The Supreme Court, Constitutional Development, and Evolution Theory: A Critique

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This article spotlights how University of Chicago Professor David Strauss's publications present the early stages of a descriptive theory of constitutional interpretation and evolution, and how his theoretical contributions might be strengthened. Specifically highlighted here are ten milestone Supreme Court rulings with the objective of determining which were "evolutionary" as opposed to "modernizing," based on Strauss's theoretical formulations. On various occasions these cases demonstrate how Strauss's theory can be not only refined but broadened. The concluding section assesses Strauss's contribution to the study of American constitutional development and how it might be revamped. There we argue that despite Strauss's influence on the study of the Supreme Court and constitutional evolution, he relies on concepts that must be clarified and honed for future research, and he must make his theory more comprehensive. At a minimum, Strauss should extend his descriptive theory to three types of Supreme Court decisions: those that are retrogressive, revolutionary, and confirming status quo in nature. Finally, Strauss should attempt the most difficult task of all: developing a causal *theory of constitutional change.*

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INTRODUCTION

The United States Supreme Court's constitutional decisions have changed in extraordinary ways throughout American history. Only recently the Roberts Court handed down several important rulings that surprised observers with how much the new conservative majority departed from precedent.[1] Most notably, the Court both struck down *Roe v. Wade*,[2] abandoning the fundamental constitutional right of women to an abortion, and sharply curtailed the affirmative action admissions policies that Harvard College and the University of North Carolina used to diversify their student populations.[3] Yet while students of the Court meticulously study specific constitutional developments such as these from term-to-term, they must also keep in mind the larger picture: how transformational changes in constitutional law over time can best be understood and conceptualized. For this reason, we begin with the scholarship of Robert McCloskey, a Harvard political scientist and constitutional historian, as he presented the basic theory of major constitutional eras in his book, *The American Supreme Court*.[4] Then, after setting out in some detail McCloskey's theoretical foundation, our focus shifts to David Strauss of the University of Chicago Law School and his contribution to understanding constitutional development and evolution in the United States.

McCloskey envisioned the Supreme Court's history as consisting of three great constitutional periods, each lasting for decades and each characterized by critical

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1. *See, e.g.*, David Leonhardt, *The Impatient, Ambitious Five*, N.Y. TIMES (June 27, 2022).

2. 410 U.S. 113 (1973); *see Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022).

3. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. ___ (2023).

4. ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 15 (Sanford Levinson, revised, 6th ed. 2010).

political and legal issues. The first era spanned the period from the Constitution's ratification until the Civil War, when the nation faced repeated political collisions between those who favored nationalism and those who preferred states' rights. During this developmental epoch, the High Court endorsed and broadly construed the powers of the federal government under the new Constitution.[5] The second constitutional era, covering from the end of the Civil War to 1937, triggered momentous changes in the Court's work. Its focus went primarily from nation-state relations to the legal and political battle over how much government could regulate economic activity as America transitioned from an agricultural to an industrial economy. The second constitutional era was a period in which the Court shielded business from government control through its interpretation of economic liberty.[6] The third constitutional era, which McCloskey described as the civil rights era, began in 1937, as the Court once more changed policy directions, ultimately allowing extensive government regulation of business and the nation's economy. Previous problems associated with slavery now turned into a concern over the rights of African Americans and civil rights and liberties more generally. During the civil rights era the Court applied almost all the provisions of the Bill of Rights to the states and expanded the rights afforded to racial, religious, political, and sexual minorities, as well as those of criminal suspects and defendants.[7] In addition to his descriptive theory of three major constitutional eras, McCloskey proposed a *causal* theory of constitutional development, but we will wait until the concluding section to introduce it since Strauss has yet to attempt the same feat.

I. BUILDING ON MCCLOSKEY

This article focuses on a topic central to the work of both McCloskey and Strauss: leading Supreme Court rulings during the civil rights era and how they should be interpreted in terms of constitutional evolution and development. Since McCloskey's *The American Supreme Court* was published, except for originalist interpretations,[8] only one other major school of thought has survived on constitutional change. However, it goes by different names, which can be confusing depending on how they are used. The two most popular current theoretical characterizations of constitutional development are emphasized here.

First, many scholars—and some Supreme Court justices—have described the Court's decisions in terms of a "living Constitution."[9] This concept suggests that the

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5. *See generally id.* at chs. 3–4.

6. *See generally id.* at chs. 5–6.

7. *See generally id.* at ch. 7. Since McCloskey's original work in chapter 7, the Court's major decisions during the civil rights era have been explored in chapters 8 and 9 by Sanford Levinson of the University of Texas Law School. For an evaluation of McCloskey's theory, see Stephen C. Halpern & Charles M. Lamb, *The Supreme Court and New Constitutional Eras*, 64 BROOK. L. REV. 1183 (1998).

8. *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

9. *See, e.g.*, Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007); William J. Brennan, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 2 (1985); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976). As used by some

Constitution has been and should be interpreted to adapt to meet changing legal, political, economic, and social problems—an idea inherent in McCloskey's vision of constitutional history.[10] As Chief Justice Marshall famously wrote in *McCulloch v. Maryland*,[11] "we must never forget that it is a c*onstitution* we are expounding," and constitutions are made up of broad principles intended to "endure for ages to come, and consequently to be adapted to the various crises of human affairs."[12] Thus, for instance, even though the Constitution is written in unequivocal language with respect to some individual rights, such as "Congress shall make *no* law . . . abridging the freedom of speech, or of the press . . . ,"[13] the Court has frequently relied on Marshall's wisdom.

Second, some scholars contend that certain Supreme Court rulings represent "constitutional evolution." The same scholars even refer to the notion of a living Constitution in their writing but go beyond it to emphasize the concept of evolution.[14] Constitutional evolution is also intrinsic in Robert McCloskey's three constitutional eras framework, but probably the leading proponent of constitutional evolution today is David Strauss. Strauss has repeatedly depended on the idea of evolution, and its conceptual cousin, "constitutional modernization," to describe leading Supreme Court rulings during the civil rights era.[15] In relying on constitutional evolution, Strauss has been joined by Geoffrey Stone, also of the University of Chicago Law School, in their book, *Democracy and Equality*,[16] as explained below.

This article emphasizes Professor Strauss's publications, how they present the early stages of a *descriptive theory of constitutional interpretation and evolution*, and how Strauss's theoretical contributions might be strengthened. Specifically highlighted here are ten milestone Supreme Court rulings with the objective of determining which were "evolutionary" as opposed to "modernizing," based on Strauss's theoretical formulations. On numerous occasions the selected cases demonstrate how Strauss's theory can be refined in some ways yet broadened in others. The concluding section assesses Strauss's contribution to the study of American constitutional evolution and how it can be revamped for future research. There, we argue that, despite Strauss's considerable influence on the study of the

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scholars, the notion of an "unwritten Constitution" is very similar to, if not synonymous with, a "living Constitution." *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012).

10. *See generally* Halpern & Lamb *supra* note 7.

11. 17 U.S. (4 Wheat.) 316 (1819).

12. *Id.* at 407, 415 (emphasis in original).

13. U.S. CONST. amend. I (emphasis added).

14. *See, e.g.*, Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J. L. & PUB. POL'Y 67 (1988); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) [hereinafter Strauss, *Common Law*]; David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001) [hereinafter Strauss, *Constitutional Amendments*].

15. *See, e.g.*, Strauss, *Common Law*, *supra* note 14; Strauss, *Constitutional Amendments*, *supra* note 14. Strauss has cited McCloskey's publications on occasion but not with respect to his theory of three great constitutional eras.

16. GEOFFREY R. STONE & DAVID A. STRAUSS, DEMOCRACY AND EQUALITY: THE ENDURING CONSTITUTIONAL VISION OF THE WARREN COURT (2020).

Supreme Court decision-making and constitutional evolution, he relies on concepts that need to be clarified and polished. He should likewise make his theory more comprehensive, at a minimum extending it to three possible types of Supreme Court decisions: those that are retrogressive, revolutionary, and confirming of the status quo in nature. In addition to refining his descriptive theory of constitutional interpretation and evolution, Strauss should attempt the most difficult task of all: developing a *causal theory of constitutional change* that surpasses the elementary one of McCloskey, as discussed in the final section of this article.

II. THEORETICAL FUNDAMENTALS

McCloskey's theory of major constitutional eras and what causes the Supreme Court to move from one great era to the next is far broader than Professor Strauss's theory, which principally accentuates two concepts. First, constitutional development is evolutionary.[17] At its core, Strauss's concept of evolution indicates that certain Supreme Court rulings depart from or extend common law in a way that significantly affects fundamental doctrines in constitutional law for relatively long periods of time. Evolutionary decisions are not determined by the Constitution's text, according to Strauss; instead, they result from the Supreme Court's need to articulate somewhat different or entirely new breakthrough policies to meet the demands of an everchanging legal, political, economic, and social world.[18]

One would anticipate that evolutionary constitutional change occurred following blockbuster Warren Court holdings like *Brown v. Board of Education*,[19] *Mapp v. Ohio*,[20] *Griswold v. Connecticut*,[21] and *Miranda v. Arizona*,[22] although some—especially *Brown*—have had more of an effect on constitutional law than on real-world America. Strauss has described historical instances of constitutional evolution by using the following illustrations: "clear and present danger; reckless disregard of the truth; separation of church and state; the presumption of innocence; proof of guilt beyond a reasonable doubt; the *Miranda* warnings; the unlawfulness of race and gender discrimination—these legal concepts . . . are not in the text" of the Constitution.[23] Rather, these and many other key constitutional doctrines have evolved because of leading Supreme Court decisions. Strauss addressed this theme in another article when he argued that his evolutionary theory generally embraced the idea that many fundamental developments have occurred in various areas of constitutional law without the Constitution being amended. Early examples include:

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17. Political scientists also occasionally rely on some form of evolution theory in their work. *See* Edward G. Carmines & James A. Stimson, Issue Evolution: Race and the Transformation of American Politics (1989); Eric Schickler, Racial Realignment" The Transformation of American Liberalism, 1932–1965 (2016).

18. Strauss, *Common Law*, *supra* note 14; Strauss, *Constitutional Amendments*, *supra* note 14.

19. 347 U.S. 483 (1954).

20. 367 U.S. 643 (1961).

21. 381 U.S. 479 (1965).

22. 384 U.S. 436 (1966).

23. David A. Strauss, *New Textualism in Constitutional Law*, 66 GEO. WASH. L. REV. 1153, 1158 (1998).

> the Marshall Court's consolidation of the role of the federal government; the decline of property qualifications for voting and the Jacksonian ascendance of popular democracy and political parties; the Taney Court's partial restoration of state sovereignty; the unparalleled changes wrought by the Civil War; . . . [and] the rise and fall of a constitutional freedom of contract.[24]

More recent illustrations include:

> the great twentieth-century growth in the power of the executive (especially in foreign affairs) and the federal government generally; the civil rights era that began in the mid-twentieth century; the reformation of the criminal justice system during the same decades; and the movement toward gender equality in the last few decades.[25]

Strauss also asserts that the Supreme Court's incorporation of the Bill of Rights vis-à-vis the states was unmistakably an evolutionary development.[26] As a result, unlike in the early 1920s, nearly all constitutional principles of justice and fairness that initially forbade federal intrusions on individual rights now constrain state and local governmental action. Numerous Court holdings may have had evolutionary effects on American democracy, based on Strauss's theory, yet most did not dramatically influence the path of constitutional rights and liberties in the long run. However, Strauss has never provided a comprehensive list of evolutionary Supreme Court rulings; he has only asserted in different publications that certain decisions were evolutionary in nature. Otherwise, the reader must cull through his work, objectively interpret it, determine what is and is not an evolutionary decision, and leave with a sense of which rulings deserve to be on that list and why.

Second, Strauss relies on the concept of constitutional modernization, especially in his article, *The Modernizing Mission of Judicial Review*.[27] He has acknowledged that even though modernization through the use of judicial review has not been apparent in all areas of constitutional law, it has been the "dominant approach" in some key issues, including gender discrimination, cruel and unusual punishment, in addition to "the Commerce Clause, the religion clauses, constitutional criminal procedure, and other aspects of the Equal Protection Clause."[28]

Take the example of cruel and unusual punishment, which Strauss has maintained is a textbook illustration of constitutional modernization. By invoking the concept of a modernizing approach to judicial review, Strauss means "an approach that, more or less consciously, looks to the future, not the past; that tries to bring laws up to

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24. Strauss, *Common Law*, *supra* note 14, at 884.

25. *Id.*

26. David A. Strauss, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 47 (2015).

27. David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859 (2009).

28. *Id.* at 860. Strauss has claimed that *Brown* was "the most celebrated modernizing decision of all." *Id.* at 904. However, more often, he has insisted that *Brown* was an evolutionary ruling. *See, e.g.*, STRAUSS, *supra* note 8, at 85 (concluding that "*Brown* was the completion of an evolutionary, common law process, not an isolated, pathbreaking act.").

date, rather than deferring to traditions; and that anticipates and accommodates, rather than limits, developments in popular opinion."[29] After defining this concept, he shows how modernization was evident in a series of Eighth Amendment decisions extending from *Weems v. United States*,[30] through more recent rulings. Strauss notes that, in *Weems*, the Court held that the Cruel and Unusual Punishment Clause "'is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice' and that the Clause should be interpreted to enforce 'the evolving standards of decency that mark the progress of a maturing society.'"[31] Strauss explains that "[t]hese formulations, with their emphasis on evolution, enlightenment, and progress, are almost an explicit statement of the modernizing approach."[32] Here is a possibly redundant aspect in Strauss's theory, as some cruel and unusual punishment cases exhibit both constitutional evolution and modernization. Are these concepts separate and distinct? Should a theory composed of two concepts at least contain two clearly distinguishable ideas? We will return to this point in the concluding section.

III. *BOLLING V. SHARPE*[33]

With constitutional evolution and modernization in mind, we turn to ten eminent Supreme Court rulings from the civil rights era to see how Strauss has applied his theory, starting with *Bolling v. Sharpe*. In *Brown*,[34] writing for a unanimous Court, Chief Justice Warren declared that segregated schools inherently violated the Fourteenth Amendment's Equal Protection Clause. *Bolling* was announced the same day. In contrast to *Brown*, Warren's unanimous opinion in *Bolling* was based on an evolutionary interpretation of the Fifth Amendment and the Court's precedents in *Sweatt v. Painter*[35] and *McLaurin v. Oklahoma State Regents*.[36] As Strauss has observed, "the text of the Constitution did not dictate *Bolling*, to say the least; *Brown* did. This certainly seems to be one unmistakable example of how the unwritten Constitution works in our system."[37] Put otherwise, *Bolling* is "a case study in of how a constitutional principle with a very weak grounding in the text not only can be adopted but can become unquestioned and then extended."[38]

Factually, in *Bolling*, Congress had passed a law segregating public schools in the District of Columbia but, of course, the Fourteenth Amendment's Equal Protection Clause applies only to the states. Warren thus inserted what was necessary into the Constitution's text by reading an "equal protection component" into the Due Process Clause of the Fifth Amendment, thereby requiring that Washington, DC, public

29. Strauss, *supra* note 26, at 860.
30. 217 U.S. 349 (1910).
31. Strauss, *supra* note 26, at 864.
32. *Id.*
33. 347 U.S. 497 (1954).
34. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
35. 339 U.S. 629 (1950).
36. 339 U.S. 637 (1950).
37. David A. Strauss, *Not Unwritten, After All?* 126 HARV. L. REV. 1532, 1541 (2013) (reviewing AMAR, *supra* note 9).
38. *Id.* at 1543.

schools be desegregated like state public schools.[39] As Strauss has noted, that interpretation was not what the Fifth Amendment's framers had in mind, meaning that Warren's "conclusion would have to rely on evolutionary understandings and judgments of fairness and policy, rather than on the text alone."[40] Moreover, "the subsequent uncritical acceptance of the 'equal protection component' of the Fifth Amendment is even more dramatic. . . . But the way *Bolling*'s principle so easily became a fixture, despite its very dubious textual basis, is pretty striking."[41]

How did Warren explain his ruling in *Bolling*? He initially acknowledged the distinction between the Due Process and Equal Protection Clauses but observed that they are based on American notions of fairness and that they "are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of the law,' and, therefore, we do not imply that the two are always interchangeable phrases."[42] Yet, Warren insisted, "discrimination may be so unjustifiable as to be violative of due process,"[43] so the liberty provision of the Fifth Amendment could be used to prohibit racial discrimination in *Bolling*. And how are we to know when a particular type of discrimination is that unjustifiable? "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."[44] Because public school segregation could never be a proper governmental objective after *Brown*, Congress's statute must fall.

Strauss contends that changing political, legal, and social circumstances required the *Bolling* Court to read into the Constitution a principle that was imperative but not there, demonstrating how a liberal High Court can play a critical leadership role in American democracy when the legislative and executive branches cannot or will not act.[45] Thus, according to Strauss, *Brown* and *Bolling* both support his evolutionary theory; the Supreme Court moved from a notoriously conservative position in *Plessy v. Ferguson*[46] to a more liberal position in the 1950s, announcing that meaningful change was expected with respect to school segregation in all states as well as the District of Columbia.

IV. *GIDEON V. WAINWRIGHT*[47]

Clarence Gideon, a white indigent drifter, was accused of breaking and entering a poolhall, a felony in Florida. Claiming his innocence but without money for a lawyer, Gideon requested assistance of counsel from a Florida court, but his request was denied. Gideon was convicted, sentenced to five years in prison, but petitioned

39. *Bolling*, 347 U.S. 497, 498–99 (1954).
40. Strauss, *supra* note 26, at 44.
41. Strauss, *supra* note 37, at 1541. *See also* Strauss, *supra* note 26, at 43–45.
42. *Bolling*, 347 U.S. 497, 499 (1954).
43. *Id.*
44. *Id.* at 499–500.
45. Strauss, *supra* note 37, at 1540–41.
46. 163 U.S. 537 (1896).
47. 372 U.S. 335 (1963).

the Supreme Court in a famous hand-written plea, which ultimately led to a unanimous ruling in his favor.[48]

Delivering the Court's opinion in *Gideon*, Justice Black initially explained the controlling precedent, *Betts v. Brady*.[49] Betts was arrested for robbery in Maryland but was unable to afford counsel, so he asked that an attorney be appointed for him. The state judge responded that Maryland only appointed counsel where murder and rape were at issue.[50] At the Supreme Court, Justice Roberts's 6–3 majority opinion announced that the Fourteenth Amendment's Due Process Clause did not require that a state furnish counsel for a person tried for a noncapital criminal offense except under certain special circumstances. "That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances and in the light of other considerations, fall short of such denial."[51] Roberts noted that in *Powell v. Alabama*,[52] the Court overruled the state death convictions of nine young, indigent African Americans accused of rape, because court-appointed counsel had not effectively represented them, thereby denying them of a fair trial. However, since Maryland required that counsel only be appointed in capital—not noncapital—cases, Roberts ruled that the state court had not denied Betts of due process; his trial had been fair.[53] Roberts also noted that in *Johnson v. Zerbst* the Court interpreted the Sixth Amendment to require appointment of counsel in all federal cases involving indigents.[54] Nonetheless, in a large percentage of states, the people and their courts did not view the appointment of counsel as a fundamental right essential to a fair trial.[55] Thus, in *Betts*, the Court chose not to incorporate the right to counsel against the states. Black, who dissented in *Betts*, argued in *Gideon* that *Betts* was wrongly decided as it broke from precedent indicating that criminal suspects cannot receive a fair trial unless counsel is appointed for them. As Black famously remarked, "lawyers in criminal courts are necessities, not luxuries."[56] Even well-educated citizens often lack the skills needed to defend themselves. Accordingly, the Court overruled *Betts* and required that counsel be provided free to indigents in all noncapital criminal cases.

Stone and Strauss view *Gideon* as a groundbreaking evolutionary decision. "*Gideon*, like many Warren Court decisions expanding the rights of criminal defendants, had its roots in a dark chapter of American history," they write. "Between the two world wars, 'southern criminal cases . . . revealed Jim Crow at its worst."[57] Many southern Blacks, if impoverished and poorly educated, found it extremely difficult to effectively defend themselves when accused of a crime. Gradually, evolutionary Supreme Court decisions sought to correct these and other right to counsel problems, beginning with *Powell*, and continuing with *Zerbst* and *Gideon*.

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48. *Id.* at 336–38.
49. 316 U.S. 445 (1942).
50. *Id.* at 457.
51. *Id.* at 462.
52. 287 U.S. 45 (1932).
53. *Betts*, 316 U.S. at 471–72.
54. 304 U.S. 458 (1938).
55. *Betts*, 316 U.S. at 471.
56. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).
57. STONE & STRAUSS, *supra* note 16, at 53.

According to Stone and Strauss, however, the Sixth Amendment's original understanding did not include the idea that government should pay for an indigent defendant's attorney. In their words, "*Gideon* was not the product of a single decision by the framers but lessons learned over a period of years, beginning with *Powell*—the kind of evolutionary development of precedent that is characteristic of constitutional law. *Gideon*, in this respect, resembles *Brown* and other Warren Court cases."[58] Indeed, "many of the Warren Court's most important decisions, like *Brown* and *Gideon*, were not bolts from the blue. They built on what had gone before, in keeping with the evolutionary, precedent-based traditions of constitutional law."[59]

V. *REYNOLDS V. SIMS*[60]

The Warren Court's "reapportionment revolution" was critical to the development of civil rights in America, and *Reynolds v. Sims* illustrates why. The Alabama state legislature was generally apportioned based on population during the 1960s, but each county was given a minimum of one representative, and the state's legislative district lines had not been redrawn since 1900. As cities and towns grew, rural counties were drastically overrepresented in the state House of Representatives, and the state Senate was malapportioned, as well. Urban voters tested the constitutionality of this malapportionment, and a federal district court ruled that Alabama's apportionment scheme was unconstitutional based on *Baker v. Carr*.[61] The Supreme Court granted an appeal, ruling that the election of members of both houses of the state legislature must be based on the principle of one-person-one-vote to comply with the Equal Protection Clause.

Warren's 8–1 majority opinion in *Reynolds* emphasized that voting is a fundamental constitutional right.[62] In addition, "legislators represent people, not trees or acres," so vote dilution that occurs when rural areas are overrepresented is a form of discrimination in violation of equal protection. "To conclude differently," Warren warned, "would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result."[63] The seats in both houses of state legislatures must therefore be based on population, unlike Congress. Guaranteeing that each state had an equal number of seats in the U.S. Senate was essential during the Constitutional Convention to avoid quarrels between the larger and smaller states, but that federal analogy was not applicable to state legislatures.[64] Unlike the original states, political subdivisions within the states were never sovereign, and thus the federal analogy was not apropos. Finally, Warren directed all states to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."[65]

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58. *Id*. at 58.
59. *Id.* at 60.
60. 377 U.S. 533 (1964).
61. 369 U.S. 186 (1962).
62. *Reynolds*, 377 U.S. at 561–62.
63. *Id.* at 565.
64. *Id.* at 572–75.
65. *Id.* at 577.

If some Supreme Court decisions are evolutionary, could a small number be theoretically characterized as "revolutionary"? And, if so, does *Reynolds* qualify as a revolutionary ruling? In their book, *Democracy and Equality*, Stone and Strauss initially submit that *Reynolds* was revolutionary in nature. "Judged by many conventional criteria, the holding of *Reynolds* was very hard to defend. Judicial precedent did not support it; *Colegrove* [*v. Green*], decided not long before, was antithetical to *Reynolds*."[66] Moreover, "'one person, one vote' has no obvious basis in the text of the Constitution."[67] Stone and Strauss then pushed their assertion further: "The overall structure of the Constitution—which allows states to control voting, subject to specific nondiscrimination requirements that are provided in constitutional amendments—implies that the Court has no power to impose additional limits on the states' prerogatives," they wrote. "Even if the Court was justified in taking some steps to deal with malapportionment, the strict rule of population equality seemed to come out of nowhere."[68] Finally, "*Reynolds* required virtually every state in the Union to revamp its central government institutions. In that way, it flouted principles of federalism and judicial restraint to an unprecedented degree."[69]

This sounds like a persuasive argument that *Reynolds* was a revolutionary ruling, as a leading part of the Warren Court's "reapportionment revolution." Yet Stone and Strauss promptly make a different claim: that it was an evolutionary decision, or at least an influential piece of an evolutionary process. *Reynolds,* they say, "had foundations in American constitutional traditions, and it reflected a deep understanding of the Supreme Court's role in a democracy. American history is characterized by the evolution toward equality in voting rights,"[70] and *Reynolds* was a vital step in that development. As part of the evolutionary process, property qualifications for voting were eliminated; the Fifteenth Amendment guaranteed the right to vote irrespective of race, color, or previous condition of servitude; the Seventeenth Amendment stipulated that U.S. senators would be popularly elected; and the Nineteenth Amendment declared that women had the right to vote. In other words, *Reynolds* "was not inevitable, and was not compelled by history. But it was a logical next step that had secure roots in those long-standing American traditions."[71]

The differences in the first and second arguments suggest that the concepts of evolutionary and revolutionary Supreme Court decisions may be too malleable to be of general use. Where does one draw the line between the two? Nowadays, constitutional scholars can interpret them in various ways, as they wish. Although this is what legal minds are trained to do, this approach can present obvious problems from a social science perspective, as alluded to in the concluding section.[72] Greater

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66. STONE & STRAUSS, *supra* note 16, at 86–87. *Colegrove v. Green*, 328 U.S. 549 (1946), ruled that federal courts lacked the power to interfere with the malapportionment of congressional districts.

67. STONE & STRAUSS, *supra* note 16, at 87.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 88.

72. *See infra* Section XIII, notes 169–71 and accompanying text.

concept clarification and refinement are needed in the future if both concepts are to be retained and adopted as analytic tools.

VI. *KATZ V. UNITED STATES*[73]

Katz v. United States overruled *Olmstead v. United States*[74] and established a new privacy standard under the Fourth Amendment. In *Olmstead*, the Taft Court faced the question of whether the Fourth Amendment allowed federal law enforcement officials to use telephone wiretaps to secure incriminating evidence in a criminal case, without a search warrant, and whether that evidence was admissible at trial.[75] Chief Justice Taft persuaded four other justices to answer both questions in the affirmative. Taft maintained that the Fourth Amendment's purpose was to protect against unreasonable searches and seizures of tangible or material things.[76] As a consequence, the Fourth Amendment was not abridged in *Olmstead* because no search and seizure of "persons, houses, papers, and effects" occurred; instead, only the sense of hearing was used by federal prohibition officers to obtain evidence.[77]

Fast forward to *Katz*. Charles Katz, a gambler, was under surveillance by the FBI, which tapped a public telephone booth where Katz made a call, providing evidence of bet-making from a public phone in violation of federal law.[78] Katz claimed that the evidence was inadmissible under the Fourth Amendment because FBI agents bugged the phone booth without obtaining a search warrant, but *Olmstead* had held that the use of electronic eavesdropping devices did not intrude upon Katz's constitutional rights. Katz lost in the lower federal courts, but his attorney asked the Warren Court to rule that a public telephone booth is a constitutionally protected area.

Justice Stewart's 7–1 opinion for the *Katz* Court went beyond that concept, though, emphasizing that the "Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection," Stewart reasoned, "[b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[79] Based on this reasoning, Katz retained his right not to be overheard even though he used a public phone booth, and a telephone conversation is a thing that can be illegally seized given the Fourth Amendment. Under *Olmstead* and *Goldman v. United States*,[80] the Fourth Amendment limited only searches and seizures of tangible property, but now the Warren Court concluded that something intangible—like a phone call—was subject to constitutional protection, thereby overruling *Olmstead* and *Goldman.* Katz had a right to believe that his privacy would

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73. 389 U.S. 347 (1967).
74. 277 U.S. 438 (1928).
75. *Id.* at 455, 459.
76. *Id.* at 464.
77. *Id.*
78. *Katz*, 389 U.S. at 348.
79. *Id.* at 351.
80. 316 U.S. 129 (1942).

be protected while using a public phone booth, so this case constituted a search and seizure.[81]

Stone and Strauss believe that *Katz* "exemplifies" the notion of a living Constitution *and* constitutional evolution.[82] "The Warren Court's embrace of the 'Living Constitution' approach," they write, "rests on the premise that the framers of our Constitution sought to address the specific challenges facing the nation during their life-times, but also to establish fundamental principles that would sustain and guide our nation into an uncertain and evolving future."[83] Those who advocate the concept of evolutionary development "maintain that the framers understood they were entrusting future generations with the responsibility to draw upon their experience in an ever-changing world to give concrete meaning to these broad principles over time."[84] What is more, "under this approach, the principles enshrined in the Constitution do not change, but the application of those principles evolves as society changes, as technology changes, and as experience informs our understanding."[85] As a result, *Katz* stands for the idea that "wiretapping a telephone call is functionally indistinguishable from opening someone's mail," and "the meaning of the word 'search' must evolve over time if the Constitution is truly to fulfill the fundamental purposes and intentions of the framers."[86]

The difficulty with this account of *Katz* is twofold. First, it uses the concepts of constitutional evolution and a living Constitution interchangeably. If they are intended to be synonymous, that should be made clear at the outset, and it is not. That is, these two concepts are not systematically employed in some of Strauss's writings. Indeed, throughout his book, *The Living Constitution*,[87] the concept of evolutionary development is frequently used, with no clear explanation of exactly what it means or how it differs from the notion of a living Constitution. Having two different characterizations of the same concept, and employing one alongside the other, muddies what is essential: the theoretical as well as the substantive conclusions being communicated to the reader. Second, this assessment of *Katz* emphasizes the intent of the framers, whereas Strauss's other accounts of evolution often fail to allude to either the framers or their intent. Indeed, if Strauss mentions the framers in the context of constitutional evolution, it is frequently to say that their intent is either not ascertainable, or that its intent was not what the Court claimed it was in a particular case. And why is the framers' intent relevant to describe constitutional evolution in *Katz* when the framers could not have foreseen the technological advances that allowed the police to tap the phone booth in Katz's case in the first place, not to speak of the more advanced technology involved in later rulings like *White v. United*

81. *Katz v. United States*, 389 U.S. 347, 356 (1967).
82. STONE & STRAUSS, *supra* note 16, at 128–29.
83. *Id.*
84. *Id.* at 129.
85. *Id.*
86. *Id.*
87. STRAUSS, *supra* note 8.

States,[88] *California v. Ciraolo*,[89] *Kyllo v. United States*,[90] and *United States v. Jones*?[91]

VII. *NEW YORK TIMES V. UNITED STATES*[92]

In the Pentagon Papers case, the *New York Times* and the *Washington Post* had published articles in 1971 based on top secret government documents given to them by Daniel Ellsberg. The federal government sued the newspapers, asking a federal district court to issue a temporary restraining order to prevent the publication of other articles. The government, speaking for President Nixon, contended that the articles' publication would cause irreparable injury to national security, while the newspapers insisted that the material was largely of historical interest.[93] Eighteen days after the suit was filed in district court, a *per curiam* decision was handed down by the Burger Court in record time.[94] The 6–3 Court stressed that the federal government had a very heavy burden of proof to justify prior restraint. If it failed to meet that burden, the *Times* must be allowed to publish these documents, even though they were classified; after that, the government could file suit against the *Times* if it believed the newspaper had breached federal law.[95]

Although the Court's conclusions in *New York Times* were historic, the concurring opinions stand out in terms of constitutional interpretation. Justice Black claimed that the First Amendment was violated each moment that the *Times* was restrained. The press "must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints."[96] Besides, Black declared, the president had no inherent power to stop a newspaper from publishing, even where national security was implicated.[97] Justice Douglas contended that the First Amendment was designed to prohibit government suppression of embarrassing information.[98] "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors," he explained; "open debate and discussion of public issues are vital to our national health."[99] Justice Brennan also concurred, stressing that the First Amendment stood as an absolute bar to prior judicial restraints under these circumstances.[100]

What does Strauss say about *New York Times* and either constitutional evolution or modernization? He sees the former concept as solely applicable here.[101] Most members of the *Times* Court recognized "that prior restraints are anathema to a

88. 401 U.S. 745 (1971).
89. 476 U.S. 207 (1988).
90. 533 U.S. 27 (2001).
91. 565 U.S. 400 (2012).
92. 403 U.S. 713 (1971).
93. *Id.* at 714.
94. SHELDON GOLDMAN, CONSTITUTIONAL LAW: CASES AND ESSAYS 475 (1991).
95. *New York Times*, 403 U.S. at 713.
96. *Id.* at 717.
97. *Id.* at 723–24.
98. *Id.* at 724.
99. *Id.*
100. *Id.* at 725.
101. STRAUSS, *supra* note 8, at 75.

system of freedom of expression. To that extent, the Pentagon Papers decision can be traced to the intentions of the framers."[102] But this connection to evolution is not the only one that Strauss perceived. The imperative need to protect political speech, even if it has negative consequences for government, is the "central theme [that] emerged from the evolutionary process that is characteristic of our living Constitution."[103] More specifically, our freedom of expression law is "the product of common law evolution," Strauss declared. "It developed over time, fitfully, by a process in which principles and standards were tried and sometimes eventually accepted, sometimes abandoned, sometimes modified, in light of experience and an ongoing, explicit assessment of whether they were sound as a matter of policy."[104] In the end, Strauss wrote, "the law of the First Amendment is a creation of the living Constitution."[105] Hence, as with *Katz*, Strauss's evaluation of the Pentagon Papers case uses constitutional evolution and a living Constitution interchangeably.

VIII. *CRUZAN V. DIRECTOR, MISSOURI DEPARTMENT OF HEALTH*[106]

A remarkable case was argued before the Rehnquist Court on December 6, 1989. At the center of the case was twenty-five-year-old Nancy Beth Cruzan, who was thrown clear from her car in an automobile accident that took place in Missouri in 1983, leaving her in a permanent vegetative state. Although she could possibly live for another thirty years, permanent brain damage meant that Cruzan would forever be unconscious, with no ability to take food or liquid, and without any memory or any way to ever communicate with others.[107] Cruzan's parents initially approved of feeding tubes to keep their daughter alive even though a former housemate had testified at trial that Cruzan said, one year before her accident, that she would rather die than live in a vegetative state.[108] However, after four years Cruzan's parents requested that the feeding tubes be removed so she could die, hospital officials refused without a court order, and a state court subsequently found that Cruzan had a fundamental constitutional right to refuse treatment that prolonged her death. The Missouri Supreme Court denied that such a right existed.[109]

Chief Justice Rehnquist self-assigned the 5–4 opinion for the Court in *Cruzan*, holding that a state may require that evidence of an incompetent patient's wishes for the withdrawal of life-prolonging treatment must be clearly and convincingly proven.[110] Rehnquist steadfastly asserted that, here, individual rights under the liberty provision of the Due Process Clause did not outweigh the state's interest in protecting and preserving human life.[111] Missouri law required clear and convincing evidence that an incompetent person wanted to withdraw life-prolonging treatment so that he

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102. *Id.*
103. *Id.* at 76.
104. *Id.*
105. *Id.*
106. 497 U.S. 261 (1990).
107. *Id.* at 266–67.
108. *Id.* at 266–68.
109. *Id.* at 268–69.
110. *Id.* at 281–82.
111. *Id.* at 284–85.

or she might die and, again, the trial court testimony of a housemate indicated that Cruzan had declared that she did not want to exist in a permanent vegetative state.[112] Rehnquist nevertheless underscored that states obviously have an interest in preserving life and for that reason prohibited homicide and suicide. Aside from that, in litigation such as this, the state was justified in requiring high standards of proof, as a person's life is at stake, and there is no room for error. It was conceivable, for instance, that family members might not act to protect a patient. Here, then, Missouri was justified in requiring clear and convincing proof of Cruzan's wishes, and no such evidence was presented here.[113]

Strauss has said little about *Cruzan* in his published work, probably because he feels it represents neither constitutional evolution nor modernization. Still, this milestone case is included in this article for a reason. As indicated in the concluding section, *Cruzan* is a status quo confirming decision—a key point to keep in mind if we are to build upon and strengthen Strauss's theory of American constitutional development.

IX. *UNITED STATES V. VIRGINIA*[114]

A vital issue pertaining to women's equal educational opportunity was presented to the Rehnquist Court in *United States v. Virginia*. Virginia had a long tradition of providing military training for men at the Virginia Military Institute (VMI), with VMI's training designed to produce citizens and soldiers for leadership positions. The Department of Justice (DOJ) filed suit against Virginia, claiming that VMI's exclusion of women denied them equal protection. On the advice of a court of appeals ruling, Virginia then created a parallel program for women, known as the Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College; however, the VWIL did not use the same military methods as VMI and was not equal to VMI in various tangible or intangible aspects of education. The lower courts sustained the female alternative to VMI, and DOJ appealed.[115]

Justice Ginsburg, widely known as a women's rights advocate, wrote for a 7–1 majority, holding that Virginia defied the requirements of equal protection by excluding women from educational opportunities provided to men at an all-male military school if female applicants were capable of all the individual activities required of male cadets.[116] In addition, the parallel program for women in this case failed to provide equal tangible and intangible aspects of education and, therefore, did not provide an acceptable remedy for the Equal Protection Clause violation.[117] Ginsburg initially surveyed the nation's history of sex discrimination and related Supreme Court decisions. She highlighted that, according to *Mississippi University for Women v. Hogan*,[118] a state may avoid an Equal Protection Clause violation by demonstrating that a challenged legal classification based on gender served important

112. *Id.*
113. *Id.* at 284.
114. 518 U.S. 515 (1996).
115. *Id.* at 520–30.
116. *Id.* at 556–57.
117. *Id.* at 548.
118. 458 U.S. 718 (1982).

governmental objectives and that the discriminatory means employed were substantially related to the achievement of those objectives.

After emphasizing that a state's justification must be exceptionally convincing, Ginsburg concluded that Virginia presented no such justification for prohibiting women from attending VMI and that the remedy was inadequate to rectify the constitutional infringement. Although Virginia advanced two defenses for the challenged legal classification—that single-sex education contributed to diversity in educational approaches and that VMI's unique educational mold would need to be changed if women were admitted—Ginsburg found no support for these justifications given this infraction of the Equal Protection Clause.[119] Historically, diversity was not a goal of Virginia's support of the all-male academy, and the constitutional infringement here outweighed the significance of any changes that must be made in VMI's educational approach.[120] VWIL was inferior to VMI in both terms of tangible and intangible aspects of education and was not an acceptable remedy for the constitutional violation that occurred here.

Strauss's treatment of *Virginia* has been straightforward: it was a modernizing decision as well as the Court's "most important" sex discrimination ruling until that time.[121] The Court's use of modernization was appropriate in *Virginia*, Strauss wrote, because women were excluded from VMI "in an era when attitudes were so different from what they are today."[122] Perhaps, he noted, the issue could have been "whether a classification is in fact justified, not whether the people who adopted it had good reasons," but modernization required something quite different: that "a policy truly reflects a present-day political decision, made according to present-day ideas about women's role in society and the economy."[123]

X. *LAWRENCE V. TEXAS*[124]

Harris County, Texas, police caught John Lawrence and Tyrone Garner engaged in sodomy in 1998, in violation of a Texas law prohibiting homosexual conduct. Both Lawrence and Garner were found guilty of "deviant homosexual conduct" under this law and fined $200.[125] On appeal, a Texas court of appeals sustained the state's homosexual conduct statute.[126]

Given this backdrop, Justice Kennedy—who also wrote the Court's opinions in *Romer v. Evans*,[127] *United States v. Windsor*,[128] and *Obergefell v. Hodges*[129]—began *Lawrence* by addressing one of the most venerated concepts of democracy: liberty. Liberty "presumes an autonomy of self that includes freedom of thought, belief,

119. *Virginia*, 518 U.S. at 534–40.
120. *Id*. at 538–39.
121. Strauss, *supra* note 26, at 872.
122. *Id.* at 873.
123. *Id.*
124. 539 U.S. 558 (2003).
125. *Id.* at 562–63.
126. *Id.* at 563.
127. 517 U.S. 620 (1996).
128. 570 U.S. 744 (2013).
129. 576 U.S. 644 (2015).

expression, and certain intimate conduct."[130] Therefore, the question in *Lawrence* was whether the notion of liberty in the Due Process Clause of the Fourteenth Amendment allowed a state to make intimate sexual conduct between people of the same sex a crime. Kennedy replied in the negative; the government may not infringe on this critical aspect of liberty.[131]

Griswold[132] was the most relevant constitutional point of departure for *Lawrence*, according to Kennedy, although there were obvious differences in the two rulings.[133] *Griswold* addressed the fundamental right of intimate relations between a husband and wife, and Justice Douglas's constitutional reasoning in *Griswold* recognized the right to marital sexual privacy as a peripheral First Amendment right—that is, "the First Amendment has a penumbra where privacy is protected from government intrusion," much as it is under the right to association cases.[134] But Lawrence and Garner were not married, so where could Kennedy's constitutional reasoning in *Lawrence* go from there? His response featured two prominent precedents: *Eisenstadt v. Baird*,[135] which recognized the right of unmarried persons to possess and distribute contraceptives on the same basis as married persons, and *Roe*,[136] which proclaimed that states could not prohibit all abortions except those undertaken to save a mother's life, as such laws infringed on a woman's right to privacy. Kennedy next turned to *Bowers v. Hardwick*,[137] which held that there is no fundamental right for gay people to engage in consensual sodomy. Kennedy insisted that, in *Bowers*, the 5–4 majority failed "to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim"[138] in that case. Indeed, the claims in both *Bowers* and *Lawrence* went far beyond the right to engage in sexual acts; they had "more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home,"[139] and thus should not be criminalized. Kennedy concluded by arguing that other recent privacy rulings had left the *Bowers* precedent in doubt, including *Planned Parenthood of Southeastern Pennsylvania v. Casey*[140] and *Romer*. In the process, he reversed *Bowers*.

Lawrence is a modernizing decision, Strauss has claimed, because "in deciding what 'liberty' meant, the Court used, among other things, a more or less explicit modernizing approach. In addition, the Court's definition of 'liberty' left many things undecided—significantly, for modernization purposes."[141] Homosexual sodomy was not a traditional right, so the *Lawrence* Court "could assert only that 'the historical grounds relied upon in *Bowers* are more complex' than the *Bowers* Court had

130. *Lawrence v. Texas*, 539 U.S. 558, 558 (2003).
131. *Id.* at 564.
132. 381 U.S. at 479.
133. 539 U.S. at 564–65.
134. 381 U.S. at 483.
135. 405 U.S. 438 (1972).
136. 410 U.S. at 113.
137. 478 U.S. 186 (1986).
138. *Lawrence*, 539 U.S. 558, 567 (2003).
139. *Id.*
140. 505 U.S. 833 (1992).
141. Strauss, *supra* note 26, at 885.

suggested."[142] Strauss highlighted Kennedy's observation that our laws and traditions in the past half century'—rather than those of previous centuries—'are of most relevance here.'" Those more recent developments, according to the Court, "show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[143] Kennedy then surveyed a number of sources that indicated "the emerging awareness," including that "of the twenty-five states that criminalized sodomy at the time of *Bowers*, only thirteen still had such prohibitions, and just four 'enforce their laws only against homosexual conduct.'"[144] Thus, Strauss concluded, "[t]he *Lawrence* Court's emphasis on an 'emerging awareness' is an explicit commitment to modernization."[145]

XI. *OBERGEFELL V. HODGES*[146]

James Obergefell and John Arthur had been a same-sex Ohio couple for two decades, but as Arthur's health deteriorated, the two men traveled to Maryland where—unlike Ohio—same-sex couples were legally allowed to marry. Following Arthur's death, Ohio law also refused to allow Obergefell to be listed as the surviving spouse on Arthur's death certificate. Obergefell challenged this Ohio law and lost in the lower courts, but the Supreme Court agreed to hear the case.

Justice Kennedy's 5–4 *Obergefell* opinion ushered in a liberal new constitutional principle: that same-sex marriage is a fundamental constitutional right, and the Fourteenth Amendment's Due Process and Equal Protection Clauses require states to issue marriage licenses to same-sex couples and recognize same-sex marriages authorized in other states.[147] In reaching these conclusions, Kennedy principally addressed the concept of liberty, as in *Lawrence*, which includes the right to express "intimate personal choices that define personal identity and beliefs."[148] Within this notion of liberty is the right to enter into a same-sex marriage and to have it viewed as lawful because marriage is central to the "human condition."[149] Additionally, the right to marry had long been established under the Equal Protection Clause, as in *Loving v. Virginia*,[150] and same-sex couples were denied equal protection if a state only recognized marriages by opposite-sex couples.

How should *Obergefell* be assessed in terms of American constitutional development? Strauss has noted that the Constitution's text "made only a cameo appearance" in *Obergefell*.[151] The Court's opinion mainly relied on principles from "the Court's previous decisions; from 'the Nation's traditions'; and . . . from the Court's own essentially moral judgment that same-sex marriage should be

142. *Id.* (quoting *Lawrence*, 539 U.S. 558, 568–71 (2003)).
143. *Id.* (quoting *Lawrence*, 539 U.S. at 572).
144. *Id.* at 886 (quoting *Lawrence*, 539 U.S. at 572–73).
145. *Id.*
146. 576 U.S. 644 (2015).
147. *Id.*
148. *Id.* at 663.
149. *Id.* at 657.
150. 388 U.S. 1 (1967).
151. Strauss, *supra* note 26, at 6.

permitted."[152] The Due Process and Equal Protection Clauses were primarily relied on ceremonially, "as sources of inspiration, roughly in the way that a revered nonlegal document like the Declaration of Independence might."[153] *Obergefell* was therefore anchored in abstract constitutional notions, "but in substance it is a common law-like opinion; or at least a common law approach is broadly consistent with the Court's own analysis and provides the most secure justification for the Court's holding."[154] Consequently, the majority relied on precedents declaring that the right to marry is fundamental and that laws are unfair that disapprove of gay and lesbian relationships. Further, lower courts had often upheld same-sex marriage claims, and those rulings served as precedent, as well.[155] Ultimately, the *Obergefell* Court chose a morally preferable approach, which "is characteristic of the common law."[156] In the process, "precedents shape the text [of the Constitution], not the other way around,"[157] and common law constitutional interpretations best explain legal evolution—not originalist or textual interpretations.[158] Presumably, then, *Obergefell* was an evolutionary ruling.

XII. *BOSTOCK V. CLAYTON COUNTY*[159]

According to Strauss, *Bostock v. Clayton County* was an evolutionary decision, like *Obergefell* but unlike *Lawrence*. Gerald Bostock, a child welfare worker in Clayton County, Georgia, was fired for conduct unbecoming a county employee due to his sexual orientation and association with a gay softball league.[160] Ruling in favor of Bostock, Justice Gorsuch delivered the 6–3 opinion for the Roberts Court, concluding that an employer who dismisses an employee for being gay or transgender violates Title VII of the Civil Rights Act of 1964.[161] *Bostock* was an unprecedented interpretation of Title VII, which prohibits employment discrimination "because of race, color, religion, *sex*, or national origin."[162] Sexual orientation is not expressly mentioned in Title VII, but focusing on the prohibition of sex discrimination, *Bostock* dramatically broadened the meaning of sex to include sexual orientation. In Gorsuch's words, Title VII requires that "an individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[163] *Bostock*'s impact may be wide-ranging, as federal and state civil rights laws typically

152. *Id.*
153. *Id.*
154. *Id.* at 6–7.
155. *Id.* at 7.
156. Id.
157. *Id.* at 17.
158. *Id.* For an elaboration of this argument, see Strauss, *Common Law*, *supra* note 14; STRAUSS, *supra* note 8.
159. 140 S. Ct. 1731 (2020).
160. *Id.* at 1737–38.
161. *Id.* at 1754.
162. 42 U.S.C. § 2000e-2(a)(1).
163. *Bostock*, 140 S. Ct. at 1741.

prohibit sex discrimination. This may mean that, going forward, they are likely to be interpreted as prohibiting discrimination based on sexual orientation as well, which would make *Bostock* an evolutionary ruling, given Strauss's theory.

So how does Strauss assess *Bostock*? The Roberts Court reached the correct conclusion in *Bostock*, Strauss argued, but its reasoning was seriously flawed in other ways. Most importantly, Gorsuch's opinion was inconsistent with Congress's intent in passing Title VII and the way Title VII had been interpreted by the courts since 1964.[164] Moreover, Gorsuch's "narrow focus on the words of Title VII meant that [he] never considered the relationship between the issue in *Bostock* and the substantial body of constitutional law concerning sex discrimination, or the more recently developed constitutional protections for gay and lesbian people."[165]

Strauss believed that these weaknesses in Gorsuch's *Bostock* opinion are, by and large, explained by the Court's focus on Title VII's text alone (the phrase "because of … sex") "as if the answer has been there ever since 1964, awaiting only the majority's analysis of meaning and syntax to unlock it, and as if we have not learned anything in the intervening years."[166] As we would anticipate, then, Strauss concluded that constitutional evolution—not textualism—provided the proper basis for deciding *Bostock*. For instance, Strauss emphasized that the evolution of case law denouncing "discrimination against gender nonconforming individuals was essentially complete" by the time *Price Waterhouse v. Hopkins*[167] was decided, so "why was it not apparent, long before *Bostock*, that sexual orientation discrimination was illegal?"[168] Finally, Strauss extended his argument by comparing constitutional evolution in *Bostock* to two legendary racial segregation cases: *Plessy* and *Brown*.

XIII. REVISING EVOLUTION THEORY

We return to the main question addressed in this article: How are transformational changes in American constitutional law best understood and conceptualized? In answering this question, we have emphasized the work of two distinguished legal theorists: first, Robert McCloskey, but then, in far greater detail, David Strauss. Though simple, McCloskey's descriptive theory of three great constitutional eras in Supreme Court history was a breakthrough for its time. By contrast, Strauss has made an important contribution to the theory of constitutional development with his concepts of evolution and modernization. In myriad publications he has used these concepts to describe and compare Supreme Court decisions, especially those involving racial segregation and school desegregation, cruel and unusual punishment, sex and sexual orientation discrimination, freedom of speech and press, voting rights and reapportionment, and various aspects of privacy. Even so, Strauss's concepts must be revised as scholars continue to investigate McCloskey's original

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164. David A. Strauss, *Sexual Orientation and the Dynamics of Discrimination*, 2020 SUP. CT. REV. 203, 203–04 (2021).

165. *Id.*

166. *Id.* at 221.

167. 490 U.S. 228 (1989). *Price Waterhouse* ruled that gender stereotyping is actionable as sex discrimination under Title VII.

168. Strauss, *supra* note 164, at 221.

goal of determining when, how, and why fundamental constitutional change occurs over time.

First, Strauss's major concepts are vague and should be clarified and refined. Precisely what is the scope of the meaning of constitutional evolution, and how does it differ from the notions of a "living Constitution" or an "unwritten Constitution"? If any of those concepts are synonymous, we should acknowledge that at the outset; if they are not interchangeable, we should explain the exact differences using prominent High Court rulings as illustrations. Modernization seems to be a more transparent concept, but at times there are also problems in how Strauss employs it.

Consider an example: Was *Roe* an evolutionary or a modernizing decision? In 2010, Strauss described *Roe* as an evolutionary ruling because "a plausible, precedent-based, common-law case can be made for a woman's right to reproductive freedom" due to the "right to bodily integrity" and "the right to control the composition of one's family."[169] Yet the previous year Strauss maintained that *Roe* was a leading example of constitutional modernization. As he wrote then, although one can argue that *Roe* was evolutionary in nature, it "is still best seen as an exercise in modernization. Indeed, that may be one of the most satisfactory justifications for *Roe*."[170] According to Strauss, "it is difficult to make a case that there was a traditional right to obtain an abortion. The right to control one's bodily integrity, reproductive capacity, and family composition do have some basis in tradition and the common law, and in constitutional precedents." Yet "the problem comes in explaining why the state's interest in protecting fetal life did not override those rights; tradition (and, for that matter, moral reasoning) seems to be of little help on this point," he argued. "But the core idea of modernization—that the trend in the nation as a whole was toward allowing the abortion decision to be made by individual women—would have provided some basis for the decision in *Roe,* and that trend undoubtedly influenced the Court." In addition, "the more general trend toward a change in the status of women, which underlay the modernizing decisions about sex classifications, also must have played some role in the decision."[171] Apparently, *Roe* has been a hard case for Strauss to classify theoretically as it can be interpreted as both an evolutionary and a modernization ruling.

This raises another question: Does Strauss simply reshuffle his deck by concluding that constitutional evolution occurred when the High Court modernized its decisions via judicial review? This question can best be answered by comparing Straus's definitions for his modernizing and evolving constitutional concepts. Modernizing rulings have two things in common, according to Strauss. First, "modernization is, by nature, a centralizing approach, one that limits local or regional diversity in favor of a nationally uniform trend that, in the courts' view, is ascendant."[172] But based on Strauss's own admission as presented above, various evolutionary decisions, including *Brown, Reynolds, Gideon, Katz, Obergefell,* and *Bostock* also had centralizing effects on the American federal system. Second, "the decisions that engaged in modernization are all 'liberal' in the sense in which that

169. STRAUSS, *supra* note 8, at 94–95.
170. Strauss, *supra* note 27, at 901.
171. *Id.* at 887.
172. *Id.*

term is commonly used to describe Supreme Court decisions," Strauss wrote. "More generally, the term 'modernization' might be taken to suggest progress, as if the decisions necessarily move the law to a more 'modern,' and therefore better, state of the world."[173] But the concept of constitutional evolution—and even a "living constitution" or an "unwritten constitution"—can imply liberalism and constitutional progress. To use the same examples, *Brown, Reynolds, Gideon, Katz, Obergefell,* and *Bostock* certainly did. So how may we clearly distinguish constitutional modernization from constitutional evolution? Once more, greater conceptual clarity is necessary.

Second, new concepts should be advanced by Strauss and others to make evolution theory more comprehensive. Supreme Court cases that Strauss sometimes examines are "cherry-picked"—chosen to support his conclusions. The overuse of *Brown* in his work is obvious.[174] New concepts would make his descriptive theory more robust but would not help to explain the causes of constitutional change. At a minimum, then, Strauss should consider formally adding at least three new descriptive concepts to his decisional analyses: retrogressive decisions, revolutionary decisions, and confirming status quo decisions.

Strauss has suggested that retrogression might be a part of descriptive constitutional evolution theory, although he has only mentioned it once, in passing. Consider the larger context of Strauss's reference to retrogression. In commenting on the research of Ernst Young of Duke University, Strauss observed that constitutional "changes over time have not always been for the better. . . . As Professor Young says, any account of the Constitution and constitutional law has to acknowledge the possibility of retrogression, not just progress."[175] Unfortunately, Strauss has yet to expand on the concept of retrogression—or of any related concept—in his published work. Here, therefore, is one concept that should receive further attention as it could relate to various decisions, including *San Antonio School District v. Rodriguez*,[176] *Milliken v. Bradley*,[177] *New York State Rifle & Pistol Association v. Bruen*,[178] and *Dobbs v. Jackson Women's Health Organization*.[179]

Likewise, perhaps a small number of Supreme Court rulings have theoretically been "revolutionary." Strauss maintains that evolutionary adjustments in constitutional law are preferable to revolutionary alterations, but "revolutionary change remains possible, and tradition is not to be venerated beyond the point where the reasons for venerating it apply."[180] So, in the end, which of the Warren Court holdings constituted revolutionary constitutional change, and why was revolutionary development not preferable to evolution? It is not clear how Strauss would reply, yet

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173. *Id.*

174. *See, e.g.*, STRAUSS, *supra* note 8, at 77–92; STONE & STRAUSS, *supra* note 16, at 13–26; Strauss, *supra* note 37, at 1540–45; David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845 (2007).

175. David A. Strauss, *The Living Constitution and Moral Progress: A Comment on Professor Young's Boden Lecture*, 102 MARQ. L. REV. 979, 980 (2019).

176. 411 U.S. 1 (1973).

177. 418 U.S. 717 (1974).

178. 142 S. Ct. 2111 (2022).

179. 597 U.S. ___ (2022).

180. Strauss, *Common Law*, *supra* note 14, at 895.

it still is a worthwhile question. What part of the Warren Court "revolution" would Strauss object to, preferring a more evolutionary approach instead? Not *Brown*, for he describes it as "the completion of an evolutionary, common-law process, not an isolated, pathbreaking act."[181] Or take a different constitutional era and situation: if the doctrine of judicial review, as established in *Marbury v. Madison*,[182] represented a revolutionary constitutional development, what conceivable alternatives did Marshall, or his successors, have in order to establish the judiciary as a third coequal branch of government? If the power of judicial review is essential in this regard, why would *Marbury* not constitute revolutionary constitutional change? Perhaps it does, for Strauss says that judicial review is undemocratic, as the judiciary can overrule popular majority opinion. Nonetheless, he also has concluded that "most of us think that these 'undemocratic' features of our system [such as judicial review] are a good thing."[183]

The idea of confirming status quo decisions is inherent in Strauss's work, as it is in McCloskey's as well, but it is not singled out as a separate concept. Some cases like *Cruzan* obviously involve a category of rulings that are neither evolutionary, modernizing, retrogressive, nor revolutionary. A robust theory of constitutional development should contain concepts representing all basic aspects of real-world constitutional interpretation, including that the Supreme Court frequently upholds common law. In this sense, Strauss has not yet advanced a "theory," as his amplification of two concepts—evolution and modernization—falls short of what is needed to analyze constitutional development and Supreme Court policymaking on a grander scale.

Even more important, Strauss should clarify whether he is presenting a theory of constitutional *interpretation*, a theory of constitutional *causation*, or both. Although his theory of interpretation is apparent, some of Strauss's statements suggest causality, such as, "rules in constitutional law, like many other things in the world, are most often the *product*—the ongoing, unfinished *product*—of evolution."[184] By contrast, McCloskey described both the Court's evolutionary interpretation of the Constitution *and* proposed a causal theory by underscoring the enabling conditions that triggered basic constitutional changes from one great era to the next.

McCloskey's attempt to develop a causal theory of constitutional change initially recognizes that "the interests and values, and hence the role, of the Court have shifted fundamentally and often in the presence of shifting national conditions."[185] Given convulsive historical events or forces,[186] the Court has altered its focus, priorities, values, and policies in response to critical new political, legal, economic, and social

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181. STRAUSS, *supra* note 8, at 85.

182. 5 U.S. (1 Cranch) 137 (1803).

183. STRAUSS, *supra* note 8, at 47.

184. David A. Strauss, *On the Origin of Rules (with Apologies to Darwin)*, 75 U. CHI. L. REV. 997, 1013 (2008) (emphasis added).

185. MCCLOSKEY, *supra* note 4, at 208.

186. Halpern & Lamb, *supra* note 7, at 1189, define a convulsive historical event or force (CHEF) as a "dramatic, precipitous occurrence that disrupts the political foundations of the nation so deeply that the political system undergoes fundamental and enduring transformations." Yet a CHEF "does not cause a new constitutional period. It is a necessary, but not a sufficient, condition for producing that new era." *Id.* at 1190.

circumstances. Following the Civil War, for example, the Court "adjusted itself and the Constitution to the altered conditions of the postwar order. Old problems like slavery had been forgotten," McCloskey observed, as the Court's principal focus turned to property rights and free enterprise. "The process of redefining the Court's role, a process impelled by the transfiguration of the nation itself, was not complete to be sure," he noted, "but the enabling conditions had been met."[187]

Similarly, according to McCloskey, the Court adjusted its focus, priorities, values, and policies in the third great constitutional era away from property rights and toward minority rights. "History . . . had displaced the Court's old ideal of free enterprise,"[188] and the Court "faced a future in which its interests of seventy years past were no longer relevant."[189] But to remain relevant in the American legal and political system, the justices "needed to evolve a new sphere of interests and a new set of values to guide them within that sphere."[190] Again, the Court had to "reorient [its] interests, to formulate another system of judicial values, and to develop a role for the Court," especially because of the rise of totalitarianism in Germany and Russia, followed by the Cold War.[191] Obviously, McCloskey argued, considering these challenging international developments, the Court was forced to pay much greater attention to individual civil rights and liberties in America than it had in the past. McCloskey, ultimately, only suggested the early stages of a robust causal theory of constitutional change, but the idea that certain enabling conditions—be it the Civil War, the Great Depression, etc.—could force the Court to alter its focus, priorities, values, and policies went well beyond any theory of causation suggested by Strauss thus far. Whether Strauss has this goal in mind we know not, but if he does and accomplishes his objective, it will substantially enhance his contribution to the study of constitutional development and change in the United States.

Evolutionary theory can additionally be strengthened by applying basic quantitative techniques to Supreme Court voting behavior over time. Charles Lamb and Jacob Neiheisel used an approach for identifying liberal and conservative evolutionary trends in the justice's voting behavior on separation of powers, federalism, and economic rights cases.[192] In doing so, they described how constitutional law has evolved on assorted issues.[193]

CONCLUSION

In the final analysis, Strauss, McCloskey, and other scholars are correct in concluding that constitutional evolution has been an innate feature of Supreme Court decision-making ever since Chief Justice Marshall underscored its existence in *McCulloch*.[194] Constitutional evolution can be detected in a wide array of fields,

187. MCCLOSKEY, *supra* note 4, at 89–90.
188. *Id.* at 122.
189. *Id.* at 119.
190. *Id.* at 121.
191. *Id.* at 122.
192. CHARLES M. LAMB & JACOB R. NEIHEISEL, CONSTITUTIONAL LANDMARKS: SUPREME COURT DECISIONS ON SEPARATION OF POWERS, FEDERALISM, AND ECONOMIC RIGHTS (2021).
193. *Id.* at 10, 12, 22, 184, 185, 224, 225, 227, 236.
194. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

including civil rights and liberties, using qualitative and even quantitative techniques. There are, however, considerable difficulties in how the concept has been used in the past. From a research perspective, Supreme Court students of all stripes should refine the and build upon the basic concept of constitutional evolutionary development as a permanent aspect of the Court's role in American democracy, while also striving to develop a causal theory of how constitutional law evolves over time.