

FOREWORD I: CONTROLLING THE SUPREME COURT— IS THERE A FUTURE FOR AMERICAN LAW?

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Something has happened.² Something important. That is why we are here at this Symposium. But what exactly has changed? This is my answer.

How many Americans today agree with Dr. Martin Luther King, Jr., that “the arc of the moral universe is long, but it bends toward justice[?]”³ We would like to believe it, but how many of us really believe it anymore?

This is a change in cultural consciousness, and it explains the nature of the struggle today to control the U.S. Supreme Court. Today’s struggle is something new. Certainly, Americans in the past have felt that the Court was out of control. That is the topic of Panel 1 today.

Americans have tried before to control the Court through the confirmation process, criticism of interpretive method, calls to follow precedent and by emphasizing democratic reform—the topics of Panels 2–5, today and tomorrow.

So, the overall subject of this Symposium, controlling the Supreme Court, is not something unprecedented. What is new, in fact extraordinary, is captured in the subtitle of the Symposium: “Controlling the Supreme Court, Now and ‘far into the future.’” That quote, “far into the future,” is from the statement of opposition by Pennsylvania

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1. I was privileged to give the opening address of the 2022 *Wisconsin Law Review* Symposium, titled “Controlling the Supreme Court: Now and ‘far into the future.’” Co-hosting the Symposium was an exhausting but very rewarding experience. I want to thank not only the *Wisconsin Law Review*, in particular the Symposium Editors, Elizabeth A. Ierulli and Sophia R. Pfander, but especially my co-host, Eric Segall. Eric and I had been in communication over the years, but, until working on this Symposium, we had never actually met and certainly did not know each other well. Counting Eric now as a friend is my most treasured result of the Symposium.

2. What follows is the talk I delivered at the opening session of the Symposium. No changes have been made in the text of the talk. I want the reader to experience the speech as a speech. These footnotes will serve not only to cite sources, but to amplify and contextualize some of the bald claims that a talk like this must inevitably include. The footnotes function then in part as a running commentary.

3. MARTIN LUTHER KING, JR., *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 252 (James Melvin Washington ed., 1986).

<https://doi.org/10.59015/wlr.PJGC7638>

Republican Senator Pat Toomey to the confirmation of then-Judge Ketanji Brown Jackson to the Supreme Court.⁴

Toomey said that he was voting against Jackson's confirmation, because Jackson's "inability to define her own judicial philosophy makes it difficult to understand how she might approach the most important cases facing the nation today, tomorrow, and far into the future."⁵ Toomey was seeking to control not just the outcome of this or that specific issue but wide swaths of the Court's work—as if FDR in 1936 had been concerned not just about the Commerce Clause, but also about how the Court was ruling on free speech. Toomey was also seeking to control the Court into the indefinite future—as if FDR had wanted assurances about case outcomes not just in 1937 but in 1957. And beyond that.

Then-Senate Majority Leader Mitch McConnell said the same thing at the 2018 Federalist Society National Lawyers Convention about his efforts to confirm as many Republican judicial nominees as he could: "The closest thing we can do to have a permanent impact is to confirm judges and transform the judiciary. [A]nd we are going to keep on doing it for as long as we can."⁶ McConnell received a standing ovation.⁷

Democrats would also like total control.⁸ They would like to permanently enshrine the rights to abortion, gay marriage, affirmative action, election contribution limits and on and on.

Why has this change occurred—from influencing discrete issues and immanent decisions to today's effort by both sides to achieve total control of the Supreme Court? The change has come about because an older understanding of law is no longer taught or held by lawyers and legal thinkers.⁹

4. Patrick Damp, *Republican Senator Pat Toomey to Oppose Ketanji Brown Jackson's SCOTUS Nomination*, CBS NEWS (Apr. 3, 2022, 6:48 PM), <https://www.cbsnews.com/pittsburgh/news/toomey-to-oppose-judge-jackson-scotus-nomination/>.

5. *Id.* Tellingly, this is the very first sentence in the statement announcing Senator Toomey's opposition to then-Judge Jackson's nomination.

6. Bruce Ledewitz, *The Obama Judge and the Foundations of the Rule of Law*, JURIST (Dec. 2, 2018, 6:21 PM), <https://www.jurist.org/commentary/2018/12/the-obama-judge-and-the-foundations-of-the-rule-of-law/>.

7. See Josh Blackman (@JoshMBlackman), TWITTER (Nov. 15, 2018, 9:16 PM), <https://twitter.com/JoshMBlackman/status/1063269631757029376>.

8. "Democrats equally reject the idea of independent federal judges." Bruce Ledewitz, *Saving Judicial Independence from the Nihilism of Court-Packing*, 12 ELON L. REV. 317, 338 (2020) (discussing court-packing as a dominant Democratic Party commitment to control the Supreme Court).

9. See generally *id.* At one time, it would have at least been conceivable to treat a Supreme Court Chief justice the way Jerome Powell, chair of the Federal Reserve since 2018, has been treated. Powell was nominated to be a member of the Federal Reserve Board of Governors by President Barack Obama, nominated to be chair by President Donald Trump and renominated to that position by President Joe Biden. The

That older way of approaching law assumed a teleology. It assumed that law is the product of reason perfecting itself over time.¹⁰ And when this view prevailed, it was neither necessary, nor even possible, to imagine controlling law in all ways for all time.

It was this older way of thinking about law that motivated Justice Robert Jackson in his opening statement to call the Nuremburg trials “one of the most significant tributes that Power ever has paid to Reason.”¹¹ It was this older way of thinking about law that reassured Justice John Harlan in his dissent in *Poe v. Ullman*¹² that liberty “is a rational continuum,” from which a judicial departure would not long survive.¹³ It was this older way of thinking about law that Lon Fuller was reflecting when he criticized H.L.A. Hart in their debate for assuming that “evil aims may have as much coherence and inner logic as good ones.”¹⁴ Fuller assumed that explanation of decisions would pull them toward goodness.¹⁵ This older way of thinking about law shared Dr. King’s

difference between the current view of the Federal Reserve and the view of the Supreme Court is that economics is now considered to be an objective undertaking—a science, if you will. Law, that is Supreme Court decisions, are now considered expressions of political ideology. But law was also once viewed to some extent as objective. Just to give one example, Justice Antonin Scalia explains that common law development was once not considered to be legislating by judges, by James Madison in Scalia’s example, because law at that time also was viewed as an objective undertaking, as opposed to the modern view of law making as subjective:

He [Madison] wrote in an era when the prevailing image of the common law was that of a preexisting body of rules, uniform throughout the nation (rather than different from state to state), that judges merely “discovered” rather than created. It is only in this century, with the rise of legal realism, that we came to acknowledge that judges in fact ‘make’ the common law, and that each state has its own.

ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 10 (Amy Gutmann ed., new ed. 2018).

10. See David Aram Kaiser, *Putting Progress Back into Progressive: Reclaiming A Philosophy of History for the Constitution*, 6 WASH. U. JURIS. REV. 257, 276 (2014) (“[T]he concept of law as the embodiment of reason has been an orthodox belief for much of the history of the law.”). The movement of perfecting is akin to the “old trope” held by “sentimental lawyers,” to which Ronald Dworkin referred: “law works itself pure.” RONALD DWORKIN, *LAW’S EMPIRE* 400 (1986). Dworkin himself would include in that development much more than reason, strictly speaking, but I do not mean to exclude moral intuition and inquiry, along with experience, from the realm of reason. In any event, his “sentimental lawyers” would not have objected to the use of the term reason.

11. ROBERT H. JACKSON, *THE NÜRNBERG CASE*, 31 (1947).

12. 367 U.S. 497 (1961) (Harlan, J., dissenting).

13. *Id.* at 542–43 (Harlan, J., dissenting).

14. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 636 (1958).

15. “Accepting these beliefs, I find a considerable incongruity in any conception that envisages a possible future in which the common law would ‘work itself pure from case to case’ toward a more perfect realization of iniquity.” *Id.*

understanding of history as bending toward justice. It assumed that law would participate in that general historical movement. Given that perspective, future control of the Court by present concerns would not be a coherent or even understandable goal.

The quest for totalizing control of the Supreme Court “far into the future” rejects David Strauss’s defense of living constitutionalism as a common law approach to constitutional interpretation.¹⁶ Even Strauss’s allies no longer believe that it is possible to engage in the kind of rational unfolding that common law development requires.¹⁷ We assume that any claim of truth serves a political agenda.¹⁸

You can see that political agenda on the left in the announcement of the May 2021 AALS Conference, entitled *Conference on Rebuilding Democracy and the Rule of Law*.¹⁹ The four themes addressed in the conference had nothing to do with the rule of law.²⁰ The conference turned out to be the usual liberal condemnations of President Trump and Republicans.

You can see the exhaustion of the older way of thinking about law in a well-known episode that occurred in 2018.²¹ After President Donald Trump attacked a decision by Federal District Judge Jon Tigar as having

16. See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 35 (2010) (describing how the common law constitution of doctrines and precedents, together with the written text of the Constitution, forms the “living Constitution”).

17. In the form of a lament, this is David Kaiser’s point: “proponents of living constitutionalism need to reclaim some version of a philosophy of history in order to rebut Justice Scalia’s challenge that living constitutionalism represents ‘rot’ rather than progress.” Kaiser, *supra* note 10, at 259.

18. I should have referred here in the talk to Richard Fallon’s *LAW AND LEGITIMACY IN THE SUPREME COURT*, which may become a kind of alternative starting point to different theories of “living constitutionalism,” in the same way that David Strauss’s common law constitutional development has functioned. See RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018). Evaluating Fallon’s reflective equilibrium is beyond my scope here. I am sympathetic to his reference to a judge’s “quasi-intuitive judgments of correctness,” *id.* at 143–44, as a starting point for decision, since I believe, like Holmes, that this is what all judges, including originalist judges, actually do, see O.W. HOLMES, JR., *THE COMMON LAW* 1 (Boston, Little, Brown & Co. 1881) (“The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”). But in today’s partisan atmosphere, that recognition sharpens the charge that judges serve their political agendas, rather than refuting it.

19. *Conference on Rebuilding Democracy and the Rule of Law*, ASS’N AM. L. SCHS., <https://www.aals.org/events/rebuilding-democracy/> (last visited Mar. 4, 2023).

20. “The Conference focused on four themes: (1) the presidency; (2) the electoral process; (3) race and voting rights; and (4) improving presidential elections. It began with a discussion of *After Trump: Reconstructing the Presidency* with its authors Bob Bauer and Jack Goldsmith.” *Id.*

21. For my description of the incident and the responses to it, see Ledewitz, *supra* note 6.

been rendered by an “Obama Judge,” Chief Justice John Roberts responded with a clear rebuke: “We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.”²²

But if you look at the responses to this episode, you will find that most observers agreed with President Trump.²³ Of course there are Obama judges and Trump judges, which is why totalizing control of the Supreme Court is so important.

The older way of understanding law still appears in cases. Chief Justice Roberts invoked it when he wrote for the majority in *Trump v. Hawaii*²⁴ that the notorious case of *Korematsu v. United States*²⁵ was “gravely wrong the day it was decided, [and] has been overruled in the court of history.”²⁶

But surely South Texas Law Professor Josh Blackman spoke for most of us when he responded to the Chief Justice, bluntly but elegantly, “There Is No Court of History.”²⁷ Rejecting Dr. King, Blackman wrote that the court of history is “imaginary.”²⁸ Or, as an earlier skeptic, Justice Oliver Wendell Holmes wrote, law is not a “brooding omnipresence in the sky.”²⁹

Skepticism is the view today of both sides trying to control the Supreme Court. This skepticism about truth also lurks in the hostility both sides exhibit toward Common Good Constitutionalism.³⁰

22. The quote was widely reported. See e.g., Robert Barnes, *Rebuking Trump’s Criticism of ‘Obama Judge,’ Chief Justice Roberts Defends Judiciary as ‘Independent,’* WASH. POST (Nov. 21, 2018, 6:21 PM), https://www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-edb7-11e8-96d4-0d23f2aaad09_story.html?noredirect=on&utm_term=.7ddba56a041d.

23. See Ledewitz, *supra* note 6.

24. 138 S. Ct. 2392 (2018).

25. 323 U.S. 214 (1944).

26. *Trump v. Hawaii*, 138 S. Ct. at 2423.

27. Josh Blackman, *There Is No Court of History*, REASON: THE VOLOKH CONSPIRACY (Sept. 12, 2020, 12:13 AM), <https://reason.com/volokh/2020/09/12/there-is-no-court-of-history/>.

28. *Id.*

29. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (referring to the common law).

30. I am referring here to the views of Adrian Vermeule, now collected and formally stated in his important book, COMMON GOOD CONSTITUTIONALISM. The critique of Vermeule from the left is that common good constitutionalism is religious; it fosters a substantive theological vision of the good for judges to follow. See Micah Schwartzman & Richard Schragger, *What Common Good?*, AM. PROSPECT (Apr. 7, 2022), <https://prospect.org/culture/books/what-common-good-vermeule-review/> (reviewing ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022)). In an exchange with me, Schwartzman wished he had thought of my suggested title for the review as

There is no cosmic court of higher appeal to bring rationality to legal development. No telos or universal value. Therefore, it is impossible for either side to be content to leave anything to future legal development. The two sides share this jurisprudential, indeed philosophical and theological, starting point. That shared starting point is the dawn of a genuinely secular legal order.³¹ The older view of law had been ineluctably religious, premised originally not only on God, but consistently on a certain metaphysical order in reality.³²

In contrast, the current struggle between the two sides is over two forms of legal/ontological positivism.³³

“Common God Constitutionalism.” The left tends to see the invocation of any substantive moral position as religious and therefore illegitimate in constitutional terms. (The left’s own substantive morality somehow avoids this critique.)

The critique of Vermuele from the right is not exactly the same. Randy Barnett, for example, criticizes Vermuele not primarily for relying on a conception of the common good, but for relying on administrative agencies to promote it. Randy E. Barnett, *Deep-State Constitutionalism*, CLAREMONT REV. BOOKS, Spring 2022, at 33, <https://scholarship.law.georgetown.edu/facpub/2450>.

But Barnett also concedes Vermuele’s—and my—criticism of originalism by chiding originalism for becoming legal positivism, emphasizing “law-as-it-is,” and ignoring the Declaration of Independence, the Ninth Amendment, and natural rights generally.

This is a monumental concession by Barnett, a master of originalism. It not only acknowledges that the framing generation were natural rights thinkers, so that no historical account of the Constitution can be faithful without protecting natural rights, but raises the question of the future of originalism, since the protection of natural rights cannot, by its nature, be confined to what the founding generation conceived of as natural rights—and the Framers would have agreed with that.

The problem for originalism is similar to the famous one of “ghosts” raised by John Hart Ely in *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW*. According to Ely, we cannot enforce natural rights because we know they do not exist—just as we would not enforce a ghost protection provision just because the Framers believed in ghosts. See Bruce Ledewitz, *The Five Days in June When Values Died in American Law*, 49 AKRON L. REV. 115, 136 (2016). What Barnett will eventually have to acknowledge is that originalism became positivism because we, unlike the framers, are under the influence of nihilism.

31. In some ways, the struggle to control the Supreme Court can be looked at in terms similar to those suggested by Nate Hochman concerning American politics generally as a struggle between secular perspectives, in which both right and left are post-religious in a secularizing society. Nate Hochman, Opinion, *What Comes After the Religious Right?*, N.Y. TIMES (June 5, 2022), <https://www.nytimes.com/2022/06/01/opinion/republicans-religion-conservatism.html>.

32. That reality includes human nature, though human nature was not usually a point of discussion.

33. This is Randy Barnett’s criticism of originalism, see Barnett, *supra* note 30, but it is equally applicable to living constitutionalism. Despite its commitments to certain outcomes, there is no defense of a connection between law and any substantive conception of the good.

The recognition that law has moved from a religious foundation to a secular one is not new. In 2004, in *Law's Quandary*,³⁴ Steven Smith identified the tension in American law between the culture's current ontology, which is materialism, and an older, classic approach to law, which assumed that there were right answers to legal questions premised on a religious or quasi-religious foundation.³⁵ For Smith, the classic view of law allowed lawyers to understand the rule of law as something beyond purely human will, versus the current understanding of law in which everything is a clash of power and preference. Smith argued that lawyers had been living perfectly well with this tension for quite some time.³⁶

But the rejection of Chief Justice Roberts's appeal to the classic conception of law and the rule of law demonstrates that the tension Smith identified has now been broken. Materialism now rules in American law. This is the criticism that the conservative legal thinker Harry Jaffa announced in the 1980's against both the left and right in American law—against both originalism and living constitutionalism—when he charged that skepticism had replaced the framework of the founding generation in constitutional thought.³⁷

And it is why, in a five-day period in 1992, every justice on the Supreme Court joined one of two opinions—either Justice Anthony Kennedy's majority opinion in *Lee v. Weisman*³⁸ or Justice Antonin Scalia's dissent in *Planned Parenthood v. Casey*³⁹—that viewed any value commitment as simply a human construct. This moment in time brought

34. See generally STEVEN D. SMITH, *LAW'S QUANDARY* (2004).

35. See Ledewitz, *supra* note 30, at 154–55.

36. *Id.*

37. See HARRY V. JAFFA, *ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION* (1994). I have not found public references by Jaffa in the 1980's, but I remember them. His critique was aimed at what he viewed as the positivist foundations of original intent, thinking that began to emerge in the 1970s and then solidified in the 1980s:

Rehnquist and Bork (together with former Attorney General Meese) have identified themselves with a jurisprudence of original intent. I share with them the conviction that only such a jurisprudence can counteract the inroads of the liberal judicial activism that like a cancer is eating away the substance of our constitution. I have however proved—beyond I think a reasonable doubt—that what *they* call original intent is *not* that of those who framed and ratified the Constitution. They identify original intent—as does Graglia—with a legal positivism that is completely alien to the thought of the Founding generation. I do not think that any good purpose can be served by acquiescing in an error of such magnitude.

Harry V. Jaffa, *Graglia's Quarrel with God: Atheism and Nihilism Masquerading as Constitutional Argument*, 4 S. CAL. INTERDISC. L.J. 715, 716 (1995).

38. 505 U.S. 577 (1992).

39. 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

the specter of nihilism into the heart of American law. It was the Five Days in June When Values Died in American Law.⁴⁰

I have called this change “the death of God come[] home to roost.”⁴¹ The Death of God does not eliminate religious believers. Nor am I suggesting that no legal thinker makes normative claims: progressive moral reasoning happens,⁴² as does natural-law-based originalism.⁴³ Rather, the point of a secular jurisprudence is simply that law and its interpretation must be justified without divine foundation or ultimate truth. Such comprehensive claims to justify legal arguments have been suspect since John Rawls came on the scene and are not now considered “respectable.”⁴⁴

Both sides live and reason within the moral skepticism of the culture and do not feel obligated to combat it. Neither side claims to expect history to vindicate truth.⁴⁵ This is the reason for the level of mistrust and enmity in American public life, including law. We are not like Dr. King, who, because of his faith in history and the future, and because of

40. See Ledewitz, *supra* note 30.

41. BRUCE LEDEWITZ, *THE UNIVERSE IS ON OUR SIDE: RESTORING FAITH IN AMERICAN PUBLIC LIFE* pt. 1 (2022).

42. This is what Schragger and Schwartzman are referring to when they write, “liberals and progressives should . . . make their own case for a moral reading of the Constitution that points to a more open, humane, tolerant, and decent society.” Schwartzman & Schragger, *supra* note 30. Ronald Dworkin may be said to have been doing this for years, see, e.g., RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996), but, for my tastes, Dworkin was more concerned with method than outcome, at least conceptually.

43. Perhaps most notably in Lee Strang’s magisterial *ORIGINALISM’S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION*.

44. This is a change. See David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 752 (2021) (“Explicit natural law reasoning, for instance, may have ceased to be ‘respectable’ in elite constitutional circles by the mid-twentieth century, but it was held in higher regard for much of the nineteenth century.”).

45. Thus, as in Rawls, disagreement over fundamental issues is treated in legal circles as unchangeable and unbridgeable. See, e.g., Lawrence B. Solum, *Themes from Fallon on Constitutional Theory*, 18 GEO. J.L. & PUB. POL’Y 287, 339 (2020). Solum writes that this is “a society that is characterized by pluralism and ideological conflict,” citing current disagreements over *Roe v. Wade*, *Obergefell v. Hodges*, and *Bush v. Gore*. It does not occur to Solum that such disagreement is dynamic, not static. For example, *Brown v. Board of Education* could once have been on that list, but clearly not today. And even in terms of that list, *Obergefell* was far more controversial a few years ago than it is today, when it was recently effectively ratified in the Senate in the Marriage Equality Bill by a bipartisan, filibuster-proof vote of sixty-one to thirty-eight. Disagreement is not proof that there is no truth. Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat. 2305 (2022); Annie Karni, *Same-Sex Marriage Bill Passes Senate After Bipartisan Breakthrough*, N.Y. TIMES, <https://www.nytimes.com/2022/11/29/us/politics/same-sex-marriage-bill-senate.html> (Dec. 5, 2022). As Hilary Putnam wrote “[n]o sane person should believe that something is ‘subjective’ merely because it cannot be settled beyond controversy.” HILARY PUTNAM, *THE MANY FACES OF REALISM* 71 (1987). Truth has power to persuade over time.

his commitment to reason and truth, could always view today's opponent as tomorrow's ally. If you do not share Dr. King's ontology, every dispute becomes a zero-sum game, in which a gain for one side results in a loss by the other. Since you cannot trust things to work out over time, everything is struggle, forever. That means, as John Marshall wrote in *Marbury v. Madison*,⁴⁶ that you have a government of men and not of law.⁴⁷ The consequence is a loss of legal legitimacy. Americans are very likely today to see decisions of the Supreme Court as nothing but political power plays. This is no one's fault. The problem is ontological. Truth, objectivity, reason—all the components of the traditional rule of law—sound empty and forced today. The skepticism of the American people about the Supreme Court is more fallout from the Death of God.

Can anything be done about this condition? The Death of God may not be permanent, but it is certainly going to be lasting. Secularism is here to stay as a cultural consensus. Other than a return to revealed religion, as hoped for by Charles Taylor,⁴⁸ is our situation irredeemable? The answer is no. But to change our condition, we must shift our focus away from what we say we think about constitutional interpretation to how we actually think about constitutional interpretation. In theory, we choose a method of interpretation for reasons that we think are good and then we practice that method. And we claim that the judicial decisions that we recommend to judges are the result of the choice and operation of that method. But in practice, that is not what happens. Instead, we choose some theory, or we attack some theory, by measuring its method and outcome against a pre-existing case outcome, as a kind of test. And if this method of interpretation would not have resulted in this particular judicial decision, the method is considered tainted.

The first time this happened involved Judge Robert Bork and *Brown v. Board of Education*⁴⁹ at Bork's Supreme Court confirmation hearing in 1987. When Bork conceded that originalism⁵⁰ might not be consistent with *Brown*, or especially *Bolling v. Sharpe*,⁵¹ though he considered both

46. 5 U.S. 137 (1803).

47. "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.* at 163.

48. See Bruce Ledewitz, *Charles Taylor and The Future of Secularism*, 3 EXPOSITIONS 106 (2009), <https://expositions.journals.villanova.edu/article/view/133/105>.

49. 347 U.S. 483 (1954).

50. At that time originalism was often referred to as a jurisprudence of original intent, but sufficiently similar to today's originalism to illustrate the point. See, e.g., Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986).

51. 347 U.S. 497 (1954).

to be great moral achievements, he damaged originalism.⁵² So common was this attack on originalism that Justice Scalia often called it waving the bloody shirt of *Brown*.⁵³ So common was this attack that Michael McConnell tried to fend it off by attempting to show that *Brown* was consistent with originalism.⁵⁴

I do not know whether McConnell succeeded, but the effort was considered absolutely necessary. Why? What was so important about *Brown* that no method of constitutional interpretation can be adopted if it would not have led to it? The answer to that is that the American people consider *Brown* to be a crucial achievement of justice, as did Judge Bork. They would not trust a Supreme Court nominee who said openly: “I would have dissented in *Brown*.” That nominee would not be confirmed. That method of interpretation would disappear from American public and legal life.

This reality suggests that Harlan was right in *Poe* after all. The American people do attend to the most important decisions by the Supreme Court and do enforce a broad orthodoxy on constitutional interpretation.⁵⁵ That is why judicial departures do not survive.

Despite our skepticism, there is a court of history. This is what Charles Black meant when he wrote that “[c]onstitutional doctrine succeeds if it expresses what turns out to be at last the authentic impulses of the nation.”⁵⁶

The Harlan and Black view is not that the American people have the power to enforce their own preferences. I believe they thought the American people were likely to be just in their conclusions. That is, after all, the classic justification of democracy—that a majority is likely to come closer to truth than is any smaller number of citizens.

And it is not just *Brown* that is treated as normative. The equality of women is also treated this way, for example—it must be consistent with any method of constitutional interpretation for that method to be

52. See Edward Walsh & Al Kamen, *Senators Question Bork’s Consistency*, WASH. POST (Sept. 17, 1987), <https://www.washingtonpost.com/archive/politics/1987/09/17/senators-question-borks-consistency/219c93e5-a0bd-4ba1-ae6c-d0fbd2a27b54/>.

53. See Margaret Talbot, *Postscript: Antonin Scalia, 1936–2016*, NEW YORKER (Feb. 14, 2016), <https://www.newyorker.com/news/news-desk/postscript-antonin-scalia-1936-2016>.

54. Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL’Y 457 (1996).

55. See, e.g., Seth Motel, *What Kinds of Supreme Court Cases Interest Americans? Not Campaign Finance*, PEW RSCH. CTR. (Apr. 10, 2014), <https://www.pewresearch.org/fact-tank/2014/04/10/what-kinds-of-supreme-court-cases-interest-americans-not-campaign-finance/>.

56. CHARLES L. BLACK, JR., *THE HUMANE IMAGINATION* 149 (1986).

credible.⁵⁷ That proved also to be true of *Miranda*.⁵⁸ And, it seems to me that if *Obergefell v. Hodges*⁵⁹ might not yet be in this category, *Lawrence v. Texas*,⁶⁰ striking down criminal penalties for same-sex relations, certainly is.

If I am right about this, if originalism now feels it must claim that the *Lawrence* decision is not inconsistent with originalism, or even if originalism must simply refuse to endorse *Bowers v. Hardwick*,⁶¹ that is a spectacular vindication of Harlan's view. It means that *Bowers* was wrong the day it was decided. It also means that the claim by Justice Samuel Alito in *Dobbs v. Jackson Women's Health Organization*⁶² that overturning *Roe v. Wade*⁶³ need not mean a later attack on gay rights,⁶⁴

57. Although he concludes that the Fourteenth Amendment should not be understood as providing protections for women equal to those of men, Ward Farnsworth recognizes the stakes for originalism in that conclusion. Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1229 (2000) ("Some moral and political ideas about the Constitution are held so widely and so deeply that a theory of interpretation is greatly undermined as a practical matter if it cannot be squared with them."). As Farnsworth also acknowledges, other interpreters using historical sources come to a conclusion different from his on the issue of gender equality. *See id.* at 1231.

58. "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). That is why, given the chance, then-Justice Rehnquist, a *Miranda* critic, held that stare decisis justified not overturning *Miranda*.

59. 135 S. Ct. 2584 (2015). That conclusion is not so clear anymore. *See supra* note 45. I should add that I do not mean that all the people morally opposed to same-sex marriage would come to change their minds. Rather, as occurred with moral and religious opposition to divorce and remarriage, and the participation in that process by Roman Catholic judges, most people morally opposed to a practice come to accept the idea that the government can recognize the practice without grave moral harm as long as it does not impose the practice on people of faith. *See, e.g.*, Stephanie Kirchgaessner, *Pope Reforms Catholic Church's Marriage Annulment Process*, GUARDIAN (Sept. 8, 2015), <https://www.theguardian.com/world/2015/sep/08/pope-radically-reforms-catholic-churchs-marriage-annulment-process>.

60. 539 U.S. 558 (2003).

61. 478 U.S. 186 (1986). This is a judgment call on my part. When *Lawrence* was decided, there was plenty of academic criticism of the opinion, which now seems to have pretty much died away. We may now be in the phase in which originalists simply stop talking about *Bowers* and *Lawrence*. Perhaps the effort to justify *Lawrence* under the principles of originalism will come later. But when was the last time there was serious talk about overturning *Lawrence*? That is evidence of acceptance.

62. 142 S. Ct. 2228 (2022).

63. *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

64. "None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way." *Dobbs*, 142 S. Ct. at 2258.

might not just be rhetoric, but a sincere recognition that such an attack is no longer possible—maybe even no longer desirable.

This power of the people does not turn law into politics because part of the judgment by the American people is that judges are different from politicians. Judges protect our fundamental rights, and the American people respect that, even if a majority feel a particular decision was wrong. You can see this in the public reaction to the flag burning decisions. Immediately after *Texas v. Johnson*⁶⁵ was decided in 1989 there were overwhelming calls for a constitutional amendment to allow criminal punishment of flag burning.⁶⁶ But, within a few years, the Court's decision protecting flag burning was accepted, if only begrudgingly.⁶⁷ No politician today runs on a platform of overruling *Johnson*.

Notice, however, that this invokes, as Harlan and Black would have, the language of fundamental or even natural rights. I do not mean by reference to natural rights what the classic tradition said, or what is “deeply rooted in this nation’s history and tradition.” Instead, I assume that rights are real and objective and that it is possible to use reason and experience, and yes, history to some extent, to uncover them today. This is a new form of legal realism.⁶⁸ These are all assumptions that I said at the beginning of this talk we now reject in the aftermath of the Death of God. But maybe we need not reject them. Maybe they are attainable even within a worldview of naturalism, even after the Death of God. In other words, even if a personal God is not available to this secular culture, maybe goodness, truth, beauty, and justice are still real and remain effective. The public reaction to *Brown* is some evidence that this is so.

65. 491 U.S. 397 (1989).

66. See, e.g., James King & Geneva Sands, *How the Law Protects Flag Burning in the United States*, ABC NEWS (Nov. 30, 2016, 10:28 AM), <https://abcnews.go.com/Politics/law-protects-flag-burning-united-states/story?id=43855624>.

67. Joseph Carroll, *Public Support for Constitutional Amendment on Flag Burning*, GALLUP (June 29, 2006), news.gallup.com/poll/23524/public-support-constitutional-amendment-flag-burning.aspx.

68. As Matthew Etchemendy notes, it is considered a “terminological irony” occasionally remarked upon that the legal realist position actually is a form of philosophical anti-realism. Matthew X. Etchemendy, *Legal Realism and Legal Reality*, 88 TENN. L. REV. 399, 402 n.8 (2021). I am proposing here some type of rights realism in the philosophical sense. Although this is not the context to explore the issue, the sort of realism I have in mind is Hilary Putnam’s “commonsense” realism, rather than what Putnam criticized as metaphysical realism. See PUTNAM, *supra* note 45, at 17. I should also add that in Putnam’s terms, American Legal Realism as conventionally understood—the view that judges’ legal opinions mask what really influences their judgments—is a form of philosophical realism, just not the commonsense form of realism that would take a legal opinion as meaning what it says in terms of appeals to precedent, or reason, or history, or justice.

This is where the future of American law lies. We must confront the question of nihilism. If we oppose nihilism, we must do so openly, in the name of truth.⁶⁹ Only then will the rule of law again be credible. Only in this way can the moral reasoning that some progressives claim is needed, be perceived as objective, rather than just another power play. Only then will the natural law basis that some claim for originalism become persuasive, rather than just an imposition from Roman Catholic teaching. Only in this way does American law have a future.

It is no longer enough for people to say that they are not value skeptics. We must each now explain how we have resolved Law's Quandary, one way or the other. We must teach, write, and speak in direct confrontation with skepticism, relativism, and nihilism. Either accepting them or refuting them. Which side are you on?

There are a number of different ways to surmount nihilism. And they can all happen together. For one, religious believers can help us recover the tradition of natural revelation. All human beings should be able to see the goodness, beauty, and coherence in reality. Why should that elemental truth be beyond us today? For another, philosophers like Hilary Putnam argue that a full-scale ontology of God is not necessary to recover the objectivity of truth.⁷⁰ Putnam was writing about mathematics and ethics. When he concluded that the success of mathematical principles in physics justifies considering those principles to be objectively true,⁷¹ he exemplified a method that can be adapted to law. The public acceptance of *Brown* and cases and principles like it justifies us in regarding such matters as objectively just.

Justice is why the American people reach consensus over time.⁷² And where such acceptance does not occur, as happened with *Roe*, we

69. This call is by no means at odds with the current commitments of American legal thought. Many originalists believe that originalism properly understood is true in this sense. Same for the conclusions of many living constitutionalists. It is more of a matter of taking the issue of truth as a first order concern and confronting skepticism in the culture. This means not taking the easy road of saying, for example, that originalism is preferred pragmatically because otherwise the Constitution can mean "anything" or that living constitutionalism avoids the issue of truth by promoting individualist expression—"my truth."

70. See generally HILARY PUTNAM, *ETHICS WITHOUT ONTOLOGY* (2004).

71. "Everything about the success of mathematics, and the deep dependence of much contemporary science, including physics, but not only physics, on mathematics, supports taking mathematical theorems as objective truths . . ." *Id.* at 67.

72. Actually, to bring my work full circle from the beginning of my career, it may be *injustice*, in Edmond Cahn's sense, that is at work. See generally, Bruce S. Ledewitz, *Edmond Cahn's Sense of Injustice: A Contemporary Reintroduction*, 3 J.L. & RELIGION 277 (1985). Certainly, the intuited injustice of state-mandated segregation is what gives *Brown* its unique authority.

can regard that failure as evidence that there is something wrong with such cases.⁷³

Finally, there are secular thinkers who regard the universe itself as a source of values. The universe is on our side.⁷⁴

If Alfred North Whitehead and Bernard Lonergan are too religious to be put in this category, certainly their more secular followers fit. And there are undoubtedly other ways to bring law back to truth.

Would recovery of a shared hope for truth solve the issues of control of the Supreme Court raised in this Symposium? Would it convince the American people that law is more than just the outcome preferred by one side? Not immediately. Things have gotten pretty bad in American public life. But recovery of a shared commitment to truth would allow a more candid approach to the moral/political reasoning in which judges inevitably engage and would encourage direct and transparent normative judgment. That would be different from today, when any assertion of values is dismissed as a judge's personal feeling. We would be debating values in the open, with an aim toward consensus.

If I had one criticism to make of our debates over constitutional interpretation, it is that we do not seek consensus. We have all wanted our side to win rather than trying to bring peace.

Peace will come out of a shared understanding that there really is, as Ronald Dworkin used to say, "a right answer,"⁷⁵ or a righter answer,⁷⁶ to our debates in law. Even if we cannot agree right now what that right answer is, the very fact that it is real and that we expect it to be vindicated will bring us together, even if we are coming together, as in this Symposium, in debate.

My hope in joining with Eric Segall and the *Wisconsin Law Review* and all of you in this Symposium is that this vision of reasoned harmony will motivate everything that we say and do here in the next two days.

73. I have been writing about cases like *Brown* out of the tradition known as the canon. Certain cases in constitutional history are considered exemplary of the tradition. But, as Ilya Somin pointed out at the Symposium, there is also an anticanon—cases regarded as fundamentally wrong in some way. See Ilya Somin, *The Case for Expanding the Anticanon of Constitutional Law*, 2023 WIS. L. REV. 575. *Dred Scott* is one such case. Perhaps *Bowers* is now regarded as another.

But in terms of cases like *Roe*, the terminology of canon and anti-canon do not really apply. Rather we should think of a case like *Roe* simply as a failure. The *Johnson* flag case, for example, is not distinctive enough to be considered canonical. Neither are the cases that established a fundamental right to use contraceptives, or to guide the life of one's child or to marry. But these cases did achieve consensus in American life. They are widely regarded as rightly decided and it is unlikely, whatever their methodological justification, that they will be overruled. *Roe* failed the test of consensus over time. The case did not "succeed" in Charles Black's formulation. See BLACK, *supra* note 56, at 149.

74. See LEDEWITZ, *supra* note 41.

75. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

76. Maybe a better characterization of the later Dworkin.