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**THE LIMITS OF EMPIRICAL POLITICAL SCIENCE AND THE
POSSIBILITIES OF LIVING-CONSTITUTION THEORY FOR A
RETROSPECTIVE ON THE REHNQUIST COURT**

ERIC R. CLAEYS*

Professor Merrill has offered a provocative thesis about the Rehnquist Court and its federalism revolution, and he has also demonstrated in action a new genre of Supreme Court retrospective.¹ Generally speaking, I have three reactions. First, Merrill's method offers several useful warnings to law professors about mistakes to avoid while summing up the work of institutions like "the second Rehnquist Court." Second, while Merrill's lecture focuses on descriptive behavioral explanations of the second Rehnquist Court, it underscores how urgently we need competent idea-based accounts of that Court's work, intentions, and legacy. Third, I suspect that the best way to produce such an idea-based account would be to study the Rehnquist Court in light of "living-Constitution" theory.

My comments proceed in two parts. In Part I, I offer a few reflections about the genre—the "applied" empirical political-science retrospective—that Professor Merrill seems to have invented. In Part II, I explain why living-Constitution ideas might do the best job of capturing the essence of and ambiguities in the Rehnquist Court's legacy, and I sketch out how a living-Constitution retrospective of the Rehnquist Court might look.

I. THE LIMITS OF AN EMPIRICAL POLITICAL-SCIENCE RETROSPECTIVE

Professor Merrill has rendered a useful service simply by sending a shot across the bow of the constitutional-law establishment. He has raised some serious and important questions about whether traditional Supreme Court retrospectives are edifying. First, Merrill warns constitutional-law professors not to place too much faith in what Supreme Court Justices *say* in their

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1. See Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003).

opinions, but, instead, to pay closer attention to what they *do* behind closed chambers.² Second, Merrill warns constitutional-law professors not to play too fast or loose when they try to unify all the cases with a few pithy generalizations about law, government, and politics.³ Both are good warnings for constitutional-law professors to hear from time to time.

At the same time, the traditional retrospective has more to say on its own behalf than Professor Merrill recognizes. Indeed, Merrill's methods and argument only reinforce how urgently we need careful and attentive studies of the political and jurisprudential themes that go farthest in unifying the Supreme Court's work. To study the "Rehnquist Court," and especially the "second Rehnquist Court," Professor Merrill borrows on the empirical methods developed by Lee Epstein and Jack Knight,⁴ Jeffrey A. Segal and Harold Spaeth,⁵ William Eskridge,⁶ and others⁷ to study descriptive behavior tendencies on the Supreme Court. Professor Merrill's lecture, however, has a slightly different focus.

Merrill's retrospective is a sort of "applied" empirical study of the Supreme Court. It stands in relation to the leading empirical work on the Supreme Court on a footing similar to that in which an engineering project stands to Newtonian physics. Some of the leading works, like Lee Epstein and Jack Knight's work *The Choices Justices Make*, justify rational-choice Supreme Court analysis as an autonomous discipline. Such works lay the groundwork for further analysis of the Court along rational-choice lines.⁸ Others, like William Eskridge and John Ferejohn's game-theoretic study of Supreme Court statutory interpretation, focus more on a narrow subset of the Court's work, but still offer general lessons about how the Supreme Court behaves within that subset.⁹ Professor Merrill's retrospective, by contrast, stretches out even further from general social-science method and theory to particular data. Merrill is not looking for cases that will help him test a

2. See, e.g., *id.* at 651 ("start[ing] not with ideals, but with the assumption that the Justices rationally are seeking to maximize certain preferences").

3. See *id.* at 571 (doubting that "the Court's recent behavior can be neatly subsumed under any single conceptual rubric").

4. See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

5. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

6. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992).

7. See, e.g., Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rationale Choice Theory and an Empirical Test*, 69 S. CAL. L. REV. 431 (1996); Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, LAW & CONTEMP. PROBS., Spring 1994, at 65.

8. See EPSTEIN & KNIGHT, *supra* note 4, at xiv.

9. See Eskridge & Ferejohn, *supra* note 6.

behavioral theory he finds interesting. He already has a fixed group of cases—the cases handed down while William Hubbs Rehnquist has served as Chief Justice—and it is incumbent on him to decide which are interesting, what they say when taken together, and why they were decided as they were.

Professor Merrill demonstrates that empirical political science can help answer these questions. His argument, however, also tends to suggest that any such “applied” empirical retrospective is bound to rely heavily on the same “ideational approach[es]” and “unifying *Weltanschauung[s]*” that cause him to disparage the format of the traditional Supreme Court retrospective in the first place.¹⁰ The political scientists in attendance at Professor Merrill’s lecture are better qualified than I to judge its contributions to their discipline. From a legal scholar’s perspective, however, it seems that an ideational approach is an indispensable element even of Merrill’s seemingly empirical and descriptive retrospective. Furthermore, at the end of the day, the ideational approach has more to say about the sorts of questions legal scholars are inclined to ask about the Supreme Court.

Let us start with the most simple problem imaginable. If we are going to study the Rehnquist Court strictly empirically, where do we begin? Why do we choose to focus on what Professor Merrill calls the “‘federalism’ basket” and the “‘social issues’ basket”?¹¹ The answer is fairly straightforward. Merrill is sensible enough to step outside his empirical framework long enough to focus his study on the issues that common political opinion finds interesting—the constitutional-law cases that “generate the most public comment and controversy.”¹² Still, if those common political opinions can single out the cases that are worth studying along empirical lines, there is no reason why they cannot serve the same function for a thematic or idea-based study of the Supreme Court.

Professor Merrill resists this conclusion. He is inclined to doubt any idea-based study of the Rehnquist Court’s constitutional federalism cases unless it can account also for the Court’s preemption, dormant Commerce Clause, and First Amendment cases.¹³ Here, however, he seems to hold thematic studies of the Rehnquist Court to a higher standard than he holds his own thesis. In his Conclusion, Merrill rests satisfied because he has shown that the constitutional federalism project—and *only* the federalism project—“[a]t least . . . is explainable” in rational-choice terms.¹⁴ As Alan Howard suggests, it is not at all obvious that Merrill’s thesis could hold if extended beyond federalism to

10. Merrill, *supra* note 1, at 571.

11. *Id.* at 580.

12. *Id.*

13. *See id.* at 570-71 & n.7 (criticizing and distinguishing John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002)).

14. *Id.* at 651.

areas like the First Amendment.¹⁵ Merrill's thesis about the Court's federalism cases is useful scholarship, even if it cannot explain the Justices' strategic behavior in First Amendment cases. Nevertheless, the same could be said of any ideational study of the Rehnquist Court's federalism cases. So far, then, realist empirical method already is borrowing on political theory and political opinion, but it has not yet made any distinctive contribution.

Separately, group opinions about law and politics are important causal forces to account for—even in the strictest “empirical” analysis of an entity like “the second Rehnquist Court.” Professor Merrill has recognized as much in previous scholarship. In *The Great Transformation of Regulated Industries Law*, Merrill and Joseph Kearney explained how the movement to deregulate common-carrier utilities over the last twenty-five years stemmed in large part from “ideological consensus . . . about the virtues of markets as the dominant mode of industrial organization for delivering public utility services.”¹⁶ “This transmission of ideas,” Merrill and Kearney concluded, “unquestionably has had a pronounced effect on the shape of public policy.”¹⁷

If anything, what Merrill called “the transmission of ideas” plays an even stronger role in his study here than it did in his and Kearney's study of utility regulation. Economic interests, of utilities and their customers, go a long way in constraining the freedom of action regulators and legislators have in making utility policy in the public interest. What a difference life tenure makes.¹⁸ As Merrill documents here, Supreme Court Justices may need to anticipate the strategic moves made by their brethren and, to a certain extent, constraints set by electoral trends outside the Court.¹⁹ Even so, because of life tenure, guaranteed salaries, and separation of powers, Justices have far more freedom of action than most regulators to do their jobs consistent with their personal opinions about the public interest. Because elite consensus about law and politics inform their opinions, such consensus count heavily in even the most descriptive and empirical accounts of the Court's work—including the observations Professor Merrill makes throughout his lecture on attitudinal preferences, internal strategic-actor behavior, and flux and stasis.²⁰ Thus, even when behavioral methods show how Justices maximize their preferences, they must acknowledge that political and jurisprudential opinions play some part in shaping the Justices' preferences in the first place.

15. See Alan J. Howard, *Continuity on the Court: The Rehnquist Court's Free Speech Cases*, 47 ST. LOUIS U. L.J. 835 (2003).

16. Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1398 (1998).

17. *Id.* at 1403.

18. See U.S. CONST. art. III, § 1.

19. See Merrill, *supra* note 1, at 601-38.

20. See *id.* at 590-620, 638-51.

Finally, it must be recognized that Professor Merrill's retrospective makes a trade-off that will strike many readers as unacceptable. To gain the advantages of what he calls the "harsh realism of political science,"²¹ Professor Merrill trades away the chance to say anything at all about whether the Rehnquist Court's work contributes to the true, the just, or the good. Because Merrill focuses on the behavioral and strategic aspects of the Rehnquist Court's work, his lecture is most interesting to the empirical scientists whose theories he is road-testing. As he notes, however, he is a law professor,²² and most of the members of his audience are law professors or lawyers. His lecture holds out at least some useful lessons for lawyers. Nevertheless, at the end of the day lawyers will be—and should be—interested not in whether Justices on the Rehnquist Court were clever strategists, but whether their legacy makes for good constitutional law and good government.

Taking everything Merrill says as true, he teaches us the country has experienced a mini-revolution in constitutional federalism in part because Justice Thomas votes his mind, in part because Justice Scalia's trades votes with skill worthy of Justice Brennan, and in part because Justices O'Connor and Kennedy mind the election returns. This account, if true, would be useful descriptive data, but I suspect most lawyers and law professors would want to know more. There are good behavioral reasons (and bad gossip reasons) to know that the Court is wheeling and dealing, and to know why. Lawyers and citizens, however, are also supposed to take seriously and live by the explanations the "Federalism Five" offers in Court opinions as to why constitutional federalism makes for good government. Over the long run, the latter court more than the former for everyone except, perhaps, full-time empirical scientists. It is no wonder, then, if the legal academy and practicing lawyers turn from empirical studies like Professor Merrill's back to idea-based studies to consider the Rehnquist Court's legacy for the course of American constitutional law.

II. LIVING-CONSTITUTION THEORY AS THE FOUNDATION FOR A RETROSPECTIVE ON THE REHNQUIST COURT

I will use the rest of my Comment to propose such an idea-based retrospective—a "living-Constitution" retrospective. Professor Merrill is right in saying that no one theme, idea, or conceptual rubric can rationalize all of the cases decided during the Rehnquist Court. Still, a few themes capture the bulk of the cases that most observers would consider "significant." If I had to pick one, to make as much sense of as many of the most important cases as I could, I would survey the Rehnquist Court's work from the standpoint of "living-Constitution" theory. Because this theory plays an influential role in politics

21. *Id.* at 571.

22. *See id.*

and constitutional interpretation today, it identifies several constitutional principles and decisions that most everyone agrees are “important.” Accordingly, it creates a useful normative complement to the kind of retrospective Professor Merrill has presented.

A. *Living-Constitution Theory*

In its simplest form, living-Constitution theory holds that the “fundamental law” of the United States consists of the American people’s historically evolving beliefs about good government and individual liberty. The object of any form of government is to secure liberty to the people governed, but factual and moral conditions change too much to say that any one conception of “liberty” will best protect the people in all circumstances. Living-Constitution theory purports to solve this dilemma by making the Constitution a vehicle for the people’s changing conceptions of liberty. As political scientist and President Woodrow Wilson, one of the seminal living-Constitution theorists, explained the project, “government is not a machine, but a living thing. . . . It is modified by its environment, necessitated by its tasks, shaped to its functions by the sheer pressure of life.”²³

Because political conditions are adaptive and popular morals are historicist, the Constitution has no independent and objective legal meaning. It is impossible to construe the Constitution staying fully within the four corners of the document because the document is a legal transmitter for the American people’s evolving fundamental moral law. As Wilson again explained, the Constitution is not “a mere lawyers’ document: it is a vehicle of life, and its spirit is always the spirit of the age.”²⁴ As the will of the American people changes from age to age, there will be “normal and legitimate alterations of . . . constitutional understanding,”²⁵ because “governments have their natural evolution and are one thing in one age, another in another.”²⁶

B. *The Predominance of Living-Constitution Theory*

Living-Constitution theory has more influence over constitutional interpretation and adjudication now than any other political or constitutional theory. Speaking for the entire Democratic Party, Vice President Al Gore asserted in one of his debates with now-President George W. Bush that “the Constitution ought to be interpreted as a document that grows with our country

23. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 56 (1908).

24. *Id.* at 69.

25. *Id.* at 50.

26. *Id.* at 54.

and our history.”²⁷ Living-Constitution ideas permeate mainline contemporary constitutional scholarship. To take just one leading example, Professor Ackerman’s *We the People* series and his theory of “constitutional moments” interpret American constitutional history as a process of “ongoing construction of national identity” and “collective self-definition.”²⁸ Such theory also has gathered considerable respect and acceptance in many areas of constitutional law. For instance, the second Justice Harlan is now revered for describing the Due Process Clause as relying on a historical tradition that is “a living thing. A decision of [the Supreme] Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.”²⁹ This dictum laid the basis, for instance, for Justices O’Connor, Kennedy, and Souter’s plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* reaffirming the constitutional right to an abortion.³⁰

This summary hits the high points, but it still understates living-Constitution theory’s influence. Most constitutional scholars associate living-Constitution theory with individual-rights guarantees like the Eighth Amendment’s limits on the death penalty,³¹ the Equal Protection Clause’s bar against racial segregation,³² and especially the Due Process Clauses’ protection

27. *First Presidential Debate Between George W. Bush and Al Gore* (ABC television broadcast, Oct. 3, 2000), transcript available at http://abcnews.go.com/sections/politics/DailyNews/debate/001003_trans_4.html (last visited Feb. 22, 2003).

28. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 33 (1991); see also *id.* at 44; MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 11 (1999); Larry D. Kramer, *The Supreme Court, Term 2000—Foreword: We the Court*, 115 HARV. L. REV. 4, 15 (2001); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (developing other theories of constitutional interpretation and constitutional change that borrow heavily on living-Constitution premises).

29. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

30. 505 U.S. 833, 850 (1992); see also William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986). According to Justice Brennan:

[T]he ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.

Id.

31. U.S. CONST. amend. VIII; see also *Atkins v. Virginia*, 122 S. Ct. 2242, 2247 (2002) (holding that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society” (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958))).

32. U.S. CONST. amend. XIV, § 1; see also Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court’s Quest for Legitimacy*, 54 STAN. L. REV. 793 (2002) (arguing that *Brown v. Board of Education*, 347 U.S. 483 (1954), was decided

of sexual contraception and abortion.³³ Constitutional law professors, however, tend not to appreciate how integral living-Constitution theory is to structural constitutional law as well. Woodrow Wilson and like-minded theorists developed living-Constitution theory at the turn of the twentieth century, primarily to discredit the understandings of federalism and separation of powers that, as of 1900, stood in the way of a national welfare state administered by an independent bureaucracy.³⁴ The theory prevailed in politics, providing a political roadmap for the Progressive social-reform movement and the New Deal. It did not, however, gain traction in the law reports immediately, in large part because it seemed so radical to lawyers and judges at the time.³⁵ Instead, the key New Deal cases and post-New Deal constitutional law scholarship rationalized the New Deal transformation in more value-neutral and legalistic Legal Realist and Legal Process terms.³⁶

As a result, while political theorists have understood the political implications of living-Constitution theory for two decades,³⁷ it is only within the last five years or so that legal academics have started to recover how central the Progressive living-Constitution project has been to an entire century's worth of constitutional interpretation. To mention some of the more noteworthy examples, historians Howard Gillman³⁸ and G.E. White³⁹ have started to retrace the connection between living-Constitution theory and early

primarily on the basis of living-Constitution principles about equality, not on the basis of social-science findings about how racial segregation affects African Americans).

33. U.S. CONST. amend. V, cl. 4; *id.* amend. XIV, § 1; *see also* sources cited *supra* notes 29-30.

34. *See* THE POLITICS OF REGULATION (James Q. Wilson ed., 1980); FRANK J. GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 3-11 (1911); Charles R. Kesler, *Separation of Powers and the Administrative State*, in THE IMPERIAL CONGRESS: CRISIS IN THE SEPARATION OF POWERS 20, 31-39 (Gordon S. Jones & John A. Marini eds., 1988).

35. *See* Morton J. Horowitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 56-57 (1993).

36. For analyses of the problems with the standard Realist and Process accounts of the Commerce Clause, *see* Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause after Lopez and Morrison*, 11 WM. & MARY BILL RTS. J. (forthcoming 2003), and Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089 (2000). The standard Realist and Process accounts of separation of powers are now known as the “functionalist” account of separation of powers. *See* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492-93 (1987).

37. *See, e.g.*, Charles R. Kesler, *Woodrow Wilson and the Statesmanship of Progress*, in NATURAL RIGHT AND POLITICAL RIGHT: ESSAYS IN HONOR OF HARRY V. JAFFA 103 (Thomas B. Silver & Peter W. Schramm eds., 1984); JOHN MARINI, THE POLITICS OF BUDGET CONTROL: CONGRESS, THE PRESIDENCY, AND THE GROWTH OF THE ADMINISTRATIVE STATE 39-48 (1992).

38. *See* Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the “Living Constitution” in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191 (1997).

39. *See* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000).

twentieth-century constitutional development. Meanwhile, in constitutional theory scholarship, Barry Friedman has made a valuable contribution by showing that problems with Progressive living-Constitution ideas led to the “counter-majoritarian difficulty,” which has plagued constitutional law ever since. Friedman has shown that this difficulty is an accidental by-product of a choice New Deal jurists made when they declined to uphold the New Deal political agenda explicitly on its Progressive merits, and, instead, upheld it using Legal Realist and Legal Process theories explaining why the courts should generally defer to Congress.⁴⁰

To be sure, living-Constitution theory is not the only body of political and jurisprudential theory influencing modern constitutional law. As John O. McGinnis has demonstrated, there is a strong case to be made that the Rehnquist Court, especially the five moderate and conservative Justices on the Court, is reviving an understanding of the Constitution consistent with the political principles of Alexis de Tocqueville and the American Founders.⁴¹ There are, however, even stronger reasons for starting with living-Constitution principles. Assuming Tocquevillean and originalist ideas explain where the “Federalism Five” want to go, living-Constitution theory explains where they are starting from. More importantly, they also help explain why Justices O’Connor and Kennedy are not in as much of a hurry to get there as the other members of that coalition. Separately, even if, as Professor McGinnis suggests, the more conservative Justices are sympathetic to Tocquevillean classical liberalism, on its own terms, their jurisprudence is *not* classically liberal.⁴² The conservatives may reject living-Constitution theory as they understand it, but they subscribe to some of the assumptions that distinguish modern liberalism from classical liberalism. McGinnis’ survey of the Court’s work suggests that the Rehnquist Court’s federalism project will gather steam; I think a retrospective based on living-Constitution ideas would give a much more clear-headed and realistic diagnosis, explaining why there are real limits to how far that project can extend in principle.

C. *Prioritizing the Constitutional Developments During the Rehnquist Court*

Because living-Constitution theory is first a political theory, it prioritizes how important different constitutional developments are in relation to each other, and marks off the topics most “important” to the living-Constitution project. The first goal of living-Constitution political theory was to establish a

40. See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty* (pt. 5), 112 YALE L.J. 153 (2002).

41. See John O. McGinnis, *Continuity and Coherence in the Rehnquist Court*, 47 ST. LOUIS U. L.J. 875, 876 (2003) [hereinafter McGinnis, *Continuity and Coherence*]; McGinnis, *supra* note 13.

42. See, e.g., Gillman, *supra* note 38, at 241-44.

national bureaucratic welfare state, and the preservation of such a state continues to be the paramount goal of such theory now. As a result, the three most critical goals in the living-Constitution project relate to property, federalism, and separation of powers—making sure that federal courts defer to Congress in all three areas. Once the New Deal established a firm constitutional commitment to a national bureaucratic welfare state, Congress and bureaucracies could secure for the American people the liberty they showed they wanted during the New Deal, namely economic security.

Once the courts had disengaged from the welfare-state project, they freed themselves to focus on other living-Constitution issues relating to equality and individual self-expression. With respect to equality, one clear priority was to make the Equal Protection Clause⁴³ a transmitter for evolving attitudes against race-based segregation. It remained an open question, however, whether that evolving consensus also barred affirmative action, and whether it reached gender-based discrimination and possibly discrimination on other grounds, as well.

By contrast, it was fairly clear within a living-Constitution framework that other individual-rights guarantees had to expand. When the American people decided during the New Deal to protect their economic interests collectively, they sacrificed constitutional property rights that had constituted an important realm of freedom and self-expression. Evolving conceptions of liberty demanded that the people receive new individual rights to make up for the rights they gave away. During the 1950s and 1960s, then, the federal courts began to countenance the proliferation of self-expression rights relating to what Professor Merrill calls the “social issues”—contraception and abortion, and probably also new understandings of free speech and religious free exercise.

The main outlines of the living-Constitution project confirm Professor Merrill’s basic instincts about the “federalism” and “social issues” cases,⁴⁴ but they suggest he should have examined a few other lines of cases. Because the Rehnquist Court’s federalism project goes against the grain of the structural commitments of living-Constitution theory, Merrill is absolutely right to suggest that this project deserves attention. By the same token, however, Merrill should have considered putting the Court’s regulatory-takings law in the same category,⁴⁵ and also why separation of powers law was nowhere near

43. U.S. CONST. amend. XIV, § 1.

44. See Merrill, *supra* note 1, at 580-87.

45. Compare *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (construing the Takings Clause to cover regulatory takings that wipe out all economic value in land without controlling traditional nuisances), with *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002) (construing *Lucas* narrowly to apply only to regulations that eliminate economic value permanently); see also Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*,

as active as constitutional federalism over the course of the Rehnquist Court. Similarly, Merrill is surely right to regard the due process “social issues” as flash points. Racial equality, affirmative action, and gender equality, however, probably provide equally compelling flash points, too.

D. Putting the Rehnquist Court in the Proper Historical Perspective

Second, living-Constitution theory provides a context for comparing the Rehnquist Court’s work against the work of earlier Courts. This historical perspective also is difficult to draw within a strictly empirical framework like Professor Merrill’s. Because living-Constitution ideas have played a part in most of the important constitutional developments over the last three or four generations, they help reveal which trends on the Rehnquist Court break with prior trends on the Burger, Warren, and New Deal Courts.

The Rehnquist Court marks a period of equipoise in American constitutional law that lags, as often happens, about a decade after a similar period of equipoise in American politics. The Nixon Era in the early 1970s, and then especially the Reagan-Bush Era from 1981-92, marked a political reaction against the Great Society—against increasing taxation, expanding entitlements, and cultural liberalism. They could not roll back the New Deal or the Great Society, but they could, at least, prevent further expansion in the same direction.⁴⁶ With varying degrees of success, Republican presidents Nixon, Reagan, and the first Bush tried to appoint to the Supreme Court nominees who saw the constitutional program of the Warren Court pretty much as their electoral base saw the Great Society. By the appointment of Justice Thomas in 1991—really the beginning of what Professor Merrill has called “the second Rehnquist Court”—these three Republican Presidents had finally appointed a working majority on the Court.

The Rehnquist Court has slowed, but not rolled back, developments in constitutional law tracking the Great Society in politics. From 1937 to *Lopez*⁴⁷ in 1995, there held a consensus on the Court that property rights, federalism, and separation of powers were off the table. A few takings cases and separation of powers cases cut the other way,⁴⁸ but these cases were tiny bumps along a generally smooth road.

The Rehnquist Court marks a state of equipoise after this period of expansion. In the case of the Commerce Clause, for instance, several of the Justices in the majority have made it abundantly clear they do not want to roll

88 CORNELL L. REV. (forthcoming Sept. 2003); Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993).

46. See MICHAEL BARONE, *OUR COUNTRY: THE SHAPING OF AMERICA FROM ROOSEVELT TO REAGAN* 594-96, 607-17, 637-38 (1990).

47. *United States v. Lopez*, 514 U.S. 549 (1995).

48. See, e.g., *Lucas*, 505 U.S. at 1003; *Buckley v. Valeo*, 424 U.S. 1 (1976).

back the New Deal. They do want to insist that Congress respect precedents like *Wickard v. Filburn*⁴⁹ and *Heart of Atlanta Motel*⁵⁰ as high-water marks for federal jurisdiction, but they do not want to call such precedents into question.⁵¹ The “social issues” show the same tension. *Casey*⁵² and *Stenberg v. Carhart*⁵³ suggest that the Court is not going to roll back the constitutional rights to abortion or sexual contraception anytime soon, but cases like *Washington v. Glucksberg*⁵⁴ suggest that further expansion of constitutionally-protected liberty will take place slowly, if at all. Within these broad outlines, the conservative and liberal wings of the Court engage in nip-and-tuck battles over more incremental attempts to expand the coverage of other constitutional individual rights.

This historical perspective helps explain why the Court seems more contentious than it has in many years. From conservatives’ point of view, it has been twenty-three years now since President Reagan was elected, but *Roe v. Wade*⁵⁵ is still good law.⁵⁶ Many of the major conservative victories over the last decade hang on 5-4 margins. Moreover, even in a period in which individual-rights guarantees have expanded haltingly, they have expanded in ways that conservatives criticize, and the Court has generated a lot of dicta that could blossom if the Democrats ever manage to appoint a fifth reliably liberal Justice. From liberals’ point of view, it is frustrating not to have a Court that can reliably be counted on to expand the scope of individual-rights guarantees. The Court’s federalism project is unlike anything anyone has seen in the last sixty years. Most of all, liberals probably feel as if they have dodged a few bullets. It is frightening for them to contemplate what might happen if President George W. Bush and future Republican Presidents ever learn how to choose nominees who stay as reliably faithful to conservative constitutional commitments as Democratic appointees do to liberal constitutional commitments.

E. Clarifying the Theoretical Alternatives After the Rehnquist Court

Finally, living-Constitution theory helps focus on the theoretical issues raised by the Rehnquist Court’s work, the questions that are will remain urgent to citizens, lawyers, and academics even after Chief Justice Rehnquist has

49. 317 U.S. 111 (1942).

50. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

51. See *Lopez*, 514 U.S. at 574 (1995) (Kennedy, J., concurring) (insisting that “[s]tare decisis operates with great force in counseling” the Court “not to call in question the essential principles now in place” over federal commercial regulation ever since the New Deal).

52. See *supra* note 30 and accompanying text.

53. 530 U.S. 914 (2000).

54. 521 U.S. 702 (1997).

55. 410 U.S. 113 (1973).

56. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

stepped down. The Rehnquist Court has been a time of theoretical ferment, raising questions about the objects of constitutional interpretation more radical than anything the Court or legal academy has seen since the New Deal. Whether they like or not, all of the Justices on the Court have a strong opinion about the concept of a “living Constitution.” Moreover, whether they agree with it or not, each of their varying approaches to constitutional interpretation has been shaped by living-Constitution theory.

Four of the Justices—Justices Stevens, Souter, Ginsburg, and Breyer—subscribe to a constitutional agenda essentially consistent with the living-Constitution project as it was understood during the late Warren Court and the Burger Court. Because these Justices’ views accord with the mainline in constitutional interpretation over the last thirty to forty years, they raise familiar questions. One is, can judges really discern the “evolving will of the people,” especially if that will is a more comprehensive and fundamental source of moral authority than the mental faculties of any one person?⁵⁷ Separately, the “counter-majoritarian difficulty” still remains: If dominant theories of adjudication hold that courts should defer to Congress and state legislatures when it comes to reviewing structural constitutional questions and property-rights questions, how do courts justify applying high levels of scrutiny to other constitutional guarantees?⁵⁸

The Rehnquist Court, however, is a time of ferment because a majority of the Court is calling the living-Constitution project as we have known it since the Warren Court into doubt. Three of the Justices—Chief Justice Rehnquist, and Justices Scalia and Thomas—have rejected living-Constitution theory. Chief Justice Rehnquist agrees with the living-Constitution theory that constitutional phrases like “due process” have no fixed meaning. He breaks with that theory, however, because he doubts that judges have any principled basis to say that they know better than anyone else how the people’s views are evolving. Thus, he recommends that courts defer to the people’s representatives, who are better-suited to adapt the Constitution to the times for the people.⁵⁹ Justice Scalia seeks to avoid similar subjectivity problems by trying to apply a series of purely objective principles for interpretation—textualism, originalism, and historical meaning, among others.⁶⁰ While Justice

57. See, e.g., Claeys, *supra* note 36.

58. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); Friedman, *supra* note 40.

59. See William H. Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693 (1976).

60. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997); see also *Michael H. v. Gerald D.*, 491 U.S. 110, 122-27 (1989) (Scalia, J., plurality opinion).

Thomas has not yet explained his approach to constitutional interpretation in a systematic way, he has made clear he prefers some mix of textual—and original—meaning interpretation.⁶¹

It is significant enough that these three Justices have broken sharply with thirty years or more of constitutional interpretation, but living-Constitution theory also helps assess the breaks they have made. It may come as a surprise, but Justice Scalia's and Chief Justice Rehnquist's breaks are not as radical as they think. Both disagree with the living-Constitution project, but they do so only on the basis of a deeper agreement with some of the first principles of that project. Living-Constitution project holds that constitutional clauses must change with the times because they have no inherent meaning, and also that such clauses cannot have inherent meaning because political and moral principles have little or no permanent content.⁶² As Philip Hamburger and Howard Gillman have suggested, this view is not the only view in our constitutional history. Founding Era and nineteenth-century American jurists believed that constitutions instituted into positive law permanently true political principles. Legislation and case law might vary from place to place and time as public officials tried to satisfy constitutional principles in practice, but the principles at which they aimed were right everywhere and always.⁶³ While the verdict is still out on Justice Thomas, Justice Scalia and Chief Justice Rehnquist agree with most twentieth-century constitutional theorists that political morality has no permanent content; they merely draw different conclusions from mainline theorists about how a judge is supposed to resolve all the theoretical problems that follow from that premise. If we have reservations about their theories of interpretation, we may want to ask whether the reservations follow from the parts of their theories that break from living-Constitution interpretation, or from the parts that subscribe to living-Constitution premises.⁶⁴

Finally, living-Constitution theory also helps us to understand better the role that Justices O'Connor and Kennedy have played on the Rehnquist Court. Simplistic portraits of the Rehnquist Court portray it as a 5-4 Court, but, as

61. See, e.g., *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (reconsidering all of the Court's Commerce Clause precedents from 1937 to 1995 because they do not square with the plain and original meanings of the Commerce Clause).

62. See WHITE, *supra* note 39, at 3-4, 232-33; Gillman, *supra* note 38, at 213-19; Claeys, *supra* note 36.

63. See Gillman, *supra* note 38, at 213-19; Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239 (1989).

64. Howard Gillman has suggested such a criticism of Chief Justice Rehnquist. See Gillman, *supra* note 38, at 241-43; see also Justice Antonin Scalia, Speech at the Gregorian University, Rome (May 2, 1996) (transcript available from Catholic News Service) (insisting in the question-and-answer session that, in a democratic constitutional order, "what the majority decides shall be the rights of minorities is what their rights are").

Professor Merrill recognizes, it is more accurate to characterize the Court as a 5-4 Court on “federalism” issues, but a 3-6 Court on “social issues.”⁶⁵ Even this characterization is too simplistic. Justices O’Connor and Kennedy side with the conservatives, but only around the margins. They are not going to subscribe to any interpretation of the Commerce Clause or Takings Clause that may threaten the constitutional revolution of 1937.⁶⁶ They side with the liberals in that they subscribe to the basic principle that non-property individual-rights guarantees grow and evolve with changing popular attitudes, and they refuse to repudiate earlier living-Constitution precedents like *Roe v. Wade*.⁶⁷ On the other hand, they are more cautious than the liberals about discovering new constitutional meanings.⁶⁸

It is difficult to explain in a theoretical way exactly how and why Justices O’Connor and Kennedy manage to straddle this middle ground on the Court. No doubt, one of the explanations is that both Justices dislike comprehensive jurisprudential theories. Still, the dislike of theory is a theoretical position, and it should be judged for what it is. In addition, we must understand Justices O’Connor and Kennedy as best we can, because they are now and will continue to remain the swing votes on the Court.

Living-Constitution ideas shed some unexpected light on Justices O’Connor and Kennedy’s positions. Their positions are similar in many ways to the positions of early twentieth-century Progressive moderates. These moderates subscribed to the basic premises of the living-Constitution project, but they insisted that social change proceed more slowly than Progressive liberals and New Deals eventually did. Justices O’Connor and Kennedy favor a similar approach in the context of the current Court. They favor federalism and states’ rights, but they tend to cite reasons that moderate Progressives would have understood, not necessarily reasons out of *The Federalist*.⁶⁹ Thus, John McGinnis does not give Justices O’Connor and Kennedy their due when he suggests their caution stems from *stare decisis* considerations.⁷⁰ They really do subscribe to the New Deal argument that the Commerce Clause is

65. See Merrill, *supra* note 1, at 629-38.

66. See, e.g., *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring with O’Connor, J.) (warning that *stare decisis* “forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy”); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring) (warning that the “Takings Clause, while conferring substantial protection on property owners, does not eliminate the police power of the State”).

67. 410 U.S. 113 (1973).

68. Compare, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 848-49 (plurality opinion of O’Connor, Kennedy, and Souter, JJ.) (subscribing to a living Constitution interpretation of the Due Process Clause to reaffirm *Roe*), with *Washington v. Glucksberg*, 521 U.S. 702 (1997) (O’Connor and Kennedy, JJ., joining a Court opinion refusing to recognize a fundamental liberty interest in a right to assisted suicide).

69. See Claeys, *supra* note 36.

70. See McGinnis, *Continuity and Coherence*, *supra* note 41, at 877.

obsolete as originally drafted, and they understand the states' roles differently as a result. The living-Constitution tradition helps us situate and clarify Justices O'Connor and Kennedy's jurisprudence, which is the first step toward assessing it.

This living-Constitution perspective provides a framework for identifying the "key" developments and battlegrounds on the Rehnquist Court. It seems to present issues in a light that partisans on all sides should consider fair. To be sure, it raises more questions than it answers. The questions it raises, however, seem to be the kinds of questions one would want to answer to understand and evaluate the Rehnquist Court's legacy.