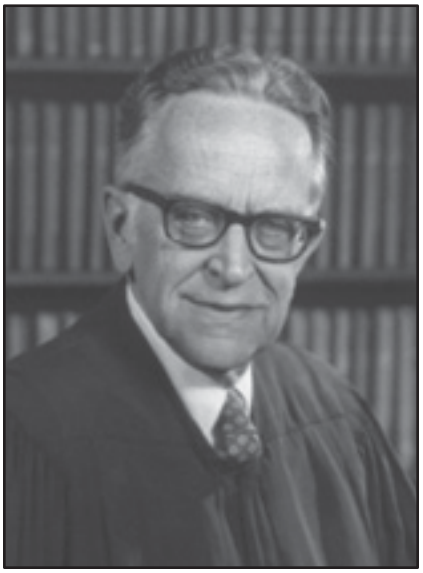
CHAPTER 5

PUTTING PRECEDENT IN ITS PLACE

America's Doctrinal Constitution



HARRY BLACKMUN (*left*) AND WILLIAM REHNQUIST (*right*) (1976).

In 1973, Justice Blackmun authored the majority opinion in Roe v. Wade and Justice Rehnquist dissented. In 1992, the two again squared off, as the Court in Planned Parenthood v. Casey pondered not merely the specific scope of abortion rights but also the proper weight to be given to precedent. Although Rehnquist by this time had become chief justice, he once again found himself in dissent.

When not spinning into paradox,* self-referential statements often bring matters into sharp focus. So it is with the Constitution, whose various references to itself reveal its essence and situate us to see how and by whom it should be interpreted and executed.

The Preamble proudly proclaims that "this Constitution" was ordained and established in the late 1780s via uniquely democratic popular action. This opening proclamation signals the fundamentality of popular sovereignty and the aptness of interpreting "this Constitution" not merely as a formal written text but also as an embodied popular deed. (Hence Chapter 2's interpretive approach.) Article I explicitly reminds us of Congress's special role in effectuating powers "vested by this Constitution" in other branches. (We shall return to this reminder in Chapter 9.) Article II obliges the president to take a uniquely personal oath to "preserve, protect, and defend the Constitution" to "the best of my Ability"—a poignant reminder that our system depends upon the willingness of specific individuals to pledge fidelity to the grand constitutional project. (We shall study the uniquely personal role of America's first president in Chapter 8 and shall ponder constitutional oaths more generally in Chapter 11.) Article V tells us that each amendment forms "Part of this Constitution." Precisely because each clause, section, article, or amendment is merely a "Part," we must often step back and consider the document as a whole. (This was the animating idea of Chapter 1.) Article V's textually interrelated language that each amendment is "valid to all Intents and Purposes" bids us to heed the intergenerational nature of "this Constitution" and to ponder how later amendments harmonize with the original text and with earlier amendments. (These themes surfaced briefly in Chapter 4 and will resurface in Chapters 6, 7, 10, and 12.) The Ninth Amendment's reference to "the Constitution" confirms yet another critical fact about the document: By its own admission, the text contains a possibly incomplete enumeration of rights. (This fact lay at the heart of Chapter 3.)

As indicated by the parentheticals in the previous paragraph, every

* For example, this footnote is a lie.

chapter of this book on America's "unwritten Constitution" can be seen as a response to one or more key clauses in which the written Constitution revealingly refers to itself.

This chapter is no exception. As we shall see, the Constitution features no less than three major references to itself in specific connection with the judiciary. This triad of self-referential clauses will help us answer some basic questions about the proper general relationship between the written document and the judicially crafted—unwritten—doctrine. In particular: Should doctrine ever go beyond the document? Should doctrine ever go against the document? How can we tell the difference between these two situations? When it becomes clear to a court that previous judicial doctrine has mangled the true meaning of the terse text, what should the court do?

Although the three clauses in which the text speaks of itself—of "this Constitution"—in specific relation to judges furnish broad guidance concerning these big questions, the clauses leave various smaller issues underspecified. (For example, what should a lower court judge do if Supreme Court cases from different eras point in different directions? Should a lower court judge pay more heed to what the Supreme Court has said in the past, or to what it would likely say in the case at hand?) In addition to examining what the text has to say about itself in regard to judicial case law, we shall thus once again venture beyond the written Constitution to consider how something outside it—here, judicial precedent—intertwines with the document in a way that draws strength from it and in turn strengthens it.

"this Constitution"

"THIS CONSTITUTION…shall be the supreme Law of the Land." "The Senators and Representatives…, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."

With this pair of self-referential sentences in the closing paragraphs of Article VI, the Constitution crowns itself king. Judges and other officials must pledge allegiance to the document. These crowning words recapitulate the Constitution's basic architecture and enactment history. In his 1803

opinion in *Marbury v. Madison*, John Marshall declared that the Constitution's supremacy would have arisen even without specific language because of the very nature of the document as approved by the American people: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation."

Of course, any document can claim to be supreme law. Something more is needed to make it so. That something is social convention. Underpinning the Constitution's self-proclaimed supremacy is the basic social fact that Americans generally accept the document's pretensions. Ordinary citizens view the Constitution as authoritative, and power-wielding officials everywhere take solemn oaths to support the Constitution, as commanded by the document itself. In particular, Supreme Court justices take these oaths, and in the pages of the *United States Reports* the justices regularly pledge allegiance to the document.

It's worth pausing to let all this soak in. Any text that self-referentially asserts its own authority can seem entirely circular to a skeptic standing outside the orb of the text's say-so. If the written Constitution asserted its own legal supremacy, while *U.S. Reports* asserted the supremacy of *U.S. Reports*, we would have two tight circles of seemingly conflicting authority. If, in addition, millions of Americans accepted the Constitution's legal pretensions, while millions of others pledged ultimate allegiance to *U.S. Reports*, then America's situation would be parlous. At the extreme, this is the stuff of civil war. But in fact this is not America's situation. *U.S. Reports* does not assert its supremacy over the written Constitution. On the contrary, case law asserts its own subordination to the Constitution, which in turn envisions the Supreme Court playing an important role in interpreting and implementing the text. In principle, at least, America's supreme law and America's Supreme Court reinforce each other.

BY PROCLAIMING ITSELF AMERICA'S SUPREME LAW, the written Constitution marked itself, and was immediately recognized in actual practice, as decisively different from its predecessor document, the Articles of Confederation. Although the Articles contained several self-referential passages, the document did not even clearly describe itself as a single holistic text as distinct from an assortment of discrete "Articles." More important,

the Articles never described themselves as "law," much less as supreme law. Nowhere did the Articles describe the Confederation Congress as a "law maker" or a "legislature"—even as the Confederation document referred a dozen times to state "legislatures" or state "legislative" power. In truth, Congress under the Articles was less a legislature than an international diplomatic and military council, loosely akin to the modern-day United Nations Security Council and the NATO North Atlantic Council.

Perhaps most important of all, the Articles of Confederation contained no language whatsoever obliging any judge in America to take an oath to support the Articles or to treat the Articles as ordinary law in a courtroom, much less as supreme law applicable in courtrooms even against a state government seeking to act in contravention. Moving beyond the text to actual practice, we find that state judges did not pledge allegiance to the Articles; nor did these judges routinely enforce the Articles if their home state legislators—whose enactments were generally recognized as binding law—directed a different outcome.

THE CONSTITUTION'S REFERENCE TO ITSELF as "supreme law" in Article VI textually interlocked with an earlier self-reference in the document's Article III, its Judicial Article. Both articles specified the hierarchy of law in America and did so in virtually identical language. Consider first the text of Article III, which extends the federal judicial power to lawsuits arising under "this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." Now, compare Article VI, which specifies America's supreme law as comprising "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States."

This textual interlock between Articles III and Article VI was no mere coincidence. The Philadelphia framers purposefully chose matching language to make clear that the supreme law of the Constitution would come before federal judges in garden-variety lawsuits, either at trial or on appeal from state court rulings. Thus, the clauses referring to "this Constitution" in Article III and the closing paragraphs of Article VI did not simply float freely in constitutional space; rather, they formed a tight textual triangle,

with two vertices positioned in close Article VI proximity and the third located in Article III.[1]

Here is how the triangle worked: Immediately after specifying the hierarchy of America's supreme law, Article VI added that all state judges would "be bound" by this supreme law, notwithstanding any contrary command in a state law or even a state constitution. In the next sentence, Article VI went on to oblige every judge, along with other state and federal officials, to swear a personal oath to support "this Constitution." Lest state judges fail to enforce the Constitution properly—either by willfully defying the Constitution, and thus dishonoring their oaths, or by simply misconstruing the document in good faith—Article III's language stood as a backstop to Article VI, ensuring that federal courts could review and, if necessary, reverse any state court decision involving a dispute about the meaning of "this Constitution." This tight triangle of self-referential provisions thus made clear that the Constitution would operate not merely as law, not merely as supreme law, but also as everyday law—as courtroom law that could be invoked by ordinary parties in ordinary lawsuits.

The Founders understood that grand constitutional questions could arise in the humblest of places. Imagine an agreement between two small farmers, in which Jones promises to sell five acres to Smith. Before money changes hands and the deed is transferred, Jones gets a better offer and wants out of the deal. And he has an argument: Smith has recently arrived from England, and state law forbids foreigners from owning real estate. But Smith has a counterargument: Congress has enacted an immigration law giving all lawful aliens the right to hold real property despite any state rule. But is this federal law constitutional? Does it properly fall within the powers of the federal government? In a suit brought by Smith against Jones, these are the constitutional issues a court would need to address to decide whether Smith or Jones should win the case. These momentous questions, pitting state against federal power, could arise in either state or federal court, at trial or on appeal, and would need to be decided by the court even if neither the state nor the federal government formally intervened as a party to the lawsuit, and indeed even if neither government bothered to file an amicus brief.

But exactly what would and what should happen when the Constitution

goes to court in this hypothetical constitutional case, or in any other case "arising under this Constitution"? How do and how should judges turn the document into workable court-law—that is, doctrine?

"The judicial Power"

VIA ITS TIGHT TRIANGLE OF self-referential clauses dealing with "law" and "judges," the Constitution envisioned that in deciding cases arising under the supreme law of the land, judges would offer interpretations of the document's meaning, give reasons for those interpretations, develop mediating principles, and craft implementing frameworks enabling the document to work as in-court law. These interpretations, reasons, principles, and frameworks are what lawyers call *doctrine*.

The basic need for doctrine arises because the terse text is and must remain terse. Concision is constitutionally constitutive. Had America's written Constitution tried to specify every detail, it would have lost its strength as a document that could be voted on in the 1780s—and that could thereafter be read and reread by ordinary Americans. (This was John Marshall's profound insight in *McCulloch v. Maryland*, where he declared that the Constitution could not properly "partake of the prolixity of a legal code," because if it did, it would "never be understood by the public.") Because terseness is necessary, the document is importantly and intentionally underspecified. Judicial doctrine helps fill in the gaps, translating the Constitution's broad dictates into law that works in court, in keeping with the vision of Article III.

ARTICLE III "JUDICIAL POWER" comprises at least five distinct components.

First, "judicial Power" encompasses the power of constitutional interpretation and exposition—the power of judges to decide for themselves and to declare what the Constitution as law means. As Marshall famously put the point in *Marbury*, "It is emphatically the province and duty of the judicial department to say what the law is."

Marshall here built his church on the solid rock of the word "jurisdiction," a word that explicitly appeared in the Judicial Article as a facet of

"judicial Power." Specifically, the Judicial Article vested "judicial Power" in federal courts; declared that this very same "judicial Power" had to extend to all legal and equitable cases arising under "this Constitution"; and then specified that the Supreme Court would generally have "appellate Jurisdiction" in these cases. Thus, "judicial Power" encompassed "Jurisdiction." "Jurisdiction" in turn encompassed the power to speak the law. As Alexander Hamilton, writing as Publius, reminded readers in *The Federalist* No. 81, the very word "jurisdiction" is "a compound of JUS and DICTO, juris, dictio, or a speaking or pronouncing of the law." Accordingly, Article III authorized any federal court hearing *Smith v. Jones* to declare its own answer to the relevant constitutional questions raised by the case.

A second and hugely significant component of "judicial Power" is the power not merely to interpret and declare the Constitution's meaning, but to implement the Constitution. This component involves taking the abstract meanings of the Constitution and making them work as actual rules of decision in the courtroom itself and in the real world beyond the courtroom. For example, in *Smith v. Jones*, what specific test should a court use to decide how broadly to construe the scope of congressional power under the Constitution? Who should bear the burden of proving what in the courtroom? What kind of evidence should count in favor of or against various factual assertions made in court? In order to decide the case at hand, a court will typically need to develop a set of tools for its own use and for the use of lawyers, litigants, and lower courts. These tools translate the core meanings of the Constitution into sub-rules, formulas, and tests that can be applied in the courtroom. Among other things, these various sub-rules and tests are necessary so that a court may go beyond abstract opining on the meaning of the Constitution and actually decide the case at hand.[2]

This need to decide also brings into view a third component of "judicial Power"—the power to adjudicate a proper constitutional case and to award a binding judgment to the prevailing party. In our hypothetical, a federal court would have the power to rule in favor of either Smith or Jones and to order that the disputed property be disposed of accordingly. So long as a lawsuit is properly before a federal court—that is, so long as the court has "jurisdiction" in the broadest sense of the word, jurisdiction as provided for in the Judicial Article and appropriate implementing legislation—the

court's rulings must be respected by private citizens and enforced by public officials, even if those citizens and officials believe (quite plausibly or even correctly from a God's-eye point of view) that the court has erred and the wrong party has won. In this sense, jurisdiction and "judicial Power" encompass the judiciary's right to be wrong, its right to err and nevertheless have that error be honored as the law of the case. This is what lawyers call *res judicata*, an "adjudicated thing," the law governing the parties to the case. Thus, a federal court hearing *Smith v. Jones* could definitively determine the status of the disputed acreage as between these two men.[3]

Beyond a court's legal authority to bind the parties in the case at hand, there exists a fourth component of "judicial Power," encompassing the authority to lay down a decisional precedent that will be entitled to a certain amount of legal weight in later cases. This is what lawyers call *stare decisis*. But how much weight should precedent carry? What kind of weight? Alongside the power to set precedents for the future, the judiciary also has the power to overturn past precedents. When and how should it exercise this power? We shall return to these momentous questions at the conclusion of this chapter.

Fifth and finally, the "judicial Power" encompasses authority to fashion traditional judicial remedies for the violations of legal rights. In our hypothetical, if a court rules for Smith, it will need to decide whether Smith should receive the land itself or merely money damages. If the latter, the court must also decide whether the damages should aim simply to compensate Smith for his loss or also to penalize Jones for his breach.

Although the written Constitution says little about remedies, a powerful regulatory ideal and background legal principle (rather like the precept that no man should be a judge in his own case) prevailed at the Founding: For every legal right there should be a judicial remedy. Just as Blackstone's *Commentaries* had highlighted the *nemo judex in causa sua* principle, so, too, the *Commentaries* emphasized the remedial imperative: "[I]t is a general and indisputable [!] rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." Several Revolutionary-era state constitutions featured similar language in their bills of rights, and Madison/Publius invoked the principle—"But a right implies a remedy"—in a passage whose very casualness indicated the uncontroversial nature of the proposition.[4]

In *Marbury v. Madison*, Marshall waxed eloquent on the point. He began as follows: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford him that protection." After quoting Blackstone's "indisputable" rule and invoking additional language from the *Commentaries*, Marshall concluded with a flourish: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

In short, the general authority of federal judges to fashion proper judicial remedies is a core feature of America's Constitution, whether we locate this remedial authority of judges (and the corresponding right of litigants to judicial redress) in the explicit phrase "judicial Power" or treat it as an implicit element of our unwritten Constitution in the spirit of Blackstone and the Ninth Amendment.

"Law and Equity"

WITH THIS FIVE-PART FRAMEWORK in place, let us now revisit the major Warren Court decisions canvassed in the previous chapter. Because these famous decisions have laid the groundwork for so much of modern constitutional jurisprudence, they furnish a particularly good assortment of case studies to illustrate the general usefulness of our five-part framework and the kind of constitutional insights it makes possible. Within each of the big areas addressed by the Warren Court—segregation, incorporation, free speech, religious freedom, criminal procedure, and voting rights—we shall see that some of the justices' key moves reflected considerations beyond pure constitutional interpretation. Questions of practical implementation and precedent management also figured prominently in these domains, as did subtle issues of remedial effectiveness.

BROWN AND *BOLLING* CORRECTLY UNDERSTOOD and honored the document's core meaning. Equal meant equal, and citizenship meant citizenship. Thus, on May 17, 1954, the Court read the Constitution aright and said what the law was. As cases about constitutional interpretation—about the

meaning of the written Constitution and about the judiciary's province and duty of law declaration—*Brown* and *Bolling* were thus easy as pie.

The *Brown* opinion also famously said that, at least in the field of education, separate was "inherently unequal." Inherently? If understood as a claim about the meaning of the Constitution, this sentence might seem confused. Separate does not mean "unequal" in any obvious dictionary sense. Nor did the Reconstruction Republicans believe that separate was always and everywhere unequal as a matter of logic.

But if *Brown*'s famous sentence is understood as an effort to *implement* rather than simply to *interpret* the Constitution, the sentence makes perfect sense. In order to make the equality rule—the Constitution's true meaning—effective in courtrooms and in the world beyond courtrooms, the Supreme Court had to fashion implementing sub-rules to guide lawyers, lower courts (both state and federal), school administrators, state legislators, and so on. One possible implementing sub-rule could have simply required black plaintiffs in each and every case to prove that separate was unequal on the facts at hand. But given that separate was almost always unequal in the real world of 1954, would this litigation burden have been fair? Would this sub-rule have vindicated the Blackstone/*Marbury* remedial imperative? After all, this sub-rule would have imposed serious and not-fully-compensable litigation costs and time delays on those who, at the end of the day, were highly likely to prevail in court based on the actual history and practice of Jim Crow. This sub-rule would also have perversely encouraged state officials to continue to sham and wink and frustrate the real meaning of the Constitution. And would such a sub-rule have given strong guidance and cover to lower courts—especially state courts operating under pressure from segregationist state lawmakers?

The terse text did not—and could not realistically be expected to—answer all these second-order issues about how to implement the equality norm in the particular milieu of mid-twentieth-century Jim Crow. The written Constitution simply laid down the civil-equality principle and entrusted courts (among others) with the task of making that principle real in court and on the ground as the genuine law of *the land*. The rule announced on May 17, 1954—that de jure segregation would be presumed unequal in light of the actual history of Jim Crow—was a thoroughly proper way for the Court to discharge its duty of constitutional implementation.

Why, we might wonder, did *Brown* limit its ruling to the field of education? As a matter of constitutional meaning, the Court was right to note that the Fourteenth Amendment equality mandate applied only over a limited domain. (Recall, for example, that the words and the original public meaning of section 1 of the amendment did not apply to political rights, such as voting or jury service.) But nothing in the Fourteenth Amendment's idea of equal citizenship distinguished between a racial caste system in public schools, on the one hand, and a racial caste system in public beaches or public transportation, on the other.

The *Brown* Court nevertheless dealt only with education: "*Plessy v. Ferguson* involv[ed] not education but transportation.…[In 1950] the Court expressly reserved decision on the question whether *Plessy* v. *Ferguson* should be held inapplicable to public education. In the instant cases, that question is directly presented.…We conclude that *in the field of public education* the doctrine of 'separate but equal' has no place."[5]

One case at a time is an appropriate way for "judicial Power" to operate. It would also have been permissible for the *Brown* Court to have fashioned a more sweeping opinion that made clear that the Court's core idea—that Jim Crow was simply not equal—of course applied outside education as well. Alongside the cautious sensibility that judges may and often should simply decide one case at a time, there exists a background first principle—one that went without saying for the Founders and was implicit in the words "judicial Power"—that judges must decide like cases alike. If a caste system in transportation was really no different from a caste system in education, then the same constitutional rule that applied in one domain applied as well in the other.

Having opened the door in *Brown* to the possibility that education might be unlike transportation, the Warren Court correctly closed that door in a 1956 case involving Alabama buses, *Gayle v. Browder*. But the *Gayle* Court acted in a two-sentence ruling that offered no real explanation. The first sentence simply announced the result ending bus segregation, and the second sentence merely cited *Brown* and two post-*Brown* cases (neither of which involved transportation). This was problematic. Judicial doctrine and judicial power require judges to offer carefully reasoned explanations for their rulings. Having opted to write a 1954 *Brown* opinion that did not simply say "equality, equality, equality," but that seemed to

qualify the scope of the Court's holding by also saying "education, education, education," the Warren Court over the next several years failed in its declaratory and implementational tasks of making crystal clear to lawyers, lower courts, school administrators, state legislators, and the rest of the citizenry what the legally operative principles truly were and why.[6]

Two factors, one backward-looking and one forward-looking, explain this lapse. First, had the Court in 1954 simply said "equality, equality, equality" in all realms of public citizenship (political rights excepted), the justices would have had to make clear that the Court had been wrong from day one in *Plessy*. In addition to striking down in a single day hundreds if not thousands of federal, state, and local segregation statutes, ordinances, and policies, the Court would have had to openly overturn its own high-profile precedent. As shall become clearer later in this chapter, the Court has at times been loath to admit its own past errors. Although most people today remember *Brown* as having formally overturned *Plessy*, in fact the Court did no such thing in May 1954. The overruling of *Plessy* became evident only in retrospect (in the cryptic *Gayle* case).

Second, the *Brown* justices knew that massive remedial and implementational challenges lay ahead in making the Court's ruling and the underlying constitutional equality principle truly the law of the land on the ground. Had the Court in 1954 simply said "equality, equality, equality," it would have been clear that state laws prohibiting interracial marriage were also unconstitutional. This is indeed what the Constitution, properly read, means. Equal means equal, and legally imposed racial separation in this domain was not truly equal. In the 1967 case of *Loving v. Virginia*, the Court said just that, in an opinion authored by Warren himself.

But when Warren said this in June 1967—at the dawn of the now-famous "summer of love"—bans on interracial marriages were relatively rare and were even more rarely enforced with vigor and efficacy. By 1967, Congress and President Lyndon Johnson had jumped into the fray in full support of *Brown*'s vision, via landmark civil rights and voting rights laws. By 1967, blacks, who had long been disfranchised in massive numbers in some parts of the South, were finally being allowed to vote, and could count on fair apportionment rules after the next census. And by 1967, Martin Luther King Jr. had delivered his iconic speech celebrating an interracial dream

of whites and blacks joining hands. America had indeed witnessed and celebrated the interracial joining of hands that was visible at the Lincoln Memorial at the very moment King spoke these words.

In 1954, however, resistance to interracial dating was intense, widespread, and politically powerful. Indeed, this resistance underlay much of Jim Crow in education: Many white parents did not want their fair-skinned girls to go to integrated schools where they might socialize (and perhaps become romantically involved) with dark-skinned boys. Had Earl Warren written *Brown* in a manner that clearly entailed the invalidity of miscegenation laws, he would have thereby made the task of ensuring actual compliance with *Brown* all the harder in the difficult days ahead. If the judicial province and duty is not merely to say what the law is, but also to make the law real, then *Brown*'s narrowness becomes easier to justify.

A SIMILAR STORY CAN BE TOLD about the Warren Court's crusade to apply the Bill of Rights against the states. Here, too, the Court aced the big issue of constitutional meaning. Here, too, implementation issues complicated matters.

The idea of applying all or virtually all of the Bill of Rights against the states was at the very heart of the Fourteenth Amendment's text as understood by the men who drafted and ratified it in the 1860s. The challenge facing the justices was how best to fashion plausible second-order sub-rules to implement the amendment's central meaning. The text and history did not dictate one and only one way of "incorporating" fundamental rights. As we saw earlier, at least five different pathways to incorporation plausibly presented themselves. Had the Warren Court rejected all five approaches—as indeed the Court did for much of the pre-Warren era—then the justices would deserve our scorn for their implementational faithlessness and their interpretational stupidity. But when a court chooses one workable approach among the handful of approaches that careful and honest interpretation leave open to it, that court is properly discharging its implementational power and duty.

As with its Jim Crow case law, the most telling criticism of the Warren Court's incorporation case law is that the justices failed to explain and expound with sufficient care the relevant constitutional principles. Just as the

Court did not make *Brown*'s reach crystal clear until the 1967 miscegenation case, so, too, the Warren Court failed to acknowledge the full sweep of incorporation. Not until decades after Warren's departure did the justices rule, in the 2010 case of *McDonald v. Chicago*, that the same ground rules that applied to First Amendment rights, Fourth Amendment rights, most Fifth Amendment rights, Sixth Amendment rights, and Eighth Amendment rights also applied to Second Amendment rights. (Fully a half-century after the incorporation project took flight, America is still waiting to hear what the Court has to say about Fifth Amendment grand-jury rights and Seventh Amendment rights.)

THE BASIC DISTINCTION between judicial interpretation and judicial implementation also brings the issues raised by *New York Times v. Sullivan* into sharp focus. The state of Alabama was trying to use its civil libel law to squelch political discourse in general and criticism of Alabama officialdom's race policies in particular. The state had imposed crushing liability—half a million dollars of punitive damages—upon *The New York Times* for having published a scathing political ad about state officials. Alabama law, however, purported to punish the *Times* not for the opinions expressed in the ad but for the ad's factual inaccuracies. This was a sham. The ad's slight misstatements of fact were trivial. (For example, the ad had criticized state authorities for having suppressed peaceful civil rights protesters, but had mistakenly asserted that the protestors had sung "My Country 'Tis of Thee." In fact, they had sung the national anthem.)

In striking down Alabama's gambit, the *Times* Court got the big issue of constitutional meaning absolutely right: The Constitution clearly entitles Americans to freely express their political opinions and to harshly criticize government servants in the process. The Sedition Act of 1798 had mocked this basic right, and Alabama's libel law eerily echoed this old act, which had been long discredited in the court of American history and public opinion. Like Alabama libel law, the 1798 act had purported to target only "false" statements, but both laws had operated to stifle core expressions of political opinion. (Under both legal regimes, disparaging remarks were typically presumed false, malicious, and injurious—a series of galloping presumptions that threatened free political discourse.)

Equipped with a sound understanding of the Constitution's meaning, the *Times* Court proceeded to fashion a series of implementing rules to ensure robust political discourse. Although the Constitution does not value false assertions as such, some falsity needs to be protected as a practical matter. In *Sullivan*'s words, truly free speech needs "breathing space." Without this space, citizens might hesitate to speak, chilled by the prospect of punishment or liability for innocent mistakes of fact that invariably pepper public discourse in a well-functioning democracy—a prospect exemplified by the facts of *Sullivan* itself and by America's earlier experience under the Sedition Act.

Thus, *Sullivan* held that no libel judgment could issue unless a publisher had acted with "actual malice" by having knowingly propagated a falsehood—having flat-out lied—or by having displayed a reckless disregard for the actual truth of the matter. Plaintiffs would need to show this "actual malice" by evidence possessing a "convincing clarity," and the *Sullivan* Court suggested that judges would keep juries on an especially tight leash to ensure that the evidence at trial met this heightened standard. Also, no plaintiff could prevail without evidence that he was the specific target of the libel. (In *Sullivan*, the ad had not named any Alabama official in particular, but had sweepingly condemned the oppressive state power structure in general.) These rules would apply to all libel suits brought by "a public official against critics of his official conduct." Later cases expanded *Sullivan* to encompass all "public figures," a category that at its core included all notable public servants and presumably all public office seekers, and that swept in other persons insofar as their activities were matters of legitimate public concern and commentary.[7]

Almost none of these specific sub-rules could be found in or logically deduced from the written Constitution. These were not rules of constitutional meaning; they were sub-rules of constitutional implementation. As an ensemble, they formed one sensible way, albeit not the only imaginable way, of ensuring that freedom of expression would actually prevail in court and on the ground. As such, this cluster of doctrinal rules fell squarely within the proper "judicial Power" of the Supreme Court.

Precisely because several of *Sullivan*'s doctrinal sub-rules were merely implementational, other branches of government may today properly pro-

pose alternative structures that might be equally effective or even more effective in protecting free expression overall, though less protective in certain implementational details. Imagine, for example, a congressional statute that tightly caps punitive damages for libel (thereby providing more financial protection for printers), but allows persons falsely defamed to recover token money damages and declaratory judgments that disparaging publications are false without having to prove actual printer malice (thereby providing more reputational vindication for libel victims). Had the Court itself tried to announce such rules for federal libel suits, perhaps the justices' efforts to restrain jury damages might have set off Seventh Amendment alarm bells about judges improperly limiting juries. More generally, the Court might have worried that it was democratically unseemly for unelected judges to limit the domain of juries. Congress, however, has long been understood to have broad legal authority to limit juries in the process of creating new "equitable" statutory systems replacing traditional common-law causes of action; elected members of Congress also enjoy a stronger democratic mandate to limit jury power. Thus, even though our hypothetical congressional statute in some ways would offer publishers less than *Sullivan* does, if Congress actually were to enact such a law the Court should not reject it out of hand, if indeed it would protect the core of the First Amendment as well as—or perhaps even better than—the Court was able to do acting purely on its own steam in *Sullivan*.

IN THE REALM OF RELIGIOUS RIGHTS, the Warren Court once again aced the question of constitutional meaning—affirming full religious liberty and equality against both state and federal officials—and then sensibly fashioned implementing rules to make that meaning a reality. Alas, post-Warren cases went further, laying down troubling doctrinal sub-rules organized around a poorly defined metaphor of "separation of church and state." Some of these sub-rules led to outlandish results. More recent cases have properly trimmed back some of these sub-rules, thereby returning America to the more sensible approach of the Warren Court itself.[8]

Recall that in two early 1960s cases, *Engel v. Vitale* and *Abington v. Schempp*, the Warren Court struck down organized worship services in the public schools in situations where public employees had either com-

posed or blessed an official government prayer. In the 1985 case of *Wallace v. Jaffree,* by contrast, the post-Warren Court repeatedly invoked *Engel* and *Abington* to strike down a state law mandating a moment of classroom silence that enabled students to pray individually or simply to engage in quiet contemplation. Unlike the governments in *Engel* and *Abington*, however, the state in *Wallace* had neither written nor endorsed any kind of prayer whatsoever. Nor had the state separated children along religious lines or forced any student to opt out or stand apart. Agnostic children were free to sit at their desks in this silent moment and think about baseball. More subversive kids were even free to silently indulge atheist, heretical, or anti-government thoughts.

In principle, a moment of silence was one way to communicate that the public schools aimed to be religiously neutral, not antireligious—to reach out to include those who had experienced *Engel* and *Abington* as assaults on and insults to their religious identities. The silent moment was meant to accommodate observance in a manner that was nevertheless wholly neutral and nonsegregative.

Some of the *Wallace* Court's hostility to moments of silence may be explained by understandable—though not admirable—institutional defensiveness. *Engel* and *Abington* provoked massive popular backlash, and in many places outright defiance of the Court's rulings. The Court responded by defending its turf, and in the process, overreacting.

More generally, post–Warren Court religion law subtly shifted away from religious equality toward separation as an organizing concept. The separation concept had been visible even before the Warren Court. The 1947 school-bus case, *Everson v. Board of Education*, had famously invoked Jefferson's 1802 metaphor of "a wall of separation" between church and state. This metaphor became an increasingly common trope in later opinions, appearing in roughly twenty Court cases in the second half of the twentieth century. But "separation" was an ambiguous concept, susceptible to profound misinterpretation and perversion of the proper principles at stake.[9]

Consider the "separation of powers." One version of this separation simply means that election to one branch of government does not automatically entitle the winner to hold a position in a different branch of govern-

ment. Thus, in America—unlike England—the person elected to lead the legislature does not thereby become the chief executive. But a stronger version of separation of powers is also easily imaginable: Membership in one branch of government *disqualifies* the member from holding a position in a different branch of government. This, too, is part of the American Constitution: The incompatibility clause of Article I, section 6, prohibits any sitting member of Congress from holding a federal executive or judicial office.

Now consider analogous issues raised by the so-called "wall of separation between church and state." Under a sensibly modest version of this metaphor, no church official would automatically be entitled to sit in government. Thus, in America—unlike England—an Anglican archbishop is not automatically a member of any official legislative body, such as the "Lords Spiritual." But under a stricter version of separation, the fact that a person is a clergyman might actually disqualify him for a position in government.

Jefferson himself at times leaned in this anticlerical direction, and most states in the Founding era did indeed embrace formal disqualifications of clergymen. However, the modern Court has made clear (in a unanimous 1978 decision, *McDaniel v. Paty*) that such discrimination against religious officials is unconstitutional—a profound violation of proper principles of religious liberty and equality.

But so long as some justices use the metaphor of separation as their polestar, it becomes easier to think that rules like the one excluding the clergy are permissible, and perhaps even required, rather than being obvious affronts to America's post-Reconstruction Constitution of liberty and equality for all.

To return to the school system for a handy hypothetical, suppose that the government decides to give every child a computer so that, truly, no child will be left behind. In this hypothetical government program, every child attending public schools receives this computer, as does every child who attends a private school that is either aggressively secular or merely religiously indifferent. But what about children who attend private religious schools—schools whose curricula are otherwise comparable to the private nonreligious schools but that also add religion to the educational experience? *May* children at such schools receive the computers? *Must* they?

Anyone whose organizing metaphor is separation might be inclined to answer no to both questions. Thus, several post–Warren Court cases from the mid-1970s, when talk of Jefferson's wall reached its peak on the Court, actually held that this sort of discrimination against religious schools was not merely constitutionally permissible but constitutionally required. Fortunately, over the past decade the Court has returned to its senses, overruled several of these cases, and begun to see and say clearly that of course private religious schools should not be treated worse than otherwise comparable private nonreligious schools. The schools should be treated equally, as should the children. So long as a private school meets proper educational standards for teaching the basic 3 Rs and so on, it is simply none of the government's business whether religion is taught pervasively or in a special part of the curriculum or whether the kids are praying in school-sponsored ways.[10]

The proper touchstones are religious liberty and equality, not separation as such. If everyone else is receiving a government benefit, then so must religious folk—not because they are religious but regardless of whether they are religious. A private secular academy should never lose its government benefits merely because it later decides to add a daily prayer to its classroom regimen. Such a tax on prayer—for that is what a funding cutoff would be—would constitute an obvious violation of the ideals of liberty and equality at the heart of the Fourteenth Amendment.

To see the same point in the context of public-school education—the context that generated *Brown*, *Bolling*, *Engel*, and *Abington*—note that while governments may not properly organize prayer, *private citizens may*. If a student-organized and student-run stamp club is allowed to meet in a classroom after school, as is a student chess club, a student baseball-card club, and any other student club, then a student-organized and student-run Bible study must be allowed equal access. The key concept is not that religion must in every way be walled out of and separated from school space, but rather that religious students must be treated equally with all others. In short, the watchword is not "separate"—but "equal."

THE PROBLEM WITH THE POST-WARREN COURT'S doctrine governing church and state was not that various sub-rules were prophylactic and overprotective. As we have seen, the same could be said of *Brown*'s sub-

rule that de jure segregation would be presumed unequal and improper; of *Sullivan*'s ensemble of sub-rules designed to give breathing space to free speech; and perhaps even of the virtually irrebuttable presumption in the incorporation cases that any right in the Bill of Rights was *ipso facto* fundamental.[11]

But in these other areas, arguable overprotection of core rights did not threaten any counterbalancing citizen rights. Even had *Sullivan* doomed all libel law, the Constitution does not require that libel law exist; a state would be free to eliminate all libel law. Also, in the areas of segregation, expression, and incorporation, the Court's opinions signaled that the justices understood the Constitution's central meaning and were thus building implementational rules on a sound interpretational foundation.

The post-Warren Court's deployment of separationist doctrine regarding church and state was different. At times, the Court seemed to misread the Constitution's main meaning and to elaborate a vision of separation for its own sake rather than a vision of religious freedom and equality. Because of the justices' misunderstanding of constitutional meaning and/or confusion about the proper relationship between interpretation and implementation, the post-Warren Court actually threatened Americans' right to freely exercise their religion—a right expressly guaranteed by the Constitution. When Court rulings began to suggest that the Constitution would permit or even require that private religious schools be treated worse than otherwise identical private nonreligious schools, it became clear that the justices had veered off course. Implementation must subserve—not subvert—the core meaning of the written Constitution.

MODERN CRIMINAL-PROCEDURE CASES—in particular, exclusionary-rule cases—have also veered off course, and here, the decisive wrong turns occurred on Earl Warren's watch.

The problem with the exclusionary rule is not that it overprotects the core right to some degree. To repeat, some prophylactic overprotection in implementation of a constitutional right is necessary and proper. But the exclusionary rule is wildly out of sync with the relevant constitutional principles. On reflection, we should not be surprised by this fact, because the rule was not born as a traditional and proportionate judicial remedy—

it was always and remains today an outlandish judicial remedy bearing no proper relationship to the scope of the violation. The Fourth Amendment is about the violation of actual privacy and property that occurs during a search or seizure. Whether evidence of criminality is found in such a violation is wholly irrelevant. A proper remedy would address the rights of innocents. It would punish flagrant unconstitutionality more severely than mere error. It would protect against police brutality and governmental oppression even if such misconduct had no causal connection to a search for criminal evidence. The Warren Court exclusionary rule did none of these things.[12]

Exclusion in America began not as a remedy rule, but rather as a rule about constitutional meaning—a rule deriving from a judicial interpretation that saw the Fourth Amendment and the Fifth Amendment self-incrimination clause as intimately interrelated. On this view, when a court excluded a defendant's diary in a criminal case, the judge was not primarily remedying an antecedent Fourth Amendment violation that had occurred when the government had grabbed the diary. Rather, the judge was also—and more importantly—preventing the Fourth-Fifth Amendment violation about to occur in his own courtrooms were the diary to be read to the jury. Though it was a principled interpretation of the Constitution's meaning, in the end this Fourth-Fifth-fusion view was demonstrably incorrect—indeed, preposterous—once the idea metastasized beyond diaries and personal papers to include stolen goods, murder weapons, and the like. Ever since the Court itself made that point about constitutional meaning clear in the 1966 blood-test case of *Schmerber v. California*, the exclusionary rule has been left without a principled legal leg—interpretational, implementational, or remedial—to stand on. Yet it still stands, in the name of *stare decisis*.

But why should a shaky rule that has lost its constitutional footing be perpetuated? We shall return to this key question in the concluding pages of this chapter.

CONSIDER, FINALLY, THE WARREN COURT'S revolutionary one-person-one-vote rule. Here, too, we see arguable overprotection at work, at least initially. If the true constitutional rule governing voting rights derived

from the equal-protection clause, then the idea that each vote had to have exactly equal weight with every other would follow naturally. But this way of justifying *Reynolds* sits atop a faulty interpretive foundation. The equal-protection clause as originally written and understood was categorically inapplicable to voting. *Baker* and *Reynolds* were really republican-government-clause cases masquerading in equal-protection clothing.

Nevertheless, one-person, one-vote can be justified as a legitimate implementational device. True, the *Reynolds* rule arguably overprotected the constitutional principle at stake, but only after decades of judicial neglect and underprotection. Without some limit on malapportionment, a person's right to cast a vote could be rendered utterly meaningless. For example, in a state composed of one hundred districts, could the government create fifty-one "rotten boroughs"—each with a single voter (say, the fifty-one most senior leaders of the incumbent party)—and relegate all other voters in the state to the remaining forty-nine districts? If this goes too far (and it surely does), and if Tennessee had surely gone too far in *Baker*, then where and how should judges draw the line in a principled way? *Whatever its other flaws, the one-person-one-vote rule was a clean and workable implementational device.[13]

Had the justices opted to openly rely upon the republican-government clause, several alternative sub-rules might have plausibly presented themselves. First, the Court could have chosen an approach akin to today's Eighth Amendment jurisprudence, using the actual practice of the fifty states as a benchmark and proclaiming state practices that fell outside the mainstream to be unrepublican by contemporary standards. Today, applying this alternative would collapse into *Reynolds*, since all states now meet the one-person-one-vote standard. Even if states were now told that they are henceforth free to reject *Reynolds*, most would probably decline to do

* The federal Constitution's structure did not raise identical concerns. Even though the Senate sharply deviated from the one-person-one-vote ideal, its apportionment rules were nevertheless entrenched in a way that limited the imaginable damage. State apportionment rules, by contrast, were far more fluid and thus more in need of some additional constitutional constraint. As for federal House elections, Article I, section 2, prevented gross interstate malapportionment. After *Baker* but before *Reynolds*, the Warren Court held, in the 1964 case of *Wesberry v. Sanders*, that congressional districts within a state must be equipopulous. For more on *Wesberry*, see p. xxx, n. 13.

so, because the voters themselves in most jurisdictions—along with leading politicians and opinion leaders—have come to embrace the idea of equally populous districts as a basic feature of political fairness.

Another imaginable alternative in 1964 would have been to allow voters in any given state, by a statewide initiative or referendum that itself would treat all voters equally, to authorize district maps that deviated from one-person, one-vote. If, at least once every census cycle, a state's electorate had to bless any deviation from districting equality, there would likely be no systematic frustration of majority rule violative of the deep principle underlying the republican-government clause.

But what about minority rights? Suppose a 55 percent statewide majority of whites approved a malapportioned statewide map giving whites majorities in 90 percent of the unevenly sized districts. Such maps might violate the spirit of the Fifteenth Amendment, but prior to *Reynolds* that amendment had proved hard for judges to enforce on their own when confronting massive state disobedience. Also, unless the Court in 1964 had decreed that every district map had to be blessed by a statewide popular vote—an approach that would have obliged every state to institute a referendum or initiative process—there needed to be a doctrinal sub-rule specifying when such a popular vote would be required. Presumably the answer to this question would have been that a statewide popular vote would be needed only when a state was malapportioned. But when was that? When it departed from one-person, one-vote, of course! Our envisioned referendum rule was thus not so much a sharply distinct alternative to one-person, one-vote, but merely a softer variant that would have treated violations of one-person, one-vote as presumptively unconstitutional rather than unconstitutional per se.

If some sub-rules about the permissible size of voting districts were necessary in order to safeguard the basic right to vote, why weren't sub-rules about the permissible shape of voting districts also necessary? In other words, once the justices decided to protect the basic right to vote in cases such as *Harper v. Virginia* and *Kramer v. Union Free School District*, and to buttress those right-to-vote rulings in the antimalapportionment cases of *Baker v. Carr* and *Reynolds v. Sims*, why did the Court stop there? Why didn't the justices take the additional step of regulating political "gerry-

mandering"—that is, the art of drawing district lines so as to favor the political group drawing the lines?

In *Reynolds*, Chief Justice Warren declared that "in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators.…Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will." Alas, *Reynolds*'s simple requirement that districts be of equal size fell short of guaranteeing that a majority of statewide voters would in fact control a majority within the legislature itself. Theoretically, a statewide minority faction supported by less than 26 percent of the voters could control the state legislature by winning a bare majority of ingeniously drawn districts and winning each district by a bare majority.

If *Reynolds* alone did not guarantee republican-government-style majority rule, neither did it ensure minority rights. Even in a state that was *Reynolds*-compliant, a minority group comprising 45 percent of the statewide vote could lose every single district, 55 percent to 45 percent, if each district were cleverly drawn so as to be a microcosm of the state as a whole.

Despite these problems, the Court was wise to stop where it did. Each of the four most salient subspecies of gerrymandering—racial gerrymandering, bipartisan gerrymandering, one-party gerrymandering, and incumbent-protective gerrymandering—implicated a unique cluster of constitutional considerations, and none of these clusters supported unilateral judicial intervention.

First, when governments have tried to fashion insidious district lines to disadvantage *racial* minorities, the modern Court has not faced a pressing need to develop its own implementational sub-rules based directly on the Fifteenth Amendment. Congress has already done much of the heavy lifting, via the 1965 Voting Rights Act and a series of subsequent statutory amendments. Enacted pursuant to Congress's explicit enforcement authority under the Reconstruction Amendments, this landmark law has created an assortment of effective statutory tools—some to be wielded by courts, others by the Justice Department—to combat laws and practices that improperly dilute the voting power of racial minorities. This subspecies of gerrymandering highlights an important lesson: Federal courts are

not the only branch of government tasked with faithful implementation of the Constitution; nor are courts always the branch best suited to address every constitutional issue.

Consider next the category of *bipartisan* gerrymanders. In jurisdictions where the two major parties, Republicans and Democrats, have worked together to draw district lines that favor these two parties and freeze out all third parties, these bipartisan "collusions" have generally not violated the Constitution. Rightly read, the Constitution in fact sanctions a self-perpetuating and self-stabilizing two-party system. No elaborate Court doctrine is called for here, because the practice is constitutionally proper.[14]

For different reasons, *partisan* gerrymandering designed to advantage one of the two major parties at the other party's expense also calls for judicial restraint. To begin with, any judicial intervention would be messy in the extreme. Few, if any, easy, workable, and principled sub-rules present themselves as plausible scripts for a large judicial role to neutralize partisanship in the drawing of district lines.

By contrast, in pure right-to-vote cases, such as *Harper* and *Kramer*, the basic framework was easy enough to construct: All adult-citizen, non-felon residents are presumptively eligible voters. This is the group textually identified by section 2 of the Fourteenth Amendment, as updated by the later Woman and Youth Suffrage Amendments.* It is also the lived-constitutional baseline suggested by actual modern practice in the fifty states. Some small questions have arisen at the margins—for example, how long a residency period may a state require?—but even here, actual practice and common sense have narrowed the range of plausible answers. Similarly, we have seen that the *Reynolds* rule offered a workable way to deal with malapportionment (although here, too, smallish questions at the margin needed to be addressed).[15]

But no comparably clean sub-rule exists to regulate district shape. In a sense, all districting is gerrymandering. No district map is neutral. How can principled judges treat like cases alike when each district map seems utterly unique and not easily comparable to any other map in any other

* For more discussion of how this updating properly operates, see Chapter 10, n. 14 and accompanying text.

state or census cycle? Perhaps the only clean approach would be to require each state to adopt some form of statewide proportional representation, but this audacious mandate would oblige every state to move beyond a single-member district system with deep historical roots almost everywhere in America.

The lesson here is that on some issues a court's implementational sub-rules may slightly underprotect certain constitutional values, just as on other issues the rules slightly overprotect. In both situations, there exists a conceptual space between the abstract meaning of the written Constitution (in the domain of interpretation) and the doctrinal sub-rules promulgated and enforced by courts (in the domain of implementation). This space arises because of institutional considerations connected to the basic features of federal courts. When the Constitution goes to court, it needs to be translated into rules that courts qua courts can properly enforce. In this process of translation—when the supreme law of the terse text becomes the detailed court-law of judicial doctrine—areas of overinclusion and underinclusion arise.

These areas form an important part of America's unwritten Constitution. As with other elements of this unwritten Constitution, these areas are not clearly mapped in the document's express words—and yet (as with other elements) they exist in close proximity to the document. In one sense, judicial sub-rules by definition range beyond and fall short of the best interpretation of the written Constitution, if the document is read in an institutional vacuum. In another sense, however, the document envisions and contemplates such areas, for they arise as a result of features built into the text itself—the affirmative scope and limitations on "judicial Power," the essential structural attributes of federal courts, the need for "one supreme Court" to supervise and suitably guide all "inferior" federal courts, and the intricate institutional relationships between the federal judiciary and other institutions created or contemplated by the Constitution.

In the case of one-party gerrymandering, whatever judicial underprotection now exists is largely harmless, because other features of modern American government have limited the potential damage. Any party seeking to maximize the number of seats it can win must minimize the number of "wasted votes" it receives—that is, votes above the necessary victory

threshold of 50 percent plus one in any district and votes going to losing candidates. In other words, optimal vote maximization means that almost every vote a party gets must go to a winning candidate (because all votes going to losers are ineffectual), and that no party candidate should win by a landslide. (If any candidate does win big, then all the extra votes above the 50 percent mark are "wasted" votes that could have gone to help some other party candidate win in some other ingeniously drawn district.) But this mathematical reality means that any successful partisan gerrymander will need to tack very close to the political wind, a highly dangerous maneuver. If some modest external event arises after district lines are drawn—a party scandal, an economic downturn, a shift in district demographics—then a party could end up losing a slew of close races rather than winning them all. Parties are understandably reluctant to play the game too fine, and this reluctance makes it difficult for one party to consistently impose "wasted" votes on the other party without suffering lots of "wasted" votes itself.

Moreover, each major party typically includes powerful legislative incumbents, and every incumbent prefers to win by a landslide rather than a squeaker. Landslides facilitate fundraising and help launch future campaigns for still higher office. But landslides also waste votes, from the party's point of view. Hence, both one-party gerrymanders and incumbent-protective gerrymanders may be troubling in theory, but in practice they tend to tug hard in opposite directions, resulting in district maps that do not seriously dishonor the deep principles of republican government. Judicial intervention is thus largely unnecessary, because the political system regulates itself tolerably well with regard to gerrymandering.[16]

This was not true of the 1960s right-to-vote and malapportionment cases. Where certain persons are literally disfranchised, how are they supposed to solve the problem themselves through politics? By definition, disfranchised persons do not, as a rule, vote on whether they should get the vote in future elections, and incumbent politicos have attenuated incentives to protect the interests of nonvoters. In situations of gross malapportionment, the political power structure is itself part of the problem and thus cannot be relied upon to be part of the solution. In *Baker v. Carr*, Justice Tom C. Clark's concurring opinion stressed that the citizenry of Tennessee had no effective way to combat the state's gross malapportionment.

In particular, the state lacked an initiative process whereby a statewide majority of disgruntled voters could have changed the corrupt status quo. Electoral reform in Tennessee perversely required assistance from the very state legislature whose leaders were the chief architects and beneficiaries of the state's rotten system of vote-counting. Thus, in right-to-vote cases such as *Harper* and malapportionment cases such as *Baker* and *Reynolds*, relief needed to come from outside the voting system itself—from the federal government as the proper guarantor of state republican government. In gerrymandering situations, by contrast, the political system adequately polices itself, and thus there is less pressing need for bold judicial initiatives.

None of the considerations cataloged in the preceding paragraphs are explicitly laid out in any clear constitutional clause. Nevertheless, they flow from a careful understanding of the written and unwritten Constitution as a whole—from the implicit premises of the document; from the revitalized ideals of republicanism enacted in the amendment process during Reconstruction; from the matrix of institutions set up by the Constitution; from America's actual lived practices of voting and conducting elections; and from actual judicial doctrine rooted, by and large, in a proper vision of Article III "judicial Power."

"the supreme Court"

IT REMAINS TO ASK the biggest set of questions about Article III "judicial Power": In general, how much weight, and what kind of weight, should today's Article III judges in the proper exercise of their "judicial Power" give to past Article III exercises of "judicial Power"? In particular, when and how should the Court overrule itself? These questions are particularly momentous because many of the most famous cases of the modern era—for instance, *Brown v. Board of Education*, *Mapp v. Ohio*, *Gideon v. Wainwright*, *Miranda v. Arizona*, *Roe v. Wade*, and *Lawrence v. Texas*—are either rulings that themselves broke with prior precedent and/or cases that prominent critics have urged overruling.

In seeking to answer the biggest questions about when the Supreme Court should overrule itself, some self-described adherents of the written Constitution as originally understood have offered accounts of precedent's

proper place that largely begin and end outside the text. Justice Scalia is the most famous example. Both on and off the Court—most famously in a 1989 published lecture on his philosophy of "originalism"—Scalia has argued that judges should generally follow the Constitution's original public meaning. Invoking the vision of John Marshall, Scalia has reminded us that the Constitution is America's "paramount law" and that this law has "a fixed meaning." But apparently Scalia also believes that judges need not follow this paramount law, whose meaning was fixed by its original understanding, when this paramount law sharply contradicts settled precedent. Any other approach would be impractical, he has argued.[17]

Huh? If the touchstone to precedent's proper status is pure practicality, it is hard to see why pure practicality cannot also be the touchstone for all issues of constitutional interpretation across the board—text and original understanding be damned! Conversely, if Scalia believes that as a judge he is generally obliged to follow the supreme law, and that this law is the written Constitution as originally understood, then by artificially limiting the domain of his obligation to areas that are not settled by past precedent, Scalia would seem to be violating his own legal obligations as he understands them. Scalia errs here because he has started his thinking in the wrong place—with himself and his own philosophy—and because he has approached the written Constitution with an unsubtle understanding of how its words were actually designed to work over time.

Of course, the proper place for a faithful constitutionalist to begin analysis of precedent's proper place—or any other constitutional question, for that matter—is the Constitution itself. When we start here, we shall see a pattern that by now should be familiar. The document answers some of the largest questions about precedent's proper place, but leaves other questions indeterminate over a certain range. Within that range, the actual practice of American government—in particular, the practice of Article III judges themselves—has plausibly and usefully glossed the text in a manner that is invited by the text, albeit not compelled by the text. In other words, although the text does not explicitly say that this useful and plausible gloss should control, neither does the text say that it shouldn't. If we choose to attend to how the gloss actually operates, the overall Article III system works, and works well. Simply put, if we approach the text from the proper

angle and with the proper interpretive methods, we can answer key questions in a way that does justice to the text itself—that is faithful to the letter and spirit of the text and that enables the text to work in court and on the ground.

CONSIDER FIRST THE "VERTICAL" ELEMENT OF PRECEDENT—the authority of some judges at the top of the judicial pyramid to impose their legal vision on judges below. The Judicial Article authorizes legal and equitable cases arising under "this Constitution" to be resolved by "one supreme Court" which presides over various "inferior" federal courts and state courts. The big idea here is that "inferior" courts should generally be bound by the interpretations, implementing frameworks, specific holdings, precedential implications, and remedial precepts—the doctrine—of the Supremes. This is so even if lower courts think that the high court is wrong about the general meaning of the written Constitution, or about the best sub-rules for implementing the document, or about how the specific case at hand or a more general category of cases must be decided, or about the proper set of legally applicable remedies. Lower courts are free to say that the high court has erred, and to offer their reasons for so believing, but disagreement does not justify a general right of disobedience. An inferior may tell his boss that she is wrong, but must nevertheless follow her instructions.

But what should a faithful inferior do when his superior seems to be in the process of changing her mind? Specifically, if the Supreme Court in case A clearly says X, but later cases B, C, and D, involving issues related to but not identical with the issue in case A, seem to point away from X, then what should an inferior court do when a case legally identical to case A—"on all fours," as lawyers would say—arises? Should it matter if none of the justices who joined the Court majority in case A is still on the Court, whereas several of the newest justices, prior to their appointment to the Court, openly criticized case A and called for its overruling?

On the one hand, the three most recent cases may well signal that principle X no longer commands the support of a current Court majority. Indeed, close analysis may suggest that cases B, C, and D were designed to lay the foundation for overruling case A, and thus the time is now ripe to declare that A no longer fits the legal landscape. Plus, the off-the-bench

comments of several new justices are surely straws in the wind for any lower-court judge seeking to avoid the embarrassment of being publicly reversed by the Supreme Court. Beyond embarrassment, wouldn't legal efficiency be served if the lower-court judge made his best guess about what the Supreme Court today would actually do in the case at hand on appeal?

On the other hand, the "judicial Power" is vested in courts, not in individual justices speaking in other capacities. And though there may be hints in cases B, C, and D, let's assume that the Court did not squarely say in any of these cases that case A was being overruled, or clearly announce that principle X was no longer good law. Unless and until the Court itself speaks clearly, principle X is arguably still the Court doctrine that should be followed.

Both of these views are textually plausible. Both reflect reasonable understandings of the supremacy of the Supreme Court over inferior federal courts. One view stresses the supremacy of past Supreme Court rulings; the other view focuses on the current supremacy of the sitting justices. If a lower-court judge had only the written Constitution to guide him, the matter might well be indeterminate.

But precedent has in fact glossed the text on this very question. The Court itself has clearly held that every past Court ruling must be followed in legally identical cases until the Supreme Court itself overrules the old case in explicit language. Thus, a dutiful inferior court should: (1) note the apparent tension between case A and cases B, C, and D—ideally in a clear opinion signaling the need for eventual Supreme Court reconsideration of this area of law; (2) follow case A and principle X if the case at hand is indeed on all fours with A; and (3) leave the rest to the Supreme Court. And to highlight the fact that not all reversals are shameful, the Court in one careful 2005 case, *Eberhart v. United States*, openly praised the lower court for following this tripartite script even as the Court overruled its own prior case law—and thus reversed its faithful lieutenant![18]

SO MUCH FOR VERTICAL PRECEDENT. "Horizontal" precedent—the amount of weight and the kind of weight that past Supreme Court exercises of "judicial Power" should carry in the current Supreme Court itself—raises its own distinctive set of issues. Once again, a careful look at

the document itself provides the broad outlines of a proper approach, even though the text does not provide all the answers.

The Judicial Article envisions the Court as a continuous body. The Court never automatically turns over, as the House does every two years and the presidency does every four. A continuing body would seem intentionally structured so as to give some weight to its past and some thought to its future. It does not invent itself anew each day. Given the Court's clear constitutional design, today's justices may properly give past Court decisions a rebuttable presumption of correctness. A past case may control until proved wrong, with those challenging it saddled with the burden of proof. A justice may also give a precedent persuasive weight in deciding whether the burden is met. Even if her first reaction is that the precedent wrongly interpreted the Constitution, the very fact of the prior decision may persuade her that her first reaction is mistaken: If John Marshall and his brethren thought X, perhaps X is right after all, despite initial appearances to the contrary. (For similar reasons, a deferential justice might choose to give Congress, a coequal branch, the benefit of the doubt in certain cases.)

The precise persuasive weight of a past case will vary. Not all opinions of the Court came from the likes of John Marshall or Joseph Story. It may be relevant that a particularly sound justice dissented in the allegedly erroneous case. Sometimes, a later Court will find wisdom in certain language of a past case even if its result seems wrong on the facts. Other times, its fact-specific result may distill great wisdom even if its language, on reflection, does not persuade.

Also, if the current Court believes that the past Court did not err in interpreting the Constitution, but merely chose a suboptimal set of implementing sub-rules that nonetheless fell within the range of plausible implementations, the current justices may properly choose to let the matter stand. In this conceptual quadrant, the old case law rests on a view of the meaning of the Constitution that the current Court believes is the correct one. No infidelity to a justice's oath occurs when she continues to build upon cases that are themselves firmly grounded in the written Constitution itself, rightly read.

But what if a current justice believes that a past case or line of cases misread—indeed, seriously misread—the written Constitution? Doesn't

her oath of office oblige her to follow the Constitution and not the case? If the Court is generally obliged to strike down constitutionally erroneous statutes passed by Congress, why isn't it equally obliged to overturn constitutionally erroneous precedents?

In 1992, these questions came before the Court in dramatic fashion as the justices openly considered whether to overrule *Roe v. Wade*, perhaps the most controversial case of the past half century. By the narrowest of margins, 5–4, the Court in *Planned Parenthood v. Casey* decided to reaffirm *Roe*'s central holding that women have a constitutional right to obtain early-term abortions. In passing, the *Casey* Court declared that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." Asserting that such a view had been "repeated in our cases," the Court thereupon cited two dissents, neither of which was squarely on point, leaving the careful reader with a sneaking suspicion that perhaps this view was not well established in pre-*Casey* case law.[19]

Indeed, a survey of earlier doctrine reveals at least seven twentieth-century overrulings based simply on the belief that the prior case was wrongly decided. Several of these overrulings are household names, at least in legal households: *Erie v. Tompkins* (1938), *West Virginia State Board of Education v. Barnette* (1943), and *Jones v. Alfred Mayer* (1968). In other words, if read broadly, *Casey*'s dictum about precedent was virtually unprecedented, and indeed contrary to precedent.[20]

These seven pre-*Casey* precedents stand for the proposition that, absent certain special countervailing considerations (which we shall analyze momentarily), today's Court may properly overrule yesterday's case simply because today's Court believes the old case incorrectly interpreted the Constitution. None of these seven overruling precedents has itself ever been overruled. These seven precedents span decades and cover a wide range of constitutional questions. *Casey*, by contrast, involved the hottest of hot-button issues—abortion rights, an area where the Court was under fire from critics and appears to have overreacted with ill-considered language. Thus, we should hesitate to read glib words in one case as repudiating first principles of previous case law and of the Constitution itself. Unless and until the Court emphatically and repeatedly reiterates that this *Casey* pas-

sage must be construed expansively—and thus far the post-*Casey* Court has said nothing of the sort—it makes sense to read the *Casey* dictum in a limited manner that would mesh with the case law (on case law) that *Casey* overlooked.[21]

The *Casey* dictum may well be a sensible way of thinking about precedent in areas where questions of constitutional meaning are not at issue—that is, areas where the precedents on the books concern merely common-law issues or constitutional issues revolving around implementational sub-rules. In these areas, although today's Court might choose to follow precedents that it now believes to be erroneous, the Court is not thereby privileging its own past pronouncements over the best interpretation of the Constitution itself.

Casey can also be read as highlighting the fact that the vast majority of recent overrulings have been based not solely on the fact that the earlier case was wrongly decided as a matter of pure constitutional meaning, but also on other factors. These other factors have included the general unworkability of the old precedent (as made clear by subsequent experience), the old precedent's inconsistency with other cases decided before it or after it, and the old precedent's incompatibility with later factual developments. Perhaps *Casey* simply meant to say that when these factors exist, they should be stressed by the overruling Court.

But if these factors were the only ones justifying overrulings in cases involving constitutional meaning, we would be left with a vision of constitutional law more Court-centered than Constitution-centered: A case could be overruled if it did not fit well with other cases, but would be retained if it simply did not fit well with the document.

It is understandable that, for reasons of institutional prestige, the Court might prefer, when overruling itself, to do so on grounds that downplay admission of past error. Such an approach allows the current Court to say that the past case was perhaps sensible when decided, but has been eclipsed by later legal and factual developments that could not have been perfectly foreseen when the Court first acted.

Yet even as we strive to understand the Court's institutional desire to avoid shouting from the rooftops that the Court itself has blundered badly in the past, we must also note the dangers of unchecked institutional self-

aggrandizement. (The Court of late has been fond of making sweeping assertions of judicial supremacy, regularly proclaiming itself the Constitution's "ultimate" interpreter—a self-description that nowhere appeared in *Marbury*, and indeed never appeared in the *United States Reports* until the second half of the twentieth century.)[22]

If the justices generally felt free (or obliged!) to follow clearly erroneous case law concerning the core meaning of the Constitution, then the foundational document might ultimately be wholly eclipsed. Rather than simply filling the document's gaps, judicial doctrine would erase its outlines. If the written Constitution indeed contemplated this odd result, one would expect to see a rather clear statement to that effect: "This Constitution may be wholly superseded by conceded judicial misinterpretations; all branches are oath-bound to follow these misinterpretations." But the Constitution says nothing of the sort. On the contrary, it explicitly and self-referentially obliges all officials to swear oaths to itself, not to conceded misinterpretations of it.

The Constitution establishes a system of coordinate powers. If neither the legislature nor the executive may unilaterally change the document's meaning, why may the judiciary? The Constitution details elaborate checks and balances. If conceded misinterpretations become the supreme law of the land, what checks adequately limit judicial self-aggrandizement? Prior to the Constitution's ratification, none of its leading friends put forth anything like the *Casey* dictum, broadly read. Rather, the basic structure of the document suggested to ratifiers that whatever "We the People" deliberately laid down could not be changed, except by a later amendment reflecting wide and deep popular approval.

In the case that the modern Court views as the very fountainhead of judicial review, *Marbury v. Madison*, Chief Justice Marshall declared that the American people's "original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness" was "the basis on which the whole American fabric has been erected." Marshall went on to observe that "[t]he exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom

act, they are designed to be permanent." Given that acts of constitution and amendment require great popular exertion that cannot be expected to occur routinely, it seems perverse to insist that We the People must repeat what We said whenever judges garble what We said the first time.

Simply put, the basic structural argument against a broad reading of the *Casey* dictum is that *Marbury*-style judicial review presupposes that judges are enforcing the people's document, not their own deviations. Departures from the document—amendments—should come from the people, not from the high court. Otherwise we are left with constitutionalism without the Constitution, popular sovereignty without the people.

DOES A PROPER VIEW OF THE CONSTITUTIONAL SYSTEM, then, require that whenever the current Court believes that a past case misinterpreted the central meaning of some part of the Constitution, the justices must overrule the erroneous case? Not quite. Two moderating structural ideas come into play, both of which can be understood as "equitable" considerations that the Judicial Article allows to be taken into account. (That article features language explicitly empowering federal courts to hear cases "in Law and Equity" arising under "this Constitution.")[23]

One structural and equitable notion may be stated as follows: Once We the People have struggled to put a rule or principle in the document, that rule or principle should not be altered, except by the people themselves. An erroneous precedent that improperly deviates from the written Constitution may in some situations stand if the precedent is later championed not merely by the Court, but also by the people. When the citizenry has widely and enthusiastically embraced an erroneous precedent—when even most initial skeptics have deemed the precedent to be fundamental and admirable—a court of equity may sometimes, consistent with the document's emphasis on popular sovereignty, view this precedent as sufficiently ratified by the American people so as to insulate it from judicial overruling. This is especially true if the erroneous precedent recognized an unenumerated right before its time. If this right then catches fire and captures the imagination of a wide swathe of citizens, it thereby becomes a proper Ninth Amendment entitlement even though the Court (by hypothesis) jumped the gun.

As we have seen, unenumerated constitutional rights retained by the people under the Ninth Amendment (and the Fourteenth Amendment's privileges-and-immunities clause) encompass, among other things, those basic rights that the people at large in fact believe that they have and should have under the Constitution. If enough people believe in a given right and view it as fundamental, then that right is for these very reasons a right of the people, a basic privilege of citizenship as understood by citizens themselves. It usually does not matter how the people's belief arose—even if it arose as a result of a Supreme Court case that was wrong as a matter of text and original intent when decided.

Thus, if the Court at time T1 gets the Constitution's text and original understanding wrong and proclaims a right that does not in fact properly exist at time T1, and if the vast majority of Americans come to rejoice in this right, the Court at time T2 should affirm the originally erroneous precedent. The case, though wrong when decided, has become right thanks to an intervening change of fact—broad and deep popular endorsement—that the Constitution's own text, via the Ninth and Fourteenth Amendments, endows with special significance. Note one key asymmetry: A case that construes a textual constitutional right too narrowly is different from one that construes the right too broadly. Even if both cases come to be widely embraced by the citizenry, only the rights-expanding case interacts with the text of the Ninth and Fourteenth Amendments so as to specially immunize it from subsequent reversal.[24]

A second equitable principle, prominent in judicial decisions stretching back hundreds of years, directs judges to give due weight to the ways in which litigants who come before the Court may have reasonably relied upon prior case law. Judicial power, by its nature, is retrospective. The judiciary applies law to transactions that have already occurred. Erroneous precedents create facts on the ground that properly influence the application of retrospective judicial power. In some cases, these facts limit the Court's ability to abruptly change course, even if persuaded of past error. For example, even if the Court were tomorrow to deem erroneous its longstanding precedents upholding the constitutionality of paper money, surely the justices could not ignore the vast economic system that has built up in reliance on paper.[25]

Erroneous precedents are not unique in this respect. Prior unconstitutional conduct of other branches may likewise create *faits accomplis* that courts cannot easily undo after the fact. Unlike a broad reading of the *Casey* dictum, which treats erroneous Court precedents with more deference than erroneous statutes, a sound structural and equitable approach would respect the general coordinacy of the three branches and would recognize that judges must have due regard for facts on the ground created by prior actions of all branches and levels of government. This feature of judicial underenforcement is built into the very structure of the Judicial Article, under which judicial review can sometimes occur long after certain practices have become settled and virtually impossible for courts to reverse.

Impossible for courts to reverse—but not necessarily for legislatures. A prior erroneous Court ruling does not properly amend the Constitution, and other branches of government may be able to return to a constitutionally proper regime by acting purely prospectively in a way that judges perhaps should not. Imagine, for example, a statute proposing a gradual ten-year phase-in of a new, more constitutionally appropriate regime to replace the old case law that the Court now admits was erroneous. Were the Court itself to announce such a purely prospective phase-in, this announcement might strain the traditional boundaries of proper "judicial Power," precisely because the announcement would look purely "legislative" in nature. But legislatures, of course, typically act in precisely this purely prospective fashion, and phase-in statutes are commonplace.

It is thus important for the Court to tell the public if the justices have indeed erred in the past precisely so that the other branches may ponder their constitutionally permissible options. Justices may not relish confessing error, but they have no warrant for refusing to do so when called to account. The Court's duty, then, is not, as a broad reading of the *Casey* dictum would have it, to affirm and extend precedent without deciding whether precedent is right or wrong. Rather, the judicial duty is first to admit error whenever the Court finds that error has occurred, and then to consider whether special reliance interests apply and how those interests might limit the use of retrospective judicial power.

In other words, the Court's province and duty is to say what the law is—the law of the Constitution, of course. If, in the process, the Court decides

that this supreme law has been violated, whether by a state law, a federal law, a presidential proclamation—*or a past ruling of the Court itself*—the justices should declare that fact and then do their best to analyze how, if at all, this wrong might be righted, and by whom. When the Court itself is the source of a constitutional wrong, it has a particular obligation to help right that wrong, or at least to identify how the wrong could be righted by sister branches.

Let us now return to the *Casey* dictum one last time: "[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." The best way to read this dictum is as follows: Even if today's Court determines that a prior case garbled the Constitution's true meaning, the judicial inquiry is not at an end. There are still two "special" questions that the Court must consider. First, have the American people themselves ratified the error in a way that cures it? Second, have litigants equitably relied upon the error in a way that immunizes it from immediate judicial reversal?

WHEN *Casey* IS READ IN this way, it meshes with the actual practice of overrulings by the Court over its entire history. It also meshes with the terse text's own understanding of the proper relationship between "this Constitution" and the "judicial Power." Seen from this angle, the document and the doctrine cohere: What the Court says about "this Constitution" squares with what "this Constitution" says about the Court. Thus, this reading of *Casey*—and of the Court's case law more generally—puts precedent in its proper place.