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Constitutional Courts as “Positive Legislators” in the United States†

This Report asks whether American courts that decide constitutional cases, and ultimately the Justices of the United States Supreme Court, may be characterized as legislators, and in particular, as “positive” legislators. After defining the terms, the report reviews the Supreme Court’s practice of constitutional lawmaking and considers academic and political reactions to that practice. The Report concludes with an account of challenges that the Court has encountered in crafting remedies fit to fulfill the promise of its constitutional rulings.

I. LEGISLATORS AND POSITIVE LEGISLATORS

The topic of this Report engages two analytically distinct ideas—legislation and “positive legislation.” By legislation, we will mean any action that adds a rule to a given system of law.¹ Historically, American jurisprudence has displayed an ambivalent attitude to the idea that judges legislate in this sense. Judicial lawmaking is, of course, an entirely familiar feature of common law adjudication, but until the latter part of the nineteenth century this proposition was widely considered heretical. The orthodox view was that what might look like judicially created rules were, in fact, deductions from a preexisting body of common law principles.² By the middle of the twentieth century, however, this idea had been fully debunked and there was common agreement that “judges do and must legislate,” although

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1. We need not, for the purposes of this Report, state more precisely what it takes to be a “rule” in a given legal system. Any attempt to do so depends in part on certain disputed assumptions about the operation of the particular legal system. See H.L.A. Hart, *Definition and Theory in Jurisprudence*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 21 (1983). The entitlement of the examples given here to be called rules is relatively uncontroversial.

2. This is not to say that more skeptical views were ever entirely absent. See BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (Princeton Univ. Press, 2009).

they can “do so only interstitially; they are confined from molar to molecular motions.”³ Critically, moreover, such judge-made law was universally acknowledged to be subject to correction and revision by elected legislatures.

A narrow view of the judicial role was even more widely held with respect to adjudication pursuant to a formally enacted text. According to the conventional wisdom, the job of the judge in that situation was in no way legislative. The act of legislation had been completed by the time the courts came into the picture. Their job was to apply the existing rule to a particular set of facts. In this respect, the judges, notwithstanding their constitutional independence, could be perceived as performing an executive function.⁴ Thomas Jefferson expressed this view when he declared that the judge should be a “mere machine.”⁵ As it involved the judicial application of a written text, the same understanding extended to constitutional adjudication. In the foundational case of *Marbury v. Madison*,⁶ Chief Justice Marshall depicted the invalidation of an unconstitutional statute not as a discretionary exercise of power, but as an inescapable duty.⁷ When asked about certain constitutional judgments of the Supreme Court, Justice Hugo Black replied: “Well, the court didn’t do it The Constitution did it.”⁸

This is a view of the function of courts in constitutional litigation that has few defenders today. The Constitution, it is reasoned, must be interpreted and interpretation is not and cannot be a mechanical process. The preoccupation of American constitutional scholars with judicial interpretation is well known. It is enough here to note that most commentators, even most of those attached to a method of interpretation tethered to the original meaning of the constitutional language, see constitutional judges as faced with inevitable choices in adjudicating claims under the Constitution.⁹ Without regard to the correctness of this assumption as a matter of theory, no candid ob-

3. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). The classic American treatment is BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

4. See Laurence Claus, *Montesquieu’s Mistakes and the True Meaning of Separation*, 25 OXFORD J. LEGAL STUD. 419, 421–23 (2005).

5. 1 THOMAS JEFFERSON, *Thomas Jefferson to Edmund Pendleton, August 26, 1776*, in *THE PAPERS OF THOMAS JEFFERSON* 503, 505 (Julian P. Boyd et al. eds., 1950).

6. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

7. *Id.* at 180 (“Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government?”). Philip Hamburger has recently stressed the historical primacy of judges’ duty to apply the law in his thorough history of the development of judicial constitutional review. See generally PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008).

8. *Justice Black and the Bill of Rights* (CBS Television Broadcast, Dec. 3, 1968).

9. See e.g., MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?*, 55–57, 95–102 (1994). We discuss the current state of the debate on “originalist” constitutional interpretation *infra* text accompanying notes 53–61.

server can deny that, in fact, the history of American constitutional law is, in critical measure, one of judicial choice.

In this sense, judges may be lawmakers, and often are. But are they in any sense *positive* lawmakers? We will treat judges as engaged in positive lawmaking when they *originate* a scheme of law as opposed to merely considering, revising or rejecting schemes conceived by other legislative actors. As we hope our examination of American constitutional law will show, this is a question of degree, not one of absolute characterization. We need to ask, that is, not “was this positive legislation?” but “to what extent was this positive legislation?”

This sense of positive legislation resonates with the famous dictum of Hans Kelsen that a constitutional court which can declare enacted laws ineffective functions as a “negative legislator.”¹⁰ Kelsen’s characterization followed from his liberal definition of legislation as any “creation of general norms.”¹¹ A judgment that effectively invalidates a statute changes the content of the set of legal norms. For Kelsen, this was enough to amount to legislation.¹² Kelsen was clear that such a judgment had “a constitutive, not a declaratory character.”¹³ This way of looking at things was in direct contradiction to the classic American view of constitutional adjudication, according to which a judicial holding of unconstitutionality amounted to an authoritative statement that the statute was void *ab initio*.¹⁴ A judgment could not repeal or “abolish” statutes. The Austrian Constitution of 1920, in language drafted by Kelsen, on the other hand, refers to the power of the Constitutional Court to cancel or undo (*aufheben*) a law—not merely to declare it to be without effect.¹⁵ While Kelsen himself sometimes used the somewhat more ambiguous English word “annul,” he was in no doubt that when a constitutional court held a law invalid it was legislating.¹⁶ In the same vein, the Austrian Constitution called for a judgment of the

10. HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 268 (Anders Wedberg trans., 1949).

11. *Id.* at 270.

12. Other scholars, focusing on other distinctive aspects of such adjudication, have denied that it involves legislation. See e.g., ALLAN R. BREWER-CARLAS, *ÉTUDES DE DROIT PUBLIC COMPARÉ* 685 (2001) (noting that constitutional courts use “legal methods and criteria, in a process initiated by a party with the required standing”).

13. Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. POL. 183, 190 (1942).

14. See *Norton v. Shelby County*, 118 U.S. 425, 442 (1886). As discussed below, this pristine view has been considerably modified.

15. The official English translation of the Austrian Constitution, in this respect unchanged since 1920, uses the even more suggestive “rescinded:” available at http://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.html (last visited Sept. 3, 2009).

16. See Kelsen, *supra* note 13, at 187–90. Later Kelsen sometimes used the English word “abolish.” See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 268 (Anders Wedberg trans., 1949).

Constitutional Court invalidating an enactment to be published in the official journal of new legislation, a practice followed in numerous national constitutions adopting the Austrian model of constitutional review.¹⁷

Kelsen, in fact, gave little attention to the ways that legislation might be negative or positive. If anything, his insistence that annulment of legislative enactments amounted to lawmaking depended on an assumption that there was no essential difference between creating and removing an official norm. Rescinding a law was legislation whether it was done by a constitutional court or by an elected assembly; indeed, there is nothing intrinsically more important about the creation of a rule than its elimination. What does distinguish these two forms of lawmaking is the universe of possibilities open to the legislator in each case. The potential agenda of the ordinary lawmaker includes any form of regulation that he or she can constitutionally conceive. The constitutional judge as a negative lawmaker, on the other hand, appears strictly limited to subjects already considered and addressed by nonjudicial legislators. For a constitutional court to be a positive lawmaker under this terminology would involve the court in considering, propounding, and creating a scheme of regulation of its own conception.

The formal characteristics of adjudication, of course, limit the lawmaking potential of constitutional courts. The agenda of such courts is largely set by the choices of other people, although in some systems, liberal rules on standing to litigate or the sheer number of potential litigants mean that there are few important questions of public policy that may not, at some point, present themselves for decision.¹⁸ In any event, once a court has taken jurisdiction, a substantial range of possible lawmaking may arise within the scope of the subject matter before it.

It is worth noting briefly a second sense of “positive lawmaking” that may be relevant in our discussion. A constitutional court may be said to engage in positive constitutional lawmaking when the rule it formulates creates “affirmative” public duties. Students of comparative constitutional law are familiar with the distinction between “first

17. See VENICE COMMISSION, DECISIONS OF CONSTITUTIONAL COURTS AND EQUIVALENT BODIES AND THEIR EXECUTION, May 17, 2001, available at [http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)009-e.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)009-e.asp).

18. See generally RICHARD S. KAY, *STANDING TO RAISE CONSTITUTIONAL ISSUES: COMPARATIVE PERSPECTIVES* (2005). Allan Brewer Crias has questioned the usefulness of referring to constitutional courts as “legislators” in light of the formal limits on the way courts do business. See ALLAN R. BREWER-CRIAS, *supra* note 12, at 684. It is also worth pointing out that sua sponte legal declarations by constitutional courts are not unknown. See *In re* 42 Pa. C. S. § 1703, 394 A.2d 444 (Pa. 1978); Wojciech Sadurski, *Twenty Years after the Transition: Constitutional Review in Central and Eastern Europe* (Sydney Law School Research Paper No. 09/69, 2009, available at <http://ssrn.com/abstract=1437843> (discussing self-initiated constitutional review in Hungary and Russia).

generation" or negative constitutional rights debarring state interference with private activity and "second generation" or positive constitutional rights obliging the state to provide certain benefits.¹⁹ When American courts have engaged in positive constitutional lawmaking in the first sense, they have mainly produced "negative" constitutional law in the second sense. That is, they have pronounced limits on what the state may do. But there is a relationship. Positive judicial lawmaking in the first sense may raise some of the problems that have been particularly associated with the enforcement of affirmative social and economic rights. In particular, commentators have worried about the ability of courts to provide adequate remedies in light of the limited capacity of courts to administer the necessary programs or to compel others to do so.²⁰ Kelsen, noting the presence in some constitutions of provisions "prescribing a certain content for future laws," assumed that they could have no legal (that is justiciable) effect since "it is hardly possible to attach legal consequences to such an omission [to legislate]."²¹

When a court engages in true "negative" legislation in the classic Kelsenian sense, the remedy of invalidation is simple enough. The legal system goes on without the law in question. When a court creates a new legal regulation, however, its effectiveness often depends on more than passive acquiescence. It requires the active co-operation of other agents. So, as we will see in Part III, when American courts formulated certain procedural rules for the apprehension and detention of persons accused of crimes, the effectiveness of those rules depended on changing police practices. And when they enunciated constitutional standards for the treatment of incarcerated persons, it proved necessary for courts to oversee the operation of prison facilities. These challenges are similar whether the rules formulated impose negative or affirmative duties.

II. HOW AMERICAN COURTS LEGISLATE THROUGH CONSTITUTIONAL ADJUDICATION

In this Part, we will review the development of lawmaking by American courts in the process of constitutional adjudication and briefly consider some of the significant subjects of policy and value in which those courts have taken a leading role. We will look briefly as well at the academic and political responses to such judicial legislation. It should go without saying that we can do no more here than adumbrate a complex and multifaceted phenomenon.

19. There are now references to "third generation" rights, the beneficiaries of which are groups and communities. See David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1282 n.15 (2008).

20. See generally ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003).

21. KELSEN, *supra* note 10, at 262.

We have referred to the long-standing tradition of elaborating law in common law adjudication, elaboration which, when practiced apart from a controlling enacted text, has come to be universally recognized as a kind of lawmaking. That elaboration was effected in opinions issued by judges explaining their decisions. Neither English nor American courts abandoned that format for decision-making when resolving legal disputes in which the law invoked was a formally enacted text. American courts have from the beginning issued written reasons in their constitutional judgments. That written reasoning, in the context of constitutional dispute resolution, expounds what the Constitution requires. Exposition is elaboration. Elaboration is lawmaking. Judicial resolution of constitutional disputes has added to the words that count as American constitutional law—the words to which later courts, and others wishing to know what American constitutional law is, have turned to find answers to their legal questions.

The American founders posited distinct executive, legislative, and judicial departments of government, relying in substantial measure on Montesquieu's tripartite schema. But when Montesquieu used "the Constitution of England"²² as his heuristic for distinguishing legislative, executive, and judicial powers, he displayed no awareness of the opinion-writing practices of the English judges.²³ His own judicial experience in France had left him aware that dispute resolvers sometimes needed to investigate the "spirit" of the laws they applied,²⁴ but he contemplated less need for that in England. The English, after all, regularly convened a representative body to legislate, and so could readily rectify their written law's deficiencies. If laws needed elaboration, Parliament could achieve that through later laws. Montesquieu did not see that English courts were, in fact, contributing to the process of elaborating law by issuing reasoned opinions for their decisions.²⁵ They were not, pace Jefferson, "mere machines."

Of what, then, did Montesquieu's "judicial power" consist? Montesquieu made that clear by identifying those whom he thought were exercising it. They were . . . juries.²⁶ Montesquieu's "power of judging"²⁷ was a power to resolve questions of *fact*. That English judges were resolving questions of law, were writing opinions explaining the reasons for their decisions on those questions of law, and were receiving deference from later courts resolving later disputes, Montesquieu

22. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Thomas Nugent trans.), Bk XI, Ch. VI. (ed. rev. 1873 (first published 1748)).

23. See Claus, *supra* note 4, at 422–23, 431–33.

24. MONTESQUIEU, *supra* note 22, at Bk. VI, Ch. III, 85–86.

25. *Id.*; *Id.* at Bk. XI, Ch. VI, 182.

26. *Id.* at 175–76.

27. *Id.* at 173–74.

seemed not to notice. Had he realized that English judges were issuing writings that elaborated upon the effect of existing laws and that, under the doctrine of precedent, later dispute resolvers were treating those elaborative words as *part of the law*, there is little doubt how Montesquieu would have classified the issuance of those writings. They were exercises of *legislative* power, analogous to the Roman rescripts that Montesquieu called "a bad method of legislation," but legislation nonetheless.²⁸

During debates over the ratification of the U.S. Constitution, the more insightful among the Constitution's opponents worried that Article III's "one supreme Court," vested with the power to resolve all disputes "arising under this Constitution," might "make" the law of the Constitution.²⁹ Alexander Hamilton aptly summarized their critique:

The authority of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the *spirit* of the Constitution, will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. In Britain, the judicial power, in the last resort, resides in the House of Lords, which is a branch of the legislature; and this part of the British government has been imitated in the State constitutions in general. The Parliament of Great Britain, and the legislatures of the several States, can at any time rectify, by law, the exceptionable decisions of their respective courts. But the errors and usurpations of the Supreme Court of the United States will be uncontrollable and remediless.³⁰

Hamilton disputed this analysis, famously countering that the judiciary would "have neither *force* nor *will*, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."³¹ As he must have known, the idea that courts exercised only case-confined judgment was false, and his ensuing citation of Montesquieu was a mischievous exploitation of the French theorist's inadequate understanding of common law adjudica-

28. *Id.* at Bk. XXIX, Ch. XVII, 290–91.

29. See Brutus, Nos. 12 and 15, in II HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST* 423–26, 437–42 (1981).

30. ALEXANDER HAMILTON, JOHN JAY & JAMES MADISON, *THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES BEING A COLLECTION OF ESSAYS WRITTEN IN SUPPORT OF THE CONSTITUTION AGREED UPON SEPTEMBER 17, 1787, BY THE FEDERAL CONVENTION* 502 (1888) (No. 81) (Alexander Hamilton).

31. *THE FEDERALIST*, No. 78, *supra* note 30.

tion and of the doctrine of precedent. *Juries* might have only judgment, for their fact-finding has no significance beyond the outcome for the parties before them, and the legal rules applied to their fact-finding are exogenously established. Subject to their understandings of morality in constitutional interpretation, on the other hand, *judges* are presented with ample opportunities to exercise will. Through their written reasons for decision, they can will law into being, as surely as congressmen and senators do when voting for bills. And in a system that apportions legislative and executive powers within a national government and federally between that government and state governments, the other constitutional actors might well find that according force to judicial exercises of will is the only way to preserve the Constitution's scheme for authentically apportioned power.

The text of the U.S. Constitution, consisting at critical points of "majestic generalities,"³² might be read as offering its expositors a linguistic basis for elaborating the great moral ideas of liberty and equality. The U.S. Supreme Court's elaboration of those ideas provides perhaps the most salient example of positive lawmaking in the course of American constitutional adjudication. On its face, the equal protection clause of the Fourteenth Amendment³³ provides a plausible textual basis for licensing courts to expound the nature of equality. The Court's choice to treat the more obscure constitutional guarantee of "due process"³⁴ as a linguistic invitation to expound "liberty," on the other hand, has been more controversial.³⁵ Some commentators have treated the Ninth Amendment³⁶ as supplying linguistic support for a general constitutional guarantee of liberty,³⁷ though this is arguably not the reading best supported by the amend-

32. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

33. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1.

34. There are two "due process" clauses in the U.S. Constitution. Amendment V of the United States Constitution ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . .") applies to the United States and amendment XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .") to the state governments. With few exceptions they have been applied consistently with each other.

35. *See*, most prominently, *Roe v. Wade*, 410 U.S. 113 (1973).

36. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

37. *See* DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE* (2007); Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006).

ment's history,³⁸ and not one that the Court has ever clearly endorsed.³⁹

The Constitution's guarantee of equal protection has been interpreted to guarantee equal treatment by the law, not just equal application of the law.⁴⁰ Expounding that guarantee has involved American courts in the highly controvertible enterprise of deciding which distinctions drawn in laws are morally acceptable and which unacceptable.⁴¹ The Constitution's insistence that no person be deprived of liberty "without due process of law" has, with less linguistic basis,⁴² been held by the Supreme Court to guarantee liberty outright,⁴³ allowing courts to decide which freedoms are so important that government is limited or precluded from removing those freedoms. The case law expounding the clause moved meaning through three stages.

The first stage of due process exposition saw judicial expositors conclude, after some initial uncertainty,⁴⁴ that the due process clause constrained legislatures in their choice of content for enacted law. Those early cases pointed to a limitation redolent of the Constitution's prohibitions of bills of attainder⁴⁵ and of cruel and unusual punishments.⁴⁶ It was a limitation that implemented more compre-

38. See Laurence Claus, *Protecting Rights from Rights: Enumeration, Disparagement, and the Ninth Amendment*, 79 NOTRE DAME L. REV. 585 (2004); Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895 (2008); Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004).

39. Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005). Cf. *Griswold v. Conn.*, 381 U.S. 479, 486–99 (1965) (Goldberg, J., joined by Warren, C.J. and Brennan, J., concurring).

40. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("[T]he equal protection of the laws is a pledge of the protection of equal laws.").

41. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Romer v. Evans*, 517 U.S. 620 (1996).

42. The clause has its roots in chapter 39 of Magna Carta, which recited an array of adverse government actions not to be done to any "free man . . . except by the lawful judgment of his peers or by the law of the land." The more general guarantee of due process was in Magna Carta explicitly in the alternative to one particular procedure for removing someone's life, liberty, or property, namely, "lawful judgment of his peers." The first American state constitution adopted that phraseology: "[T]hat no man be deprived of his liberty, except by the law of the land or the judgment of his peers." VA. CONST., art. I, § 8 (1776). That clause could be satisfied by a jury verdict, and "liberty" in the clause clearly just meant not being locked up. The alternative, more general promise of due process would thus also appear to have been simply about legally required procedures for deciding whether someone should be imprisoned. "Liberty" was something that a jury could plausibly vote to remove—the term was used in the narrow sense of freedom from jail, not in the quite distinct and sweeping sense of freedom from legal restrictions on action.

43. See *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lochner v. New York*, 198 U.S. 45 (1905).

44. See, e.g., *Mayo v. Wilson*, 1 N.H. 53, 57 (1817) (treating duly enacted legislation as necessarily due process of law).

45. U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1.

46. U.S. CONST. amend. VIII.

hensively the separation-of-powers principle, later reflected in the equal protection clause, that legislation should be general in character, not targeted by legislators to kill, lock up, or take property from particular disfavored individuals.⁴⁷ Broader judicial power to protect liberty and property from legislative encroachment was in this period sometimes directly attributed to extra-textual natural rights.⁴⁸

Expounding the due process clause moved into a second stage when American courts began holding that the clause precluded legislatures from impairing existing property rights even by general legislation,⁴⁹ a principle congruent with the protection for liberty provided more specifically in the Constitution's prohibition of *ex post facto* laws.⁵⁰ Laws could prevent property rights from arising in the future, and could provide for loss of liberty or property based on future conduct,⁵¹ but could not simply confiscate or imprison. But then came stage three, in which courts began treating "liberty" in the clause not just as a modest reference to being out of jail, but as an expansive expression of freedom to live one's life free from unjustified government regulation.⁵² So read, the clause condemns any government restriction that the courts—and ultimately, five Justices of the Supreme Court—consider morally unjustified. And so the law of liberty and equality in America is now, in large measure, ultimately created and shaped by the Supreme Court.

Those who consider such open-ended moral decision-making an inapt allocation of power to courts have expressed their concern, in part, as following from theories of interpretive morality. Prominent in this context are principles of so-called originalist interpretation that require judges to take the meaning of a constitutional rule as fixed at the moment of its promulgation. But originalism does not necessarily obviate broad moral decision-making that in turn makes law for the nation. The most prominent and widely-endorsed contemporary theory of originalism, "original public meaning originalism," calls for interpretation to be based on the meaning that the language of the Constitution had for a (variously defined) typical American

47. See, e.g., *Dartmouth College v. Woodward*, 4 Wheat. 518, 581 (1819) (submissions of Daniel Webster); *Hoke v. Henderson*, 15 N.C. 1, 14–15 (1833) (Ruffin, C.J.).

48. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387–89 (1798) (Chase, J.). Cf. *id.* at 398–99 (Iredell, J., concurring). See also *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829) (Story, J.); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 52 (1815) (Story, J.); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135–36 (1810) (Marshall, C.J.).

49. See *Wynehamer v. People*, 13 N.Y. 378 (1856).

50. U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1. At an early date the Supreme Court held this provision to apply only to retroactive imposition or enhancement of criminal penalties. *Calder*, 3 U.S. (3 Dall.) at 386.

51. Cf. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1856) (Taney, C.J.), which signaled that even future conduct (in that case, bringing a slave into a free state) might not always be sufficient ground for removing property rights.

52. See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (affirming, unanimously, the "liberty to contract").

reader or speaker of English at the time of enactment.⁵³ This approach draws support from the fact that we make law as a community to serve an essentially predictive function, and that law cannot fulfill that function if it lacks meaning-fixedness across its audience community and over time. But the original public meaning of "equal protection," for example, provides enormous opportunities for judicial legislation insofar as it hands to expositors the job of deciding, without much restriction, which distinctions morally matter. Likewise, the original public meaning of the Second Amendment's "right to bear arms"⁵⁴ hands to the courts the chance for elaborative decision-making about which weapons count as "arms."⁵⁵ In identifying original public meaning, one can no more justify limiting "equal protection" to prohibiting race discrimination than one can justify limiting "arms" to muskets.

The apparent judicial discretion to legislate national morality entailed by original public meaning interpretation is less obvious in a different strain of originalism, which we might call intentionalism, and which identifies the original meaning with the meaning the text had for the actual enactors of a constitutional provision (as opposed to the hypothetical community member of public meaning originalism).⁵⁶ Intentionalism might appear a more appealing interpretive principle for those who wish to limit the Constitution's reach to something resembling the "original expected application"⁵⁷ of constitutional guarantees. In order to ascertain the intended meaning, this approach calls for consulting, among other sources, legislative history to a degree that English common law courts declined to do until 1992.⁵⁸ But confining meaning to original expected application need not be the consequence of intentionalism, depending

53. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); Lawrence B. Solum, *Semantic Originalism* 120 (Illinois Public Law Research Paper No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244>. Various specifications for the typical reader have been posited in the literature. See Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 Nw. U. L. Rev. 703, 721-23 (2009).

54. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

55. See *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008).

56. See, e.g., Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. Rev. 226 (1988).

57. See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293 (2007); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007).

58. See *Pepper v. Hart* [1992] A.C. 593 (H.L.) (U.K.). Public meaning originalists also consult drafting and ratification history, but they do so to gather evidence of usage in the period of enactment. See Vasan Kesavan & Michael Stokes Paulsen, *The*

on what was intended by those whose views intentionalists think we should care about. Choice to express oneself at a level of abstraction above one's concrete concerns suggests an intention to address future counterparts to those concerns, counterparts perhaps not yet adequately appreciated at the time of enactment. The Second Amendment's adopters could have explicitly confined themselves to the weapons that they personally valued. The Fourteenth Amendment's adopters could have explicitly confined themselves to the particular immoral discrimination that was bothering them. They chose, instead, to express themselves at a higher level of abstraction. Whether or not that choice of language reflected a decision to delegate broad elaborative discretion to later expositors is itself a historical fact, one that intentionalist interpreters need to investigate.

The debate between proponents of intentionalism and proponents of original public meaning may ultimately turn on differing perceptions of the nature and function of law. Particularly relevant is the question whether lawmakers have "authority" in the sense of moral right to be obeyed. One of us finds moral support for intentionalism in widely-endorsed notions about what creates a moral duty to obey the U.S. Constitution,⁵⁹ while the other of us favors original public meaning on the basis that law is, in Holmes' terms, just a body of "systematized prediction."⁶⁰ On that view, notions of lawgivers' moral right to be obeyed are superfluous to law's true nature.⁶¹

In any event, theories of morality in interpretation have not had much effect in constraining the courts, which have, as the examples given illustrate, appropriated a wide range of fundamental social and political decision-making. What else might constrain? For much of its history, the U.S. Congress has been dubiously treated as having power to create "Exceptions" to the Supreme Court's jurisdiction to decide constitutional questions.⁶² But this alleged ability to deprive

Interpretive Force of the Constitution's Secret Drafting History, 91 GEO. L.J. 1113, 1118 (2003).

59. See Kay, *supra* note 53, *passim*.

60. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) ("lay[ing] down some first principles for the study of this body of dogma or systematized prediction which we call the law . . .").

61. Laurence Claus, *The Empty Idea of Authority*, 2009 U. ILL. L. REV. 1301.

62. See U.S. CONST. art. III, § 2, cl. 2. For a range of views on the scope of the power, see MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER*, 24-45 (2d ed. 1990); Akhil Reed Amar, *Article III and the Judiciary Act of 1789: The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Charles L. Black, *Decision According to Law*, 37-39 (1981); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007); Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59 (2007); Laurence Claus, *Constitutional Guarantees of the Judiciary: Ju-*

the Court of constitutional lawmaking power has lain largely in desuetude, thanks to Congress's need for judicial policing of the Constitution's apportionment of powers. That apportionment between Congress, the President, and the state governments, must be the subject of elaborative judicial lawmaking regardless of the Constitution's linguistic vagueness. Umpiring the apportionment of power among American government institutions has rendered the Supreme Court's expositions of the Constitution an indispensable feature of American public life. When the issue is *which* of multiple competing elected government actors is allowed to act, the Justices lack the option of being pervasively pro-democratic "minimalists" who routinely resolve vagueness and ambiguity in favor of the validity of action by elected institutions.⁶³ However unclear the Constitution, the Court must decide who gets to act, and its decisions must succeed in affecting what the competing actors do. The American system of separated branches and levels of government cannot otherwise survive.

Secure in its almost universally recognized indispensability, the Supreme Court has elaborated with similar latitude upon the constitutional vaguenesses and ambiguities that concern relations between government and the individual. For the most part, Congress has not been tempted to truncate the Court's jurisdiction to do this. The exceptional circumstances in which Congress has seriously threatened use of its "Exceptions" power have been occasions on which the Court had protected, or looked likely to protect, "discrete and insular minor-

isdiction, Tenure, and Beyond, 54 AM. J. COMP. L. 459, 460–76 (2006); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 243–44 (1997); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990); James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515 (2001); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1455 n.8 (2000); Lawrence Gene Sager, *The Supreme Court 1980 Term, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005–06 (1965).

63. James Bradley Thayer argued that the Supreme Court should resolve constitutional underdeterminacy in favor of the validity of Congressional action, but that the Court should accord no comparable favor to state government action. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 150, 154–55 (1893). Thayerian minimalism rests, then, not on deference to democratic choice, but on whether institutions enjoy coordinate status with the Court. On that premise, how should the Court resolve demarcation disputes between the Court's two elected coordinates?

ities”⁶⁴ from government action. Until recently, Congress’s most notorious use of the power was to strip the Court of jurisdiction to hear challenges to federal measures of doubtful constitutionality adopted in the wake of the American Civil War.⁶⁵ In this century and decade, the “Exceptions” power has been invoked in Congress in connection with proposals to stop the Court hearing claims from aliens,⁶⁶ atheists,⁶⁷ and gay people.⁶⁸ Notwithstanding substantial support for some of these measures, the breadth of the Supreme Court’s jurisdiction has escaped largely untouched. Measured by durability and depth of influence in shaping constitutional values, the Justices may well be the most powerful sitting lawmakers in the nation.

III. ENFORCING JUDICIAL LEGISLATION

The impressive enterprise of positive lawmaking by American courts in the course of constitutional adjudication has, necessarily, raised questions about how to enforce the resulting law. Kelsen expected enforcement of “negative” law that emerged from constitutional courts to be fairly straightforward. The condemned measure would be erased from the statute book, just as if it had been repealed by the legislature.

The American constitutional experience, however, has shown that complexities arise when enforcing even decisions that simply hold legislative acts invalid. There has been controversy, for example, concerning the effect that such decisions have on the legal status of actions taken pursuant to law before that law’s invalidation.⁶⁹ Under

64. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (Stone, J., opinion of the Court).

65. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869).

66. Detainee Treatment Act of 2005 §§ 1005(e), 1005(h); Military Commissions Act of 2006 § 7. The Court’s decisions holding aspects of the Acts invalid did not directly address the reach of the “Exceptions” power. *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

67. Pledge Protection Act of 2004 § 2 (passed by the House of Representatives as H.R. 2028 on Sept. 23, 2004) and Pledge Protection Act of 2005 § 2 (introduced to the House of Representatives and Senate respectively as H.R. 2389 and S. 1046 on May 17, 2005) (purporting to eliminate the Supreme Court’s jurisdiction to determine the constitutionality of the Pledge of Allegiance as defined in 4 U.S.C. § 4 or of that pledge’s recitation). *See also* Constitution Restoration Act of 2005 § 101 (introduced to the House of Representatives and Senate respectively as H.R. 1070 and S. 520 on Mar. 3, 2005) (purporting to eliminate the Supreme Court’s jurisdiction to determine the constitutionality of government actors’ “acknowledgment of God as the sovereign source of law, liberty, or government”).

68. Marriage Protection Act of 2004 § 2 (passed by the House of Representatives as H.R. 3313 on July 22, 2004) and Marriage Protection Act of 2005 § 2 (introduced to the House of Representatives as H.R. 1100 on Mar. 3, 2005) (purporting to eliminate the Supreme Court’s jurisdiction to determine the constitutionality of the Defense of Marriage Act, 28 U.S.C. § 1738C).

69. A related question attaches to the case of a statute held invalid in a judgment subsequently overruled. Does the law in question spring back into life or is a new enactment necessary? The Supreme Court, to the extent it has considered the question, seems to have assumed such a statute is once more automatically effective. *See*

the classic understanding of constitutional judicial review derived from *Marbury v. Madison*, a judgment of unconstitutionality holds that the unconstitutional enactment was, contra Kelsen, never law at all. This orthodox view was expressed in a nineteenth century decision of the U.S. Supreme Court: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."⁷⁰ The unsettling results of such a policy with respect to actions undertaken in reliance on an apparently valid law have persuaded the Supreme Court to abandon this absolute rule. It will now, sometimes, declare its holdings to operate only prospectively, based on an evaluation of the particular interests of individuals, society, and the legal system.⁷¹ This kind of holding, of course, makes the legislative character of the judicial action dramatically clear.⁷²

The remedial complexities of negative judicial lawmaking are minor, however, when compared with those that attend the judicial creation of legal rules. When a legislature creates a body of law, it is in a position to provide the means by which that law is to be made effective. The new scheme may use existing agencies of law administration and enforcement, or create new ones. It may also provide the necessary resources by appropriating public funds and raising new revenues. Sometimes, as when conduct is regulated by criminal sanction, the existing law enforcement and criminal justice system may be adequate. But in other situations, as has been the case, for example, with respect to new rules protecting the environment, a large new bureaucratic apparatus may be required.⁷³ In contrast, the instrumentalities of administration and enforcement available to *judicial* legislators are radically limited. It is for this reason that Kel-

Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870). The issue is discussed in William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902 (1993).

70. *Norton v. Shelby County*, 118 U.S. 425, 442 (1886).

71. See, e.g., *Lemon v. Kurtzman*, 411 U.S. 192, 197–201 (1973).

72. "That concept is quite foreign to the American legal and constitutional tradition. It would have struck John Marshall as an extraordinary assertion of raw power Fully retroactive decisionmaking was considered a principal distinction between the judicial and the legislative power: '[I]t is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases.' T. Cooley, *Constitutional Limitations* *91." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 106–07 (1993) (Scalia, J., dissenting in part).

73. Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 719–20 (2006) (discussing the creation of agencies to implement environmental laws). See generally PETER L. STRAUSS, TODD D. RAKOFF, CYNTHIA R. FARINA & WALTER GELLHORN, GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 13–23 (Robert C. Clark ed., 10th ed. 2003).

sen dismissed the potential for judicial enforcement of positive constitutional rights.⁷⁴ The way in which judicially-created rules have been implemented in the United States has been deeply affected by the courts' institutional limitations.⁷⁵

Much depends, of course, on the kind of law the courts have made. Some judge-made law regulates government actors who cannot achieve their goals without judicial confirmation. In such cases, those other officials must comply with the judicial legislation or risk failing in their objectives. The U.S. Supreme Court, invoking the Fourth, Fifth, and Sixth Amendments to the Constitution, has created a fairly detailed set of rules regulating the conditions for lawful search and arrest in connection with investigating and prosecuting crime. These decisions have resulted in a substantial and relatively complex body of law controlling police behavior.⁷⁶ The means for assuring the effectiveness of this law are direct and obvious. Courts may simply reverse the convictions of defendants who have been treated other than in accordance with the judicially produced rules.⁷⁷ Law enforcement agencies interested in securing convictions, therefore, have an interest in compliance. To a very significant extent, police departments have adopted procedures and trained their personnel to follow these rules—a result familiar to any viewer of American television police dramas.⁷⁸

Judicial lawmaking is not so easy to implement when it relates to behavior that does not contemplate some subsequent judicial process. It may happen that, upon a statement of the law by a court, the relevant actors, and especially the holders of government power, will conform their behavior to the rules announced. Sometimes, moreover,

74. See Kelsen, *supra* note 10, at 262.

75. The most famous summary of the limited abilities of the courts is Alexander Hamilton's in *The Federalist* No. 78, noting that the judiciary has "no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." See *THE FEDERALIST* No. 78, *supra* note 30.

76. See JOSHUA DRESSLER & ALAN C. MICHAELS, *UNDERSTANDING CRIMINAL PROCEDURE*, 149–89 (2006).

77. This is a substantial simplification of the actual practice. Not every deviation from the prescribed procedures results in a reversal of the subsequent conviction. One important qualification is the "harmless error" rule whereby a conviction may be affirmed if the reviewing court concludes that it would have resulted even if the police had acted properly. See *id.* at 44. On the uncertain status of these rules in the American legal hierarchy see Henry P. Monaghan, *The Supreme Court 1974 Term, Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

78. See Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987) (discussing changes in police training and record-keeping in response to judicial constitutional rulings); Corey Fleming Hirokawa, Comment, *Making the "Law of the Land" the Law on the Street: How Police Academies Teach Evolving Fourth Amendment Law*, 49 EMORY L.J. 295 (2000) (same).

elected legislators will re-enact the court's law in statutory form. The Supreme Court's various and changing pronouncements on the death penalty (whose implementation does require some judicial confirmation) have generally been followed by conforming legislation.⁷⁹ Indeed, in the United States, respect for, and deference to, the constitutional mandates of the courts is much more the norm than the exception.⁸⁰ Judges have come to learn, however, that adequate cooperation is not always forthcoming. In such situations, the question arises as to how the judges, lacking the powers of "the sword or the purse," may give substance to the law declared.

This issue has to be seen against the background of Anglo-American law concerning remedies available to successful litigants. That law is, in part, a product of the historic division between courts of common law and courts of equity. Generally speaking, in noncriminal proceedings at common law, courts were limited to remedies reaching the property of the defendant, whereas courts of equity could act "on the person," ordering even a non-governmental defendant to act or to refrain from acting. From the uneasy coexistence of these systems there eventually emerged a practice whereby resort to equity—and the in personam relief it offered—was available only when remedies at law were deemed inadequate to redress the violation of the plaintiff's rights.⁸¹ When, in the last century, both law and equity were lodged in unitary court systems, the priority of remedies was, at least formally, retained. Equitable remedies, including injunctions decreeing a course of conduct by the defendant, were treated as exceptional, to be granted only where law damages were inadequate and, even then, only in the discretion of the court.⁸²

The preference for damages remedies raised obvious difficulties in the enforcement of constitutional law in which the wrongs involved so often resist pecuniary measurement. Moreover, until about fifty years ago, an action for money damages premised on a violation of constitutional rights was generally unavailable in federal courts.⁸³ The quintessential relief accorded in constitutional cases, exemplified in *Marbury v. Madison*, was, as we have seen, the negative one of

79. Christine Holdeman, Sandi Mather & Judith A. Young, Case Note, *Roper v. Simmons: The Death Penalty Was Banned for Juvenile Offenders*, 35 LINCOLN L. REV. 43, 43 (2007) (noting that thirty-five states amended their death penalty statutes after the Supreme Court's first major decision in 1972).

80. For a survey of the history of Congressional resistance and acquiescence see Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153 (2003).

81. See HENRY L. MCCLINTOCK, *HANDBOOK OF EQUITY*, 25–26 (1936).

82. See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506–11 (1959). Among the factors weighing against the exercise of such discretion is the need for continuous supervision by the court of any decrees that might be issued. See MCCLINTOCK, *supra* note 81, at 94.

83. Such an action was not recognized as authorized by federal statute law until 1961. *Monroe v. Pape*, 365 U.S. 167 (1961).

finding an unconstitutional act to be without legal effect. Still, the judicial power created in Article III of the Constitution extended to "all cases, in law and equity, arising under this Constitution [and] laws of the United States," suggesting the availability of equitable relief in proper cases. In the early part of the twentieth century, federal courts began issuing injunctions against state officials to bar the enforcement of unconstitutional state laws.⁸⁴ Such orders were, however, clearly inadequate to redress constitutional violations that required affirmative changes in the way a state operated. The extent to which U.S. courts have exploited their equitable powers to move beyond prohibitory to mandatory relief is one of the most striking developments in modern constitutional law.

We begin our account of this phenomenon with the Supreme Court's momentous judgments in *Brown v. Board of Education*. In 1954, the Court held that racial segregation in public education was a denial of the "equal protection of the laws" which, under the Fourteenth Amendment, no state was to deny to any person within the state's jurisdiction.⁸⁵ At the time of the decision, racially segregated schools operated in thousands of districts, affecting tens of thousands of children in twenty states and the District of Columbia.⁸⁶ Under the best circumstances, the necessary reassignment of students and personnel would have been complicated. But, as the Court knew well, circumstances were far from the best. The decision in *Brown* would be bitterly resented and resisted by much of the white population of the American south. The Justices understood that it would take more than a declaration of law to end the dual system of education.⁸⁷

The case was argued before the Supreme Court in December 1952, but in June 1953 the Court issued an order setting the case for reargument the following term and asking the parties to address five questions set by the Court. Questions four and five dealt with the content of any decree the Court might issue should it find segregation unconstitutional. Should that decree order that African-American children "forthwith be admitted to schools of their choice" or should the court "in the exercise of its equity powers, permit an effective gradual adjustment" to unitary systems? And if the latter course were chosen, should the Court "formulate detailed decrees?"⁸⁸ Notwithstanding these inquiries and the parties' responses to them, when the Supreme Court, in May 1954, declared racial segregation

84. *Ex Parte Young*, 209 U.S. 123 (1908).

85. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

86. See CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION*, 14-22 (2004).

87. The unwillingness of other government actors to implement fully a mere judicial declaration of law was a critical factor leading courts to undertake the kind of extensive managerial functions discussed in this section. For a sensitive discussion see Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983).

88. *Brown v. Bd. of Educ.*, 345 U.S. 972, 972 (1953).

incompatible with the Fourteenth Amendment, it *again* postponed formulating a remedial order and set down the question for further argument.⁸⁹ The Court did not issue its decree in the case until May 1955, two and one-half years after the initial argument.⁹⁰

The Court's opinion in this second *Brown* opinion displays an obvious uncertainty as to what exactly should happen next. It plainly declined to treat the case as ordinary. Rather than particularized relief, the Court foresaw a "transition to a system of public education freed from racial discrimination." This was going to be a process, not an event. Although the "primary responsibility" belonged to local school authorities, their actions would be subject to "judicial appraisal" by lower courts applying "equitable principles":

Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a number of obstacles Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis During this period of transition, the courts will retain jurisdiction of these cases.⁹¹

The *Brown* cases were remanded to the trial courts with instructions to issue orders to the states to admit the plaintiffs to public schools on a nondiscriminatory basis not "forthwith," but "with all deliberate speed."⁹² This obscure prescription implicitly recognized that the Court's judgment amounted to the promulgation of a new national policy to apply across a wide variety of circumstances and into an extended future. Implementing that policy required the machinery of law administration and enforcement. In a memorandum to his colleagues while the case was under consideration, Justice Felix Frankfurter noted that the decree "would be radically different from decrees enforcing merely individual rights . . .," for the Court would be, "broadly speaking, promoting a process of social betterment . . .

89. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495–96 (1954).

90. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

91. *Id.* at 300–01.

92. *Id.*

[S]preading the adjustment over time will more effectively accomplish the desired end”⁹³

The subsequent history of the desegregation of schools in the United States bore out the expectation implicit in the Supreme Court’s decision. Desegregation was a painfully slow process. By one count, in 1963, almost a decade after the Court’s initial pronouncement, only 1.06% of African-American children in the South attended school with whites.⁹⁴ By that time the federal courts, and the Supreme Court in particular, began to understand that the complex process of readjustment could not be left to the local school authorities, the defendants in the desegregation cases. An important turning point was reached in 1968 in *Green v. County School Board*.⁹⁵ The local school district had responded to a desegregation action by adopting a “freedom-of-choice” attendance policy honoring any student’s request to change schools. But after three years, the previously all black school was still all black although some African-American students had enrolled in the previously white school. The Supreme Court declared that the order in *Brown* obliged any school board that had operated a “dual system . . . to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated *root and branch*.”⁹⁶ It was not enough, that is, to discontinue the policies that had led to unconstitutional segregation. The school district had to “undo” the segregation that those policies had created.⁹⁷ The district was obliged to take further measures, such as creating compulsory attendance zones, that would eliminate the racial character of the system.⁹⁸ Supervising courts had to evaluate the measures taken “in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness.” District courts “should retain jurisdiction until it is clear that state-imposed segregation has been completely removed.”⁹⁹

93. Quoted in RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 866–67 (1975). See also MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 313 (2004) (“The justices chose vagueness and gradualism.”). In argument before the Court, Thurgood Marshall, one of the counsel for the plaintiffs in *Brown*, and later a Justice of the Supreme Court, argued for an order setting a fixed date for full desegregation no later than one year after the judgment: “I submit that a longer period would get the lower court into the legislative field” Doug Rendleman, *Brown II’s “All Deliberate Speed” at Fifty: A Golden Anniversary or a Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?* 41 *SAN DIEGO L. REV.* 1575, 1585 (2004).

94. Some of the statistics are collected in KLARMAN, *supra* note 93, at 344–63.

95. *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

96. *Id.* at 437–38 (emphasis added).

97. *Id.* at 440 (quoting the dissenting opinion in the Court of Appeals).

98. *Id.* at 441–42.

99. *Id.* at 439.

What this would mean for the ongoing involvement of courts in administering desegregation plans became clear three years later in *Swann v. Charlotte-Mecklenburg Board of Education*.¹⁰⁰ The Supreme Court approved a detailed decree issued by a district court, based on the recommendation of an expert in educational administration. The Supreme Court endorsed decrees calling for such measures as designing oddly shaped attendance zones, pairing or clustering of black and white schools to produce better racial balance, compulsorily transporting students to schools outside their neighborhoods, reassigning teachers and other personnel to reduce the racial specificity of individual schools, and requiring that new schools be constructed in locations that would not contribute to the persistence of segregation.¹⁰¹ All of these tools, however, were to be employed with discretion and sensitivity to the particular conditions present in a particular time and place, taking into account both "individual and collective interests."¹⁰²

Over the following twenty years, federal courts repeatedly had to reconcile the constitutional imperative with the practical realities of operating a school system, a task often made more difficult by the passive or active resistance of the local authorities. The practical and political questions associated with managing a desegregation regime returned regularly to the Supreme Court, whose subsequent judgments were largely concerned with defining limits on the broad judicial mandate sketched out in *Brown*, *Green*, and *Swann*. The kinds of issues involved were illustrated by the Supreme Court's judgment in *Missouri v. Jenkins*¹⁰³ in 1995, one of the Court's last significant statements on the remedial authority of federal courts in desegregation cases. The district court in that case had found that unconstitutional segregation had affected the quality of the education offered in the schools in issue. Over a ten-year period, the district court judge had, consequently, ordered that class sizes be reduced, that a full-time kindergarten be instituted, that summer programs be expanded, that before and after school tutoring be provided, and that an early childhood development program be established. The district court also ordered a major capital improvement program and salary increases for teachers and other school employees.¹⁰⁴ The Supreme Court held that, since many of these actions sought to remedy a racial disparity among school districts, they were not part of a proper

100. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

101. *Id.* at 19–25.

102. *Id.* at 16. The court quoted *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944) for the proposition that equity was an "instrument for nice adjustment and reconciliation between the public interest and private needs as well as competing private claims."

103. *Missouri v. Jenkins*, 515 U.S. 70 (1995).

104. *Id.* at 74–80.

remedy for the constitutional violation that had been found within a particular district.¹⁰⁵

The issues emerging from the remedial approaches developed in desegregation litigation suggest more general themes applicable when constitutional courts make public law. What the substantive constitutional prohibition of racial segregation required may have seemed clear enough when *Brown* was decided in 1954. But the idea, enunciated in *Green*, that an adequate remedy required eliminating every "vestige" of discrimination meant that the supervising courts had to determine what counted as vestiges, how vestiges could be identified, and what measures were appropriate to eliminate them.

The desegregation cases have provided the remedial model for a number of important categories of modern constitutional litigation. The Eighth Amendment's prohibition of "cruel and unusual punishments" has been the predicate for widespread constitutional challenges to the operation of prisons. The same features we have already noted—the need for extended time to reform facilities, the technical complexities of institutional change, the uncertain outcomes of alternative measures and the sometimes reluctant compliance of the responsible officials—have resulted in long-term supervision of numerous institutions. In litigation challenging the constitutionality of aspects of Arkansas state correctional institutions, federal judges ordered, among other things, that institutions be closed, maximum numbers of inmates for particular facilities and for individual cells, detailed procedures for determining disciplinary violations, and limits on the punishments administered. The courts also required employment of full-time psychiatrists or psychologists, affirmative action to recruit more minority personnel, and mandatory training of employees to improve race relations in the prisons. The practice of using armed inmates as "trusty" guards was prohibited. Inmates were to be provided with educational opportunities and a fair procedure for filing grievances. The courts retained jurisdiction for more than ten years.¹⁰⁶ Mental hospitals have been the subject of similar decrees¹⁰⁷ and, in somewhat more contained

105. *Id.* at 90–100.

106. See *Hutto v. Finney*, 437 U.S. 678 (1978) (dealing with limited aspects of the case). Details and citations are set forth in MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* 59–74 (1998).

107. *Wyatt v. Stickney*, 344 F. Supp. 373 (1972). See Jules B. Gerard, *A Restrained Perspective on Activism*, 64 CHI.-KENT L. REV. 605, 613 (1988) ("The full flavor of the order he did enter is impossible to capture in a summary. It covers eight printed pages and is divided into five major sections. Beside definitions, it contains thirty-five paragraphs, some with as many as sixteen subparagraphs, and some subparagraphs with as many as five sub-subparagraphs. It lists thirty-five different kinds of employees, ranging from psychiatrists and psychologists to messengers and vehicle drivers, and how many of each, every Alabama institution was ordered to have on its staff. It contains detailed instructions with respect to physical facilities—how hot the water

proceedings, so has the process of apportioning legislative representation.¹⁰⁸

Remedial measures of this scope and complexity, especially when combined with such procedural innovations as class actions, flexible rules on joinder of parties, and liberal standing requirements for associations, constitute a new category of judicial action. In an influential article published in 1976, Abram Chayes contrasted the attributes of "public law litigation" with those of traditional adjudication. The object in the new actions was not the well-defined settlement of a discrete dispute between identified parties. It was "not a terminal, compensatory transfer, but an effort to devise a program to contain future consequences in a way that accommodates the range of interests involved."¹⁰⁹ Chayes made clear how these decrees blurred the difference between adjudication and legislation:

The whole process begins to look like the traditional description of legislation: Attention is drawn to a "mischief," existing or threatened, and the activity of the parties and court is directed to the development of on-going measures designed to cure that mischief. Indeed, if, as is often the case, the decree sets up an affirmative regime governing the activities in controversy for the indefinite future and having binding force for persons within its ambit, then it is not very much of a stretch to see it as, *pro tanto*, a legislative act.¹¹⁰

An essential aspect of this development was the elimination or even reversal of the historic priority of legal over equitable remedies. In this category of litigation, at least, the primary remedy is the injunction. Courts often choose, moreover, not a simple command to do or refrain from doing a particular act. Rather, as exemplified by the desegregation cases, they issue continuing injunctions directed at a vaguely expressed goal. They allow for repeated recourse to further judicial review for modification as circumstances change, or as one or another solution proves inadequate to the long-term elimination of the objectionable conditions.¹¹¹ The result, at least sometimes, is

must be (110F at the fixture), for example. And so on—and on." (citing *Wyatt*, at 379–86)).

108. See *Branch v. Smith*, 538 U.S. 254 (2003) (upholding a district court injunction ordering adoption of a Congressional district reapportionment plan of the district court's own devising).

109. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1294 (1976).

110. *Id.* at 1297.

111. See *id.* at 1292. See generally, OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978). Fiss posited the utility of the "structural injunction, which seeks to effectuate the reorganization of an ongoing social institution." *Id.* at 7.

what Donald Horowitz has called a "chameleon case, ever-new, ever-changing, never-ending."¹¹²

The actual management of such remedial regimes necessarily occurs in the trial courts, although, as we have seen, their orders are subject to periodic correction by appellate tribunals. The administrative and bureaucratic functions of the trial courts are, in that way, manifestations of the lawmaking activities of the appellate courts. Even more than occurs in modern legislatures, much of the lawmaking by American courts in constitutional litigation involves promulgating broad standards of constitutional conduct.¹¹³ The lower courts thus play a role analogous to that of administrative agencies in giving specific shape to the "soft rights" they have been directed to enforce.¹¹⁴ Again, the lower courts' experiences working out the practicalities of the Supreme Court's general mandate to eliminate racially segregated schools are exemplary.

The new remedial regimes have been sharply criticized for their radical departure from the ordinary judicial role. Some of the critics may have been motivated merely by disagreement with the substantive changes that the courts have engineered. This was surely the case with many of the shrillest complaints about the courts' involvement in the desegregation of the schools. But some academic critique focused distinctly on the redefinition of judicial authority that such litigation has produced. According to those critics, such developments transgressed the constitutionally defined limits of the judicial power and involved an unwarranted assumption of both legislative and executive responsibility.¹¹⁵ Some of the defenses of the expanded judicial role helped to generate this concern. "Civil litigation," according to an early and prominent proponent of structural reform litigation, "is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals."¹¹⁶ Critics questioned whether the unambiguous evil of segregation and its legacy was sufficient moral justification for catapulting the courts into an essentially different institutional role. Given the breadth and complexity of the issues involved, critics contended, courts were

112. Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1297 (1983).

113. Michael Dorf draws a connection between broad, indeterminate legal norms and "experimentalist" trial courts that creatively solve problems rather than merely applying controlling rules, although he does not refer explicitly to the judicial administration of structural injunctions. See Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 885-87, 940-43 (2003).

114. See SANDLER & SCHOENBROD, *supra* note 20, at 99-103. While the subject of this Report is limited to the law emerging from constitutional adjudication, the greater part of "public law litigation" involves the attempted judicial enforcement of personal rights arising from ordinary legislation. See generally *id.*

115. John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1144-71 (1996).

116. Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984).

necessarily making decisions without full benefit of argument on behalf of all relevant interests, potentially compromising the appearance of disinterestedness that supports judicial authority.¹¹⁷ Critics charged, moreover, that even strictly in terms of achieving judicially-identified social progress, the courts were proving to be crude and clumsy managers of institutional reform.¹¹⁸

Worries about judicial overreaching have sometimes manifested themselves in legislative efforts to limit remedial decrees. The Civil Rights Act of 1964 significantly increased the opportunities for judicial intervention in school administration by authorizing the federal government to initiate legal action against segregated systems.¹¹⁹ Subsequently, however, Congress prescribed a set of priorities for federal courts issuing desegregation orders, including limits on the circumstances in which those courts may order the transportation of students.¹²⁰ Unhappiness with intervention in the operation of prisons led to enactment of the Prison Litigation Reform Act in 1996. That legislation limited federal court decrees in prisoner rights cases to "narrowly drawn" relief employing "the least intrusive means necessary to correct violation of the Federal right." The Act also set in place various procedural devices to ensure that the supervising court paid attention to the Act's limitations.¹²¹ But insofar as we are dealing with the implementation of legal rules promulgated by the courts in the name of the Constitution, any attempt at legislative correction that was found to thwart the effectiveness of those rules would itself be unconstitutional.¹²²

In recent years, the Supreme Court has itself stressed the limits rather than the reach of judicial remedial authority.¹²³ Commentators perceive a significant reduction in the number of cases where courts have retained supervisory authority over public institutions.¹²⁴ It would be wrong, however, to conclude that public law litigation and "structural injunctions" are now of mere historical sig-

117. See SANDLER & SCHOENBROD, *supra* note 20, at 123–38.

118. See Horowitz, *supra* note 112. This article remains one of the most perceptive critical reviews of institutional public litigation. See also GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 30–36 (1991) (surveying limitations to courts' ability to effect social reform); SANDLER & SCHOENBROD, *supra* note 20, at 113–162. See generally Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289 (2002).

119. 42 U.S.C. § 2000c-6(a).

120. Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1721, *et seq.*

121. 42 U.S.C. §§ 3626(a)-3626(b). A constitutional challenge to one of these devices was rejected by the Supreme Court in *Miller v. French*, 530 U.S. 327 (2000).

122. On whether Congress can preclude judicial findings of unconstitutionality, see the range of views expressed at note 62, *supra*.

123. See *Lewis v. Casey*, 518 U.S. 347 (1996); *Missouri v. Jenkins*, 515 U.S. 70 (1995).

124. See Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. MIAMI L. REV. 143, 144 (2003); Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L.

nificance. Courts continue to be confronted with requests for specific relief ordering the reform of public institutions alleged to be operating unconstitutionally. In July 2009, the U.S. Department of Justice had a list of 208 "open cases" concerning the discriminatory administration of public schools.¹²⁵

Some commentators have noted a change in the techniques of judicial control of public administration, whereby detailed management has been replaced by more flexible processes that allow the various "stakeholders" to participate in formulating methods of reform.¹²⁶ But this is a far cry from the elimination of judicial authority, final judicial authority, in determining the way government operates in important sectors of public activity. The Supreme Court has moderated, but it has never renounced, the kind of ongoing structural relief that we have described, despite the doubts of some of its members.¹²⁷ It may, in fact, be fair to say that the role of the constitutional judge as policymaker and potential administrator of public institutions has now become a permanent feature of American constitutional law.

REV 1623, 1626-44 (2003); Russell L. Weaver, *The Rise and Decline of Structural Remedies*, 41 SAN DIEGO L. REV. 1617, 1623-28 (2004).

125. List on file with authors. We are grateful to John Brittain for providing this information.

126. See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1067-73 (2004). "The judge's role changes from that of directly determining the merits to facilitating a process of deliberation and negotiations among the stakeholders." *Id.* at 1055.

127. See *Missouri v. Jenkins*, 515 U.S. 70, 124-25 (Thomas, J. concurring). See also *id.* at 112 (O'Connor, J. concurring) (expressing doubts about judicial capacity to manage institutional reform).