

REVIEW

The Inescapability of Constitutional Theory

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Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance
J. Harvie Wilkinson III. Oxford, 2012. Pp 3, 161.

INTRODUCTION

The Constitution inevitably must be interpreted. There are countless issues—such as whether the president can fire cabinet officials¹ or rescind treaties² or assert executive privilege³—where the document is silent, but a constitutional answer is necessary. So much of the Constitution is written in broad language that must be given meaning and applied to specific situations. What is “Commerce . . . among the several States”⁴ or “liberty”⁵ or “cruel and unusual punishments”⁶ or “equal protection of the laws”⁷—and countless other phrases—must be defined and applied. The assurances of freedom and equality in the Constitution are not absolute,⁸ and it is necessary to decide what justifications

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¹ See *Myers v United States*, 272 US 52, 134 (1926).

² See *Goldwater v Carter*, 444 US 996, 1002 (1979) (Rehnquist concurring in denial of certiorari) (positing that a challenge to the president’s rescinding a treaty was nonjusticiable).

³ See *United States v Nixon*, 418 US 683, 706 (1974) (holding that the president may invoke executive privilege, but it must yield to other overriding needs for information).

⁴ US Const Art I, § 8, cl 3. See *United States v Lopez*, 514 US 549, 567–68 (1995) (holding that the Gun Free School Zone Act, prohibiting firearms within one-thousand feet of a school, exceeded the scope of Congress’s Commerce Power).

⁵ US Const Amend XIV, § 1. See *Lochner v New York*, 198 US 45, 53 (1905) (finding freedom of contract to be a liberty interest protected by the Constitution).

⁶ US Const Amend VIII. See *Ewing v California*, 538 US 11, 30–31 (2003) (holding that a sentence of twenty-five years to life for shoplifting was not cruel and unusual punishment).

⁷ US Const Amend XIV, § 1. See *Brown v Board of Education of Topeka*, 347 US 483, 495 (1954) (holding that separate can never be equal in public education).

⁸ See *Schenck v United States*, 249 US 47, 52 (1919) (holding that freedom of speech is not absolute); *Ross v Moffitt*, 417 US 600, 612 (1974) (holding that the Fourteenth Amendment does not require “absolute equality”).

are sufficient to allow the government to infringe rights or discriminate. Obviously, for all of these reasons, courts must interpret the Constitution, but so must all government officials, all of whom take an oath to uphold the Constitution.⁹

A constitutional theory is an approach that is used to interpret and give meaning to the Constitution. Over the last few decades, two competing constitutional theories have been originalism and nonoriginalism. Originalists believe that the meaning of a constitutional provision is fixed at the time of its adoption and is changeable only by constitutional amendment.¹⁰ Under this view, Article I of the Constitution means the same thing as it did in 1787 or the First Amendment means the same thing as it did in 1791, and nothing that has happened since should matter in deciding their meanings. By contrast, nonoriginalists believe that the Constitution's meaning evolves by both interpretation and by amendment; loosely speaking, nonoriginalists believe in a "living Constitution."¹¹ Of course, there are many variants of each of these approaches, and there are other constitutional theories as well. There is a huge scholarly literature debating these and other theories of constitutional interpretation.¹²

Judge J. Harvie Wilkinson III, a former law professor and a highly respected judge on the United States Court of Appeals for the Fourth Circuit, has written a provocative book arguing against constitutional theory. In it, he identifies several of the most prominent constitutional theories and presents powerful critiques of them. He concludes that "[w]hat's needed is not yet

⁹ See US Const Art II, § 1, cl 7 (requiring the president to swear an oath to uphold the Constitution); US Const Art VI, cl 3 (requiring senators, representatives, state legislators, and state executives to swear to uphold the Constitution); 5 USC § 3331 (requiring civil servants and members of the military to swear to defend and remain faithful to the Constitution).

¹⁰ See Attorney General Edwin Meese III, *Speech before the American Bar Association: Washington, D.C., July 9, 1985*, in Steven G. Calabresi, ed, *Originalism: A Quarter Century of Debate* 47, 54 (Regnery 2007) (collecting essays advocating originalism and presenting a discussion of arguments for and against it).

¹¹ See Howard Lee McBain, *The Living Constitution: A Consideration of the Realities and Legends of Our Fundamental Law* 272 (Macmillan 1928). See also Charles A. Reich, *The Living Constitution and the Court's Role*, in Stephen Parks Strickland, ed, *Hugo Black and the Supreme Court: A Symposium* 133, 141 (Bobbs-Merrill 1967).

¹² See, for example, Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press 1990); Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Harvard 1988); Erwin Chemerinsky, *Interpreting the Constitution* (Praeger 1987); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard 1980); Michael J. Perry, *The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (Yale 1982).

another theory but an escape from theorizing” (p 115). He contends that constitutional theories have been harmful to democratic governance. He says that “the theories are taking us down the road to judicial hegemony where the self-governance at the heart of our political order cannot thrive” (p 4).

In one sense, Judge Wilkinson is surely correct. Throughout American history, justices and judges have decided cases without having a “cosmic constitutional theory.”¹³ In deciding constitutional cases, courts always look at the Constitution’s text (which rarely provides answers), the Framers’ intent (if any can be ascertained), the structure of the Constitution, precedent, and social needs.¹⁴ The vast majority of constitutional cases have been decided without any invocation of a constitutional theory. Moreover, no theory ever has been developed for deciding what is a “compelling” or an “important” or a “legitimate” government interest, even though such determinations are at the core of litigation about individual rights and equal protection.¹⁵ No theory exists for deciding what is an “unreasonable” search or arrest, even though judges in courts across the country make that determination countless times every day.¹⁶

Yet, in another sense, Judge Wilkinson is profoundly wrong because there is simply no way to avoid a constitutional theory in deciding, or having views on, constitutional issues. Justices and judges—and executives and legislators—need to decide how they will go about giving the Constitution meaning. For example, as explained above, a fundamental question is whether the meaning of a constitutional provision is fixed when it is adopted

¹³ For example, prominent recent cases have been decided without reference to or invocation of constitutional theory, such as *National Federation of Independent Business v Sebelius*, 132 S Ct 2566 (2012) (concluding, without express reference to any constitutional theory, that the (1) Affordable Care Act’s (ACA) minimum coverage provision is constitutional under Congress’s Taxing Power, (2) ACA’s Medicaid expansion exceeds the scope of Congress’s conditional Spending Power, but (3) proper remedy is to prohibit the federal government from withdrawing all pre-ACA Medicaid funding).

¹⁴ See, for example, *Miller v Alabama*, 132 S Ct 2455, 2463–64 (2012) (reasoning from two lines of precedent in holding that the Eighth Amendment prohibits mandatory life sentences for juveniles); *Pleasant Grove City, Utah v Summum*, 555 US 460, 467–68 (2009) (reasoning from precedent and public policy in deciding that the First Amendment does not bar a city government’s decision not to erect a monument donated by a very small religious group).

¹⁵ See Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 Penn St L Rev 139, 140 (2012). But see generally Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 Cal L Rev 297 (1997).

¹⁶ See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175, 1186 (1989).

or whether its meaning can evolve by interpretation; this determines what materials and what arguments are even relevant in interpreting a constitutional provision. In deciding what is cruel and unusual punishment, should the focus be solely on what the Framers deemed objectionable or should the inquiry be about “evolving standards of decency”?¹⁷ There is no way to avoid that question, and whatever the answer, that is a constitutional theory. More generally, there needs to be an approach to deciding when courts should defer to the political process and when they should overrule it.¹⁸ This, too, is a constitutional theory. Judge Wilkinson’s underlying thesis—that constitutional theory is unnecessary and harmful (p 4)—is wrong because constitutional theory is inescapable.

This Review is divided into three parts. First, I briefly summarize Judge Wilkinson’s argument. Second, I argue that despite his protestations to the contrary, Judge Wilkinson has a constitutional theory; it is one that calls for great judicial deference to the elected branches of government. Third, I contend that Judge Wilkinson’s theory is neither defended nor desirable.

I. AGAINST COSMIC CONSTITUTIONAL THEORY

Judge Wilkinson’s book is only 116 pages long. There is a short introduction and five chapters. The first four chapters each identify a major constitutional theory and then proceed to criticize it. The last chapter, “The Failure of Cosmic Constitutional Theory,” presents his conclusion: constitutional theory causes judges to overrule democratically elected branches of government, and this is undesirable (p 115). He says, “I fear that democratic liberty will more and more become the victim of cosmic theory’s triumphal rise” (p 114).

That is the central thesis of his book: constitutional theory tells judges when it is permissible for them to overrule the decisions of popularly elected legislatures and executives and therefore makes it more likely that judges will do so (pp 6–7). This is undesirable because judges’ overruling the decisions of elected officials is inconsistent with democracy.¹⁹ At the beginning of the book, Judge Wilkinson writes, “The great casualty of cosmic

¹⁷ *Trop v Dulles*, 356 US 86, 101 (1958).

¹⁸ See, for example, Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 Yale L J 1329, 1330–32 (2005).

¹⁹ See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16–23 (Yale 2d ed 1986).

constitutional theory has been our inalienable right of self-governance. . . . Moreover, theory's siege on self-governance is hardly complete" (p 9). He says that "[c]ontemporary issues" such as challenges to bans on marriage equality for gays and lesbians²⁰ and to the Patient Protection and Affordable Care Act²¹ have "done little to assuage the larger fear that courts will use their own preferences to resolve our most volatile political controversies and that democratic liberty will once again be compromised" (p 9).

Judge Wilkinson develops this point by looking at four major constitutional theories. The title of Chapter 1—"Living Constitutionalism: Activism Unleashed"—expresses his view of the idea of a "living" Constitution. He identifies Justice William Brennan as a leading proponent of living constitutionalism and says,

Brennan and other living constitutionalists led the courts deep into the thickets of abortion, capital punishment, and habeas corpus. They endowed trial courts with broad authority over local school administration, extended the realm of constitutional tort at the expense of state and local governance, and were poised to confer broad constitutional protections on economic entitlements as well (pp 11–12).

He concludes, "In short, the influence of living constitutionalism has been exceeded only by the cumulative damage to democratic liberty that it inflicted" (p 12).

As with each theory, he begins by acknowledging the benefits of living constitutionalism—such as *Brown v Board of Education of Topeka*²² and rulings equipping Congress with the needed authority to regulate interstate commerce in a complex, modern economy (p 19).²³ But he then sharply criticizes living constitutionalism and says that "both in theory and in practice, [it] has elevated judicial hubris over humility, boldness over modesty, and intervention over restraint" (p 19).

²⁰ See, for example, *Windsor v United States*, 699 F3d 169, 188 (2d Cir 2012), cert granted, 2012 WL 4009654; *Perry v Brown*, 671 F3d 1052, 1095 (9th Cir 2012), cert granted as *Hollingsworth v Perry*, 2012 WL 3134429.

²¹ Pub L No 111-148, 124 Stat 119 (2010).

²² 347 US 483 (1954).

²³ See, for example, *United States v Lopez*, 514 US 549, 568 (1995) (Kennedy concurring) (explaining that the United States has transitioned to a single national market); *Wickard v Filburn*, 317 US 111, 127–28 (1942).

He argues that courts are less well-suited than legislatures to adapt to modern needs and says that “living constitutionalism, at least in [Brennan’s] incarnation, suffers from the vice of institutional blindness that all too commonly afflicts judicial activism” (p 22). He argues that legislatures are “the superior updater” (p 23). As an example, he strongly objects to the Supreme Court’s decision in 2011 affirming a lower court decision ordering the release of inmates from a California prison as a remedy for tremendous overcrowding that was found to have caused deliberate indifference to the medical needs of inmates.²⁴ He says that the legislature, much more than the judiciary, should decide what is best for society in this regard. He objects that “the capacious language of the constitutional vessel simply provides too much temptation for judges to pour their own beliefs in” (p 27).

The title of Chapter 2 again captures Judge Wilkinson’s argument: “Originalism: Activism Masquerading as Restraint.” Judge Wilkinson relies on a famous article by Judge Robert Bork as his basis for explaining originalism.²⁵ He identifies the virtues of originalism and writes,

The virtues of originalism are real, and they should not be cast aside because the theory is ultimately wanting. These virtues include providing judicial constraints; harnessing the judiciary’s expertise in traditional legal analysis; offering a coherent justification for the judiciary’s democratic legitimacy; and enjoying, at least on a basic level, a good measure of acceptance (p 39).

But Judge Wilkinson then criticizes originalism because it, too, is used by courts to overturn the decisions of popularly elected government officials. He writes, “A sad fact nonetheless lies at originalism’s heart. For all its virtues, originalism has failed to deliver on its promise of restraint. Activism still characterizes many a judicial decision, and originalist judges have been among the worst offenders” (p 46).

He says that “[t]he chief failure of originalism is that the search for original understanding often fails to constrain judicial choices” (p 46). The reality is that the historical record is generally so incomplete and inconsistent that judges can come to almost

²⁴ See *Brown v Plata*, 131 S Ct 1910, 1945–46 (2011).

²⁵ See generally Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind L J 1 (1971).

any conclusion and justify it in originalist terms.²⁶ Moreover, he says that “[e]ven where there is a digestible quantity of coherent historical evidence, it is often difficult for judges to reconstruct the past” (p 50). Originalism requires an arbitrary choice as to the level of abstraction at which to describe the original understanding of a constitutional provision (pp 52–53). For example, was the original understanding of the Equal Protection Clause of the Fourteenth Amendment about protecting former slaves, or about protecting those of African descent, or about protecting all racial minorities, or about protecting all historically disadvantaged groups, or about protecting all who have been unfairly discriminated against by the government (p 52)? Any of these can claim to be the original meaning of the Equal Protection Clause, but the choice is hugely important, such as in determining whether women are protected from discrimination.²⁷

Judge Wilkinson points out that all justices and judges sometimes must reject originalism because it leads to unacceptable results (p 54).²⁸ He calls this “hot-and-cold originalism” and says that even the justices who most profess to be originalists, such as Justice Antonin Scalia, are guilty of this (pp 54–55).²⁹

He criticizes originalism when it leads to “judicial activism” (p 46). He writes that “[r]ecently originalism has provided cover for episodic activism” (p 57). He says, “What is immensely sad is that a theory that was boldly advertised at its inception as a constraining force on the judiciary has been hijacked for unrestrained incursions” (p 57). His primary example of this is the Court’s decision in *District of Columbia v Heller*,³⁰ which found that the Second Amendment protects a right of individuals to possess firearms and struck down a District of Columbia law prohibiting private ownership or possession of handguns.³¹ He writes, “Disenfranchising democratic majorities across the nation by the narrowest of judicial margins was troubling enough. To do so on the basis of the ambiguous language and inconclusive history of the Second Amendment compounded the difficulties” (p 58).

²⁶ See John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U Chi L Rev 502, 508–09 (1964).

²⁷ See, for example, *Bradwell v Illinois*, 83 US (16 Wall) 130 (1872) (denying women protection under the Equal Protection Clause).

²⁸ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U Cin L Rev 849, 861–62 (1989).

²⁹ See, for example, *Blakely v Washington*, 542 US 296, 302–08 (2004) (Scalia).

³⁰ 554 US 570 (2008).

³¹ *Id.* at 595.

He accuses the Court's majority of "substitut[ing] their own preferences for those of the Constitution" (p 58).

In Chapter 3, Judge Wilkinson discusses political process theory. He centers especially on the writings of the late Professor John Hart Ely.³² Professor Ely argued that the judiciary's focus should be on the processes of government, with substantive choices left to the political process.³³ In essence, Professor Ely would allow judges to be nonoriginalists so long as they were dealing with issues of process, but to be originalists when dealing with substantive constitutional questions.

As with the other theories, Judge Wilkinson criticizes process-based judicial review on the ground that it would allow judges to decide cases based on their own views and values. He writes, "Rather than eschewing value judgments, Ely's theory *requires* judges to make substantive determinations about the nature of American democracy and the wisdom of law" (p 62). After describing process theory, Judge Wilkinson explains its virtues, focusing attention on the importance of process (pp 65–69). Like Judge Wilkinson, Professor Ely defined democracy as majority rule,³⁴ and Judge Wilkinson commends his "devotion to representative democracy" (p 68). He praises Professor Ely for recognizing that judges undermine democracy when they substitute their own views for those of elected officials (p 69).

But he then criticizes Professor Ely's theory for allowing judges to make value choices in defining the processes required by the Constitution. He says that "procedural judgments can be every bit as subjective and consequential as substantive ones" (p 71). He says that the "number of value judgments involved in '[p]olicing the [p]rocess of [r]epresentation' is enough to cast a shadow over Ely's promises of judicial restraint" (p 74) (alterations in original). Judge Wilkinson points out that the line between process and substance is inherently arbitrary and that substantive issues—like marriage equality for gays and lesbians—might be analyzed in process terms (pp 74–77).³⁵

Judge Wilkinson concludes his analysis of process theory by arguing that it is not supported by the Constitution; the Constitution gives judges no special role with regard to the processes of

³² See generally Ely, *Democracy and Distrust* (cited in note 12).

³³ *Id.* at 181–83.

³⁴ See *id.* at 4–5.

³⁵ See also Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *Yale L J* 1063, 1065 (1980).

government (pp 78–79). Judge Wilkinson ends this chapter by stating, “In short, process theory can be viewed as exactly the opposite of what it is advertised to be. It is a prescription for an emboldened judicial role unsupported by the Constitution and covered by little more than a fig leaf of restraint” (p 79).

Chapter 4 is entitled, “Pragmatism: Activism through Antitheory.” Judge Wilkinson here focuses on the writings of Judge Richard Posner.³⁶ After describing pragmatism, Judge Wilkinson explains its virtues (pp 84–87). He says that it provides adjudicative flexibility. As an example, he agrees with Judge Posner in praising Justice Stephen Breyer’s opinion in *Van Orden v Perry*,³⁷ finding that a six-foot-high, three-foot-wide Ten Commandments monument at the corner between the Texas State Capitol and the Texas Supreme Court did not violate the First Amendment.³⁸ He says that the view of the four dissenting justices would have been “disastrous” (p 85). Judge Wilkinson also praises pragmatism for reminding judges of their own limitations and for being honest about what judges actually do in deciding cases (p 86).

But Judge Wilkinson says that the flaw with pragmatism is that “it puts great power in judges’ hands and tells them precious little about what to do with it” (p 88). The balancing that is inherent in pragmatism allows judges discretion to decide what to weigh, and inevitably the weighing is the product of the views of the judges (p 92). Judge Wilkinson says that pragmatism is the “[a]ntithesis of [r]estraint” (p 94). He says that “[p]ragmatism cuts the bonds to representative institutions by making adherence to enacted law a matter of practical convenience rather than democratic obligation” (p 95). He criticizes pragmatism for giving judges an “immense policymaking role” (p 95).

Finally, in the last chapter, Judge Wilkinson expressly defends “judicial restraint” (pp 104–05). He explains that judges are not elected and not accountable (p 105). When judges declare executive and legislative actions unconstitutional they are displacing the choices of officials who are elected and electorally accountable (p 106). The constitutional decisions of the Supreme Court cannot be changed except by constitutional amendment or

³⁶ See generally Richard A. Posner, *How Judges Think* (Harvard 2008).

³⁷ 545 US 677 (2005).

³⁸ *Id.* at 699 (Breyer concurring). I should disclose that I argued this case in the Supreme Court, on the losing side, contending that such a clear religious message at the seat of state government violated the Establishment Clause of the First Amendment.

by a later Court ruling (p 107); the dangers of judicial errors are thus much greater (p 107). Judge Wilkinson emphasizes the antidemocratic dangers of judicial review and he writes, “The more promiscuous forms of constitutional adjudication threaten to fracture the American social compact in the most elemental way” (p 107).

Judge Wilkinson’s solution then is judicial restraint. He says that “[t]he republican virtue of restraint requires no cosmic theory” (p 107). He denies having or needing a constitutional theory. On the last page of the book, he writes, “So what is my theory? The answer is I have no theory” (p 116).

II. JUDGE WILKINSON’S CONSTITUTIONAL THEORY

The thesis of Judge Wilkinson’s book is that constitutional theory is unnecessary and undesirable. But a key flaw in Judge Wilkinson’s analysis is his failure to recognize that constitutional theory is inescapable and that, therefore, contrary to his protestations, he has a constitutional theory. His constitutional theory is one of great judicial deference to the decisions of the elected branches of government (pp 104–06). His constitutional theory is that American democracy means majority rule and that judicial invalidation of the acts of popularly elected government officials is impermissible. Although he never acknowledges that this is a constitutional theory, it is exactly that. It is an approach that courts should use in giving meaning to the Constitution and in deciding cases.³⁹ Moreover, he is arguing for a constitutional theory in which judges do not impose their own values in deciding cases (pp 20, 52, 72, 88).

It is a theory of judicial review that Judge Wilkinson captures in one word that he repeatedly uses and extolls: “restraint” (pp 31, 46, 60, 103). Judge Wilkinson declares, “It would thus take an extreme blindness not to discern that judicial restraint is a bedrock principle of America’s founding” (p 105). Judge Wilkinson’s theory of judicial review, repeatedly expressed, is that judicial restraint is good and judicial activism is bad, though neither of these terms is ever explicitly defined.

³⁹ For a definition of “constitutional theory,” see Richard A. Posner, *Against Constitutional Theory*, 73 NYU L Rev 1, 1 (1998) (“Constitutional theory . . . is the effort to develop a generally accepted theory to guide the interpretation of the Constitution of the United States.”).

Throughout the entire book, Judge Wilkinson expresses his constitutional theory of judicial deference to the elected branches of government. In his Introduction, he states,

In short, cosmic constitutional theory has done real damage to the rule of law, the role of courts in our society, and the ideals of restraint that the greatest judges in our country once embraced. But the worst damage of all has been to democracy itself, which theory has emboldened judges to displace (p 4).

This emphasis on democracy as majority rule, and judicial review being inconsistent with it, is expressed in every chapter in the book. Judge Wilkinson's central objection to living constitutionalism is that it has unelected judges usurping the choices of popularly elected officials (pp 20–22). He says that living constitutionalism “at heart is anti-democratic” (p 20) (quotation marks omitted). He declares, “In short, living constitutionalism is a complete inversion of democratic primacy and turns the Constitution's foremost premise of popular governance on its head” (p 20).

Judge Wilkinson defends his constitutional theory of judicial deference by extolling the virtues of the democratic process. He writes, “When a court declares certain rights or powers beyond the legislative capacity, Americans can no longer attempt to persuade their fellow citizens on these issues in the legislative arena and can no longer enjoy the intellectual and psychic satisfactions of reasoned republican self-rule” (p 26).

Judge Wilkinson's constitutional theory is evident in his criticism of *Roe v Wade*.⁴⁰ He says that decision “flunked simultaneously the three most basic interpretive tests”: it is not based on the text of the Constitution, nothing in the structure of the Constitution indicates that judges were to substitute their views for the legislatures', and nothing in the Framers' intent suggests that they meant to protect such a right (p 28). In other words, Judge Wilkinson does have a constitutional theory and “interpretive tests”; under this constitutional theory, a court is justified in protecting a right under the Constitution only if it is in the text or clearly intended by the Framers, or if there is something in the structure of the Constitution which indicates that it is a matter for judicial protection. This theory is remarkably like

⁴⁰ 410 US 113 (1973).

originalism, though he never recognizes this or acknowledges that he has made a traditional originalist critique of *Roe*.⁴¹

Throughout the book, he defends a constitutional theory that does not allow judges' personal policy preferences to be used in deciding cases. In Chapter 2, for example, in criticizing originalism, he explains the uncertainty of historical records and of the choice of the level of abstraction at which to describe the original understanding. He says "[t]he result is even more uncertainty, which creates even more space for judicial discretion. And in these spaces personal policy preferences sneak into law, with originalism covering their trail" (p 53). He observes that "[j]udges lifted high by the lofty promises of originalism are laid bare to the insidious temptations of personal preference" (p 57). In other words, once more, Judge Wilkinson is clear that he has a theory of judicial review: one in which justices' "personal preferences" play no role in decisions.⁴²

In Chapter 3, in discussing political process theory, he echoes this view that judicial review must avoid judicial value imposition. He writes: "Until recently, originalists could claim the high ground in debates about judicial restraint No more: *Heller* and *McDonald v. City of Chicago*[, 130 S Ct 3020 (2010),] showed originalism to be susceptible to the temptation of imposing judicial value judgments based on thin and shaky grounds" (p 68).

In Chapter 4, he criticizes the pragmatism of Judge Posner on the ground that it authorizes judges to engage in "policymaking" (p 95). His objection is that pragmatism causes courts to substitute their own judgments for those of elected officials and to become, in his words, "aggressive junior varsity legislator[s]" (p 88).

Judge Wilkinson's theory of judicial review thus can be summarized in a few principles that he states throughout the book:

- (1) American democracy means majority rule.

⁴¹ See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L J 920, 935–36 (1973) ("What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure.").

⁴² See, for example, *Michael H. v. Gerald D.*, 491 US 110, 127–28 n 6 (1989) ("Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.").

(2) Decisions by unelected judges declaring executive and legislative actions unconstitutional are inconsistent with majority rule.

(3) Judicial activism—implicitly defined as courts invalidating the acts of the elected branches of government—is bad. Judges deciding cases on the basis of their own views and preferences is bad.

(4) Judicial restraint—implicitly defined as courts upholding the acts of the elected branches of government—is good.

This is a theory of judicial review because it defines how judges should decide constitutional cases. Indeed, Judge Wilkinson uses these principles—his theory of judicial review—as the basis for criticizing decisions favored by both liberals and conservatives, ranging from *Roe v Wade* to *District of Columbia v Heller* to *Citizens United v Federal Election Commission*.⁴³ Not surprisingly, in each instance he is objecting to Supreme Court decisions that declared government actions unconstitutional.

I am perplexed that Judge Wilkinson doesn't recognize that he has, and throughout the book implicitly defends, a constitutional theory. I think it must be that it is so obvious to Judge Wilkinson that democracy means majority rule and that judicial review is incompatible with it that he therefore sees no need to defend these premises. His objection to constitutional theory is so great that he doesn't see that his book is arguing for one based on great judicial deference to elected government officials.

But, of course, he must have a constitutional theory. Judges must have some way of approaching the Constitution and of deciding when to declare the actions of the other branches of government unconstitutional. Even if the answer is never—and Judge Wilkinson does not go that far (pp 109)—that is still a constitutional theory.

III. THE FLAWS IN JUDGE WILKINSON'S CONSTITUTIONAL THEORY

The premises of Judge Wilkinson's analysis are familiar. Long ago, Professor Alexander Bickel wrote of the "Counter-Majoritarian Difficulty" and how judicial review is a "deviant

⁴³ 130 S Ct 876 (2010).

institution” in American democracy.⁴⁴ Many of the constitutional theories that Judge Wilkinson discusses—such as originalism and process theory—begin with the premise that democracy means majority rule and seek to reconcile judicial review with democracy.⁴⁵ Judge Wilkinson goes further in that he shows that all theories of judicial review are inconsistent with democracy defined as majority rule.

I have many disagreements with Judge Wilkinson’s constitutional theory. First, Judge Wilkinson’s emphasis on majoritarianism and judicial deference to the elected branches of government has no stopping point: Why have judicial review at all if the highest value is deference to the choices of elected officials? Why have judicial review at all if, as Judge Wilkinson argues, elected officials are better equipped to determine the Constitution’s meaning in modern circumstances and there are such grave costs and dangers to judicial review? There are those who have advanced such an approach, that courts should not have the authority to overturn the decisions of elected officials and that judicial review should be eliminated.⁴⁶

Judge Wilkinson does not go this far, but it is not clear why since that would seem to be the logical conclusion from his analysis. Judge Wilkinson provides and defends no role for the courts.⁴⁷ He explains what judges should not do—displace democratic self-governance—but never offers his account of when it is permissible for courts to overturn the decisions of the elected branches of government. An emphasis on majoritarianism by itself leads to the conclusion that there should not be any judicial

⁴⁴ Bickel, *The Least Dangerous Branch* at 16, 18 (cited in note 19).

⁴⁵ See, for example, Perry, *The Constitution, the Courts, and Human Rights* at 9–10 (cited in note 12); Ely, *Democracy and Distrust* at vii (cited in note 12); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 *Nw U L Rev* 549, 592 (2009); Bork, 47 *Ind L J* at 3 (cited in note 25); Bork, *The Tempting of America* at 163 (cited in note 12).

⁴⁶ See, for example, Mark Tushnet, *Taking the Constitution away from the Courts* 154 (Princeton 1999); James MacGregor Burns, *Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court* 252–53 (Penguin 2009).

⁴⁷ But see J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 *Va L Rev* 253, 254–55 (2009):

But if any one theme emerges when looking at the role of the courts in American history, it is this: when the channels of democracy are functioning properly, judges should be modest in their ambitions and overrule the results of the democratic process only where the constitution unambiguously commands it.

review.⁴⁸ He does not argue for that, but he never explains why that is not the appropriate conclusion from his premises.

In the last chapter, he praises the Supreme Court's decisions in *Brown*, *Gideon v Wainwright*,⁴⁹ and *Miranda v Arizona*.⁵⁰ He said that these are "success stories because they vindicated foundational principles essential to the functioning of our nation" (p 111). In other words, Judge Wilkinson says that it is permissible for courts to overturn democratic choices if they vindicate foundational principles essential to the functioning of the nation. But he never defines what this means. What are "foundational principles" and which ones are "essential to the functioning of the nation"? Is it really essential to the functioning of the nation that police give warnings before questioning suspects in custody? The nation functioned, albeit tragically, before *Brown*. In fact, Judge Wilkinson also provides a strong basis for criticizing each of these decisions. He says in the last chapter, "The more volatile the issue, the less justification there often is for constitutionalizing it" (p 108). Few constitutional issues have been more volatile than school desegregation, and *Brown* then was seemingly wrongly decided according to Judge Wilkinson's logic.

After identifying these few instances that he regards as the successes of judicial review, he declares, "But I doubt there are now *Browns* and *Gideons* waiting to be born" (p 111). If that is so—if judicial review is justified only in cases like *Brown* and *Gideon*, and these occasions no longer exist—then Judge Wilkinson really is calling for the elimination of judicial review.

Second, I disagree with the premise that democracy means majority rule. The United States is a constitutional democracy; the system of government created by it cannot be equated with majority rule. The Constitution itself is profoundly antidemocratic.⁵¹ No one alive today participated in its drafting or ratification, and most of us did not have ancestors who did. Even if the majority loathes it, or a part of it, that majority cannot change it unless a supermajority (as reflected in an action of

⁴⁸ See, for example, Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 Harv L Rev 43, 96–97.

⁴⁹ 372 US 335 (1963).

⁵⁰ 384 US 436 (1966).

⁵¹ See Chemerinsky, *Interpreting the Constitution* at ix (cited in note 12).

two-thirds of both houses of Congress and three-fourths of the states) agrees.⁵²

Nor is this coincidental or incidental to the American Constitution. It is meant to put the country's most important commitments in a document that is very difficult to change.⁵³ Indeed, so much of the Constitution was inherently antimajoritarian. The president is chosen by the electoral college, not the popular vote.⁵⁴ The members of the Senate were chosen by state legislators.⁵⁵ Supreme Court justices and federal judges are chosen by the president and confirmed by the Senate.⁵⁶ Of the four institutions of the federal government, only one, the House of Representatives, was elected by the people.⁵⁷

In other words, Judge Wilkinson's error is in not recognizing that it is the Constitution, rather than judicial review, that is the deviant institution in a system where democracy is defined as majority rule. By definition, any enforcement of the antimajoritarian constitution will be antimajoritarian.

In fact, if democracy is defined as majority rule, there never will be a way to reconcile judicial review with democracy. Whether the courts are following the Framers' intent or perfecting the process of government or adhering to traditions, it still entails unelected judges invalidating choices made by elected branches of government. This is why Judge Wilkinson is correct that constitutional theory is on a futile quest if it seeks to reconcile judicial review with majoritarianism.

But if American democracy is defined not simply as majority rule, but also as including the substantive values within the Constitution, then judicial review enforcing those values is actually furthering democracy. I believe, as many do,⁵⁸ that a preeminent role of the Constitution is to protect minorities who cannot protect themselves through the political process—whether they are unpopular individuals like criminal defendants, prisoners, dissidents, and enemy combatants, or racial minorities and groups

⁵² US Const Art V.

⁵³ Professor Laurence Tribe explained this well when he said that the Constitution is an elaborate edifice to make sure that society's short-term passions do not cause it to lose sight of its long-term values. Laurence H. Tribe, 1 *American Constitutional Law* 10–12 (Foundation 2d ed 1988).

⁵⁴ US Const Art II, § 1, cl 2.

⁵⁵ US Const Art I, § 3, cl 1, amended by US Const Amend XVII.

⁵⁶ US Const Art I, § 3, cl 1, amended by US Const Amend XVII.

⁵⁷ US Const Art I, § 2, cl 1.

⁵⁸ See, for example, Ely, *Democracy and Distrust* at 135 (cited in note 12); *United States v Carolene Products Co*, 304 US 144, 152 n 4 (1938).

that have been historically discriminated against.⁵⁹ A crucial flaw in Judge Wilkinson's approach to judicial review is that he fails to recognize the dangers of unchecked majoritarianism. When is the last time a legislature passed a law increasing the rights of criminal defendants or prisoners or enemy combatants? It is easy to romanticize self-government and democratic rule, but it is precisely because of distrust of majoritarianism and a fear of its excesses that the Constitution was adopted.⁶⁰ Judge Wilkinson never even acknowledges this.

Finally, Judge Wilkinson is engaged in an impossible quest to have judicial review without judges making value choices. In deciding whether a government action violates equal protection or infringes a constitutionally protected freedom, courts must decide whether there is a "compelling" or an "important" or a "legitimate" interest. Such a determination inevitably involves a value choice by the judges. Deciding whether a search or an arrest is "reasonable," as the Fourth Amendment requires, necessitates a value choice.⁶¹ There is no such thing as value-neutral judging and there never has been. In fact, even the choice to favor the decisions of the majority over the claims of constitutional challenges is a value choice by the judges.⁶²

CONCLUSION

For decades, justices and judges and constitutional scholars have been in a debate over constitutional theory. I despair over whether there is anything new or useful to say in the debate between originalism and nonoriginalism. It therefore is not surprising for someone to come along and say that all of the constitutional theorizing has been unsuccessful.⁶³

⁵⁹ See, for example, *Brown v Plata*, 131 S Ct 1910, 1923 (2011) (ruling in favor of releasing prisoners to remedy cruel and unusual punishment); *Boumediene v Bush*, 553 US 723, 771 (2008) (ruling in favor of Guantanamo detainees having access to habeas corpus); *Miranda*, 384 US at 492 (ruling that criminal defendants must be advised of their constitutional rights).

⁶⁰ See Federalist 10 (Madison), in *The Federalist* 56, 61–62 (Wesleyan 1961) (Jacob E. Cooke, ed).

⁶¹ See, for example, *Safford Unified School District # 1 v Redding*, 557 US 364, 379 (2009) (finding that strip searching a seventh grade student to find ibuprofen was unreasonable).

⁶² See Sheri J. Engelken, *Majoritarian Democracy in a Federalist System: The Late Chief Justice Rehnquist and the First Amendment*, 30 Harv J L & Pub Pol 695, 720 (2007).

⁶³ Nor is Judge Wilkinson the first to object to constitutional theories. See, for example, William Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U Fla L Rev 209, 233 (1983).

But what is surprising is that the critique is based on a simplistic definition of democracy as majority rule and a criticism of every theory as impermissibly having unelected judges usurp the decisions of electorally accountable individuals. It is a critique that leaves no role for judicial review, but the elimination (or near elimination) of judicial review is never defended.

Judge Wilkinson is surely right: a cosmic constitutional theory to reconcile judicial review with majority rule is impossible. But the lesson to be drawn is that he—and so much of constitutional theory—has been asking the wrong question. After all, long ago, Professor Bickel realized that “[n]o answer is what the wrong question begets.”⁶⁴

⁶⁴ Bickel, *The Least Dangerous Branch* at 103 (cited in note 19).