originalist arguments. The Justice talks about our history at the time of the writing of the constitution, the intentions of those who wrote the Constitution, and he refers explicitly to the Founders.¹⁶² This passage alone is enough to make *Engel* an originalist dream. But there is more.

Justice Black goes on to talk openly about the historical purposes that he says underlie the Establishment Clause. He says that the “first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion.”¹⁶³ Justice Black then goes on to say at length:

Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand. . . . It was in large part to get completely away from this sort of systematic religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion. The New York laws officially prescribing the Regents’ prayer are inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself.¹⁶⁴

Justice Potter Stewart, the lone dissenter, sounded in vain the Burkean, conventionalist complaint that “[w]hat is relevant to the issue here is not the history of an established church in sixteenth century England or in eighteenth century America, but the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government.”¹⁶⁵ Stewart’s lone cry for Burkeanism and conventionalism

161. *Id.* at 429-30.

162. *Id.*

163. *Id.* at 431.

164. *Id.* at 432-33 (footnotes omitted).

165. *Id.* at 446.

went unheeded and sixteenth-century English history and eighteenth-century American history carried the day.

The year after *Engel*, the Supreme Court, in *Abington School District v. Schempp*, expanded *Engel* also to ban coerced Bible readings in schools.¹⁶⁶ The opinion in *Abington* builds on the Court's Establishment Clause case-law, including *Engel*, to outlaw mandatory Bible readings and mandatory school prayers.¹⁶⁷ Justice Clark's opinion in *Abington* quotes Justice Jackson's discussion in *Barnette* concerning the purpose of the Bill of Rights.¹⁶⁸ But it is a more precedent, less originalist, driven opinion than Justice Black's opinion in *Engel*. By 1963, however, the big originalist step had already been taken in *Engel*, which was a plain triumph for originalism and textualism over Burkeanism and practice.

F. *Jones v. Alfred H. Mayer Co.* and The Civil Rights Cases

The sixth great overruling of the last sixty-eight years occurred in *Jones v. Alfred H. Mayer Co.*,¹⁶⁹ a 1968 decision in which the Court construed portions of the Civil Rights Act of 1866 as prohibiting forms of private race discrimination in real estate transactions.¹⁷⁰ *Jones* implicitly undermines the *Civil Rights Cases*,¹⁷¹ explicitly overrules *Hodges v. United States*,¹⁷² and clearly augments congressional power under Section 2 of the Thirteenth Amendment enormously. The issue for the Court in *Jones* was whether Congress had the power to ban private race discrimination in housing on the grounds that it was "a badge of slavery" pursuant to Congress's power to enforce the Thirteenth Amendment under Section 2 of that amendment.¹⁷³ The Court read congressional power to enforce the Thirteenth Amendment very expansively, saying the question of what federal laws were "appropriate" should be judged under the *McCulloch v. Maryland*¹⁷⁴ standard of what laws were "necessary and proper."¹⁷⁵ This reading of Section 2 of the Thirteenth Amendment is plainly inconsistent with the reading given that clause in *Hodges v. United States* and is in tension with the reading given in the *Civil Rights Cases*,¹⁷⁶ where the Court struck down a congressional law banning private discrimination in contracts offered by public inns and conveyances, saying that it would be going too far to analogize private acts of discrimination to slavery.¹⁷⁷ *Jones v. Alfred H. Mayer* is a 180-degree turn-

166. 374 U.S. 203, 224-25 (1963).

167. *Id.*

168. *Id.* at 226.

169. 392 U.S. 409 (1968).

170. *Id.* at 413.

171. 109 U.S. 3 (1883).

172. 203 U.S. 1 (1906).

173. *Jones*, 392 U.S. at 412.

174. 17 U.S. 316 (1819).

175. *Jones*, 392 U.S. at 443-44.

176. 109 U.S. 3 (1883).

177. *Id.* at 24-25.

around from the rule of the *Civil Rights Cases*, and the decision in *Jones* contains analysis more reminiscent of Justice Harlan's famous dissent in the *Civil Rights Cases* than it is of anything in the majority opinion.

Justice Potter Stewart's opinion in *Jones v. Alfred H. Mayer* contains lengthy originalist portions quoting from the congressional debates leading up to the adoption of the Thirteenth Amendment. Justice Stewart quotes Senator Trumbull of Illinois, Chairman of the Judiciary Committee at the time of the adoption of the Thirteenth Amendment, as saying:

I reported from the Judiciary Committee the second section of the [Thirteenth Amendment] for the very purpose of conferring upon Congress authority to see that the first section was carried out in good faith . . . and I hold that under that second section Congress will have the authority, when the constitutional amendment is adopted . . . to pass . . . a bill that will be much more efficient to protect the freedman in his rights. . . . And, sir, when the constitutional amendment shall have been adopted, if the information from the South be that the men whose liberties are secured by it are deprived of the privilege to go and come when they please, *to buy and sell when they please*, to make contracts and enforce contracts, I give notice that, if no one else does, I shall introduce a bill and urge its passage through Congress that will secure to those men every one of these rights: they would not be freemen without them. *It is idle to say that a man is free who cannot go and come at [his] pleasure, who cannot buy and sell, who cannot enforce his rights.*¹⁷⁸

It is worth pausing for a moment to reflect on this passage. This is a direct reference to the original intentions of the Framers of the Thirteenth Amendment. The passage links Congress's Section 2 power to *McCulloch's* broad reading of the Necessary and Proper Clause. Justice Stewart thus directly implies with this passage that the original meaning of Section 2 is breath-takingly broad, contrary to the view expressed in the *Civil Rights Cases*.¹⁷⁹ This passage is pure triumph of originalism through and through.

Justice Stewart goes on to note that after the Thirteenth Amendment had been ratified and during the debates in the House of Representatives over the adoption of the Civil Rights Act of 1866, Representative Thayer of Pennsylvania said this about the Thirteenth Amendment:

[W]hen I voted for the amendment to abolish slavery . . . I did not suppose that I was offering . . . a mere paper guarantee. And when I voted for the second section of the amendment, I felt . . . certain that

178. *Jones*, 392 U.S. 429-30 (quoting Cong. Globe, 39th Cong., 1st Sess., 43 (1866)) (alteration and first and fourth ellipses in original).

179. 109 U.S. 3 (1883).

I had . . . given to Congress ability to protect . . . the rights which the first section gave¹⁸⁰

Justice Stewart's opinion thus quoted, yet again, from the original history surrounding the adoption and meaning of Section 2 of the Thirteenth Amendment.

Justice Stewart then goes on to consider "whether Congress has power under the Constitution to do what § 1982 [originally part of the Civil Rights Act of 1866] purports to do: to prohibit all racial discrimination, private and public, in the sale and rental of property."¹⁸¹ He says, "Our starting point [in analyzing that question] is the Thirteenth Amendment,"¹⁸² the full text of which he then quotes. Justice Stewart proceeds as follows:

As its text reveals, the Thirteenth Amendment "is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." It has never been doubted, therefore, "that the power vested in Congress to enforce the article by appropriate legislation," includes the power to enact laws "direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not."

Thus, the fact that § 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem. . . .

"By its own unaided force and effect," the Thirteenth Amendment "abolished slavery, and established universal freedom." Whether or not the Amendment *itself* did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed "Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."¹⁸³

Justice Stewart thus makes a textual, originalist argument that Congress could legislate against private discriminatory action under Section 2 of the Thirteenth Amendment, which he explicitly reads as giving Congress *McCulloch*-like power to enforce with all necessary and proper laws.

Justice Stewart's broad reading of Section 2 of the Thirteenth Amendment is clearly in tension with the *Civil Rights Cases*, even if it quotes from

180. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 433-40 (1968) (alteration and ellipses in original).

181. *Id.* at 437.

182. *Id.*

183. *Id.* at 438-39 (citations omitted).

the Court's opinion in that case. Stewart concedes as much in Footnote 78 of his opinion.¹⁸⁴ His broad reading of Section 2 plainly conflicts with the Supreme Court's 1906 opinion in *Hodges v. United States*.¹⁸⁵ Accordingly, Stewart says:

The conclusion of the majority in *Hodges* rested upon a concept of congressional power under the Thirteenth Amendment irreconcilable with the position taken by every member of this Court in the *Civil Rights Cases* and incompatible with the history and purpose of the Amendment itself. Insofar as *Hodges* is inconsistent with our holding today, it is hereby overruled.¹⁸⁶

Thus, the force of Justice Stewart's originalist assessment nullified a sixty-two-year-old precedent. In concluding that Congress could punish private, discriminatory action as a badge of slavery under Section 2 of the Thirteenth Amendment, Justice Stewart—by falling back on originalism—broadened Congress's power to eradicate racial discrimination.

G. The Death Penalty Cases

The seventh great overruling is an implicit overruling, but there is little doubt to those of us who lived through it that it constitutes an instance of the Court sharply reversing its course several times. For the first 183 years of our constitutional history, the U.S. Supreme Court accepted the imposition of the death penalty in both federal and state cases as a routine practice—a practice sanctioned by the Framers of the Constitution. The Court upheld a number of capital sentences without any suggestion that different procedural hurdles had to be overcome in capital punishment cases that were not present in other ordinary criminal procedure cases. As Justice Stewart said in *Gregg v. Georgia*:

The Court on a number of occasions has both assumed and asserted the constitutionality of capital punishment. In several cases that assumption provided a necessary foundation for the decision, as the Court was asked to decide whether a particular method of carrying out a capital sentence would be allowed to stand under the Eighth Amendment.¹⁸⁷

184. See *id.* at 441 n.78.

185. 203 U.S. 1 (1906), *overruled in part by Jones*, 392 U.S. 409.

186. *Jones*, 392 U.S. at 441 n.78.

187. 428 U.S. 153, 168 (1976) (citing *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947); *In re Kemmler*, 136 U.S. 436, 447 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1879)); see also *McGautha v. California*, 402 U.S. 183 (1971); *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

Thus, there was no reason whatsoever for those following only the Court's doctrine to think that capital punishment might be always and everywhere unconstitutional. Suddenly, in 1972, in *Furman v. Georgia*, the Supreme Court struck down, in one fell swoop, all federal and state death penalty laws then on the books as being so arbitrary and capricious in practice as to constitute cruel and unusual punishment in violation of the Eighth Amendment.¹⁸⁸

At the time, the Court's decision (there was no agreed upon opinion of the Court) was widely understood as a revolutionary change in practice and as possibly the first step toward a general holding that capital punishment was always and everywhere cruel and unusual.¹⁸⁹ For a brief moment after *Furman*, it appeared that the death penalty in the United States might actually always be unconstitutional.

A strange thing happened, however, as a majority of the states responded to the Court's *Furman* decision. Some thirty-five states, believing that the death penalty was not always and everywhere cruel and unusual, responded to *Furman* by passing new death penalty laws with added procedural safeguards to protect against arbitrary and capricious executions.¹⁹⁰ As Justice Stewart explained in *Gregg v. Georgia*:

Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.

The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person. And the Congress of the United States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death.¹⁹¹

The United States, speaking through Solicitor General Robert H. Bork, then weighed in with a defense of these state and federal laws¹⁹² in an amicus brief in *Gregg v. Georgia*.¹⁹³ The Supreme Court then reversed course almost 180 degrees from its position in *Furman*, a decision made a mere four years earlier. In *Gregg*, the Court moved away from *Furman* and upheld capital punishment laws as being constitutional so long as adequate addi-

188. 408 U.S. 238, 239-40 (1972).

189. *Id.*

190. *See Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976).

191. *Id.* (footnote omitted).

192. Brief for the United States as Amicus Curiae for Respondents, *Gregg v. Georgia*, 428 U.S. 153 (1976) (Nos. 74-6257, 75-5394, 75-5491, 75-5706, 75-5844), available at 1976 WL 181758.

193. 428 U.S. 153.

tional procedural safeguards were afforded to capital punishment litigants.¹⁹⁴

Solicitor General Robert Bork's amicus brief for the United States in *Gregg v. Georgia*, which was also signed by future federal Court of Appeals judges Ray Randolph and Frank Easterbrook, was a textualist and originalist *tour de force*. Section I of the brief is labeled: "The origins of the Eighth Amendment show that a legislature may constitutionally provide for capital punishment."¹⁹⁵ Subsection A then is titled: "The text of the Constitution demonstrates that the framers intended to allow capital punishment."¹⁹⁶ These two headings tell one all that one really needs to know about the originalist and textual foundation of the Bork brief in defense of the constitutionality of capital punishment.

The Supreme Court's opinion in *Gregg* was, in my view, a textualist and an originalist victory in that the original Constitution plainly contemplates deprivations of life so long as they are accomplished with due process of law. I do not think *Gregg*'s departure from *Furman* is explicable as a normal constitutional common law development any more than *Furman*'s sharp break with 183 years of American constitutional history is explicable as a constitutional common law development. Rather, *Gregg* constitutes an instance where a majority of the states, joined by Congress, forced the Supreme Court to rethink its view on a big constitutional question. Had the *Furman* constitutional common law precedent been adhered to faithfully, there would have been no massive reintroduction of capital punishment into the United States in the late 1970s.

The opinion in *Gregg* rests on several foundations, but first and foremost, it rests on the Constitution's text and original meaning. Accordingly, Justice Stewart begins his analysis by saying:

The history of the prohibition of "cruel and unusual" punishment already has been reviewed at length. The phrase first appeared in the English Bill of Rights of 1689, which was drafted by Parliament at the accession of William and Mary. The English version appears to have been directed against punishments unauthorized by statute and beyond the jurisdiction of the sentencing court, as well as those disproportionate to the offense involved. The American draftsmen, who adopted the English phrasing in drafting the Eighth Amendment, were primarily concerned, however, with proscribing "tortures" and other "barbarous" methods of punishment."¹⁹⁷

Justice Stewart then continues in a purely originalist footnote saying:

194. *Id.* at 187-97.

195. Brief for the United States, *supra* note 192, at 16.

196. *Id.*

197. *Gregg*, 428 U.S. at 169-70 (citations and footnote omitted).

This conclusion derives primarily from statements made during the debates in the various state conventions called to ratify the Federal Constitution. For example, Virginia delegate Patrick Henry objected vehemently to the lack of a provision banning “cruel and unusual punishments:

“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—of torturing, to extort a confession of the crime.”¹⁹⁸

A similar objection was made in the Massachusetts convention: “They are nowhere restrained from inventing the most cruel and unheard-of punishments and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline.”¹⁹⁹ It is worth reflecting for a moment on this originalist paragraph and footnote from Justice Stewart’s opinion in *Gregg*. These passages are purely originalist. They presuppose that the intentions of the Framers shed light on the continued vitality of the *Furman* precedent and that they rely on history, not convention or caselaw. Therefore, Stewart’s opinion in *Gregg* clearly begins by accepting the invitation of the Bork brief to revive capital punishment on originalist grounds.

Justice Stewart’s opinion goes on to discuss post-1789 constitutional practice inconsistent with *Furman*. Specifically, he says:

The imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England. The common-law rule imposed a mandatory death sentence on all convicted murderers. And the penalty continued to be used into the 20th century by most American States, although the breadth of the common-law rule was diminished, initially by narrowing the class of murders to be punished by death and subsequently by widespread adoption of laws expressly granting juries the discretion to recommend mercy.²⁰⁰

Justice Stewart then launches into a striking discussion of the constitutional text:

It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the

198. *Id.* at 170 n.17 (quoting 3 JONATHAN ELLIOT, DEBATES 447-48 (2d. ed. 1836)).

199. *Id.* (quoting 2 ELLIOT, *supra* note 198, at 111).

200. *Id.* at 176-77 (citation omitted).

time the Eighth Amendment was ratified, capital punishment was a common sanction in every State. Indeed, the First Congress of the United States enacted legislation providing death as the penalty for specified crimes. The Fifth Amendment, adopted at the same time as the Eighth, contemplated the continued existence of the capital sanction by imposing certain limits on the prosecution of capital cases:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law. . . .”

And the Fourteenth Amendment, adopted over three-quarters of a century later, similarly contemplates the existence of the capital sanction in providing that no State shall deprive any person of “life, liberty, or property” without due process of law.

For nearly two centuries, this Court, repeatedly and often expressly, has recognized that capital punishment is not invalid *per se*.²⁰¹

This lengthy passage is again straight out of the Bork brief and is a paean to originalism. There can be no question but that *Gregg* was a big, consequential originalist victory.

It is true, of course, that Justice Stewart says in *Gregg* that the Eighth Amendment has been interpreted in a flexible and dynamic manner to ban disproportionate punishments in conflict with “the evolving standards of decency that mark the progress of a maturing society.”²⁰² But even there, Justice Stewart makes clear that it is the standards of decency of the American people, as expressed in state legislation, not the standards of the justices in their *Furman* era caselaw at issue.²⁰³ Thus, his opinion says at least four different times that the question presented in *Gregg v. Georgia* is whether the death penalty for murder violates the Eighth and Fourteenth Amendments.²⁰⁴ He does not ask whether the death penalty for murder violates

201. *Id.* at 177-78 (citation omitted and ellipsis in original).

202. *Id.* at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

203. *See id.* at 173-76.

204. “The issue in this case is whether the imposition of the sentence of death for the crime of murder under the law of Georgia violates the Eighth and Fourteenth Amendments.” *Gregg*, 428 U.S. at 158. “We granted the petitioner’s application for a writ of certiorari limited to his challenge to the imposition of the death sentences in this case as ‘cruel and unusual’ punishment in violation of the Eighth and the Fourteenth Amendments.” *Id.* at 162. “We address initially the basic contention that the punishment of death for the crime of murder is, under all circumstances, ‘cruel and unusual’ in violation of the Eighth

Furman or even the plurality opinion in *Trop v. Dulles*.²⁰⁵ Rather, he asks whether it violates the constitutional text. The answer is clearly that it does not.

Gregg was not to remain the last death penalty case where the Court would change its mind and overrule itself. Thus, in *Penry v. Lynaugh*, decided in 1989, the Supreme Court upheld the execution of mentally retarded persons as being constitutionally permissible.²⁰⁶ But, a mere thirteen years later, in *Atkins v. Virginia*,²⁰⁷ the Court again changed its mind and overruled *Penry*, holding that the death penalty for mentally retarded defendants was cruel and unusual. The same thing occurred just this past year with respect to the death penalty for sixteen and seventeen-year-olds. The Court had upheld the death penalty for juveniles in *Stanford v. Kentucky*,²⁰⁸ but in *Roper v. Simmons*,²⁰⁹ decided March 1, 2005, the Court changed its mind and decided that the death penalty for sixteen and seventeen-year-olds is unconstitutional after all.²¹⁰

In short, the Court has changed its mind at least four times about the constitutionality of the death penalty, at least for the mentally retarded and for juveniles. Pre-1972, the death penalty raised no constitutional problems. From 1972 until *Gregg*, the death penalty seemed to be almost always unconstitutional. From *Gregg* until recently, the death penalty was permissible for the mentally retarded and for juveniles. Today, both of those cases stand overruled, and the death penalty is again unconstitutional for both the mentally retarded and juveniles. The death penalty cases then stand as strong support for the notion that the Court is willing to overrule itself at the drop of a hat on life and death issues other than abortion.

H. The Garcia Line of Cases

The eighth great overruling of the last sixty-five years actually comprises three overrulings, all by five-to-four votes on the same issue. The question presented in each case was: Does the Constitution, and perhaps especially the Tenth Amendment, impose affirmative limits on the congressional regulations of state governments, for example, with respect to prescribing wage and hour work conditions for state employees. The Court said there was no such limitation in *Maryland v. Wirtz*,²¹¹ but that case was overruled in 1976 by *National League of Cities v. Usury*.²¹²

and Fourteenth Amendments of the Constitution." *Id.* at 168. "We now consider specifically whether the sentence of death for the crime of murder is a *per se* violation of the Eighth and Fourteenth Amendments to the Constitution." *Id.* at 176.

205. 356 U.S. 86 (1958).

206. 492 U.S. 302, 340 (1989).

207. 536 U.S. 304, 307, 321 (2002).

208. 492 U.S. 361, 380 (1989).

209. 543 U.S. 551 (2005).

210. *Id.* at 554.

211. 392 U.S. 183, 198-200 (1968).

212. 426 U.S. 833 (1976).

Justice Rehnquist's opinion in *Usury* is a clear departure from the post-1937 New Deal caselaw, showing great deference to claims of federal power, and explicitly saying that it is significant that the states are "a coordinate element in the system established by the Framers for governing our Federal Union."²¹³ Moreover, *Usury*, on a five-to-four vote, expressly overrules *Wirtz*, a case decided by the Court a mere eight years before with an opinion written by leading conservative jurist, John Marshall Harlan the younger. *Usury* alone is plainly a decision that is at war with Burkeanism or conventionalism.

Justice Rehnquist's opinion in *Usury* is full of references to the text of the Constitution and to first principles. Thus, he says, "It is established beyond peradventure that the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress."²¹⁴ He continues:

Appellants [contend that here Congress] . . . transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained in the Constitution. Congressional enactments which may be fully within the grant of legislative authority contained in the Commerce Clause may nonetheless be invalid because found to offend against the right to trial by jury contained in the Sixth Amendment, or the Due Process Clause of the Fifth Amendment.²¹⁵

Rehnquist then goes on in an exceptionally lengthy textualist and originalist passage which is worth reproducing in its entirety:

[O]ur federal system of government imposes definite limits upon the authority of Congress to regulate the activities of the States as States by means of the commerce power. In *Fry* . . . the Court recognized that an express declaration of this limitation is found in the Tenth Amendment:

"While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' [citing *Darby*] it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."

. . . .

213. *Id.* at 849.

214. *Id.* at 840.

215. *Id.* at 841 (citation omitted).

The expressions in these more recent cases trace back to earlier decisions of this Court recognizing the essential role of the States in our federal system of government. Mr. Chief Justice Chase, perhaps because of the particular time at which he occupied that office, had occasion more than once to speak for the Court on this point. In *Texas v. White*, he declared that “[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”

[Chief Justice Chase is quoted further as saying in *Lane County v. Oregon*:]

“Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized.”

....

... We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.²¹⁶

Stop and reflect for a moment on this amazing passage. Rehnquist explicitly invokes the text of the Commerce Clause and of the Tenth Amendment.²¹⁷ The latter is brought back from the grave to which *Darby* had consigned it years earlier. Rehnquist says that the text of the Constitution contemplates an indestructible union of indestructible states.²¹⁸ This argument is all originalist and textualist, flying in the face of decades of settled law. *Usery* is another unambiguous victory for first principles over precedent.

Rehnquist goes on to say in *Usery* that the States will be constitutionally protected when they are exercising traditional state functions because otherwise “there would be little left of the States’ ‘separate and independent

216. *Id.* at 842-45 (citation omitted and third alteration in original).

217. *See supra* note 202 and accompanying text.

218. *Nat'l League*, 426 U.S. at 844.

existence.”²¹⁹ He claims Congress’s exercise of power in applying the Fair Labor Standards Act to the States:

[D]oes not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3. [In a footnote, Rehnquist then adds:] We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment.²²⁰

All of these passages are striking in their citation of, and reliance upon, the constitutional text, admittedly read at a high level of abstraction. Rehnquist does not say that Congress’s law is unconstitutional because of some prior Supreme Court case. Rather, he says it is unconstitutional because of Article I, Section 8, Clause 3, and that a different result might be obtained under Article I, Section 8, Clause 1 or under Section 5 of the Fourteenth Amendment.²²¹ If this is not a textual rather than a common law constitutionalist argument, I do not know what is! Indeed, Justice Brennan says in dissent, “I cannot recall another instance in the Court’s history when the reasoning of so many decisions covering so long a span of time has been discarded in such a roughshod manner,”²²² and he goes on to bemoan “[m]y Brethren’s disregard for precedents recognizing these long-settled constitutional principles [as is] painfully obvious in their cavalier treatment of *Maryland v. Wirtz*.”²²³ So much for the claim that, as a positive matter, what the Supreme Court does accurately can be described as conventionalism.

Ironically, Justice Brennan’s dissent in *National League of Cities v. Usery* itself makes some powerful textualist arguments against what the Rehnquist majority does in that case. Brennan says “there is no restraint based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution,”²²⁴ and he makes the *Darby* textual argument that the Tenth Amendment is a truism.²²⁵ Thus, both the majority and the dissenting opinions in *National League of Cities* make textual arguments which are central to the conclusions the respective justices reach.

219. *Id.* at 851 (quoting *Coyle v. Smith*, 221 U.S. 559, 580 (1911)).

220. *Id.* at 852.

221. *Id.*

222. *Id.* at 871-72.

223. *Id.* at 879.

224. *Id.* at 858.

225. *See id.* at 862 (citing *United States v. Darby*, 312 U.S. 657, 462 (1941)).

National League of Cities was, of course, itself overruled, in a five-to-four vote nine years later by *Garcia v. San Antonio Metropolitan Transit Authority*.²²⁶ The Court's opinion in *Garcia* contained broad dicta that was 180 degrees contrary to the message the *National League of Cities* Court meant to convey. *Garcia* implied that cases involving the scope of congressional power vis-à-vis the states are never judicially reviewable, a view that is the exact opposite of the view in *National League of Cities*. Strikingly, Justice Rehnquist's dissent in *Garcia* predicts that he is confident the principles recognized in *National League of Cities* will "in time again command the support of a majority of this Court."²²⁷

Justice Blackmun's opinion in *Garcia* is full of textual arguments. He says that "the Commerce Clause by its specific language does not provide any special limitation on Congress' actions with respect to the States,"²²⁸ and he notes:

A variety of sovereign powers, for example, are withdrawn from the States by Article I, § 10. Section 8 of the same Article works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation.²²⁹

Justice Blackmun carefully discusses how the text of the Constitution protects the states through their participation in shaping Congress, through the Electoral College, and through the presidency.²³⁰ All of this leads him to conclude by saying, "We do not lightly overrule recent precedent. We have not hesitated, however, when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause."²³¹ *Garcia* is, in essence, a textual rejection of *National League of Cities*, and it constitutes yet another instance of the Court overruling itself. But, as most of my readers undoubtedly know, even *Garcia* does not mark the end of this story.

The Rehnquist Court did not formally overrule *Garcia*, but it probably could fairly be described in Justice Frankfurter's words as being "a derelict on the waters of the law."²³² In 1991, *Gregory v. Ashcroft*²³³ did away with the notion that the Court could never enforce federalism limits—a decision augmented by *New York v. United States*²³⁴ and *Printz v. United States*²³⁵—

226. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985).

227. *Id.* at 580 (Rehnquist, J., dissenting).

228. *Id.* at 547.

229. *Id.* at 548.

230. *Id.* at 565-66.

231. *Id.* at 557 (footnote omitted).

232. *Lambert v. California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting).

233. 501 U.S. 452 (1991).

234. 505 U.S. 144 (1992).

235. 521 U.S. 898, 918-19 (1997).

that the federal government could not “commandeer” state legislatures or state executive bodies by directing them to pass or enforce federal rules.²³⁶ *New York* and *Printz* thus reestablish the notion from *National League of Cities* that there are affirmative, constitutional limits on congressional power to regulate state governments.

Subsequently, in two leading sovereign immunity cases—*Seminole Tribe of Florida v. Florida*²³⁷ and *Alden v. Maine*²³⁸—the Court, again on five-to-four votes, made it functionally impossible for state employees to sue state governments in *either* federal or state court when denied their rights under the Fair Labor Standards Act.²³⁹ The net result is that, *Garcia* is effectively a dead letter even though it has not formally been overruled, and it no longer gives any legal rights of value to state employees.

Hence my claim that in the last thirty-seven years, the Court has overruled itself three times on the issue of affirmative, constitutional limits for congressional regulations of state governments. *Wirtz*, *National League of Cities*, and most recently, *Garcia* have all been discarded. So much for the claim that our actual practice in the Supreme Court is one of following common law precedents or conventionalism!

I. The Rehnquist Court’s Federalism Cases

The ninth great overruling or departure from precedent came in 1995 when the Rehnquist Court astonished the bar and the citizenry at large, holding in *United States v. Lopez* that there were judicially enforceable limits to congressional power under the Commerce Clause to regulate wholly intrastate activities that substantially affected interstate commerce.²⁴⁰ This decision flew in the face of a long line of Commerce Clause cases including *Jones & Laughlin Steel*,²⁴¹ *Darby*,²⁴² *Wickard*,²⁴³ *Heart of Atlanta Motel*,²⁴⁴ and *Katzenbach*,²⁴⁵ all of which had seemed to suggest that the commerce power was essentially unlimited.²⁴⁶ The Court’s opinion in *Lopez* purported to be a mundane application of *Jones & Laughlin Steel*, but it was widely recognized as being potentially revolutionary.²⁴⁷ The bar was simply stunned by *Lopez*, and that opinion clearly flew in the face of sixty-eight years of settled convention, precedent, and practice under the Commerce Clause.

236. *New York*, 505 U.S. at 155-56, 161.

237. 517 U.S. 44 (1996).

238. 527 U.S. 706 (1999).

239. *See Seminole Tribe*, 517 U.S. at 76; *Alden*, 527 U.S. at 739-40.

240. 514 U.S. 549, 551 (1995).

241. *Nat’l Labor Relations Bd. v. Jones & McLaughlin Steel Corp.*, 301 U.S. 1, 36-43 (1937).

242. *United States v. Darby*, 312 U.S. 100, 115-20 (1941).

243. *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942).

244. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257-59 (1964).

245. *Katzenbach v. McClung*, 379 U.S. 294, 301-05 (1964).

246. *See cases cited supra* notes 241-45.

247. *See, e.g.*, Symposium, *Reflections on United States v. Lopez*, 94 MICH L. REV. 533 (1995).

Unsurprisingly, Chief Justice Rehnquist's opinion in *Lopez* begins with the constitutional text and original meaning:

We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties."²⁴⁸

Rehnquist then casts aside 171 years of caselaw and reaches back to the 1824 statement in *Gibbons v. Ogden*²⁴⁹ that "limitations on the commerce power are inherent in the very language of the Commerce Clause."²⁵⁰ He quoted as controlling the following language from *Gibbons*, which is plainly inconsistent with *Darby* and *Wickard*:

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State."²⁵¹

Chief Justice Rehnquist returns to this point later in his opinion:

As Chief Justice Marshall stated in *McCulloch v. Maryland*:

"Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist."

248. 514 U.S. 549, 552 (1995) (quoting THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)) (citations omitted).

249. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

250. *Lopez*, 514 U.S. at 553.

251. *Id.* (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 194-95) (ellipsis in original).

. . . The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation.²⁵²

Rehnquist concludes his opinion in *Lopez* with an open acknowledgment that his ruling is in severe tension with the constitutional common law precedents and conventional understanding in this area. Thus, he says:

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.²⁵³

Consequently, the majority opinion in *United States v. Lopez* is a clear victory of text and original meaning over conventional or caselaw understandings of what the law in 1995 required. For the first time in the forty-eight years since the constitutional revolution of 1937, the Supreme Court invalidated an act of Congress regulating private action as being beyond the scope of the commerce power.

It also bears noting that Chief Justice Rehnquist's opinion for the Court in *Lopez* was accompanied by a ringing concurrence filed by Justice Clarence Thomas as a strong reaffirmation of textual originalism in this Commerce Clause context. Justice Thomas wrote separately:

[T]o observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.²⁵⁴

Justice Thomas's concurrence begins with dictionary definitions of commerce as meaning only buying and selling;²⁵⁵ it quotes the debates on

252. *Id.* at 566 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)) (citations omitted).

253. *Id.* at 567-68 (citations omitted).

254. *Id.* at 584.

255. *Id.* at 585-86.

these matters between Federalists and anti-Federalists,²⁵⁶ it explains that the word “commerce” was “used in contradistinction to productive activities such as manufacturing and agriculture;”²⁵⁷ and it notes that if the power to regulate interstate commerce includes a power to regulate manufacturing, then the power to regulate foreign commerce must implausibly also be a power to regulate foreign manufacturing.²⁵⁸ In a whole host of ways, then, Justice Thomas’s *Lopez* concurrence takes Rehnquist’s textualism and originalism to a new and even higher level.

Nor was the Rehnquist Court’s federalism revolution confined to the Commerce Clause arena. In 1997, in *City of Boerne v. Flores*,²⁵⁹ the Court also greatly narrowed congressional power under Section 5 of the Fourteenth Amendment to enforce that amendment. The Court struck down in *Boerne*, the Religious Freedom Restoration Act,²⁶⁰ a very popular statute that had passed Congress by nearly unanimous votes in both houses.²⁶¹ In the course of deciding *Boerne*, the Court clearly trimmed back its previous leading Section 5 precedent, *Katzenbach v. Morgan*,²⁶² saying, “There is language in our opinion in *Katzenbach v. Morgan* which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment. This is not a necessary interpretation, however, or even the best one.”²⁶³ Thus, the *Lopez* revolution reached Section 5 of the Fourteenth Amendment in the *City of Boerne* case.

Justice Anthony Kennedy’s majority opinion in *City of Boerne* was, if anything, even more originalist than Chief Justice Rehnquist’s majority opinion in *Lopez*. Justice Kennedy begins his substantive analysis saying:

Under our Constitution, the Federal Government is one of enumerated powers. The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the “powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”²⁶⁴

Justice Kennedy then gets to the heart of the problem raised by the case in the following textualist passage:

256. *Id.* at 586.

257. *Id.*

258. *Id.* at 587.

259. 521 U.S. 507, 518-20 (1997).

260. *City of Boerne*, 521 U.S. at 536.

261. See 145 CONG. REC. E1636 (July 22, 1999) (noting that only three representatives voted against the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000))).

262. 384 U.S. 641 (1996).

263. *City of Boerne*, 521 U.S. at 527-28 (citation omitted).

264. *Id.* at 516 (citations omitted).

Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power “to enforce,” not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the “provisions of [the Fourteenth Amendment].”²⁶⁵

This statement is followed shortly by Part III.A.1 of the opinion, an originalist legislative history of the congressional debates which produced the Fourteenth Amendment, occupying five pages in the U.S. Reports.²⁶⁶ So replete is this section of Justice Kennedy’s opinion with quotes from the original legislative history that it is the only section of the opinion which Justice Scalia, a foe of legislative history, refused to join.²⁶⁷

Justice Kennedy concludes by noting that if the case had come out the other way, “[s]hifting legislative majorities [would have been able to] change [the meaning of] the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.”²⁶⁸ *City of Boerne v. Flores* is then another landmark case which departs from the precedent of *Katzenbach v. Morgan* for textualist and originalist reasons.

United States v. Lopez has subsequently been reaffirmed in *United States v. Morrison*,²⁶⁹ and *City of Boerne* has been reaffirmed in both *Morrison* and a separate line of sovereign immunity cases dealing with whether Congress had Section 5 power to trump state sovereign immunity.²⁷⁰ In three of these cases, *Florida Prepaid*, *Kimel*, and *Garrett*, the Court struck down acts of Congress for exceeding enumerated powers, while in two recent cases the Court upheld congressional enactments it reviewed.²⁷¹

To sum up, since the Rehnquist Court’s federalism revolution of 1995 began, the Court has struck down five acts of Congress as exceeding the enumerated powers in *Lopez*, *Morrison*, *City of Boerne*, *Florida Prepaid*, *Kimel*, and *Garrett*, and all of this occurred simultaneously with the Court’s expansion of the Tenth Amendment limits on the states in *Printz* and *New York v. United States*²⁷² and its expansion of sovereign immunity limits in *Seminole Tribe* and *Alden*. Major federal statutes such as the Violence

265. *Id.* at 519 (alteration in original).

266. *Id.* at 520-24.

267. *Id.* at 511.

268. *Id.* at 529.

269. 529 U.S. 598 (2000).

270. *See* *Alabama v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999). *But see* *Nev. Dep’t of Human Res. v. Hibbs*, 528 U.S. 721 (2003); *Lane v. Tennessee*, 315 F.3d 680 (6th Cir. 2003).

271. *See* *Hibbs*, 528 U.S. 721 (upholding the Family Medical Leave Act as being within Congress’s Section 5 power); *Lane*, 315 F.3d 680 (upholding a portion of the Americans with Disabilities Act as being within Congress’s Section 5 power).

272. 505 U.S. 144 (1992).

Against Women Act,²⁷³ the Brady Bill,²⁷⁴ and the anti-discrimination laws have been affected.

This is a federalism record that begins to rival that of the pre-New Deal Court, and it is a striking and sweeping rejection of the fair implications of such precedents as *Wickard v. Filburn*, *Katzenbach v. McClung*, and *Katzenbach v. Morgan*. There can be no doubt that the *Lopez* and *City of Boerne* line of cases, coming as it did seemingly out of nowhere, is a striking blow for theories of Burkeanism or constitutional common law or conventionalism as a positive theory of the actual behavior of the U.S. Supreme Court. If conventionalism “refers to a style of judging that produces the fewest surprises”²⁷⁵ then the *Lopez*, *City of Boerne*, *Printz*, *Seminole Tribe* line of cases certainly cannot be counted as examples of conventionalism.

J. Lawrence and Bowers

The tenth and final dramatic overruling of the last sixty-eight years occurred just recently with respect to the issue of gay rights. In 1986, in *Bowers v. Hardwick*,²⁷⁶ the Supreme Court upheld the constitutionality of a Georgia law banning sodomy against a challenge that that law violated substantive due process and the Court-created right to privacy.²⁷⁷ The *Bowers* ruling was a five-to-four decision that seemed not only to doom constitutional claims of gay rights, but also to limit substantive due process, allowing its invocation only where rights deeply rooted in history or tradition were implicated. A mere eleven years later, in *Romer v. Evans*,²⁷⁸ the Court completely undercut the authority of *Bowers* in an unusual equal protection opinion that struck down a Colorado initiative to forbid local governments in Colorado from protecting gays against discrimination under their civil rights ordinances.²⁷⁹

As Justice Scalia pointed out in his biting dissent, *Romer* is obviously inconsistent with *Bowers*, and its constitutional analysis is very odd because it says that gays can be imprisoned for twenty years for having sex, but localities that want to protect them under their civil rights laws have an absolute right to do so, which state law cannot trump.²⁸⁰ *Romer* is also an odd decision because it evaluates the Colorado ordinance in question under rational basis scrutiny—the lowest level of scrutiny available—but astonishingly finds the Colorado ordinance in question “irrational.”²⁸¹ Thus, *Romer*

273. Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of Titles 16, 18, and 42 U.S.C.).

274. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, tit. I, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921-924 (2000)).

275. Merrill, *Judicial Restraint*, *supra* note 4 (manuscript at 5, on with author).

276. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

277. *Id.* at 194-95.

278. 517 U.S. 620 (1996).

279. *Id.* at 635.

280. *Id.* at 636 (Scalia, J., dissenting).

281. *Id.* at 641-43.

is not only inconsistent with *Bowers*, but it is also inconsistent with such leading equal protection rational basis precedents as *Williamson v. Lee Optical of Oklahoma, Inc.*²⁸²

It is instructive to note that, like Justice Douglas's majority opinion in *Griswold v. Connecticut*,²⁸³ Justice Anthony Kennedy's majority opinion in *Romer* could have been based on the emanations and penumbras of the Bill of Rights. Instead, he repeatedly described the result in *Romer* as being mandated by the text of the Equal Protection Clause.²⁸⁴ While Kennedy's opinion is not at all originalist, it marked a firm return to first principles and a rejecting of caselaw and conventionalism. Consequently, the opinion begins by saying that "[t]he Equal Protection Clause enforces [the] principle [that the Constitution neither knows nor tolerates classes among citizens] and today requires us to hold invalid a provision of Colorado's Constitution."²⁸⁵ The use of the verb "requires" here seems worthy of note. Justice Kennedy goes on to make the following historical and textualist argument:

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . . Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'"²⁸⁶

Note the textualist argument that the Colorado law violates equal protection in "the most literal sense."²⁸⁷ Justice Kennedy is invoking as authority here the constitutional text, as animated by first principles. He is not following or even leaning on the right to privacy caselaw.

Justice Kennedy concludes with the constitutional text in *Romer*, as well, saying that the Colorado law under review "is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."²⁸⁸ Once again it is the Equal Protection Clause which the Court relies upon in striking down Colorado's laws, not the emanations and pe-

282. 348 U.S. 483 (1955).

283. 381 U.S. 479 (1965).

284. *Romer*, 517 U.S. at 632.

285. *Id.* at 623.

286. *Id.* at 633-34.

287. *Id.* at 633.

288. *Id.* at 635.

numbras of the Bill of Rights nor the emanations and penumbras of past Supreme Court cases like *Griswold* or *Roe*.

Seven years after *Romer*, and seventeen years after *Bowers*, the Court dropped the other shoe and overruled *Bowers* in *Lawrence v. Texas*.²⁸⁹ Six justices found that sodomy laws violated the constitutional rights of gays but the vote on overruling *Bowers* was five to four. Strikingly, all three justices who joined the paean to stare decisis in *Planned Parenthood v. Casey* voted against *Bowers* to find a constitutional right of gays to engage in sodomy.²⁹⁰

Lawrence was a major and explicit overruling of a leading Supreme Court precedent on a major and very controversial social issue. As Justice Scalia noted in his dissent, *Lawrence* rendered laughable the paean to stare decisis that Justices O'Connor, Kennedy, and Souter had signed onto in *Casey*.²⁹¹ *Lawrence* was also a departure from precedent in that it seemed to reject tradition as a limiting force on the Court's power to create new constitutional rights in substantive due process cases as articulated in *Bowers* and in the assisted suicide case, *Washington v. Glucksberg*.²⁹² *Lawrence* thus rejected precedent both as to gay rights and as to the methodology the Court ought to use in substantive due process cases.

At least one strikingly textualist and originalist amicus brief was filed in *Lawrence* by Professor William Eskridge and by Bob Levy of the Cato Institute, and this brief appears to have had some influence on the Court.²⁹³ Justice Kennedy's majority opinion for the Court in *Lawrence* follows his opinion in *Romer* in relying squarely on the constitutional text and not on any emanations or penumbras of the Bill of Rights or of past Supreme Court cases like *Griswold* or *Roe*.²⁹⁴

Justice Kennedy begins his substantive analysis by saying the case requires that the Court determine whether the petitioners "were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in *Bowers*."²⁹⁵ Justice Kennedy then makes the following dubious but nonetheless originalist claim:

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial times there were prohibitions of

289. 539 U.S. 558 (2003).

290. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Lawrence v. Texas*, 539 U.S. 558 (2003) (O'Connor, Kennedy, & Souter, JJ.).

291. *Id.* at 586-87.

292. 521 U.S. 702 (1997).

293. Brief for the Cato Institute as Amicus Curiae Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

294. *Lawrence*, 539 U.S. at 578-79.

295. *Id.* at 564.

sodomy derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533. The English prohibition was understood to include relations between men and women as well as relations between men and men. Nineteenth-century commentators similarly read American sodomy, buggery, and crime-against-nature statutes as criminalizing certain relations between men and women and between men and men. The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century. Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit non-procreative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.²⁹⁶

Justice Kennedy goes on to describe *Romer* as a case where “the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause,”²⁹⁷ and he makes the originalist, non-evolutionary claim that “*Bowers* was not correct when it was decided, [and it] is not correct today.”²⁹⁸ In the final paragraph of his opinion, Kennedy invokes the majestic generality of the first principles that he thinks animate the Constitutional text:

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 blind 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 its principles in their own search for greater freedom.²⁹⁹

Justice Kennedy’s majority opinion in *Lawrence* drew a concurrence from Justice O’Connor, who also struck down Texas’s sodomy law, albeit on a different textual ground.³⁰⁰ Like Justice Kennedy, Justice O’Connor did not dare to base her opinion openly on emanations or penumbras, or on caselaw like *Griswold* and *Roe*, or on the political philosophy of John Stuart Mill. Justice O’Connor says in *Lawrence* that “[r]ather than relying on the

296. *Id.* at 568-69 (citations omitted).

297. *Id.* at 574.

298. *Id.* at 560.

299. *Id.* at 578-79.

300. *Id.* at 579-85 (O’Connor, J., concurring).

substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does, [she based her] conclusion on the Fourteenth Amendment's Equal Protection Clause."³⁰¹ She goes on to cite the text of the Equal Protection Clause several additional times as supporting her conclusion in *Lawrence*.³⁰²

Thus, *Lawrence* is another nail in the coffin for those who claim the Supreme Court's actual practice is one of following Burkean traditions, constitutional precedents, or conventionalism. The breadth of Justice Kennedy's opinion, an opinion which did not point to a single law discriminating against gays that would be constitutionally permissible,³⁰³ led immediately to a raging national debate on same sex marriage.³⁰⁴ The Court's view on gay rights clearly flew in the face of substantial currents of public opinion, and it triggered much controversy and loud, persistent calls for a constitutional amendment.³⁰⁵ Thus, *Lawrence* was not in any way a conventionalist opinion.

The ten cases I discuss above question or overrule landmark precedents, or fly in the face of well-settled conventions or practices. In each case, the Court appeals to the text of the Constitution to trump wayward practices or heresies that have grown on that text like barnacles on the bottom of a ship.³⁰⁶

301. *Id.* at 579.

302. *Id.* at 579-80, 582-85. Justice O'Connor wrote:

This case raises a different issue than *Bowers*: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. . . . Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

...

. . . I am confident, however, that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society. In the words of Justice Jackson:

"The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected."

Id. at 582, 584-85 (quoting *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (concurring opinion)).

303. *See id.* at 562-79.

304. *See, e.g.,* Michael McGough, *Not So Slippery A Slope: A Federal Court Disproves Justice Scalia's Theory That Privacy Rights for Gays Means That Everything Is Permitted*, PITTSBURG POST-GAZETTE, Dec. 26, 2005, at B7, available at 2005 WLNR 20946347 (discussing the backlash following the *Lawrence v. Texas* decision).

305. *See, e.g.,* Cheryl Wetzstein, *The Marriage of Many If Homosexuals Can 'Wed,' Will Polygamists Be Next?*, WASH. TIMES, Dec. 11, 2005, at A1, available at 2005 WLNR 19958673 (discussing the impact of *Lawrence v. Texas* on the push for a constitutional amendment to define marriage as a union between one woman and one man).

306. American constitutional law reformers appeal to the constitutional text to trump wayward practice and heresy in the same way that Reformation Protestants appealed to the Bible to complain about the wayward practices and heresies of the sixteenth century Catholic Church. This parallelism is not an

As Tom Merrill has noted, this tradition of appealing to rights secured by our ancient Constitution has roots in our English heritage.³⁰⁷ During the legendary battles of the early seventeenth century against the Stuart Kings, Englishmen claimed to assert fundamental rights dating back hundreds of years to the Magna Carta and the early periods of the formation of the common law.³⁰⁸ When English constitutionalism triumphed in the Glorious Revolution of 1689, the Revolution was called a revolution because there had been a coming around full circle in respect to enforcement of constitutional rights. The revolutionaries of 1689 believed they had restored ancient, original liberties, not that they had guaranteed new ones. Merrill himself says “Borkean originalism does not seem very conservative at all. It is more akin to the radical philosophy of the Seventeenth Century puritan revolutionaries, who argued for throwing off the ‘Norman Yoke’ by returning to the purity of the original Anglo-Saxon constitution.”³⁰⁹ I submit that in the ten lines of cases discussed above there is the same sense of appealing to constitutional texts or first principles guaranteeing ancient liberties to displace wayward conventional practices and precedents.

III. OTHER MAJOR OVERRULINGS EXPLICIT AND IMPLICIT

To avoid boring the reader, I have confined my discussion of our actual practice of appealing to text over precedent and practice to only the ten cases discussed above, decided in the modern era between 1937 and 2005. There are, however, many other famous overrulings, either explicit or implicit, which I could also discuss, as well as many other incidents of the Court rejecting practices that it thought unconstitutional. Perhaps the most famous of these other changes of position is the Supreme Court’s 180-degree reversal of their position on whether the criminal procedure guarantees of the Bill of Rights were incorporated by the Fourteenth Amendment to apply against the States.

In cases like *Palko v. Connecticut*³¹⁰ and *Adamson v. California*,³¹¹ the Court refused to incorporate the criminal procedure guarantees of the Bill of Rights against the States, but then in landmark rulings like *Mapp v. Ohio*,³¹² the Court did precisely that. There is neither a good common law constitutional nor a solid conventionalist justification of the incorporation revolution, but originalists like Hugo Black could justify incorporation as a restoration of the original meaning of Section 1 of the Fourteenth Amendment.

Many other examples exist of the Court implicitly or explicitly overruling itself on the most major constitutional issues. These include the follow-

accident. It is a reflection of the religious origins of our country.

307. Merrill, *Bork v. Burke*, *supra* note 4, at 509.

308. *Id.*

309. *Id.* at 523.

310. 302 U.S. 319, 328 (1937).

311. 332 U.S. 46, 54 (1947).

312. 367 U.S. 643, 660 (1961).

ing: 1) the Legal Tender Cases where *Hepburn v. Griswold*,³¹³ banning the issuance of paper money, was explicitly overruled one year later by *Knox v. Lee*,³¹⁴ upholding the constitutionality of the issuance of paper money; 2) the proper rule of decision under the Free Exercise Clause, where *Employment Division, Department of Human Resources of Oregon v. Smith*³¹⁵ in effect overruled a thirty-year-old line of Warren Court precedents first announced in *Sherbert v. Verner*³¹⁶ 3) the Taney Court's departure from the broad Marshall Court reading of the commerce power in *Gibbons v. Ogden*³¹⁷ in *Mayor of the City of New York v. Miln*,³¹⁸ 4) the Taney Court's departure from the broad Marshall Court reading of the Contracts Clause in *Charles River Bridge v. Warren Bridge*,³¹⁹ 5) the Fuller Court's departure in *Lochner v. New York*³²⁰ from the narrow reading of Section 1 of the Fourteenth Amendment adopted in the *Slaughterhouse Cases*,³²¹ and 6) the Rehnquist Court's rejection of twenty years of practice allowing upward departures by judges without aid of a jury in the *Apprendi*³²² line of cases, culminating with *United States v. Booker*.³²³

To these six additional instances of overruling, either explicit or implicit, might be added the four Supreme Court decisions in which "We the people"³²⁴ have overruled directly by constitutional amendment: *Chisholm v. Georgia*,³²⁵ *Dred Scott v. Sandford*,³²⁶ *Pollock v. Farmers' Loan & Trust Co.*,³²⁷ and *Oregon v. Mitchell*.³²⁸ In all four cases, substantial numbers of those advocating the constitutional amendments thought that the decisions being overturned were not merely bad as a matter of policy but were also wrong as a matter of constitutional interpretation. The rejection of these four precedents involved to some degree an effort to restore fundamental constitutional principles in the face of contrary Supreme Court precedent.

I submit that the cases, overrulings, and departures from practice discussed above suggest that it is common practice in the United States to appeal to the text of the Constitution or the principles that animate it to trump even long-established lines of precedent around which substantial reliance interests have formed. Contrary to the writings of Professors Strauss and Merrill, our actual practice is for the Supreme Court *not* to give important

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313. 75 U.S. (8 Wall.) 603, 626 (1869).
 314. 79 U.S. (12 Wall.) 457, 586 (1870).
 315. 485 U.S. 660 (1988).
 316. 374 U.S. 398 (1963).
 317. 22 U.S. (9 Wheat.) 1 (1824).
 318. 36 U.S. (11 Pet.) 102 (1837).
 319. 36 U.S. (11 Pet.) 420 (1837).
 320. 198 U.S. 45 (1905).
 321. 83 U.S. (16 Wall.) 36 (1873).
 322. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
 323. 543 U.S. 220 (2005).
 324. U.S. CONST. pmbi.
 325. 2 U.S. (2 Dall.) 419 (1793), *overruled by* U.S. CONST. amend. XI.
 326. 60 U.S. (19 How.) 393 (1856), *overruled by* U.S. CONST. amend. XIV.
 327. 158 U.S. 601 (1895), *overruled by* U.S. CONST. amend. XVI.
 328. 400 U.S. 112 (1970), *overruled by* U.S. CONST. amend. XXVI.

constitutional precedents all that much weight.³²⁹ It might thus be said of the Burkean writings of Professors Strauss and Merrill that “[a] theory that leaves such a huge unexplained gulf with practice is suspect.”³³⁰

IV. WHY THE COURT TALKS THE LANGUAGE OF COMMON LAW CONSTITUTIONALISM WHILE CONSTANTLY OVERRULING ITSELF IN RELIANCE ON THE TEXT

In his latest defense of conventionalism in the Constitutional Commentary Symposium,³³¹ Professor Merrill makes a somewhat less ambitious claim than his and Professor Strauss’s claim in their earlier writings that our actual practice is a practice of conventionalism. In his latest article, Professor Merrill argues that “[b]y some counts, 80 percent of the justificatory arguments in Supreme Court constitutional law opinions are grounded in precedent, and a very large proportion of cases are decided without any argument based on the text of the Constitution or any reference to historical evidence bearing on original understanding.”³³² Professor Strauss makes the same point saying that “in the day-to-day practice of constitutional interpretation, in the courts and in general public discourse, the specific words of the text play at most a small role.”³³³ Strauss goes on to discuss the priority of doctrine over text saying “[i]t is the rare constitutional case in which the text plays any significant role”³³⁴ and that “[t]he common law approach captures the central features of our practices as a descriptive matter.”³³⁵

Both Professors Merrill and Strauss, along with doctrinalist Charles Fried, are veterans of the elite world of the Solicitor General’s office. Having practiced before the Court, they know that lawyers usually argue to the Court from precedent, not text, and that the Court usually justifies its opinions rhetorically by citing and misusing precedents. All that this practice establishes, however, is that the rhetoric of Supreme Court briefs and opinions is largely rhetoric about caselaw. It does not establish that the Court is actually following precedents or being guided by them. The best positive theory of the Court’s actual behavior—as I believe Professor Merrill knows—is not that the Court practices common law constitutionalism or conventionalism but that, as Mr. Dooley and Professor Robert Dahl both claimed, it follows the presidential and senatorial election returns.

The New Deal overrulings, like the Rehnquist Court’s federalism revolution, are not positively explained as the Court spinning out the implications of its caselaw. They are positively explained as the Court responding

329. See *supra* notes 291-309 and accompanying text.

330. Merrill, *Bork v. Burke*, *supra* note 4, at 518.

331. Merrill, *Judicial Restraint*, *supra* note 4.

332. *Id.* (manuscript at 2, on file with author).

333. Strauss, *supra* note 8, at 877.

334. *Id.* at 883.

335. *Id.* at 888.

to the constitutional philosophies of Presidents Franklin D. Roosevelt and Ronald Reagan.

In launching these new doctrines, the Court sometimes lies about its precedents, as it did in *NLRB v. Jones & Laughlin Steel Corp.*³³⁶ and in *United States v. Lopez*,³³⁷ and it sometimes relies on the constitutional text to trump wayward practices that have grown up in the body politic or the caselaw as it did in *Engel v. Vitale*³³⁸ or *Erie Railroad Co. v. Tompkins*.³³⁹ But simply because the Court often uses the rhetoric of common law constitutionalism to rationalize what it is doing fails to prove that the Court is actually guided by common law constitutionalism or by conventionalism.

As I argued above, the Court has also often used the rhetoric of textualism or originalism in major cases to displace what it thought were wayward practices or precedents.³⁴⁰ If we are going to be good Burkeans and follow tradition, we must admit that the United States has a tradition of allowing the Court occasionally to upset the apple cart by appealing to the Constitution's text or first principles.

To be fair to Professor Merrill, I acknowledge that he does not always follow Professor Strauss in claiming that conventionalism is always what the Court actually does. Rather, he sometimes claims that conventionalism is what the Court ought to do.³⁴¹ Professor Merrill really thinks that our practice is one of a weak theory of precedent and that, if the Supreme Court were to follow a strong theory of precedent, it would be normatively desirable and would lead to more judicial restraint.³⁴² Nonetheless, the problem for Professor Merrill stems from the Court's long history of overrulings, some of which open huge gaps between the Court's interpretation of the Constitution and existing practice or precedent, meaning that Professor Merrill's own theory that the Court ought to be a conventionalist court diverges from our conventional practice.

We are not a nation that worships at the alter of the constitutional status quo, but we are instead more akin to those seventeenth-century puritans who wanted to throw off the Norman yoke and return to the purity of the original Anglo-Saxon constitution.³⁴³ As a rhetorical matter, the Supreme Court and the Solicitor General's office may talk the language of caselaw, but "We the People"³⁴⁴ elect the President who,³⁴⁵ together with the Senate, picks a Court to follow constitutional text and constitutional first principles.³⁴⁶ And, not infrequently, that leads the Court to use the text to get rid

336. 301 U.S. 1 (1937).

337. 514 U.S. 549 (1995).

338. 370 U.S. 421 (1962).

339. 304 U.S. 641 (1938).

340. See *supra* notes 291-309 and accompanying text.

341. *Merrill, Burke v. Bork*, *supra* note 4, at 515-23.

342. *Id.* at 518-25.

343. See *id.* at 523.

344. U.S. CONST. pmbi.

345. *Id.* amend. XII.

346. *Id.* art. II, § 2.

of wayward practices, heresies, and court decisions that have become entrenched upon it.

V. CONCLUSION

In conclusion, a good Burkean living in the American constitutional culture should admit that it is not our practice to follow precedent on any constitutional matter of any significance. Burkean Americans then should be textualists and should follow the document, not the doctrine. Our actual practice in this country, since 1937, is one of repeated overruling and disregarding precedents on every major constitutional issue other than abortion. In fact, our nation is neither a common law constitutionalist nor a conventionalist nation, although some distinguished and eminent lawyers who have worked in the Solicitor General's office may be under the mistaken impression that we do.

We live in a nation where our Supreme Court follows the presidential and senatorial election returns and frequently overrules major precedents, invoking the constitutional text as its reason for doing so. The fact of the matter is that for the American people, in our constitutional tradition, the text retains a powerful ability to disturb and displace wayward practices and heresies. Our religious and puritan origins as a people may help explain why we are so prone to periodic fundamentalist and textual revivals where wayward practices and heresies are tossed aside.

