QUIET-REVOLUTION RULINGS IN CONSTITUTIONAL LAW

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ABSTRACT

*The Supreme Court ordinarily supports its establishment of major constitutional principles with detailed justifications in its opinions. On occasion, however, the Court proceeds in a very different way, issuing landmark pronouncements without giving any supportive reasons at all. This Article documents the recurring character and deep importance of these "quiet-revolution rulings" in constitutional law. It shows that—however surprising it might seem—rulings of this sort have played key roles in shaping incorporation; reverse incorporation; congressional power; federal courts; and freedom-of-speech, freedom-of-religion, and equal-protection law. According to the synthesis offered here, these rulings fall into two categories. One set of cases involves "*ipse dixit *declarations," which establish major hornbook-type principles even while offering no reasons on their behalf. In the other group of cases—characterized here as "invitational pronouncements"—the Court does not establish discrete constitutional doctrines but instead deploys rhetoric that sets the stage for transformative future developments. This Article explores the nature and justifiability of quiet-revolution rulings. It posits that recent developments may well steer the Court away from the future issuance of decisions of this kind. Such a result will appeal to observers who view the law as centered on careful reason-giving. Even so, it may be that the issuance of quiet-revolution rulings sometimes makes good sense. Especially for analysts drawn to common-law constitutionalism, invitational pronouncements may hold value because they signal possible pathways for developing the law over time. In unusual cases,* ipse dixit *declarations may do helpful work, too. In particular, the Court sometimes faces the unwelcome prospect of deciding a case through the issuance of a confusing mix of plurality opinions. In these instances, the option of issuing an* ipse dixit *declaration may allow a majority of the Court to come together in a single opinion, thus allowing it to bring needed clarity to the law.*

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INTRODUCTION

Some Supreme Court rulings make a grand entrance. *Marbury v. Madison*,[1] *McCulloch v. Maryland*,[2] and *Miranda v. Arizona*[3] illustrate the point. In each of these cases, the Court launched a transformative constitutional principle in a setting marked by white-hot public debate. Oftentimes, high-profile decisions build on high-profile decisions that came before. *Brown v. Board of Education*[4] drew on *Sweatt v. Painter*.[5] *Roe v. Wade*[6] pointed to the earlier *Griswold v. Connecticut*[7] and *Eisenstadt v. Baird*[8] decisions. The Court's same-sex-marriage ruling in *Obergefell v. Hodges*[9] found support in *Romer v. Evans*,[10] *Lawrence v. Texas*,[11] and *United States v. Windsor*.[12] With these pronouncements, too, visibility was high, and the effort to establish new doctrine met stiff resistance. Citizens took notice. Interest groups took sides. The media editorialized. Opinion leaders railed. Other opinion leaders railed right back.

Sometimes the legal community, more so than the larger political community, takes on the task of monitoring the Supreme Court's work. With regard to *Craig v. Boren*,[13] for example, ordinary citizens likely had little interest in the nuances of state "near beer" regulation, but a majority of the Court used the case both to articulate and to justify a new "intermediate scrutiny" test for laws that treat women and men differently.[14] In response, then-Associate Justice Rehnquist

[1] 5 U.S. (1 Cranch) 137, 177 (1803) (announcing power of judicial review).

[2] 17 U.S. (4 Wheat.) 316, 426 (1819) (rejecting narrow view of Necessary and Proper Clause in upholding Congress's creation of national bank and rejecting state authority to tax operation of federal instrumentalities).

[3] 384 U.S. 436, 460 (1966) (setting forth rules regarding officer warnings to be given to persons in custody to ensure meaningful protection of right against self-incrimination).

[4] 347 U.S. 483, 493-95 (1954) (rejecting "separate but equal" doctrine in context of public education).

[5] 339 U.S. 629, 633 (1950) (finding no "substantial equality in the educational opportunities offered" white and black law students by state).

[6] 410 U.S. 113, 153 (1973) (invalidating state prohibitions of abortion).

[7] 381 U.S. 479, 484 (1965) (invalidating state ban on contraceptive use by married couples).

[8] 405 U.S. 438, 453 (1972) (invalidating state ban on contraceptive use by unmarried, as well as married, persons).

[9] 135 S. Ct. 2584, 2607 (2015).

[10] 517 U.S. 620, 633 (1996) (invalidating state constitutional ban on extending antidiscrimination laws to homosexuals).

[11] 539 U.S. 558, 562 (2003) (invalidating criminal sodomy laws as applied to consenting partners in private places and noncommerical contexts).

[12] 570 U.S. 744, 763-64 (2013) (invalidating portions of federal Defense of Marriage Act as applied to disadvantage same-sex married couples).

[13] 429 U.S. 190 (1976).

[14] *See id.* at 197 (stating that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

penned a vigorous dissent,[15] and the importance of the ruling was hardly lost on lawyers and legal academics.[16] Many cases fit the mold of *Craig*. The majority reasons its way to embracing a new legal principle in the face of objections set forth in a dissenting opinion. Constitutional analysts line up on one side or the other. The law takes shape in a crucible of robust disagreement within the legal profession.

Cases such as *Marbury*, *Brown*, and *Craig*—and less famous rulings that share their focus on thoughtful justification—dominate thinking about the Court's work. These are the cases that fill the pages of constitutional law casebooks, in part because the very elaborateness of their reasoning makes them lengthy in character. These decisions combine the announcement of major principles with conscientious exercises of the lawyerly craft, which in turn trigger reactions—often expressed in dissenting opinions—likewise rooted in reason-giving. These rulings conform to lawyerly notions about how law is done in part because lawyerly training and lawyerly work center on reasoned analysis.

Sometimes, however, the Court issues rulings of a very different kind. In these cases, the Court does *not* exercise the lawyerly craft. Instead, the Court lays down major doctrines *without* offering reasons on their behalf. New principles thus do not enter the law by earning victory in pitched battles. Instead, they capture ground—often sprawling ground—without the support of any analysis at all. This Article considers this set of "quiet-revolution rulings." In four parts, it documents and explores the significance of this important, but little-noticed, feature of the Supreme Court's constitutional work.

Part I offers examples of quiet-revolution rulings. An illustration is provided by *Schenck v. United States*,[17] the First Amendment case that initially set forth the rhetoric of "clear and present danger."[18] In *Schenck* itself, Justice Holmes used the phrase almost in passing, without stirring even a hint of objection from any other Justice. In dozens of later cases, however, the Court drew on this pronouncement to push First Amendment law in a strongly libertarian direction. As a result, a quiet revolution took place, and it took place because an action of the Court that went largely unnoticed at the time later played a major role in the remolding of constitutional doctrine.[19] This Article shows that similar

[15] *See id.* at 217-20 (Rehnquist, J., dissenting).

[16] *See, e.g.*, Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 54 (1977) (reflecting on *Craig* and noting that it might mark "beginning of a candid acknowledgement by the Supreme Court that it uses a variable standard of judicial review").

[17] 249 U.S. 47 (1919).

[18] *See id.* at 52 ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.").

[19] For a more detailed treatment of *Schenck*, see *infra* notes 186-203 and accompanying text.

developments mark almost all areas of constitutional law. From incorporation to reverse incorporation, from means-ends analysis to the law of federal courts, from equal-protection limits to commerce-power doctrine—in all these areas, quiet legal revolutions have radically reshaped the legal landscape.

Part II offers the beginnings of a systematic analysis of this body of decisions. It suggests that quiet-revolution rulings come in two main forms: invitational pronouncements and *ipse dixit* declarations. Invitational pronouncements—well exemplified by the "clear and present danger" rhetoric of *Schenck*[20]—summon up the image of the planted seed. In this set of cases, whether consciously or not, the Court works into its analysis, in an unheralded way, open-textured rhetoric that holds the later-realized potential to support judicial innovation. In contrast, *ipse dixit* declarations themselves set forth concrete, newly operative, hornbook-proposition doctrines. These doctrines, however, come into the law by way of opinions that differ fundamentally from the thoughtfully reasoned rulings handed down in cases such as *Marbury*, *Brown*, and *Craig*. Instead of offering careful justifications, the *ipse dixit* ruling declares a new constitutional doctrine in a one-sentence or "all but nothing more" pronouncement, thus failing to signal that any serious change (far less a sea change) in the law has occurred. The Court's rulings that asserted, with no explanation whatsoever, that the Fourteenth Amendment Due Process Clause incorporates the Free Speech, Free Press, Free Exercise, and Establishment Clauses of the First Amendment provide examples.[21]

Parts III and IV address two big-picture questions brought into focus by the descriptive account offered in Parts I and II: First, will the Court continue to issue quiet-revolution rulings? Second, should it? As to the former question, recent decades have produced sweeping changes in our legal culture, including as a result of internet communications, growing political polarization and a widening attentiveness among the general public to the Supreme Court's work.[22] Part III suggests that these forces are likely to push the Justices away from the future issuance of *ipse dixit* declarations and perhaps, although to a lesser extent, from invitational pronouncements as well. With regard to the latter question, Part IV makes the case that the normative justifiability of quiet-revolution rulings will hinge, to a large extent, on the underlying theory of interpretation that constitutional analysts bring to their work. For originalists, both *ipse dixit* declarations and invitational pronouncements raise profound concerns because unreasoned rulings of any kind stand in tension with an interpretive approach built at its core on the giving of reasons rooted in historical understandings.[23] So-called "living constitutionalists" may approach these matters with a greater

[20] *See supra* notes 17-19 and accompanying text.

[21] *See generally infra* notes 44-64 and accompanying text.

[22] *See infra* notes 333-338 and accompanying text.

[23] *See infra* Section IV.A.

measure of flexibility.[24] Even so, these analysts tend to gravitate to the common-law method of decision-making, which also emphasizes the importance of reason-giving, and thus they too will likely view *ipse dixit* pronouncements with skepticism as a general matter.[25] At the same time, nonoriginalist analysts may well be more likely than originalists to find quiet-revolution rulings justifiable in two respects. First, nonoriginalist analysts may endorse *ipse dixit* declarations in exceptional cases, especially when fragmentation within the Court threatens efforts to produce intelligible majority opinions. Second, nonoriginalist analysts may well look favorably on invitational pronouncements on the theory that those pronouncements comport with the incremental unfolding of constitutional law over time, in keeping with the common-law method.

In the end, far-reaching uncertainty overhangs the future prospects of quiet-revolution constitutional rulings. One thing, however, is not uncertain at all: These rulings have played a critical role in the past development of constitutional law, including by giving rise to many of the most consequential judicial rulings in American history.[26] And when it turns out that an identifiable group of Supreme Court rulings has dramatically altered our constitutional regime in ways that went wholly unexplained when those decisions came down, it seems sensible to examine closely what has been happening. In addition, precisely because quiet-revolution rulings often have gained acceptance in the past, there is every reason to expect that the Court will find itself contemplating the possibility of issuing such rulings in the future. That likelihood suggests, in turn, the wisdom of subjecting this set of rulings to a critical examination.

Many legal academics—precisely because of their reason-steeped lawyerly training and outlook—will be quick to decry rulings of this kind due to their conclusory and "under the table" nature. Such a reaction, however, may be mistaken if, as Holmes observed, "[t]he life of the law has not been logic: it has been experience."[27] The recurring character of quiet-revolution rulings, coupled with their transformational effects, suggests the importance of looking hard at their origins, their operation, and their justifiability. Such a descriptive and evaluative examination is offered here.

I. AN OVERVIEW OF KEY QUIET-REVOLUTION RULINGS

Quiet-revolution rulings have done heavy lifting in diverse fields of constitutional decision-making. Their impact has been great, for example, with regard to the law of incorporation, reverse incorporation, free speech, equal protection, congressional powers, federal court jurisdiction, and means-ends

[24] *See generally infra* notes 367-375 and accompanying text.

[25] *See infra* Section IV.B.

[26] Among those cases are *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Gitlow v. New York*, 268 U.S. 652 (1925); *Schenck v. United States*, 249 U.S. 47 (1919); and *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886), all of which are discussed below.

[27] Oliver Wendell Holmes, *The Common Law* (1881), *reprinted in* THE FUNDAMENTAL HOLMES: A FREE SPEECH CHRONICLE AND READER 60 (Ronald K.L. Collins ed., 2010).

analysis as it has operated to define the scope of almost all constitutional rights. These and other examples, which are documented in detail below, make it clear that quiet-revolution rulings have shaped constitutional doctrine in far-reaching ways.

A. *Incorporation*

Few developments in constitutional law have had greater practical significance than the Court's invocation of the Fourteenth Amendment's Due Process Clause to apply to the states nearly all of the protections set forth in the Bill of Rights. Yet the Court's long journey to this endpoint has been marked by a series of quiet-revolution rulings. And of particular importance has been the Court's full-scale incorporation of each of the protections set forth in the First Amendment.

1. Incorporating the Free Speech and Free Press Clauses

It is a curiosity of constitutional history that the Court did no serious work with the First Amendment's Free Speech and Free Press Clauses for more than one hundred twenty years following that Amendment's ratification. This period of quiescence came to a halt as the government moved to jail activists who opposed the nation's military policies during World War I. Key rulings included *Schenck*,[28] as well as *Frohwerk v. United States*,[29] *Debs v. United States*,[30] and *Abrams v. United States*.[31] Each of these cases involved a challenge to a federal statute, so that the First Amendment clearly applied regardless of the dictates of the Fourteenth Amendment. One question these decisions brought into view, however, was clear enough: What would happen when *state* officials took aim at antigovernment agitators?

They soon did. The earliest prosecutions stemmed from growing alarm about the Bolshevik Revolution, rising worker movements in America, and the resulting enactment of state criminal syndicalism laws. The Supreme Court's first brush with these proscriptions came in *Gitlow v. New York*,[32] in which Justice Sanford began his analysis by observing that:

> For present purposes, we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and

[28] *See supra* notes 17-19 and accompanying text (discussing introduction of "clear and present danger" to First Amendment lexicon).

[29] 249 U.S. 204, 206 (1919) (upholding conviction for conspiracy to violate Espionage Act of 1917 based on antiwar tracts contained in circulated newspapers).

[30] 249 U.S. 211, 215 (1919) (upholding conviction under Espionage Act of 1917 for delivery of antiwar speech).

[31] 250 U.S. 616, 619 (1919) (upholding conviction under Espionage Act of 1917 for printing and distributing circulars focused on criticizing American military action in Russia).

[32] 268 U.S. 652 (1925).

> "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.[33]

The Court went on to consider the merits of the defendant's constitutional claim and found it unavailing.[34] Notably, the Court in *Gitlow* did not agonize over—indeed, it did not discuss at all—whether it made sense to read into the state-limiting Fourteenth Amendment Due Process Clause the substantive protections of liberty directed against the national government by the First Amendment.[35] The Court did not agonize because it did not have to agonize. Given its ruling against the defendant on the merits, it made perfect sense for the Justices to do just what they did—that is, to "assume," and only to "assume," that the operative protections set forth in the First Amendment applied in Gitlow's case.

As things turned out, however, *Gitlow* spawned a quiet constitutional revolution. In later rulings that involved state—not federal—prosecutions, the Court applied the limiting principles of the Free Speech and Free Press Clauses without hesitation. Illustrative is *Stromberg v. California*.[36] There, as if forgetting that the Court only had to "assume" the point in *Gitlow*, Chief Justice Hughes asserted for the majority without equivocation: "It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech."[37] Thereafter, in *Schneider v.*

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[33] *Id.* at 666. The Court added: "We do not regard the incidental statement in *Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543*, that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question." *Id.* In practical effect, the Court thus displaced one quiet-revolution ruling, handed down only three years earlier, with another by repudiating, without any explanation, an earlier *ipse dixit* declaration made in a similarly "incidental" way.

[34] *See id.* at 664-65 (finding statute and conviction constitutional because legislature validly targeted "words [that] imply urging to action" even though no actual incitement occurred).

[35] *See id.* at 666; *see also* Patterson v. Colorado *ex rel.* Attorney Gen., 205 U.S. 454, 462 (1907) ("We leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First.").

[36] 283 U.S. 359 (1931).

[37] *Id.* In support of this proposition, the Court cited *Gitlow*, together with *Whitney v. California*, 274 U.S. 357, 368 (1927) and *Fiske v. Kansas*, 274 U.S. 380 (1927). Just as in *Gitlow*, however, the majority in *Whitney* did not discuss the question whether the protections put in place by the Free Speech Clause apply or should apply to the states; rather, and again as in *Gitlow*, the Court merely concluded that the case provided no basis for endorsing the free-speech-based claim of liberty advanced by the defendant. 274 U.S. at 368. In *Fiske*, a unanimous Court did overturn a conviction obtained under a state syndicalism statute. In doing so, however, the Court simply distinguished *Gitlow* and *Whitney* on their facts without even mentioning the underlying incorporation question and leaving some room for readers to view the case as rooted less in the First Amendment than in traditional due-process

New Jersey,[38] the Court pointed to *Gitlow* in clarifying that this principle reached the Free Press Clause as well.[39] Again, the pronouncement of the Court was as categorical as it was unreasoned. The Justices simply proclaimed that "[t]he freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state."[40] These rulings left no doubt about the revolutionary impact of *Gitlow*, at least when viewed in hindsight. As the Court in *Bridges v. California*[41] explained: "Not until 1925, with the decision in *Gitlow v. New York*, did this Court recognize in the Fourteenth Amendment the application to the states of the same standards of freedom of expression as, under the First Amendment, are applicable to the federal government."[42]

2. Incorporating the Religion Clauses

The quiet Fourteenth Amendment revolution launched by *Gitlow* did not stop with the "standards of freedom of expression" referenced in *Bridges*.[43] By 1940, the Court was prepared to declare that the fundamental concept of liberty embodied in the Fourteenth Amendment embraced *all* "the liberties guaranteed by the First Amendment,"[44] including its safeguards of religious freedom. As the Court put the point in *Cantwell v. Connecticut*[45]: "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has

constraints. *See Fiske*, 274 U.S. at 386-87 (assailing conviction of defendant "without any charge or evidence" of a necessary element of the crime).

[38] 308 U.S. 147 (1939).

[39] *Id.* at 160.

[40] *Id.* In *Schneider*, the Court supplemented its citation to *Gitlow* (as well as to *Stromberg*) with additional citations to *Whitney*, *see supra* note 37, as well as *Grosjean v. American Press Co.*, 297 U.S. 233, 239 (1936); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *Herndon v. Lowry*, 301 U.S. 242, 255 (1937); and *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938). *See Schneider*, 308 U.S. at 160 n.8, 161 n.9. But these cases, too, involved at most conclusory pronouncements. *Grosjean*, for example, merely cited *Gitlow* as having established the "fundamental character" of expressive freedoms. *See Grosjean*, 297 U.S. at 244 (citing *Gitlow*, 268 U.S. at 666). In like fashion, *De Jonge* tersely described speech and press rights as "fundamental," citing *Gitlow* together with follow-on rulings, including *Stromberg* and *Grosjean*. *See De Jonge*, 299 U.S. at 364 ("Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution." (first citing *Gitlow*, 268 U.S. at 666; then citing *Stromberg*, 283 U.S. at 368; then citing Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 707 (1931); and then citing *Grosjean*, 297 U.S. at 243-44)).

[41] 314 U.S. 252 (1941).

[42] *Id.* at 267-68 (citation omitted).

[43] *Id.* at 268.

[44] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[45] 310 U.S. 296 (1940).

rendered the legislatures of the states as incompetent as Congress to enact such laws."[46] This declaration—reaching well past the Free Speech and Free Press Clauses to incorporate both the Free Exercise Clause and the Establishment Clause—again came in a quiet revolution. The first Justice Roberts offered not one word of explanation for the Court's pronouncement, even though it massively contracted state autonomy in the service of safeguarding religious liberty. Of particular importance, he did not address the specialized argument as to why the Fourteenth Amendment should not incorporate the Establishment Clause even if the Amendment broadly incorporates other Bill of Rights protections.[47] Instead, Justice Roberts supported his eighteen-word treatment of how the Fourteenth Amendment assimilated both religion clauses by pointing only to the Court's earlier free-expression ruling in *Schneider*.[48] And that case's ruling—as we have seen—rested in essence only on the assumption made by the Court in *Gitlow* about speech and press rights.[49]

[46] *Id.* at 303.

[47] *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring) (rejecting incorporation of Establishment Clause because it "is best understood as a federalism provision [that] does not protect any individual right"); Akhil Reed Amar, *Some Notes on the Establishment Clause*, 2 ROGER WILLIAMS U. L. REV. 1, 3 (1996) ("[T]he nature of the states' establishment clause right against federal disestablishment makes it quite awkward to mechanically 'incorporate' the clause against the states via the Fourteenth Amendment. . . . [T]o apply the clause against a state government is precisely to eliminate its right to choose whether to establish a religion—a right explicitly confirmed by the Establishment Clause itself!").

[48] *See Cantwell*, 310 U.S. at 303 ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment." (citing Schneider v. New Jersey, 308 U.S. 147, 160 (1939))).

[49] *See supra* notes 38-40 and accompanying text. One step on the way to the Court's declaration in *Cantwell* came in *Palko v. Connecticut*, in which the Court noted that "the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge . . . the free exercise of religion." 302 U.S. 319, 324 (1937), *overruled in part by* Benton v. Maryland, 395 U.S. 784 (1969). To say the least, this statement about what the Due Process Clause "may" do was not determinative (if even informative) as to the issue presented in *Cantwell*. This is all the more true because the Court in *Palko* could muster only one citation in support of this proposition. *See id.* (citing Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 262 (1934)). In that cited case, however, the Court had done nothing more than reject a student's claim that the Due Process Clause should free him from a state rule requiring enrollment in a military training class, noting in doing so only that "the 'liberty' protected by the due process clause . . . does include the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections . . . ." *Hamilton*, 293 U.S. at 262. Whatever else this passage might have established, it did not say that the Free Exercise Clause, far less the Establishment Clause, is incorporated into the Fourteenth Amendment. *See id.*

3. The Revolutionary Character of the *Gitlow* Line of Cases

From a present-day perspective, *Gitlow* and its progeny may seem more prosaic than transformative. After all, the all-but-complete incorporation of the Bill of Rights—borne largely of the labors of Justice Hugo Black—is now a well-accepted feature of constitutional doctrine. When *Gitlow* was decided in 1919, however, the law was in a very different place. Hugo Black was a young, practicing lawyer just returning from service in World War I and was still nearly two decades away from appointment to the Court. Indeed, the confident brusqueness with which the incorporation principles launched in *Gitlow* found expression in later cases was especially surprising because, in earlier decisions, the Court had taken a highly cautious approach to applying Bill of Rights protections to the states. In 1876, for example, it signaled that the Second Amendment did not constrain state action.[50] In other rulings, the Court refused to read into the Due Process Clause even long-celebrated procedural safeguards, deeming neither the Fifth Amendment's requirement of grand jury indictment[51] nor its protection against self-incrimination applicable to state authorities.[52] Most important of all, only three years before *Gitlow*, the Court had gone so far as to reject the very principle that *Gitlow* itself came to embody, stating without qualification that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech.'"[53] To be sure, that pronouncement itself came in an unreasoned, one-line proclamation. But its preexisting, and very recent, appearance in the work of the Court puts into bold relief the law-transforming character of the no-less-conclusory line of rulings that began with *Gitlow*.

The revolutionary impact of these rulings cannot be overstated because, since World War I, most legal challenges founded on the First Amendment have taken aim at state and local action. As a result, the Court's most consequential rulings in this area have arisen out of laws and practices not involving the federal government at all—in cases addressing public-official defamation,[54] flag

[50] *See* United States v. Cruikshank, 92 U.S. 542, 553 (1876) ("The second amendment declares that [the right to bear arms] shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government . . . .").

[51] *See* Hurtado v. California, 110 U.S. 516, 535-38 (1884).

[52] S*ee* Twining v. New Jersey, 211 U.S. 78, 99 (1908), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964); *see also Palko*, 302 U.S. at 323-24 (rejecting incorporation of Double Jeopardy Clause).

[53] That pronouncement came in *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 543 (1922), which is discussed *supra* note 33 and accompanying text.

[54] *E.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (holding that states cannot award damages to public-official defamation plaintiffs unless they prove "actual malice").

burning,[55] flag salutes,[56] hate speech,[57] prayer in public school,[58] government religious displays,[59] faith-based exceptions to generally applicable laws,[60] discretionary licensing rules,[61] commercial speech,[62] public-employee speech,[63] religious-school funding,[64] and on and on. Today, it is hard to imagine a U.S. Constitution that provides no protections against state action that constrains expressive and religious liberties. But it is hard to imagine only because of the quiet revolution that sprang from *Gitlow* and its near-in-time successor rulings.

4. "Jot-for-Jot" Incorporation

The *Gitlow* line of cases quietly embodied another ruling on incorporation that, in time, profoundly reshaped the law of constitutional rights. This is so because, in cases such as *Schneider* and *Cantwell*, the Court simply assumed its way around a doctrinal question that long has vexed constitutional analysts.[65] The question is this: If the Court deems the protections provided by a particular Bill of Rights provision to be sufficiently fundamental to merit incorporation,

[55] *E.g.*, Texas v. Johnson, 491 U.S. 397, 411-12 (1989) (holding that Texas flag-burning statute both triggered and could not survive strict scrutiny).

[56] *E.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943) (invalidating state statute that compelled public school children to salute American flag).

[57] *E.g.*, R.A.V. v. City of Saint Paul, 505 U.S. 377, 388 (1992) (rejecting ordinance that banned only fighting words "which one knows or has reasonable grounds to know arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990))).

[58] *E.g.*, Engel v. Vitale, 370 U.S. 421, 431 (1962) (invalidating classroom prayer conducted in public school).

[59] *E.g.*, Allegheny County v. ACLU, 492 U.S. 573, 579 (1989) (finding county stand-alone crèche display unconstitutional, while upholding display of menorah accompanied by nonsectarian holiday symbols), *abrogated in part by* Town of Greece v. Galloway, 575 U.S. 565 (2014).

[60] *E.g.*, Sherbert v. Verner, 374 U.S. 398, 404 (1963) (finding that denial of unemployment compensation to worker who lost her job due to sincere Sabbatarian belief and practice violated free-exercise principles).

[61] *E.g.*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 430-31 (1993) (overturning city's refusal to allow distribution of commercial publications through freestanding newsracks located on public property).

[62] *E.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771-73 (1976) (invalidating state prohibition on advertising prescription drug prices).

[63] *E.g.*, Connick v. Myers, 461 U.S. 138, 146 (1983) (recognizing opportunity of state and local employees to assert free-speech claims but rejecting claim on facts presented).

[64] *E.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (recognizing limits on state authority to fund religious schools but upholding neutral state law with respect to bus transportation of all students).

[65] *See supra* notes 38-40, 44-46, and accompanying text (discussing Court's approach in *Schneider* and *Cantwell*).

must the Court apply against the states each and every feature of that protection to exactly the same extent that that protection operates to limit the actions of the federal government? Notably, in *Gitlow* itself, Justice Holmes wrote a separate opinion, dissenting from the majority's refusal to find a First Amendment violation, that expressed his readiness to apply only the "*general principle* of free speech" to the states.[66] In other words, it might be that the Fourteenth Amendment, in light of its vague phrasing, would leave states with a "somewhat larger latitude" to pass speech-limiting laws than Congress possessed as a result of the "sweeping language" that the First Amendment itself directs at only federal authorities.[67]

The Court, however, simply blew through this analytical complexity in its post-*Gitlow* rulings. The coup de grâce came in *Cantwell*, as the Court declared, without any explanation at all, that "the legislatures of the states [are] *as incompetent as Congress* to enact . . . laws" that offend First Amendment principles.[68] Again, from a present-day perspective, this "jot-for-jot" view of how to deal with incorporated Bill of Rights protections may seem uncontroversial. But, as Holmes's dissent in *Gitlow* itself illustrates, the jot-for-jot approach to incorporation was hardly a foregone conclusion. In fact, in later cases, the Court specifically *rejected* this view of exact rights-parity in dealing with other incorporated Bill of Rights protections. In *Betts v. Brady*,[69] for example, the Court held that the Fourteenth Amendment did not cover "every such case" in which the Sixth Amendment required the federal government to supply indigent criminal defendants with counsel.[70] Likewise, in *Wolf v. Colorado*,[71] the Court saw fit to incorporate only the "core" protections afforded by the Fourth Amendment's Search and Seizure Clause and thus declined to make the exclusionary rule applicable to the states.[72]

The Court later overruled the specific holdings of *Betts* and *Wolf*.[73] Even in doing so, however, the Justices did not endorse jot-for-jot extension to the states of all incorporated Bill of Rights guarantees.[74] To be sure, the Court in time did

[66] Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting) (emphasis added).

[67] *Id.*

[68] *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (emphasis added).

[69] 316 U.S. 455 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963).

[70] *Id.* at 471.

[71] 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

[72] *Id.* at 27-28.

[73] *See* Gideon v. Wainwright, 372 U.S. 335, 339 (1963) (overruling *Betts*); Mapp v. Ohio, 367 U.S. 643, 653-55 (1961) (overruling *Wolf*).

[74] Indeed, in the *Gideon* case, which overturned the rule of *Betts*, Justice Harlan wrote separately to emphasize this very point. With good reason, he viewed the majority opinion as *not* endorsing the proposition that "we automatically carry over an entire body of federal law and apply it in full sweep to the States" when incorporating a particular Bill of Rights

embrace a full-scale, jot-for-jot approach, with a key pronouncement coming in *Benton v. Maryland.*[75] There, as the Court applied the Double Jeopardy Clause to the states, it declared in across-the-board fashion that "[o]nce it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' the same constitutional standards apply against both the States and the Federal Government."[76] In making this pronouncement, however, the Court relied primarily on the "increasing number" of cases that had cut down the scope of unincorporated protections, with the leading decisions in that stage-setting line of authority embodying quiet revolutions of their own.[77]

safeguard. *Gideon*, 372 U.S. at 352 (Harlan, J., concurring) (noting, in addition, that he did not "understand the Court" to hold that "the Fourteenth Amendment 'incorporates' the Sixth Amendment as such").

[75] 395 U.S. 784 (1969).

[76] *Id.* at 795 (citation omitted) (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968)).

[77] Of particular importance, a five-Justice majority had endorsed all-out incorporation of the Fifth Amendment's Self Incrimination Clause in *Malloy v. Hogan*, 378 U.S. 1 (1964), declaring in categorical terms that "[t]he Fourteenth Amendment secures against state invasion *the same privilege* that the Fifth Amendment guarantees against federal infringement." *Id.* at 8 (emphasis added). In support of this jot-for-jot view of Self Incrimination Clause protections, however, the Court relied on little more than its earlier, not-on-point rulings in *Gideon* and *Mapp* and the broad assertion that the protection against self-incrimination was an "essential mainstay" of the American accusatorial process. *See id.* at 7-8. Not surprisingly, adherents of the Court's prior non-jot-for-jot approach took aim at this aspect of the Court's ruling in *Malloy*. *See id.* at 16 (Harlan, J., dissenting) (rejecting "simple device of incorporating . . . the whole body of law that surrounds a specific prohibition directed against the Federal Government [because] compelled uniformity is inconsistent with the purpose of our federal system"); *id.* at 21 (Fortas, J., concurring) (disagreeing with majority's "implication . . . that the tail must go with the hide"). In soon-to-follow cases, however, majorities of the Court endorsed jot-for-jot incorporation of other Bill of Rights safeguards, relying largely on *Malloy* in doing so. *See Duncan*, 391 U.S. at 155 (incorporating fully Sixth Amendment's right to trial by jury); Pointer v. Texas, 380 U.S. 400, 406 (1965) (incorporating fully Sixth Amendment's right to confront accusers). Because the Court in *Benton* could and did point to these earlier rulings, its wholesale endorsement of jot-for-jot incorporation, although revolutionary in its effects, was not entirely quiet, if it was quiet at all. Nor was the Court's approach to the case surprising because courts not infrequently distill a broad and unifying legal principle through the application of inductive reasoning to a disparate set of prior, specialized rulings. Even so, some of those earlier rulings (in particular, *Gideon* and *Mapp*) did not even purport to embrace the jot-for-jot approach, while others (most prominently, *Malloy*) endorsed jot-for-jot incorporation only as to a specific clause, while relying largely (and dubiously) on *Gideon* and *Mapp* in doing so. None of this is meant to suggest that no good reasons support across-the-board jot-for-jot incorporation. Justice Black, for example, long argued on originalist grounds for this approach, and practical concerns about judicial manageability also weigh in favor of the Court's one-size-fits-all approach. *See* Adamson v. California, 332 U.S. 46, 72-73 (1947) (Black, J., dissenting) (discussing original intent of Fourteenth Amendment's framers, particularly Representative Bingham), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964). The relevant point is

In any event, the starting point of all of this was the quintessentially quiet set of post-*Gitlow* rulings that embraced wholesale incorporation of each clause set forth in the First Amendment. Put another way, the quiet revolution that had its origins in *Gitlow* did not stop with its dramatic expansion of communicative and religious liberty. As significant as those developments were, *Gitlow*'s impact swept further. The Court's action in that case set the stage for an incorporation-doctrine revolution that, in time, came to render applicable to the states virtually every protection set forth in the Bill of Rights in an all-out, full-scale fashion.

B. *Corporate Personhood Under the Fourteenth Amendment*

The most curious quiet-revolution ruling in the Court's long history came in *Santa Clara County v. Southern Pacific Railroad Co*.[78] That case, which arose out of a challenge to a state tax placed on railroad properties, presented an array of issues under both state and federal law, but one issue stood out. The case presented the question whether corporations, in addition to individual human beings, qualify as "persons" for purposes of the Fourteenth Amendment's Due Process and Equal Protection Clauses.[79] The answer to this question was far from a no-brainer. The original Constitution routinely uses the term "persons" in referring to only natural persons,[80] and prior rulings of the Court had established that corporations do not qualify as "citizens" for purposes of Article IV's Privileges and Immunities Clause.[81] Of no less consequence, the Court in the seminal *Slaughter-House Cases*[82] had denied relief to local butchers who challenged a meat-handling monopoly based largely on the rationale that the Fourteenth Amendment was focused on aiding the "newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[83] This line of reasoning offered little support (to say the

that the Court's early decisions that opted for a jot-for-jot approach were quiet insofar as they did not set forth these reasons. And this is most prominently the case with regard to the Court's seminal post-*Gitlow* First Amendment incorporation rulings.

[78] 118 U.S. 394 (1886).

[79] *See id.* at 395.

[80] *See, e.g.*, U.S. CONST. art. I, § 2 (stating that no "person" shall be eligible for House membership under certain conditions); *id.* § 3 (discussing "Persons" to be counted for purposes of House-seat apportionment); *id.* § 5 (stating that no "person" shall be eligible for Senate membership under certain conditions).

[81] *See, e.g.*, Paul v. Virginia, 75 U.S. (8 Wall.) 168, 178 (1869) (emphasizing that "in no case which has come under our observation, either in the State or Federal courts, has a corporation been considered a citizen within the meaning of that provision"), *overruled on other grounds* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

[82] 83 U.S. (16 Wall.) 36 (1873).

[83] *Id.* at 71.

least) for reading the Amendment to afford broad protections to the Southern Pacific Railroad Company.[84]

Nonetheless, the ruling in *Santa Clara County* did just that, and it did so in the quietest of ways. In his opinion for the Court, Chief Justice Waite never even mentioned, far less addressed, the question: "Is a corporation a person?" Nor did he have to because, as things turned out, the Court ruled for the railroad based on principles of state, not federal, law.[85] How then could it be that *Santa Clara County* came to resolve this foundational matter of constitutional doctrine? In the syllabus that accompanied the opinion in the case, the Court's Reporter included the following passage:

> One of the points made and discussed at length in the brief of counsel for defendants in error was that "Corporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States." Before argument, Mr. Chief Justice Waite said: "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."[86]

Based on this pronouncement, it became settled law that corporate entities are indeed "persons" for purposes of the Fourteenth Amendment.[87] Yet, under long-accepted principles of Supreme Court practice, syllabi are "not the work of the court, but are simply the work of the Reporter, giving his understanding of the decision, prepared for the convenience of the profession."[88] In *Santa Clara County*, however, "to the Reporter fell the decision which enshrined the declaration in the United States Reports."[89] And few rulings in the Court's

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[84] *See* Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 87 (1938) (Black, J., dissenting) ("The history of the Amendment proves that the people were told that its purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control of state governments. . . . The language of the Amendment itself does not support the theory that it was passed for the benefit of corporations."). *See generally* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 143-53 (2018) (recounting history of *Santa Clara County*).

[85] Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394, 400-05, 414-16 (1886).

[86] *Id.* at 396 (syllabus).

[87] *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 780 n.15 (1978) ("It has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment."); Wheeling Steel Corp. v. Glander, 337 U.S. 562, 574-76 (1949) (Jackson, J., concurring) (documenting long-standing nature of the rule, dating back to the ruling in *Santa Clara County*).

[88] United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 322 (1906) (syllabus).

[89] C. PETER MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 224 (1963). More specifically, before finalizing the headnote, the Reporter corresponded with Chief Justice Waite, who wrote back, "I leave it with you to determine whether anything need be

history have had a more profound impact.[90] Later landmark cases, ranging across such varied subjects as defamation law,[91] campaign-finance regulation,[92] and the rules related to the taking of private property,[93] came about only because of the declaration of law set forth in the *Santa Clara County* syllabus. As with other issues discussed in this Article, the point is not that the stated proposition was erroneous. The point instead is that a seminal constitutional ruling—later described by Justice Douglas as one of the "most momentous" in the Court's history—came in a paradigmatically quiet-revolution ruling.[94] Indeed, that ruling was so quiet that it did not even make its way into an actual opinion of the Court.

C. *Reverse Incorporation*

The Fifth Amendment includes a Due Process Clause. The Fourteenth Amendment includes both a Due Process Clause and an Equal Protection Clause. One plausible, if not indisputable, implication of this textual contrast is hard to miss—namely, that the protections created by the due-process guarantees apply in the same way to both the federal government and the states, but the differing protections created by the Equal Protection Clause necessarily apply only to the states and not to the federal government. By way of a quiet revolution, however, the Court moved sharply away from this position with its so-called "reverse incorporation" jurisprudence.

This story begins with *Hirabayashi v. United States*[95] and *Korematsu v. United States*,[96] in which the Court rejected challenges to World War II-era federal programs that culminated in the internment of some one hundred twenty

said about [the issue] in the report inasmuch as we avoided meeting the constitutional question in the decision." JACK BEATTY, AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA, 1865-1900, at 173 (2008). As Jack Beatty has noted, these words suggest that the Court in the end purposefully "avoided" deciding the issue for which the case came to stand. *Id.* at 172.

[90] *See, e.g.*, KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 486-87 (19th ed. 2016) (noting key role played by *Santa Clara County* in *Lochner*-era rulings).

[91] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (vindicating corporation's claim that state defamation law violated its free-expression rights).

[92] *Bellotti*, 435 U.S. at 784-86 (holding statute placing campaign expenditure limits on corporations to be unconstitutional).

[93] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (upholding claim of unlawful regulatory taking asserted by corporation).

[94] William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949); *see* Wheeling Steel Corp. v. Glander, 337 U.S. 562, 576-77 (1949) (Douglas, J., dissenting) (emphasizing that Court's ruling in *Santa Clara County* was "cryptic," that "[t]here was no history, logic, or reason given to support" it, and that "the result was [not] so obvious that exposition was unnecessary").

[95] 320 U.S. 81 (1943).

[96] 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

thousand citizens and lawful residents of Japanese descent.[97] The rulings stand today as some of the most vilified in the Court's long history.[98] The key point here, however, is that even as the Court crushed basic rights with one hand, it began to put in place new rights with the other. In particular, notwithstanding the absence of an Equal Protection Clause in the Bill of Rights, the Court in *Korematsu* announced that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," so that "courts must subject them to the most rigid scrutiny."[99] Put another way, despite the now-condemned, liberty-flouting result in the case, the Court declared itself ready to use the Fifth Amendment Due Process Clause to subject federal programs marked by racial or ethnic discrimination to the same (or, at least, much the same) probing form of scrutiny that state programs would receive under the Fourteenth Amendment Equal Protection Clause.

This idea bore fruit in *Bolling v. Sharpe*,[100] which involved an attack on the de jure segregation of Washington, D.C.'s public schools. Because the District of Columbia is not a state, the Court could not apply the Fourteenth Amendment's equal-protection-based principle of *Brown v. Board of Education* to extinguish the District's race-based practice. Even so, the Court declared:

> The Fifth Amendment . . . does not contain an equal protection clause . . . . But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[101]

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[97] Dean Maseru Hashimoto, *The Legacy of* Korematsu v. United States*: A Dangerous Narrative Retold*, 4 UCLA ASIAN PAC. AM. L.J. 72, 75 (1996). *Korematsu* itself involved the exclusion of Japanese Americans from certain areas of the West Coast. In *Hirabayashi*, which preceded *Korematsu*, the Court upheld a curfew imposed only on persons of Japanese ancestry. The Court in that case asserted (with citation only to cases involving state discrimination) that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," so that "[w]e may assume that these considerations would be controlling" if the challenged federal action did not involve "the danger of espionage and sabotage, in a time of war." *Hirabayashi*, 320 U.S. at 100 (first citing Yick Wo v. Hopkins, 118 U.S. 356 (1886); then citing Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926); and then citing Hill v. Texas, 316 U.S. 400 (1942)).

[98] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (declaring what was "already obvious"—namely, that "*Korematsu* was gravely wrong the day it was decided [and] has been overruled in the court of history").

[99] *Korematsu*, 323 U.S. at 216.

[100] 347 U.S. 497 (1954).

[101] *Id.* at 499.

Citing *Hirabayashi* and *Korematsu*, the Court went on to observe that "[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."[102] The Court concluded by observing that, "in view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."[103]

One can quibble about whether the Court's ruling in *Bolling* perfectly fits the quiet-revolution label. Unlike in *Gitlow*, for example, the Court's discussion (as the quoted passages indicate) reached beyond a single sentence. Moreover, the Court did not simply cite past authorities; it also reasoned that "our traditions," coupled with the "American ideal of fairness," dictate that some protections embodied in the state-limiting Equal Protection Clause should extend to the federal government by way of the Fifth Amendment Due Process Clause.[104] Even so, the Court's analysis in *Bolling* left much unsaid. Most notably, the idea of reaching the opposite result in the case may not have been—at least as a textual or historical matter—as "unthinkable" as the Court summarily suggested.[105] Central to James Madison's constitutional theory, for example, was the idea that the dangers posed by oppression at the hands of political majorities are far greater at the state level of government than at the federal level.[106] Building on this thought, the Court might have left it to Congress to

[102] *Id.* The Court also referenced *Buchanan v. Warley*, 245 U.S. 60 (1917) and (albeit with only a "cf." signal) *Hurd v. Hodge*, 334 U.S. 24 (1948). *Buchanan*, however, was readily distinguishable as embodying a *Lochner*-era freedom-of-contract pronouncement. *Buchanan*, 245 U.S. at 78. And in *Hurd*—a companion case to *Shelley v. Kraemer*, 334 U.S. 1 (1948), in which the Court found state-court enforcement of privately created, racially restrictive home-sale covenants violative of the Equal Protection Clause—the Court did not consider any constitutional question at all. *See Hurd*, 334 U.S. at 34 (invoking "rights intended by Congress to be protected by the Civil Rights Act" and, in the alternative, "the public policy of the United States"). Finally, the Court in *Bolling* cited *Gibson v. Mississippi*, 162 U.S. 565 (1896), in which the Court had asserted that "the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race." *Bolling*, 347 U.S. at 499 (quoting *Gibson*, 162 U.S. at 591). But that case, which involved an unsuccessful claim that the state had excluded blacks from a state-court jury in a case involving a black defendant, was susceptible to a procedural-due-process-centered reading. *See Gibson*, 162 U.S. at 591 (observing that "[i]n the administration of criminal justice no rule can be applied to one class which is not applicable to all other classes"). To the extent that the quoted one-sentence pronouncement in *Gibson* might have suggested more, it effectively embodied a quiet revolution of its own.

[103] *Bolling*, 347 U.S. at 500.

[104] *See supra* notes 101-102 and accompanying text.

[105] *See supra* note 103 and accompanying text.

[106] *See generally* THE FEDERALIST NOS. 10, 51 (James Madison).

address segregation in the D.C. schools in the post-*Brown* period while marshaling its own resources to root out state-sponsored segregation, particularly in the American South. The Court, however, did not pause to consider these possibilities as it read the Fifth Amendment Due Process Clause to embody the same protections derived in *Brown* from the states-constraining Equal Protection Clause.

These observations are (emphatically) not offered to show that the Court decided *Bolling* the wrong way. They do suggest, however, that one can readily view the reverse-incorporation concept as the product of a quiet revolution. In *Hirabayashi* and *Korematsu*, the Court in essence deemed the Fifth Amendment's overlap with Equal Protection Clause guarantees against race discrimination to be self-evident, at least when it came to some unspecified set of abridgments of "civil rights."[107] In *Bolling*, the Court offered little more, perhaps because no dissenters stepped forward to question the result or the analysis in the case. Especially in light of *Hirabayashi* and *Korematsu*, one might say that *Bolling* was not entirely "quiet" in its reasoning because it openly adverted to a principle of deeming race-and-ethnicity-based discrimination so distinctly intolerable that it must run afoul of both due-process and equal-protection safeguards. But that view of things, even if indisputably correct, shines a light on a more deeply quiet revolution—that is, the Court's later hook-line-and-sinker transplantation into the Fifth Amendment of *all* of its Fourteenth Amendment Equal Protection jurisprudence, including as to non-race-related matters.

The story of post-*Bolling* reverse incorporation is both complex and simple. It is complex because it involved a series of rulings that dramatically refashioned the governing principle of *Bolling* over an extended period of time. It is simple because, in the end, it put in place a straightforward doctrinal proposition—namely, that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."[108] A key step along the way came in *Schneider v. Rusk*,[109] in which the Court invalidated a federal program that afforded different treatment to naturalized citizens and birthright citizens. In deeming its equality-centered assessment of this federal program legally proper, the Court simply cited *Bolling*,[110] without noting the "particular" concern expressed in that case about "[c]lassifications based on race" or otherwise offering any discussion of the Fifth Amendment's proper reach.[111] A

[107] *See supra* note 99 and accompanying text.

[108] Buckley v. Valeo, 424 U.S. 1, 93 (1976) (per curiam); *accord* United States v. Paradise, 480 U.S. 149, 166 n.16 (1987) (plurality opinion) ("[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth . . . .").

[109] 377 U.S. 163 (1964).

[110] *Id.* at 168 (citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

[111] *See supra* note 102 and accompanying text (setting forth these passages in *Bolling*).

decade later, in *Jimenez v. Weinberger*,[112] the Court closely scrutinized a federal program that discriminated against certain categories of nonmarital children, now relying (and relying only) on a citation to *Schneider v. Rusk* coupled with a citation to *Bolling*.[113] Within a year, in *Weinberger v. Wiesenfeld*,[114] the Court stood ready to propound the sweeping and now-governing principle that "equal protection claims," whether brought under the Fourteenth Amendment or the Fifth Amendment, are to be treated by courts "precisely the same."[115]

[112] 417 U.S. 628 (1974).

[113] *Id.* at 637 (first citing *Schneider*, 377 U.S. at 168; then citing *Bolling*, 347 U.S. at 499); *see also* Shapiro v. Thompson, 394 U.S. 618, 642 (1969) (first citing *Schneider*, 377 U.S. at 168; then citing *Bolling*, 347 U.S. at 499) (invalidating discriminatory federal law targeting newly arriving state residents), *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974).

[114] 420 U.S. 636 (1975).

[115] Indeed, the Court deemed the principle so well-established by earlier cases that it was set forth only in a footnote. *See id.* at 638 n.2 (citing *Bolling*, *Schneider*, *Jimenez*, and two earlier sex-discrimination cases, which likewise had triggered references to *Bolling*); *see also* Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541, 554 (1977) (noting that, after *Bolling*, "[i]n case after case, fifth amendment equal protection problems are discussed on the assumption that fourteenth amendment precedents are controlling"). For a treatment of the law as it stands today, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 696-97 (5th ed. 2015). Notably, in the aftermath of *Wiesenfeld*, there have been a few—though only a very few—way stations along this road. In particular, the Court has assessed state classifications based on alienage more critically than federal laws that discriminate on the same ground. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 84-85 (1976) ("The equal protection analysis . . . involves significantly different considerations [when] it concerns the relationship between aliens and the States rather than between aliens and the Federal Government."). Even this modest limitation on full-blown reverse incorporation is beside the point here, however, because (as the Court itself has made clear) discriminatory state laws of this sort implicate not only equality interests but also specialized constitutional concerns founded on the express textual grant of federal authority over immigration matters. *See* Graham v. Richardson, 403 U.S. 365, 377-78 (1971) (noting that, apart from concerns based on historical discrimination and lack of political rights held by noncitizens, "[t]he National Government has broad constitutional powers" regarding their status, so that state discrimination against noncitizens threatens additional "overriding national policies in an area constitutionally entrusted to the Federal Government" (quoting Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948))); Michael B. Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1085-86 (2016) (reflecting on this aspect of *Graham* in characterizing case as resting on joint operation of two constitutional provisions). In just one other field of law—the field of affirmative action—did the Court for a time tinker with the idea that the protections of equality embedded in the Fifth Amendment might have a different valence than those afforded by the Fourteenth. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 486-91, 504-05, 507-09 (1989) (plurality opinion); *id.* at 521-25 (Scalia, J., concurring). In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), however, the Court repudiated even this narrow refinement, holding that "all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny." To be sure, Justice O'Connor offered a

To say the least, this principle was revolutionary in its impact. Indeed, it has given rise to foundational rulings that reach across the subjects of gay and lesbian rights,[116] sex-discrimination law,[117] and claims regarding so-called "fundamental" interests.[118] No less surely, this generalized Fifth Amendment "equal protection principle"[119] came into the law with the deepest level of quietness. Indeed, in the pre-*Wiesenfeld* cases, the Court simply relied on *Bolling* (and on authorities that in substance did nothing more than rely on *Bolling*) without ever acknowledging that constitutional doctrine was shifting in a major way. Still more curiously, the Court's *Bolling*-based synthesis in *Wiesenfeld*—to the effect that courts must apply "precisely the same" limits to state and federal rules challenged as unconstitutionally discriminatory[120]—took hold even though *Bolling* itself had emphasized that Equal Protection Clause guarantees and Due Process Clause safeguards are neither "mutually exclusive" nor "always interchangeable."[121] *Bolling* thus painted a picture of a constitutional world in which some forms of discrimination by the federal government would *not* "be so unjustifiable as to be violative of due process," even if state discrimination of exactly the same kind did offend the Fourteenth Amendment's "more explicit" protection.[122] As a result, the Court's post-*Bolling* reverse-discrimination rulings worked a particularly remarkable quiet revolution. The Court relied on *Bolling*—and, for all practical purposes, only on *Bolling*—to lay

detailed, non-quiet rationale for this holding in *Adarand*, but (not surprisingly) in doing so she relied heavily on the Court's already-in-place quiet-revolution reverse-incorporation jurisprudence. *See id.* at 224. What is more, her defense of the Court's articulated principle of "congruence" in the affirmative-action context focused, as had *Bolling* itself, on the proper handling of federally imposed "racial classifications." *See id.*

[116] *See* United States v. Windsor, 570 U.S. 744, 774 (2013).

[117] *See* Rostker v. Goldberg, 453 U.S. 57, 62 (1981) (involving exclusion of women from requirements to register for draft); Schlesinger v. Ballard, 419 U.S. 498, 500-01 (1975) (involving sex-based discrimination among military service members); Frontiero v. Richardson, 411 U.S. 677, 680 (1973) (plurality opinion) (involving sex-based discrimination as to spousal benefits).

[118] *See* Shapiro v. Thompson, 394 U.S. 618, 642 (1969) (addressing equal-protection principles as applied to federal treatment of fundamental right of interstate movement); *see also* Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976) (applying equal-protection principles in invalidating federal hiring rule that discriminated against noncitizens).

[119] Washington v. Davis, 426 U.S. 229, 240 (1976); *accord* Mathews v. De Castro, 429 U.S. 181, 182 n.1 (1976).

[120] *Wiesenfeld*, 420 U.S. at 638.

[121] Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[122] *Id.* For an earlier suggestion along the same lines, see *Detroit Bank v. United States*, 317 U.S. 329, 337-38 (1943) ("Unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress.").

down a seminal doctrinal proposition directly contradictory to the one that *Bolling* actually had announced.

D. *Post*-Brown *Equal-Protection Law*

The story of *Bolling* reveals how a seemingly limited constitutional principle (there, one focused on the reverse incorporation of protections against race-related discrimination) can be transformed into a broader principle (namely, one of across-the-board reverse incorporation) by way of follow-on quiet-revolution rulings. This phenomenon is not limited to reverse incorporation. Consider, for example, what came of the Court's decision in *Brown*. In that canonical ruling, the Court concluded that the then-widespread practice of racial segregation in public education violated the Equal Protection Clause.[123] Many years before *Brown*, however, the Court had upheld state programs of racially segregated transportation facilities in *Plessy v. Ferguson*.[124] The Court thus had to navigate *Plessy* as it ruled in *Brown*. It might well have done so by overruling that earlier case. But the Court chose to take another route, identifying the "primary question" as involving "the constitutionality of segregation in public education" and deeming *Plessy* inapplicable in the school context.[125] In the end, the education-centered holding of the Court could not have been more explicit. As

[123] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[124] Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896).

[125] *Brown*, 347 U.S. at 495; *id.* at 491 (emphasizing that "*Plessy* . . . involv[ed] not education but transportation"); *id.* at 494-95 (reiterating district court finding focused on harmful effects of "[s]egregation of white and colored children in public schools" and adding that "[a]ny language in *Plessy v. Ferguson* contrary to this finding is rejected"). Following up on this core point, the Court emphasized that, at the time the Amendment was ratified, the development of public education in the South "had not yet taken hold" and that "[e]ven in the North, the conditions of public education did not approximate those existing today." *Id.* at 490. Thus, it was "not surprising that there should be so little in the history on the Fourteenth Amendment relating to its intended effect on public education." *Id.* In light of these circumstances, the Court found it necessary to "look instead to the effect of segregation itself on public education." *Id.* at 492. The Court then emphasized that "[t]oday, education is perhaps the most important function of state and local governments"; that everyone recognizes the "importance of education to our democratic society"; and that education operates as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Id.* at 493. Education had become so important that "it is doubtful that any child may reasonably be expected to succeed in life" without it. *Id.* Thus, "intangible considerations," especially for "children in grade and high schools," were of critical significance. *Id.* at 493-94. In this regard, separating schoolchildren "because of their race generates a feeling of inferiority . . . in a way unlikely ever to be undone" while simultaneously slowing "the educational and mental development of negro children." *Id.* at 494.

Chief Justice Warren declared, "We conclude that in the field of public education the doctrine of 'separate but equal' has no place."[126]

On its face, *Brown* raised the prospect of hard-fought follow-on battles about the constitutionality of racial segregation in noneducational settings. That, however, is not how things played out. Rather, as Professors Kathleen Sullivan and Noah Feldman have observed, "[d]espite the Court's emphasis on the school context in *Brown*, its results in later cases were reached in brief per curiam orders."[127] The Court first outlawed segregated beaches, then golf courses, then buses, then parks, all by way of one-sentence pronouncements that did not even pause to cite *Brown*.[128] Drawing on these precedents, the Court later categorically declared that "it is no longer open to question that a State may not constitutionally require segregation of public facilities."[129] The Court thus reworked the principle of *Brown* to reach far beyond the educational setting. This reworking of doctrine, unlike *Brown* itself, overruled *Plessy*, thus generating profoundly salutary social changes. There can be no doubt that powerful legal justifications supported this post-*Brown* expansion of the principle of *Brown*. Whatever the reason, however, the Court chose not to articulate those justifications. It opted instead to reframe the principle of *Brown* in a series of quiet-revolution rulings.

E. *Means-Ends Analysis*

At the heart of constitutional law lies means-ends analysis. Equal-protection law, for example, is built around the principles of minimum, intermediate, and strict scrutiny—each of which directs attention to the sufficiency of an identified government purpose and how well the challenged classification fits together with the achievement of that purpose. When it comes to strict scrutiny, for example, the Court asks whether the challenged classification is "narrowly tailored" to advance a "compelling state interest."[130] Of no small importance, judicial use of the means-ends methodology reaches far beyond the equal-protection context. Evaluating the fit between means and ends is standard fare, for example, in cases that involve free speech,[131] substantive due process,[132] the dormant Commerce Clause,[133] the Free Exercise Clause,[134] the Privileges and

[126] *Id.* at 495.

[127] SULLIVAN & FELDMAN, *supra* note 90, at 666.

[128] *See id.* (collecting cases).

[129] Johnson v. Virginia, 373 U.S. 61, 62 (1963) (per curiam).

[130] *E.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

[131] *E.g.*, Burson v. Freeman, 504 U.S. 191, 197-98 (1992).

[132] *E.g.*, Turner v. Safley, 482 U.S. 78, 89-90 (1987).

[133] *E.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 622-23 (1978).

[134] *E.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

Immunities Clause of Article IV,[135] and Second Amendment gun rights.[136] In sum, the methodology of means-ends analysis extends across almost all areas of constitutional-rights law. It is also the product, and has been the source, of many quiet-revolution rulings.

1. The Quiet-Revolution Origins of Means-Ends Analysis

A central question about means-ends law is seldom asked: Just where did this methodology come from? As long ago as the *Lochner* era, the Court put means-ends review to work.[137] But why? The clauses that trigger means-ends analysis do not speak of means or ends. Nor is it obvious that judicial use of this methodology always, if ever, makes good sense. In a celebrated article, for example, Professor (and later Justice) Hans Linde urged that even minimum means-ends review under the Due Process Clause intrudes too much on legislative prerogatives.[138] Serious methodological problems also loom over the subject. Government ends, for example, are often difficult to identify,[139] and courts can manipulate results by characterizing those ends at different levels of generality.[140] Key questions raised in applying means-ends analysis border on the imponderable. What makes a state interest rise to the level of being "compelling," as opposed to only "important"?[141] When does a challenged law fail to qualify as "narrowly tailored" to its end, as opposed to being only "substantially related"?[142] And, once again, what justification supports using means-ends analysis in the first place?

Perhaps the best answer to the last of these questions is: "Common sense!" Everyone agrees, for example, that not all laws that restrict speech are unconstitutional. Courts thus need to distinguish permissible laws from

[135] *E.g.*, Supreme Court of N.H. v. Piper, 470 U.S. 274, 283 n.14 (1985).

[136] *See, e.g.*, David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 302 (2017) (discussing how heightened scrutiny applies to Second Amendment rights); Joan H. Miller, *The Slow Evolution of Second Amendment Law*, SEATTLE U. L. REV. SUPRA, 2014, at 3, https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1000&context=sulr_supra [https://perma.cc/Q9XM-MSL8] (arguing that courts should apply intermediate scrutiny to gun regulations).

[137] *See, e.g.*, Lindsley v. Nat. Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).

[138] *See* Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 241-42 (1976); *see also* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2326-30 (2016) (Thomas, J., dissenting) (vigorously challenging Court's "tiers-of-scrutiny approach to constitutional adjudication" as wrongly "reducing constitutional law to policy-driven value judgments").

[139] Linde, *supra* note 138, at 220-21 (discussing difficulties inherent in deciphering legislative intent).

[140] *See, e.g.*, Michael Coenen, *Characterizing Constitutional Inputs*, 67 DUKE L.J. 743, 771-74 (2018) (discussing complexities of characterizing government interests).

[141] Craig v. Boren, 429 U.S. 190, 197 (1976) (identifying need to establish "important" interest to satisfy intermediate scrutiny).

[142] *Id.* (setting forth "substantially related" component of "intermediate scrutiny" test).

impermissible ones, and means-ends analysis can provide a helpful sorting device. Intuition suggests, for example, that a law that threatens core constitutional values should give way if there exists a workable "less restrictive alternative" for achieving the government's underlying purpose.[143] Stupid laws are not necessarily unconstitutional. But stupid laws that clash with rights of free expression, religious liberty, or bodily autonomy probably should be the first to go. Means-ends analysis seems defensible to the extent that it pushes results in this sensible direction.

Other styles of review, however, might work even better to advance these aims. Common in European courts, for example, is so-called "proportionality" analysis, which—while resembling means-ends scrutiny in some respects—might provide a better mode of review to the extent that it brings additional relevant considerations into play.[144] In some constitutional settings, the Justices themselves have abandoned the rhetoric of mean-ends scrutiny, opting instead for a more open-ended inquiry into whether the challenged action is "reasonable."[145] Justice Thurgood Marshall argued for the use of a "sliding scale" approach to equal-protection cases, under which a variety of factors—the nature of the discrimination, the importance of the personal interest at stake, the state's justifications for the law, the availability of alternative means for pursuing those justifications, and perhaps other considerations, too—properly weigh in the decisional balance.[146] Some already-accepted doctrines seem to reflect much the same orientation. The multifactor weighing of individual and state interests used by the Court to assess procedural-due-process cases offers an illustration.[147]

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[143] *See* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981) (putting forward "least restrictive means" test).

[144] *See, e.g.*, Joshua E. Weishart, *Equal Liberty in Proportion*, 59 WM. & MARY L. REV. 215, 280-92 (2017) (arguing for "direct-proportionality" review); *see also* Reeve T. Bull, *Market Corrective Rulemaking: Drawing on EU Insights to Rationalize U.S. Regulation*, 67 ADMIN. L. REV. 629, 666 (2015) (describing proportionality analysis). *See generally* VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 60-64 (2010) (discussing proportionality, balancing, and means-end analysis).

[145] *See, e.g.*, Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 190 (2008) (plurality opinion).

[146] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (explaining that "this Court's decisions in the field of equal protection defy such easy categorization" as is suggested by traditional tiers-of-scrutiny approach); Rebecca Brown, *Deep and Wide: Justice Marshall's Contributions to Constitutional Law*, 52 HOW. L.J. 637, 643 (2009) (noting that "Justice Marshall viewed the 'strict scrutiny' standard as one point along a 'spectrum of standards' to be used by the Court").

[147] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (setting forth three-factor test for procedural-due-process cases under which courts consider "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such

The salient point is that the Court's wide-ranging endorsement of means-ends analysis came into the law through a quiet revolution. Like a fog bank that moves "on little cat feet,"[148] means-ends review crept into constitutional doctrine in all-but-unnoticed (and unquestioned) silence. Unlike most fog banks, however, this fog bank never lifted. It continues to overhang the law, together with a welter of important decision-guiding sub-rules, many of which originated in quiet-revolution rulings of their own.

2. The Working Rules of Means-Ends Analysis

One sub-rule involves the "strict scrutiny" standard. This rhetoric first surfaced in a single sentence in *Skinner v. Oklahoma ex rel. Williamson*[149] as the Court invalidated a compulsory sterilization law on equal-protection grounds.[150] Of particular significance, the Court seemed to view strict scrutiny as proper in the case because it involved so "basic" a civil right that "the very existence and survival" of the human race depended on it.[151] Before long, however, the Court had found its way to applying this formulation across a sweeping spectrum of constitutional cases.[152] In similar fashion, the Court in *Personnel Administrator of Massachusetts v. Feeney*[153] presented the idea—albeit in dicta and without any specific citation to authority—that the government must advance an "exceedingly persuasive justification" to justify discrimination on the basis of sex.[154] Thereafter, in *United States v. Virginia*[155]—which involved a challenge to the single-sex military-college program provided by the Virginia Military Institute—this phrase took on a starring role in Justice Ginsburg's majority opinion. Indeed, it played so prominent a part that Justice Scalia in dissent

interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

[148] CARL SANDBURG, *Fog*, *in* CHICAGO POEMS 71, 71 (1916).

[149] 316 U.S. 535 (1942).

[150] *See id.* at 541 (alluding to need for "strict scrutiny of the classification" in assessing whether state's requirement of mandatory sterilization for some serious offenses but not others comported with requirements of equal protection).

[151] *See id.*

[152] *See, e.g.*, United States v. Kokinda, 497 U.S. 720, 726 (1990) (plurality opinion) (applying strict scrutiny to regulation of speech in public forums); Police Dep't v. Mosley, 408 U.S. 92, 98-99 (1972) (applying strict scrutiny to content-based speech regulation); *see also* Larson v. Valente, 456 U.S. 228, 246 (1982) (applying strict scrutiny under Establishment Clause to law that reflects "denominational preference").

[153] 442 U.S. 256 (1979).

[154] *See id.* at 273; *accord, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981).

[155] 518 U.S. 515 (1996).

assailed the Court for effectively jettisoning the traditional intermediate level of review in favor of de facto strict scrutiny.[156]

In another set of quiet-revolution rulings, the Court drew upon the concept of strict scrutiny to develop the now-familiar ends-related "compelling state interest" standard.[157] This story began with Justice Frankfurter's concurring opinion in *Sweezy v. New Hampshire*,[158] in which he observed that state authorities lacked "reasons that [were] exigent and obviously compelling" enough to justify a distinctly problematic interference with academic freedom.[159] Even though Justice Frankfurter—a committed proponent of contextual balancing in the free-speech context—did not purport to set forth a broadly applicable test, the second Justice Harlan cited the passage in *NAACP v. Alabama ex rel. Patterson*[160] to support the assertion that the "subordinating interest of the State must be compelling."[161] Again, however, that case presented a narrow and distinctly appealing free-speech claim based on Alabama's effort to gain access to NAACP membership lists. With *Bates v. City of Little Rock*,[162] the Court inched toward a more aggressive stance, as Justice Stewart wrote for the Court that "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."[163] At the same time, Justice Stewart offered no guidance on when an "encroachment" would qualify as "significant," and (even more important) he signaled that the form of "compelling-ness" the Court had in mind was so lax that it might require nothing more than "a reasonable relationship to the achievement of the governmental purpose."[164]

Not until three years later did a high-octane "compelling state interest" test take firm hold in free-expression law. The seminal moment came with the

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[156] *See id.* at 571-72 (Scalia, J., dissenting) (asserting that majority used "phrase 'exceedingly persuasive justification' . . . in a way that contradicts [the] precedents").

[157] For a far more detailed account, see Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 356 (2006).

[158] 354 U.S. 234 (1957).

[159] *Id.* at 262 (Frankfurter, J., concurring).

[160] 357 U.S. 449 (1958).

[161] *Id.* at 463 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 365 (1957)).

[162] 361 U.S. 516 (1960).

[163] *Id.* at 524.

[164] *Id.* at 525; *see* Siegel, *supra* note 157, at 372 (claiming that, "[b]y using the 'compelling' and 'reasonable' standards interchangeably, Stewart's opinion intimated an equivalence between them" and that "just two weeks after *Bates*, most of the low-protectionist Justices showed that they understood *Bates* to stand for the 'reasonable' standard when they cited and quoted only Stewart's second paragraph as providing 'the requirements of our cases'"); *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1274, 1284-85 (2007) (recounting that Court did not apply strict scrutiny in any serious way until the 1960s).

Court's six-to-three decision in *NAACP v. Button*.[165] There, with no small measure of hyperbole, Justice Brennan proclaimed that "[t]he decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."[166] Building on this platform, the Court in later years fashioned a wide range of exacting speech-rights doctrines.[167]

As this account shows, the "compelling state interest" standard came to operate in free-expression law in a manner akin to the "clear and present danger" test. Invoked initially in limited and ambiguous ways, that standard became—first haltingly, then robustly—a linchpin component of a broadly protective set of First Amendment rights. No less important, the quiet revolution that spawned the "compelling state interest" formulation did not stop with free-speech law. In later cases, that standard found its way, first, into free-exercise law[168] and, later, into equal-protection doctrine.[169] These developments involved quiet revolutions of their own because the Court, in its key rulings, never paused to explain why this cross-clause transfer of the compelling-interest requirement made good sense. Nor was the soundness of the transplantation self-evident. In the view of Professor Siegel, for example, the "compelling state interest" litmus worked its way into Free Speech Clause jurisprudence to deal with distinctly free-expression-related concerns within the Court.[170] In any event, the larger

[165] 371 U.S. 415, 438 (1963).

[166] *Id.* Even more important, in striking contrast to *Bates*, no wishy-washy rhetoric about "reasonable" efforts to advance "the governmental purpose" found its way into Justice Brennan's unmistakably speech-sensitive opinion for the Court. *See, e.g.*, *id.* (emphasizing that "[b]road, prophylactic rules in the area of free expression are suspect" and that "[p]recision of regulation must be the touchstone"); *id.* at 444 (noting absence of "substantial regulatory interest" supporting state's intervention).

[167] *See, e.g.*, Gibson v. Fla. Legislative Investigative Comm., 372 U.S. 539, 546 (1963) ("[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.").

[168] *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963).

[169] *See* Siegel, *supra* note 157, at 381 (detailing how "after strict scrutiny's appearance in the First Amendment in 1963, its various branches migrated piecemeal into the Equal Protection Clause" and that "compelling state interest test, which was the last branch of strict scrutiny to make the move, was not employed in equal protection analysis until 1969").

[170] In particular, Justices Black and Douglas styled themselves First Amendment absolutists, while Justices Frankfurter and Harlan generally opted for a state-sensitive "reasonableness" evaluation of laws challenged under the Free Speech Clause. *See id.* at 365-75. Against this backdrop, according to Professor Siegel, the "compelling state interest" test found its way into the books as Justice Brennan sought to chart a middle course between these views in the specialized free-expression context. *See id.* at 360.

point is apparent: In a series of quiet-revolution decisions dealing with the "compelling state interest" test, a significant reworking of free-expression, free-exercise, and equal-protection doctrine swept across constitutional law.

F. *Substantive Free-Speech Doctrine*

1. First Amendment Limits on Nonlegislative Actors

The First Amendment begins with the words "*Congress* shall make no law."[171] Even so, the Court has never seen fit to confine the Amendment's reach to legislative conduct. Rather, it has proceeded on the understanding that the actions of executive and judicial officials, no less than those of legislative officials, are subject to First Amendment constraints. As with other quiet revolutions, the Court's embrace of this view came without fanfare—indeed, without any explanation at all. A key ruling was *Bridges v. California*,[172] which grew out of the issuance of contempt citations against newspaper commentators who had published provocative articles concerning pending criminal proceedings.[173] In assessing the defendants' constitutional arguments, the Court began its analysis by noting that the case concerned "no direction by the legislature of California."[174] Instead, the contempt orders found their source in the "common law" power of judicial tribunals, which arose entirely "by reason of their creation as courts," to ensure "the fair and orderly administration of justice."[175] Even so, the Court barreled forward, invalidating the contempt citations without even considering the possibility that the First Amendment's protections (here, as made applicable to the states by the Fourteenth Amendment) might be inapplicable due to the absence of legislative action.[176] Notably, Justice Frankfurter, joined by three colleagues, penned a twenty-seven-page dissent. His analysis, however, focused exclusively on the long-accepted authority of courts to impose sanctions on out-of-court statements that might influence pending proceedings. Just like the majority, he voiced not one whit of concern about extending First Amendment limits to nonlegislative action. Instead, he too asserted, again without further explanation, that free-expression

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[171] U.S. CONST. amend. I (emphasis added).

[172] 314 U.S. 252 (1941).

[173] *See id.* at 268 (noting that "this is the first time [following *Gitlow*] that we have been called upon to determine the constitutionality of a state's exercise of the contempt power in this kind of situation").

[174] *Id.* at 260.

[175] *Id.* at 259.

[176] *See id.* at 268 (rejecting out of hand idea that "criteria applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case").

protections apply just as much to "a decision of a court" as to "a rule of law . . . declared in a statute."[177]

In later cases, the Court made it clear that the First Amendment extends to non-legislator executive officers just as surely as it extends to judges.[178] In *Elrod v. Burns*[179] and follow-on cases, for example, the Court overturned actions taken by executive-branch decision-makers to terminate or otherwise disadvantage employees based on party membership.[180] In light of these authorities, Justice Brennan could declare with confidence in 1974 that "[t]he First Amendment binds the Government as a whole, regardless of which branch is at work in a particular instance."[181] Even more important, not a single Justice took issue with the Court's recent pronouncement in *Matal v. Tam*[182] that "[t]he First Amendment prohibits Congress *and other government entities and actors* from 'abridging the freedom of speech.'"[183]

In recent years, a few academic commentators have questioned this proposition, advancing the idea that courts should pay closer heed to the First Amendment's first word.[184] There are considerations reaching beyond the text

[177] *Id.* at 296 (Frankfurter, J., dissenting); *see* Pennekamp v. Florida, 328 U.S. 331, 335-36 (1946) (noting that "[w]hile there was a division of the Court in the *Bridges* case as to whether some of the public expressions by editorial comment transgressed the boundaries of a free press and as to the phrasing of the test, there was unanimous recognition that California's power to punish for contempt was limited by this Court's interpretation of the extent of protection afforded by the First Amendment" (citing *Bridges*, 314 U.S. at 297 (Frankfurter, J., dissenting))). For a more recent pronouncement of the relevant principle, see *Citizens United v. FEC*, 558 U.S. 310, 326 (2010) (noting that "[c]ourts, too, are bound by the First Amendment").

[178] Daniel J. Hemel, *Executive Action and the First Amendment's First Word*, 40 PEPP. L. REV. 601, 623 (2013) ("Although the executive branch is not the First Amendment's grammatical subject, the executive branch is still subject to constitutional constraints . . . .").

[179] 427 U.S. 347 (1976).

[180] *See id.* at 373. In another set of cases, the Court has invoked the First Amendment to invalidate actions taken by executive agencies or other nonlegislative boards, such as state bar associations. *See generally* Konigsberg v. State Bar, 353 U.S. 252 (1957); Schware v. Bd. of Bar Exam'rs, 353 U.S. 232 (1957).

[181] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 511 (1982) (Brennan, J., dissenting).

[182] 137 S. Ct. 1744 (2017).

[183] *Id.* at 1757 (emphasis added).

[184] *See, e.g.*, GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 43 (Yale Univ. Press 2004) ("The simple fact is that the First Amendment by its terms does not apply to executive or judicial actions . . . ."); Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1028 (2011) ("[The First Amendment] is written in the active voice, with a single, identifiable subject. . . . The First Amendment announces the answer to the *who* question with its first word: 'Congress.'"); Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1252-53 (2010) ("[T]he First Amendment is written in the *active* voice, with a

that offer some support for this point of view. For example, James Madison, who served as the primary architect of the First Amendment, emphasized in *The Federalist* that "the primary risk of abused power came from legislative officials," as opposed to members of the executive and judicial departments.[185] As a result, the wording of the First Amendment might combine with founding-era theory to support limitation of the Amendment's operation to legislative action. Despite these points, one senses that arguments along these lines offer far too little, far too late. This is because a quiet revolution has long since occurred, building into our law—with justifications, to be sure, even though they remain unstated to this day—a conception of expressive and religious liberties much broader than what a more text-conscious parsing, once upon a time, might have wrought.

2. Clear and Present Danger

Another quiet revolution in free-speech law came with Justice Holmes's famous formulation of the "clear and present danger" test in *Schenck v. United States*.[186] Today, this four-word phrase stands as a shield of American liberty. At the outset, however, it was something very different. Indeed, a unanimous Court drew on the "clear and present danger" concept in *Schenck* itself to uphold the defendant's conviction,[187] even though he had done nothing more than distribute an "impassioned" anti-war circular that urged readers to "assert your rights."[188] Indeed, Holmes may have formulated the "clear and present danger" idea with a plan to do nothing more than differentiate, whether for free-speech

clear and express subject. Its ringing first words are: 'Congress shall make no law . . . .'" (omission in original)); s*ee also* Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156, 1158 (1986) ("Article I, section 1 of the Constitution states: 'All legislative powers herein granted shall be vested in a Congress of the United States . . . .' If this is the 'Congress' intended by the framers of the Bill of Rights, then the first amendment clearly prohibits the legislative branch . . . from making laws that abridge freedom of speech and press and just as clearly places no prohibitions upon either the judicial or executive branches.").

[185] DAN T. COENEN, THE STORY OF THE FEDERALIST, HOW HAMILTON AND MADISON RECONCEIVED AMERICA 123 (2007) (detailing Madison's view on this point); *see also, e.g.*, THE FEDERALIST NO. 48, at 252-53 (James Madison) (Jacob E. Cooke ed., 1961) (asserting that it is "against the enterprising ambition" of legislatures "that the people ought to indulge all their jealousy and exhaust all their precautions").

[186] 249 U.S. 47, 52 (1919) (recognizing government's authority to act if "in such circumstances" words used are "of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent").

[187] *Id.* at 52-53.

[188] *Id.* at 51.

purposes or otherwise, between conduct properly prosecuted under the criminal law as an attempt and nonchargeable pre-attempt preparation for action.[189]

Any doubt about the then-toothlessness of the "clear and present danger" rhetoric fell away with the Court's ensuing rulings in *Debs v. United States* and *Frohwerk v. United States*. In each of those cases, Holmes wrote for all nine Justices in upholding the jury's "reasonable" finding that draft avoidance and military insubordination were the "natural and intended effect" of anti-war communications.[190] Building on this momentum, a majority in *Gitlow* indicated that the "clear and present danger" formulation required nothing more than "a natural tendency and probable effect."[191] It also held that an even less speech-protective standard applied in a large category of cases—namely, all cases that did not involve "general provisions" that simultaneously covered both speech and nonspeech behavior, as opposed to cases in which "the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."[192] In short, in the years following the Court's ruling in *Schenck*, the Court took a narrow view of protecting even core political speech.

During this same period, however, a quiet revolution began to occur under the banner of the "clear and present danger" rubric. In a trilogy of now-famous dissenting and concurring opinions, Justices Holmes and Brandeis made the case for expanding the constitutional protections afforded to political agitators.[193] Holmes continued to insist that *Schenck* was rightly decided,[194] and even his most prominent dissent of the era "is marred by ambiguity."[195] Nonetheless, his new approach, and even more so that of Justice Brandeis, called for ratcheting

[189] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 841 (2d ed. 1988) (noting that Court's reasoning and result it reached could be seen as reconcilable with then-prevailing, statist notion that "speech was punishable as an attempt if the natural and reasonable tendency of what was said would be to bring about a forbidden result").

[190] Debs v. United States, 249 U.S. 211, 215 (1919); Frohwerk v. United States, 249 U.S. 204, 206 (1919); *see* TRIBE, *supra* note 189, at 842 (noting Court's deferral to jury's purportedly reasonable determination that natural and intended effect of expressions at issue was to obstruct recruiting or to cause insubordination).

[191] Gitlow v. New York, 268 U.S. 652, 671 (1925).

[192] *Id.*

[193] *See* Whitney v. California, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); *Gitlow*, 268 U.S. at 672-73 (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

[194] *Abrams*, 250 U.S. at 627 (Holmes, J., dissenting) ("I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck*, *Frohwerk*, and *Debs* were rightly decided." (citations omitted)).

[195] *See* TRIBE, *supra* note 189, at 895.

up the requirements of both likelihood and imminence suggested by the "clear and present danger" formulation.[196]

Most important of all, despite its initial hesitation, the Court as a whole began to apply the "clear and present danger" standard both with strengthened rigor and in a broadened set of cases. By 1945, Justice Black could describe the lay of the land in the following terms:

> [T]he "clear and present danger" language of the *Schenck* case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue. It has been utilized by either a majority or minority of this Court in passing upon the constitutionality of convictions under espionage acts, under a criminal syndicalism act, under an "anti-insurrection" act, and for breach of the peace at common law. And very recently we have also suggested that "clear and present danger" is an appropriate guide in determining the constitutionality of restrictions upon expression where the substantive evil sought to be prevented by the restriction is "destruction of life or property, or invasion of the right of privacy."[197]

The Court in the same case applied the "clear and present danger" touchstone in assessing whether courts could sanction negative out-of-court commentary directed at the handling of pending judicial proceedings.[198] It also explained that, under the now-operative version of the test, "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[199]

In short, over two decades, a quiet revolution in free-speech law had come to pass. A four-word phrase, initially used in upholding a conviction without an apparent design to expand expressive freedom in a dramatic way, had morphed into a muscular libertarian principle applicable in a sweeping range of free-speech contexts.[200] It bears emphasis that the Court's build-out of the "clear and

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[196] Most notably, in his concurring opinion in *Whitney*, Justice Brandeis emphasized the need for a showing of imminence, especially in light of the opportunity for counterspeech to work with the passage of time. 274 U.S. at 376 (Brandeis, J., concurring). In addition, he refined the requirement of a "clear" danger to focus not only on a high probability of harm but also on the severity of the harm that was threatened. *See id.* at 378.

[197] Bridges v. California, 314 U.S. 252, 262 (1941) (footnote omitted) (citations omitted) (quoting Thornhill v. Alabama, 310 U.S. 88, 105 (1940)).

[198] *See id.* at 261-63, 273.

[199] *Id.* at 263.

[200] Nor did the impact of the *Schenck* rhetoric end with the Court's ruling in *Bridges*. In later cases, the Court continued to put the "clear and present danger" formulation to work in vindicating First Amendment liberties in additional contexts. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (per curiam) (drawing on formula in refining constitutional protections of alleged incitement); Pickering v. Bd. of Educ., 391 U.S. 563, 574-75 (1968) (applying "clear and present danger" standard in public-employee-speech context).

present danger" test sometimes involved the Court in very non-quiet, indeed heated, internal conflicts.[201] In addition, the Justices in post-*Schenck* cases openly offered reasons why an exacting "clear and present danger" test has strong roots in First Amendment policy.[202] But it was Holmes's then-unheralded four-word phrase—terse and unexplained but laden with interpretive potential—that served as the verbal vehicle with which the Court in time drove forward dramatic reforms in free-speech law.[203]

G. *Congressional Powers*

Few events have figured more prominently in our nation's history than the Great Depression, the ensuing election of President Franklin D. Roosevelt, and the enactment of his New Deal programs of Keynesian reform. These developments ushered in major changes in constitutional law, and many of those changes came by way of high-profile, carefully reasoned rulings.[204] Others, however, involved quiet revolutions.

The reworking of constitutional doctrine during the New Deal era focused largely on endorsing an expanded vision of Congress's power to regulate interstate commerce. As late as 1936, in *Carter v. Carter Coal Co.*,[205] the Court held that a categorical principle foreclosed Congress from invoking the commerce power to regulate any and all forms of "production."[206] It followed, for example, that Congress could not meddle with the wages and hours of workers in even the nation's largest mines, factories, and agricultural facilities.[207] A transformative change in commerce-power law came, however, with the Court's ruling in *NLRB v. Jones & Laughlin Steel Corp*.[208] There the

[201] *See, e.g.*, *supra* notes 172-177 and accompanying text (discussing disagreement that marked ruling in *Bridges*).

[202] Of particular importance in this regard was Justice Brandeis's defense in *Whitney* of a meaningful "clear and present danger" requirement. *See supra* note 196 and accompanying text.

[203] Another illustration of a quiet-revolution ruling in free-speech law is provided by *United States v. O'Brien*, 391 U.S. 367 (1968), in which the Court set forth a new, four-part test for assessing speech-sanctioning operations of generally applicable laws, while offering no meaningful explanation for the appropriateness of that approach beyond "we think it clear." *Id.* at 377. For one suggestion that things were not so clear, see *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991) (Scalia, J., concurring) (asserting that "general law regulating conduct and not specifically directed at expression . . . is not subject to First Amendment scrutiny at all").

[204] *See* Wickard v. Filburn, 317 U.S. 111, 119 (1942) (explaining in detail why Congress had authority to regulate amount of farmer's wheat production even for his own family's use).

[205] 298 U.S. 238 (1936).

[206] *See id.* at 301.

[207] *See id.* at 308 (emphasizing that "magnitude" of effects on interstate commerce was inconsequential if "character" of regulated industry involved local production).

[208] 301 U.S. 1 (1936).

Court upheld the National Labor Relations Act, which safeguarded unionizing efforts by production workers, insofar as the Act applied to one of the nation's largest steel producers.[209]

The majority's ruling in *Jones & Laughlin Steel Corp.* is not easily described as quiet, especially because of the case's high visibility and the issuance of a passionate dissent joined by four disquieted Justices.[210] To be sure, the majority opinion included quiet elements, especially in its one-sentence brush-off of the once-determinative ruling in *Carter*.[211] On the whole, however, the analysis of the Court was elaborate and nuanced, built around a painstaking account of the many interstate activities engaged in by the Jones & Laughlin Steel Corporation. As the Court took care to explain, that firm was the nation's fourth largest steel producer, with vertically integrated operations involving coal mining, ore mining, river transport, railroading, warehousing, metal making, and steel fabrication in locations that ranged from New Orleans to Long Island to Memphis and beyond. The Court, quoting the Labor Board, declared that the steel mills themselves "might be likened to the heart of a self-contained, highly integrated body."[212] More to the point: "They draw in the raw materials from Michigan, Minnesota, West Virginia, Pennsylvania in part through arteries and by means controlled by the [corporation]; they transform the materials and then pump them out to all parts of the nation through the vast mechanism which [the corporation] has elaborated."[213]

It was this set of facts that, from all appearances, led the Court to find no constitutional overreach in applying the National Labor Relations Act to this massive firm. As Chief Justice Hughes explained:

> When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?[214]

This disquisition left behind questions about just how far Congress could go in regulating labor relations. Yet the striking emphasis in *Jones & Laughlin Steel*

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[209] *See id.* at 49.

[210] *See id.* at 76 (McReynolds, J., dissenting, joined by Van Devanter, Sutherland & Butler, JJ.).

[211] *See id.* at 41 (majority opinion) (dismissing *Carter* on ground that Court "was of the opinion that the provisions of the statute relating to production were invalid upon several grounds").

[212] *Id.* at 27.

[213] *Id.*

[214] *Id.* at 41.

Corp. on the "integrated,"[215] "far-flung,"[216] and "national"[217] character of the employer's operations gave reason to believe that the Court might well deal with small, local employers in a very different manner.

In a major-league quiet-revolution ruling, the Court broke the other way. *NLRB v. Friedman-Harry Marks Clothing, Co.*[218] involved an alleged unfair labor practice committed by a "small clothing manufacturer with a minuscule share of the interstate market."[219] This change in the facts, however, produced no change in the result. On the same day it handed down its ruling in *Jones & Laughlin Steel Corp.*, the Court also decided *Friedman-Harry Marks Clothing, Co*. The Court's entire analysis in the latter case was set forth in a single sentence: "For the reasons stated in our opinion in *NLRB v. Jones & Laughlin Steel Corp.*, we hold that the objections raised by respondent to the construction and validity of the National Labor Relations Act are without merit."[220] The Court in *Friedman-Harry Marks Clothing, Co.* thus worked a quiet revolution that radically expanded the scope of the federal commerce power. In practical effect, the Court's one-sentence ruling transformed *Jones & Laughlin Steel Corp.* from a fact-bound treatment of a distinctly national mega-firm into a ruling that authorized congressional regulation of countless employers, both large and small, throughout the United States.

II. ORGANIZING THE COURT'S QUIET-REVOLUTION RULINGS

The examples offered in Part I show the widespread impact of quiet revolutions in constitutional law. So, too, do the additional examples offered in the pages that follow—examples that range across such widely varying subjects as the reach of Second Amendment protections, the one-time "commercial speech" doctrine, habeas corpus jurisdiction, and the scope of state sovereign immunity from suit. These cases also show that quiet revolutions come in many forms. Or do they? The answer to this question, as it turns out, is both "yes" and "no." Yes, because every quiet revolution has distinctive characteristics with regard to such matters as the precise nature of the Court's pronouncement, the degree to which the ruling reworks preexisting law, and the level of judicial focus on the potential consequences of its action. No, because close inspection suggests that all quiet-revolution rulings fall into two major categories: *ipse dixit* declarations and invitational pronouncements. This Part explores the differences that mark these contrasting types of Supreme Court action.

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[215] *Id.* at 26.

[216] *Id.* at 41.

[217] *Id.*

[218] 301 U.S. 58 (1937).

[219] DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986, at 237 (1990).

[220] *Friedman-Harry Marks Clothing, Co.*, 301 U.S. at 75 (citation omitted).

A. Ipse Dixit *Declarations*

Many cases discussed in Part I illustrate the operation of *ipse dixit* declarations. In *Friedman-Harry Marks Clothing, Co.*, for example, the Court simply declared in one sentence that the principle of *Jones & Laughlin Steel Corp.* would apply across the board to localized production facilities.[221] In *Gitlow* (as interpreted by later cases), the Court without discussion established a hornbook-law rule of foundational significance—namely, that the Fourteenth Amendment makes applicable to the states all the protections established by the Free Speech and Free Press Clauses.[222] In *Cantwell*, again without openly reflecting on the issue, the Court simply announced the full-bore incorporation of both the Free Exercise and Establishment Clauses.[223]

Some *ipse dixit* declarations depart sharply from preexisting law, or at least from the direction in which the law then seems to be headed. Consider *Patterson v. Colorado ex rel. Attorney General*.[224] That ruling stemmed from a finding of criminal contempt based on the publication of a political cartoon that criticized a state court's handling of several then-pending cases.[225] In rejecting the petitioner's free-expression-based defense, Justice Holmes began by citing authority for the proposition that "the main purpose of [the Speech and Press Clauses] is 'to prevent all such *previous restraints* upon publications as have been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare."[226] The Court's ruling in *Patterson* thus invited the conclusion that the free-expression clauses concern nothing more than licensing denials and other prior restraints. By the time of *Schenck*, however, Justice Holmes was so ready to cut loose this constraining proposition that he needed only thirty-nine words to make the point. As he wrote for a unanimous Court: "It well may be that prohibition of laws abridging freedom of speech is not confined to previous restraints,"[227] so that "in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights."[228] Soon thereafter, in *Stromberg v.*

[221] *See supra* notes 218-220 and accompanying text.

[222] *See supra* notes 32-64 and accompanying text.

[223] *See supra* notes 44-46 and accompanying text.

[224] 205 U.S. 454, 463 (1907).

[225] *Id.* at 458-59.

[226] *Id.* at 462 (quoting Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 313-14 (1825)); *see also* LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 1-18 (1960) (setting forth classic historical treatment of this point). Among other things, Professor Levy highlights how the prior-restraints-targeting view of the First Amendment had its roots in the writings of Blackstone. *See* LEVY, *supra*, at 173-74.

[227] Schenck v. United States, 249 U.S. 47, 51 (1919).

[228] *Id.* at 52.

California,[229] the Court extinguished any doubt on this score by declaring that some applications of ordinary criminal statutes, even though they involved no prior restraints, were invalid because they targeted "conduct which the State could not constitutionally prohibit."[230] In *Stromberg*, the Court did not pause to discredit the historical argument for a prior-restraint-focused First Amendment protection. It simply dispatched in a single sentence the position that the Court had seemed to endorse in *Patterson*.

Sometimes *ipse dixit* rulings open legal doors. The Court's one-liner in *Stromberg*, for example, led to the Court's development of almost all now-recognized constitutional free-expression protections because the vast majority of communicative-liberty disputes involve not prior restraints but subsequent punishments. Other *ipse dixit* declarations slam doors shut. In *Valentine v. Chrestensen*,[231] for example, the Court rebuffed without analysis the idea that First Amendment protections accorded to political handbill distributors should extend to commercial handbill distributors as well.[232] In some cases, as with the Court's treatment of *Patterson* in *Schenck* and *Stromberg*, the Court reworks an area of law by simply ignoring, without comment, what it said before.[233] These "dog that did not bark" rulings have a kinship to decisions in which the Court engages in "stealth overruling" by distinguishing an earlier case in a way that strips its holding of practical significance.[234] Stealth overrulings, however, involve an open effort by the Court to deal with the contested precedent, albeit by offering distinctions that critics deem flimsy and contrived. In contrast, the sort of *ipse dixit* declarations exemplified by the Court's later treatment of *Patterson* are quiet in a distinct way because the ruling that sets forth the operative declaration offers no analysis of the relevant precedent at all.[235]

Ipse dixit declarations sometimes come into the law as obiter dicta, and in these cases the Court might well give with one hand as it takes with the other. In *Gitlow*, for example, the Court rejected the defendant's First Amendment

[229] 283 U.S. 359 (1931).

[230] *Id.* at 369.

[231] 316 U.S. 52 (1942), *overruled by* Bigelow v. Virginia, 421 U.S. 809 (1975).

[232] *See id.* at 54; Arnold H. Loewy, *The Use, Nonuse, and Misuse of Low Value Speech*, 58 WASH. & LEE L. REV. 195, 196 (2001) (noting that, via *Chrestensen*, "by a simple *ipse dixit*, commercial speech became nonspeech or, at least, no value speech"). In due course, *Chrestensen* was overruled. *See* Bigelow v. Virginia, 421 U.S. 809, 820 (1975). For more than two decades, however, the *ipse dixit* declaration made in the earlier case cut off at the pass a wide-ranging set of potential First Amendment challenges to commercial-speech regulation.

[233] Another set of cases that illustrates this phenomenon involves the Court's treatment over time of earlier rulings concerning the availability of federal habeas corpus relief. *See infra* notes 276-297 and accompanying text (discussing these cases).

[234] *See generally* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1 (2010).

[235] For more on this point, see *supra* notes 224-226 and accompanying text (discussing *Patterson*).

defense, even while setting the stage for a dramatic expansion of expressive liberty with its *ipse dixit* comment on the incorporation of Free Speech and Free Press Clause protections.[236] In similar fashion, the Court in *Hirabayashi* and *Korematsu* upheld a sweeping program of oppression directed at a single ethnic minority; at the same time, however, it launched the now-far-reaching, rights-protective phenomenon of reverse incorporation.[237] This give-and-take manner of judicial maneuvering is not uncommon. Indeed, the poster-child case for such behavior is no less of a landmark than *Marbury v. Madison*. There the Court declared that, on the facts presented, it had no jurisdiction to vindicate the plaintiff's rightful claim against the Secretary of State, but it also made use of the occasion to set forth in broad terms its power to nullify even duly enacted federal statutes and to enjoin the actions even of cabinet officers.[238] In some quiet-revolution rulings, the same dynamics may be at work. In *Gitlow*, for example, the Court's "loud" ruling about its lack of authority to protect the prosecuted political dissident was accompanied by a quiet move that created the opportunity to apply all constitutional free-expression limitations to the states in future cases.[239] To the extent that *ipse dixit* declarations work this way, they serve to expand the Court's power in the long run, even as the Justices act with seeming self-abnegation in the present moment.[240]

The *Gitlow* line of authorities illustrates another feature of *ipse dixit* declarations: Some quiet revolutions find support in the distortion of precedent, particularly as the Court ascribes to an earlier ruling a far-reaching principle that the ruling does not embody on any fair view. In *Gitlow* itself, the Court only assumed that the Fourteenth Amendment incorporated the free-expression rights established by the First Amendment.[241] In later cases, however, the Court cited *Gitlow*, without batting an eye, as having resolved the very question it reserved.[242] Likewise, in *Bolling v. Sharpe*, the Court signaled that the Fifth Amendment did not render applicable to the federal government many of the anti-discrimination rules directed at states by the Equal Protection Clause.[243] In

[236] Gitlow v. New York, 268 U.S. 652, 672 (1925); *see supra* notes 32-64 and accompanying text (discussing *Gitlow*'s impact).

[237] *See supra* notes 95-99 and accompanying text.

[238] *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 25 (6th ed. 2016) ("The decision is a masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another.").

[239] *Gitlow*, 268 U.S. at 672.

[240] *See, e.g.*, Munn v. Illinois, 94 U.S. 113, 134 (1877) (upholding state regulation of grain elevator prices because such prices are infused with "public interest" while asserting broad judicial authority to police state regulation of "mere private contracts").

[241] *Gitlow*, 268 U.S. at 672 (rejecting First Amendment challenge).

[242] *See supra* notes 37-42 and accompanying text (describing later Court's handling of *Gitlow*).

[243] *See* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).

later cases, however, the Court relied on *Bolling* on its way to endorsing exactly the opposite proposition.[244] Long ago, the legal historian Sir Henry Maine emphasized the centrality of the use of legal fictions by courts to facilitate the making of needed changes in the law.[245] Rulings of the Court that purported to draw upon *Gitlow* and *Bolling* resonate with Maine's insight. They demonstrate how *ipse dixit* declarations can reshape the law to adapt to new conditions by essentially fictionalizing what has come before.[246]

Precisely because *ipse dixit* rulings require no analytical heavy lifting, they can enter the law in unusual ways. Take *Robertson v. Baldwin*,[247] which raised the question whether a sailor's compelled service on a merchant ship based on an earlier act of desertion offended the ban on "involuntary servitude" set forth in the Thirteenth Amendment. On its way to ruling against the seaman, the Court reflected on how constitutional prohibitions often do not call for a strictly literal application, observing that "[t]he law is perfectly well settled that the first ten amendments to the Constitution . . . were not intended to lay down any novel principles of government," so that unstated exceptions to those protections "continued to be recognized as if they had been formally expressed."[248] In support of this proposition, the Court proceeded to offer a series of examples, including by noting that "the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons."[249] *Robertson* thus worked a Second Amendment quiet revolution in a case that did not involve the Second Amendment at all. In a mere sentence fragment, the Justices categorically resolved an issue that, perhaps more than any other, occupies the minds of present-day gun-rights advocates.[250]

The Second Amendment ruling of *Robertson* came in twenty-one words. The Court's first explicit endorsement of full-scale reverse incorporation came in a footnote. The *ipse dixit* expansions of *Brown v. Board of Education* and *Jones & Laughlin Steel Corp.* came in one-line per curiam rulings. And the corporate-personhood ruling of the *Santa Clara County* case, as we have seen, came into

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[244] *See supra* notes 108-122 and accompanying text (describing how Court relied on *Bolling* to support full application of Equal Protection Clause safeguards to federal government).

[245] *See* HENRY MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 13-25 (Univ. of Ariz. Press 1986) (1861). For another classic treatment of the subject, see generally LON FULLER, LEGAL FICTIONS (1967).

[246] *See infra* notes 276-297 and accompanying text (offering similar account of Court's development of federal habeas corpus law).

[247] 165 U.S. 275 (1897).

[248] *Id.* at 281.

[249] *Id.* at 281-82.

[250] *See, e.g.*, Joseph G.S. Greenlee, *Concealed Carry and the Right to Bear Arms*, 20 FEDERALIST SOC'Y REV. 32, 32 (2019) (asserting that recognition of concealed-carry right finds support in the rulings of "Supreme Court, American history and tradition, and the most influential lower court decisions").

the law solely by way of a Court Reporter's syllabus. *Ipse dixit* declarations can, in short, be found in unusual places. But, however humble their lodgings may be, their revolutionary significance remains.

B. *Invitational Pronouncements*

As with *ipse dixit* declarations, quiet revolutions by way of invitational pronouncements enter the law in different ways. Even so, the basic pattern is a recurring one, and the Court's "clear and present danger" cases illustrate that pattern well. In *Schenck*, the Court did not, as it did in cases such as *Friedman-Harry Marx Clothing* or *Santa Clara County*, decide a discrete, legal question by way of a brief, categorical proclamation. Instead, the Court—without offering any citation to authority or other supportive justification—put forward a phrase laden with the potential for later creative use as it worked its way to resolving the issue at hand. As things turned out, Charles Schenck did not receive the benefit of the quiet revolution launched in his case; instead, with the blessing of the Supreme Court, he went to federal prison for six months.[251] In later decades, however, the "clear and present danger" formulation found its way into dozens of opinions, undergirding a sweeping, speech-protective movement in American law.[252]

Here is the critical point: The key moments in the quiet revolution borne of *Schenck* came not so much in *Schenck* itself as in later cases in which the Court leveraged the open-textured—and thus invitational—nature of the "clear and present danger" passage. More specifically, the Court drew on the libertarian ring of the phrase over time to help justify libertarian results founded on a libertarian theory.[253] A transformative line of constitutional authority thus found its footing in the sparse but suggestive phrase that Holmes laid down, almost in passing, in *Schenck*.

Another example of this sort of judicial seed-planting is provided by Chief Justice Marshall's treatment of the commerce power in *Gibbons v. Ogden*.[254] That case involved congressional regulation of activity that itself was readily characterized as "commerce . . . among the several States"—namely, the movement of ferries between New Jersey and New York directly across state lines.[255] On his way to finding a proper exercise of congressional authority, however, the Chief Justice dropped a comment that described the federal power as reaching "internal concerns which affect the states generally; but not those which are completely within a particular state [and] which do not affect other

[251] *See* Alexander Tsesis, *Prohibiting Incitement on the Internet*, 7 VA. J.L. & TECH. 5, ¶ 15 (2002).

[252] *See supra* notes 197-200 and accompanying text (surveying Court's use of "clear and present danger" formulation).

[253] *See supra* notes 201-203 (discussing build-out of "clear and present danger" concept).

[254] 22 U.S. (9 Wheat.) 1 (1824).

[255] *See id.* at 186.

states."[256] This language hinted at the idea that Congress might be able to regulate not only the sort of plainly cross-border activities at issue in *Gibbons* itself, but also wholly intrastate activities, so long as they "affect" interstate commerce. The Court in time came to uphold a broad range of federal laws on this very theory. Of particular importance for present purposes, the Justices drew directly on *Gibbons*'s invitational pronouncement as it did so, reasoning that "[a]t the beginning, Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded."[257]

Several points about invitational pronouncements merit attention. First, in contrast to *ipse dixit* declarations, invitational pronouncements never close the door on future constitutional growth. As we have seen, for example, the Court's *ipse dixit* declaration in *Chrestensen* drew a line in the sand, stanching efforts to secure protections of commercial speech for nearly a quarter century.[258] With invitational pronouncements, such a result never occurs. Instead, precisely because the Court's turn of a phrase invites later creative uses, opportunities for deploying the Court's pronouncements are opened up going forward. Their significance lies in the potential they quietly create for a follow-up reframing of the law.

Second, while *ipse dixit* declarations always are consequential because they establish new, discrete, and transformative propositions of law, some invitational pronouncements end up having no consequences at all. Again, the nature of invitational pronouncements indicates why. In cases that post-dated *Schenck*, for example, the Court chose to make far-reaching use of that decision's "clear and present danger" rhetoric.[259] In similar fashion, the Court invoked opinions that had made only passing and opaque use of the word "compelling" as it issued later seminal rulings that both energized and dramatically expanded the operation of strict scrutiny in means-ends law.[260] When it comes to invitational pronouncements, however, things do not always work out this way. Take *Harper v. Virginia Board of Elections*,[261] in which the Court invalidated state-imposed poll taxes.[262] This core holding did not involve anything remotely like an *ipse dixit* declaration because the Court justified it by trumpeting the significance of the franchise at length.[263] Justice Douglas, however, wove into his analysis the terse observation that "[l]ines drawn on the

[256] *Id.* at 195.

[257] Wickard v. Filburn, 317 U.S. 111, 120 (1942).

[258] *See supra* notes 231-232 and accompanying text (describing *Chrestensen*'s impact).

[259] *See supra* notes 197-203 and accompanying text (discussing development of "clear and present danger" formulation).

[260] *See supra* notes 157-170 and accompanying text (outlining this history).

[261] 383 U.S. 663 (1966).

[262] *See id.* at 670.

[263] *See id.* at 667, 669.

basis of wealth or property, like those of race, are traditionally disfavored."[264] Here were words pregnant with the potential to give rise to new constitutional protections of the poor. Moreover, thoughtful commentators were, at the same time, putting forward arguments designed to push the law in precisely this direction.[265] In later rulings, however, the Court chose not to take up this agenda.[266] *Harper*, in short, set forth an invitational pronouncement. The post-*Harper* Court, however, chose not to accept the invitation that had been offered.

A third point regarding invitational pronouncements concerns the complexity of the ways in which their use can unfold. Oftentimes, quiet revolutions do not involve only invitational pronouncements; rather, they involve a blend of invitational pronouncements and *ipse dixit* rulings. The *Gitlow* cases, for example, involved sharp-edged *ipse dixit* declarations about whether or not the protections of the First Amendment were applicable to the states. Quietly embedded in those rulings, however, was also a subtle form of invitational pronouncement. In effect, if not in terms, *Gitlow* invited the Court to consider expanding, well beyond the First Amendment, the range of Bill of Rights protections that limit state, not just federal, action.[267] And over time, that is just what the Court did.

The Court's means-ends jurisprudence embodies an especially rich mix of invitational pronouncements and *ipse dixit* declarations. As we have seen, the entire rhetoric of means-ends analysis crept into the law in a quiet way, and important developments in the field involved the Court's "cashing in" on invitational pronouncements to put in place, among other things, a highly exacting version of the "compelling state interest" test in many areas of law.[268] At the same time, some means-ends rulings have involved *ipse dixit* declarations—including the unreasoned decisions that deemed the "compelling state interest" test applicable in the free-exercise and equal-protection contexts.[269] To be sure, some build-outs of means-ends law have come in non-quiet actions, as illustrated by the Court's openly justified endorsement of

[264] *Id.* at 668.

[265] *See, e.g.*, Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 24 (1969) (discussing how *Harper* raises possibility of constitutional protections based on income). For additional ruminations along these lines, see generally Milner S. Ball, *Judicial Protection of Powerless Minorities*, 59 IOWA L. REV. 1059 (1974).

[266] *See, e.g.*, James v. Valtierra, 402 U.S. 137, 143 (1971) (rejecting challenge to special requirement of referendum approval prior to government pursuit of low-rent housing projects).

[267] *See supra* notes 32-64 (highlighting post-*Gitlow* opinions in which Court expanded scope of Bill of Rights protections directed at not only federal but also state actions).

[268] *See supra* notes 157-170 and accompanying text (discussing this history).

[269] *See, e.g.*, *supra* notes 168-169 and accompanying text (discussing extension of "compelling state interest" test to free-exercise and equal-protection contexts).

intermediate scrutiny for sex-discrimination cases in *Craig v. Boren*.[270] But a variety of sub-rules in the equal-protection field have entered the law in a quiet way. We have seen, for example, how the Court reworked the intermediate scrutiny standard to incorporate and energize the "exceedingly persuasive justification" test.[271] Indeed, even in applying low-level rational-basis scrutiny, the Court has invalidated what seem at first blush to be entirely permissible forms of government action.[272] It has done so in those cases by leveraging the open-textured nature of the word "rational" to apply "rationality review 'with bite.'"[273]

The Court's means-ends jurisprudence illustrates a critical point: Sometimes a quiet revolution takes the form of a quiet *evolution*—that is, a process in which *ipse dixit* declarations, invitational pronouncements, and more ordinary forms of judicial action interact over time to rearrange a field of doctrine in a far-reaching way. In the case of means-ends review, this process primarily has involved filling in open spaces in the law. During the early- to mid-twentieth century, as the Court moved for the first time to assess large numbers of claims based on constitutional protections of liberty and equality, it needed new tools to help it carry out its work. As a result, it forged a wide array of means-ends rules, building out those rules—sometimes dramatically, but oftentimes subtly—with the overarching goal of developing workable mechanisms for dealing with a set of legal problems that, for the most part, the Court had not faced before.[274] The end result was the rich mix of means-ends doctrines that now guide almost all of the Court's rights-related work.[275]

Sometimes, quiet revolutions that involve invitational pronouncements work in a different way. In these instances, invitational pronouncements and *ipse dixit* rulings (and other rulings, too) interact over time not so much to fill doctrinal interstices as to displace preexisting legal structures. Illustrative is the evolution of habeas corpus doctrine in the period that preceded the Burger Court,

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[270] *See supra* note 13 and accompanying text (describing *Craig*).

[271] *See supra* notes 154-156 and accompanying text (outlining changes in sex-discrimination law, culminating in *United States v. Virginia*, 518 U.S. 515 (1996)).

[272] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (striking down application of permitting ordinance that disadvantaged mentally disabled residents); Reed v. Reed, 404 U.S. 71, 74 (1971) (striking down sex-based preference in probate law).

[273] *See* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 34 (1972) (contending, for example, that *Reed* Court applied new equal-protection criteria while continuing to use rational-basis standard); *see also* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 259 n.2 (2009) (noting Professor Gunther's description of *Reed* in these terms).

[274] *See supra* notes 202-203 and accompanying text (discussing similar phenomenon with regard to development of "clear and present danger" concept).

[275] *See* Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting) (reflecting on how "tiers of scrutiny proliferated into ever more gradations").

culminating in the seminal ruling in *Brown v. Allen*.[276] This story is complex, but a shorthand summary goes like this: In its early jurisprudence, the Court declared that federal courts could grant habeas corpus relief from state court action only in the narrow band of cases in which the indirectly attacked judgment came from a tribunal that lacked "jurisdiction" in the case.[277] Precisely because this rule was single-mindedly jurisdiction-centered, it had the effect of confining federal habeas corpus jurisdiction to an extremely small set of cases. Over time, the Court's rhetoric shifted without explanation to a focus (at least in some cases) on whether the challenged judgment was rightly characterized as "void."[278] Soon, the Court was authorizing habeas relief in cases that did not involve a lack of "jurisdiction" in any ordinary sense of the word. First, it upheld remedial intervention for prisoners who persuaded the habeas tribunal that a challenged sentence was unlawfully excessive.[279] Next, the Justices endorsed the grant of the remedy whenever a federal habeas court determined that the petitioner had been convicted under an unconstitutional state statute.[280] While these new rules greatly expanded access to postconviction relief, their readily applied boundaries rendered them not "completely unintelligible."[281]

In later cases, however, the Court's increasingly rights-protective rhetoric produced more inroads. Of particular importance, the Court declared, in a pronouncement that now stirs little controversy, that a federal tribunal could consider any constitutional challenge to state decision-making processes so long as the state system had not addressed that challenge by way of a fair "corrective process."[282] Of even greater importance, some cases hinted at an approach that was even less—indeed, far less—accommodating of the finality of state court judgments. In *Ex Parte Royall*,[283] for example, the Court (in keeping with pre-existing authority) considered the habeas petitioner's challenge to the constitutionality of the substantive state statute under which he had been

[276] 344 U.S. 443 (1953). The term "pre-Burger Court" is used here because the law described in the ensuing discussion was modified in significant respects by the Burger and Rehnquist Courts, as well as by Congress's enactment of the Antiterrorism and Effective Death Penalty Act of 1996. All of this occurred, however, against the backdrop of *Brown v. Allen*.

[277] *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830).

[278] *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 176 (1874).

[279] *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 467-68, 471 (1963) (detailing this development).

[280] *See id.* at 468, 471.

[281] *See id.* at 471.

[282] Frank v. Mangum, 237 U.S. 309, 335 (1915); *see* Bator, *supra* note 279, at 487 (attributing to this principle "beneficent expansions of the writ we have witnessed over the past fifty years").

[283] 117 U.S. 241 (1886).

convicted.[284] In the process of deciding the case, however, the Court wrote loosely about the prospect of recognizing a general federal authority to determine in habeas actions "whether the petitioner is restrained of his liberty in violation of the Constitution of the United States."[285] Likewise, in *Moore v. Dempsey*,[286] the Court authorized habeas relief in a case that fit within the tapestry of preexisting law because the state tribunals had not subjected the petitioner's procedural due process claim to "any process of inquiry . . . at all."[287] Even so, language cropped up in Justice Holmes's opinion that pointed to the potential availability of habeas relief whenever "the State Courts failed to correct the wrong," regardless of the quality of state-court review processes.[288]

The possibility that *Moore* might produce such a "radical change"[289] was clouded by later cases in which the Court sometimes reverted to its no-jurisdiction rhetoric or suggested the centrality of whether a "full and fair adjudication" of the contested issue in the state system had occurred.[290] With its 1953 ruling in *Brown v. Allen*, however, the Court finally flipped the switch. In that case, the Court signaled, albeit in an odd configuration of separate opinions and statements submitted by eight of the nine Justices, that federal habeas courts could reconsider de novo any constitutional claim asserted by any petitioner even if that claim had received a fully adequate processing in the state courts.[291] What is important for present purposes is that this ruling had its origins in the elaborate body of earlier habeas rulings that, though often quietly, had pushed the law in the direction of broadening access to habeas relief. As Professor Bator wrote: "What is the basis of *Brown v. Allen*? The opinions do not cast much light

[284] Bator, *supra* note 279, at 479 ("The question in *Royall* was the constitutionality of the statute creating the offense.").

[285] *Ex parte* Royall, 117 U.S. at 253.

[286] 261 U.S. 86, 91 (1923).

[287] Bator, *supra* note 279, at 489.

[288] *Moore*, 261 U.S. at 91.

[289] Curtis R. Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1329 (1961).

[290] *Ex parte* Hawk, 321 U.S. 114, 118 (1944).

[291] *See* Brown v. Allen, 344 U.S. 443, 458-59 (1953) (indicating appropriateness of hearing constitutional claim "even after trial and review by the state"); *id.* at 500 (Frankfurter, J., concurring) (declaring that "prior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress . . . provided it should not have"). *See generally* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1280 (7th ed. 2015) (identifying decision's "basic principle" as establishing that "federal habeas courts should relitigate questions of federal constitutional law that were fully and fairly litigated in state court").

on that question."[292] Instead, they set forth "mere statements of conclusion."[293] In the end, the most illuminating opinion in the case relied on little more than the Court's earlier rulings in *Royall* and *Moore*, and even those authorities received only a passing mention.[294]

There are different ways to think about the quiet revolution that gave rise to, and became embodied in, *Brown v. Allen*. One might say that the Court's "mere statements of conclusion" style of reasoning marked the case itself as setting forth a quiet-revolution *ipse dixit* declaration.[295] On another view, the key role of *Brown v. Allen* was to reaffirm the Court's earlier *ipse dixit* declaration in *Moore*.[296] But *Brown v. Allen* is probably best seen another way. According to this account, the ruling embodied the culmination of a long-in-the-making, case-by-case reshaping of federal habeas corpus law that involved both quiet-revolution and non-quiet-revolution components. Some rulings along the way embodied *ipse dixit* declarations—for example, that a want of jurisdiction in the ordinary sense was not an essential prerequisite to granting habeas relief. Some rulings involved invitational pronouncements—for example, that a judgment's "voidness" provided the proper touchstone for subjecting it to collateral attack. Some rulings were not unanimous; *Moore*, for example, generated a two-Justice dissent. But others, such as *Royall*, triggered no objection at all, so that the Court's suggestive pronouncements came into the law without any contemporaneous analytical cross-examination. The bottom line is that a rising tide of many decisions prominently including both *ipse dixit* declarations and invitational pronouncements pushed the Court toward abandoning—first a little and then a lot—a once-settled, jurisdiction-centered habeas corpus doctrine. *Brown v. Allen*, in short, was largely the product of a number of quiet-revolution rulings perhaps best seen as involving a quiet *evolution* that played out over a period of more than one hundred years.[297]

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[292] Bator, *supra* note 279, at 500.

[293] *Id.* at 501; *see id.* at 505 (noting that justification for reordering functions of state and federal courts in habeas cases "was simply not provided in the opinions in *Brown v. Allen*").

[294] *See Allen*, 344 U.S. at 500 (Frankfurter, J., concurring) (providing only "cf." citation to *Royall* after stating key rule of law); *id.* at 503 (citing *Moore* and *Royall* for proposition that past statements about habeas corpus not serving as de facto form of appeal were inapplicable in "those extraordinary cases in which a substantial claim goes to the very foundation of a proceeding").

[295] As to the revolutionary character of the ruling, see Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 106 (1959) ("The decision manifestly broke new ground."). As to its quietness, although Justice Jackson challenged the Court's key holding in a separate opinion, *see id.* at 532-45, no other Justice paused to address his expressions of concern.

[296] *See supra* notes 294-295 and accompanying text.

[297] A similar process of case-law development culminated in the Court's landmark holding in *Ex parte Young*, 209 U.S. 123 (1908), that the Eleventh Amendment does not bar suits to enjoin the operation of state programs so long as the named defendant is a state officer, rather

A fourth and final point regarding invitational pronouncements concerns constitutional theory. Earlier discussion emphasizes doctrine. But is it possible that invitational pronouncements also might spur the development of underlying legal theory? An answer of "yes" finds support in the Court's post-New Deal ruling in *Carolene Products Co. v. United States*.[298] There, the Court helped seal the demise of the economic-due-process activism of the *Lochner* era. It did so by upholding a congressional ban on the sale of "filled milk" based on a deferential application of the "rational relation" test.[299] Along the way, however, something more enduring happened, and that something happened because of a quiet revolution rooted in constitutional theory. This revolution grew out of the now most famous footnote in American law—Footnote Four of the *Carolene Products* decision.[300] In that corner of Justice Stone's opinion, he shifted attention away from economic regulations to other forms of state control by laying down the following pronouncement:

than the state itself. In fact, the Court's earliest rulings in this field authorized only a limited set of actions against state officers on the theory that "a trespass is a breach of duty under state law," thus rendering the named defendant a wrongdoer in his individual character. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 524 (1954). Even so, according to Professor Hart, the Court over time "came to neglect" this underlying theory by moving in "almost imperceptible steps" toward treating "the remedy of injunction as conferred directly by federal law for any abuse of state authority which in the view of federal law ought to be remediable." *Id.*; *see Ex parte* Young, 209 U.S. at 152 (emphasizing that early cases never specifically "stated that the suit or the injunction was necessarily confined" to trespass cases and that intervening cases, even when explicable on trespass theory, had more generally spoken of "rights and privileges . . . guaranteed by the Constitution"). In essence, the Court's ruling in *Ex parte Young*—just like its ruling in *Brown v. Allen*—rested on a mix of past remedy-expanding decisions, handed down over many decades, that included both invitational-pronouncement and *ipse-dixit*-declaration rulings.

[298] 304 U.S. 144 (1938).

[299] *See id.* at 152-53. *See generally* Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397, 397-98 (detailing background and exploring impact of *Carolene Products*).

[300] As Justice Thomas has emphasized, the portion of the Court's opinion that included Footnote Four gained only four votes, albeit in a case in which only seven Justices participated. *See* Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2328-29 (2016) (Thomas, J., dissenting). Again, however, the salient point here is not whether the theory set forth in Footnote Four is right or wrong, far less whether it constitutes governing law as the result of a four-three ruling. Rather, the point has to do with the footnote's quiet nature (which arose in large part precisely because it was only a footnote) and its generally recognized revolutionary effects. As Justice Thomas noted, Footnote Four, even though it was "pure dicta," has been "seized upon" by the Court "to justify its special treatment of certain personal liberties." *Id.*; *see, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971) (citing Footnote Four in reasoning that "[a]liens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial scrutiny is appropriate").

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities [or] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[301]

Many words have been written about the significance of this text. But the most important academic commentary came from Professor John Hart Ely in his justly famous book, *Democracy and Distrust, A Theory of Judicial Review*.[302] There, Professor Ely argued that the great, guiding principle that overarched the Warren Court's work lay in the representation-reinforcing theory suggested by Justice Stone's musings in Footnote Four—even though those musings were "unnecessary" to resolving the issue at hand, as indicated by the third word of the quoted portion of the footnote set forth above.

Professor Ely's thesis finds support in seminal precedents of the Warren Court: *Reynolds v. Sims*[303] and other reapportionment cases,[304] *Brown v. Board of Education*,[305] *Harper v. Virginia Board of Elections*,[306] rulings protective of religious minorities such as *Sherbert v. Verner*,[307] and the many rights-expanding free-expression decisions exemplified by cases such as *New York Times Co. v. Sullivan*,[308] *Cohen v. California*,[309] and *Tinker v. Des Moines*

[301] *Carolene Prods*., 304 U.S. at 153 n.4.

[302] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). For that portion of the book that most specifically focuses on the footnote itself, see *id.* at 75-88.

[303] 377 U.S. 533, 584 (1964) (rejecting state use of malapportioned legislative bodies as incompatible with constitutional protections of equal voting rights).

[304] *See, e.g.*, Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 734-35 (1964) (applying constitutional reapportionment rules to malapportioned legislatures established through popular vote, as well as legislative action).

[305] *See supra* notes 123-126 (discussing *Brown* and its invalidation of programs of "separate but equal" public education).

[306] *See supra* notes 261-263 (discussing *Harper* and its invalidation of state poll taxes).

[307] *See supra* notes 60, 134, and 168 (discussing *Sherbert* and its protection of religious minorities in application of unemployment benefits programs).

[308] 376 U.S. 254, 283-84 (1964) (sharply limiting government's ability to subject speakers critical of public officials to liability for defamation).

[309] 403 U.S. 15, 26 (1971) (invalidating conviction of critic of military draft for wearing jacket that displayed provocative, but nonobscene, language).

Independent Community School District.[310] To be sure, the Warren Court's work involved much more than quiet-revolution rulings; indeed, its action in each of these cases was emphatically "loud," as shifting majorities offered extensive justifications for their rulings, almost always in the face of provocative dissents. The key point here is that the core set of ideas that largely animated these decisions was not put forward with trumpet blasts and fireworks. Instead, it was outlined in a footnote.

One can quibble about the location of the dividing line between doctrine and theory. We have seen, for example, that key rulings of the Court that involved means-ends analysis came into the law with little explanation or controversy.[311] These rulings, without question, involved doctrinal matters. But theory was in the picture, too, especially because the use of means-ends review sometimes produces results deemed inconsistent with the originalist philosophy of interpretation.[312]

Another theory-laden quiet revolution—this one largely attributable to the most prominent originalist of all—may now be in the process of playing itself out. The first chapter of this story was written in well-aged rulings that hinted at the notion that some rights spring not from a single constitutional clause but from the synergistic operation of two or more clauses.[313] The important point for present purposes is that the story picked up steam with Justice Scalia's opinion for the Court in *Employment Division v. Smith*.[314] In that case, the Court jettisoned the previously recognized principle that generally applicable laws are subject to Free Exercise Clause challenge by persons who violate those laws based on sincere religious beliefs.[315] This redirection of preexisting doctrine was

[310] 393 U.S. 503, 514 (1969) (recognizing right of public-school students to express political views by wearing black armbands).

[311] *See supra* notes 157-170 and accompanying text (tracing quiet development of "compelling state interest" test in free-speech context).

[312] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) (discounting state's originalist argument against claimed right to same-sex marriage and inquiring instead whether any sufficient justification for excluding a particular class from right to marry exists); United States v. Virginia, 518 U.S. 515, 532-33 (1996) (applying means-ends analysis in rejecting exclusion of women from Virginia Military Institute, notwithstanding originalist arguments in support of state's practice); Loving v. Virginia, 388 U.S. 1, 11 (1967) (applying strict scrutiny to invalidate antimiscegenation laws despite origninalist argument that such laws were generally viewed as consistent with equal-protection principles both when and long after Fourteenth Amendment gained ratifcation).

[313] *See, e.g.*, Coenen, *supra* note 115, at 1079-81 (noting, for example, constitutional synergies involved in *Bearden v. Georgia*, 461 U.S. 660, 665 (1983), and *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)).

[314] 494 U.S. 872 (1990), *superseded in part by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Holts v. Hobbs, 574 U.S. 352 (2015).

[315] *See id.* at 882-85.

quintessentially non-quiet. Justice Scalia defended it at length in his majority opinion,[316] and four dissenters blasted away at his rationale.[317] Even as Justice Scalia cut back on free-exercise rights, however, he laid down an invitational pronouncement that created new opportunities to develop personal rights in far-reaching ways.

At the center of the dissenters' objections in *Smith* stood arguments based on precedent, especially the Court's prior ruling in *Wisconsin v. Yoder*.[318] There, the Court had confronted a challenge made by Amish parents to a law that compelled their children's school attendance through the age of sixteen even if they already had passed the eighth grade.[319] The parents argued that, notwithstanding this statutory mandate, the Amish faith required their fourteen- and fifteen-year-olds to work at home.[320] The Court in *Yoder* might have responded that the generally applicable character of the law, which the legislature obviously had enacted for reasons far removed from disadvantaging the Amish, foreclosed any constitutional attack. The Justices, however, upheld the parents' challenge, reasoning that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[321]

In response to the dissenters' reliance on *Yoder* and similar authorities, Justice Scalia in *Smith* wrote as follows for a majority of the Court:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the rights of parents to direct the education of their children. . . . The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right.[322]

The potential of this language to reshape widely held views of constitutional liberty is significant. After all, it seems likely that most judges and lawyers see the text of the Constitution as setting forth a listing of separate, freestanding constitutional protections. In *Smith*, however, the Court's most celebrated proponent of textualism pushed forward a read-the-clauses-together view of interpretation that was sure to unsettle other text-oriented analysts. Thoughtful commentators have begun to explore the hybrid-rights concept, with some of

316 *See id.* at 877-85, 888-90.

317 *See id.* at 908, 910-14, 919-21 (Blackmun, J., dissenting).

318 406 U.S. 205 (1972).

319 *Id.* at 207.

320 *Id.* at 201-13.

321 *Id.* at 215.

322 *Smith*, 494 U.S. at 881-82 (footnote omitted) (citations omitted).

them offering words of support.[323] Of even greater importance, the Court itself picked up the baton in its seminal ruling in the same-sex marriage case. As Justice Kennedy explained in declaring the right at issue in that setting to be "fundamental":

> [The] right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other.[324]

Justice Kennedy did not cite *Smith* in support of this pronouncement. But he well might have. At the least, he could have pointed to Justice Scalia's hybrid-rights reasoning had the dissenters in the same-sex-marriage case challenged his intimation that the due-process and equal-protection safeguards can and sometimes do work in unison to give rise to protected liberties.

It remains to be seen what the future holds for this combine-the-clauses theory of constitutional law. But in *Smith*, Justice Scalia created an opening. Even as he denied the claim put forward by the religious practitioner involved in that case, he invited others to assert new claims of "hybrid" rights. Of such pronouncements, quiet revolutions are born.

III. THE PROSPECTS FOR MORE QUIET REVOLUTIONS

One question raised by the foregoing discussion is whether the Court in the future will continue to launch quiet revolutions by way of invitational pronouncements, *ipse dixit* declarations, or both. In other words, in upcoming years, are we likely to encounter additional terse, but transformational, rhetoric along the lines of the key passages that appeared in *Schenck*, *Gitlow*, *Cantwell*, *Bridges*, *Friedman-Harry Marks Clothing, Co.*, *Santa Clara County*, *Chrestensen*, *Carolene Products Co.*, *Smith*, *Robertson*, the Court's post-*Brown*

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[323] *See, e.g.*, Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1330-31 (2017) (discussing idea of "intersectionality" of clauses); Coenen, *supra* note 115, at 1078 (exploring hybrid-rights decisions); Scott W. Howe, *Constitutional Clause Aggregation and the Marijuana Crimes*, 75 WASH. & LEE L. REV. 779, 878 (2018) (describing "aggregation" of clauses that "puts the concerns they embody together"); *see also* Stephen Kanter, *The* Griswold *Diagrams: Toward a Unified Theory of Constitutional Rights*, 28 CARDOZO L. REV. 623, 636 (2006) (describing Court's *Griswold* decision as reflecting view that "Fourth and Fifth Amendments should be read together"); Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. 16, 26 (2015) (describing *Barnette* and *Obergefell* as relying "on no single clause . . . but on the broader postulates of our constitutional order").

[324] Obergefell v. Hodges, 135 S. Ct. 2584, 2602-03 (2015).

equal-protection decrees, its post-*Bolling* reverse-incorporation rulings, and the various quiet-revolution rulings that marked the evolution of means-ends analysis and habeas corpus law? As to this question, the difference between *ipse dixit* declarations and invitational pronouncements may turn out to be important.

To begin with, shifts in legal practice and the broader culture may render the future prospects of *ipse dixit* declarations less than bright. Put simply, past conditions created openings for these sorts of quiet-revolution rulings, while present and future conditions seem less hospitable. Of particular importance, the nature of Supreme Court opinion writing has changed over the years. In general, modern opinions are fewer, longer, and more complex than opinions of the past.[325] Indeed, until 1988, the Court had no choice but to take jurisdiction over a significant number of constitutional cases it otherwise might well have elected not to hear on the merits.[326] In turn, the Court dealt with many of those cases by issuing nothing more than a one-line summary affirmance or a binding on-the-merits announcement that the matter was "dismissed for want of a substantial federal question."[327] Handling these cases took away time that the Court might have used to spell out in greater detail its reasoning in other cases. More importantly, each of these conclusionary dispositions embodied the sort of unelaborated-upon assertion of authority that marks *ipse dixit* declarations. And it may be that, in an environment in which such rulings were routinely delivered,

[325] *See, e.g.*, Adam Feldman, *Empirical SCOTUS: An Opinion Is Worth at Least a Thousand Words*, SCOTUSBLOG (Apr. 3, 2018, 12:03 PM), http://www.scotusblog.com/2018/04/empirical-scotus-an-opinion-is-worth-at-least-a-thousand-words/ [https://perma.cc/RE3R-NHUC] ("The mean majority-opinion length steadily increased from under 4,000 words to over 6,000 [from 1951 to 2016]."); *see also* Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 621, 634 (2008) (noting increase in opinion length).

[326] *See* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1244 (2012) (noting that this reform occurred in 1988).

[327] For one prominent example, see *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.) (rejecting challenge to prohibition on same-sex marriage), *overruled by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015). Notably, some of these summary rulings may be seen as involving quiet revolutions in their own right, particularly to the extent they were relied on in later published opinions that endorsed constitutional principles of far-reaching importance. *See* Marburger v. Pub. Funds for Pub. Sch., 417 U.S. 961, 961 (1974) (mem.) (setting forth one-line affirmance upon which Court would later rely in *Meek v. Pittenger*, 421 U.S. 349, 370 (1975), to redefine what constituted impermissible state support of religion in school-supplies context); Fincher v. Scott, 411 U.S. 961, 961 (1973) (mem.) (setting forth one-line affirmance upon which Court would later rely in *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974), to hold that state laws that disenfranchise convicted felons are constitutional); Am. Smelting & Ref. Co. v. County of Contra Costa, 396 U.S. 273, 273 (1970) (mem.) (setting forth one-line dismissal for want of substantial federal question upon which Court would later rely in *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 152 (1986), to uphold nondiscriminatory state ad valorem property tax).

the Justices came to see it as acceptable to craft *ipse dixit* declaration rulings even in cases of major importance disposed of in published opinions. To the extent that any such "we do it all the time" influence came to bear on the Justices, it is now long gone. Indeed, not a single member of the current Court sat on it during the era of mandatory jurisdiction and resulting summary actions.

Other recent developments add to the momentum that pushes against the issuance of *ipse dixit* declarations. Dissenting opinions, no less than majority opinions, have become more nuanced and nitpicky, thus creating conditions in which writers of majority opinions may find it necessary to defend their claims with more specificity and depth.[328] Far more amicus curiae briefs are filed than in the past, so that Justices now may more readily make use of already spelled-out analytical pathways (and critiques of such pathways) to navigate whatever issues a case presents.[329] Each of the Justices has more law clerks than in earlier days, and those clerks are both well positioned and highly incentivized to comb over other Justices' opinion drafts with a critical eye.[330] Perhaps most importantly, the tendency toward unanimity that produced many of the Court's most prominent quiet-revolution rulings—for example, in *Schenck*, *Gitlow*, *Cantwell*, and *Chrestensen*—seems to have gone by the wayside, at least in cases that present major constitutional questions.[331]

Coupled with these changes in the Court's internal operations has been a transformation of the broader culture in which the Court operates. The proliferation of mass communications—with talking-head constitutional commentators now routinely appearing on televised programming—is illustrative of the point.[332] Even more influential is the emergence of the internet,

[328] *See* Adam Feldman, *Empirical SCOTUS: The Dissenting-est Dissenters on the Modern Court*, SCOTUSBLOG (Feb. 26, 2018), https://empiricalscotus.com/2018/02/26/the-dissentingest-dissenters [https://perma.cc/8UBY-8SDJ] (noting that dissents have steadily increased in length, with word count growing by five hundred from 1980 to 2018).

[329] *See, e.g.*, Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 776 (2000) (noting that amicus briefs can bring "to the attention of the Court relevant matter not already brought to its attention by the parties" and thus "be of considerable help to the Court"); *id.* at 749 ("[O]ur study shows conclusively that the incidence of amicus curiae participation in the Supreme Court has increased dramatically over the last fifty years.").

[330] *See, e.g.*, Black & Spriggs, *supra* note 325, at 642 (noting "clear and constant trend towards the delegation of [opinion-drafting] duties by the Justices" to their law clerks).

[331] Aaron J. Ley, Kathleen Searles & Cornell W. Clayton, *The Mysterious Persistence of Non-Consensual Norms on the U.S. Supreme Court*, 49 TULSA L. REV. 99, 100 (2013) (observing that "collapse in unanimity has been accompanied by a dramatic surge in separate opinions (both dissents and concurrences)").

[332] High-profile lawyers who have taken on this role include many types of experts, ranging from former prosecutors (for example, Nancy Grace) to one-time presidential advisors (for example, John Dean) to celebrated authors (for example, Jeffrey Toobin) to former law professors (for example, Greta Van Susteren) to current faculty members (for

which hosts blogs and websites devoted in whole or in part to monitoring the Court's activities.[333] Political polarization, which tends to generate a critical assessment of every move every significant government official makes, appears to be on the rise, including with respect to the work of the Justices.[334] In recent decades, many Court-watchers have signed on with organized interest groups—most notably, the Federalist Society[335] and the American Constitution Society[336]—focused, often critically, on the opinions of the Court. The result of these developments, especially in their cumulative effect, is a level of watchdogging of the current Court's activities unlike anything seen in the eras of Holmes, Stone, or Brennan. Nor would it be surprising if this heightened watchdogging has had and continues to have practical effects in terms of the issuance of quiet-revolution rulings. Of special importance in this regard, the risk of "getting caught"—and being lambasted for acting in a nonlawyerly way—might cause Justices, otherwise open to trying to "sneak" doctrine-shaping *ipse dixit* declarations into their opinions, now balk at doing so.[337]

There is another respect, too, in which the rise of the information age might operate to diminish the future issuance of *ipse dixit* declarations. Why? Because some past constitutional rulings may have come into the law unadorned with extensive reasoning simply as a result of the practical challenges of putting together a detailed rationale.[338] In the modern era, however, it seems likely that

example, Alan Dershowitz). For one account, see Ruth Marcus, *Jonathan Turley Takes His Case to TV*, WASH. POST, July 30, 1998, at B1 (outlining Jonathan Turley's transition from traditional legal scholar to media commentator).

[333] *See, e.g.*, SCOTUSBLOG, http://www.scotusblog.com [https://perma.cc/8FE3-AMGA] (last visited Sept. 21, 2019).

[334] *See, e.g.*, Carl Hulse, *Political Polarization Takes Hold of the Supreme Court*, N.Y. TIMES, July 5, 2018, at A11 (discussing influence of polarization on public opinion towards Court).

[335] *See generally* Lawrence Baum & Neal Devins, *Federalist Court: How the Federalist Society Became the De Facto Elector of Republican Supreme Court Justices*, SLATE (Jan. 31, 2017, 10:12 AM), https://slate.com/news-and-politics/2017/01/how-the-federalist-society-became-the-de-facto-selector-of-republican-supreme-court-justices.html . [https://perma.cc/F7JL-9UUF] (describing history of Federalist Society's influence in federal judicial selection processes).

[336] *See, e.g.*, Charlie Savage, *Liberal Legal Group Is Following New Administration's Path to Power*, N.Y. TIMES, Dec. 10, 2018, at A30 (describing rise of American Constitution Society as liberal counterweight to conservative Federalist Society).

[337] *Cf.* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1380 (1995) (noting with regard to her service as circuit-court judge that "[m]y experience in recent years is that my colleagues of all ideological bents scan others' opinions carefully for any hint of gratuitous approval of doctrinal views to which they do not subscribe or unnecessary criticism of those they do").

[338] *See infra* note 422 and accompanying text (noting problems in opinion writing that stem from time pressures).

if a Justice (or a law clerk) is in search of a doctrine-supporting rationale, such a rationale will be out there somewhere in a blog post, a law journal tract, or the ever-expanding body of opinions issued by the lower courts. In addition, because the Court is hearing and deciding fewer cases, more time exists to find and build on materials of this kind. To be sure, neither the rise in the watchdogging of the Court nor the ready availability of "prefabricated" legal analyses forecloses the occurrence of future quiet revolutions. In the end, five Justices can do what they want to do, including by issuing *ipse dixit* declarations. Even so, it is telling that *ipse dixit* declarations—at least of the most far-reaching sort—seem increasingly hard to find in the Supreme Court's work.

What about invitational pronouncements? Curiously, some of the same forces that cut against the future issuance of *ipse dixit* declarations may help to ensure the continued presence of invitational pronouncements in opinions of the Court. One point is simple: The greater the length of a majority opinion, the greater the number of invitational pronouncements it might contain.[339] Cutting the other way is the much-reduced total number of opinion-generating decisions the Court now hands down—some 69 during the 2016-2017 Term,[340] in contrast, for example, to 161 during the 1977-1978 Term[341] and 182 in the 1937-1938 Term.[342] Despite this reduction in the Court's issuance of full-blown opinions, it seems likely that, one way or the other, at least some invitational pronouncements will find their way into majority opinions that now reach upwards of ten thousand words in length.[343] Another point is important, too. Whenever a Court majority sets forth an *ipse dixit* declaration, the target to shoot at is well defined. This is so because, by definition, each such declaration sets forth a new, specific, and well-defined point of law. As a result, potential critics of the thus-declared doctrinal principle—including dissenting opinion writers—can readily launch an attack on that principle, leaving the majority little choice but to counterattack with a more expansive non-*ipse dixit* rationale.

To say the least, invitational pronouncements do not work this way. Instead, they come into opinions in passing phrases that do not resolve any issue at all. In addition, these pronouncements, precisely because of their passing-phrase nature, may gain little attention from Justices when incorporated into majority

[339] *See infra* note 343 and accompanying text (noting growing length of Supreme Court opinions).

[340] United States Supreme Court, 2017 J. SUP. CT. U.S. I, II.

[341] United States Supreme Court, 1977 J. SUP. CT. U.S. I, II.

[342] United States Supreme Court, 1937 J. SUP. CT. U.S. I, I.

[343] Adam Liptak, *The Roberts Court: Justices Are Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 18, 2010, at A1 ("The lengths of decisions, including the majority opinion and all separate opinions, also set a record, at [a median of] 8,265 words."); Feldman, *supra* note 325 (noting that *Cooper v. Harris*, 137 S. Ct. 1455 (2017), ran 10,773 words).

opinion drafts, including from even majority-opinion writers themselves.[344] No less important, a potential concurring or dissenting Justice is less likely to take on an invitational pronouncement than an *ipse dixit* declaration—including when the relevant formulation does gain notice—precisely because invitational pronouncements set forth governing law in only the loosest sense. Thus, even dissenters who find themselves troubled by invitational pronouncements detected in a majority-opinion draft may pass on the chance to register a critique simply because they have bigger fish to fry. Not surprisingly, dissenting-opinion writers tend to focus on the actual ruling of the Court, not some turn of a phrase that may or may not end up having analytical significance in some future case. As a result, invitational pronouncements, woven into majority opinions without challenge or explication, will probably continue—at least more so than *ipse dixit* declarations—to find their way into the United States Reports.

IV. THE NORMATIVE CLAIMS OF QUIET-REVOLUTION RULINGS

Prognostication about how quiet-revolution rulings will fare in the future is tied at the hip to a more basic question: Are *ipse dixit* declarations and invitational pronouncements defensible as a normative matter? This question invites a preliminary observation. From all appearances, some quiet-revolution rulings are the product of the Court's total lack of awareness that it is speaking to a matter that lends itself even to the possibility of debate. In *Robertson v. Baldwin*, for example, the Court asserted that the Second Amendment does not protect the right to carry concealed weapons, while not seeming to sense that the question could be (especially more than a century later) a matter of even modest controversy.[345] One message of this Article is that, in some cases, the Court might merit criticism precisely because it fails to recognize the existence of a colorable counterargument to a position it tersely asserts with unwavering self-assurance. More generally, the Court should always be mindful that difficulties can lie beneath the surface of even the most innocent-seeming doctrinal propositions, especially when they concern highly divisive social issues.

Nonetheless, at least for purposes of addressing the normative question presented here, there is a major difference between the self-aware and the non-self-aware issuance of a quiet-revolution ruling. In particular, only a Court that recognizes that it is on the brink of issuing such a ruling can choose not to do so for that very reason. The key question thus becomes whether Justices who find themselves in this position are justified, at least sometimes, in moving forward with the issuance of quiet-revolution rulings.

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[344] To be sure, dissenters may raise a hue and cry when a Court majority actually "cashes in" on the invitational pronouncement by making use of it in justifying a later controversial legal pronouncement. By then, however, the invitational pronouncement has already done its work. The majority-opinion writer thus can quote the invitational pronouncement as good law (indeed, as unchallenged law), perhaps in launching a sharp doctrinal transformation.

[345] *See supra* notes 247-250 and accompanying text (discussing *Robertson*).

Different analysts will approach this question in different ways. Thinkers no less insightful than Hamilton and Madison, for example, emphasized that "experience is the parent of wisdom,"[346] "the oracle of truth,"[347] and "the guide that ought always to be followed whenever it can be found."[348] From this perspective, the large number of quiet-revolution rulings documented in this Article, handed down by many Justices over many years, provides significant evidence of the worthiness of the practice. Others, however, will recoil at this line of thinking. For them, a pattern of past behavior hardly merits emulation simply because it exists.[349] Many past practices, after all, have reflected unthinking prejudice and attitudes built around ignorance, self-interest, and hierarchy.[350] Law-trained specialists may find quiet-revolution rulings especially hard to swallow. The difficulty is that the very idea of "doing law"—with its focus on rationality, internal consistency, and continuity over time—seems in its nature to clash with the making of unreasoned *ex cathedra* pronouncements,[351] especially by democratically unaccountable decision-makers.[352] Advocates of judicial reason-giving argue that the practice provides an essential source of legitimacy for American courts,[353] especially in light of

[346] THE FEDERALIST NO. 72, at 489-90 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[347] THE FEDERALIST NO. 20, at 128 (James Madison) (Jacob E. Cooke ed., 1961).

[348] THE FEDERALIST NO. 52, at 355 (James Madison) (Jacob E. Cooke ed., 1961).

[349] *See, e.g.*, ELY, *supra* note 302, at 60-63.

[350] *See id.* at 61 (noting, for example, long-standing traditions of racial discrimination).

[351] *See* Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 486 (2015) ("More than other branches of government, judges are expected to be model reason-givers."); Hart, *supra* note 295, at 99 (focusing in part on need to establish legitimacy and importance of guiding future lawmaking in broadly endorsing judicial reason-giving); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 633-34 (1995) (observing that "[i]n law . . . giving reasons is seen as a necessary condition of rationality" and that "conventional picture . . . is one in which giving reasons is both the norm and the ideal"); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1754 (1995) ("Reason-giving is usually prized in law, as of course it should be. Without reasons, there is no assurance that decisions are not arbitrary or irrational . . . ."); Wald, *supra* note 337, at 1372 (asserting that "litigants, lawyers, reviewing judges, the press, and ordinary citizens need to know why a particular judge came to a particular decision," especially to achieve "consistency" in the law).

[352] *See* Cohen, *supra* note 351, at 507 ("Because life-tenured judges are not held accountable at the ballot box, their accountability stems from the reasoned explanations they produce."); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1278 (2009) (arguing that "public officials in a democracy can be held accountable by a requirement or expectation that they give reasoned explanations for their decisions").

[353] *See* Randy Beck, *Transtemporal Separation of Powers in the Law of Precedent*, 87 NOTRE DAME L. REV. 1405, 1426-27 (2012) ("When a court offers persuasive explanations for its decisions, its opinions tend to bolster the court's legitimacy in the eyes of the public."); Wald, *supra* note 337, at 1372 ("One of the few ways we have to justify our power to decide matters important to our fellow citizens is to explain why we decide as we do."). *But see*

the nation's deep-seated hostility to authoritarianism.[354] In addition, so the argument goes, the process of openly articulating reasons disciplines decision-makers, thus fostering a more accurate resolution of disputed questions,[355] while also providing some assurance to those on the losing side that they received a fair shake.[356]

Some observers will view these arguments for reason-giving as unconvincing or at least overstated. They will point out that many forms of decision-making do not call for any reason-giving at all[357] and that some legal systems have eschewed the practice even in the work of appellate judges.[358] The high courts of France, for example, almost always resolve legal issues with an essentially conclusionary application of a supposedly controlling codified text.[359] Skeptics of reason-giving might add that proponents of the practice should be careful what they wish for. The underlying concern is that judges in actuality often do not give their real reasons for deciding cases as they do.[360] From this perspective, quiet-revolution rulings at least offer the upside of not promoting judicial dissembling.

This mix of potential reactions to quiet-revolution rulings raises hard questions about where even to begin in trying to assess their legitimacy. It may be, however, that one helpful starting point is near at hand—that is, in the lessons

Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81, 84 (1994) ("The supposed benefits of the American form—in particular . . . legitimacy—may be largely illusory.").

[354] *See, e.g.*, Schauer, *supra* note 351, at 636-37 ("The act of giving a reason is the antithesis of authority.").

[355] Beck, *supra* note 353, at 1426 ("Writing out one's legal analysis serves as a discipline that can force judges to think more carefully and systematically about the issues in dispute."); Cohen, *supra* note 351, at 511 ("In sum, the existence and availability of judicial reasons ensures that a wide variety of audiences can evaluate, discuss, follow, or criticize judicial decisions.").

[356] *See* Cohen, *supra* note 351, at 506 (noting that perception that "decision maker has given 'due consideration' to the 'respondent's views and arguments' is crucial to individuals' acceptance of both the decision and the authority of the institution").

[357] *See, e.g.*, *id.* at 538-58 (discussing, for example, rejections of pardon applications and judicial denials of discretionary review); Schauer, *supra* note 351, at 636-39 (reviewing, similarly, rejections of pardon applications).

[358] *See* Cohen, *supra* note 351, at 486 ("Roman courts, ecclesiastical courts, and a number of aristocratic courts in premodern, continental Europe functioned without giving reasons . . . ."). Notably in this regard, the issuance of unpublished opinions and summary affirmances has been on the rise in the federal courts of appeals.

[359] Wells, *supra* note 353, at 92 ("Rather than a reasoned and candid essay, an opinion in the highest courts [in France] is a terse and opaque summary of the outcome and the reasons for it.").

[360] *See* Michael L. Wells, *"Sociological Legitimacy" in Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1033 (2007).

to be gleaned from overarching theories of constitutional interpretation. Some analysts might question this idea. They could say, for example, that interpretive theory focuses on giving meaning to the Constitution, as opposed to structuring the Court's decision-making practices, including with regard to the proper fashioning of its published opinions. It seems apparent, however, that matters concerning the Court's articulation (or nonarticulation) of reasons have a close tie to interpretive methodologies since those methodologies focus specifically on how courts should *reason* in reaching interpretive results. Among other things, a citizenry that requires judges to decide matters based on particular sets of reasons—related to text, history, precedent, or whatever—cannot assess whether judges in fact are acting properly unless they openly put forward their justifications for their legal pronouncements. In addition, interpretive theories reflect deep understandings of the Court's role in our system of governance, and those deep understandings are likely to cast light on a question as fundamental as whether judges should set forth reasons to support their pronouncements, especially in their most consequential—that is, their most "revolutionary"—rulings. At the least, as we will see, the focus of some theorists on the centrality of judicial pragmatism in the decision-making process provides one useful point of focus in thinking about the justifiability of quiet-revolution rulings.[361] None of this is to say that constitutional theory provides the only helpful basis for assessing the normative claims of quiet-revolution rulings or that adherents of one interpretive theory or another necessarily will line up for or against the issuance of unreasoned decisions. Even so, one might fairly and fruitfully ask: How do quiet-revolution rulings square with prevailing theories of constitutional interpretation?

The subject of constitutional theory is laden with complexity. Even so, two major approaches dominate the scene. "Originalism," which builds on the jurisprudential tradition of positivism,[362] directs attention to the communicated dictates of the enactors of relevant texts as of the time those texts became law.[363] Although there are different styles of originalism, particularly with regard to how open its adherents are to characterizing original meaning at high levels of generality,[364] a unifying theme runs through the work of all originalists. The

[361] *See infra* notes 408-409 and accompanying text.

[362] David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 886 (1996) (discussing connection between positivism and originalism).

[363] 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, 38 (Amy Gutmann ed., 1997) (endorsing approach that focuses on "how the text of the Constitution was originally understood"—that is, "the original meaning of the text").

[364] *Compare, e.g.*, Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 646 (2013) (arguing in favor of "thin" theory of original meaning), *and* Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIAMI L. REV. 648, 706 (2016) (arguing that "originalist reading of the Fourteenth

original understanding of the contested constitutional text—often described in terms of "original public meaning"—is fixed and controlling.[365] By way of example, almost all originalists read the Constitution as not establishing any constitutional right to secure an abortion. The reason why is that, in their view, the meaning of the Fourteenth Amendment was settled at the time of its ratification, and then-members of Congress, the state legislatures, and the general public did not have in mind that the Amendment would afford this type of protection.[366]

In contrast to originalism stands the theory of interpretation sometimes described as "living constitutionalism."[367] This approach differs from originalism primarily because it authorizes judges to reach beyond historical understandings to consider the values reflected in ambiguous texts in light of changing knowledge, altered circumstances, and developing social conditions.[368] Many adherents of living constitutionalism, for example, argue

Amendment would require the Supreme Court to defend a right to same-sex marriage"), *with* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (worrying that "the faint-hearted originalist" is no different from "the moderate nonoriginalist" because "former finds it comforting to make up (out of whole cloth) an original evolutionary intent"). *See also* DAVID A. STRAUSS, THE LIVING CONSTITUTION 17 (2010) (observing that "fainthearted, or qualified, or sometime originalism . . . gives away most of the qualities that purported to make originalism appealing in the first place").

[365] *See, e.g.*, Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 73 (2016); *see also* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990) ("Law is a public act. Secret reservations or intentions count for nothing. All that counts is how the words used in the Constitution would have been understood at the time.").

[366] *See* Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting) ("To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment.").

[367] James E. Fleming, *Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution*, 92 B.U. L. REV. 1171, 1171 (2012); *see also* STRAUSS, *supra* note 364, at 1 ("A 'living constitution' is one that evolves, changes over time, and adapts to new circumstances, without being formally amended."). It merits emphasis that some constitutional analysts will question the idea that only two theories of interpretation dominate modern constitutional law. Professor Richard Fallon, for example, has advanced a theory of interpretation that calls for a ranked judicial assessment of five interpretive influences, beginning with "arguments from text" and followed by "the framers' intent, constitutional theory, precedent, and moral and policy values." Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189 (1987). Different constitutional thinkers are sure to view this approach in different ways. But some of them, especially those who gravitate to the originalist tradition, might well characterize it as embodying one form of "living constitutionalism," especially in light of its openness to judicial consideration of morality- and policy-based considerations.

[368] *See* STRAUSS, *supra* note 364, at 112 (celebrating Framers' use of language "general enough not to force on a society outcomes that are so unacceptable that they discredit the

that the Fourteenth Amendment's tersely stated vindication of "due process of law" and "liberty" are properly understood today—whatever might have been thought by a select group of men in 1868—to authorize the distinctly "intimate and personal" decision of a woman to control her own body.[369] Critics argue that this interpretive style permits judges to "determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary."[370] But nonoriginalists respond by emphasizing that their approach is constrained by, among other things, an honoring of the same common-law tradition that informed the work of the Framers themselves.[371] The result, they say, is a respectful attentiveness to "the accumulated wisdom of many generations,"[372] including as reflected in "the specific intentions of the Framers"[373] to the extent those intentions are identifiable.[374] As a consequence, in the view of common-law constitutionalists, the work of the Court both must and does involve building, with lawyerly thoughtfulness and care, on "the elaborate body of law that has developed, mostly through judicial decisions, over the years."[375]

With these core principles of constitutional theory in view, what can be said about the worthiness of quiet-revolution rulings? How, in other words, does this form of decision-making map onto the now most prominent theories of constitutional interpretation?

A. *Quiet-Revolution Rulings and Constitutional Originalism*

As for originalism, the key points seem clear enough. This theory posits that constitutional texts set forth controlling principles established at, and only at, the

document" and noting that "[t]here is reason to think that the framers were self-conscious about this"); Thurgood Marshall, Commentary, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) ("When contemporary Americans cite 'The Constitution,' they invoke a concept that is vastly different from what the framers barely began to construct two centuries ago.").

[369] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion).

[370] Griswold v. Connecticut, 381 U.S. 479, 511-12 (1965) (Black, J., dissenting).

[371] *See* STRAUSS, *supra* note 364, at 17; CASS R. SUNSTEIN, ONE CASE AT A TIME, JUDICIAL MINIMALISM ON THE SUPREME COURT, at xiii (1999) ("American constitutional law is rooted in the common law."). In addition, some argue that undue judicial activism is constrained by political checks placed on the Court by the Framers' constitutional plan, including because of the ever-looming possibilities of impeachment, jurisdiction-stripping, nonenforcement of judgments, court-packing, and the like. *See* RICHARD A. POSNER, HOW JUDGES THINK 156 (2008).

[372] Strauss, *supra* note 362, at 892.

[373] *Id.* at 881 (building on this idea to claim that "[i]t is unusual for clear evidence of a specific intention to be disregarded").

[374] STRAUSS, *supra* note 364, at 18 ("On the most practical level, it is often impossible to uncover what the original understandings were . . . .").

[375] Strauss, *supra* note 362, at 877.

time those texts took effect.[376] To be sure, those controlling principles are sometimes hard to discern, but even then courts must focus their energies on the process of discovery.[377] More particularly, the analyst must consult historical materials to identify operative constitutional principles and then apply those principles (and only those principles) to decide the case at hand.[378] Put simply, originalist judges must resolve constitutional disputes based on controlling reasons—that is, controlling history-based reasons that reveal the originally understood meaning of the relevant constitutional text.[379]

With these organizing principles laid bare, there is reason to conclude that *ipse dixit* declarations, particularly in cases of revolutionary significance, create severe tensions with an originalism-driven view of constitutional law. In particular, as we have seen, originalism calls for the resolution of cases organized around a form of reason-giving centered on historical inquiry. Yet *ipse dixit* decision-making involves no giving of historical reasons or, indeed, any reasons at all.[380] To be sure, some interpretive disputes might call for a result so clearly dictated by originalist principles that an originalism-minded Court would deem it unnecessary to justify its declaration of controlling law with a spelled-out rationale. In other words, the existence of "easy cases" might render

[376] *See supra* note 365 and accompanying text (highlighting fixed understanding of "original" meaning).

[377] *See* Scalia, *supra* note 363, at 38 (describing materials, historical in nature, to be consulted to determine original meaning).

[378] *See id.*; *see also* BORK, *supra* note 365, at 144.

[379] One important qualification merits mention. Sometimes, a principle ascribable to an originalist line of thinking will require a great deal of elaboration in the face of extremely sparse historical evidence. It might be, for example, that sound originalist analysis supports the Court's recognition of the so-called dormant Commerce Clause principle. The historical evidence, however, may offer very little further guidance as to how that principle should operate in the many different contexts in which it might be invoked. Different originalists will deal with these sorts of open questions in different ways. It is predictable, if not certain, however, that they will have reasons of some kind for recognizing whatever sub-rules, exceptions, and the like that they deem operative. Of particular importance, to the extent the creation and application of such doctrinal elaborations reflect (whether explicitly or implicitly) the common-law method, the discussion of common-law constitutionalism offered below would seem to come into play.

[380] To be sure, many originalists—most notably, Justice Scalia—have deemed it proper to depart from an originalist view of constitutional commands so as to honor the principle of stare decisis in some contexts. *See, e.g.*, W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 210 (1994) (Scalia, J., concurring) (expressing willingness, "on *stare decisis* grounds, [to] enforce a self-executing 'negative' Commerce Clause" even while viewing that limit as unjustifiable on originalist grounds). Of course, there are reasons to honor precedent—reasons rooted in stability, humility, legal coherence, and the like. The point is that even originalists who "water down" their adherence to originalism-based principles by honoring precedent are acting on the basis of reasons and indeed no less so than more hardline adherents of the originalist approach.

the issuance of *ipse dixit* declarations reconcilable with the originalist methodology based on the common-sense idea that one need not state the obvious.[381] In actuality, however, the Court's past *ipse dixit* declarations cannot be explained based on this logic. To begin with, if an obvious originalist justification for a newly minted doctrine were to exist, one would expect the Court to spell out that justification precisely because it would be so easy to do so. Indeed, this is especially true because the originalist methodology is driven in large measure by worries about self-indulgent judicial inventiveness.[382] Given this outlook, even if an obvious originalist explanation for a newly declared principle of law were to exist, an originalist Court should be strongly motivated to spell out that explanation so as to dispel any suspicion that it is "making," rather than "interpreting," the law.

Examination of the Court's actual catalog of *ipse dixit* declarations removes any doubt on this score. As we have seen, some *ipse dixit* declarations seem starkly at odds with—rather than clearly dictated by—the express directives of the constitutional text itself. The Court's application of the First Amendment to decision-makers other than legislatures is illustrative.[383] Other *ipse dixit* declarations, although potentially reconcilable with the text, appear nonetheless to stand in no small measure of tension with original understandings. By way of example, the conclusion that a corporation is a "person" for Fourteenth Amendment purposes is, at the very least, historically debatable.[384] In fact, not a single *ipse dixit* declaration examined in this Article is readily explicable as involving an obvious application of originalist principles.

Invitational pronouncements also raise problems for adherents of originalist theory. To be sure, it might be (for example) that a careful study of historical materials would reveal that the framing generation viewed the operation of free-expression protections as closely bound up with whether regulated speech raises a "clear and present danger." But if that is true, one would expect the Court, if it were of an originalist mindset, to have pointed to those materials as it enshrined this concept in the law. In *Schenck* and its progeny, however, the Court did no such thing, suggesting that the phrase was not so much meant to capture the public views of 1791 as it was meant to speak to the practical concerns of twentieth-century America. In the end, the originalist approach centers on limiting judicial power by requiring that exercises of that power have their source in the giving of reasons centered on historical understandings.[385] Yet, as the Court's work with the "clear and present danger" standard illustrates, invitational pronouncements are just as "quiet" in this respect as *ipse dixit*

[381] For a detailed treatment of the phenomenon of "easy cases," see generally Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

[382] *See supra* note 370 and accompanying text (highlighting expression of this view by Justice Black in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965)).

[383] *See supra* note 181 and accompanying text.

[384] *See supra* notes 80-84 and accompanying text.

[385] *See supra* notes 363, 365, and accompanying text.

declarations. Thus, the former, no less than the latter, seems to stand in tension with the originalist methodology.

B. *Quiet-Revolution Rulings and Common-Law Constitutionalism*

As we have seen, both *ipse dixit* declarations and invitational pronouncements present serious concerns for the originalist school of thought because they come into the law untethered to a history-based—or, indeed, any—rationale. These same concerns, however, may not apply so obviously in the world of common-law constitutionalism because that methodology can be seen as being in its nature more adaptive, flexible, and pragmatic than the originalist approach. Does that mean that quiet-revolution rulings readily comport with the common-law constitutionalism? Hardly.

The keystone point is that the unfolding of the common law centers on judicial work with reasons.[386] At the heart of even the first year of law school lies the meticulous study of how to apply common-law doctrines—in large part by distinguishing or analogizing past case rulings—based on their underlying rationales.[387] Particularly telling is the honored mantra of the common law that "[t]he rule follows where its reason leads; where the reason stops, there stops the rule."[388] All of this suggests that the same central problem that originalists have with quiet-revolution rulings may well be shared by common-law constitutionalists. To be sure, nonoriginalists do not insist on giving history-based reasons to support judicial pronouncements. Even so—and precisely because of the reason-centered nature of the common-law method—they would seem (at least at first blush) duty-bound to demand the giving of *some* reasons of *some* kind in support of the Court's pronouncements. Simply put, the declaration of rules without reasons seems at loggerheads with a decision-making methodology—that is, the common-law methodology—that is deeply committed to the giving and use of reasons.[389]

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[386] *See generally* Robert S. Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 CORNELL L. REV. 707 (1978).

[387] *See, e.g.*, Schauer, *supra* note 351, at 644 ("[I]n the standard law school socratic dialogue . . . a student, asked to give a reason for an assertion, is bombarded with an array of carefully crafted hypotheticals designed to test the student's commitment to the reason as well as to the general result."). To be sure, common-law courts sometimes decide cases not by investigating and then drawing upon the reasons that gave rise to relevant precedents but instead by abandoning those precedents altogether. Even then, however, the retrenchment ordinarily comes to pass because intervening judicial decisions, changed circumstances, or evolving societal understandings offer reasons for ringing out the old and ringing in the new.

[388] KARL N. LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL 174 (Oxford Univ. Press 2008) (emphasis omitted); *see also* Hart, *supra* note 295, at 125 (stating that "reason is the life of the law").

[389] *See* Hart, *supra* note 295, at 99 (tying Court's need to offer reasons in part to "the thrilling tradition of Anglo-American law").

This line of analysis casts a long shadow over *ipse dixit* declarations, including for common-law constitutionalists. But, upon close inspection, invitational pronouncements may well not pose the same set of problems. The distinction arises because *ipse dixit* declarations inject entirely new doctrines into the law without offering any reasons on their behalf. In contrast, invitational pronouncements come into the law because they are themselves a *part of the reasoning* that is offered to justify a non-*ipse dixit* ruling. To be sure, passages that embody invitational pronouncements themselves find their way into judicial opinions without explanation about their origins or soundness, thus rendering them "quiet" in a significant respect. But that is in the nature of common-law decision-making, within which the giving of "reasons for the reasons" inevitably must reach a stopping point.[390] When the Court in *Schenck* spun out the "clear and present danger" formulation, for example, it did not profess to be stating a rule of law at all, and it offered no background reasons—apart from reasons discernible on the face of things from common sense—about where that formulation had come from. What is more, the cryptic nature and unspoken source of the phrase joined together to render it able to support a range of extrapolations in the future—which over time, in keeping with the common-law method, is exactly what it did.

Put simply, the Court in *Schenck* made a suggestive, though modest, move in setting forth the "clear and present danger" formulation. A seed was planted. But that seed might or might not have later sprung to life. A trial balloon went up, but the experiment could have played out in very different ways. Everything depended—as it should have, from a common-law constitutionalist perspective—on shifting insights and social conditions, together with the Court's ever better-informed observation of how its own developing doctrine was playing out in the real world. In short, invitational pronouncements fit nicely within the common-law tradition, through which the law is continuously working itself out—always building on the past but moving in new directions here and there—in a pragmatic process of unfolding over time.

What about *ipse dixit* declarations? It may be that common-law-oriented judges, unconstrained by the dictates of historical understandings, sometimes encounter "the power of the idea whose time has come."[391] In turn, they may see fit to put forward that idea in a form that suggests it is axiomatic. To the extent that judges do so by way of *ipse dixit* declarations, however, widespread understandings about the common law method raise a serious, if not insuperable,

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[390] *See* LUDWIG WITTGENSTEIN, ON CERTAINTY 26e-27e (G.E.M. Anscombe & G.H. von Wright eds., Denis Paul & G.E.M. Anscombe trans., 1969) ("At some point one has to pass from explanation to mere description . . . . To be sure there is justification; but justification comes to an end.").

[391] This quotation comes from civil rights pioneer Diane Nash and is engraved on the wall of the Birmingham Civil Rights Institute in Birmingham, Alabama. *See also* Interview by Blackside, Inc. with Diane Nash, in Chi., Ill. (Nov. 12, 1985), http://digital.wustl.edu/e/eop/eopweb/nas0015.0267.075dianenash.html [https://perma.cc/9Q6U-FZWR] (transcript).

difficulty. To repeat: The common law method has at its core the idea that rules must be based on a thoughtful invocation of persuasive reasons. *Ipse dixit* declarations, however, involve the announcement of new rules without the giving of any supportive reasons at all. *Ipse dixit* declarations thus seem to run counter to the premises of the common law and (so it logically follows) of common-law constitutionalism.

One problem with this line of thinking may be that its portrayal of the common law is too simplistic, if not wildly romantic. On this view, the law of contracts, torts, and property has been the product of all sorts of judicial decisions—some long, some short, some thorough, some superficial, some elaborate in their reasoning, some impenetrable and cryptic. If this depiction of things is accurate, it should follow that *ipse dixit* declarations do not depart from the spirit of common-law decision-making. To the contrary, they would seem to reflect a natural and predictable product of constitutional law's linkage to the common-law tradition.

One sticky wicket, however, is that quiet-revolution rulings, by definition, are revolutionary. It is one thing for courts to dispose of garden-variety problems—whether in constitutional or nonconstitutional cases—in unreasoned, perhaps hurried-along, pronouncements.[392] But the *ipse dixit* declarations brought to the surface here—for example, in *Gitlow* and its progeny, *Santa Clara County*, *Friedman-Harry Marks Clothing, Co.*, and the post-*Bolling* reverse-incorporation cases—are constitutional landmarks. Widely accepted justifications for favoring judicial reason-giving, such as those centered on fostering legitimacy and avoiding the appearance of authoritarianism,[393] seem especially weighty in this set of cases. Put simply, for most observers, the Court's unreasoned resolution of the most legally and socially salient constitutional cases is unlikely to engender a peaceful, easy feeling.

A related point is that the common law itself may have changed, and may still be changing, in a way that causes *ipse dixit* pronouncements to be in heightened tension with common-law norms. Once upon a time, according to this account, courts may have seen fit to reformulate doctrine in dramatic respects by way of *tour de force* pronouncements or the anything-goes use of legal fictions. In the present day, however, it is standard practice for analysts to assault the reasoning of common-law judges who make these kinds of moves as conclusionary, circular, disingenuous, or question-begging.[394] The consequence, so this portrayal of things suggests, is that good judges nowadays work hard to give reasons and thus avoid the attachment of these condemnatory labels to their work. Historians and others might wish to take a look at whether this account of

[392] Indeed, one might say that disposing of such cases in such a way is justifiable precisely because it allows courts to deal more thoroughly with the very sort of higher-stakes issues that are the subject of quiet-revolution rulings.

[393] *See supra* notes 351-354 and accompanying text (discussing these justifications).

[394] *See, e.g.*, Schauer, *supra* note 351, at 633 ("Results unaccompanied by reasons are typically castigated as deficient.").

previous and present-day judicial practice corresponds with the facts. But if such a shift in the work of common-law decision-makers has occurred, or even if sound policy dictates that such a shift should occur, it would seem to follow that common-law constitutionalists will look askance at quiet-revolution rulings of the *ipse dixit* sort.

Might it be, however, that the case for common-law-type reason-giving does not carry over to the Court's work with constitutional law? In other words, might it be that constitutional cases differ from nonconstitutional cases in such a way that a greater acceptance of reasonless decision-making should apply when it comes to *ipse dixit* declarations that arise in the constitutional context? Of no small relevance in this regard is the idea, championed most prominently by Professor Cass Sunstein, that the Court should bring a "minimalist" style of decision-making to its constitutional work.[395] On this view, many (if not most) constitutional questions are best resolved by way of decisions that lack both "breadth" and "depth."[396] Instead, the Court's rulings should be "narrow" in the sense that they decide not much more than "the case at hand."[397] And, of more importance for present purposes, they should be "shallow" in the sense that they are "unaccompanied by abstract accounts about what accounts for those judgments."[398]

This approach makes sense, according to Sunstein, because short and cautious steps are preferable to long and bold ones as the Court deals with the sort of foundational constitutional disputes that often sharply divide the public.[399] The minimalist style, he argues, also contributes to a healthy dialogue between the Court and nonjudicial actors, including by sometimes forcing elected officials to focus on issues they otherwise might prefer to sweep under the rug.[400] At the same time, judicial minimalism helps the Court maintain its good standing by keeping it from alienating large segments of the citizenry by pushing the law in any one direction too far, too fast.[401] Against this backdrop, it might seem that *ipse dixit* constitutional declarations have a special claim to legitimacy because, at least in terms of "shallowness," they fit hand-in-glove with the minimalist philosophy. At the core of that philosophy, after all, is the celebration of constitutional rulings that have an "incompletely theorized" character.[402] And if any ruling is incompletely theorized, it is the *ipse dixit* ruling that lacks any theorizing at all.

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[395] *See* SUNSTEIN, *supra* note 371, at 1.

[396] *Id.* at 10-11.

[397] *Id.* at 10.

[398] *Id.* at 13 (emphasis omitted).

[399] *See* Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1903 (2006).

[400] *See* SUNSTEIN, *supra* note 371, at 259 (highlighting potential value of minimalist rulings in "spurring the processes of democratic deliberation").

[401] *Id.* at 14.

[402] *Id.* at 11.

Even Sunstein, however, suggests that courts should give at least *some* reasons as they set forth case-deciding legal principles, stating that "[t]here is a big difference between a refusal to give an ambitious argument for an outcome and a refusal to give any reasons at all."[403] This view of things circles us back to the basic arguments for judicial reason-giving. If openness and accountability in government are virtues, if reason-giving is central to shaping the course of the law, if the unexplained assertion is especially worrisome when it comes from unelected judges, and if justification is most logically required when the Court issues rulings not open to legislative correction, then *ipse dixit* declarations in constitutional cases should be greeted with no small measure of worry.[404] Building on this idea, Professor Sunstein might well hesitate to endorse some of the Court's most prominent *ipse dixit* declarations—for example, its wholly unexplained rulings on commercial speech in *Chrestensen* and on corporate personhood in *Santa Clara County*.[405]

But are there ever instances in which *ipse dixit* declarations are justifiable? Consider *Gitlow*, where—unlike in *Chrestensen* and *Santa Clara County*—the Court at least dropped a footnote in which it cited several earlier rulings that had read the Due Process Clause to protect "fundamental rights."[406] To be sure, there was no discussion in the footnote, or anywhere in *Gitlow*, about what "fundamental-ness" entails or about why free-expression rights should fall on the fundamental-rights, rather than the nonfundamental-rights, side of the constitutional dividing line. The Court's string-cite, however, provided at least the hint of an underlying rationale for the Justices' treatment of the incorporation question, and this feature of *Gitlow* brings into focus two significant points. First, every constitutional ruling in actuality lies somewhere on a spectrum that ranges from the totally quiet to the totally loud.[407] Second, sometimes a quiet-

[403] *Id.* at 13; *see id.* at 15-16 (indicating that some reason-giving is "too shallow" and thus neither "adequate to justify the outcome" nor compliant with "norms associated with the legal craft").

[404] *See supra* notes 351-356 and accompanying text.

[405] *See supra* notes 85-87, 231, and accompanying text.

[406] Gitlow v. New York, 268 U.S. 652, 666 n.9 (1925).

[407] This point is well illustrated by important decisions of the Court in the field of administrative law. Particularly notable is *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), in which the Court dramatically narrowed the range of cases in which governing law required agency officials to engage in formal rulemaking. As Professor Barnett has documented, "Whatever the policy merits of formal rulemaking, the Court's sua sponte rejection of formal rulemaking was perfunctory, relied upon unpersuasive authorities, and failed to account for formal rulemaking's consistent historical understandings and use." Kent Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1, 2 (2017). Even more notably, it turns out that perhaps the most prominent of all the Court's administrative-law rulings, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), embodies the characteristics of an *ipse dixit* declaration in important respects. To be sure, it would be inaccurate to say that the Court supplied no

revolution ruling will, on close inspection, prove to be less quiet than a first impression might suggest because that ruling draws upon, even if implicitly, principles set forth in earlier decisions. Notwithstanding these qualifications, *Gitlow* occupies a space so close to the endpoint of the quiet-to-loud continuum that it should raise deep difficulties for anyone who views it as a necessary ingredient of credible judicial work that the court make at least some minimal effort at reason-giving.

The foregoing discussion suggests that judicial minimalism offers little in the way of support for *ipse dixit* constitutional rulings. There is, however, another concept connected up with the common-law approach to constitutional interpretation that may lend support to the Court's issuance of some *ipse dixit* declarations—namely, the concept of "pragmatism."[408] At the least, pragmatic considerations—considerations tied, in this instance, to the well-functioning operation of the Court—provide the most plausible justification for its occasional issuance of *ipse dixit* declarations.[409]

Consider again the *ipse dixit* declaration, set forth in the *Gitlow* line of cases, to the effect that the Fourteenth Amendment incorporates the Free Speech and Free Press Clauses. Whether the Court took a wrong turn in issuing this unreasoned ruling might well hinge, from a pragmatist's point of view, on the mix of options the Court then confronted. More specifically, one can imagine a

justification for the deferential two-part test of agency authority articulated in that case. Even so, as Professor Thomas Merrill has explained, the ruling "was considered routine by those who made it" and was "little noticed when it was decided." Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 257 (2014). In part this was the case because no member of the Court authored a dissenting or other separate opinion, perhaps because only six Justices participated in the ruling. As for the arguments presented to the Court by counsel, there was "nothing in the merits briefs to suggest that the case was seen as a vehicle for a major statement about statutory interpretation." *Id.* at 268. And most important of all, "[t]here is no evidence that Justice Stevens understood his handiwork in *Chevron* as announcing fundamental changes in the law," *id.* at 275, or that any one of his "colleagues on the Court perceived *Chevron* as some kind of watershed decision." *Id.* at 276. In fact, "after *Chevron* was decided, Justice Stevens himself authored opinions that analyzed agency interpretations using the traditional factors approach that preceded *Chevron*," and he later stated publicly that "he regarded it as simply a restatement of existing law." *Id.* at 275. In short, *Chevron* brought a "profound" change to American administrative-law doctrine, even though "the Court that rendered this decision had utterly no intention of producing such a decision," *id.* at 283, thus rendering the case's later impact fairly described as an "accident." *Id.* at 282.

[408] RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 1 (2003) (asserting that "pragmatism is the best description of the American judicial ethos and also the best guide to the improvement of judicial performance"); *see also* Cohen, *supra* note 351, at 490 (arguing that judges must "compromise between reason-giving and other values").

[409] *See, e.g.*, SUNSTEIN, *supra* note 371, at 57 (suggesting that sometimes minimalist reasoning "will not be so much desirable as inevitable" because it provides the only way to generate a majority opinion).

world in which an elaborate consideration of the incorporation issue would have caused the Court to splinter. Some Justices, for example, might have concluded that expression rights were sufficiently "fundamental" to merit application to the states while taking no position on whether other rights merited this description. Another set of Justices may have been unwilling to endorse any *ratio decidendi* other than one founded on the principle of total incorporation. Still others might have concluded that the Due Process Clause supported incorporation only of "procedural" rights, while characterizing expressive liberties as procedural because of the special role they play in facilitating republican self-government. Another Justice or two might have seen the Free Speech and Free Press Clause guarantees as so central to personal self-realization that they had a one-of-a-kind claim to incorporation. A remaining set of Justices, although convinced that the clauses merited incorporation, might have had a sufficient level of uncertainty about all these approaches that they were unwilling to sign on to any of them. On top of all this, some Justices (perhaps even a majority) might have expressed an unwillingness to endorse any more-than-conclusionary rationale unless it tilted in the direction of their preferred theory—for example, by including, for some, a strong statement about the presumptive non-incorporation of other rights or, for others, the endorsement of a presumption of exactly the opposite sort.

The broader point is that sometimes the construction of a meaningfully reasoned treatment of a constitutional issue will stir up a hornet's nest of controversy within the Court, pushing it in the direction of issuing the sort of fractionated ruling that members of the legal profession routinely decry.[410] Members of the profession who bemoan fractionated rulings, however, tend to underestimate how powerful the pressures to issue such rulings can be. Indeed, at least six separate forces conjoin in many cases to push the Justices in this direction.

First, the cases heard by the Court are almost always challenging and divisive. Most grants of certiorari arise because of conflicts in the lower courts,[411] and typically these "conflicts arise because the legal issue is hard."[412] In the present day, most cases that manage to move all the way to oral argument in lower appellate courts present some measure of complexity.[413] Levels of difficulty

[410] As to the views of the profession, see Thomas B. Bennett et al., *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817, 837-38, 845 (2018) (noting practical difficulties raised by concurrences in no-majority cases, with result that "[c]ommentators are virtually uniform in contempt for [them] on this score"); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 804 (1982) (citing prior scholarship indicating that many observers view plurality opinions with "special scorn").

[411] *See, e.g.*, Emily Grant, Scott A. Henderson & Michael S. Lynch, *The Ideological Divide: Conflict and the Supreme Court's Certiorari Decision*, 60 CLEV. ST. L. REV. 559, 568-69 (2012).

[412] Easterbrook, *supra* note 410, at 806.

[413] *See id.* (noting tendency toward settlement when results seem clear).

increase enormously, however, when attention shifts to only those cases singled out for review by the high Court precisely because they are so vexing.[414]

Second, as the hypothetical about First Amendment incorporation highlights, it is common for cases that reach the Court to invite more than two analytical approaches for resolving the issue at hand. Even when the Court confronts an essentially binary decision, complications in the opinion-writing process can arise—for example, with regard to how broadly or narrowly to spell out the governing principle. But, as Judge Easterbook has explained, the difficulty of forging a majority position among the Justices is profoundly magnified when three or more pathways to resolving the disputed issue come into play.[415]

Third, the generation of majority opinions is especially tricky for a nine-member decision-making body. A single judge has a single mind. For a three-judge court, an approach that works for two members is typically discoverable. Finding a way forward among nine judges is far more complex. Among other things, within a three-member court, at most three analytical approaches can surface. Among nine Justices, the emergence of more than three preferred approaches—each held with differing levels of intensity—is always a possibility.[416]

Fourth, a likelihood of disagreement is baked into the case-deciding process by the appointment and selection process for Supreme Court Justices.[417] Presidents appoint Justices for reasons connected up with ideology, and Presidents change on a regular basis, while Justices almost always serve for far longer stretches of time. Resulting dynamics within the Court are (to say the least) complex. But the bottom line is that Justices who have widely different views of many matters almost always serve together. And Justices do not become Justices by being shrinking violets. Building consensus among nine such decision-makers presents inevitable challenges.[418]

Fifth, long-standing and essential operating norms within the Court contribute to the difficulty of creating a majority position for each case the Court hears.

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[414] *See id.* (highlighting inexorable push toward Court's being "inundated with tricky, division-creating problems").

[415] *See id.* at 815 (highlighting decisional difficulties where "there are more than two possible outcomes and different voters do not rank the outcomes in the same order").

[416] *See* SUNSTEIN, *supra* note 371, at 4 ("It may be very hard . . . to obtain a ruling . . . on a multimember court, consisting of diverse people who disagree on a great deal."); *id.* at 57 (adding that "minimalism may be the only route for a multi-member tribunal [to bridge] many disagreements").

[417] Easterbrook, *supra* note 410, at 827-28 (noting that "appointment process ensures that the Justices will have multi-peaked responses to many issues" and that their recurring inability "to reach agreement on fundamental principles of constitutional interpretation" mirrors same lack of "agreement on such matters within the legal profession").

[418] *See* Paul H. Edelman, David E. Klein & Stefanie A. Lindquist, *Consensus, Disorder, and Ideology on the Supreme Court*, 9 J. EMPIRICAL LEGAL STUD. 129, 144-45 (2012) (examining influence of ideology in cases with dissensus).

Legislative bodies, for example, deal with the difficulties of forming majorities by authorizing, if not celebrating, logrolling and vote-trading as part of their decision-making processes. In contrast, the principled nature of judicial decision-making rightly takes away from the Court these tools for forging five-Justice positions.[419] Also in the picture is the accepted idea that Justices are duty-bound to show "candor" in their reason-giving.[420] This foundational notion, however, is inherently in tension with calls for the Justices to avoid the expression of differing views in fractionated rulings.[421] Again, how all of this plays out in the operation of the Court is highly complex. But the norm of candor in some instances ensures that no majority will be able to come together to support a single case-resolving rationale.

Finally, there exists the pressure of time. Especially as the annual term of the Court moves to its end, the felt need to resolve argued cases mounts. As a result, the Justices must not only work their way through internal disagreements; they must race against the clock.[422] Refusing to join a circulated would-be majority opinion—including by doing nothing more than cryptically "concurring in the judgment"—may provide a ready mechanism to help simply get things done.[423] But such actions also can thwart the coming together of five Justices in a coherent ruling.

All of these forces combine to push the Justices toward issuing multiple opinions in any given case. And that is not always a bad thing. Concurring opinions have value, and the sky does not fall every time the Court resolves a matter without generating a majority-supported rationale.[424] This is the case in part because there is a body of law—focused on honoring the lowest common denominator of fractionated rulings—that often allows those rulings to operate as helpful, law-clarifying precedents.[425] In some instances, however, it is

[419] In addition, there exists within the Court no one remotely like (for example) the Speaker of the House or the Majority Leader of the Senate, who have at their disposal managerial tools for fostering party discipline and otherwise incentivizing the creation of majorities.

[420] *See* Suzanna Sherry, *The Four Pillars of Constitutional Doctrine*, 32 CARDOZO L. REV. 969, 973 (2011). *See generally* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

[421] *See* Easterbrook, *supra* note 410, at 811 (rejecting view that fractionated rulings result from "Justices' sloth or lack of aptitude"; instead "they go hand in hand with the attempts at reasoned explanation that most . . . critics [of fractionated rulings] endorse").

[422] *See* Hart, *supra* note 295, at 84 (asserting, albeit in 1959, that in light of time constraints "Court has more work to do than it is able to do in the way in which the work ought to be done").

[423] *See* Greg Goelzhauser, *Silent Concurrences*, 31 CONST. COMMENT. 351, 356 (2016).

[424] *See* Bennett et al., *supra* note 410, at 823 (arguing that such opinions heighten "judicial transparency," even if "at the cost of clarity"). *But see* Cohen, *supra* note 351, at 517 (observing that issuance of "separate opinions may not only have divisive effects on the public, it may also aggravate divisions within a court itself").

[425] *See, e.g.*, Marks v. United States, 420 U.S. 188, 193 (1977).

difficult to distill governing principles from multi-opinion rulings.[426] On occasion, it is all but impossible.[427] Resulting uncertainties raise tensions with the Court's core function of clarifying federal law.[428] Nor are "the Court's displays of division . . . costless."[429] Lower courts must struggle to squeeze out the controlling effects of multipart Supreme Court rulings.[430] So, too, must ordinary citizens who are required to respond to the dictates of the Court in the real world. Perhaps for these reasons, Chief Justice Roberts has been especially vocal in expressing a desire to build greater consensus in the Court's work.[431] In pursuing this objective, the Chief Justice might do well to think about the potential usefulness of *ipse dixit* declarations. In particular, it could be that unexplained (or essentially unexplained) legal pronouncements handed down by a majority of the Court—that is, the stuff of *ipse dixit* declarations—sometimes have a useful role to play precisely because they mask underlying disagreements.[432]

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[426] Sonja R. West, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1954 (2006) ("As the *Branzburg* case demonstrates, courts and commentators are confused about the proper interpretation and use of pseudo-concurrences.").

[427] An illustration is provided (at least arguably) by the Court's ruling in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 267 (1978). In *Hopwood v. Texas*, 78 F.3d 932, 940 (5th Cir. 1996), the Fifth Circuit concluded that *Bakke* did not support use of the "Harvard Plan" approach to race-conscious university admissions. The court relied squarely on the *Bakke* ruling's failure to generate a majority opinion. *See id.* at 944. In particular, the Court reasoned that, while five Justices deemed the Harvard Plan approach to be permissible, those same five Justices did not embrace the same rationale for reaching that result. *See id. Hopwood* generated widespread criticism. The key point here, however, is that—whatever one thinks about the Court's analysis in that case—it was the failure of the Court to produce a majority opinion in *Bakke* that opened the door to the ruling in *Hopwood*.

[428] *See, e.g.*, Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 717 (1984) (noting Court's "unique position as the only institution in our society capable of an authoritative, final judicial resolution of a controversy governed by federal law").

[429] Easterbrook, *supra* note 410, at 811.

[430] For one example of concerns of this kind, see *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 221 (1995) (noting that "[l]ower courts found this lack of guidance [created by fractionated affirmative-action rulings] unsettling").

[431] *See Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States: Hearing Before S. Comm. on the Judiciary*, 109th Cong. 371 (2005) (statement of nominee) ("I think one of the things that the Chief Justice should have as a top priority is to try to bring about a greater degree of coherence and consensus in the opinions of the Court."); Adam Liptak, *A Supreme Court Not So Much Deadlocked as Diminished*, N.Y. TIMES, May 18, 2016, at A1 (noting Justice Kagan's observation that "chief justice . . . is concerned about consensus building").

[432] SUNSTEIN, *supra* note 371, at 13 (noting possibility that even "Judges who disagree . . . about the foundations of constitutional rights . . . might be well able to agree on how particular cases should be handled"); Cohen, *supra* note 351, at 514 (noting that

Skeptics might respond by observing that the present-day Court has better ways to deal with highly divisive cases than to issue reasonless declarations. In particular, because the Justices now have all but plenary control over their docket, they can (unlike in bygone days) artfully dodge those cases in which forging a majority opinion is most difficult by simply denying at the outset the petition for the writ of certiorari. In addition, even if such a messy case makes it to the full-argument stage, the Court can solve the problem by dismissing the writ as improvidently granted. At the least, these analysts might say, the Court should use these devices to avoid unreasoned rulings in the most important cases—that is, the very set of cases that produce quiet-revolution rulings.

These points are fair ones, but countervailing considerations are in the picture, too. Consider again our hypothetical Justices' struggle with how to deal with their bevy of views on whether and how to incorporate the Free Speech and Free Press Clauses into the Fourteenth Amendment. To be sure, that Court might have ducked the question, perhaps (if then possible) by declining to decide that case on the merits. But even if a decision in the case thereby became unnecessary, the underlying question was not about to go away. Indeed, in our hypothesized case, the incorporation issue was all but guaranteed to surface again and again in lower-court litigation.[433] Justice Brandeis famously declared that "it is more important that the applicable rule of law be settled than that it be settled right."[434] A corollary might state that it is better to settle the applicable rule of law, *and* to settle it right, than not to settle it at all. In addition, while some observers may find the unreasoned disposition of highly important issues to be especially distasteful, it might be that the very importance of those issues creates the most pressing need for immediate resolution. In our hypothetical case, for example, one can imagine the Justices collaboratively agreeing that a prompt resolution of the contested incorporation question was in the best interest of the country even though they could not collaboratively agree on a unifying *ratio decidendi*. Those same Justices, perhaps with the encouragement of the Chief Justice, also might have concluded that it would be wise for the Court to address the issue in a unanimous or nearly unanimous ruling precisely because the issue was so important. And given the widely different views of the different Justices, the only way to reach that result would be to issue an *ipse dixit* declaration.

"different individuals are more likely to agree on outcomes than on reasons"); Archibald Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 72 (1980) (reasoning that "greater effort to obtain consensus, perhaps by shortening opinions and limiting them to points of common agreement, might beneficially reduce the volume of concurring and separate opinions"); Easterbrook, *supra* note 410, at 807.

[433] With regard to this particular issue, also in the picture was the presence of earlier precedent that likely would steer the lower courts to deem incorporation improper, even though (according to the hypothetical) that view had since been abandoned by a majority of the Court. *See supra* notes 33, 53, and accompanying text.

[434] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), *overruled by* Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938).

This discussion is not meant to suggest that only adherents of common-law constitutionalism should or will sign on to future *ipse dixit* declarations. To be sure, the common law's focus on flexibility and pragmatism may render common-law constitutionalists distinctly open to the possibility of joining such rulings. But originalist Justices also must operate within the Court's complex multi-judge community, and sometimes they may see their way to joining an unreasoned opinion, at least if the result is reconcilable with their own history-centered thinking. This discussion, even more emphatically, is not meant to set forth a broad defense of *ipse dixit* declarations. To the contrary, as we have seen, both originalists and nonoriginalists are likely to agree in large numbers that the Justices should make every effort in every case to justify in an open way the rules of law they lay down. Even so, these efforts may fail in exceptional cases, thus producing a situation in which the Court may choose to establish a new rule—even a revolutionary new rule—without offering meaningful reasons on its behalf. The most critical point is that the Court should always think hard about the prospect of taking action of this kind. If the Justices do choose to issue an unreasoned quiet-revolution ruling, they should have good reasons for doing so.

CONCLUSION

Quiet-revolution rulings in constitutional law have been both common and important. Indeed, as this Article shows, they have transformed constitutional doctrine regarding such diverse subjects as incorporation, reverse incorporation, corporate personhood, equal protection, freedom of speech, freedom of religion, congressional powers, federal court jurisdiction, and means-ends analysis in all of its many rights-defining dimensions. No one has previously looked at these cases as a unitary whole, perhaps because the very quietness of these rulings has tended to keep them out of view. Examining these rulings in a systematic way, however, raises key questions about both our constitutional past and our constitutional future.

One question about the future centers on whether the Court should abandon quiet-revolution rulings because they unjustifiably depart from its ordinary practice of supporting its rulings with an open articulation of reasons. As Part IV suggests, the issuance of invitational pronouncements typically can be seen as fitting within this ordinary practice because these pronouncements come into the law as part of the very giving of reasons that the Court offers in resolving the case at hand. The same cannot be said of *ipse dixit* declarations, however, because they set forth new and specific rules of law. Even so, as Part IV shows, the issuance of *ipse dixit* declarations (or rulings closely akin to such declarations) may sometimes prove helpful—if not indispensable—as the Court seeks to avert handing down a confusing patchwork of non-majority opinions in ruling on an important case.

The analysis set forth in this Article also raises new questions about how both courts and lawyers should approach past quiet-revolution rulings in the future. One question involves whether the Court should devise specialized stare decisis

rules to deal with quiet-revolution precedents. Another question concerns whether courts should be particularly open to the possibility of limiting the operation of quiet-revolution precedents, even if an outright overruling is not possible.[435] To be sure, some observers might wonder whether quiet-revolution rulings matter much in the real world. After all, the Supreme Court can abandon any one of these precedents whenever it wants to; indeed, it can abandon such precedents more easily than other precedents precisely because it can point to the earlier ruling's unreasoned character as a reason for doing so. Any effort to minimize the significance of the Court's quiet-revolution rulings based on their susceptibility to overruling, however, rests on feet of clay. In part this is true because many quiet-revolution precedents—such as the Court's rulings on First Amendment incorporation—now stand at the center of such sprawling realms of doctrine that it is all but unthinkable that the Court would cast them aside. In any event, each of the Court's quiet-revolution precedents—no less than each of its loud ones—binds the lower courts until that precedent is discarded by the Court, thus shaping in the meantime the real-world impact of the law in far-reaching ways in every corner of the nation.

A look at the Court's quiet-revolution rulings also raises questions for those who think most deeply about the Court as an institution. One question brought into focus by this Article concerns whether this set of rulings supports (and perhaps strongly supports) the idea that a common-law approach to constitutional decision-making has dominated the Court's past work. To be sure, as Part III highlights, recent developments in both law and culture may portend a decline in rulings of this sort. But if the past is prologue to the future, pressures to issue quiet-revolution rulings will continue to arise. As the Supreme Court deals with those pressures, it will have no choice but to evaluate in individual cases whether the benefits of issuing such rulings outweigh their built-in costs. Perhaps the Court is destined to move away from the future issuance of quiet-revolution rulings. In considering whether to do so, however, the Justices should take care to be mindful of the long and rich history of these rulings in constitutional law.

[435] For some preliminary thoughts on these topics, see generally Dan T. Coenen, Quiet-Revolution Constitutional Rulings and the Future Work of Lawyers and Judges (unpublished manuscript) (on file with author).