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HISTORICAL CONSCIOUSNESS: HOW THE U.S. SUPREME COURT UNDERSTANDS TIME

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Abstract

HISTORICAL CONSCIOUSNESS: HOW THE U.S. SUPREME COURT UNDERSTANDS TIME

Laura A. Cisneros

This dissertation explores the complex relationship between time, history, and judicial decision-making in the U.S. Supreme Court under Chief Justice John Roberts. I address the Court's prevailing "present-past" orientation—a tendency to anchor decisions in historical precedent without adequately considering the differentiating power of time to alter the experience of living under the Constitution. This approach, while respectful of tradition, often results in judicial outcomes that fail to resonate with the dynamic conditions of contemporary society.

I interrogate this issue from a philosophical—as opposed to political—perspective by applying Henri Bergson's concepts of "duration" and "simultaneity" to reveal the temporal aspects of Supreme Court decision-making. Bergson's philosophy provides a framework for critiquing the Supreme Court's static view of history. When applied, that framework suggests that legal precedents should not be seen as fixed points but as evolving constructs that must be interpreted in light of current societal contexts. The dissertation contrasts the Court's historical approach with what I call a "present-future" orientation—one where the Constitution's founding principles are adapted to the experiences of modern Americans.

The dissertation argues that the Roberts Court's historical consciousness, with its emphasis on static interpretations of the past, often constrains the Court's ability to

engage with the Constitution as a living document that must answer to contemporary contingencies. Further, the dissertation reveals a real but often overlooked dynamic of judicial opinion writing—namely, that precedent cases self-differentiate over time and thus must constantly be checked to ensure their continuing relevance to contemporary experience. This has significant implications for the Court's role in shaping legal principles that are responsive to modern challenges.

I conclude by proposing a method for rethinking constitutional interpretation—one that embraces the fluidity of time and history as integral to judicial creativity. This approach would allow the Supreme Court to better fulfill its role as a guardian of constitutional values in a manner that is both historically informed and future-oriented, thereby ensuring that its decisions remain relevant to the lived experiences of the American people.

INTRODUCTION

If asked to explain the connection between the English Game Act of 1671 and modern gun control laws, most Americans would be hard-pressed to respond. The two things seem worlds—and centuries—apart. So, for many observers, it was strange to watch members of the United States Supreme Court debate whether English law in the 1670s allowed individual gun ownership for non-military purposes such as hunting and home protection, and then use the results of that debate to determine whether a recent gun control ordinance adopted by the City of Washington, D.C. violated the right to bear arms guaranteed by the Second Amendment of the Constitution.[1] But that is exactly what the Court did in *District of Columbia v. Heller*, 554 U.S. 570 (2008). Justice Scalia, writing for the majority, and Justice Stevens, writing for the dissent, went at it hammer and tong, trying to outduel each other with references to "historic" legal precedent that either supported or undermined the city's effort to prohibit private ownership of handguns.

The outcome of the "history" debate in *Heller* is not the subject of this dissertation, though, for the record, Scalia convinced four other justices, including Chief Justice John Roberts, that the city's anti-handgun ordinance offended the Second Amendment and had to be struck down. Rather, this dissertation seeks to understand why that debate—and others like it—have come to characterize how the Roberts Court applies constitutional law to contemporary problems. Every case, it

[1] US Constitution, amend. 2, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

seems, is subjected to a historical analysis, the results of which then guide the Court's adjudicatory process. This approach often, but not always, leads to decisions that are considered politically conservative, even regressive. In *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 215 (2022), for example, the "conservative" and "liberal" factions within the Court sparred over whether the long-standing tradition of prohibiting abortion, which was followed from the Nation's founding until 1973 when *Roe v. Wade* was decided, trumped the more recent, almost-50-year practice of protecting a woman's right to choose when and if to terminate a pregnancy. By a 6-3 vote, the Court held that it did, thereby giving each State the ability to outlaw abortion if it wished to do so.

I am less interested in the politics of these decisions than in the mind-set that produces them. That is, I want to investigate the Court's use of history to make decisions on constitutional questions; I want to interrogate philosophically whether the Court properly understands how time, memory (especially collective memory), and history form the context within which the Constitution can and must be applied to a given case. In short, the purpose of this dissertation is to examine whether the Constitution, as delivered to the American polity through the opinions of the Supreme Court, matches up with, or at least resembles, the experience of the Constitution as lived by contemporary Americans.

A. Examining the Supreme Court as an Intertemporal Actor, Not a Political One

This dissertation analyzes how the Court navigates and orients itself to the temporal structure of past, present, and future. I explore the phenomenological concept of time consciousness through the lens of the Supreme Court's awareness of the passing of time represented through its judicial opinions. Building upon this phenomenological inquiry, I argue that the historical expressions of time consciousness in the Roberts Court's opinions exhibit a "present-past" orientation to time, which tends to weaken the Court's ability to recognize how time—not as a spatially defined fixture on a line, but as a living force of human construction—changes the Constitution even when the constitutional text remains unaltered.[2] This

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[2] Aleida Assmann, *Is Time Out of* Joint, trans. Sarah Clift (New York: Cornell University Press, 2020, introduction). In *Is Time Out of Joint?* cultural memory scholar, Aleida Assman, interrogates the evolving temporal orientations of our understanding of the past, the present, and the future. Assman observes a notable shift in our perception of the future, which has seemingly lost its once utopian allure. The once prevalent optimism for a progressive and improved future appears to have been eroded by a multitude of formidable challenges, including the depletion of natural resources, the environmental degradation attributable to technologically advanced societies, climate change, and water crises (Assmann, 4). Concurrently, Assman identifies an "unprecedented return of the past," manifested through a surge of aggressive nostalgia, the resurgence of traumatic memory, and the proliferation of atavistic origin narratives anchored in constructs of nation, race, or tribe (Assmann, 5). She attributes this to a significant shift in the fabric of Western temporality, where a dwindling fascination with the future coincides with an intensifying preoccupation with the past. (Assmann, 5). She notes that this observation resonates with insights provided almost twenty years prior by cultural theorist Andreas Huyssen, who highlighted a similar temporal shift from future orientations to an increased focus on the past, writing:

> "One of our most surprising cultural and political phenomena of recent years has been the emergence of memory as a key concern in Western societies, a turning point toward the past that stands in stark contrast to the privileging of the future so characteristic of earlier decades of twentieth-century modernity. From the early twentieth century's apocalyptic myths of radical breakthrough and the emergence of the "new man" in Europe via the murderous phantasms of racial or class purification in National Socialism and Stalinism to the post-World War II American paradigm of modernization, modernist culture was energized by what one might call "present futures." Since the 1980s, it seems, the focus has shifted from present futures to present pasts, and this shift in the experience and sensibility of time needs to be explained historically and phenomenologically." Andreas Huyssen, "Present Pasts: Media, Politics, Amnesia," *Public Culture* 12, no. 1 (Winter 2000): 21.

investigation further exposes the potential threats to freedom posed by the Roberts Court's specific interpretation of historical consciousness.

At a basic level, a present-past orientation to time is a backward looking orientation to time. However, what the concept of present-past time orientation entails is more complex than that. It is helpful to think about present-past in relation to its opposite, present-future. Under a present-future orientation, decisions in the present are focused on actualizing a future understood as a space for creation and coming fulfillment. Conversely, a present-past orientation places the greater emphasis on the past instead of the future. Under a present-past orientation, decisions in the present are focused on restoring/recovering the traditions of the past. Here, the future becomes the repository of a reversion to a previous state.

The study of history allows us to reflect on the past and envision a future shaped by our collective experiences. However, the politicization of history and the shifting notions of progress pose challenges to our understanding of the past, present, and future. By recognizing these transformations and exploring their implications, we can gain a deeper appreciation for the complexities of history and its significance for the Court's shaping of the constitutional experience. To unpack the Roberts Court's time consciousness, it is necessary to interrogate how the Court constructs remembered history.[3]

[3] The phrase "remembered history" is not conventionally attributed to a single originator but is a conceptual framework that surfaces within the broader field of memory studies. The idea generally refers to the ways in which societies and individuals remember and interpret historical events, as distinct from "recorded history," which refers to the official documentation of those events. However, several scholars have significantly contributed to the development and popularization of this concept exploring the ways in which history is remembered, interpreted, and transmitted within societies,

The interplay of politics and ideology often serves to obfuscate our understanding of time as duration—i.e., the dynamic flow of time that interpenetrates experience. This invariably fosters a climate of cynicism about judicial creativity, overshadowing its fundamental role in the evolution and preservation of constitutional jurisprudence. The pervasive influence of politics, often manifested in ideologically-driven agendas, can disrupt our perception of time, reducing it to a linear sequence of events instead of a continuous flow. This reductionist perspective hampers our comprehension of time as an ongoing process, a dynamic medium within which the law lives, breathes, and evolves.

Furthermore, this political and ideological interference inhibits our ability to appreciate the inherent creativity within the adjudicatory process. Instead of

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shaping the understanding of "remembered history." See for example, Maurice Halbwachs, *On Collective Memory,* trans. Lewis A. Coser (Chicago: University of Chicago Press, 1992), 50-51 (arguing that memories are not mechanical inscriptions of the past on the mind, but a continuous and creative reconstruction under the influence of current concerns, pressures and fears.); Pierre Nora, "Between Memory and History: Les Lieux de Mémoire," *Representations*, no. 26 (1989): 7-24. (A French historian known for his work on *"lieux de mémoire"* (sites of memory), this article outlines Nora's theory that collective memory is anchored in physical spaces and symbols, which serve as repositories of communal memory and identity.); Aleida Assmann, *Cultural Memory and Western Civilization: Functions, Media, Archives,* 1st English ed. (New York: Cambridge University Press, 2011) (focusing on cultural memory as a way societies use texts, images, rites, and practices to remember and forget their past; emphasizing the role of media, symbols, and institutions in the construction and transmission of cultural memory across generations; and investigating how cultural memory shapes collective identities and the processes by which certain narratives become central to a culture's understanding of itself.); and Jan Assmann and John Czaplicka, "Collective Memory and Cultural Identity," *New German Critique* 65 (1995): 125-133 (distinguishing between communicative memory, which encompasses the lived experiences of the recent past, and cultural memory, which involves the long-term memory of a society that extends beyond the bounds of living memory.) But see, Jan Assmann, *Moses the Egyptian: The Memory of Egypt in Western Monotheism* (Cambridge, MA: Harvard University Press, 1997) (addressing the concept of collective memory by focusing on how groups use narratives, symbols, and shared practices to construct a common identity and understanding of history); Jan Assmann, *Cultural Memory and Early Civilization: Writing, Remembrance, and Political Imagination* (Cambridge: Cambridge University Press, 2011); and Paul Connerton, *How Societies Remember* (Cambridge: Cambridge University Press, 1989) (focusing on and examining how collective memory is constructed and traditions are transmitted through embodied practices).

recognizing judicial imagination as an essential instrument for maintaining the responsiveness and relevance of constitutional jurisprudence, we are led to view it with skepticism and mistrust. This undermines the recognition of judicial creativity as a constructive and necessary force that safeguards the Constitution's vitality, keeping it attuned to the lived experiences of the American people.

In the discourse of constitutional law and judicial behavior, the terms "judicial action" and "judicial activism" are often considered interchangeable.[4] However, a more nuanced understanding reveals distinguishing characteristics between the two. While both terms encompass a range of judicial activities—such as reading cases and briefs, hearing oral arguments, and drafting opinions—their implications diverge significantly based on the philosophical and political context of the Court's decision-making process.

Judicial action, as I define it, refers to the Court acting philosophically. It involves the application of legal principles and theories in the process of adjudication, interpreting the Constitution, and shaping legal doctrine. It is an intellectual engagement with the law, where judges seek to maintain coherence with the pre-existing legal framework while addressing the present case's unique complexities. In

[4] For a discussion of the practice of judicial action conflated with the concept of judicial activism, see for example, Jack M. Balkin, *The Cycles of Constitutional Time* (Oxford: Oxford University Press, 2006), 80-81 (arguing that perceptions of judicial activism and restraint shift based on the Supreme Court's docket, composition, and the specific issues it addresses, leading liberals and conservatives to alternate advocating for or against judicial review over time based on the political climate and the changing priorities of each ideological group.); see also, Kermit Roosevelt, III, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions* (New Haven: Yale University Press, 2006), 2-3 (arguing that judicial activism is largely a rhetorical term, used subjectively to criticize judicial decisions with which the speaker disagrees, lacking a consistent, objective definition).

performing judicial action, justices do not act as mere conduits for legal principles but actively engage with those principles, ensuring their evolution aligns with the philosophy underpinning the Constitution.

On the other hand, judicial activism is the Court acting politically. It occurs when Justices attempt proactively to shape policy outcomes through their rulings, often extending beyond the traditional boundaries of judicial interpretation. Justices become activist when they consciously or unconsciously allow their personal beliefs, political ideologies, or perceptions of public opinion to influence their decision-making process. The term judicial activism often carries a pejorative connotation, suggesting deviation from the perceived neutrality and objectivity ideally associated with judicial roles. In essence, the distinction between judicial action and judicial activism lies in the philosophical and political aspects of judicial behavior. Understanding this divergence is crucial for a comprehensive analysis of the Court within the broader constitutional system.

My objective is to explore the workings of the Supreme Court's adjudicatory task beyond the confining dichotomy of judicial activism and judicial restraint, which often reduces constitutional interpretation to a political contest. Instead, I aim to uncover the role that temporality plays in both the action and deferral inherent to judicial decision-making. By focusing on the temporal nature of these processes, I aspire to shed light on how time influences the very act of judgment, shaping the dynamics of constitutional interpretation and development. This approach brackets the politicized debates of judicial activism and restraint, instead concentrating on the

philosophical underpinnings of judicial action. By doing so, it opens up a new avenue for understanding the intricacies of constitutional adjudication and the philosophical dimensions that underlie it.

B. Using Continental Philosophy to Break the Deadlock Created by Current Constitutional Theories

For more than 40 years, scholars and judges have been locked in a debate over which of two theories of constitutional interpretation – originalism or nonoriginalism (sometimes referred to as "living constitutionalism" – should prevail. The debate has produced no definitive winner, just long stretches of doctrinal impasse occasionally punctuated by moments when one approach achieves primacy over the other. These periods of dominance are inevitably short-lived, lasting only until academics and Supreme Court justices favoring the other approach regain strength, mount a counter-attack, and gain sway. Little progress is thus achieved. This dissertation addresses the deadlock engendered by these two prevailing methodologies (and their various permutations) in constitutional theory by integrating insights from continental philosophy with a specific emphasis on phenomenology and existentialism. These philosophical perspectives introduce a frame of reference typically absent in mainstream constitutional discourse.[5] My goal is to broaden the interpretative lens

[5] Phenomenology and existentialism began influencing American constitutional theory in the mid-20th century. These philosophical frameworks enabled scholars to critique the abstract, impersonal nature of traditional constitutional analysis by emphasizing human experience and individual agency. Key issues included judicial interpretation, the nature of rights, and the role of personal identity in legal reasoning. See for example, Duncan Kennedy, "A Left/Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation," *Legal Reasoning Collected Essays* (Colorado: The Davies Group, 2008) (critiquing the formalist and positivist approaches of Hart and Kelsen, proposing instead a phenomenological perspective that emphasizes the subjective experience of legal actors and the socio-political context influencing legal interpretation; this work argues for a more fluid and contextual understanding of legal texts aligning with leftist and critical legal theories); Drucilla Cornell, *The*

and cultivate an enriched understanding of constitutional dynamics, thereby moving beyond the constraints imposed by the existing theoretical paradigms.

I argue that substantive and linguistic elements of contemporary constitutional theory fail to understand the qualitative aspect of the lived constitutional experience.

In an effort to address this theoretical deficiency, I draw on the works of a host of continental philosophers, especially Henri Bergson, but also Martin Heidegger, Walter Benjamin, Paul Ricoeur, and Gilles Deleuze, not as the primary subjects of inquiry, but as intellectual interlocutors in our understanding of the Supreme Court's approach to constitutional decision-making. This is not an analysis of their philosophies per se. Instead, it is a study conducted in conversation with their ideas, so as to explore the historical consciousness of the Court and its understanding of the role time plays in the Court's constitutional adjudicatory process.

I use Bergson's concept of time as duration to examine the Supreme Court's approach towards precedent. I conclude that precedent is never not-new; rather, it is continually evolving. Each time a precedent case is brought forward, it undergoes a

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Philosophy of the Limit (New York: Routledge, 1992) (integrating existentialist and phenomenological insights into feminist legal theory; this work combines phenomenological and existentialist insights to challenge traditional legal theory, focusing on the role of identity, ethics, and the concept of justice beyond formal legal structures); Robert M. Cover, "The Supreme Court 1982 Term: Foreword: Nomos and Narrative," 97 *Harvard Law Review*, *4* 1983 (emphasizing the narrative and cultural context of constitutional law; this work explores the relationship between law and narrative, arguing that legal texts must be understood within their broader cultural and social contexts, thus highlighting the phenomenological aspect of law as a lived experience); Lon L. Fuller, *The Morality of Law*, 2nd ed. (New Haven: Yale University Press, 1969) (applying phenomenological principles to argue for a natural law perspective on legal interpretation; this work critiques positivist legal theory and argues for a connection between law and morality, emphasizing the importance of legal processes and the lived experience of individuals within the legal system). While these scholars individually received acclaim for their work, their approaches were generally considered marginal in mainstream legal academia. However, they have had a significant impact on critical and interdisciplinary legal studies.

process of internal self-differentiation, triggered by the unique circumstances of the new case into which it is incorporated. I also investigate the relationship between temporality and several critical dimensions: experience, language, and history. The purpose of this exploration is to reassess the Supreme Court's capacity to respond aptly to the societal imperatives of the day.

This dissertation seeks to cultivate an understanding of temporality that can bolster effective critical inquiries and inform examination of the actual situations, issues, and experiences of the Constitution in light of their articulation in the Court's jurisprudence. The intent is to navigate beyond the impasse created by the political and linguistic limitations that the two dominant models of constitutional theory—originalism and nonoriginalism—impose. In doing so, this work seeks to show that judicial attention to constitutional temporality opens up a wider range of legal responses to contemporary problems. This could lead to a more nuanced appreciation of the Constitution's dynamism and the Court's role in shaping it. Ultimately, the hope is to offer resources for future engagement with the Court's opinions beyond the nakedly political.

C. Using Bergsonian "Duration" to Assess the Disconnect Between the "Constitutional Experience" and the "Experience of the Constitution"

At various points throughout this dissertation, I use the terms "constitutional experience" and "experience of the Constitution." The repetition of the word "experience" and the root "constitution" in the two may suggest that they are interchangeable. They are not. While they are closely related, as both ideas associate

experience with the Constitution, there is a difference between constitutional experience and the experience of the Constitution.

I use the phrase "constitutional experience" to define a particular type of experience. The term "experience" is modified by the term "constitutional," meaning that the experience satisfies criteria that the Court has identified as constitutional in nature. These decisions announce accepted norms of what is constitutionally acceptable behavior at any given time.

On the other hand, the experience of the Constitution refers to the subjective experience of living under the universal constitutional experience established by the Court. It is the individual (and group) experience of conducting one's life in accordance with what the Court's interpretation of the Constitution accepts as constitutional and rejects as unconstitutional.

The distinction between constitutional experience and the experience of the Constitution provides valuable insights into how the Court uses history in its judicial decisions. While it may be tempting to read these decisions as representations of the overtly political, the objective here is not merely to acknowledge the political nature of judicial decisions or to assert that the Court employs history for political purposes. Although that preliminary assessment aids in identification, it falls short of deeper comprehension. Adopting such a unifocal approach limits our understanding, leading to an impasse where the Court's decisions are evaluated solely based on political affiliations. This leaves little room for critique beyond the stalemate of ideologically opposed positions. The point is not simply to acknowledge that the Court's

production of the constitutional experience, expressed though its decisions, can be interpreted as reflecting a political ideology. Rather, it is to gain a nuanced understanding of how the Court's use of history is deployed in this process of politicization. By comprehending how the Court perceives and aligns itself with the concept of time, we can better grasp the impact on both the constitutional experience established by the Court and the lived experience of the Constitution for individuals under its jurisdiction.

This examination of the intersection—or disconnect—of constitutional experience and the experience of the Constitution demands that we explore how the Court understands time and its role in shaping collective memory, because it is our collective memory that the Court both taps into and then returns to us in modified form each time it uses history to resolve a constitutional legal challenge.

D. Memory, History, and Dialectics at a Standstill

As I discuss in Chapter 2 of this dissertation, memory is an integral feature of our cognitive processes that shapes our perception and understanding of the world. It serves as a bridge between our individual experiences, the collective history of humanity, and the passage of time. Memory engages with the past not only as a repository for storing and retrieving knowledge, but also as a dynamic mechanism for reflection and learning from historical experiences. To understand this engagement, one must explore memory's operation within the flow of time itself. Within the context of the Court's constitutional decision making, this exploration provides insight into the influence of collective recollection on the construction of acceptable

legal argument and the formation of legal principles – that is, the Court's production of constitutional experience. I argue that recognizing memory as a temporal synthesis of past, present, and future enhances our ability to assess and critique that production.

Understanding time as duration is central to this exploration of the Court's historical consciousness and its impact on the interpretation and application of constitutional law. I argue that duration provides a more effective tool for analyzing the Court's construction of the constitutional experiences, going beyond a linear and progressive trajectory of law's development. Recognizing time as duration infuses a dynamism into historicity that acknowledges the inherent movement and mobility of historical development.[6]

Bergson's concept of time as duration emphasizes the subjective and qualitative aspects of time rather than its quantitative measurement. He describes duration as the continuous flow of lived experience, where the past, present, and future are interconnected and constantly interpenetrate.[7] As discussed below, the Court's opinions often suggest that the Justices do not appreciate or care that law – especially constitutional law – *must* penetrate, and be penetrated by, human

[6] In the context of philosophical discussions, "motion" generally refers to physical displacement or change in position, typically involving the observable, measurable movement of objects. "Mobility" can encompass a more abstract, conceptual understanding of movement emphasizing dynamic, transformative, and relationship aspects of change. The concept of mobility can extend beyond physical displacement to include changes in states, conditions, and perspectives.

[7] Henri Bergson, *Duration and Simultaneity: With Reference to Einstein's Theory,* trans. Leon Jacobson (Indianapolis: The Bobbs-Merrill Company, Inc., 1965), 44. "There is no doubt but that for us time is at first identical with the continuity of our inner life. What is this continuity? That of a flow or passage, but a self-sufficient flow or passage, the flow not implying a thing that flows, and the passing not presupposing states through which we pass; the thing and the state are only artificially taken snapshots of the transition; and this transition, all that is naturally experienced, is duration itself."

experience, lest it become a dead but oppressive force that attempts to enclose us in a static past.

Bergson disrupts the conventional view of memory. He does not see it as a passive recording of past events, but rather as an active and creative process. For him, authentic memory involves a dynamic interchange between the past and the present. It is not merely a reproduction of facts, but a selective and creative engagement with the past that contributes to the ongoing process of becoming.[8]

Bergson's idea of temporal simultaneity challenges a linear understanding of time. He believes that human authenticity necessitates an awareness of the coexistence of different temporal moments. In other words, the past is not simply a distant history but actively participates in shaping the present. Authentic engagement with time, according to Bergson, involves acknowledging this simultaneity.

The other thinker who shadows Bergson in this dissertation, who provides insights that augment Bergson's ideas and fills their lacunae, is Walter Benjamin. Benjamin's concept of "dialectics at a standstill" emphasizes moments of interruption and crisis in historical time, challenging the notion of history as a seamless progression. This idea provides a counter-point to Bergson's "duration", which posits time as a continuous flow, anchored in subjective experience. Integrating these

[8] Bergson, *Duration and Simultaneity*, 44 (elaborating on duration as a form of memory: "[Duration] is memory, but not personal memory, external to what it retains, distinct from a past whose preservation it assures; it is a memory within change itself, a memory that prolongs the before into the after, keeping them from being mere snapshots appearing and disappearing in a present ceaselessly reborn.").

theories, it could be argued that historical time is characterized by an ongoing stream of lived experiences punctuated by standstills and radical discontinuities.

Benjamin's notion of *kairos*, denoting transformative moments of revelation and opportunity, aligns with Bergson's focus on intuition and immediate experience. Both philosophers underscore the significance of non-linear, qualitative dimensions of time in shaping human perception. A synthesis of these concepts suggests that instances of *kairos* represent immersive encounters with the more authentic experience of Bergsonian duration.

Memory, as conceptualized by both Benjamin and Bergson, also contributes to our understanding of time and history. Benjamin's assertion that the past can be illuminated in moments of sudden insight parallels Bergson's view of memory as not mere recollection but a dynamic, creative process. Merging these ideas yields further insights into how memory acts as a nexus between standstills in historical time and the fluid continuity of duration.

Applying this synthesis of Benjamin and Bergson's philosophies to constitutional law can broaden the Court's historical consciousness and understanding of time. By recognizing the interplay between standstills and duration in historical time, the Court can acknowledge that while its rulings may represent momentary declarations of the law, these are not immutable. They are originary points that provide a settled place from which to start again, but they do not define the nature or essence of the law for all time. Consequently, the law can be seen as a living entity, subject to the continuous flow of lived experiences and the transformative potential of

kairos moments, an understanding that could contribute to a more dynamic and responsive jurisprudence.

It is important to note that this qualitative focus on temporal experience does not seek to replace quantitative metrics. The latter remain an important tool in our interpretative arsenal. Quantitative metrics provide a necessary means of spatializing and representing the experience of time in language, thus allowing us to communicate and be understood by others. Rather than displacing quantitative metrics, understanding time as duration is about reconfiguring the relationship between time and space, between experience and language.

In essence, Bergson's philosophy invites us to see time and space as interdependent and interpenetrative. It encourages us to approach them not as dichotomous entities, but as complementary aspects of our lived reality that shape and inform each other. By incorporating this perspective into our interpretation of constitutional law and precedent, we can foster a more expansive and inclusive understanding that better reflects the complexity and richness of the human experience.

Conducting a temporal synthesis, following the principles of Bergson's thought, entails engaging with time's depth through intuition, transcending time's spatialization, leveraging the active role of memory, and embracing the creative potential of the present moment. This process is not a mere philosophical abstraction; it assumes a practical, lived reality that mirrors the fundamental nature of human existence and freedom.

To further understand the concept of temporal synthesis, derived from Bergson's philosophy, it is necessary to explore time in its multidimensional aspects. Bergson's perspective on time, or "*durée*", is that it is an intuitive, lived experience, a continuous and indivisible reality. This view positions time not as a sequence of discrete moments but as a dynamic amalgam of past, present, and future. Suzanne Guerlac writes, "For Bergson, time is always flowing and consciousness is always just working through this flow. Paradoxically, time becomes energy by passing, by losing itself in the very act of becoming, and by being stored through memory. There is a sense in which we are always already in the past."[9] In other words, time is active, it transforms into energy in its very passage, in its act of becoming, and through its preservation in memory. This transformation underscores that time is a force. Such a notion introduces a temporal dimension that assumes we naturally see ourselves as always being rooted in the past.

This natural feeling that we are always already in the past, undergirds Bergson's emphasis on the importance of engaging with the concreteness of lived experience, as opposed to abstract conceptualizations. Abstraction drains time of its force, weakening time's essential aspect. And because our cognitive comprehension of flowing time is inherently limited, we can only transcend the abstract by apprehending the experience of different qualities at different moments. In essence,

[9] Suzanne Guerlac, *Thinking in Time: An Introduction to Henri Bergson* (Ithaca: Cornell University Press, 2006), 80. Guerlac notes that this "sense that we are always already in the past" is derived from Bergson's early work in *Matter and Memory.* (Guerlac, 80 n. 38 "In *Matter and Memory*…Bergson will claim that memory does not involve a movement from the present back into the past but rather a movement from the past toward the future.").

Bergson urges us to shift from an abstract intellectual gaze to a focus on the concrete lived experience.[10] This shift, grounded in the concrete and subjective experience of time, allows for a more nuanced understanding of the temporal flux as it is truly lived.

This intertemporal aspect of judicial decisions underscores how the Court, akin to human consciousness, does not merely react to the past but engages with it in a continuous dialogue. This dialogue not only shapes the Court's interpretations but also molds the very nature of legal reality. It suggests that, in both law and life, we are constantly engaged in a temporal synthesis, blending past experiences with present realities to shape future actions.

This perspective lends a fresh view on the role of imagination and creativity in the Court's decision-making process. Here, we can see that creativity – the act of production – is deeply engaged with memory, because of memory's ability to influence decision making by carrying the past into the present. This suggests that while the justices are influenced by precedents, their decisions are not just predetermined outcomes but are creative acts that integrate memory, present understanding, and future implications.

Applying Bergson's philosophy to legal precedent can instigate a significant shift in perspective regarding the continuity and evolution of legal thought and practice. This shift in perspective urges us to reorient our view of legal precedents as isolated past incidents and recognize them as integral components that inform our

[10] In reading constitutional law with Bergson I do not put forward a call for a complete shift, but rather a call to add the subjective experience as understood within the context of Bergson's concept of time as duration to the intellectual gaze.

present and future decision-making process – a process that is inherently creative. This perspective accentuates the fluidity and complexity of legal reasoning, mirroring the fluid and complex nature of human consciousness and memory as described by Bergson. By adopting this philosophical lens, our understanding of how legal decisions are made and how they echo through time is enriched, offering a deeper appreciation of the temporal dynamics at play in the legal field.

E. Structure of this Dissertation

This dissertation consists of six chapters.

Chapter 1 is titled "The Roberts Court and Interpretive Impasse." There, I describe how the Supreme Court, under the leadership of Chief Justice John Roberts, has shown an increasing reliance on "historical" analyses to determine the outcome of constitutional challenges. I explain that the Court majority favors a form of constitutional interpretation known as "originalism" which has a strong rear-facing orientation and tends to encourage the use of history to decide cases. To illustrate how the Roberts Court deploys history in an originalist fashion, I conduct a "close-read" of two court opinions, both authored by Chief Justice Roberts, that involve the constitutionality of certain provisions of the 1965 Voting Rights Act. As these case analyses show, there is often a disconnect between the "history" that the Court feels bound to honor and the lived experience of contemporary Americans.

Chapter 2 is titled "Bergsonian Duration as a Means to Re-Actualize Lived Experience in the Constitutional Context: Time, Memory, and History." Here I explain the philosophical foundations of Henri Bergson's theories regarding time and

memory and how they ultimately affect the way we interact with the world through action, through experience. I discuss Bergson's ideas on time and memory in relation to those of other thinkers, including Albert Einstein, Martin Heidegger, Walter Benjamin, and Paul Ricoeur, among others. The point of this discussion is to gain an understanding of Bergsonian duration from a philosophical perspective so that I can use it later to engage with the Supreme Court and it interpretive methodologies on a level that goes beyond politics. In short, I want to show that Bergson's ideas on time as a force of differentiation, properly understood, can be applied to constitutional problems in a way that responds to contemporary conditions while remaining faithful to the principles that inform the Constitution. This, however, requires a substantial exploration into how individual memories, the very things that affect—and are affected by—time, are translated into collective memories. I also discuss how collective memories, at least in the American context, are sometimes converted into "constitutional" memories.

Chapter 3—titled "Duration and Simultaneity: Imbuing History with Meaning"—introduces the Bergsonian concept of "simultaneity". As I explain, Bergson uses the term simultaneity in an unusual way. It does not connote two things happening at the same point in time, at least not along a standard linear chronograph. Rather, Bergson defines simultaneity as the process by which two events, however much they may have been separated by space or clock-time in their original entry into the world, come together within the memory and image-making mind of a human being. As I show, Bergsonian simultaneity is what allows us to move fluidly,

ceaselessly, between the past and present, and to project ourselves into the future, based on disparate experiences that nevertheless possess qualities that allow us to connect them together. This, I argue, is exactly what the Supreme Court justices do when using former case rulings (i.e., legal precedent) to inform their reasoning in similar cases that subsequently come before them. In short, simultaneity, whether Supreme Court justices realize it, is the only authentic mode of judicial action; everything else is politics.

Chapter 4—titled "Simultaneity, Difference, and Legal Precedent"—builds on Chapter 3's discussion of simultaneity by introducing the key concept of difference (or, to put it in Deleuzean terms "differentiation"). Difference, especially self-differentiation, is actually what defines each thing in the world exposed to the force and mobility of time. In other words, all things, no matter how immutable they appear, change in response to time. I explain that this concept, whether applied figuratively or literally, applies perfectly to the judicial process of *stare decisis*—i.e., the use of legal precedent—because precedent cases, despite being fixed in space-time or homogeneous time, are never "not new". Each time they are cited in a new court opinion, they are re-actualized and re-animated, but not in their original form. The flow of time and the experiences it carries along with it necessarily change the original case, though not a word of that case is ever altered.

Chapter 5 is titled "The Search for a Better Method: Applying Simultaneity to Supreme Court Cases." In this chapter, I conduct a Bergsonian durational analysis—using simultaneity and differentiation—to show how a seminal Supreme Court

decision (here, *Brown v. Board of Education*) is deployed and redeployed in subsequent cases dealing with racial segregation in schools. Through this analysis, I show how the original *Brown*—what I call (B)—changes each time it is cited or relied upon in subsequent cases. Although each of those subsequent cases remains faithful to the text of the original *Brown* (B), they nevertheless alter its meaning, so that (B) becomes (B1). It is this process of differentiation that is the very essence of *stare decisis*. But there is more to it than that. It is not enough to recognize that (B) changes to (B1) and later to (B2) and (B3), et cetera, each time it is cited in a new case. Courts must also grapple with why the *Brown* decision handed down in 1954 (B) has changed. Few court opinions ever conduct such an analysis. I interrogate this issue extensively because it represents a significant analytical failure in most legal reasoning, at least when applied to constitutional cases.

Chapter 6 is titled "Constructing Constitutional Time: *Kairos* and Seizing the Now." In this Chapter, I use Walter Benjamin's concept of messianic time—sometimes referred to as "kairos"—to augment Bergson's theories of duration, simultaneity, and difference. I argue that Benjamin, though a dialectical thinker in a way that Bergson was not, nevertheless complements Bergson and offers a way to reimagine—and re-image—constitutional law, at least during those moments of crisis when the existing *nomos* cannot answer the current legal controversy. Benjamin, I maintain, offers a vision of the Constitution that is forced to evolve but does not break.

CHAPTER 1

THE ROBERTS COURT AND INTERPRETIVE IMPASSE

In this chapter, I discuss the Supreme Court's tradition of looking to historical evidence—historical referents—when confronted with cases that implicate the Constitution and its various amendments. There is nothing legally or logically wrong with this practice, at least in the abstract. And one can explain it as ontologically compatible with modes of interpretation which, of necessity, must establish a tether, however remote, to a historical document—here, the Constitution itself.

What I take issue with, and what I will illustrate, is the Roberts Court's over-reliance on historical assessments to determine whether a particular statute or governmental action—local, state, or federal—is consonant with the Constitution. More fundamentally, I intend to show that the Roberts Court not only conducts history poorly; it often does so by making time stand still, by forcing it to occupy space statically, without recognizing it as a force of change, of differentiation. I critique the Court for its failure to appreciate that time dynamically affects how the Constitution is lived and thus how it should be applied to circumstances which could not have been anticipated by any epiphany of the constitutional Founders. I will show that, even when issuing an opinion that is politically progressive (or at least appears to be so), the Roberts Court, through its application of static historical analysis, impedes the otherwise natural course of jurisprudence to meet life as experienced in the homes and streets and on the land where Americans interact with the law.

A. The Roberts Court and Its Use of History in Decision-Making

In thinking about how the Roberts Court constructs remembered history through its judicial opinions, this dissertation borrows the ideas about memory presented by Henri Bergson in *Time and Free Will* and *Matter and Memory: Essay On the Relation of Body and Spirit.*[11] The latter work is Bergson's response to French psychologist Théodule Ribot's 1881 publication, *The Maladies of Memory*, in which Ribot argued brain science proved that memory has a material nature and is located within a distinct section of the nervous system.[12] Bergson opposed this reduction of memory to matter, offering instead a more nuanced understanding of the ontological nature of memory.

Bergson claimed there are two types of memory. The first he described as habit memory, which refers to the automatic repeating of learned past action.[13] This type of memory is not recognized as representing the past as such. Instead, habit memory consists of those actions inscribed within the body that automatically respond to external stimuli. Habit memory functions in a utilitarian way for the purpose of acting in the present.

The second type of memory Bergson identified as pure memory. This type of memory registers the past in the form of "image-remembrance," which represents the past as such.[14] This type of memory is contemplative. Bergson used the example of

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[11] Henri Bergson, *Matter and Memory: Essay on the Relation between the Body and the Mind,* trans. N.M. Paul and W.S. Palmer (New York: Zone Books, 1990).
[12] Théodule Ribot, *Diseases of Memory* (*Les maladies de la mémoire*, 1881; English Translation, 1882) London: Kegan Paul, Trench & Co.
[13] Bergson, *Matter and Memory,* 78.
[14] Bergson, *Matter and Memory*, 88.

learning a verse by rote to explain the difference between the two types of memory.[15] Habit memory results in the ability to mechanically and non-reflectively recite the verse. Here, memory functions to clarify the habitual behavior. Pure memory, by contrast, provides a remembrance of the lesson of learning the verse. It is the memory of the qualitative experience itself. The dated fact of the learned lesson cannot be repeated. For example, one cannot recreate the act of learning the verse for the first time again. The repetition of learning the verse after the first time and any subsequent time is inherently different by nature of its repetition. However, the remembrance of pure memory not only acknowledges that the lesson has been learned in the past, it also registers the qualitative experience of learning that lesson. In other words, the image-remembrance captures the sensory components associated with learning the lesson (e.g., feelings of frustration while learning, feelings of accomplishment and pride after committing the verse to memory, etc.).

Memory is dynamic in that it pulls the unconscious past into the present to be actualized. In this sense, the past and present have a dynamic and interdependent relation. The past shapes the present, and the present continuously recontextualizes the past. This dynamic relationship highlights the inter-reliance of the two, as they continuously influence and inform each other. Memory is constantly changing in relation to ongoing events, which shape and contextualize past events. The past provides the foundation upon which the present is built, while the present, in turn, reinterprets and gives new meaning to the events and experiences of the past. This

[15] Bergson, *Matter and Memory*, 79-81.

dynamic nature of their relationship underscores the ongoing dialogue between the past and the present, shaping our understanding of history and the progression of time.

Memory is not a weakened version of the past.[16] It is an active interlocutor with the past which, along with time consciousness, is co-constitutive of history. The use of the conjunctive "and" and the choice of the word "relation" in Bergson's title, *Matter and Memory: An Essay on the Relation of Body and Spirit,* are telling as they convey that the exchange between materiality and spirit is not exclusively causal, i.e., the relation is not unidirectional (always from body to mind or always from mind to body). Instead, body and mind are engaged in a reciprocal relationship where elements of each influence and contribute to the formation and constitution of the other. Awareness of the mutually reinforcing connection between the two becomes significant when considering history. History is a tool that shapes narratives, which can have far reaching consequences. As such, an awareness of orientation to the temporal structure is vital.

The Roberts Court makes a critical error in its approach to history. While the Court claims to use history to gain an understanding of the Constitution through the original public meaning of the past, its opinions often demonstrate a focus on the political implications held in the present moment. This tendency toward a politicized approach to history obscures the underlying issue of how the concept of history and the notion of the future have been transformed over time.

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[16] Bergson, *Matter and Memory*, 67.

I use the term "tendency" to qualify the Roberts Court's politicized approach to history because while an acknowledgement of politics cannot be ignored, this investigation is not limited to or even predominantly about the purely political. A purely politicized approach to history often overshadows the fundamental question of how the judicial use of history has evolved over time. By focusing only on the political implications of historical narratives, ideas about what history is for and the relation of historical understanding to the future become obscured.

The Supreme Court's use of history to answer constitutional questions is not a new development.[17] Chief Justice John Marshall relied on the historical pedigree of the First Bank of the United States to begin the Court's analysis of the constitutionality of the Second Bank of the United States in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).[18] Nearly two hundred years later, the Court affirmed

[17] History has always played a role in the Court's decision-making process. Although there has been a renewed interest in memory due to changes in our perception of and orientation to the modern time regime (see note 2), some scholars have consistently emphasized the significance of the relationship between history, law, and memory. See for example, *History, Memory and the Law*, a collection of essays that explore the role played by courts in the process of writing history. The aim of the compilation was to consider "law as an active participant in the process through which history is written and memory constructed." Austin Sarat and Thomas Kearns, eds., "Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction," in *History, Memory, and the Law*, (Ann Arbor: University of Michigan Press, 1999), 3.

[18] Similarly, *Powell v. Alabama* 287 U.S. 45 (1932) underscores the U.S. Supreme Court's historical tendency in its jurisprudence. This case centered on nine young African American men, accused of sexual assault of two white women in Alabama in 1931. Following a swift trial resulting in capital punishment, the defendants appealed to the Supreme Court, alleging a Fourteenth Amendment violation of due process. The Court's ruling was firmly rooted in a historical analysis. It drew upon the English common law tradition and the evolution of due process in U.S. history, tracing the concept of due process to its antecedents in the Magna Carta of 1215, and recognizing the Fourteenth Amendment as a constitutional reaffirmation of this fundamental right. The Court also highlighted the marked prejudice and bias within the societal and political climate as contributing to the infringement upon the defendants' basic rights. *Powell* not only stands as a landmark precedent safeguarding due process rights in criminal proceedings, it also demonstrates the Court's engagement with historical context in its approach to legal interpretation.

that history was a primary feature of its method for establishing rights protected under the substantive due process clause of the Fourteenth Amendment, noting that "[T]he Court has regularly observed that the clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition."[19]

Other examples demonstrate the willingness of Supreme Court justices to place historical inquiring at the center of their decision making. For example, as mentioned above in *District of Columbia v. Heller* (2008),[20] Justice Scalia, writing for the majority, relied heavily on the historical analysis of 17th century English law, 18th and 19th century state constitutional provisions, 19th century writings of legal scholars, and post-Civil War debates to support the Court's interpretation that the Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that firearm for traditionally lawful purposes, such as self-defense within the home.[21] In that same case, Justice Stevens, writing for the dissent, also relied on historical sources, including the Second Amendment's drafting history, to argue that the Second Amendment only protects the right to have weapons for militia service.[22]

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[19] *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997) citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) describing "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.
[20] 554 U.S. 570.
[21] *Heller* 605-619.
[22] *Heller* 653-661 (Stevens, J., dissenting).

Similarly, in *Obergefell v. Hodges* (2015),[23] Justice Kennedy's majority opinion included a historical inquiry into the subject of marriage. "Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court."[24] Kennedy drew upon a range of historical evidence to support the Court's holding that same-sex marriage bans were a violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. The opinion describes "[t]he history of marriage[as] one of both continuity and change," noting first that "the ancient origins of marriage confirm[ing] its centrality," but then pointing out that institution has evolved over time (e.g., changes from arranged marriages to voluntary choice, changes in the legal status of women that led to the termination of the centuries-old doctrine of coverture (where a married man and woman were treated by the State as a single, male-dominated legal entity)).[25]

Notwithstanding the Court's consistent use of history to inform its decision making, in recent years, the Roberts Court has shown an increasing interest in aggressively and, in some cases, exclusively relying on historical analysis and interpretation in its decisions.[26]

Justice Thomas has been particularly vocal in advocating the use of history in constitutional interpretation. In *New York State Rifle & Pistol Association v. Bruen*

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[23] 576 U.S. 644 (2015).
[24] *Obergefell* 656.
[25] *Obergefell* 656.
[26] See for example, *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022); and *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022).

(2022),[27] Justice Thomas' majority opinion relied heavily on the historical context of the Second Amendment of the Constitution to support his argument. The case involved a challenge to a 109-year old New York state law that required individuals to show "proper cause" to obtain a license to carry a concealed firearm in public. The New York State Rifle & Pistol Association argued that the law violated the Second Amendment's guarantee of the right to bear arms. In the opinion, Justice Thomas concluded that the Second Amendment's historical context supported the plaintiffs' claim. He noted that the right to bear arms had been an important part of Anglo-American law and tradition for centuries, dating back to the English Bill of Rights of 1689 and the American Revolution.[28] He also cited several historical sources, including legal treatises and founding-era documents, to support his argument that the Second Amendment protected the right to carry firearms in public for self-defense. Finally, Justice Thomas criticized the lower courts for failing to give proper weight to the historical context of the Second Amendment in their analysis, noting that the courts had relied too heavily on modern legal and policy considerations, such as public safety concerns, rather than looking to the original meaning and purpose of the Second Amendment.[29]

The majority opinion in *Bruen* places the burden on the government to demonstrate that any gun law "is consistent with this Nation's historical tradition of

[27] 597 U.S. 1 (2022).
[28] *Bruen,* 44.
[29] Ibid., 17.

firearm regulation."[30] Moreover, the opinion advises that courts should determine the consistency of a modern-day gun regulation by drawing "historical analogies" to early American gun laws.[31] This suggests that these analogies may need to be drawn to laws that existed in 1791, when the Second Amendment was ratified; or that they may need to be drawn to laws that existed in 1868, when the Fourteenth Amendment, which requires States to comply with the Second Amendment, was ratified. Indeed, the opinion notes that, "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment."[32] In other words, modern gun laws, even those that address problems that existed in the 1700s, are likely to fall, unless similar laws existed in the 18th century.

Overall, Justice Thomas's near-exclusive reliance on history in *Bruen* reflects a broader approach to constitutional interpretation—namely originalism—that has guided, in weaker or stronger forms, many of the Court's opinions since the mid-1980s. Thomas's approach to originalism, however, involves an especially sharp turn to the historical context of the Constitution in determining the document's meaning and scope. Dissenting in *Bruen,* Justice Breyer lamented the majority's aggressive use of history. "Although I agree that history can often be a useful tool in determining the

[30] *Bruen,* 24.
[31] Ibid., 29-30.
[32] Ibid., 26.

meaning and scope of constitutional provisions, I believe the Court's near-exclusive reliance on that single tool today goes much too far."[33]

One of the key drivers of this more forceful "turn to history" has been the rise of originalism as a prominent legal theory. Originalism holds that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution."[34] This approach requires a deep understanding of the historical context in which the Constitution was written and ratified, as well as the original intent of its authors.

Mid-twentieth-century constitutional jurisprudence, from which emerged originalism's critique, is currently under rigorous scrutiny in a nation beset by intense political polarization.[35] This polarization has given rise to persistent interpretive debates. In some cases, the debates take the form of normative arguments rooted in political ideology. Advocates from both the political left and right promote interpretations of constitutional principles as substantive values linked to ideology through history. In other cases, the debate involves linguistic arguments, where proponents and opponents vie for ownership of constitutional signifiers. This facet of constitutional theory supplants understanding and development with a mere

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[33] *Bruen* 103 (Breyer, J., dissenting).
[34] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), 1.
[35] For a discussion on the emergence of Originalism in the 1980s as a response to the progressive substantive due process and pro-defendant criminal procedure decisions of the Warren Court, see for example, Amanda Hollis-Brusky, *Ideas With Consequences: The Federalist Society and the Conservative Counterrevolution* (Oxford: Oxford University Press, 2015). For a discussion on political polarization in the United States, see, Jack M. Balkin, *The Cycles of Constitutional Time* (New York: Oxford University Press).

accumulation of linguistic victories. It replaces understanding and development with empty accumulation. The polarization of constitutional theory into the two main approaches—originalism and living constitutionalism—has underscored the prevailing impasse within the field. These models of constitutional theory inadequately address the intricate issues confronting America's pluralistic society, leaving those issues underserved. The Court's recent intensified reliance on historical interpretation has further exacerbated this deadlock.

The convergence of a conservative majority on the Court with a moment of extreme political polarization has enabled and normalized a version of constitutional interpretation that I describe as "vulgar originalism," a reductive and overly simplistic method of constitutional interpretation. Unlike more sophisticated or nuanced versions of originalism, which may involve deep historical analysis and consideration of the framers' intentions and context, vulgar originalism tends to rely on a more superficial and rigid application of historical texts. Vulgar originalism seems to treat constitutional interpretation as a game. It juggles signs, symbols, and meanings; it pulls out odd-words from obscure texts; it disproportionately relies on outliers; and it searches for ever more refined and unlikely wisps of signification in American history as the controlling source of meaning-making in the present. This approach can lead to overly literal or anachronistic applications of constitutional principles, potentially ignoring the dynamic and living nature of law and society.

That the Roberts Court has increased its reliance on history to aid its interpretive task is not in itself problematic. Difficulties arise, however, when the

approach to history enlists habit memory to the near-exclusion of pure memory as the constitutive elements of the historical narrative on which the Court relies. One of the risks of excessive dependence on habit memory is that reference to history may become rote. When historical reflection is reduced to mechanical repetition, there may be a tendency to prioritize secondary issues over the substantive constitutional matters at hand. Instead of addressing the core substance of a constitutional issue, the Court may become fixated on superficial aspects of the mechanical repetition itself. Such an approach not only detracts from the proper examination of constitutional matters; it also hinders a comprehensive understanding of the past and its relevance to the present.

While the Court has always been engaged with history and historical analysis, it has, at times, had a problematic relationship with it due to the susceptibility of history to ideological capture. The Roberts Court has not adequately acknowledged the complex connection between the constituent components of history—memory, time, and experience. Instead, the Court has both conflated and alternatively isolated these concepts from one another, resulting in an overrepresentation of ideological outcomes disguised as legal interpretation.

Judicial opinions are multifaceted in their functionality, serving a myriad of purposes within the legal and societal landscape. First and foremost, they operate as determinants of constitutionality and interpreters of statutory law's scope. These opinions not only resolve legal disputes between parties, they also act as

commentaries on the nation's history and reflections of its current cultural and moral state.

Simultaneously, they serve an educational role, elucidating and making public the principles and aspirations that underpin the nation’s constitutional democracy. They delineate the power relationship between the U.S. government and the States, and articulate the rights citizens possess vis-à-vis federal, state, and local regulators. Furthermore, they memorialize the collective history and tradition of a people, anchoring the present to the past and future through their rulings and reasonings.

Each individual opinion, therefore, is tasked with addressing some combination of these various functionalities. Whether articulating an authorization to act or an order to desist, each opinion embodies a response to the multi-layered demands of the constitutional interpretive process. Thus, the judicial opinion, in its multitude of roles, forms an integral part of the broader constitutional dialogue, helping shape our understanding of the Constitution and its application in a changing society.

The Court, in its operation, internalizes the external world and imprints it with an inner consciousness. In other words, the Court internalizes the lived subjective experience of the Constitution and through its opinions articulates and externalizes an authoritative constitutional experience. The internalization process can be seen as the Justices' engagement with the temporal dimension existing between precedent cases

and the case at bar.[36] In temporal terms, the external world can be understood as the temporal passages from the precedent case to the current one. This perspective emphasizes the transformative journey of the constitutional interpretation process, highlighting the dynamic interplay between time, consciousness, and the Court's interpretive task.

The interpretive process involves a blend of chaos and individualism, where the individual's interpretation coexists and interacts within the broader group context. This interaction creates an assemblage - an ensemble of history.[37] It is through this

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[36] "The case at bar" refers to the specific legal case currently under consideration or being discussed in a court of law. It denotes the particular case that is being actively adjudicated or reviewed by the court, as opposed to other cases that may be referenced for precedent or comparison.

[37] In *Time and Freewill,* Bergson writes:

> "We forget that states of consciousness are progressions and not things, that if we call each of them by only one name, it is for the convenience of language. We forget that they are living, and that, as such, they are continually changing and that, therefore, one cannot reduce them by a single moment without losing some of their impressions, and thereby modifying the quality. I understand full well that one observes the orbit of a planet all at once, or in very little time, because the successive positions, or results of its movement, are the only things that matter, and not the duration of the equal intervals that separates them. But when it is a question of a sentiment, it has no precise result, except to have been felt. And to adequately appreciate this result, it would have been necessary to have passed through all the phases of the sentiment itself, and occupied the same duration. Even if this sentiment finally culminates in certain actions or events [*demarches*] of a determined nature, comparable to the position of a planet in space, the knowledge of this act will hardly help me appreciate the influence of the sentiment on the *ensemble of a history*, and it is a question of understanding precisely this influence….Thus when one asks if a future action could be foreseen, one unconsciously identifies the time of the exact sciences, which reduces to a number, with real duration, where what appears to be quantity is really quality which one could not reduce by a single instant without changing the nature of the facts or events that fill it." (Henri, Bergson, *Time and Freewill: An Essay on the Data of Immediate Consciousness,* authorized translation by F.L. Pogson, (London: Dover Publications, 2001), 196-197, emphasis added).

Bergson's philosophy challenges mechanistic psychology, asserting that psychological phenomena's distinctiveness defies reduction to natural science models. He emphasizes time as unidirectional duration in the psychological realm, where qualitative elements resist quantification, and experiences shape a person's historical narrative, supplanting a cause-effect scheme. Bergson rejects the deterministic viewpoint that all phenomena are law-governed, contending that the unique qualitative aspects of inner experiences, situated in specific moments, preclude identical causality. These Bergsonian concepts of duration and intuition illuminate the Court's production of constitutional time, Bergson shows us how thinking in time (i.e., the temporal lens) more precisely reveals the Court's

dynamic interplay that constitutional time is created and shaped, offering a richer understanding of the Court's interpretive task in articulating constitutional principles.

B. Politics and Constitutional Interpretation

Law usually expresses time as history. What this means is that legal change is understood only within a historical context, i.e. periodization. When courts rely on periodization as the organizing principle for understanding changes in the law, legal change becomes comprehensible only as the result of historical struggle. Viewing legal change as solely the product of past struggle reduces law to a mere battleground of politics. However, it is important to recognize that while politics and law are intertwined, law encompasses more than just political battles. Law has its own distinct nature and principles that go beyond pure politics.[38]

While not exclusively responsible for linking law to politics, two major interventions that explained constitutional jurisprudence and justified judicial decision-making solidified the law and politics relation. The first of those interventions is Legal Realism. The second is Alexander Bickel's seminal work, *The*

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interpretive task when articulating constitutional principles--that constitutional principles are progressions and not things, and as such, there is an inherent creativity to announcing constitutional principles at a standstill.

[38] For resources supporting the idea that law is not just politics, see e.g., H.L.A. Hart, *The Concept of Law*. (Oxford: Oxford University Press, 1961); Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, (1978); Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979); Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964); and John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980). These resources delve into the philosophical foundations of law and explore the inherent nature and principles that distinguish law from mere politics. They provide insights into the role of law in society, its relationship with politics, and the importance of legal reasoning and principles in shaping legal decisions.

Least Dangerous Branch: The Supreme Court at the Bar of Politics, which addresses the "problem" of the Supreme Court's judicial review authority.[39]

Legal Realism emerged as a form of jurisprudence in the 1920s and 1930s. According to Keith Bybee, a constitutional law and political science professor, "legal realism exposed the role played by politics in judicial decision-making and, in doing so, called into question conventional efforts to anchor judicial power on a fixed, impartial foundation."[40] Rather than rely on abstract legal principles and theories of how law ought to be, legal realists considered how law was practiced and applied, and determined that the power of judges to pronounce the law was inseparable from human intentionality and action.[41] Thus, they looked to explain legal outcomes in terms of judicial behavior. From this perspective, legal realists argued that because law did not exist in a metaphysical realm beyond the real world, judges were influenced by real world factors, such as politics. Given their conviction that law was more than mere mechanical application of known legal principles to fact, the realists concluded that legal principles, which legal formalism tended to treat as neutral, were actually embedded with contentious political and moral choices.[42]

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[39] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed. (New Haven: Yale University Press, 1962).
[40] Keith J. Bybee, "Legal Realism, Common Courtesy, and Hypocrisy," *Law, Culture and the Humanities* vol. 1 (February 2005): 76.
[41] For an excellent summary of the legal realists' critique of formalism, see Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy*, (Oxford: Oxford University Press, 1992),183–230.
[42] See, Richard A. Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution," 37 *Case Western Law Review* 179 (1986) (describing legal formalism as a descriptive and normative theory of how judges decide cases. Descriptively, legal formalists claim that judges reach their decisions by applying uncontroversial principles to the facts of the case. Normatively, legal formalists hold that judges should decide cases by mechanically applying principles from a single and determinate system to facts.). See also, David Lyons, "Legal Formalism and Instrumentalism– A

The paradox of the Court's judicial review authority—*i.e.*, the power to declare legislative acts and government conduct unconstitutional and thus inoperative—has long engaged American legal scholars.[43] Indeed, in an attempt to justify one of the Court's most controversial decisions– the elimination of public school segregation in *Brown v. Board of Education*[44] – legal scholar Alexander Bickel embarked on an ambitious study of the Court's practice of judicial review. The resulting book, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, published in 1962 became *de rigueur* reading among law school academics and legal professionals in the United States. In this highly-influential book, Bickel problematized judicial review and gave a name to the fundamental quandary of judicial review – "the counter-majoritarian difficulty."[45] According to Bickel:

> [N]othing can…deprecate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic.[46]

In this short statement, Bickel identifies the electoral process as the fundamental or "distinguishing" feature of democracy and then places that process, which itself is defined by majority-rule, in opposition to the Supreme Court's practice

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Pathological Study," 66 *Cornell Law Review* 949 (1981) (espousing the legitimacy benefits of legal formalism's mechanical jurisprudence: "sound legal decisions can be justified as the conclusions of valid deductive syllogisms.").

[43] *Marbury v. Madison*, 5 U.S. 137 (1803) established the principle of judicial review—the power of the federal courts to determine whether legislative and executive acts are consistent with the Constitution. Actions judged inconsistent (or "repugnant" to the Constitution according to Chief Justice John Marshall's majority opinion) are declared unconstitutional and, therefore, null and void.

[44] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[45] Bickel, *The Least Dangerous Branch*, 16.

[46] Bickel, *The Least Dangerous Branch*, 19.

of judicial review. Thus, he establishes a dialectical relationship between democracy on one hand and judicial action on the other. Bickel locates the antinomy between democracy and judicial review within the constitutional system itself and then attempts to reconcile the two concepts through a series of legal operations and arguments. In short, he attempts to justify judicial review on legal grounds firmly embedded in the existing juridical order. Importantly, Bickel realized that the power of judicial review could not be found in the one place most people would expect to find it – the Constitution.[47] While Bickel described this fact as "curious," he did not question whether or why the power to determine the constitutionality of government decisions might, of necessity, reside outside the constitutional document itself. Instead, he sought a pathway, a portal, by which the power of judicial review could be "placed in the Constitution"[48] thereby legitimizing the practice.

Using *Brown v. Board of Education* as the occasion to examine the Court's judicial review authority, Bickel endeavored to justify the power of a non-elected nine-member judiciary to override the democratically-enacted political decisions of local, state, and federal governmental entities. Bickel argued that despite the counter-majoritarian difficulty presented by the Court's willingness on rare occasions to withhold deference to the political branches, judicial review was nevertheless consistent with and legitimate in a representative democracy.[49] For Bickel, the existence of a counter-majoritarian difficulty did not prevent the Court in all instances

[47] Bickel, *The Least Dangerous Branch*, 1.
[48] Ibid.
[49] Ibid., 29-31.

from taking an active role in enforcing constitutional principles. Indeed, Bickel's significant and controversial claim was that understanding the nature of the counter-majoritarian difficulty inevitably led one to conclude that the unique position of the Court in a representative democracy required that it enforce the demands of constitutional principle where necessary, even if those decisions went against the current will of the majority.[50]

Ultimately, Bickel defends judicial review as democratically legitimate by arguing that the judiciary does not create new law outside the political process; it merely enforces those constitutional principles which elected governmental institutions underenforce, ignore, distort, or outright violate.[51] Thus, the judiciary does not operate outside the bounds of the Constitution's principles; rather, it contributes to a legitimate system of government by filling in the gaps left open by, and correcting improper political practices of, the elected institutions.[52] Instead of

[50] Bickel's justification of an active judiciary should not be confused with the argument for an unrestrained judiciary. He concedes that the Court does not have authority to make meaning out of whole cloth as such an operation would be beyond the boundaries of democratic legitimacy. (Bickel, 199-200). Rather, for Bickel, the meanings the Court constructs through its interpretation of the Constitution must comport with the meanings of the constitutional principles as understood and accepted by a majority of contemporary society. (Bickel, 199, 244-45). Indeed, Bickel presents various procedural mechanisms, including the justiciability doctrines, which he refers to as "passive virtues," available to the Court to delay enforcement of a not-yet accepted principle – i.e., a principle that the majority of the American populace has not yet absorbed as a norm. (Bickel, 111-198). In addition to the justiciability doctrines of standing, mootness, ripeness, and political question, Bickel pointed to other procedural mechanisms of avoidance the Court could deploy to delay decision on the merits of a constitutional issue, for example, narrowly construing the applicable statutes to avoid unconstitutionality, narrowly formulating a rule of constitutional law to encompass only the particular facts in the case before the Court, or deciding a case based on statutory rather than constitutional interpretation. Bickel contends these procedural evasions may stimulate further discussion among the lower courts, extra-judicial government actors, and the public itself, thereby allowing – eventually – for a collectivized embrace of a not-yet accepted principle.

[51] Bickel, *The Least Dangerous Branch*, 58.

[52] Ibid.

rejecting political deference outright, Bickel's approach creates space for judicial deference to the political branches on a holistic rather than decisional level. This means that the judiciary should defer to the workings of politics on a systemic level rather than at the level of individual political decisions. In this way, Bickel argued, the Court maintains its crucial role as a co-equal partner in the maintenance and protection of constitutional principles.

Regardless of whether one accepted Bickel's justification of judicial decision-making, his framing of the judicial review paradox as a counter-majoritarian difficulty created a binary opposition between judicial action and democracy. This had the effect of creating a paradigm in which any judicial action that did not defer to democratic politics could be criticized as political rather than legal.

C. Originalism as the Roberts Court's Dominant Interpretive Method

Two interpretive theories have dominated constitutional discourse and the Court's decision-making process for more than 40 years: originalism and nonoriginalism. While a full analysis of the two theories of constitutional interpretation is beyond the scope of this dissertation, the following discussion provides context to ground the reader in the main aspects of the debate.[53]

[53] For fuller discussions on the topic of constitutional interpretive theory, see for example, Keith E. Whittington, "Originalism: A Critical Introduction," *82 Fordham Law Review*, 375 (2013); Lawrence Solum and Robert W. Bennett, *Constitutional Originalism: A Debate* (New York: Cornell University Press, 2011); Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (New Jersey: Princeton University Press, 2013); Lee J. Strang, *Originalism's Promise: A Natural Law Account of the American Constitution* (Cambridge: Cambridge University Press, 2019) (explaining and defending originalism). But see Erwin Chemerinsky, *Worse than Nothing: The Fallacy of Originalism* (New Haven: Yale University Press, 2022); Eric J. Segall, *Originalism as Faith* (Cambridge: Cambridge University Press, 2018) (criticizing originalism). For treatments on living constitutionalism see for example, Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New

Originalism, as a legal theory, proposes that constitutional rights should only be protected if they are explicitly stated in the text or were intended to be protected according to the original understanding of the Constitution.[54] Those who advocate for this theory, often referred to as "originalists", contend that it serves as an effective means to limit the power of unelected judges within a democratic society.[55] As John Hart Ely notes in *Democracy and Distrust*, originalism is the belief that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution."[56] In essence, originalism maintains that the interpretation of a constitutional provision is fixed at its time of adoption and can only be altered through formal amendment.[57] The arguments

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York: Alfred A. Knopf, 2005); David A. Strauss, *The Living Constitution* (Oxford: Oxford University Press, 2010); Jack M. Balkin, *Living Originalism* (Cambridge: Harvard University Press, 2011).

[54] For a defense of this perspective see for example, Ilan Wurman, *A Debt Against the Living: An Introduction to Originalism* (Cambridge: Cambridge University Press, 2017); John O. McGinnis and Michael B. Rappaport *Originalism and the Good Constitution* (Cambridge: Harvard University Press, 2013). While commonly confused strict constructionism and originalism are distinct interpretive philosophies in the context of constitutional law. In the United States, strict constructionism is a particular legal philosophy of judicial interpretation that limits or restricts the powers of the federal government only to those expressly, i.e., explicitly and clearly, granted to the government by the Constitution. This approach emphasizes interpreting the text of the Constitution as it is written, without inferring beyond the explicit words. Strict constructionists tend to avoid expanding the meaning of the text, adhering closely to its literal or plain meaning. While both strict constructionism and originalism resist modern reinterpretations that deviate from the text's original meaning, strict constructionism focuses strictly on the text itself, whereas originalism considers the historical context and intent behind the text. The late Justice Antonin Scalia noted that, "no one ought to be" a strict constructionist, because the most literal interpretation of the meaning of a text can conflict with the commonly-understood or original meaning. (Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of Unites States Federal Courts in Interpreting the Constitution and Laws," *The Tanner Lectures on Human Values,* 18 (1997), 98. The general public often uses these terms interchangeably, leading to confusion about their specific nuances and differences.

[55] See, for example, Raoul Berger, "Ely's Theory of Judicial Review," 42 *Ohio State Law Journal* 87 (1981), 87.

[56] John Hart Ely notes in *Democracy and Distrust: A Theory of Judicial Review* Cambridge: Harvard University Press, 1980), 1.

[57] See Lawrence Solum and Robert W. Bennett, *Constitutional Originalism: A Debate* (New York: Cornell University Press, 2011), 2-4.

encapsulated by originalism have evolved over time.[58] Within that evolution, three distinct variants have emerged: Original Intent, Textualist, and Text and Principles.

The Original Intent approach within originalism concentrates on the intent of the Framers or ratifiers of the Constitution.[59] This approach might assert, for instance, that if the Framers or ratifiers of the Fourteenth Amendment did not explicitly intend to include practices such as integrated public schools or same-sex marriage as part of the concepts of due process or equal protection, then we should not construe the Fourteenth Amendment to incorporate these practices today.

The Textualist variant of originalism shifts the focus from the Framers' intent to the "original public meaning" of the constitutional text under review.[60] In this perspective, the critical inquiry is on how the text was understood by the people who ratified the constitutional text, not by the Framers who drafted it. As such, the optimal way to understand the original meaning is not through the subjective intent of the

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[58] For example, in the 1980s and 1990s, originalism underwent significant transformations, leading to the emergence of what scholars in the late 1990s and early 2000s began to call "the New Originalism." This term was popularized by scholars Randy Barnett and Keith Whittington. (Randy E. Barnett, "An Originalism for Nonoriginalists," 5 *Loyola Law Review* 611 (1999), 620; Keith Whittington, "The New Originalism," 2 *Georgetown Journal of Law & Public Policy*, 599 (2004)). The New Originalism can be considered a subset of originalist theories that retain certain core principles of earlier originalism, such as the fixation thesis (asserting that the meaning of the constitutional text is fixed at the time of its enactment), and the constraint principle (maintaining that judicial decisions in constitutional cases should be constrained by, or at least consistent with, this original meaning). Unlike earlier forms of originalism, however, the New Originalism rejects the idea that the specific intentions, purposes, or expectations of the framers should be the primary guide in constitutional interpretation.

[59] This approach to constitutional interpretation can include the intent of both the framers (those who drafted the Constitution) and the ratifiers (those who voted to adopt it), although there is some debate and variation among originalists about the weight given to each group's intent. Most proponents of original intent originalism consider the intentions of both the framers and the ratifiers to gain a comprehensive understanding of the original meaning of the Constitution, arguing that the Constitution's meaning should be grounded in the historical context and the collective intentions of those who created and agreed to it.

[60] See for example, Keith E. Whittington, "Originalism: A Critical Introduction," 82 *Fordham Law Review* 375 (2013).

Framers, but through the objective meaning that the words held during the ratification of the Constitution (or amendment).[61] These were the meanings that would have been discernible to the ratifiers.

Finally, there is the "text and principles" approach, adopted by a subset of originalists. Adherents to this approach agree that the Constitution's original public meaning is binding but resist the notion that the Constitution comprises only rules. They argue that the Constitution also embodies standards or principles. Here, fidelity to the original meaning of constitutional provisions necessitates identifying the level of abstraction at which a specific clause was intended to operate. For example, if the Equal Protection Clause was originally designed to embody a broad principle of equal citizenship, then its application must evolve over time to ensure this principle is upheld. Consequently, contemporary interpretations must adapt to address current societal contexts, ensuring the clause's fundamental promise of equality is consistently fulfilled.

Contesting the theories of originalism are those who argue that it is more beneficial for the Court to possess significant discretion in interpreting the Constitution. These "non-originalists" emphasize the importance of allowing the Constitution to evolve through interpretation, rather than solely through amendments. Nonoriginalism is characterized not by a shared set of beliefs, but by a common

[61] Randy Barnett describes original public meaning, "[e]ach word must be interpreted the way a normal speaker of English would have read it when it was enacted." Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton University Press: Princeton, New Jersey, 2004), p. xiii.

rejection of originalism.[62] Nonoriginalism is the perspective that courts should extend their jurisdictional reach beyond the explicit references within the Constitution and enforce broader norms not found within the literal text of the document. In this way, nonoriginalists push against a static or regressive interpretation of the Constitution. Indeed, as Ilan Wurman notes in *A Debt Against the Living,*[63] living constitutionalism is referred to as the "most common" among nonoriginalist theories. Proponents of this approach argue that a nonoriginalist interpretation is key to preventing the Constitution from becoming ossified, and to ensure it evolves alongside the moral and technological needs and advancements in society.

Similar to the wide range of approaches developed under originalism, there are various approaches among nonoriginalists when determining the meaning of unclear constitutional provisions. For example, some emphasize tradition, while others stress natural law principles. Others argue that constitutional law should be focused on improving the processes of government, while another group emphasizes contemporary values.[64]

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[62] See Mitchell N. Berman, "Constitutional Interpretation: Non-originalism," *Philosophy Compass* 6, no. 6 (2011): 408-420.

[63] Ilan Wurman, *A Debt Against the Living: An Introduction to Originalism* (Cambridge: Cambridge University Press, 2017).

[64] For an important analysis of forms of constitutional argument, see Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982), 3-119. Bobbitt's modalities of constitutional argument encompass a range of interpretive strategies, including textual, historical, structural, doctrinal, ethical, and prudential arguments. His approach is not strictly aligned with either originalism or living constitutionalism. Instead, it provides a more comprehensive framework that recognizes multiple legitimate methods of constitutional interpretation. This pluralistic view allows for the incorporation of both originalist and living constitutionalist perspectives, suggesting that constitutional interpretation can be enriched by a variety of argumentative modalities rather than being confined to a single methodology. See also, Phillip Bobbitt, *Constitutional Interpretation* (New York: Blackwell, 1993) (focusing on non-judicial examples of constitutional argument and decision making).

In the field of constitutional theory, scholars have embarked on the challenging quest to reconcile originalism and nonoriginalism by melding the two theoretical approaches into a hybrid. However, these endeavors have not produced a comprehensive alternative that resolves the contradictions inherent within these competing interpretive theories. As a result, these proposed hybrids often reproduce the same ideological impasse from which they seek to escape, thereby perpetuating the binary opposition they aim to transcend.

For example, Jack Balkin's *Living Originalism* can be read as such a reconciliation attempt. It critiques the binary opposition between (a) originalism grounded in the Founder's original expected applications, and (b) living constitutionalism in which the binding nature of the text's original semantic meaning must on occasion yield to the needs of contemporary society. He asks, "Is our Constitution a living document that adapts to changing circumstances, or must we interpret it according to its original meaning?"[65] He presents a theory of constitutional change called "framework originalism" that understands the Constitution as a skeletal framework for governance rather than a completed structure. To reconcile aspects of originalism and living constitutionalism, he employs an interpretive methodology known as "text and principle".[66]

Balkin explains this methodology as follows: "[T]he opposition between originalism and living constitutionalism is a false dichotomy. Constitutional

[65] Jack M. Balkin, *Living Originalism* (Cambridge: Harvard University Press, 2011).
[66] Balkin, *Living Originalism*, 3.

interpretation requires fidelity to the original meaning of the text and to the principles stated by [or] underlying the text. But fidelity to original meaning does not require fidelity to the original expected applications of text and principle."[67] He continues, "[In] each generation the American people are charged with implementing text and principle in their own time, through [constitutional construction which entails] building political institutions, passing legislation, and creating precedents, both judicial and non-judicial."[68] These constitutional constructions, in turn, shape how succeeding generations will understand and apply the Constitution in their time. According to Balkin, "[t]hat is the best way to understand the interpretive practices of our constitutional tradition and the work of the many political and social movements that have transformed our understandings of the Constitution's guarantees."[69]

Balkin asserts that "[m]uch of the most important constitutional work does not come from courts. It comes from acts of constitutional construction by executive officials and legislatures…. Many of the most significant changes in constitutional understandings …occurred through mobilizations and countermobilizations by social and political movements."[70] Balkin thus places the primary agency for constitutional construction outside of the Court.

Additionally, Balkin argues that constitutional construction is created through rhetorical persuasion and by convincing others of the "rightness" of one's

[67] Jack M. Balkin, *Commerce*, 109 *Michigan Law Review* 1 (2010), 4.
[68] Balkin, *Living Originalism*, 3.
[69] Ibid.
[70] Ibid., 17.

interpretation. The chief defect in Balkin's explanation of constitutional construction is that it fails to acknowledge the vital role the Court plays in providing a physical and intellectual space within which to disrupt or preempt the prevailing ideological interpretation of any given constitutional principle (see Bickel, above).

Balkin's text and principle method, as advocated in *Living Originalism,* is trapped inside an ideologically closed system. The outcome of each constitutional argument is ultimately determined by political persuasion – i.e., power. Either the current structure (and its interpretation of constitutional principles) is retained or it is inverted in favor of those who oppose it. The system itself, however, does not change. There is no rupture of that system or the relationships on which it is built; there is no room or potential to imagine or re-image a different kind of politics. In this sense it is a force-approach—relying on a discourse of power to determine outcome. This creates at best a circularity that breeds stasis and, at worst, an alternating inversion of power relations. Given the constitutional imperative to "form a more perfect union," stasis is unsatisfactory, as is an oscillating arrangement of dominance and subordination. Thus, to move beyond the impasse of the current constitutional methodological debate, one must infuse a processual element into constitutional construction that acknowledges and permits creativity. Bergsonian thinking of time as duration can provide that element.

D. Originalism in Action: *Shelby County v. Holder* and *Allen v. Milligan*

The best illustrations of the Roberts Court's particular brand of originalism come from the cases themselves. Below, I provide a close analysis of two opinions,

both authored by Chief Justice Roberts himself, that address the critical issue of race-based obstacles to voting: *Shelby County, Alabama v. Holder,* 570 U.S. 529 (2013) and *Allen v. Milligan*, 599 U.S. 1 (2023).

Shelby County, Alabama v. Holder, involved a constitutional challenge to Sections 4 and 5 of the 1965 Voting Rights Act (VRA),[71] the federal statute that implemented the Fifteenth Amendment's mandate to provide equal access to voting, especially in the former slave states of the South.[72]

By 1965, it was clear that states in the Jim Crow south had flouted the Fifteenth Amendment and enacted various rules to keep Blacks from voting.[73] The VRA was intended to remedy this problem. Combined, Sections 4 and 5 of the VRA require those states with a history of racial discrimination in voting to not only eliminate the most egregiously racist voting prerequisites, such as poll taxes and literacy tests, but to submit for federal approval any new voting-related law the state planned to enact and implement in future elections.[74] If the federal monitors

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[71] The Voting Rights Act, Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-l (2006)); 52 U.S.C. § 10101, et seq.; 52 U.S.C. § 10301 et seq.; 52 U.S. C. § 10501 et seq. (formerly cited as §§ 42 U.S.C. 1973). The purpose of the Voting Rights Act of 1965 (VRA) was "to foster our transformation to a society that is no longer fixated on race." *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003).

[72] The Fifteenth Amendment to the United States Constitution prohibits the federal and state governments from denying a citizen the right to vote based on that citizen's, "race, color, or previous condition of servitude." U.S. CONST. amend. XV.

[73] I capitalize Black when referring to the racial group. See Kimberlé Williams Crenshaw, *"*Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law", 101 *Harvard Law Review*. 1331, 1332 n.2 (1988) ("When using 'Black,' I shall use an upper-case 'B' to reflect my view that Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun"); see also David Lanham, "A Public Letter to the Associated Press: Listen to the Nation and Capitalize Black", *Brookings* (June 16, 2020), https://www.brookings.edu/blog/the-avenue/2020/06/16/a-public-letter-to-the-associated-press-listen-to-the-nation-and-capitalize-black/.

[74] *Shelby County, Alabama v. Holder,* 570 U.S. 529 (2013), 535.

determined that the proposed voting rule would perpetuate or increase racial bias in voting, the rule would be rejected, meaning the state could not adopt it.[75]

This process – known as "preclearance" – was extraordinary, in that it put the federal government in control of state elections to an unprecedented degree. Moreover, the preclearance process only applied to seven states and portions of three others; it did not apply uniformly to the entire union.[76] This, too, was highly unusual. Nevertheless, Congress, in 1965, determined that such a radical step was necessary to address Jim Crow voting laws that systematically kept Black Americans from exercising their political franchise.

Recognizing that the preclearance procedure would cause resentment if made permanent, and hoping that the affected states would move to comply quickly, Congress declared that Sections 4 and 5 would terminate in five years unless circumstances dictated they be extended.[77] As it happened, however, during that five-year period, many of the affected states continued their attempts to curtail minority voting.[78] As a result, the VRA's preclearance procedure was extended in 1970 for an additional five years, at the end of which Congress gave itself the ability to extend it still further if necessary. Subsequent extensions of Sections 4 and 5 took place in 1975, 1982, and 2006. Like the 1982 extension, the 2006 extension was also for 25 years, which meant preclearance would remain part of the VRA until at least 2031. Each time Congress extended these parts of the VRA, it did so after holding lengthy

[75] *Shelby County*, 537.
[76] Ibid.
[77] Ibid., 538.
[78] Ibid.

hearings and considering evidence of continued racial bias in voting within the affected states.

It should be noted, however, that from the very beginning, Sections 4 and 5 included a "bailout" provision, under which an affected State could submit to federal regulators information demonstrating it had eliminated all racially biased voting rules. Then, based on that information, the State could request permission to be removed from the "preclearance" pool of states.

Shelby County is located in Alabama, one of the original six states covered under the VRA's preclearance provision. In 2009, Shelby County filed suit against the U.S. Attorney General, Eric Holder, alleging that Sections 4 and 5 of the VRA – particularly the coverage formula of the first and the preclearance requirement of the second – violated the Tenth Amendment of the Constitution, which reserves to the states all powers not expressly granted to the federal government. In short, Shelby County argued that the VRA's preclearance requirement was an unconstitutional intrusion into the legal and political sovereignty of all states subject to Sections 4 and 5. Shelby County chose to attack the VRA's preclearance requirement on its face.[79] This facial challenge triggered a broader constitutional review – one requiring the

[79] When plaintiffs attack a statute (local, state, or federal) as unconstitutional, they may do so as a *facial* challenge or an *as-applied* challenge. An *as-applied* challenge is typically easier to prosecute successfully, because the plaintiff need not show that the statute in question violates the Constitution in all cases, only that the statute, as it was applied to the plaintiff, damaged the plaintiff's constitutional rights. A *facial* challenge is more difficult, in that the plaintiff must demonstrate that the statute itself offends the Constitution, no matter how or against whom it may be applied. The plaintiff's task is especially tough where, as here, the statute under review has withstood prior judicial review and been upheld as constitutional.

Court to examine whether the VRA's preclearance requirement was fundamentally consistent with, or at variance to, the Constitution.[80]

Shelby County filed suit in the federal District Court for the District of Columbia. There, the trial court found in favor of the federal government and ruled that the evidence supported Congress's decision in 2006 to extend Sections 4 and 5 of the VRA through 2031. The County appealed to the D.C. Circuit Court, which affirmed the District Court decision. The County then sought review at the Supreme Court, which granted certiorari and agreed to hear the case. By a 5-4 vote, the Court reversed the Circuit Court (and, by extension, the District Court), holding that the Section 4 "coverage formula" was no longer rationally related to evidence of discriminatory voting practices in the affected States, and thus could not be implemented consistent with the Constitution and its federalism principles. In addition, because the Section 4 coverage formula establishes which States are subject to Section 5's preclearance procedure, the Court's decision effectively terminated preclearance under the VRA.

Chief Justice Roberts begins the Court's majority opinion with a brief history lesson.[81] He reminds us that the Civil War was fought (in part) to eradicate slavery and that it gave rise to the Thirteenth, Fourteenth, and Fifteenth Amendments, which

[80] This was a strategic decision no doubt driven by Shelby County's history of racially-biased voting rules. In fact, as recently as 2009, the Attorney General "objected to voting changes within the County," effectively foreclosing any effort by the County to be removed from preclearance coverage under Section 5's "bailout" provision. In light of these facts, an as-applied challenge would likely fail.
[81] The Court's majority opinion was authored by Chief Justice Roberts, and was joined Justices Scalia, Thomas, Alito, and Kennedy. The dissent was written by Justice Ginsburg, and was joined by Justices Sotomayor, Breyer, and Kagan.

were intended to create by force of law something approaching political equality for African-Americans, i.e., former slaves.[82] He then explains how the promise of those amendments, along with the hopes of the Reconstruction generally, were dashed by a recalcitrant South, how many rights supposedly guaranteed by the post-Civil War amendments were denied by something more fierce – the Jim Crow "black" codes.[83]

Roberts then pivots to describe Congress's realization that, to implement the Fifteenth Amendment, it needed to enact a specific federal statute that would curb efforts by the former Confederate states to deny Blacks the right to vote. What emerged from this realization was the 1965 Voting Rights Act (VRA), perhaps the federal government's most aggressive intrusion into the jurisdictional prerogatives of the individual States. As Roberts put it, "[t]he Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem."[84]

Roberts then extols the virtues of the VRA, giving it credit for eliminating the most egregious discriminatory voting "devices" implemented by former Jim Crow states to suppress minority participation in elections.[85] Nevertheless, such encomiums are often followed by statements claiming that, despite its success, sections of the statute in question should be discontinued. Roberts follows this familiar rhetorical pattern: the powerful astringent of the VRA's preclearance requirement, says Roberts, while necessary in 1965 and constitutional when first enacted, has ceased to be

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[82] *Shelby County*, 536.
[83] Ibid.
[84] Ibid., 534.
[85] Ibid., 548. "There is no doubt that these improvements are in large part *because of* the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process."

either.[86] Times have changed; the South has changed. The vote-suppression devices that were once common in the Jim Crow states have been abolished or have otherwise disappeared. The statute served its purpose; but now it creates an unacceptable disparity between the States covered under Sections 4 and 5 and those that are not. Fifty years on, the preclearance provisions of the VRA have been rendered unconstitutional—not by changes in its text but by the march of time, by the changes in the cultural and political landscape:

> Nearly 50 years later, things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force. In the covered jurisdictions, "[v]oter turnout and registration rates now approach parity. Blatant discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.[87]
>
> Those conclusions are not ours alone. Congress said the same when it reauthorized the Act in 2006, writing that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices."[88]

Roberts contends that, in light of these positive changes, the VRA's voting equality measures must now yield to the Constitution's traditional respect for state's rights and parity among the States in the application of federal law. That the Court had previously upheld the VRA, including its preclearance requirement, in a host of prior cases – most notably *Katzenbach,* a landmark 1966 decision in which the Warren court rebuffed efforts by Southern States to kill the VRA in the cradle – does

[86] *Shelby County*, 551-554.
[87] Ibid., 547.
[88] Ibid.

not impede the Court's decision.[89] Roberts's opinion relegates those prior decisions, like the preclearance requirements themselves, to the status of historical artifact. They are permanently fixed in their particular time, fossilized. They need not be overturned; they remain valuable as reminders of our past, but they are cast in amber. They no longer carry legal weight in contemporary America.

> [W]hen we first upheld the Act in 1966, we described it as "stringent" and "potent." We recognized that it "may have been an uncommon exercise of congressional power," but concluded that "legislative measures not otherwise appropriate" could be justified by "exceptional conditions." We have since noted that the Act 'authorizes federal intrusion into sensitive areas of state and local policymaking, and represents an "extraordinary departure from the traditional course of relations between the States and the Federal Government." As we reiterated in *Northwest Austin,* the Act constitutes "extraordinary legislation otherwise unfamiliar to our federal system.[90]
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> In 1966 [when the Court issued its opinion in *Katzenbach*], we found these departures from the basic features of our system of government justified.[91]
>
> In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.[92]
>
> A statute's "current burdens" must be justified by "current needs," and any "disparate geographic coverage" must be "sufficiently related to the problem that it targets." The [section 4] coverage formula met that test in 1965, but no longer does so.[93]

To blunt criticism that he is naïve, Roberts acknowledges that racism in voting still exists in the United States. "At the same time, voting discrimination still exists; no

[89] *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).
[90] *Shelby County*, 545.
[91] Ibid.
[92] Ibid., 551.
[93] Ibid., 550-551.

one doubts that."[94] Still, this fact is not enough to save Sections 4 and 5. "The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements."[95] For Roberts and the rest of the Court majority, the answer to that question is no, they don't.

In many respects, Roberts's analysis is temporally dynamic. Roberts is not just aware that time works changes on both politics and culture; he uses time as the driving force behind his arguments for dismantling Section 4 and 5 and returning the covered States to their former constitutional position vis-à-vis the non-covered States. But there is an inconsistency in the way Roberts looks at historical change in the juridical context: He fails to recognize that just as factual conditions evolve, the law evolves as well, constantly stretching and applying itself to circumstances which, while unforeseen when the statute was enacted, nevertheless fall within its jurisdictional reach. Roberts fails to see or ignores this part of the equation. His opinion for the Court is fixated on the kind of "[b]latantly discriminatory evasions of federal decrees" that characterized the Jim Crow south in the 1950s and 1960s, such as literacy tests for voters and poll taxes.[96] He is sufficiently contented by the fact that voter registration and voter turnout among Blacks in the former slave States has improved significantly since 1965, and that minority politicians now hold office in unprecedented number.

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[94] *Shelby County*, 536.
[95] Ibid.
[96] Ibid., 531.

The dissent, authored by Justice Ginsburg, seizes on Roberts's disregard for what Congress called "second generation" barriers to minority voting that some covered States continue to propose. These consists of less flagrant, less obvious devices for reducing minority voting power, such as reducing the number of polling places or the hours that polls are open in counties with large Black populations.[97] Were it not for Sections 4 and 5 and the preclearance procedure, writes Ginsburg, these more subtle barriers would be enacted, effectively eroding the political franchise of minorities, especially African-Americans and Hispanics—the very thing the VRA was supposed to stop and prevent on a going-forward basis. Implicit in Ginsburg's dissent is that laws are not forever bound by the facticity of the historical moment giving rise to their enactment. They are temporally elastic – and must be so – to address the constantly differentiating problems they were initially designed to address. In other words, the Hydra that Justice Ginsburg describes as characterizing Jim Crow states and their innovative efforts to deny the vote to minorities (see p. 560) has not yet been slayed; she has only shifted shape and position, and we need to remain vigilant against her. The preclearance procedure of Sections 4 and 5 allow us to do that.

In the end, Roberts's single-column historical argument prevailed over Ginsburg's dual-column one. A law deemed necessary in 1965 and repeatedly upheld

[97] *Shelby County,* 563 (Ginsburg, J. dissenting). "Second-generation barriers come in various forms. One of the blockages is racial gerrymandering, the redrawing of legislative districts in an "effort to segregate the races for purposes of voting." Another is adoption of a system of at-large voting in lieu of district-by-district voting in a city with a sizable black minority." (internal citations omitted).

as constitutional since then, has now become anathema to the Constitution and the tradition of state's rights enshrined within it.

Allen v. Milligan, 599 U.S. 1 (2023) involved a civil rights challenge to the State of Alabama's congressional districting map – *i.e.,* the map which determines voter boundaries for purposes of electing Alabama's seven members to the House of Representatives in Washington, D.C. The plaintiffs, three groups of Black registered voters and a number of civil rights organizations, brought suit in federal district court alleging that Alabama's new congressional map – known as HB1 – reflected impermissible racial gerrymandering, where only one of Alabama's seven congressional districts contained a majority of Black voters, despite Blacks making up approximately 28 percent of the state's voting population. According to the plaintiffs, HB1 diluted their voting strength, as well as that of other Black Alabamians, in violation of Section 2 of the 1965 Voting Rights Act (VRA) and the Equal Protection Clause of the Fourteenth Amendment.[98] The plaintiffs sued the Alabama Secretary of State, seeking to prevent him from conducting congressional elections under HB1.[99]

A District Court panel of three judges was convened to consider the plaintiffs' motion for preliminary injunction.[100] After reviewing more than 1000 pages of briefing, 350 exhibits, and the testimony of 17 witnesses, including experts on the production of congressional districting maps, the three-judge panel concluded that

[98] *Allen*, 16.
[99] Ibid.
[100] Ibid.

Alabama, in adopting HB1, had in fact violated Section 2 of the VRA.[101] The panel granted the requested injunction, enjoining Alabama from using HB1 in forthcoming elections.[102]

As permitted under the jurisdictional provisions of the VRA, Alabama bypassed the Eleventh Circuit Court and filed its appeal directly with the U.S. Supreme Court. As part of its appeal, Alabama asked that the District Court injunction be stayed while the matter was briefed and argued.[103] The Court granted Alabama's request for stay and then considered the case on its merits. Ultimately, the Court agreed with the District Court panel, affirmed its decision, and reactivated the injunction preventing Alabama from using HB1 in any future elections.[104]

Chief Justice Roberts wrote the opinion, with Justices Kagan, Sotomayor, and Jackson—the Court's so-called "liberal wing"—joining. Justice Kavanaugh also joined in the opinion, rounding out the five-vote majority. He drafted a short concurring opinion that addressed the Court's limited authority to alter past interpretations of a federal statute. Two dissents were filed: One by Justice Thomas, in which Justice Gorsuch joined and in which Justices Alito and Barrett joined in part; and a second by Justice Alito, in which Justice Gorsuch joined.

On the surface, the Court's majority opinion appeared to signal that Chief Justice Roberts, author of the *Shelby* decision ten years prior, had become more receptive to civil rights VRA challenges to state election laws (especially those

[101] *Allen,* 16.
[102] Ibid.
[103] Ibid.
[104] Ibid.

enacted by the State of Alabama). He and the other members of the majority were moved by Alabama's long history of disenfranchising Black voters. In the opinion, the Court noted that well into the 1990s – more than a century after Reconstruction, and more than 25 years after the passage of the VRA itself – Alabama still had not elected a single Black Representative to Congress.[105] It was not until 1992, following a lawsuit alleging that Alabama had been diluting the votes of Black Alabamians, that the state's districting map was amended and a majority-Black district created. "And that fall, Birmingham lawyer Earl Hillard became the first Black Representative from Alabama since 1877."[106] The problem, noted Roberts, is that the 1992 congressional map for Alabama had changed very little in the 30-plus years since Hillard was elected, even though Alabama had experienced significant population growth and redistribution in the interim.

In 2020, a group of litigants sued the state demanding that the map be updated to reflect the 2020 decennial census. While that litigation was proceeding, the Alabama Legislature's Committee on Reapportionment began creating a new districting map to reflect changes in population growth and distribution. The map that emerged from this process was HB 1; and like every other Alabama districting map since 1992, it, too, identified only one district with a majority-Black voter population.

In their challenge to HB1, "[t]he plaintiffs adduced eleven illustrative maps – that is, example districting maps that Alabama could enact – each of which contained

[105] *Allen,* 16.
[106] Ibid., 14.

two majority-Black districts that comported with traditional districting criteria."[107] That such maps could be created was enough for the Court to find that Alabama, by not adopting such a map, violated Section 2 of the VRA. "We agree with the District Court, therefore, that plaintiffs' illustrative maps 'strongly suggest[ed] that Black voters in Alabama' could constitute a majority in a second, reasonably configured, district."[108]

For our purposes here, the key phrases in the Court's decision are "comported with traditional districting criteria" and "reasonably configured district". To understand the importance of these phrases and how they shape the Court's VRA and Equal Protection jurisprudence, one must go back to 1980 and the case of *Mobile v. Bolden,* 446 U.S. 55 (1980), where the Supreme Court rejected a claim by Black voters that the City of Mobile's at-large election system effectively excluded them from participating in the election of city commissioners. The Court held that the city's elections laws, though clearly resulting in a dilution of Black voting power, did not evince a clear intent to discriminate on the basis of race. According to the Court in *Mobile*, the Fifteenth Amendment and thus Section 2 "prohibits States from acting with a 'racially discriminatory motivation' . . . [b]ut it does not prohibit laws that are discriminatory only in effect."[109]

The backlash was swift, and in 1981 Congress went to work drafting amendments to the VRA to insert an "effects" test into the statute. A compromise was

[107] *Allen,* 20.
[108] Ibid.
[109] Ibid., 11, quoting *Mobile v. Bolden, supra,* 446 U.S. 55 (1980), 61-65.

reached between those who favored such an amendment and those who feared an "effects" test would open the door to requiring that states ensure "proportional" voting based on race. Under this compromise, Congress amended the VRA to include an "effects" component, but it was accompanied by an additional proviso which stated that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."[110]

The Court, however, did not develop a workable framework for addressing alleged violations of section 2 (as amended) until 1986, when it decided *Thornburg v. Gingles,* 478 U.S. 30 (1986), a case in which Black voters challenged North Carolina's multimember districting scheme.[111] *Gingles "*presented the first opportunity since the 1982 amendments to address how the new § 2 would operate," and the case has guided the Court's Section 2 decision-making for the last 37 years.[112] As explained in the Court's *Milligan* opinion, *Gingles* set the criteria for future challenges to congressional districting under Section 2 of the VRA, and those criteria are based on so-called "traditional" mapping parameters:

> To succeed in proving a § 2 violation under *Gingles*, plaintiffs must satisfy three "preconditions." [Citation omitted.] First, the "minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district." [Citation omitted.] A district will be reasonably configured, our cases explain, if it comports with traditional districting criteria, such as being contiguous and reasonably compact. [Citation omitted.] "Second, the minority group must be able to show that it is politically cohesive." [Citation omitted.] And third, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." Finally, a plaintiff

[110] 52 U.S.C. § 10301, quoted in *Allen*, 14.
[111] *Allen,* 17, citing *Thornburg v. Gingles*, 478 U.S. 30 (1986), 34-36.
[112] *Gingles,* 17-19.

> who demonstrates the three preconditions must also show, under the "totality of circumstances," that the political process is not "equally open" to minority voters.[113]

In an effort to preempt or deflect claims that it had softened its stance on Section 2 challenges or relaxed its application of the *Gingles* criteria, the Court provided a short history of recent decisions where it had rejected state efforts to redraw districting maps for purposes of complying with Section 2. According to the Court, these cases illustrate that even when states try to improve minority voter representation through redistricting, they still must meet the *Gingles* criteria, including geographical compactness and contiguity.[114] For example, the Court described its 1995 decision in *Miller v. Johnson*, 515 U.S. 900 (1995), where it threw out the new congressional districting map adopted by the State of Georgia to provide greater representation for Black voters:

> To comply with the VRA, Georgia thought it necessary to create two more majority-minority districts—achieving proportionality. [Citation omitted.] But like North Carolina in *Shaw,* Georgia could not create the districts without flouting traditional criteria. One district "centered around four discrete, widely spaced urban centers that ha[d] nothing to do with each other, and stretch[ed] the district hundreds of miles across rural counties and narrow swamp corridors." [Citation omitted.] "Geographically," we said of the map, "it is a monstrosity."[115]

The Court also discussed its opinion in *Bush v. Vera*, 517 U.S. 952 (1996), which rejected Texas's creation of three additional majority-minority districts to improve representation of Black and Hispanic voters. According to the Court, the new map

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[113] *Gingles,* 18.
[114] Ibid., 27-28.
[115] Ibid., quoting *Miller v. Johnson,* 515 U.S. 900 (1995), 906, 908, 909.

violated the Fourteenth Amendment because the new districts "had no integrity in terms of traditional, neutral redistricting criteria."[116] The Court went so far as to describe one of the majority-Black districts as consisting of "narrow and bizarrely shaped tentacles," and one of the majority-Hispanic districts as resembling "a sacred Mayan bird with [s]pindly legs reach[ing] south and a plumed head ris[ing] northward."[117]

The point of these examples, said the Court, is a simple one. "Forcing proportional representation is unlawful and inconsistent with the Court's approach to implementing § 2."[118] This would seem to have settled the matter, at least in terms of the Court's continued insistence that the *Gingles* criteria, including those relating to "traditional" mapping parameters, be adhered to. But the Court when one step further and acknowledged that application of the *Gingles* criteria often frustrated efforts to address *bona fide* inequality in state voting districts.

> At the congressional level, the fraction of districts in which black-preferred candidates are likely to win "is currently below the Black share of the eligible voter population in every state but three." Brief for Professors Jowei Chen et al. as *Amici Curiae* 3 (Chen Brief). Only one State in the country, meanwhile, "has attained a proportional share" of districts in which Hispanic-preferred candidates are likely to prevail. *Id.* at 3-4. That is because as residential segregation decreases—as it has "sharply" done since the 1970s—satisfying traditional districting criteria such as the compactness requirement "becomes more difficult." T.Crum, Reconstructing Racially Polarized Voting, 70 Duke L.J. 261, 279, and n. 105 (2020).
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> Indeed, as *amici* supporting the appellees emphasize, § 2 litigation in recent years has rarely been successful for just that reason. See Chen Brief 3—4.

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[116] *Gingles,* 28, quoting *Bush v. Vera,* 517 U.S. 952 (1996), 960.
[117] Ibid., 28, quoting *Bush v. Vera,* 965.
[118] Ibid., 28.

> Since 2010, plaintiffs nationwide have apparently succeeded in fewer than ten § 2 suits . . . .
>
> Reapportionment, we have repeatedly observed, "is primarily the duty and responsibility of the State[s], not the federal courts. [Citation omitted.]
>
> Properly applied, the *Gingles* factors help ensure that remains the case. As respondents themselves emphasize, § 2 "never require[s] adoption of districts that violate traditional redistricting principles. Brief for Respondents in No. 21-1087, p. 3. Its exacting requirements, instead, limit judicial intervention to "those instances of intensive racial politics" where the "excessive role [of race] in the electoral process . . . den[ies] minority voters equal opportunity to participate. Senate Report 33-34.[119]

There is much to unpack in these three paragraphs. At the least, they demonstrate a disconnect between (a) the legal standard the Court believes itself bound to apply and (b) the ongoing real experience of being a Black or Hispanic voter in many parts of the United States. Though the Court admits that minority voters, even when they make up a significant portion of a particular state's electors, can rarely put any of their preferred candidates into office, the Court refuses to budge from the "traditional redistricting principles" established in *Gingles* nearly 40 years ago. The Court is happy to point out that residential segregation among races has decreased "sharply" since 1970, as if this were the primary cause of race-based inequality in congressional voting. Yet, the Court's reference to this historical factoid is highly selective and unaccompanied by similar references to data showing that in the years since *Gingles* was decided, some states have become very sophisticated in the myriad techniques they use to suppress or dilute minority votes – techniques that *Gingles* did not anticipate.

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[119] *Gingles,* 29-30.

Further, there is nothing constitutional about the traditional redistricting principles enshrined in *Gingles.* In fact, these principles are not even found in Section 2 of the VRA or anywhere else in the statute. They were developed by the Court. Nor is there anything "magical" about the traditional districting factors in terms of their ability to ferret out race-based voter suppression. On the contrary, traditional districting factors were not developed to address the problem of electoral inequality based on race. If anything, those traditional factors were (and are) themselves the product of systemic racial bias. For example, the dual criteria of "geographical compactness" and "political cohesion" suggest that only when minority voters live in tightly bounded enclaves and exhibit racial and political homogeneity will they qualify, at least potentially, for a voting district of their own. Such a view masks the reality of racial bias in 2023.

In short, the Court's steadfast and continued reliance on the *Gingles* factors reflects an outdated view of what racism looks like in America today. Though minority populations are not ghettoized to the same degree they were in the 1960s, that does not mean their access to the vote and political power generally is equal to that of white Americans. It's not equal and the Court knows it. Yet, the Court continues to apply *Gingles* to Section 2 challenges, upholding a "tradition" that has a poor track record of rectifying racism and inequality in voting.

Ironically, in its vigilance to ensure that Section 2 challenges do not result in proportional voting, the Court undermines, to the point of effectively vitiating, the "effects" test inserted into the VRA in 1981. This result does not trouble the Court

because, in its view, the ills that the VRA was intended to address – i.e., "intensive racial politics" and the "excessive role of race in electoral process" – have been eliminated or have otherwise disappeared. The VRA, however, was not fossilized in 1965 (when first enacted) or in 1981 (when amended to include the "effects" test and the "no proportional voting" proviso). It, along with its principles and purposes, moves forward though time, borne along by the experience of millions of minority voters, including those who intend to cast ballots in the next election.

As *Shelby* and *Milligan* show, the Roberts Court is quite attuned to certain historical developments that warrant consideration when deciding constitutional cases. This is a good thing—or would be if the Court applied its historical inquiry on a robust and uniform basis and was willing to accept the premise that laws differentiate over time to remain relevant in their ongoing purpose. Unfortunately, that is not how the Roberts Court uses history.

CHAPTER 2

BERGSONIAN DURATION AS A MEANS TO RE-ACTUALIZE LIVED EXPERIENCE UNDER THE CONSTITUTION

It may at first seem unnecessary to explicate the ontological qualities of time and memory simply to critique the U.S. Supreme Court's use of historical evidence when deciding to uphold or strike down a particular statute on constitutional grounds. But it is precisely this reluctance to engage the Court philosophically, to test its analytical modes from an ontological perspective, that keeps us in the unsatisfactory debate over the Court's interpretive methods.

Therefore, in this Chapter, I describe Henri Bergson's theories on time and memory, and explore how they can be deployed in a juridical context to assess the Supreme Court's use of history when deciding cases that trigger constitutional review. I argue that Bergson's concept of time as duration—i.e., as a dynamic force that interpenetrates all experience, including the law—provides an excellent means for interrogating the Court's use of history to guide its adjudicatory task. So, let us now turn to time as duration, to memory as a force of human agency, and to history as more than a chronicle of linear events devoid of changed, and changing, human experience.

A. Bergson and Time: Understanding Time as Duration

Time is often taken for granted, treated as a natural backdrop or simply a periodization, rather than being critically examined as a force in its own right that

shapes and directs social and political reality.[120] Typically, when time is examined, it is understood through its historical context, observed in its tangible and visible effects on external materiality (bodies, objects, environments). In other words, when we inquire of time, we tend to convert time into space rather than to "think time as time," ontologically. However, it is important to recognize that time is ontological, meaning it is a fundamental part of life and the process of change.[121] Although historicity is closely related to temporality as it refers to the historical context or the specific historical conditions in which events occur, temporality is a broader concept that encompasses the ontological nature of time and its influence on the unfolding of events and processes. One of the consequences of disregarding the relation of time and history and instead treating time as history is that historicity can reduce time it to a mere periodization. When this happens, we fail to recognize time as a dynamic force that organizes and regulates social and political life. Thus, problematizing time is central to this philosophical investigation into the Court's production of constitutional experience.

The prevailing viewpoint holds that Einstein's theory of relativity demonstrated the apparent illusion of the passage of time by asserting the coexistence of past, present, and future. However, Bergson, Einstein's contemporary, strongly

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[120] See Kathleen Davis, *Periodization and Sovereignty: How Ideas of Feudalism and Secularization Govern the Politics of Time* (Philadelphia: University of Pennsylvania Press, 2008); Renisa Mawani, "Law as Temporality: Colonial Politics and Indian Settlers," *University of California Irvine Law Review* 4, no. 1 (2014): 65-95.

[121] See Elizabeth Grosz, *The Nick of Time: Politics, Evolution, and the Untimely*, (Durham: Duke University Press, 2004), 4; Suzanne Guerlac, *Thinking in Time: An Introduction to Henri Bergson*, (Ithaca: Cornell University Press, 2006).

criticized the theory's portrayal of time. Bergson made clear that his objection to Einstein's theory was philosophical, not factual.[122] He argued that Einstein's theory failed to recognize the materialistic metaphysics that it adopted and incorporated into the realm of science. The main target of Bergson's critique was the cultural and technological context in which Einstein formulated his theory of relativity. Einstein's theory emerged as part of the scientific tradition that privileged the ability of science to describe the world in an objective true sense correcting for illusions that relied on the appearances of everyday experience. Bergson took issue with the outsized role of science vis-a-vis other forms of knowledge. His specific objection to Einstein's notion of time was that relying solely on clocks without understanding their history and significance is an incomplete understanding of time.

On the one hand, understanding time seems relatively simple. Physicists define time as the progression of events from the past to the present into the future. Time in the natural world is irreversible, it has one direction called the "arrow of time". This chronological understanding of time is not something we can see, touch, or taste, but we can quantitatively measure its passage with calendars and clocks. Time measured in this way, allows it to function as a universal constant. On the other hand, we can understand time by considering it qualitatively, through the subjective phenomena of experience. Experience allows us to differentiate among

[122] See Jimena Canales, *The Physicist & The Philosopher: Einstein, Bergson and the Debate That Changed Our Understanding of Time,* (Princeton: Princeton University Press, 2015). Nevertheless, Bergson was criticized as misunderstanding the nature of time grounded in physics that Einstein proposed.

interchangeable units of chronological time (days, months, years, hours), and perceive certain moments within chronological time as meaningful and thus memorable.

Duration was a label that Bergson used to describe aspects of time that could never be grasped quantitatively. Bergson described duration as follows:

> In a word pure duration might well be nothing but a succession of qualitative changes, which melt into and permeate one another, without precise outlines, without any tendency to externalize themselves in relation to one another, without any affiliation with number: it would be pure heterogeneity. But for the present we shall not insist upon this point; it is enough for us to have shown that, from the moment when you attribute the least homogeneity into duration, you surreptitiously introduce space.[123]

For Bergson, duration stood for our perception of the reality of time. He proposed that it is this qualitative experience of time that enables us to perceive certain moments as significant or meaningful.[124]

He warned against confusing duration—the reality of time as it is experienced—with the artificial representations of time constructed externally through clocks and calendars. He argued that such external representations rely on spatial analogies to measure, mark, and differentiate the flow of time in terms of the

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[123] Henri Bergson, *Time and Free Will: An Essay on the Immediate Data of Consciousness,* trans. F.L. Pogson, (Mineola: Dover Publications, Inc., 2001), 104 (Original work published in French in 1913).
[124] The irreversibility of duration was pointed out by Bergson in one of the initial paragraphs of Creative Evolution: "From this survival of the past it follows that consciousness cannot go through the same state twice. The circumstances may still be the same, but they will act no longer on the same person, since they find him at a new moment of his history. Our personality, which is being built up each instant with its accumulated experience, changes without ceasing. By changing, it prevents any state, although superficially identical with another, from ever repeating it in its very depth. That is why our duration is irreversible. We could not live over again a single moment, for we should have to begin by effacing the memory of all that had followed." Henri Bergson, *Creative Evolution*, trans. Arthur Mitchell (London: MacMillan & Co, 1911).

distance between one moment and another. Time measured in this way, he noted, is an abstraction that is often mistaken for the experiential reality.

In 1922, Bergson and Einstein met in an unplanned debate. Einstein had been invited to give a presentation in Paris on his theory of relativity. “Time was central to Einstein's work. It was, however, also the central issue in Bergson's philosophy. Their conflicting views on the meaning of time set the scholars on a collision course. In the debate, Bergson made it clear he had no problem with the mathematical logic of Einstein's theory or the data that supported it.”[125] But Bergson argued that time does not exist independently from us. He challenged Einstein’s quantitative definition of time as the privileged way to determine simultaneity. Bergson searched for a more basic understanding of simultaneity, one that would not stop at the clock but would explain why clocks were used in the first place. Yes, clocks were helpful to know what time it is, admitted Bergson, but knowing what time it is presupposed that the correspondence between the clock and an event that is happening was meaningful for the person involved so that it commanded their attention. Clocks by themselves could not explain why a particular time was significant.

One of Bergson’s main concerns was that science’s idea of uncovering an ultimate reality through the scientific image blunted an awareness of the concept of change and movement in our everyday experiences. For Bergson, science’s flaw, manifested through Einstein’s theory, was its inability to grasp time as mobility.

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[125] Was Einstein Wrong?. https://www.npr.org/sections/13.7/2016/02/16/466109612/was-einstein-wrong#:~:text=In%20the%20debate%2C%20Bergson%20made,about%20clocks%20and%20their%20behavior.

"Science," he said, "cannot deal with time and motion except on condition of first eliminating the essential and qualitative element—of time, duration, and of motion, mobility."[126] Bergson's critical project in *Duration and Simultaneity* attempted to reestablish the philosophical sense of time's passage that Einstein's theory had subverted.

In *Creative Evolution* Bergson noted that, "Our entire belief in objects…rests upon the idea that time does not bite into them."[127] Time is thus often ignored as a force in itself. Consequently, we often fail to see how experience – the human manifestation of duration – intersects with social, political, moral, and for our purposes here, legal questions. Neglecting time as an ontological feature of law confines our understanding of the nature of law to that of an object of history, i.e., a historical artifact. In this way, law is converted into an object in time, as history; and time's effect on law is limited to historicity, periodization. What is overlooked in this spatialization of time is time's temporal impact as a constitute feature of law. Constitutional law itself has its own internal temporal rhythm, which is evident in the continuities and differences it has with itself over time. This rhythm creates "constitutional time".

Bergson's concept of memory aligns with this idea, as he explains that memory is not simply a recollection of the past, but a synthesis of past, present, and future.[128] This understanding of memory as a temporal synthesis enhances our

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[126] Bergson, *Time and Free Will,* 115.
[127] Bergson, *Creative Evolution*, 9.
[128] Bergson, *Matter and Memory*, 220.

comprehension of its role in shaping our perception and interpretation of constitutional decision making.

Bergson's concept of duration was not without its detractors. Martin Heidegger in *Being and Time***,** proposed a different understanding of temporality emphasizing the existential and ontological aspects of time.[129] While Heidegger acknowledged Bergson's significance in addressing the temporal character of human existence, Heidegger critiqued Bergson's treatment of time as a continuous flow.[130] Heidegger argued that Bergson's notion of duration did not sufficiently capture the existential modes of being, e.g., future-oriented anticipation and the way beings project themselves into possibilities.

However, in *Being and Time,* Heidegger was concerned with unveiling the fundamental structures and modes of being, emphasizing the ontological aspects of existence. Bergson, on the other hand, focused on duration as a tool to elucidate the nature of time and memory as a process leading towards becoming. While both philosophers were engaged in inquiries into the nature of time, their orientations diverged, with Heidegger concentrating on the existential states of being and Bergson prioritizing duration as a means to comprehend the temporal and dynamic aspects of existence.

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[129] Martin Heidegger, *Being and Time*, trans. J. Macquarrie and E. Robinson, Oxford: Basil Blackwell, 1962.

[130] See Heath Massey, *The Origin of Time: Heidegger and Bergson* (New York: State University of New York Press, 2015), 6 "In Being and Time and several of the lecture courses surrounding it, Heidegger criticizes Bergson for having tried but failed to grasp the phenomenon of originary temporality."

In Bergson's philosophy, intuition holds a pivotal role in our understanding and experience of duration.[131] Duration refers to the continuous and indivisible flow of time, a succession that is lived rather than merely observed. Intuition, by contrast, is a tool for accessing and comprehending this dynamic flow of time. Bergson defines intuition as an immediate, non-discursive form of knowledge that provides a direct insight into the inner nature of a given phenomenon.[132] Unlike analytic thinking, which dissects concepts into parts for sequential examination and comparison, intuition is holistic, enabling a simultaneous grasp of the whole.

This notion of intuition is not merely about instinctual or gut feelings; it is a sophisticated cognitive process that allows one to delve into the essence or reality of something, bypassing intermediary steps of analysis or reasoning.[133] In essence, intuition enables us to experience the world in its continuity and fluidity, rather than in fragmented, static representations.

It is through intuition that we can perceive time in its true form – not as a static, spatialized entity dissected into measurable units, but as a continuous, unbroken flow of lived experiences. This perspective challenges the scientific and

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[131] Guerlac, *Thinking in Time*, 63 "If Bergson's thought is a philosophy of intuition, "something quite distinct from cognition or understanding, from thinking as it takes place in words and in numbers….It is because the subject of inquiry is duration, a notion of time radically independent of space and for this reason completely inaccessible to reflective consciousness."

[132] Henri Bergson, *The Creative Mind: An Introduction to Metaphysics,* trans. Mabelle L. Andison (New York: American Dover Publications, 2007), 190.

[133] "Intuition is the method of Bergsonism. Intuition is neither a feeling, an aspiration, nor a disorderly sympathy, but a fully developed method, one of the most fully developed methods in philosophy. It has strict rules, constituting that which Bergson calls 'precision' in philosophy." See Gilles Deleuze, *Bergsonism*, trans. Hugh Tomlinson and Barbara Habberjam (New York: Zone Books, 1991), 13.

mechanistic views of time, inviting us to appreciate the richness and complexity of life in its constant evolution.

B. Duration, Repetition and Difference: Bergson and Deleuze

In his essay, *"Bergson's Conception of Difference,"* Gilles Deleuze examines Bergson's pivotal concept of internal difference, a notion that diverges markedly from traditional metaphysical views on identity and representation.[134] Deleuze discusses Bergson's philosophical concepts related to understanding space and things within it. He emphasizes that everything within space is a result or product, and differences between these things are only differences of proportion.[135] Deleuze highlights Bergson's suggestion that the nature of differences isn't about the things themselves nor their states, but their tendencies or potential to evolve. Deleuze positions Bergson's approach as a critique of the concept of specific differences, arguing that one should not focus on the characteristics of things but on their potential for development.

At the heart of Bergson's philosophy, as interpreted by Deleuze, is the notion of tendency. For Bergson, tendencies are dynamic and active; they are not fixed attributes or characteristics but processes of becoming. A tendency, according to Deleuze's reading of Bergson, is primary in relation to its product and even its causes, which are retroactively deduced from the product.[136] In this sense, a thing in its true

[134] Gilles Deleuze, "Bergson's Conception of Difference," in *The New Bergson,* ed. John Mullarkey (Manchester: Manchester University Press, 1999): 42-65.
[135] Deleuze, *Bergson's Conception of Difference,* 44-45.
[136] Ibid., 45.

nature is the expression of a tendency, rather than a result of a cause.[137] Deleuze points out that according to Bergson, our understanding, which is spatialized, perceives only static entities or outcomes. This overlooks the dynamic interaction of differences in proportion and tendencies. Bergson asserts, "The group must not be defined by the possession of certain characters, but by its tendency to emphasize them."[138] Deleuze concludes that this emphasis on the active, mobile nature of tendency over static products or causes underpins Bergson's philosophy of time and difference.

Further expanding on this, Deleuze's interpretation of Bergson posits that reality consists of mixtures – e.g., the mixture of perception and memory. In these mixtures, differences are not static but dynamic blends of tendencies, challenging us to discern the qualitative changes beyond mere products or results. It's a state where we can't pinpoint any differences in nature. "[W]e can only identify what's truly different by finding the tendency beyond its result."[139] Thus, we should focus on what the mixture shows us, differences in degree or proportion, as that is all we have. But we use these differences only to measure the trend (tendency), so we can identify the trend (tendency) as the reason behind the proportion.[140] This concept establishes that difference is an entity in itself. It illustrates the relationship between a temporal or qualitative evaluation and a representational expression. Both elements are necessary. Deleuze thus elucidates Bergson's approach as a way to transcend the limitations of

[137] Deleuze, *Bergson's Conception of Difference,* 45.
[138] Bergson, *Creative Evolution*, 112.
[139] Deleuze, *Bergson's Conception of Difference,* 45.
[140] Ibid.

spatial representation, advocating for a nuanced understanding of difference as a process of becoming, rather than a state of being.

Importantly, Deleuze highlights Bergson's concept of duration as a key element of internal difference. Duration is indivisible and self-differentiating, embodying the movement of difference.[141] It is through duration that internal difference becomes perceptible, allowing the recognition of changes in nature or pure quality that are not captured in changes in quantity or magnitude.

Deleuze also emphasizes Bergson's critique of traditional metaphysical problems that fail to acknowledge the genuine differences in nature, revealing Bergson’s inclination towards intuition over analytical categorization. This intuition helps one navigate the fallacy of treating intensity as difference, exposing the superficiality of such metaphysical errors.

Bergson's philosophy, as interpreted by Deleuze, marks a departure from Hegelian dialectics and Platonic idealism. Unlike the dialectical method, which often hinges on negation and contradiction, Deleuze points out that Bergson's method of differentiation focuses on the positive processes of becoming and change. For Bergson, a thing differs from itself immediately, without the need for differentiation from what it is not. In this sense, Bergson's philosophy of difference is a "logic of nuance" that resists reduction to contradiction or negation.[142] This perspective shows that what defines entities is not their static, virtual potentiality but the actualization

[141] Deleuze, *Bergson’s Conception of Difference,* 49.
[142] Ibid., 53.

process itself, a process imbued with tendencies that unfold over time. This view aligns with arguments in contemporary philosophy, such as those found in Barden's "Methods in Philosophy," which suggest that substance and essence are not external or underlying realities but are intrinsic to the process of differentiation itself.[143]

Deleuze's analysis also draws attention to Bergson's rejection of finality or teleology. Unlike Plato's philosophy which posits an external principle of finality (the Good), Bergson's philosophy avoids any recourse to finality. Difference, in Bergson's philosophy, is inherent in the thing itself, eliminating the need for an external end to explain it.[144] Thus, in contrast to Plato's envisaged ideal form or telos guiding differentiation, Bergson posits a more fluid, contingent process, devoid of predetermined endpoints. This process-oriented view aligns with Deleuze's own philosophical inquiries into the nature of difference and repetition, challenging static conceptions of identity and essence.

Deleuze's interpretation of Bergson's philosophy presents a nuanced, dynamic understanding of internal difference. It emphasizes the continuous process of differentiation, where entities evolve not through negation or contradiction but through the unfolding of their inherent tendencies over time. This approach encourages an understanding of Bergson's thought as a dynamic, self-differentiating process inherent to the nature of things. It also contributes to the broader philosophical discourse on difference, identity, and time.

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[143] Garrett Barden, "Methods in Philosophy," in *The New Bergson,* ed. John Mullarkey (Manchester: Manchester University Press, 1999): 32-39.
[144] Deleuze, *Bergson's Conception of Difference,* 52-53.

C. Relationship Between Time and Memory

As one might suspect from his dynamic conception of time as duration and his corresponding emphasis on differentiation, Bergson has a complex understanding of memory. For Bergson, memory is not simply a recollection of the past, but a synthesis of past, present, and future. This understanding of memory as a temporal synthesis enhances our comprehension of its role in shaping our perception and interpretation of constitutional decision-making.

Bergson's insight sets the conditions to recognize memory's dual nature, one imagistic and one temporal. According to Bergson scholar Suzanne Guerlac, memory can be seen as the preservation of past images.[145] In this sense, memory represents a static form of experience, capturing the lived experience at a standstill. However, memory also encompasses the concept of storing duration.[146] In this sense, memory is dynamic. Indeed, it is the closest thing we have to a way of conceptualizing the capture of qualitative lived experience.

Bergson claims that the difference between matter and perception is a matter of degree, meaning they exist on the same continuum but at different points. According to Bergson, unless matter and perception are seen as degrees of the same thing, the emergence of perception from matter would be unexplainable. However, he maintains that the difference between perception and memory is of a different kind, suggesting they are fundamentally different entities. For Bergson, if we don't see

[145] Guerlac, *Thinking in Time,* 118.
[146] Ibid.

memory as fundamentally different from perception, then memory loses its unique and independent nature, becoming just a weaker form of perception. Furthermore, with perception and memory construed as different in kind, Bergson can distinguish between past and present intelligibly, allowing him to assign an ontological character to the past. Moreover, it permits him to think through the problem of recognition (i.e., in what situations does the body recognize past images?).

Bergson's claim that memory is autonomous rests on two grounds. The first relies on the active character of perception. Bergson maintains that memory is not a weakened form of perception, but instead has its own unique characteristics and functions. Asserting that memory is autonomous means that it is self-governing and operates independently of other mental processes. This perspective emphasizes the active role of memory in our perception of the world. Rather than viewing memory as a passive storage system for past experiences, it is seen as an active process that is deeply intertwined with our perception and understanding of the world. In cases of failed recognition, it is not that the memories have been destroyed. Rather, they cannot be actualized due to a break in the chain that links perception, action, and memory, preventing the memory from being realized or brought into conscious thought. Bergson's concept of memory as an active process underscores the challenges and inherent limitations in linguistic representation.

> But stating the problem is not simply uncovering, it is inventing. Discovery, or uncovering, has to do with what already exists actually or virtually; it was therefore certain to happen sooner or later. Invention gives being to what did not exist; it might never have happened. [T]he effort of invention consists

> most often in raising the problem, in creating the terms in which it will be stated.[147]

This suggests that our ability to recall memories is not just about the integrity of the memory itself, but also relies on memory's relation to other processes, like the narrative construction of history.[148]

The second ground on which Bergson relies to justify his claim that memory is autonomous rests on the concept of time conceived as duration. As duration, time is not a thing or an object, but rather a continuous flow. In this sense, time is movement; time is change itself. Bergson's notion of duration invites us to understand time as an active process, constantly in flux. This understanding of time aligns with Bergson's explication of the active character of perception: that perception is an active, present, and conscious process. Perception is not merely a passive reception of information, but an active engagement with the present moment. The activity inherent in both time as duration and perception coincides with Bergson's understanding of memory as an active and dynamic process. Rather than being a passive repository for past

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[147] Bergson, *The Creative Mind*, 35.

[148] Bergson's idea of invention as a means of understanding problems, as stated in *The Creative Mind* aligns with Kenneth Burke's concept of the "terministic screen," illuminating how our framing and naming of a concept limit and shape our ability to understand and engage with it. Kenneth Burke, "Terministic Screens," in *Language as Symbolic Action: Essays on Life, Literature, and Method* (Berkeley: University of California Press, 1966), 44-62 (Burke discusses how language systems influence perception and symbolic action by highlighting certain aspects of reality while deflecting others. The terministic screen acts as a filter through which we view and interpret the world, shaping our understanding and interactions based on the terms and symbols we use. Burke's concept of the terministic screen is a short-hand way to explain how representation works – i.e., once you name something and recognize a term for it, that's the term used to describe and identify the thing itself. The naming process produces a "terministic screen" that encloses that object or concept within the terms that you have given it, and forecloses thinking of it as anything else. Essentially, the name screens you off from understanding the thing as anything other than what you've already named it. Burke's terminology has a dual function: terministic in that it's driven by the term given, also terministic in that it cuts off any other interpretation.).

experiences, memory actively engages with the past and brings it into the present. Memories serve as a bridge between the past and the present, accessing and translating elements of the past into movements or actions that can be actualized in the present moment.

For Bergson, the active relation among the past, memory, perception, and time challenges the common assumption that the brain merely stores independent recollections, which rests on the language of containment.[149] Instead, Bergson suggests that the brain stores motor contrivances, or practical strategies for accomplishing tasks. Memories, according to Bergson, do not reside in the physical brain, which he conceptualizes as anchored in the present. Instead, memories exist within the realm of time, inextricably tied to the past, which persists and exists in various forms. Therefore, any serious contemplation of memory, according to Bergson, must take into account the nature of memory's being, its existence through time.

D. Memory and How it Functions

At the core of any discourse on memory is its definition. There is a broad understanding of memory as not merely a recall of the past but a complex synthesis of past, present, and future experiences. Bergson's explanation positions memory as a dynamic intersection of time and experience, suggesting a model where memory is both imagistic and temporal. This definition underscores memory's dual nature,

[149] See for example, Edward S. Casey, *Remembering* (Bloomington: Indiana University Press, 2000, 310 (discussing the entrenched hold of thinking that memory is contained and somewhere; confined to some type of receptacle, whether in the brain or on a computer).

emphasizing its role in representing absent objects and preserving moments that have evaporated in time. This imagistic aspect allows memory to effectively capture the past. This concept is well-articulated by Frédéric Worms, who emphasizes that memory is not simply a recollection of past objects but also a preservation of the departed moments of time.[150] On the other hand, the temporal aspect of memory is underscored by its relationship with time, history, and experience. As Bergson explains, memory is a synthesis of past, present, and future, which gives it a dynamic and evolving nature. The interplay between these two aspects of memory - imagistic and temporal - contributes to the richness and complexity of our understanding and interpretation of memory.

As alluded to earlier, Bergson claimed there are two types of memory: habit memory, which refers to the automatic repeating of learned past action,[151] and pure memory, which registers the past in the form of "image-remembrance," i.e., the past as such.[152] This type of memory is contemplative.

To accurately understand Bergson's theory of how memory operates within duration, it is important to see that Bergson in fact provides a tripartite theory of memory, with pure memory advanced alongside those of habit and independent recollection. Pure memory includes the components that make up episodic (or

[150] Frédéric Worms, "Matter and Memory on Mind and Body: Final Statements and New Perspectives," in *The New Bergson*, ed. John Mullarkey, (Manchester: Manchester University Press, 1999), 88-98.
[151] Bergson, *Matter and Memory*, 78.
[152] Ibid., 88.

representational) memory, but pure memory's function goes beyond the accumulation of past experiences, stored independently of their immediate utility for action.

Imagine you are walking through a park you visited as a child. As you stroll through the park, you suddenly experience a vivid and emotionally-charged memory of a specific day from your childhood when you played there with friends. This memory is not triggered by any external cues or conscious effort to recall it. Instead, it spontaneously arises from pure memory, allowing you to relive that moment from your past in a timeless and vivid way. Pure memory grants you access to the past as a living, ongoing experience, rather than a mere recollection. In essence, Bergson's concept of pure memory underscores the idea that memory is not solely a function of the past but an integral part of our present experience, connecting us to the continuous flow of our lives and enriching our perception of reality.

Bergson's concept of pure memory is not rooted in the idea of origin or development in the conventional sense. Instead, it suggests that pure memory is an inherent and continuous aspect of human consciousness that exists alongside our immediate sensory experiences and is an integral part of our subjective reality. It is always present as a potentiality within human consciousness. He argues that pure memory coexists with our perceptions of the present moment. It is not something separate from our ongoing experiences but is intertwined with them. While we perceive the world around us through our senses, pure memory enables us to connect our current experiences with past ones in a non-linear and intuitive manner. It is not

limited to a chronological recall of events but enables a more profound and holistic connection with one's personal history.

The primary function of memory, according to Bergson, is to utilize past experience for present action. This process, known as recognition, is a fundamental aspect of how we interact with and make sense of the world. Recognition relies on both types of memory (habit and pure). Motor mechanisms allow us to respond automatically to familiar situations, while independent recollections (pure memory) enable us to reflect on past experiences and apply this knowledge to current circumstances. Together, these two forms of memory contribute to our ability to adapt effectively to our environment and navigate our lives.

In *Mind and Variability: Mental Darwinism, Memory, and Self,* Patrick McNamara, explains how memory operates in the process of contracting the past to address present circumstances in the context of Bergsonian philosophy.[153] Contraction refers to the mechanism by which consciousness organizes and synthesizes multiple moments of duration into a coherent experience. It is through this contraction that the past and present can coexist in consciousness, allowing for the continuity of identity and experience over time.

Bergson argues that pure memory serves as a link between the past and the present, enabling the contraction of time. Instead of recalling past events as isolated representations, pure memory enables a direct re-encounter with the past in the

[153] Patrick McNamara, *Mind and Variability: Mental Darwinism, Memory, and Self* (London: Praeger, 1999), 37.

present moment. This contraction occurs spontaneously and effortlessly, as past experiences come into one's immediate awareness. A consequence of Bergson's identification of pure memory as a process (as well as encompassing the category of episodic/representational recollection) is to highlight that pure memory can never be solely recalled in its pristine form. The process of recollection as memory retrieval is always and inherently productive and creative precisely because memory retrieval can only actualize latent (virtual) memories using the resources available in the present. More importantly, this process is always oriented towards action in the present and future. It is this movement between the past and present that makes temporal synthesis possible. Therefore, memory is not a passive recall of past experiences but an active and strategic engagement with the past, shaped by the contingencies of the present and future-oriented actions.

Contraction plays a key role in how these memories are accessed and utilized. For instance, when a particular memory is needed for action or thought, the mind contracts the vast expanse of pure memory, selecting and bringing forth the relevant memory into the present. This act of contraction is what allows for the fluidity of thought and the ability to navigate complex situations based on past experiences.

In an attempt to illuminate the complexities of memory, Bergson introduces the image of a cone. The base of the cone symbolizes memories in their purest form, prior to their incarnation within the present, whereas the summit, the point, signifies their insertion into the present moment of action.

As we move toward the base of the cone, Bergson explains that we encounter personal, episodic memories. These are the elements that facilitate what Bergson describes as personal recognition, a phenomenon distinct from general recognition. While general recognition enables me to identify an object such as a desk *as* a desk, personal recognition is deeply rooted in my individual experiences. It allows me to connect the recognized object to my personal history, to recognize this particular desk as the one at which I sat for my exams at university, for instance.

Significantly, the space between the base and the summit of the cone is not vacant but teems with memory manifesting itself according to an infinite number of "degrees of contraction". Consequently, memory can be "repeated an infinite number of times in these myriad possible reductions of pure past life."[154] Bergson used this dynamic movement, this intensive condensation, to counter the perspective of associationist psychology, which he argued restricted the mind to isolated, atomistic ideas and their interrelations, neglecting the profound interconnectedness and dynamism inherent in memory.

Bergson's concept of contraction underscores the interconnectedness of past and present in the perception of time. It highlights the active role of consciousness in merging past and present experiences, fostering a deeper, more comprehensive understanding of time's passage.

McNamara explains that memory operates by contracting levels of the past. This contraction is perceived by the present consciousness as an expansion because of

[154] Bergson, *Matter and Memory*, 169.

an increased and intensified collection of images and moments of duration. Essentially, memory allows us to encapsulate multiple temporal moments into a single intuitive perception. This capability detaches us from the incessant flow of events and the rhythm of mechanical necessity, offering us a nuanced understanding of time beyond the linear progression of moments. This is how Bergson often described memory as images that survive even after being overtaken by new or "present" perceptions:

> We assert, at the outset, that if there be memory, that is, the survival of past images, these images must constantly mingle with our perception of the present and may even take its place. For if they have survived it is with a view toward utility; at every moment they complete our present experience, enriching it with experience already acquired, and, as the latter is ever increasing, it must end by covering up and submerging the former.[155]

Alexandre Lefebvre, in his interpretations of Henri Bergson's philosophy, delves into the nuanced processes of memory, particularly as expressed through the lens of Bergson's metaphor of the cone, to elucidate how memories transition and transform within the continuum of time, or duration. Lefebvre notes that Bergson's cone serves as a foundational image for understanding the dynamic nature of memory and its operation through two principal movements: translation and rotation.[156]

Translation refers to how memories shift from the depths of the cone (representing the past in its pure form, detached from the immediate concerns of action) towards the apex of the cone, which intersects with the plane of the present.

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[155] Bergson, *Matter and Memory*, 65-66.
[156] Alexandre Lefebvre, "A New Image of Law: Deleuze and Jurisprudence" *Telos.* 130 (2005): 121-125.

Translation symbolizes the process of bringing a memory from the pure state of recollection to a point where it can be acted upon or influence current perception and decision-making. It's a movement from the potential to the actual, where memories are selectively brought into the present, mediated by our current needs, context, and emotional state. In this process, memories undergo modification; they are translated into a form that can be integrated with the current moment, thereby influencing how we perceive, interpret, and engage with our environment.

Rotation describes the internal reorganization of the memory itself within the cone. The virtual past rotates upon itself to present the most relevant memories to the situation in order to act (make a decision). It's a conceptual movement that reflects the active, dynamic reconfiguration of memories in relation to one another and to new experiences. Rotation is the active decision making whereby distinct memories are partitioned from the virtual past and actualized by virtue of their use in the decision-making process. As we accumulate more experiences, our memories do not remain isolated or unchanged; they interact, intertwine, and reorient themselves in relation to new data and perspectives. This reorientation or rotation is crucial for the creativity of memory, allowing for the emergence of new insights, interpretations, and understandings from the blending of past experiences with the present context. Rotation ensures that memory is a living process, capable of adaptation and evolution, rather than a mere repository of fixed images.

Lefebvre's exploration of translation and rotation in the context of Bergson's cone emphasizes the fluidity and dynamism of memory. It underscores the idea that

memories are not merely retrieved but are actively constructed and reconstructed in the continuous flow of duration. This process enables individuals to interpret the present, envision the future, and navigate the complexities of the present with an array of past experiences that are constantly being reinterpreted and reshaped. Through translation, memories become relevant to the present; through rotation, they gain new meanings and associations, highlighting the intricate web of connections that constitute our understanding of time, memory, and identity.

Bergson's cone, and Lefebvre's explication of the translation and rotation features within the cone, offers a helpful way to understand the workings of memory within the continuum of duration. The cone demonstrates the interaction between memory and the present moment as not merely a retrieval of static images from the past but an active, creative process that involves the entire spectrum of one's accumulated experiences.

With the cone of memory as a conceptual backdrop, Lefebvre then examines law through the philosophy of Bergson and Gilles Deleuze. Lefebvre disputes the notion that judges simply apply law without creating it. Specifically, he uses Bergson's theory of perception and memory to argue that creativity is an inherent aspect of judgement. Lefebvre asks,

> How then does the plane divide and yield recollections with which to treat the present? The judicial selection of recollections (or precedents) is accomplished through translation and rotation: "Memory, laden with the whole of the past, responds to the appeal of the present state by two simultaneous movements, one of translation, by which it moves in its entirety to meet experience, thus contracting more or less, though without dividing,

> with a view to action; and the other of rotation upon itself, by which it turns toward the situation of the moment, presenting to it its most useful side."[157]

While the above-quoted passage focuses on Bergson's concepts, considering Lefebvre's ideas in this context involve interpreting how memories (and precedents) and their selection contribute to the production of socio-legal spaces through legal judgments. Using Lefebvre, we can view contraction in terms of how social practices and spatial experiences shape and are shaped by those memories (and precedents) which are deemed relevant and then selected to guide action. In this framework, as in Jack Balkin's, the selection of and emphasis on certain memories over others could play a critical role in the production and understanding of space, reflecting broader socio-legal narratives and identities.

Spatializing memory is a cognitive process that comes naturally to us, as we effortlessly perceive it as a repository where the past is preserved and readily available for retrieval. This spatial understanding of memory, wherein it is conceptualized as a place where past experiences are stored, is deeply ingrained in our collective consciousness. However, to maintain its dynamism, memory must engage in a temporal synthesis of the layers of time, which means it cannot be spatially confined. Viewing time as a vertical, stacked multiplicity challenges the traditional notion of history as a linear progression. By vertically intersecting multiple temporalities, memory can synthesize a more profound understanding of the lived

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[157] Lefebvre, "A New Image of Law: Deleuze and Jurisprudence," 121 citing Henri Bergson, *Matter and Memory: Essay on the Relation between the Body and the Mind,* trans. N.M. Paul and W.S. Palmer (New York: Zone Books, 1990), 168-169.

experiences within a particular event. This conception of time, proposed as an alternative to the conventional horizontal concept, emphasizes that memory is not simply an act of retrieval but a process of temporal synthesis. In other words, memory possesses a being that is more temporal than material, rooted in qualitative experiences rather than concrete objects. However, when memory is turned into history, it becomes objectified and loses its dynamism, transforming into a static artifact. In this sense, the memory becomes spatially trapped, robbed of its temporal mobility.

Understanding memory as an activity within the temporal sphere can be challenging due to its inherent existence. While memory has an activity component, its dynamic nature is often overshadowed when it is converted into history. History tends to treat memory as a thing, reducing it to a mere representation of past events. However, memory, as a temporal being and temporal force, shares commonalities with qualitative lived experiences.

E. Walter Benjamin: The "Image" as Dialectics at a Standstill

In Walter Benjamin's exploration of the relationship between the past and present, he presents a unique perspective on memory, viewing it not as a linear or chronological progression but as a still image that encapsulates a moment in time. "It's not that what is past casts its light on what is present, or what is present its light

on what is past; rather, image is that wherein what has been comes together in a flash with the now to form a constellation."[158]

This image represents a point of synchronicity between the Then and the Now, serving as a conduit that links past and present, thus providing a dialectical, non-temporal understanding of memory. This idea, as he puts it in *The Arcades Project*, suggests that "image is dialectics at a standstill."[159] This conception of memory implies that a historical event or memory is brought into the present moment through its recognition. This memory, although grounded in the past, is simultaneously deeply rooted in the present, thus establishing a bridge between the two. It is a radical departure from conventional views of memory as a mere record of the past. Instead, Benjamin posits that the past can only be actualized, or made real, in the Now.

> For while the relation of the present to the past is purely temporal, the relation of what-has-been to the now is dialectical: not temporal in nature but figural <*bildlich*>. Only dialectical images are genuinely historical-that is, not archaic images. The image that is read – which is to say, the image in the now of its recognizability – bears to the highest degree the imprint of the perilous critical moment on which all reading is founded. [160]

This means that any image of the past can only be grasped at the very moment it is recognized, and once that moment passes, the image is never seen again.[161]

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[158] Walter Benjamin, *The Arcades Project*, trans. Howard Eiland and Kevin McLaughlin, (Cambridge: Harvard University Press, 2002), 462.
[159] Ibid.
[160] Ibid., 463.
[161] Walter Benjamin, "On the Concept of History," in *Selected Writings Volume 4: 1938*-1940, trans. Harry Zohn, ed. Howard Eiland and Michael W. Jennings (Cambridge: Harvard University Press, 2003), 390.

Benjamin's theory of memory underscores the interdependence between the past and present, suggesting that neither holds supremacy over the other. Each is reliant on the other for its existence and understanding. This contrasts sharply with Henri Bergson's approach to memory, which views it as a dynamic process that synthesizes past, present, and future experiences within the framework of history and time. Where Benjamin's theory posits memory as a static image linking past and present, Bergson's theory infuses movement into this structure, ensuring that history does not remain static or unchanging.

Benjamin's dialectics at a standstill reflects the idea that history is not a linear progression but a constellation of past and present moments. This notion resonates with the idea of memory as image, comprised of various temporal layers. When applied to the Supreme Court's decision making process, it suggests that the Court's approach should not be a rigid adherence to historical events but an interdependent consideration of the past experiences from multiple layers of time in conjunction with the experiences in contemporary contexts. The Court's current tendency to rely heavily on 18th and 19th century history to analyze today's constitutional issues misapplies Benjamin's imagistic approach to memory by limiting its consideration of memorial images to one specific time period, which limits Benjamin's multi-layered consideration into just one layer, thus transforming the understanding of memory into a static one, at odds with the dynamic nature of memory as continually constructed and reconstructed. This restrictive perspective not only freezes the significance of memory but also limits its potential as a resource in constitutional argumentation and

interpretation, reducing it to a singular narrative that may not truly represent the multifaceted experiences and interpretations of constitutional principles across time.

Walter Benjamin and Henri Bergson both challenge traditional understandings of time, history, and memory. For example, they both critique the concept of linear time, proposing instead a dynamic, qualitative interpretation. In addition, both philosophers emphasized the role of subjectivity in perceiving time and history. Bergson's "inner time" foregrounds personal experience and consciousness in shaping our understanding of time while Benjamin's "dialectical images" spotlights the intersection of individual memories and historical events.

However, their approaches diverged significantly when considering history and memory. Benjamin, influenced by Marxism and critical theory, focused on historical materialism and the dialectical tension within history, examining how historical events inform the present and the potential for redemption through messianic time (to be discussed later, in Chapter 6). In contrast, Bergson's approach to history prioritized the subjective experience of time as a continuous flow over a focus on historical events. In terms of memory, Bergson conceived it as a process of reactivating the past, where the past and present coexist. Meanwhile, Benjamin was interested in the construction and reconstruction of memories over time and proposed the concept of "aura" to suggest that the authenticity of memories could be affected by technological reproduction.

Despite the conceptual differences between Benjamin and Bergson in their understanding of time, history, and memory, their theories can be synthesized to

provide a more nuanced approach to enhancing the Supreme Court's historical consciousness and understanding of time. This approach would address the limitations imposed by the Court's current strict focus on 18th and 19th-century history.

F. The Power and Necessity of Forgetting: Bergson and Ricoeur

While Bergson tended to avoid antinomies, he was clear that the operation of memory, indeed, its very ability to function, required a corresponding ability to forget. In other words, forgetting makes memory possible.

Bergson distinguishes between two forms of forgetting: involuntary and voluntary (or intentional) forgetting. Involuntary forgetting is the forgetting of habit memory. It occurs when we are unable to access what is necessary to perform the habit at the moment of executing the activity. Involuntary forgetting is not a deliberate act, but a natural consequence of the focus on practical tasks and immediate concerns. Voluntary (or intentional) forgetting, is a conscious and deliberate act. It represents an individual's freedom to select which memories to bring into conscious awareness and which to keep in the background.

Bergson's view of forgetting is intimately tied to his philosophy of time. He maintains that habitual memory operates in a spatialized, quantitative mode, while pure memory is rooted in the qualitative, durational experience of time. Forgetting, in habitual memory, is a result of the limitations of spatialized memory, while pure memory transcends these limitations. Habitual memory, according to Bergson, operates within a spatialized, quantitative mode—akin to storing and retrieving

discrete items from specific locations in a physical space. This mode of memory is closely associated with the practical needs of daily life, automating routine actions and responses. However, its primary limitation lies in its spatial nature; it treats memories as static objects that can be lost or obscured, leading to forgetting. Forgetting, in the context of habitual memory, occurs because this type of memory is finite and subject to the constraints of spatial organization; memories can be overwritten or become inaccessible due to the limitations in how they are stored and retrieved.

In his seminal work, *Memory, History, Forgetting*, Paul Ricoeur acknowledges the innovative and original contributions Henri Bergson made to our understanding of memory.[162] Ricoeur, in particular, commends Bergson for his acute grasp of the intricate relationship between the persistence of images and the phenomenon of recognition. In Ricoeur's view, it is Bergson who stands out as the philosopher who has best articulated this connection.[163]

While Bergson and Ricoeur share a critical stance toward linear time and recognize the importance of memory in constituting identity, their approaches diverge significantly in their conceptualization of memory, the role of forgetting, the integration of history, and their methodological perspectives. Bergson offers a more psychological and metaphysical account, emphasizing the continuity of the self through memory and duration, while Ricoeur focuses on the narrative construction of

[162] Paul Ricoeur, *Memory, History, Forgetting*, trans. Kathleen Blamey and David Pellauer (Chicago and London: University of Chicago Press, 2004), 430-31.
[163] Keith Ansell-Pearson, *Bergson: Thinking Beyond the Human Condition* (London: Bloomsbury Academic, 2018), 89.

time, memory, and identity, highlighting the mediated, constructed nature of our engagement with the past.

For Bergson, forgetting is a result of the limitations of spatializing memory, where memories not immediately useful are obscured or lost. Ricoeur's exploration of forgetting is more nuanced within the context of narrative and history; he considers forgetting both as a failure of memory and as a necessary condition for the formation of identity and historical understanding. Ricoeur also examines the ethical dimensions of forgetting and remembering, particularly in relation to forgiveness and the construction of historical narratives.

While Bergson's focus is primarily on the individual's internal experience of time and memory, Ricoeur extends his analysis to the intersection of personal memory and collective history. In *Time and Narrative*, Ricoeur examines how historical events are integrated into narratives, shaping and being shaped by collective memory, and how these narratives contribute to our understanding of time.

Yet, Ricoeur recognizes our debt to Bergson on the question of forgetting. Ricoeur suggests that Bergson's thinking holds the key to understanding the workings of forgetting, even though Bergson himself had only conceptualized this in terms of effacement. Ricoeur introduces an intriguing question, "On what basis, then, would the survival of memories be equivalent to forgetting?"[164] He offers a thought-provoking response by proposing a shift in our conventional understanding of forgetting. Instead of seeing it as merely the obliteration of traces, Ricoeur suggests

[164] Ricoeur, *Memory, History, Forgetting,* 440.

we consider forgetting in terms of a reserve or resource. Here, forgetting is identified as the "unperceived" character of the persistence of memories, their removal from the watchful eye of consciousness.[165] This interpretation of forgetting invites us to see it not as a relentless process of destruction, but as an immemorial resource.[166] Ricoeur's reinterpretation of Bergson's understanding of memory through the lens of forgetting offers an innovative perspective that takes us beyond Bergson's initial conception and pushes the boundaries of our understanding of memory and forgetting.

G. Collective Memory

Maurice Halbwachs, a renowned French sociologist of the 1920s, pioneered the concept of collective memory. Halbwachs was cognizant of the potential misunderstanding that this term might engender. To mitigate such doubts, he linked the notion of collective memory with another construct, "social frame". Halbwachs asserted that the concept of collective memory is linked to the idea of social frames, and it is impossible to understand one without the other. He stated, “No memory is possible outside frameworks used by people living in society to determine and retrieve their recollections.”[167]

Halbwachs argued that people perceive the past from the vantage point of the present, situating themselves within the context of their communities. These communities can take various forms—they can be ethnic, class-based, political,

[165] Ricoeur, *Memory, History, Forgetting,* 440.
[166] Ansell-Pearson, *Bergson: Thinking Beyond the Human Condition*, 90.
[167] Maurice Halbwachs, *On Collective Memory*, trans. Lewis A. Coser (Chicago: Chicago University Press, 1992), 43.

professional, familial, or any other kind of social grouping. Our placement within these communities and networks influences how we recall and interpret past events. This process of collective memory formation is not a solitary act; it is a communal activity that is deeply intertwined with our social environment.

According to Halbwachs, collective memory is shaped by the communities and networks where people find their identities. It is not a unitary or singular entity. Instead, it is pluralistic and polyvalent, reflecting the diversity and multiplicity of human experiences and perspectives. In this light, we can appreciate Halbwachs's contribution to our understanding of collective memory – a concept that is not only about the past but also about how we understand our present and envision our future. It is a concept that recognizes the active role of individuals and communities in shaping their recollections, thereby shaping their identities and their understanding of the world.

Institutions like the Supreme Court possess the capacity to both cultivate and impart collective memory. The Court holds a unique position where it can shape and instill shared recollections and interpretations of historical events, effectively molding society's collective consciousness and establishing the nation's constitutional experience. This pivotal role allows it to influence societal understanding of past occurrences, influencing perceptions of constitutional law and its interpretation by forming and disseminating collective memory.

Social psychology posits a significant link between the development of collective memory and the cultural forms and institutional practices within a society.

In their article, "Collective Memory, History, and Social Justice," Sharon K. Hom and Eric K. Yamamoto argue that memories of historical events, personalities, and social interactions are generated within a cultural framework. These memories are subject to socially constructed patterns of recall, often incited by social stimuli, and communicated through a shared language.[168] In essence, collective memory is a product of cultural and social structures, and it is these structures that drive the collective recollection and interpretation of past events.

The narrative structure and its inherent possibilities and constraints also shape our recollection of the past. As noted by Hom and Yamamoto, narratives play a crucial role in buttressing a group's identity and formulating the conceptual frameworks people employ to render the past meaningful. This notion echoes Michael Schudson's perspective in "Dynamics of Distortion in Collective Memory," where he suggests that the shaping of collective memory is inextricably tied to the narrative structure, which carries the potential for both distortion and meaningful reconstruction.[169] Collective memory, therefore, is not merely a passive repository of the past but an active, narrative-driven process that shapes our understanding of history and our place within it.

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[168] Sharon K. Hom & Eric K. Yamamoto, "Collective Memory and Social Justice," *47 University of California Los Angeles Law Review 1747* (2000), 1761.
[169] Hom & Yamamoto, "Collective Memory and Social Justice," 1761-1762 citing Michael Schudson, "Dynamics of Distortion in Collective Memory," in *Memory Distortion: How Minds, Brains, and Societies Reconstruct the Past*, ed. Daniel L. Shacter (Cambridge: Harvard University Press, 1995), 346-347.

Collective memory historians posit that collective memory is inherently provisional.[170] The term provisional here signifies its flexible nature and its openness to revision and reinterpretation. These historians perceive the act of remembering as a dynamic interaction between the past and the present. They argue that our narratives of the past are not mere chronicles of historical events but are constructed and reconstructed narratives based on our present understanding and standpoint. In this context, the past is not an objective, immutable reality but a subjective, malleable construct that is continually being shaped by our present perspectives and experiences. Thus, the story of the past is always told from the vantage point of the present, indicating a continuity of the present in the past.

Similarly, collective memory historians argue that our collective recollections are not fixed representations of the past but fluid interpretations that evolve with time, context, and perspective. Our collective memory is, therefore, a living, transformative continuum that bridges the past with the present and shapes our understanding of both in the process.

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[170] As Costas Douzinas notes, "The two major schools of historiography in this area have opposing views about the function of memory and forgetting. For Freudian historians, the past exerts an existential power over the present. *See generally,* FREDERIC JAMESON, THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT (1981). … Memories are screens raised to shelter the self from the traumas of the past, but despite the great policing of imagination and forgetting, the original trauma remains a foreigner in the house of being and will inexorably return, in symptoms and sickness and dread. We try to forget the past, we cover it through screen memories (*See generally,* PATRICK HUTTON, HISTORY AS AN ART OF MEMORY (1993)). Collective memory historians, on the other hand, believe that the story of the past is always told from the perspective of the present, and see in the past the continuation of the present. If memory is provisional, as collective memory historians believe, it can always change to good effect." Costas Douzinas, "Theses on Law, History and Time," *7 Melbourne Journal of International Law 13* (2006), 22.

This understanding of collective memory as provisional highlights the transformative power of memory, its role in molding our collective consciousness, and its influence on our present and future.

Not everyone, however, thinks collective memory is related to memory at all. In *Regarding the Pain of Others*, critic and theorist Susan Sontag claims "there is no such thing as collective memory."[171] According to Sontag, what is often referred to as "collective memory" is not an act of recollection, but rather, a stipulation. It is a declaration that this is the narrative of how events unfolded. Ideologies, in turn, construct substantial archives of representative images, encapsulating and propagating common ideas of significance and prompting predictable thoughts and emotions.[172] In Sontag's view, what we call collective memory is really a narrative of power constructed by those with the ability to insist on their interpretation of events.

In her article, *Transformations between Memory and History,* memory and history scholar Aleida Assmann confronts Sontag's proclamation, arguing that while it holds a degree of veracity, it is nonetheless incomplete. Assmann contends that Sontag's assertion neglects the tangible reality that autobiographical memories, or episodic memories that pertain to personal incidents of individual experience, while embodied and thus non-transferable, can be shared with others. Assmann asserts that once these memories are verbalized in a narrative or represented by a visual image, they move beyond the realm of personal property. Through the common medium of

[171] Susan Sontag, *Regarding the Pain of Others* (New York: Farrar, Straus and Giroux, 2003), 85-86.
[172] Ibid.

language, these individual memories can be exchanged, shared, corroborated, confirmed, corrected, disputed, and even appropriated by others.[173]

Further, Assmann maintains that human beings exist not solely in the domain of the first-person singular but also within the manifold dimensions of the first-person plural.[174] That is to say, individuals become constituents of diverse collectives, adopting the "we" that corresponds to their respective social frameworks. These frameworks are implicit or explicit structures composed of shared concerns, values, experiences, and narratives. Each collective "we" is constructed through shared practices and discourses that delineate certain boundaries and define the principles of inclusion and exclusion.

For instance, to be a part of a collective entity such as a nation, one must assimilate and adopt the group's history, which invariably extends beyond the confines of one's individual lifespan. The individual participates in the group's perception of its past through cognitive learning processes and emotional acts of identification and commemoration. However, this past cannot be remembered in the traditional sense; it must be memorized. Consequently, Assmann notes that collective memory is a hybrid of semantic and episodic memory: it must be acquired through the process of learning.[175]

In tracing the evolution of academic discourse, Assmann notes a shift from the heavy usage of ideology in the 1960s and 1970s to the rising prominence of collective

[173] Aleida Assmann, "Transformations between Memory and History," *Social Research: An International Quarterly*, 75, no. 1 (Spring 2008), 50.
[174] Ibid., 51-52.
[175] Ibid.

memory in the 1990s. She contends that this is not merely a superficial substitution of one term for another but signifies a theoretical transformation within scholarly thought.

Assmann explains that ideology inherently carries derogatory implications, casting a mental framework as false, manipulated, and harmful, thereby implying an indisputable, absolute truth. However, this presupposition of a self-assured truth has been gradually eroded since the 1990s, influenced by the rise of multiculturalist and constructivist thought.[176]

Assmann posits that this shift in discourse has led scholars to recognize that Koselleck's concepts of subjective or objective truth exhibit many qualities previously attributed to ideology.[177] "It is in particular the insight into the irreducible constructedness of both our memories and the work of the historian that has taught us to discard the term ideology as a descriptive term and recognize it as a purely polemical tool."[178]

As Assmann observes, the term "memory" has usurped the place of "ideology" while simultaneously strengthening the construct of "identity" on both individual and collective planes.[179] Similarly, in *Imagined Communities*, Benedict Anderson presents a nuanced understanding of the intricate relationship between

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[176] Assmann, "Transformations between Memory and History," 53.
[177] Ibid., 52-53. "German historian Reinhart Koselleck differentiated between two types of truth: subjective and objective. Subjective truth is personal and based on an individual's unique memories and experiences. Objective truth, in contrast, is established by historians through impartial analysis and comparison of sources. According to Koselleck, the space between these two types of truth is filled with "ideology".
[178] Ibid., 53.
[179] Ibid., 54.

memory and identity. He contends that the formation of national identities is significantly shaped by collective memories.[180] These collective memories, encompassing shared narratives and experiences, transcend individuality and foster a sense of belonging to a broader community. Anderson's concept of "imagined communities" encapsulates this idea, suggesting that nations are constructs that emerge from these shared memories and narratives. This perspective offers a profound understanding of how collective memory serves as a crucial building block in the formation of national identities, fostering a sense of commonality and shared identity among individuals within a nation.

Assmann's exploration of the shift from individual to collective memory is helpful here as it highlights a critical distinction in the ways memory functions at different scales. The shift is not a straightforward conversion, for institutions and collectives do not possess memory in the same nuanced manner that individuals do. Indeed, there is no collective corollary to the individual's neurological system that stores and retrieves memories.

Entities such as nations, governments, religious institutions, or corporations do not inherently have memory. Instead, they actively construct memory utilizing memorial signs encompassing symbols, texts, images, rites, ceremonies, places, and monuments. This constructed memory, in turn, forms the foundation upon which

[180] Benedict Anderson, *Imagined Communities*, (London, England: Verso Books, 1983).

these groups and institutions establish an identity.[181] Assmann thus situates collective memory as an active process of creation rather than a passive act of possession.

The collective memory that is constructed, Assmann posits, is intrinsically selective and exclusive. It parses out and privileges certain memories—those deemed useful or relevant—while marginalizing or excluding others. In this sense, collective memory is necessarily a mediated memory supported and shaped by material media, symbols, and practices embedded into individuals' consciousness.

The degree to which these collective memories permeate the individual psyche, Assmann suggests, hinges on two key factors: the efficacy of political pedagogy and the intensity of patriotic or ethnic fervor. Thus, through these processes of construction, mediation, and implantation, collective memory is created, maintained, and perpetuated, offering a rich and complex understanding of how memory works in larger social structures.

The importance of collective memory in law lies in its dynamic and impactful role in shaping legal institutions, influencing jurisprudential decisions, and facilitating rights claims. Given its significant influence on law and society, understanding the complex interplay of memory, community, and identity in the context of constitutional memory is of paramount importance.

Collective memory's role and its relationship to law is both multifaceted and significant. One critical aspect is the way collective memory governs the relationship

[181] Aleida Assmann, "Memory, Individual and Collective." *The Oxford Handbook of Contextual Political Analysis*. Eds. Robert E. Goodin und Charles Tilly. Oxford: Oxford University Press, 2006: 210- 224.

between memory and forgetting. As Sharon K. Hom and Eric K. Yamamoto note collective memory arises in frameworks that underscore contemporary and future priorities. It serves as a regulatory force, dictating what should be remembered and what should be forgotten.[182] The law sets the criteria for memory selection, effectively curating our collective recollections and determining what elements of the past are to be preserved and what are to be forgotten.

Additionally, collective memory is of great importance to law because of its potential to both uphold and disrupt social and political hierarchies.[183] Collective memory not only breathes life into a group's past, it also reconstructs it, positioning a group in relation to others within a power hierarchy. The Court's production of collective memory dictates whose stories get to be preserved and told, thereby influencing the preservation of the social and political hierarchy. Concern with how the Court constructs and embeds historical narratives in its legal opinions reflects the widely acknowledged significance of narrative in every historiography. According to Hayden White, "[t]he events are made into a story by the suppression or subordination of certain of them and the highlighting of others, by characterization, motific repetition, variation of tone and point of view, alternative descriptive strategies, and the like—in short, all of the techniques that we would normally expect to find in the emplotment of a novel or play."[184] Given the Justices' power to write

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[182] Hom & Yamamoto, "Collective Memory, History, and Social Justice," 1756.
[183] Ibid., 1758.
[184] Hayden White, "The Historical Text as Literary Artifact," in *Essays in Cultural Criticism,* (Baltimore: The Johns Hopkins University Press, 1978), 84; See also, Hayden White, *Metahistory: The Historical Imagination in Nineteenth-Century Europe,* Fortieth-Anniversary ed. (Baltimore: The Johns Hopkins University Press, 2014), 1-31.

these historical narratives, we should be mindful that each time the story is retold, it gets farther away from the experience in time that created the event (by making it significant) in the first place.

Moreover, collective memory constructs both jurisprudential and legal memory, which then function as the legal archive from which the constitutionality of contemporary cases is judged. According to Alexandre Lefebvre, this archive, though virtual, represents the totality of past decisions and statutory law available for judgment.[185] It serves as the institutionally recognized past that enables the legal present to come into relief.[186] The judge, as an inhabitant of the legal archive, functions as the medium of the past, drawing upon the virtual coexistence of the archive to make judgments.[187] The recursive impact of this narration on the construction and reconstruction of institutional memory further underscores the importance of the Court's role as a narrator of history in law.[188]

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[185] Lefebvre, "A New Image of Law: Deleuze and Jurisprudence," 118.
[186] Ibid. "As a human ("public") being, a judge obviously moves in Being-Memory, a virtual existence of the past that permits actualizations of lived presents. But in his capacity as a Judge, he occupies an institutional Being-memory, the being-past of the law. Although Bergson did not develop this specific insight, it is possible to claim that not only do living beings presuppose pure memory for their present action, but institutions presuppose it for their operation. Judicial law, as an institution, is ideally suited to develop this homology. The judge, as judge, exists within an enormous history, an institutional past, which we call archive memory. This archive is virtual, and as such it is the general past in which the totality of past decisions (precedents) and statutory law available for judgment is to be found. It is no distortion to say that the "pure past," institutionally considered, offers a way to theorize the pure archive that enables actual presents to come into relief."
[187] Ibid. "[T]he judge is in the legal archive as the medium of the past in general and presupposes its virtual coexistence, an ontological existence that enables the institutional action of judgment."
[188] Ibid., 118-119.

H. Constitutional Memory and Constitutional Interpretation

The concept of constitutional memory as a facet of collective memory has recently emerged as an important area of study in U.S. constitutional law, with legal scholars beginning to explore how memory is politicized in the interpretation of the Constitution. In academic discourse, the exploration of memory holds significant implications for constitutional decision-making, as it affects legal arguments and the formation of legal principles.

Constitutional law scholars have defined constitutional memory in terms of its functional role and its ability to legitimize authority. For example, Professor Balkin posits that the application of collective memory in constitutional discourse is, in fact, "constitutional memory."[189] This construct, he asserts, molds public perception about the meaning of the law and the roots of authority.[190] Articulating a similar sentiment, Professor Reva Siegel argues that constitutional memory is a mode through which Americans "make claims on the past as they argue about the Constitution's

[189] In his article "Constitutional Memories," Jack Balkin explores the concept of collective memory in constitutional law and its role in shaping constitutional discourse. Jack M. Balkin, "Constitutional Memories," *31 William & Mary Bill of Rights Journal 1* (2022) 1. He draws upon the work of sociologist, Maurice Halbwachs who defines collective memory as the shared recollection and forgetting of a group regarding its past. (Balkin, 1 citing Maurice Halbwachs, On Collective Memory 38 (Lewis A. Cose ed. & trans., Univ. of Chi. Press 1992)(1925). Balkin acknowledges that terms like collective memory, cultural memory, and social memory are often used interchangeably in memory literature, although some scholars make distinctions among them. (Balkin, 1). For example, in "Collective Memory and Cultural Identity, "Collective Memory and Cultural Identity," *New German Critique* 65 (1995)" Jan Assmann identifies cultural memory as the narrative memory of events that shape a group's identity notwithstanding the fact that most of the group's members did not personally witness those events. (Assmann, 65). Balkin applies the concept of cultural memory to the collective memory of the Founding and Reconstruction eras. (Balkin, 1). In this context, he defines constitutional memory as "the use of collective memory in constitutional argument." (Balkin, 1).

[190] Balkin, "Constitutional Memories," 1.

meaning."[191] Both Balkin and Siegel's interpretations of constitutional memory emphasize its instrumental role and its effect on how the law and legal authority are comprehended.

Moreover, Siegel identifies constitutional memory as an instrument of resistance that can be used to challenge the Court-produced constitutional memory, which she alleges is incomplete. The interventions by Balkin and Siegel are noteworthy not only for illuminating the concept of constitutional memory in American constitutional law, but also for underscoring the necessity of employing it to enrich our historical understanding.

The recent emergence of memory as a concern in U.S. constitutional law can be attributed to three interrelated factors that reflect broader societal shifts, technological advancements, and evolving legal interpretations.

The first factor is the digital revolution and the way it can make memories permanent. The advent of digital technology and social media has radically transformed the way memory is created, stored, and accessed. Digital platforms have made historical and personal memories more permanent and widely accessible, raising new legal challenges related to privacy, freedom of expression, and the right to be forgotten. In the U.S., where free speech is a paramount constitutional right, courts have been increasingly confronted with cases that require balancing the First Amendment against individuals' rights to privacy and dignity. The digital age has thus

[191] Reva Siegel, "The Politics of Constitutional Memory," *20 Georgetown Journal of Law & Public Policy 19* (2022) 31.

necessitated a reevaluation of constitutional principles in light of the enduring and pervasive nature of memory in the digital realm.

The second factor relates to the way social movements cause us to reinterpret history. Recent social movements in the United States, such as Black Lives Matter and the movement to remove Confederate monuments, have brought to the forefront the question of how historical memory influences present-day inequalities and injustices. These movements challenge traditional narratives and seek to reinterpret historical events and figures in a manner that acknowledges past wrongs and their ongoing impact. This has led to legal battles over the removal of statues, the renaming of public spaces, and the content of educational programs, all of which implicate First Amendment rights and state powers. These disputes necessitate judicial intervention to address the complex interplay between preserving historical memory (often constructed by those in power) and promoting social justice.

Third and finally, the concept of transitional justice contributes to the increasing relevance of memory in American law. The United States is increasingly grappling with the legacy of historical injustices, such as slavery, segregation, and the treatment of Native Americans. This engagement with the past involves a consideration of how memory and acknowledgment of these injustices are integral to achieving reconciliation. Legal scholars and practitioners are examining how constitutional law can facilitate transitional justice mechanisms, such as truth and reconciliation commissions, apologies, and reparations. This reflects a broader concern with how the law can address historical wrongs, ensure that they are

remembered correctly, and prevent their recurrence. The constitutional implications of these efforts, particularly regarding equal protection and due process rights, are significant areas of legal inquiry and debate.

In "Constitutional Memories," Balkin argues that the scope of constitutional memory must be broadened to enhance the process of meaning-making within American constitutional law. He critiques the notion of the American constitutional tradition as monolithic, emphasizing its inherently dialectical nature—a cacophony of voices and perspectives often at odds with one another. Balkin invokes Robert Cover's concept of "jurispathy" to critique efforts to homogenize constitutional tradition, which involves asserting a singular legal authority while attempting to marginalize or erase competing narratives.[192]

Paradoxically, Balkin champions a "jurisgenerative" approach, as termed by Cover, which, while acknowledging the diversity within American constitutional tradition, eschews the need to value all aspects of this tradition equally.[193] Instead, Balkin suggests that expanding constitutional memory involves a critical engagement with our past, where argumentation and persuasion play pivotal roles in determining which memories gain prominence. This endeavor seeks not to equalize every part of our tradition but to make the past more accessible and relevant for contemporary use, effectively turning more of our history into a "usable past."[194] Balkin's work calls for a richer, more inclusive exploration of constitutional memory, one that can foster a

[192] Balkin, “Constitutional Memories,” 58.
[193] Ibid.
[194] Ibid.

deeper understanding and appreciation of the multifaceted legal heritage that shapes American law and society today.

Balkin's "Constitutional Memories" discusses the concept of constitutional memory and its implications for constitutional interpretation. He notes that collective memory refers to what a group, regardless of how it is defined, "remembers and forgets about its past."[195] Balkin asserts that collective memory becomes especially pertinent in the realm of constitutional law when it is employed in constitutional argumentation.[196] "Following Reva Siegel, we might call the invocation of memory in constitutional argument the use of constitutional memory."[197] Accordingly, judicial decisions play a dual role in this context: they both depend on and contribute to the development of constitutional memory. What becomes apparent from Balkin's analysis is that the formation and manipulation of constitutional memory are ultimately about power, determining whose experiences and interpretations are deemed significant and whose are effaced.

Collective memory is vital to the life of the law. Key methods of constitutional interpretation—such as precedent, tradition, and original meaning—blend elements of memory and intentional forgetfulness.[198] These practices underscore the importance of collective memory, not only as a form of argument but also as a cornerstone of legal legitimacy. The perceived legitimacy of constitutional law relies heavily on the assumptions of societal consensus, majority opinion, and

[195] Balkin, "Constitutional Memories," 1.
[196] Ibid., 17-18.
[197] Ibid., quoting Reva Siegel, "The Politics of Constitutional Memory," 21.
[198] Ibid., 2.

consent of the governed. However, these pillars of legitimacy are challenged when the consensus proves illusory and the consent of the governed is drawn into question. When this occurs, traditional assumptions about legitimacy are undermined. The political issue is whether such undermining is occasionally useful, even necessary, in a society that prides itself as much on its ability to adapt as it does its fidelity to tradition.

Balkin also articulates how memory provides origin stories that shape interactions both within and between groups, offering a framework for understanding present circumstances and deciding on future actions.[199] This normative influence extends to narrative memory, which not only makes situations comprehensible but also furnishes historical and social scripts that dictate social analysis and interaction.[200] Such narratives offer ideological closure by suggesting acceptable behaviors and social relations, imbuing historical scripts with the power to influence current behaviors and expectations.[201]

In *The Political Unconscious,* Fredric Jameson elaborates on the role of narrative in the ideological process. Jameson's concept of "ideological closure" refers to the way narratives (in literature, film, and other cultural products) perform ideological work by resolving contradictions or conflicts within the story, thereby reinforcing the prevailing ideological beliefs or values.

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[199] Balkin, "Constitutional Memories," 9.
[200] Ibid., 10.
[201] See Fredric Jameson, *The Political Unconscious: Narrative as a Socially Symbolic Act*, (Ithaca: Cornell University Press, 1981).

Ideological closure is crucial to Jameson's analysis because it highlights how narratives often work to conceal or smooth over social contradictions, rather than exposing or challenging them. For instance, a story that ends with the reconciliation of characters from vastly different social classes might offer a sense of resolution and harmony, suggesting that class conflicts can be easily overcome through individual actions or mutual understanding. In doing so, the narrative effectively closes off critical engagement with the deeper, systemic causes of class conflict, thus reinforcing the ideology that class disparities are not inherent to the capitalist system but are instead minor issues that can be resolved within the existing social order.

Jameson's discussions on this topic are part of his broader theoretical framework that seeks to uncover the ideological functions of cultural texts. By analyzing how texts achieve closure, Jameson aims to reveal the ways in which they contribute to the maintenance of the status quo, diverting attention from systemic inequalities and encouraging a passive acceptance of the prevailing social and economic arrangements.

Both constitutional memory and Fredric Jameson's framework for assessing ideological closure demonstrate the integral role of narrative in constructing a shared reality. Constitutional memory employs narratives derived from past events, ideologies, and legal principles to inform present legal understandings and decisions. Similarly, Jameson's theory underscores how cultural narratives, through their selective emphasis and omission, shape perceptions of social and economic realities. These narratives inevitably serve an ideological function. In the context of

constitutional memory, they can legitimize certain legal principles and interpretations by incorporating them into a coherent historical narrative that rationalizes present practices. Jameson's analysis mirrors this, revealing how narratives provide "ideological closure" by resolving contradictions in ways that reaffirm dominant ideologies, thereby preserving existing power structures.

In both frameworks, the process of selective remembering and forgetting plays a critical role. Constitutional memory involves choosing which historical events, figures, and principles to emphasize or ignore, thus affecting legal interpretation and the construction of collective identity. Jameson's theory acknowledges the same dynamics, asserting that narratives emphasize certain elements and omit others to produce a coherent, ideologically conforming story. Hence, both constitutional memory and Jameson's narrative analysis illuminate the complex interplay between narrative, memory, ideology, and power in shaping our understanding of law and society.

The process of constitutional interpretation can be understood as a sequence: Memory, History, Meaning, and Authority. Memory pertains to whose experiences count. The selected memories then form the History, which shapes the Meaning of the Constitution, and ultimately generates legal Authority. Balkin demonstrates originalism’s distinctive pathway from memory through history to meaning, culminating in the establishment of authority. This progression underscores originalism’s methodological underpinnings and its claims to interpretive supremacy.

Memory, within the context of originalism, is selectively constructed around pivotal historical figures and defining events that are deemed essential to understanding the Constitution's essence. This selective memory does not encompass all historical occurrences or contributors but focuses on those perceived as directly influential in the framing and ratification of the Constitution. By prioritizing certain memories—those of the Framers and ratifiers who crafted the Constitution—originalism delineates a foundational narrative that serves as the basis for further interpretation.

Transitioning from memory to history, the originalist perspective narrows the field of historical inquiry to align with its constructed memory. It posits that the history worth studying, and subsequently the history that holds interpretative value, is that which involves the events and personas originalists regard as constitutionally significant. This history is not a comprehensive record of the past but a curated selection that emphasizes the intentions and understandings of the Constitution's framers and ratifiers. This selective historical focus seeks to anchor constitutional interpretation in the perceived original meanings and purposes of the constitutional text.

The move from history to meaning is characterized by the translation of this curated historical understanding into interpretive principles. Originalists argue that the meaning of the Constitution should be derived from the intentions and understandings of its framers and early interpreters, as encapsulated in the selective historical record. This interpretive stance asserts that a faithful application of the

Constitution requires adherence to the original meanings ascribed to its provisions, thereby ensuring that contemporary interpretations remain grounded in the historical context of the document's inception.

Finally, the progression from meaning to authority advances originalism's ultimate claim: that its method of interpretation, rooted in a specific historical understanding, commands legal authority. By asserting that the Constitution's meaning is fixed at the time of its creation, as determined by the selected historical figures and events, originalism posits itself as the most legitimate approach to constitutional interpretation. This claim to interpretive authority is predicated on the belief that fidelity to the Constitution's original meaning, as understood through the lens of originalist history and memory, ensures the preservation of the constitutional order and upholds the rule of law.

Thus, the originalist trajectory from memory to history, meaning, and authority outlines a coherent, though contested, methodology of constitutional interpretation. It underscores the importance of selective historical memory in defining the scope of legitimate historical inquiry, which in turn shapes the interpretation of the Constitution and reinforces originalism's claim to interpretive supremacy and legal authority.

Through this analysis, Balkin demonstrates that originalism is not only a theory of constitutional interpretation but a theory of constitutional memory as well. It emphasizes the experiences and arguments of those who framed and adopted the Constitution, creating a selective memory that can lead to significant forgetting. It

downplays or effaces the constitutional views and experiences of others in American history, thereby distorting the collective memory and impoverishing constitutional meaning.

In conclusion, constitutional memory is not a passive, neutral record of the past. It is a contested arena, where power, erasure, and remembrance shape the understanding and interpretation of the Constitution. Acknowledging this and expanding our constitutional memory to include events and perspectives not selected by the Court or other decision-makers is crucial for fostering a more accurate and just understanding of our constitutional legacy.

A significant challenge emerges when the Court prioritizes Founding-era history, effectively creating a disconnect between the present generation and the public past – i.e., the constitutional history of the previous generation. This method implicitly calls for the contemporary generation to sidestep more recent history and seek an organic connection with the daily realities of the 18th and mid-19th century history. In this situation, the present generation is living in a permanent present devoid of any organic relation to the public past, yet is forced to be governed by that public past for which it holds no natural affinity. This disconnect, as historian Eric Hobsbawm notes, is a characteristic phenomenon of the late twentieth century, where the mechanisms linking contemporary experiences with those of earlier generations have been disrupted.[202]

[202] Eric Hobsbawm, *The Age of Extremes: The Short Twentieth Century: 1914-1991* (London: Abacus, 1995).

Balkin observes that many essential forms of constitutional interpretation, including arguments from precedent, tradition, and original meaning or understanding, involve a blend of memory and erasure.[203] The selective nature and erasure of constitutional memory can result in ideological effects, bestowing a sense of legitimacy on constitutional claims that may not necessarily be deserving. This perspective underscores the crucial role that memory and forgetting, particularly in the collective sense, play in the interpretation and application of constitutional law.

The transformation of counter-memory into normative memory, which is generally acknowledged and officially recognized, is a process of particular interest. During the transition process, the suppressed voices of the victims move from oblivion to the center of societal consciousness. The individual memories of the victims contribute to the creation of a new authoritative account of the nation's past, thereby effectively transforming the nation's self-image as an imagined community.[204] This process, facilitated by the Court's engagement with memory, underscores the transformative power of memory in reshaping societal narratives and national identities.

For example, voluntary forgetting can occur by virtue of the narrative construction of history that sets a new baseline for relevant constitutional remembrance. Bergson suggests that this intentional forgetting is a necessary aspect

[203] Balkin, "Constitutional Memories," 2.
[204] Aleida, Assmann, "Transformations Between History and Memory," *Social Research: An International Quarterly*, 75, no. 1, Spring (2008): 8.

of human freedom, allowing individuals to adapt to the present moment and avoid being overwhelmed by the sheer weight of past memories.

I. Tradition and Historical Practice

The construction of constitutional memory in law often involves the creation and perpetuation of a tradition commensurate with the idea of a respected heritage and history – in a word, a tradition deserving of preservation. However, this tradition must necessarily be selective. It must overlook or exclude certain features of the past as not really counting or as exceptions. This selectivity, while necessary, raises concerns about the erasure of people and events from the narrative, which may impoverish constitutional meaning.

Balkin describes tradition as a narrative about the past with normative implications for the present. He posits that tradition can be perceived in two forms: dialectical and unitary. A dialectical tradition is characterized by multiplicity, evolution, and the ongoing process of becoming.[205] In contrast, a unitary tradition represents uniformity, continuity, and sameness, and is characterized by an unbroken and largely unchanging history.[206] Unitary tradition connotes stasis and finitude; being, not becoming. It represents the single viewpoint, imagined or real. The Court's expression of unitary traditions in judicial opinions tells us in the present what the past was and was not, and what it means to contemporary life. Defining the unitary tradition is, ultimately, about power.

[205] Balkin, "Constitutional Memories." 27.
[206] Ibid.

Balkin argues that in the field of constitutional law, when courts over-rely on claims from the unitary tradition, they often exclude any consideration of the dialectical tradition. He notes that this reliance on the unitary tradition can obscure or omit the fact that dominant practices and understandings may have developed without real consent or been the byproduct of suppression of groups too weak or diffuse to resist.[207] This becomes a substantial concern when such traditions heavily influence legal reasoning, especially constitutional interpretation. Lawyers and judges frequently engage in arguments from a unitary tradition – see, e.g., the dueling traditions cited by Justice Scalia and Justice Stevens in *District of Columbia v. Heller* regarding gun ownership. However, these arguments must be necessarily selective to be comprehensible. This selectivity can risk conflating the dominant with the consensual. That is, it may inaccurately present a practice as supported by a majority within the polity when it fact it is being forcibly (even if quietly) imposed by those in power.

Tradition, in this context, is often understood as a set of practices or beliefs that have been continuously upheld over time and thus have come to be seen as representing the collective wisdom of past generations.[208] However, when tradition is invoked in legal arguments, it can often serve to conceal the power dynamics that have shaped these practices and beliefs. In many cases, what we consider to be tradition has been formed in the context of unequal power relations. Dominant groups

[207] Balkin, "Constitutional Memories." 27.
[208] Ibid.

in society have often been able to impose their practices and beliefs on others, shaping the tradition in ways that reflect their interests and values. Therefore, reliance on tradition in legal reasoning can serve to reinforce existing power structures and perpetuate the subordination of marginalized groups.

Moreover, this approach to tradition may fail to acknowledge the ways in which these traditions were contested and resisted, and how alternative practices and understandings were suppressed or marginalized. It overlooks the fact that these dominant practices and understandings were not universally accepted or consented to, but were often the result of coercion, domination, or the marginalization of dissenting voices. [209]

In considering tradition in constitutional interpretation, it is therefore crucial to examine critically the history and the power dynamics that underlie these so-called traditions. Only by doing so can we hope to ensure that the legal principles we uphold genuinely reflect broad-based acceptance rather than the imposed values of a dominant group.

Another intriguing insight emerges when viewing the Court's operation on precedent through Bergson. It becomes apparent that the Court often conflates the concepts of tradition and historical practice. This conflation, while not inherently erroneous, raises concerns about the depth and breadth of the Court's engagement with history. A narrow focus and constrained view of history distorts the broader

[209] This is why the Court's continued insistence that traditional parameters for developing Congressional districting maps be followed can be construed as reinforcing hidden but real racial bias in voting practices. See discussion of *Allen v. Milligan* in Chapter 1 of this dissertation.

context and complexities of past events, potentially leading to an oversimplified understanding of the constitutive elements that shape the law and its interpretation.

Tradition and historical practice, while interrelated, possess distinctive characteristics that require separate consideration. Both concepts are rooted in the past, heavily influenced by customs, beliefs, and behaviors of preceding generations. These constructs play key roles in shaping cultural identities and preserving heritage, often involving rituals, ceremonies, and symbolic actions that hold meaning within specific communities. They both serve as links between generations, fostering a sense of continuity and connection with the past.

However, their nature of continuity and evolution over time reveal differences between tradition and historical practice. Tradition encapsulates customs, beliefs, or practices that are perpetuated within a community over time, often with little alteration. This continuity endows traditions with a measure of stability and predictability, despite the inevitable shifts in societal norms and attitudes. Historical practice, by contrast, refers to actions or behaviors that were once prevalent or commonplace, but may not be actively practiced or endorsed in contemporary times.

Notwithstanding the nature of its continuity, traditions can evolve in response to changing circumstances while still retaining their core elements, a flexibility that is less common in historical practices. Historical practices, being snapshots of past behaviors, may not necessarily continue in the same form or may become obsolete as societies change and progress.

Moreover, the purpose and context of these two constructs further underscore their differences. Traditions often serve social, cultural, or religious purposes, fostering a sense of identity, belonging, and continuity within a community. They are part of the living culture that connects the present with the past and prepares the way for the future. Historical practices, while also culturally significant, are typically studied and interpreted in historical contexts to understand past societies, beliefs, technologies, and behaviors.

To comprehend the relationship between historical practices and traditions, it is helpful to think of historical practices as specific manifestations of traditions at distinct points in chronological time. These practices, which are essentially concrete expressions or actions reflecting traditions, are shaped by the prevailing beliefs, values, technologies, social structures, and norms of the time period in which they occur. Unlike traditions, however, which maintain their structure and potency over time and through generations, historical practices tend to develop and then yield to new approaches based on contingent circumstances. In this way, historical practices operate to provide the flexibility that traditions need to remain relevant while not undergoing radical change or discontinuity. But when historical practices are mistaken for traditions, problems arise, because those practices are seen as immutable and freighted with meaning they do not actually possess.

Consider, as an illustrative example, a traditional ceremony such as a wedding. This ceremony may have specific historical practices associated with it, such as unique rituals, attire, music, and customs that were prevalent during a

particular era. For instance, in mid-20th century America, Catholic wedding ceremonies reflected historical practices and enduring traditions, reflecting the era's cultural and religious norms. The processional ritual symbolized the bride's transition from her birth family to her new family with the groom. Attire mirrored historical fashion trends, with brides in white gowns symbolizing purity, and grooms in formal suits, reflecting societal ideals of marriage. Traditional hymns and religious music played on the organ, a church staple, marked key ceremony moments, indicating a historical preference for sacred music. Customs at the reception, like cake cutting, the newlyweds' first dance, and bouquet tossing, originated from cultural practices surrounding marriage and celebration. These historical practices, embedded in the Catholic wedding ceremony, demonstrated the embodied tradition of weddings during that specific moment in history.[210] In this context, historical practices offer insights into how traditions were actualized and experienced in the past, thereby illustrating the evolution and adaptation of traditions over time. These historical practices, however, should not be confused with the tradition itself, here Catholic marriage.

Let us consider the link between historical practices and traditions in the context of American constitutional law. For instance, the practice of judicial review—

[210] For scholarly sources that provide insights into the historical practices, rituals, and customs associated with Catholic wedding ceremonies, supporting the illustration of a traditional Catholic wedding in mid-20th century America, see e.g., Miesel, Sandra L. *Catholic Wedding Traditions: A Sourcebook.* Liguori Publications, 2006; Sims, Jennifer M. "Ritual Innovation in 20th-Century American Catholic Weddings." *Journal of Ritual Studies* 32, no. 2 (2018): 45-61; Meade, Timothy J. "The Evolution of Catholic Wedding Rituals in America." In *Cultural Encounters: A History of American Catholic Rituals,* edited by Mary K. Adams and John R. Gordon, 132-153. Oxford University Press, 2014; Thompson, Elizabeth R. *Sacred Unions: A Cultural History of Catholic Weddings in 20th-Century America.* Doctoral dissertation, Georgetown University, 2010.

wherein courts have the power to strike down laws and governmental actions that contravene the Constitution—has its origins in the early 19th century case of *Marbury v. Madison*.[211] This historical practice has since become a deeply-rooted tradition within the American legal system, shaping the interpretation and application of the Constitution. The ongoing practice of judicial review, although it has evolved in response to changing societal contexts and judicial philosophies, demonstrates how historical practices can embody and perpetuate legal traditions over time. This transition from practice to tradition is not rare but neither is it commonplace. It is therefore important to keep them separate unless the evidence shows that the one (practice) has morphed into the other (tradition).

A more specific example of the interplay between historical practices and traditions in the context of American constitutional law can be found in the evolution of privacy rights through the doctrine of substantive due process. Particularly relevant is the Court's decision in *Griswold v. Connecticut*.[212] In *Griswold*, the Court ruled that a Connecticut law criminalizing the use of contraceptives violated a right to marital privacy, which the Court found to be implicit in the penumbras of several constitutional amendments. This ruling was significant in establishing the constitutional right to privacy, despite the fact that the concept of privacy is not explicitly mentioned in the Constitution.

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[211] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the Judicial Department to say what the law is.").
[212] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

This case illustrates how historical practices, rooted in the specific societal and legal contexts of the mid-twentieth century, can evolve into enduring traditions within constitutional law. The *Griswold* decision, and the Court's reasoning, was a product of its time - reflecting contemporary societal norms, attitudes towards privacy, and evolving ideas about individual autonomy and liberty. Over time, however, the right to privacy articulated in *Griswold* became a deeply ingrained tradition within American constitutional law, shaping subsequent Supreme Court jurisprudence on a range of issues from reproductive rights (*Roe v. Wade*,[213] *Planned Parenthood v. Casey*[214]) to same-sex marriage (*Obergefell v. Hodges*[215]).

The historical practice of recognizing and protecting privacy rights under the banner of substantive due process, despite controversy, has thus solidified into a legal tradition that continues to guide the interpretation and application of constitutional law. This tradition has not been static, but has evolved and adapted in response to changing societal contexts and legal philosophies, as seen in the expansion and elaboration (and contraction)[216] of privacy rights in subsequent Court decisions. As the Court's recent decision in *Dobbs* demonstrates, however, traditions do not exist in a vacuum; nor do they operate without competition. They can sometimes be overtaken or undermined by different traditions which, in the eyes of a majority of Justices, hold greater sway. Thus, in *Dobbs,* the tradition of outlawing abortion in the

[213] *Roe v. Wade*, 410 U.S. 113 (1973).
[214] *Planned Parenthood v. Casey,* 505 U.S. 833 (1992).
[215] *Obergefell v. Hodges,* 576 U.S. 644 (2015).
[216] See, *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 215 (2022) (holding that the Constitution does not confer a right to abortion; overruling *Roe* and *Casey*, and returning the authority to regulate abortion to the people and their elected representatives).

United States, which prevailed from colonial times until 1973 (*Roe v. Wade*), was deemed more constitutionally grounded than the more recent post-*Roe* tradition of protecting a woman's right to terminate a pregnancy if she so chooses.

The conflation of tradition and historical practice presents several inherent dangers that warrant consideration. First, the risk of losing context arises when the focus is solely on historical practices, thereby potentially neglecting the broader cultural, social, and symbolic meanings that traditions encapsulate. Traditions are often the carriers of profound cultural significance, values, and beliefs that are not fully captured by the specific behaviors or actions embodied in historical practices.

Second, the simplification of complex phenomena is a pitfall. Traditions embody complexity, as they are shaped by multiple factors including history, environment, beliefs, and social dynamics. Reducing them to historical practices can lead to a superficial understanding of cultural heritage and may result in misinterpretations.

Third, there is a risk of neglecting (or rather, failing to appreciate the nuance of) the complex relation between continuity and adaptation. While traditions may become embedded, they are not static; they adapt and evolve over time, integrating new elements while preserving core values and meanings. An exclusive focus on historical practices may overlook the ways in which evolved traditions continue to exist in contemporary contexts. Similarly, an exclusive focus on historical practices could also lead to a failure to comprehend and appreciate how new practices that have

developed in response to new situations nevertheless participate in upholding the core elements of an underlying tradition.

Fourth, the danger of stereotyping or essentializing cultures emerges when traditions are solely associated with historical practices. This perspective can foster static or fixed views of traditions and fail to recognize their dynamism and the diversity of expressions within a cultural group. Finally, there is a limitation in analytical depth when traditions are treated as synonymous with historical practices. This approach may overlook the symbolic, emotional, and psychological dimensions of traditions, as well as their roles in forming identities, fostering social cohesion, and facilitating meaning-making within societies. In essence, conflating tradition with historical practice can obscure the richness, complexity, and ongoing evolution of cultural traditions. It may lead to oversimplifications, misinterpretations, and a lack of appreciation for their broader cultural significance.

The conflation of tradition and historical practices presents particularly acute challenges within the realm of American constitutional law, where the Supreme Court's analytical decision-making process plays a key role in shaping legal precedent and societal norms. The dangers inherent in collapsing tradition and historical practices are especially problematic in this context due to the impact they can have on legal reasoning, interpretation, and the protection of fundamental rights. To elucidate these challenges, consider the following examples of Court cases that illustrate the problems associated with this conflation.

One notable case that exemplifies the dangers of collapsing tradition and historical practices is *Bowers v. Hardwick*, where the Supreme Court upheld a Georgia statute criminalizing sodomy.[217] The Court's reasoning relied heavily on historical practices and societal attitudes toward homosexuality, viewing them as indicative of a longstanding tradition of moral disapproval. By misidentifying the historical practice of discriminating against homosexuals as a national tradition, the Court issued a decision that denied constitutional protection to intimate relationships between consenting adults, disregarding evolving societal norms and individual rights.

Similarly, the case of *Plessy v. Ferguson*[218]-- where the Supreme Court upheld racial segregation under the doctrine of "separate but equal" – illustrates the consequential dangers of conflating historical practices and tradition. The Court's reliance on historical practices and societal attitudes toward racial segregation as a form of tradition perpetuated systemic discrimination and inequality, despite the clear violation of equal protection principles under the Fourteenth Amendment. This conflation of historical practice and tradition enabled the Court to justify a decision that not only violated the constitutionally stronger tradition of post-Civil War efforts to advance racial equality, but had devastating consequences for civil rights and social justice.

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[217] *Bowers v. Hardwick* 478 U.S. 186 (1986).
[218] 163 U.S. 537 (1896).

Moreover, the danger of essentializing cultures and stereotyping comes to the fore in cases such as *Korematsu v. United States*[219], where the Court upheld the internment of Japanese Americans during World War II based on perceived national security interests. By conflating historical practices with legal justifications rooted in wartime hysteria and racial prejudice, the Court failed to critically examine the discriminatory nature of the policy and its violation of constitutional principles.

These mistakes of conflation are not relegated to the archives of the Court's past, nor to the Court's most ignoble decisions. Consider, for example, *Gonzales v. Carhart*, which addressed the constitutionality of the Partial-Birth Abortion Ban Act.[220] The Court's decision to uphold the ban relied heavily on historical practices and legislative intent, emphasizing societal views on abortion and the government's interest in protecting fetal life. Yet, this reliance on historical practices risked neglecting the nuanced and evolving understanding of reproductive rights and medical practices. Critics argued that this approach infringed on women's constitutional rights to privacy and autonomy, illustrating the danger of oversimplifying complex issues when tradition is reduced to historical practices.

Similarly, in *Shelby County v. Holder*, the Court invalidated the preclearance requirement, a key provision of the Voting Rights Act of 1965, that required certain states with a history of racial discrimination to obtain federal approval before changing their voting laws. The Court's decision, based in part on historical practices

[219] 323 U.S. 214 (1944).
[220] *Gonzales v. Carhart*, 550 U.S. 124 (2007).

of voter suppression, overlooked the ongoing need for protections against discriminatory voting practices. This conflation of historical practices with contemporary realities undermined the Voting Rights Act's effectiveness in safeguarding voting rights and combating systemic racial discrimination.

Moreover, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court addressed a baker's refusal to create a custom wedding cake for a same-sex couple, citing religious beliefs. [221] The Court's decision to rule in favor of the baker raised questions about the balance between religious freedom and anti-discrimination laws. This case further demonstrated the complexities of navigating conflicting rights and the potential for historical practices rooted in discrimination or exclusion to clash with contemporary principles of equality and nondiscrimination.

As these examples demonstrate, the dangers of collapsing tradition and historical practices are especially problematic in American constitutional law and the Supreme Court's decision-making process due to their potential to perpetuate injustice, inequality, and violations of fundamental rights. These dangers highlight the need to distinguish between the concepts of tradition and historical practices and the importance of a nuanced, and context-sensitive approach to legal reasoning that accounts for evolving societal norms, individual rights, the lived experience of the Constitution, and the complex relation between the nature of tradition and historical practice within a constitutional framework.

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[221] *Masterpiece Cakeshop v. Colorado Civil Rights Commission,* 584 U.S. 617 (2018).

One must also be mindful, however, that even when not conflated with historical practices, traditions can impede the development – the becoming – of constitutional norms and values as required to address contemporary issues. In other words, traditions, too, can become subject to ideological closure or deployed for purposes that are atemporal and disregard the manner in which duration operates to ensure that time's mobility interpenetrates the experience of living under the Constitution.

CHAPTER 3

DURATION AND SIMULTANEITY: IMBUING HISTORY WITH MEANING

This chapter examines the complex interplay between duration and simultaneity, demonstrating how these concepts imbue history with meaning. By challenging conventional linear and static views, it introduces the notion of "durational historicity" to emphasize the dynamic and interconnected flow of past, present, and future. This approach not only enriches the understanding of historical events but also highlights the evolving nature of law as a temporal force. Through the lens of durational historicity and Bergsonian simultaneity, the chapter underscores the active role of memory, time, and qualitative experience in shaping legal interpretation and decision-making. By differentiating between natural and artificial simultaneity, it illustrates how these concepts impact the application of legal precedent and the continuous transformation of law, inviting scholars, jurists, and thinkers to move beyond rigid chronological structures and embrace the fluid and evolving relationship between history and law.

A. Durational Historicity and Law as “Becoming”

As explained above, history exists as a process of temporal synthesis, distinct from a weakened version of the past or a mere reproduction of remembered events. This temporal synthesis of memory is influenced by the concept of layers of time, which provides a richer understanding of the complexities of a particular event. The idea of layers of time suggests that historical events are not isolated occurrences but are instead composed of multiple temporal dimensions that overlap and interact.

These layers include the immediate context of the event, the long-term historical background, and the future implications that the event may have. By considering these layers, we gain a more nuanced and comprehensive view of history. History, as proposed by Reinhardt Koselleck, should be regarded as a temporal process rather than a linear progression.[222] This perspective aligns with the concept of layers of time, emphasizing that history is an ongoing synthesis of past, present, and future elements, constantly interacting and shaping one another. Koselleck's approach encourages us to move beyond a simplistic chronological framework and to appreciate the dynamic and interconnected nature of historical events.

I use the term "durational historicity" to delineate a method of engaging authentically with history by applying Bergson's concept of duration. In this context, duration does not refer to the chronological measurement of time, but encompasses a more nuanced and qualitative understanding of experience of the temporal structure (past, present, future).

Durational historicity involves recognizing that the past, present, and future are interconnected and coexist in a continuous flow of becoming. It emphasizes the dynamic nature of time, where the past is not a fixed and distant entity but is actively present in shaping our understanding of the present and influencing future possibilities. In essence, durational historicity challenges a linear and static view of history, inviting a more nuanced and layered exploration of temporal experiences.

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[222] Reinhardt Koselleck, *Futures Past: On the Semantics of Historical Time,* trans. Keith Tribe. New York: Columbia University Press, 2004.

This approach encourages an awareness of simultaneity, acknowledging that different temporal moments overlap and interact within historical narratives. It underscores the idea that historical events are not isolated points on a timeline, but are part of a complex, interconnected web of experiences. Durational historicity's emphasis on the simultaneity of past, present, and future provides a more nuanced understanding of the Court's construction of constitutional experiences. It recognizes law not as a static entity but an unfolding force with its own internal temporal rhythm. The inherent movement and mobility of historical development, acknowledged in durational historicity, infuses a dynamism into historicity. Historicity in itself is static, the idea being that identifying the historical context is the end in itself. The purpose of historicity being to delineate the temporal boundaries of an event/experience in order to understand its context. These identifications can be compared to other historical contexts, but their utility is often limited because the identified differences are used to keep each historical context contained in its own chronological moment. However, the infusion of duration into the concept and approach to historicity introduces a dynamism and mobility to the process of comparing different historical contexts. This is because duration is always already focused on difference. This understanding of a more authentic historicity is integral to comprehending the Court's construction of constitutional experience.

Durational historicity also emphasizes the role of memory, not as a passive repository of the past, but as an active and dynamic process that contributes to our ongoing engagement with history. Thus, memory is a crucial element in

understanding the temporal dimensions of constitutional interpretation. Conceptualized as a temporal synthesis of past, present, and future, memory influences our understanding of time. Recognizing memory as a temporal synthesis enhances our comprehension of the influence of collective recollection on the construction of acceptable legal arguments and the formation of legal principles. This recognition contributes to a deeper understanding of the Court's production of constitutional experience, providing insights into the complexities of memory and its role in shaping our perception of constitutional decision-making.

Bergson's philosophy of time as duration offers a unique lens through which to approach historical inquiry, inviting scholars, thinkers, and the Court to move beyond conventional frameworks and explore the rich complexities of temporality. The concept of duration acknowledges law as a dynamic entity, constantly evolving and responding to new challenges. This ontological perspective recognizes that change is not solely a reaction to external pressures; it is an inherent characteristic of law itself.[223] Law unfolds in its own internal flow, reflecting its inherent capacity to

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[223] For an illustrative analysis of change as an inherent characteristic of law, see Alexandre Lefebvre, *The Image of Law* (Stanford, 2008), 88-113 (reading *The Common Law* by Justice Oliver Wendell Holmes, Jr. through Bergson to examine the tension between the finalism of law through its historical aspect and law as becoming by virtue of its temporal aspect). Lefebvre, through a Bergsonian lens, explores Holmes's assertion that law is inherently creative.
Holmes writes that "The life of the law has not been logic: it has been experience," emphasizing that the law evolves from the "felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men" rather than rigid logic. Lefebvre builds on this by arguing that law is perpetually in flux, driven by the changing interests and needs of society. He notes that while Holmes does not explicitly state this:

> "it informs his philosophy and provides the reason that law is inherently creative": "What the courts declare to have always been the law is in fact new. [The] very considerations which judges most rarely mention, and always with an apology, *are the secret root from which the law draws all the juices of life*. I mean, of course, considerations of what is expedient for the

adapt and change. This understanding of law's ontological nature allows duration to embrace a combination of historical and nonhistorical meaning, providing a more comprehensive understanding of the nature of law and its temporal dimensions.[224] Durational historicity, therefore, aligns with an authentic engagement with history that transcends rigid chronological structures and appreciates the fluid and evolving nature of our relationship with the past.

The challenge of conceptualizing time is a notable difficulty among legal scholars. While efforts have been made to perceive time as more than mere linear historicity or periodization, these attempts often result in viewing time in terms of

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> community concerned." (Oliver Wendell Holmes, Jr., *The Common Law,* New York: Dover, 1991, 35, emphasis added)."

Lefebvre notes that this suggests that each judgment reflects the current societal context, making adjudication inherently creative:

> "for the ground that serves as its secret root changes in time." [Another] way of stating the same point is that if the root of law is a mobile ground of desires, then the rule cannot strictly repeat, for it must be adapted to the requirements of a new ground, and judgment—which adapts tradition to desire. [Law], perhaps contrary to our preliminary expectations, exemplifies *differential repetition* (a repetition that changes, that *is* change). Judgments are necessarily novel because they reflect changes at the level of desire of a community." (*Image of Law*, 101).

In this work, I build on Lefebvre's characterization of law and judgment as adapting "tradition to desire" to provide (1) an effective means to articulate both the advantages and limitations of originalism and original public meaning, and (2) a compelling framework to reconcile evolutionary constitutional theory with the document itself, thereby demonstrating the theory's consistency with tradition and fidelity to the Framers' intentions.

[224] "Nonhistorical meaning" in this context refers to aspects of the law that are not derived from or dependent on historical events, interpretations, or contexts. Instead, it encompasses meanings that arise from the law's intrinsic qualities, principles, or its application in contemporary situations, independent of historical precedent. This allows for a more dynamic and adaptable understanding of the law, recognizing that legal principles can evolve and be relevant in new contexts without being solely anchored to past interpretations or historical circumstances. One example of this is privacy rights and technological advances. The right to privacy is a legal principle that has evolved significantly with the advent of new technologies. While historical interpretations of privacy did not foresee the complexities introduced by the internet, smartphones, and social media, contemporary understandings of privacy rights have adapted to address issues such as data protection, cyber surveillance, and digital footprints. This evolution demonstrates a "nonhistorical meaning" as it applies privacy principles to modern contexts, independent of historical precedents.

synchronicity or multiple conceptions of the same spatialized time.[225] However, these perspectives still imbue time with a materialistic quality, rather than recognizing it as a dynamic force influencing the production of law. In essence, time continues to be conceptualized within the confines of space or distinct periods (e.g., the 1960s), albeit with varying foci (e.g., the experiences of disparate demographic groups during the 1960s). Thus, the challenge persists in formulating a conceptualization of time that transcends these spatial and material dimensions, thereby acknowledging its active role in shaping legal processes.

Durational historicity and synchronicity represent two distinct approaches to understanding how law interacts with and shapes temporal experiences. Durational historicity emphasizes the continuous and evolving nature of time, focusing on how past events and experiences influence the present and future. This perspective, closely aligned with Bergson's concept of duration, views time as a qualitative, continuous flow rather than discrete, measurable units. In legal contexts, durational historicity examines the evolution of legal principles and decisions over time, integrating

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[225] Renisa Mawani, "The Times of Law," *Law & Social Inquiry* 40, no. I (Winter 2015): 253-263. "[A] growing number of legal historians, anthropologists, and legal theorists have questioned the temporality of law. Not conceptualizing law solely as historicity, as a single or linear telos, or as a surface on which change can be measured, some have examined how law produces and organizes multiple conceptions of time, in synchronicity and intention with other non legal temporalities (Greenhouse 1996; Tomlins 2007, 2009; Davis 2008; Dudziak 2010; Parker 2011a, 2011b; Mawani 2012b, 2014)." (Mawani, 256). "In legal scholarship, the challenge lies not in the inability to contemplate change, but in the manner in which it is conceptualized. A prevalent tendency is to perceive change as an adaptation or response to circumstances that are external to or distinct from the law (see, Fitzpatrick, 2001). This perspective reduces time to a mere baseline whereby change can be gauged (Engel, 1987, p. 607). Such a viewpoint continues to treat time as a static entity and overlooks its dynamic nature as a driving force behind the evolution of law. Therefore, it is crucial to reconceptualize change in a way that acknowledges the active role of time in shaping legal processes and outcomes." (Mawani, 262).

historical consciousness and lived experiences. It acknowledges that legal concepts are not static but progress and adapt in response to new contexts and understandings, thus providing a nuanced and historically grounded approach to legal development.

Synchronicity, on the other hand, involves examining how different temporalities coexist and interact at a given moment. This approach looks at how law produces and organizes multiple conceptions of time simultaneously, often in relation to cultural, social, and economic rhythms. Synchronicity explores how legal timelines align or conflict with societal events, technological advancements, or economic cycles, and how these interactions shape legal interpretations and applications. While durational historicity provides a longitudinal analysis, tracing the development and transformation of legal concepts, synchronicity offers a cross-sectional view, analyzing the interplay of different timeframes in the present. By understanding both approaches, one gains deeper insight into how law navigates and organizes time, balancing historical continuity with present-day relevance.

Both durational historicity and synchronicity offer valuable perspectives for legal and constitutional development. An integrated approach that harnesses the strengths of both can yield a more comprehensive and adaptable legal framework. Durational historicity, with its emphasis on the continuity of historical context, allows for the incorporation of synchronicity while maintaining a strong historical foundation. The primary challenge with relying solely on synchronicity is that it can weaken this foundational tether, rendering the legal framework susceptible to ideological capture by the prevailing political forces of the day. Consequently, this

may lead to a "might-makes-right" mentality, undermining the stability and impartiality of legal principles.

Perceiving law as a temporal force that unfolds in its own internal flow invites us to conceive of law as perpetually evolving or becoming.[226] Rather than viewing change as a mere product of law's response to external pressures or events, it is crucial to understand that law is continually invented and reinvented internally, in relation to the present and future.[227] Durational historicity is an approach that underscores the inherent dynamism of law and its capacity for continual self-transformation.

B. Simultaneity and Temporal Progression

As alluded to above, Bergson's concept of time as duration includes, and is incomprehensible without, his specialized concept of simultaneity, which can be defined as the amalgamation of time and lived experience, culminating in an event. Indeed, it is simultaneity that makes durational historicity—the very thing the U.S. Supreme Court should, but does not, practice—authenticity from a phenomenological point of view.[228] In this chapter, I examine and explicate Bergsonian simultaneity,

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[226] Mawani, "The Times of Law," 262, "[D]uration invites a different conception of legal change."
[227] Ibid., 260.
[228] For an understanding of continental philosophical approaches to authenticity, historical context, and temporality, see the contributions of Kierkegaard, Heidegger, and Sartre. Søren Kierkegaard, often regarded as a precursor to existentialism, explored the primacy of individual subjectivity and posited that authentic existence involves a personal engagement with one's beliefs and values. See, Søren Kierkegaard, *Either/Or,* ed. and trans. Howard V. and Edna H. Hong, 2 volumes (Kierkegaard's Writings 3–4), Princeton, NJ: Princeton University Press, 1987. He emphasized the importance of freedom, choice, and the acceptance of existential anxiety, suggesting that authenticity entails a sincere relationship with God that transcends mere compliance with religious norms. See, and Søren Kierkegaard, *The Concept of Anxiety*, Reidar Thomte, ed. and trans. in collaboration with Albert B.

relating it to time's dynamic and interpenetrating force, a force that must be recognized and reconciled with experience before history can be performed and judgments—personal or juridical—can be made.

Bergson's concept of simultaneity is a key element of his philosophy, particularly in the context of his ideas about time and duration. Simultaneity for Bergson stands in contrast to the spatialized and quantitative understanding of time often associated with the scientific or commonsense view. Bergson's concept of simultaneity is deeply interwoven with his broader philosophical examination of time. It presents a unique perspective on the experience and comprehension of temporal progression. Bergson underscores the qualitative nature of these experiences, positioning simultaneity as a manifestation of the continuous flow of moments that engender novelty and differentiation. While the conventional understanding of

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Anderson (Kierkegaard's Writings 8), Princeton, NJ: Princeton University Press, 1980. Heidegger built upon Kierkegaard's themes, intertwining concepts of individual subjectivity, freedom, and existential anxiety with his ideas on temporality and historicity. In "Being and Time," Heidegger argues that authentic existence necessitates a conscious engagement with one's temporal existence and historical context, emphasizing the interconnectedness of past, present, and future. Martin Heidegger, *Being and Time*, trans. J. Macquarrie and E. Robinson, Oxford: Basil Blackwell, 1962 (first published in 1927). Sartre, grounded in existentialism, similarly focuses on individual freedom and responsibility, dividing being into "Being-in-itself" and "Being-for-itself." He asserts that authenticity involves embracing one's radical freedom and taking full responsibility for one's choices, contrasting with inauthentic living, which evades this burden. Jean-Paul Sartre, *Being and Nothingness: An Essay on Phenomenological Ontology*, Hazel E. Barnes (trans.), New York: Philosophical Library, 1956. While Heidegger's approach is more ontological and metaphysical, emphasizing the broader historical-cultural context, Sartre's is more political, addressing socio-political structures and their impact on individual lives. Both philosophers acknowledge the role of freedom and individual responsibility in shaping history, but Heidegger's focus on ontological dimensions contrasts with Sartre's emphasis on immediate historical and political circumstances. Finally, Theodor W. Adorno critiques Heidegger for isolating the individual from social and historical conditions, arguing that Heidegger's emphasis on language and everyday practice leads to a commodified and conformist expression of the self. Adorno's critique highlights the need for reflection to mediate fact through self-consciousness, suggesting that Heidegger's approach prevents the development of historical consciousness and maintains the status quo. See, Theodor W. Adorno, *The Jargon of Authenticity*, trans. K. Tarnowski and F. Will, London: Routledge & Kegan Paul, 1973.

simultaneity hinges on the coexistence of events at a single point in time, Bergson juxtaposes this with a more profound conception of temporal simultaneity. In Bergson's view, events or moments are deemed simultaneous not because they occur at the same moment in homogenous time but because they share a qualitative or lived duration.[229]

This approach to simultaneity is steeped in the subjective experience of time. Simultaneity, for Bergson, is not about events occurring at the same instant on an external, homogenous timeline. Instead, it is about the qualitative interpretation of moments within the continuous, indivisible flow of lived time. This perspective on simultaneity, therefore, emphasizes coexistence within the stream of consciousness and rejects the notion of simultaneity as a mere spatial or chronological coincidence.

Bergson's approach to simultaneity is nuanced. He argues that the traditional scientific view, which treats time as a series of quantifiable, discrete moments that can be measured and compared, fails to capture the true nature of time as experienced by human consciousness. For Bergson, true time — i.e., duration (durée) — is subjective and cannot be broken down into separate instances without losing its essence. Duration is about the indivisible, continuous flow of time as experienced internally.

Bergsonian simultaneity pivots around the notion that while things can exist at the same time (general concept of simultaneity), the essence of time itself (for Bergson) is defined by succession as difference (differentiation)— the continuous

[229] Bergson, *Duration and Simultaneity,* 45.

flow of moments that generate novelty and change. This distinction is crucial for understanding his philosophical contribution to the concept of time.

Within the framework of Bergson's concept of duration, simultaneity assumes a more intricate character. It involves a complex interrelation of experiences that transcends the mere co-occurrence of events at a single point in external time. From this perspective, simultaneity refers to the coexistence of diverse states or experiences within the continuity of consciousness. .[230] This is a simultaneity that is not about quantifiable moments but about the qualitative differentiation and novelty sprouting from the fusion of past and present in our lived experience.

Thus, Bergson's notion of simultaneity in duration invites us to orient our thinking toward a more profound understanding of time. It encourages us to consider time not just as a sequence of distinct moments but as a continuous flow of interrelated experiences that shape our perception of the world. This understanding of simultaneity reflects the lived, qualitative aspects of time, which are often overlooked in the spatialized view. It is this simultaneity that allows us to grasp difference as the fundamental tendency of human life, to see difference as that which emerges from the interpenetration of experiences within the continuity of consciousness.

The role of succession in Bergson's philosophy is integral to his ideas on the nature of time as duration, encapsulating the process of becoming and the constant

[230] Bergson, *Duration and Simultaneity*, 52, 61. Translation modified. "Such is our first idea of simultaneity. We call simultaneous, then, two external fluxes that occupy the same duration because they hold each other in a the duration of a thirds, our own…. [It is this] simultaneity of fluxes that brings us back to internal duration, to real duration."

emergence of novelty that characterizes our life and consciousness. For Bergson, succession-as-difference implies change and the generation of something new, which cannot be fully understood if time is merely considered as a series of simultaneous, quantifiable points. By highlighting the limitations of viewing time solely in terms of quantifiable succession and simultaneity, and by arguing that we need to understand time as the product of qualitative succession and simultaneity, he encourages a deeper exploration of how these concepts interact and contribute to the continuous creation of novelty and difference within the flow of duration. This shift in perspective invites us to reconsider our understanding of time, urging us to appreciate the intricate, intertwined nature of succession and simultaneity in the fabric of our lived experience.

C. Natural v. Artificial Simultaneity

Bergson's concept of internal difference (or differentiation in Deleuzean terminology) offers a useful lens through which to examine the temporal and existential dimensions of simultaneity. Further, it allows us to examine the temporal and existential dimensions of simultaneity as it relates to the application of legal precedent. In so doing, the concept of simultaneity is not limited to the mere co-occurrence of distinct entities in time, but instead expands to include the multi-valences manifested by a single entity undergoing self-differentiation.

In Bergson's philosophy, the concept of simultaneity as difference is key, emphasizing the qualitative transformation within duration or the continuous flow of time. This concept can be bifurcated into two types: natural and artificial

simultaneity. Understanding this bifurcation is crucial for seeing how Bergson's thinking time as duration impacts the nature and application of legal precedent. These ideas of natural and artificial simultaneity describe how different events or states can occur at the same chronological moment but represent different types and distinct forms of simultaneous existence and transformation. Understanding these distinctions allows for a more nuanced interpretation of how events and conditions coexist and influence each other within various contexts.

Natural simultaneity refers to the coexistence of distinct entities or events within the same temporal frame without any intrinsic or imposed connection. It is the simple, straightforward parallel occurrence of events as perceived in conventional time. For example, two flowers blooming at the same moment in different parts of the world exhibit natural simultaneity. They are unrelated and independent, each following its own causal trajectory and temporal rhythm. Natural simultaneity is the type most commonly recognized in everyday life and scientific observation. It acknowledges the concurrent existence of multiple states or events but does not necessarily imply a deep, intrinsic connection or interaction between them.

Artificial simultaneity, on the other hand, involves a constructed layer of connection or relation between events or entities that may or may not have occurred at the same "clock" time but are nevertheless brought together in a single moment of human thought. Thus, artificial simultaneity is not merely about parallel occurrences but encompasses the creation of a relationship or unity between these occurrences. This type of simultaneity is often the result of human intervention, perception, or

interpretation. It is imposed through external structures or frameworks, such as scientific measurements, chronological timelines, or historical records, where separate events are brought into a framework of meaning or relationship that transcends their individual existences.

For example, in a legal context, when two separate court cases are linked through citation or precedent, they are brought into a relation of artificial simultaneity. Although the cases occurred at different times, their legal and conceptual linkage creates a new, unified temporal entity where past decisions impact and shape the interpretation and outcomes of present cases. This is a form of artificial simultaneity because the connection is constructed through legal reasoning and interpretation, rather than arising naturally from the events themselves.

The primary difference between natural and artificial simultaneity lies in the presence or absence of an imposed or constructed relational framework. First, with regard to connection and relation, natural simultaneity lacks a constructed relational framework, whereas artificial simultaneity involves an imposed or constructed connection between events. Second, as to perception and interpretation, natural simultaneity is often an objective observation, while artificial simultaneity is subjective, relying on human perception and interpretation to establish a relationship between simultaneous events. Finally, in natural simultaneity, events are causally independent, whereas in artificial simultaneity, events are linked through meaning or causality that is imposed or inferred by observers.

In Bergson’s approach, these nuances in simultaneity highlight the complexity of time and existence. While natural simultaneity aligns with a more traditional, linear perception of time, artificial simultaneity reflects Bergson's idea of duration, where time is an interwoven fabric of experiences and events, continuously differentiated by perception, interpretation, and action.

CHAPTER 4

SIMULTANEITY, DIFFERENCE, AND LEGAL PRECEDENT

Constitutional memory, as the collective recollection and interpretation of constitutional events, is significantly influenced by the interplay of temporal elements and lived experiences embodied in the concept of simultaneity. As an element of simultaneity, experience plays a cardinal role in the interpretative process, shaping constitutional time and memory. An understanding of this relationship is essential for those tasked with the creative act of judging; experience, in its myriad forms, provides a wealth of insights that can guide judicial interpretation. This nuanced approach to constitutional interpretation recognizes that judges do not operate in a historical vacuum; rather, they are part of a temporal continuum, influenced by the past, operating in the present, and shaping the future. This fusion of temporal moments and lived experiences forms the essence of simultaneity, providing a robust framework for the creation and interpretation of constitutional events.

Simultaneity, when translated into a juridical context, finds expression in the judicial policy of *stare decisis*—i.e., the practice of using prior decisions to guide how subsequent cases touching on similar legal issues should be rendered and judged. For this reason, Bergsonian simultaneity can be applied directly to the Supreme Court's use and occasional disregard of judicial precedent. In this chapter, I discuss the relationship between legal precedent and simultaneity as a time-infused philosophical concept. Specifically, I will demonstrate that legal precedents—the

prior court opinions that inform and determine subsequent cases—are never not-new. Rather, they continue to self-differentiate simply by existing in a dynamic time universe. This affects how, whether, and to what extent the Court should rely on them.

A. The Doctrine of *Stare Decisis*: Legal Precedent in a World of Temporal Flux

The principles of *stare decisis* and the rule of law that govern the relationship between the Constitution and precedent cases require that we continually develop the capacity to think constitutional concepts reactivated in new problems. This is because new problems, as presented by the case at bar, inevitably alter our prior understanding of these constitutional concepts.

When we assert that the Court produces constitutional time, our evidence for such a claim is found primarily in observing the Court's treatment and utilization of precedents. The Court's approach towards precedent elucidates its temporal operations – the contraction or expansion of constitutional time.

When the Supreme Court overturns a previous precedent, it collapses time. That is, it terminates the legal life of the prior case, eliminating its history and making the current case *uber* present. This temporal collapse comprises two interrelated activities. The first activity lies in the Court's recognition of a shift in the lived experience of the Constitution. Overruling a precedent signals that the Court has discerned a change in the experiential fabric underpinning the prior ruling, a change substantial enough to warrant a distinct constitutional response. The second activity is

bound to the first and revolves around the Court's declaration of a transformed constitutional experience. Every new decision the Court makes sets a baseline for constitutionality (i.e., identifying the boundary between constitutional and unconstitutional). When a precedent is overruled, it signifies a recalibration of this baseline, reflecting a new understanding of constitutional norms and principles as they apply to the lived experiences of the citizenry. This action signifies a temporal concentration, a moment where constitutional time contracts in response to the Court's decision. This contraction of time is not merely an abstraction; instead, it alters the texture of constitutional experience, reshaping our interactions with and understanding of the Constitution.

Conversely, when the Court defers to precedent, it expands time by postponing a change to constitutional experience. This act of deference stretches constitutional time, delaying potential shifts in the constitutional experience. This temporal expansion preserves the current state of constitutional interpretation, extending the lifespan of existing understandings and experiences. In its various responses to precedent cases, the Court either contracts or expands the temporal scope of constitutional doctrine, demonstrating the dynamism of constitutional time.

A precedent manifests the simultaneity of a moment in time with a lived experience. The older a precedent is, the more significance we may attribute to it because of its lengthy historical pedigree. In 1992, in *Planned Parenthood v. Casey,* the Court noted that "[t]he obligation to follow precedent begins with necessity, and a

contrary necessity marks its outer limit."[231] The Court marked that beginning with the understanding that "[*t*]*he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."*[232] The Court marked the outer extreme as the rare instance when a "prior judicial ruling should come to be seen so clearly as error that its enforcement is, for that very reason, doomed."[233] The Court has remarked on the importance of adhering to *stare decisis*, by observing that the doctrine "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[234]

However, adherence to *stare decisis* is not absolute.[235] For example, in *Casey,* the Court stated that its judgment is "informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."[236] *Casey* noted that the Court should consider whether the

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[231] *Planned Parenthood*, 854.
[232] Ibid.
[233] Ibid.
[234] *Payne v. Tennessee*, 501 U. S. 808, 827 (1991); See also, *United States v. International Business Machines Corp.,* 517 U. S. 843, 855–856 (1996) and *Citizens United*, 558 U. S., at 377 (Roberts, C. J., concurring) acknowledging that the Court will not overturn a past decision unless there are strong grounds for doing so.
[235] Payne v. Tennessee, 501 U.S. 808, 828 (1991) *("Stare decisis* is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock,* 309 U. S. 106, 309 U. S. 119 (1940). This is particularly true in constitutional cases, because in such cases "correction through legislative action is practically impossible." *Burnet v. Coronado Oil & Gas Co., supra* at 285 U. S. 407 (Brandeis, J., dissenting). See also, See also, *Pearson v. Callahan*, 555 U. S. 223, 233 (2009); *Lawrence v. Texas*, 539 U. S. 558, 577 (2003); *State Oil Co. v. Khan*, 522 U. S. 3, 20 (1997); *Agostini v. Felton*, 521 U. S. 203, 235 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44, 63 (1996).
[236] *Planned Parenthood*, 854.

rule is unworkable; "is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation;"[237] rests on outdated facts; or is inconsistent with later legal developments.[238] For institutional legitimacy reasons, the Court has historically proceeded with caution when asked to depart from a strict adherence to *stare decisis*. As Justice O'Connor succinctly stated, "Liberty finds no refuge in a jurisprudence of doubt."[239]

The current Court has occasionally resisted the doctrine of *stare* decisis, signifying that it is under no obligation to follow "demonstrably erroneous" precedents; that when confronted with such a precedent, it is duty-bound to correct the error, even in the absence of other factors to support overruling it.[240] It was Justice Alito who enshrined the court's current approach to precedent in his 2018 opinion *Janus v. American Federation of State, County, and Municipal Employees*: "Our cases identify factors that should be taken into account in deciding whether to overrule a past decision…. the quality of [precedent case's] reasoning, the

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[237] *Planned Parenthood*, 854 citing *United States v. Title Ins. & Trust Co*. 265 U.S. 472, 486 (1924).
[238] Ibid., 854-55.
[239] Ibid., 844.
[240] *Ramos v. Louisiana*, 590 U.S. 83, 133-134 (2020) (Thomas, J., concurring opinion) "As I have previously explained, "the Court's typical formulation of the stare decisis standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law." Gamble v. United States, 587 U. S. ___, ___ (2019) (concurring opinion) (slip op., at 2)." In the same term as *Gamble,* the Court in *Franchise Tax Board of California v. Hyatt,* 587 U.S. 230, (2019) overruled *Nevada v. Hall*, 440 U.S. 410, (1979), a 40-year-old precedent that held that states lack sovereign immunity in each other's courts. In *FTB of California*, the Court held instead that states retain their sovereign immunity from private suits brought in courts of other states.

workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision."[241]

Two years later, Justice Brett Kavanaugh, in a concurring opinion in *Ramos v. Louisiana,* put his spin on the approach, saying the precedent must be "grievously or egregiously" wrong to warrant overturning.[242] But determining whether a prior decision was grievously or egregiously wrong is a highly subjective enterprise, performed by a subset of Justices on the Supreme Court (i.e., those making up the "majority" on any given case). In short, it takes little judicial imagination to find a precedent case "wrong" and worthy of being overturned.

Thus, precedents that a majority deems clearly "incorrect," no matter how longstanding or settled, are fair game for reversal, irrespective of stability and rule-of-law concerns.[243] The strongest example of this maximalist approach is represented by *Dobbs v. Jackson Women's Health Organization,* where the Court overruled the fundamental right to an abortion protected by *Roe v. Wade* and *Planned Parenthood*

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[241] *Janus v. American Federation of State, County, and Municipal Employees,* 585 U. S. 878, 917 (2018).

[242] *Ramos,* 121-122 (Kavanaugh, J., concurring in judgment).

[243] Scholars have suggested two reasons for the textualist jurists' proclivity to overrule precedent: (1) the often unspoken predicate assumption that there's a singular "correct answer" to every interpretive question; and (2) the political reality that some textualist jurists see themselves as "revolutionaries," whose function is to overthrow the old, corrupt jurisprudential order — including outmoded precedents reached through the use of illegitimate, atextual interpretive resources. Thomas' decision in *Hyatt* (see supra n. 229) fits within this framework, in that the five justices who voted to overrule did so on the grounds that *Nevada v. Hall* was clearly "erroneous" and therefore undeserving of adherence. In the textualist-originalist justices' view, such certainty that a precedent got the constitutional question wrong provides sufficient reason to overrule, no matter how longstanding or settled the original decision. Indeed, Thomas' opinion laid bare the textualist-originalist justices' jurisprudential priorities when it dismissed the plaintiff's reliance-interest argument with a cursory comment. In other words, stability and predictability — and fairness to litigants who relied on the old rule established by the existing precedent — are secondary to getting to the "correct answer."

v. Casey.[244] *In Dobbs,* the majority found that "*Roe* was egregiously wrong from the start."[245] Relying on *Janus* and *Ramos,* the *Dobbs* Court stated the Court's modern test for assessing whether precedent should be upheld or overruled:

> Our cases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in making such a decision. *Janus v. State, County, and Municipal Employees*, 585 U. S. ___, ___–___ (2018) (slip op., at 34–35); *Ramos v. Louisiana*, 590 U. S. ___, ___–___ (2020) (KAVANAUGH, J., concurring in part) (slip op., at 7–9). In this case, five factors weigh strongly in favor of overruling Roe and Casey: the nature of their error, the quality of their reasoning, the "workability" of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.[246]

The legal literature explores precedent from three dominant and intertwined perspectives.[247] The first views precedent as a way to address the counter-majoritarian nature of the Court, thus safeguarding democratic legitimacy.[248]

The second perspective highlights precedent's function as a constraint.[249] This viewpoint focuses on the role of precedent in restraining judicial discretion, thereby

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[244] *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 215, 231 2022.
[245] Ibid.*,* 231.
[246] Ibid., 267-268.
[247] For a general overview of the interests served by adherence to precedent and the doctrine of stare decisis, see Nina Varsava, "Precedent, Reliance, and *Dobbs*, *136 Harv. L. Rev. 1845* (2023).
[248] See e.g., Richard H. Fallon, Jr. *Law and Legitimacy in the Supreme Court*, Cambridge: Cambridge: The Belknap Press of Harvard University Press, 2018, 98-101; Michael J. Gerhardt, *The Power of Precedent*. Oxford: Oxford University Press, 2008. See, also, e.g., Lewis F. Powell, Jr., "Stare Decisis and Judicial Restraint," *47 Washington & Lee Law Review 281, 288* (1990) ("[E]limination of constitutional stare decisis would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is."); Earl M. Maltz, "Commentary, Some Thoughts on the Death of Stare Decisis in Constitutional Law," *l980 Wisconsin Law Review 467, 484* (1980) (insisting that adhering to precedent is necessary because the public will not accept the Supreme Court's authority unless it believes that "in each case the majority of the Court is speaking for the Constitution itself rather than simply for five or more lawyers in black robes").
[249] See e.g., Michael Bailey and Forrest Maltzman, *The Constrained Court: Law Politics, and the Decisions Justices Make,* New Jersey: Princeton University Press, 2011; Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutmann (Princeton: Princeton University Press, 1997), 139 ("The whole function of the doctrine is to make us say that what is false under proper

ensuring that judges' decisions are not arbitrary but are bound by previous rulings. Additionally, literature in this category discusses the importance of precedent in preserving the stability of the rule of law, asserting that without the consistency provided by precedent, the law would be subject to fluctuation and unpredictability.

The third perspective derives from the various interpretive approaches to the Constitution – i.e., how these interpretive methodologies confront the tension between the doctrine of *stare decisis* and the judicial responsibility to rectify erroneous constitutional interpretations.[250] This tension is emblematically depicted in

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analysis must nonetheless be held to be true, all in the interest of stability."); see also, Richard H. Fallon, Jr., "Stare Decisis and the Constitution: An Essay on Constitutional Methodology," 76 *New York University Law Review 570, 570* (2001) ("The force of the doctrine...lies in its propensity to perpetuate what was initially judicial error or to block reconsideration of what was at least arguably judicial error.").

[250] For discussion of living constitutionalists favoring weak stare decisis because constraint to overrule hinders progress, see e.g., Justin Driver, "The Significance of the Frontier in American Constitutional Law," *2011 Supreme Court Review 345,* (2012), 398 (arguing that "common law theories of constitutional adjudication risk overemphasizing the importance of stare decisis, for judges should feel free to "cast aside their predecessors' outmoded thinking." See also, "Living constitutionalism, properly conceived, must create significant leeway for judicial interpretations that deviate from even well-settled precedents."). For discussion of originalists favoring weak stare decisis to avoid doctrine trumping the Constitution (i.e., arguing that the Court should never follow precedent that contradicts the Constitution's original meaning, see e.g., Randy E. Barnett, Response, "It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt," *90 Minnesota Law Review 1232,* (2006), 1233 ("describing himself as a "fearless originalist[ ]" because he is willing to reject stare decisis when it would require infidelity to the text); Gary Lawson, "The Constitutional Case Against Precedent," *17 Harvard Journal of Law & Public Policy, 23* (1994), 25-28 ("arguing that it is unconstitutional to adhere to precedent in conflict with the Constitution's text."). Cf. Antonin Scalia, "Originalism: The Lesser Evil," *57 U. Cin. L. Rev. 849* (1989), 864 (characterizing himself as a "faint-hearted originalist" because of his willingness to follow some precedents that may conflict with the Constitution's text.). See also, Randy J. Kozel, "The Scope of Precedent," *113 Michigan Law Review 179* (2014), 179 (noting "This Article connects the scope of precedent with recurring and foundational debates about the proper ends of judicial interpretation. A precedent's forward-looking effect should not depend on the superficial categories of holding and dictum. Instead, it should reflect deeper normative commitments that define the nature of adjudication within American legal culture....Ultimately, what should determine the scope of precedent is the set of premises—regarding the judicial role, the separation of powers, and the relevance of history, morality, and policy—that informs a judge's methodological choices.").

the ongoing "settled versus right" debate.[251] In this debate, one side privileges adherence to established interpretations to maintain settled decisions. The aim here is to strengthen the predictability and consistency of the rule of law. The other side prioritizes adherence to *stare decisis* only for those cases that the Court in its contemporary context deems were correctly decided, i.e., "right" decisions. While the Court has always relied on interpretive methodologies to determine and comment on the "correctness" of a prior decision, the Court has increasingly justified its decision to overturn settled precedent based on the application of a different interpretive methodology from the one used in the prior case.[252] Chief Justice Roberts' nuanced approach to precedent, viewing it as an evolving process that shapes rather than

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[251] See e.g., Randy J. Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge: Cambridge University Press, 2017).

[252] In "Precedent and Jurisprudential Disagreement," *91 Texas Law Review 1711* (2013), then-professor Amy Coney Barrett argued that one function of stare decisis is to accommodate pluralism by mediating jurisprudential disagreement about constitutional interpretation. ("Stare decisis purports to guide a justice's decision whether to reverse or tolerate error.... Sometimes, however, it functions less to handle doctrinal missteps than to mediate intense disagreements between justices about the fundamental nature of the Constitution." (1711). She noted that "Stare decisis is not a hard-and-fast rule in the Court's constitutional cases, and the Court has not been afraid to exercise its prerogative to overrule precedent." (1726) "Consider just a few of the well-known fluctuations in the Court's constitutional case law. The Court has flipped twice on the question whether Congress can regulate state governments with respect to prescribing wage and hour limitations for state employees. Compare Maryland v. Wirtz, 392 U.S. 183, 201 (1968), with Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985), and Nat'l League of Cities v. Usery, 426 U.S. 833, 840 (1976). The Court has also changed course on the question of incorporation, compare Adamson v. California, 332 U.S. 46, 51 (1947), and Palko v. Connecticut, 302 U.S. 319, 323 (1937), with Mapp v. Ohio, 367 U.S. 643, 654-55 (1961); the protection given by the Free Exercise Clause, compare Sherbert v. Verner, 374 U.S. 398, 410 (1963), with Emp't Div., Dep't of Human Res. of State of Or. v. Smith, 485 U.S. 660, 672 (1988); the scope of the Commerce Clause, compare Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 561-62 (1923), and Lochner v. New York, 198 U.S. 45, 58 (1905), with W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 398-400 (1937); the lawfulness of segregation, compare Plessy v. Ferguson, 163 U.S. 537, 552 (1896), with Brown v. Bd. of Educ., 347 U.S. 483, 494-95 (1954); and the freedom of corporations to engage in political speech, compare McConnell v. FEC, 540 U.S. 93, 170 (2003), and Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 655 (1990), with Citizens United v. FEC, 558 U.S. 310, 319, 365-66 (2010)." (1726-27 n.97).

dictates judicial decisions, highlights the complex interplay between past rulings and future legal directions.[253]

B. Simultaneity and Instantiation: Recognizing Difference

When using Bergsonian concepts to read the Court's operation on precedent, it becomes evident that the Court often confuses *iteration* with *instantiation* in its jurisprudential practice. This confusion impacts our understanding of the Court's treatment of legal precedents and invites a deeper interrogation, particularly in light of Gilles Deleuze's philosophical grafts on to Bergsonian duration.

Bergson's conception of time as duration—a continuous flow that cannot be divided without altering its nature—and his emphasis on qualitative multiplicity and difference provide the underpinning for Deleuze's explorations of difference, repetition, and becoming. Deleuze extends Bergson's ideas, asserting that repetition

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[253] See, e.g., Frank B. Cross, "Chief Justice Roberts and Precedent: A Preliminary Study," *86 North Carolina Law Review 1251, 1276-77* (2008). Cross conducts a quantitative empirical examination of Chief Justice Roberts's first term opinions in relation to his views on precedent. Cross's results indicate that precedent is a creative act and it is selective. "This brief study illuminates a richer and more sophisticated understanding of stare decisis. Precedent is not simply governing or irrelevant. Prior decisions represent a web into which current decisions are placed. The existing precedents may not dictate particular outcomes or opinions in the current decisions, but they influence those decisions. Likewise, the choices of which precedents to cite in the current decisions serve to shape the course of the law, and to influence future decisions. Chief Justice Roberts has an apparent commitment to stare decisis, not in the sense that he feels tightly bound by the directions of past cases, but in the sense that he is influenced by those cases and uses them to project his own influence on future decisions." Cross concludes that Roberts's nuanced approach to stare decisis reflects a dynamic interpretation of precedent, viewing it as a guiding framework rather than a rigid constraint. "The tentative data suggest that Chief Justice Roberts puts great importance on precedent, but not in the precise sense that was commonly invoked. He appears to view stare decisis as an evolving process, in which prior opinions are not straightjackets that dictate his decisions but are instead boundaries that shape the nature of his opinions. The Chief Justice also appears dedicated to creating a new path of stare decisis that will direct the course of future rulings. This is a more sophisticated understanding of the legal process, escaping the binary "precedent governs/precedent doesn't matter" false / dichotomy. Legal researchers need to develop a better understanding of this process."

involves the creation of something new within each repetition, echoing the concept of instantiation.[254]

In computer science and mathematics, instantiation and iteration are distinguished by their functions. Instantiation refers to the creation of a specific instance of an object or class.[255] Instantiation is the process by which a class is used to create an object in memory, thereby implementing the structure and behavior defined in the class.[256] In contrast, iteration is a process of repetition, often involving looping through elements in a data structure or repeating a set of instructions until a certain condition is met.[257]

In terms of outcome, instantiation and iteration serve different purposes. Instantiation results in the creation of a unique instance of a class that can function independently, interacting with other objects or within its own methods. Conversely, iteration primarily affects a multitude of data points or repeatedly executes logic, often utilized to traverse or modify collections. In essence, while both processes deal

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[254] See, Gilles Deleuze, *Difference and Repetition,* trans. Paul Patton (New York: Columbia University Press, 1994); Gilles Deleuze, *Bergsonism* (New York: Zone Books, 1991).

[255] See, e.g., Grady Booch, *Object-Oriented Analysis and Design with Applications*, 3rd ed. (Boston: Addison-Wesley Professional, 2007) (providing an in-depth look at object-oriented programming, explaining concepts like classes, objects, and instantiation).

[256] Ibid. See also, Kenneth C. Louden and Kenneth A. Lambert, *Programming Languages: Principles and Practices*, 3rd ed. (Boston: Cengage Learning, 2011) (offering comprehensive insights into various programming paradigms, including object-oriented programming and detailed explanations of concepts such as classes, objects, and the instantiation process in the context of software development).

[257] Daniel Y. Liang, *Introduction to Java Programming and Data Structures: Comprehensive Version*. 11th ed. (Boston: Pearson, 2017) (explaining basic and advanced programming concepts, including loops for iteration and the process of object instantiation). See also, Thomas H. Cormen, Charles E. Leiserson, Ronald L. Rivest, and Clifford Stein, *Introduction to Algorithms*. 3rd ed. (Cambridge: The MIT Press, 2009) (Commonly referred to as CLRS, this text is a foundational resource in computer science education, covering a wide range of algorithmic strategies, including iterative processes in algorithm design and analysis).

with multiple instances or occurrences, the core distinction lies in instantiation's role in creating individual objects from a blueprint, contrasted with iteration's function of repetitively executing actions across elements or a set of conditions.

In the context of the Court's review and analysis of precedent cases, the process is commonly characterized as being more consistent with the concept of *iteration* than the concept of *instantiation*. There are several reasons that support this viewpoint.

First, iteration inherently involves the repetition of a set of actions or procedures. This characteristic aligns with the Court's practice of reviewing precedent cases. The process necessitates a repetitive examination of past rulings and decisions to comprehend their application to a current case. Such a process enables scrutiny of past judgments to ensure consistency and adherence to established legal principles.

Second, the concept of iteration in the Court’s analysis of precedent cases is underscored by the application of established procedures to new situations. This aspect parallels the programming concept of iteration, which involves executing the same block of code multiple times under varying conditions or with different data. In reviewing precedents, the Court applies established legal principles and frameworks to new cases iteratively.

Lastly, the iterative process in legal review encompasses adaptation and analysis. It includes assessing how previous decisions were rendered under similar circumstances and determining if or how those rationales should be applied in the current context. This process may also involve an evolution of the interpretation in

light of new factors or societal changes, akin to iterative revisions in a project or system.

In contrast, instantiation, as understood in the realm of object-oriented programming, refers to the creation of a new instance of a class. This process is more closely associated with the production of something new, as opposed to the revisitation and reapplication of established structures or principles. Consequently, instantiation may not align closely with the concept of reviewing legal precedents, which is fundamentally about re-examining existing materials rather than creating new entities. Therefore, the general tendency leans towards understanding the Court's treatment of precedent as iterative rather than instantive.

However, although the Court's review and analysis of precedent seems to align with the definition of iteration given above, the philosophical insights of Bergson and Deleuze suggest that the Court's treatment of precedent actually more closely resembles instantiation. This argument, though contrarian, is compelling when one considers the nuanced nature of legal analysis and decision-making. It invites us to revisit the terminologies of iteration and instantiation, traditionally sequestered within the realms of computer science and mathematics. Instantiation, within the paradigm of object-oriented programming, refers to the creation of a new instance of a class, or the application of a general blueprint to a specific new case. This conceptual foundation can be transposed to the Supreme Court's use of precedents in new cases, especially if we can train ourselves to see precedents as “never not new”.

We can think of legal precedents serving as standard blueprints or templates, providing foundational legal principles or rules. When the Court reviews a new case, it does not merely recycle an old decision. Instead, it instantiates a new application of these principles, adapting and interpreting the precedent within the unique factual and legal context of the current case. Each case, while drawing from the same foundational laws or precedents, embodies a unique instance due to its distinct amalgamation of facts, contexts, and nuances. This dynamic application demonstrates that every time a precedent is cited, discussed, and meaningfully relied on for a proposition, the Court is effectively instantiating a new object from the class defined by the original case.

Just as each object instantiated from a class is unique and tailored to its specific circumstances, each application of a precedent is also unique and context-specific. It aligns with the idea that every time a precedent is invoked for analysis, the precedent case itself undergoes a transformation—it is not merely replicated but is reinterpreted and modified by the new context (both the specific context of the current case, and the general socio-political-legal and cultural context of the contemporary society in which it is being called into/actualized). Over time, the interpretation of a precedent evolves, demonstrating that each instantiation can subtly alter the "code" or meaning of the precedent. This evolution is evident in how legal doctrines shift in their application over time, influenced by societal changes, new legal arguments, and different judicial philosophies.

Another critical aspect of instantiation is its potential to shape future cases. Each instantiation of a precedent has the potential to set a new precedent. The decision rendered by the Supreme Court in a current case may itself become a blueprint for future cases. This cyclical nature demonstrates that instantiation in legal contexts is not merely about reproducing existing decisions; rather, it contributes to the creation of a living, evolving legal doctrine.

Furthermore, instantiation in the context of Supreme Court rulings involves revisiting the fundamental legal principles with each new case, potentially refining and expanding upon them. This improvement through successive instantiations contributes to the deepening and broadening of legal interpretations. Thus, instantiation, as a concept, captures the dynamism and creativity inherent in the Supreme Court's engagement with precedents. It acknowledges that each new case not only modifies but potentially enhances the legal landscape, much the way each new instance in programming can customize and extend the functionalities defined by a class.

The argument for viewing the Supreme Court's use of precedents as instantiation gains further depth when considered in the light of Deleuze's philosophical ideas as presented in his work *Difference and Repetition*. There, Deleuze presents the concepts of “Difference in Itself” and “Repetition for Itself”. Deleuze proposes that repetition is not a mere replication of the same, but rather a dynamic process that introduces difference within the repetition itself, making each repetition unique, bringing something new. This process aligns with how each

application of a legal precedent is not a mere reuse, but a reinterpretation and adaptation to new circumstances. For his part, Bergson described the relationship between repetition and difference as something more easily lived than thought:

> Real duration is the duration which gnaws on things, and leaves on them the mark of its tooth. If everything is in time, everything changes inwardly, and the same concrete reality never recurs. Repetition is therefore possible only in the abstract: what is repeated is some aspect that our senses, and especially our intellect, have singled out from reality, just because our action, upon which all the effort of our intellect is directed, can move only among repetitions. Thus, concentrated on that which repeats, solely preoccupied in welding the same to the same, intellect turns away from the vision of time. It dislikes what is fluid, and solidifies everything it touches. We do not *think* in real time. But we *live* it, because life transcends intellect.[258]

Deleuze's idea of "Repetition for Itself" suggests that each repetition can change the meaning or significance of what is repeated. This matches up with the Court's practice and resonates with the idea that each application of a precedent can potentially transform the interpretation and application of that precedent, influenced by the unique factual and legal context of each successive case.

Just as Deleuze sees repetition as a dynamic process that includes differentiation, the Supreme Court's use of precedents can be viewed as an instantiation where each application is a new creation that differentiates from previous uses. Each new case, while drawing from the same legal principles (the general blueprint), becomes a unique instance that may alter the framework of the original precedent. Every instantiation of a precedent, therefore, brings into existence

[258] Bergson, *Creative Evolution,* 46 (emphasis in the original).

a differentiated reality, reflecting the changing societal, political, and cultural contexts.

Deleuze's philosophy provides a robust theoretical foundation to ground the claim that instantiation, as a concept, can be applied to understand how the Supreme Court treats legal precedents. Each new application (instantiation) of a precedent is not a mere mechanical reproduction but an active creation that involves significant interpretation and modification, reflecting Deleuze's emphasis on the creative and differentiating power of repetition. The nuanced process of instantiation, with its inherent dynamism and transformative potential, offers a more fitting lens through which to understand the Court's complex interplay with legal precedents.

Instantiation, as applied to the Court’s use of precedent, also reveals the imagination and creativity inherent in the act of judging and the drafting of legal opinions, both of which require the jurist to select the cases, or portions thereof, to emphasize and cite in the subsequent case. In this sense, the judge or Justice functions like a novelist, carefully choosing which details to include so as to drive the narrative.

CHAPTER 5

SEARCH FOR A BETTER METHOD: APPLYING SIMULTANEITY TO U.S. SUPREME COURT CASES

It is difficult to grasp Bergsonian simultaneity in the abstract and understand its juridical implications without the benefit (and context) of a real piece of constitutional litigation. But that difficulty is easily overcome. In this chapter, I illustrate how Bergsonian simultaneity, indeed durational historicity as a whole, can be applied to a series of actual Supreme Court cases. Specifically, I examine how the Court's 1954 decision in *Brown v. Board of Education*—the decision that eliminated (at least constitutionally) racial segregation in America's public schools—has been deployed and redeployed in subsequent cases involving discrimination in the educational sphere. I also show how simultaneity, as applied in two separate but connected moves of differentiation, can assist the Court in rendering decisions that are faithful to the constitutional principles articulated in the originary case (i.e., *Brown v. Board of Education*) while still being sensitive to the lived experiences that gave rise to the subsequent case now at bar.

Before embarking on that analysis, however, it is first necessary to recognize that not all lawsuits that find their way to the Supreme Court implicate constitutional questions or require the kind of Bergsonian treatment I describe below. In short, not all Supreme Court cases are created equal; some are more important than others, at least in terms of their impact on the experience of the Constitution.

A. The Constitutional "Event": Simultaneity in Action

The concept of a constitutional event has been theorized by Bruce Ackerman, Akhil Reed Amar, and Jack Balkin, with each providing a distinct lens through which to understand pivotal occurrences that shape and redefine the constitutional landscape. In *We the People: Foundations,* Bruce Ackerman introduces the concept of "constitutional moments," which are closely related to constitutional events.[259] He argues that constitutional moments are periods of intense political reform and mobilization that result in significant changes to the constitutional order, beyond ordinary politics. These events, like the New Deal or the Civil Rights Movement lead to transformative changes that are eventually consolidated into the constitutional framework, even if they do not always lead to formal amendments.

Akhil Reed Amar discusses the concept of constitutional events in the context of how pivotal moments and actions by key figures can redefine the interpretation and application of the Constitution.[260] For Amar, these events are not just formal amendments or judicial decisions, but also include significant acts by political leaders, movements, or societal changes that reshape the understanding and functioning of the constitutional order. Amar's perspective on constitutional events is further elaborated in his book *America's Unwritten Constitution: The Precedents and*

[259] Bruce Ackerman, *We the People: Foundations*, (Cambridge: Harvard University Press, 1991) (presenting a theory of constitutional change through "constitutional moments," significant societal mobilization and reform periods that lead to fundamental shifts in the constitutional framework).
[260] Akhil Reed Amar, *America's Constitution: A Biography,* (New York: Random House, 2005) (exploring how historical events, actions by political figures, and shifts in societal norms have shaped the interpretation and application of the U.S. Constitution over time).

Principles We Live By.[261] In this work, Amar explores the idea that not all constitutional norms and principles are explicitly outlined in the document's text. Instead, many evolve through practice, tradition, and interpretation, encapsulating a broad range of historical, societal, and political developments. These unwritten elements become crucial during constitutional events, as they guide the interpretation and application of the formal Constitution in times of significant change and uncertainty. Amar highlights how these events can lead to a deeper understanding and expansion of constitutional doctrine, even in the absence of formal amendments.

Finally, Jack Balkin's concept of constitutional events can be read as revolving around the idea of constitutional construction. In *Living Originalism*, he argues that constitutional interpretation is not fixed but evolves through various events and practices that fill out the framework and meaning of the Constitution.[262] These events can include judicial decisions, legislative actions, and social movements that contribute to the ongoing process of constitutional development and understanding.

In examining the definitions provided by Ackerman, Amar, and Balkin, several shared characteristics emerge that define the concept of "constitutional events". Primarily, all three scholars emphasize the transformative impact of such events. Constitutional events, they posit, bear significant and enduring imprints on the constitutional order, instigating profound alterations in the social, political, and legal

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[261] Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By,* (New York: Basic Books, 2012).
[262] Jack Balkin, *Living Originalism* (Cambridge: Harvard University Press, 2011) (discussing how constitutional interpretation changes through various actions and societal developments).

fabric of a society. These changes influence the Constitution's interpretation, understanding, and application, leading to a fundamental shift in societal governance.

Furthermore, these scholars propose that constitutional events transcend the sphere of ordinary politics. They are not mere everyday acts of governance or legislative processes. Instead, they represent extraordinary moments or periods of change that redefine the foundational principles of the constitutional system. In essence, these events are key turning points that shape the trajectory of constitutional evolution.

Another shared characteristic evident in the scholars' definitions pertains to the involvement of multiple actors in constitutional events. Ackerman, Amar, and Balkin suggest that these events are not confined to the judiciary or the formal amendment process. Rather, they can involve an array of actors, ranging from political leaders and social movements to the general populace. This broad participatory approach emphasizes the collective effort that drives constitutional change.

Lastly, nonoriginalists acknowledge the dynamic interpretation and construction of the Constitution through constitutional events. These scholars recognize that constitutional events play a crucial role in the ongoing process of defining and redefining the Constitution's meaning and scope. This perspective acknowledges the Constitution as a dynamic document that evolves in response to changing historical, social, and political contexts, rather than a static piece of legislation.

The definitions of "constitutional event" offered by Ackerman, Amar, and Balkin can be subsumed under the overarching concept of constitutional evolution (a term that captures the process through which constitutions adapt and transform over time in response to a variety of transformative forces). Constitutional evolution acknowledges that while some changes are codified explicitly through amendments, others result from shifts in societal values, political practices, judicial interpretations, and unwritten norms. This understanding reflects the Constitution's dynamic and evolving nature, where events both within and beyond formal legal processes contribute to its living character.

I argue that precedent in constitutional law mirrors these characteristics of time and experience as outlined above. That is, each precedent case, and its subsequent citation and discussion in later cases, reflects distinct moments of constitutional life, effectively embodying the idea that time intertwined with experiences, generates a constitutional event. Therefore, within this context, a precedent can be conceptualized as a tangible constitutional event. This interpretation emphasizes that precedents are not mere transient instances, but rather the product of a complex temporal process interwoven with accumulated experience. Importantly, this perspective acknowledges the multiple intersections of time and experience embedded within a single case, as these intersections vary based on how the case is cited and interpreted in subsequent legal discourse. Although the process of constitutional evolution proposed by Ackerman, Amar, and Balkin implicitly acknowledges these temporal and experiential dimensions, my conceptualization of a

precedent as a constitutional event provides a more explicit focus on these aspects. Therefore, while the foundational principles align, my emphasis on the temporal and experiential dynamism inherent in precedents distinguishes my perspective.

Expanding on this, a precedent case includes multiple temporal dimensions. Initially, there is the time of the case at the point of decision, referring to the chronological moment of the judicial ruling in response to the litigation presenting the legal issue (designated as T). Additionally, there is the time of the case when it is subsequently cited and discussed as a precedent in subsequent cases (denoted as T1, T2, T3, etc.).[263] The number of temporal dimensions a precedent embodies expands with each subsequent case where it is cited and discussed. Each temporal dimension, represented as T, T1, T2, T3, etc., signifies time combined with experience, which gives rise to a constitutional event, those some are weightier than others. For instance, T embodies the time and collective experience of the initial litigation, thereby symbolizing the initial Precedent-setting Time and Precedent-setting Experience. T1, T2, T3, etc., encapsulate the time and collective experience of the case currently under consideration, in which the initial precedent case is cited and discussed, and through that process, changed. In essence, T1, T2, and T3, etc., represent the Current

[263] Noting that appeals to history are common in constitutional law, often involving interpretations made after the original adoption of the Constitution, Professor Richard H. Fallon, Jr. uses a T1, T2, T3 framework to describe constitutional history in three stages: the original meaning at T1, subsequent interpretations at T2, and the present implications at T3. Richard H. Fallon, Jr., *Law and Legitimacy in the Supreme Court* (Cambridge: Cambridge: The Belknap Press of Harvard University Press, 2018). I extend this framework by emphasizing the temporal and experiential dimensions embedded in each precedent. While Fallon focuses on the interpretive significance and potential errors across these times, my work highlights how each citation and discussion of a precedent adds new layers of temporal and experiential context, transforming precedents into dynamic constitutional events.

Time and Current Experience of the chronological moment of the case at hand, whereby the precedent case is invoked, analyzed, and reactivated in a new context.

Experience, within a constitutional framework, embodies the cumulative wisdom, insights, and lessons gleaned from a history of legal decisions and actions. This includes, but is not limited to, the tangible outcomes of past court rulings, the evolution of law's interpretation across time, and the judiciary's comprehension of legal principles as they have been applied in various situations. Nonetheless, we must remind ourselves of the distinction between two dimensions of experience in this context: constitutional experience and the experience of the Constitution. Constitutional experience is the collective knowledge set forth by the judiciary through the interpretations of constitutionality articulated in its opinions. Each time a precedent is cited and discussed, it inherently incorporates the temporal context and experiential wisdom that exists at that particular juncture, thus continuously shaping and reshaping constitutional experience. On the other hand, the experience of the Constitution refers to the subjective, lived experience of individuals operating under the overarching constitutional framework established by the Court. This dimension captures the individual and societal implications of constitutional rulings and interpretations, reflecting the dynamic interplay between law, society, and individual lives. In essence, both dimensions of experience – the objective constitutional experience and the subjective experience of the Constitution – integrate to develop the comprehensive body and texture of constitutional jurisprudence. Each interaction

with precedent contributes a new element to this continually evolving and constructed narrative of constitutional history.

B. Conducting a Temporal Synthesis

As alluded to above, the simultaneity process central to Bergsonian duration requires that the human subject conduct a temporal synthesis. This involves two specific tasks: (1) coalescing experiences to identify temporal layers and (2) synthesizing those temporal layers to gain a deeper grasp of how events differentiate over and in response to time.

Coalescing temporal experiences to identify temporal layers is an intuitive process that primarily emphasizes the experiential aspect of time, focusing on how individuals and collectives merge different temporal frames to form a coherent narrative. This exercise is fundamentally phenomenological, focusing on the people's lived experience of the Constitution. It involves weaving together the diverse lived experiences into a cohesive understanding of the Constitution's progression and evolution as announced through the Court's jurisprudence. This coalescence is not a mere aggregation of experiences; it is an active integration that accounts for the dynamic interplay of past, present, and future in shaping the collective understanding of constitutional principles. Its aim is to illuminate how experiences of the Constitution are felt, perceived, and interconnected over time, despite their apparent chronological separation. Coalescing these temporal experiences enables the Court to form a comprehensive picture of the collective constitutional memory and experience.

The second action –synthesizing the identified temporal layers – is a more analytical, objective exercise. This is not a passive amalgamation of disparate elements, but an intentional process of integrating different temporal dimensions to construct a comprehensive understanding of the evolution of the past legal decision. This synthesis is essential for the Court to render a decision that is cognizant of historical intricacies and future implications.

For example, it would enable the Court to engage in a deliberate exploration of diverse historical periods, analyzing them to understand patterns, discern causal relationships, and consider potential future impacts. Methodologically, this undertaking would involve using a range of structured approaches, including but not limited to, historical analysis, scenario planning and application, and conducting layered case studies in law and ethics. The objective of this examination is not simply to map a chronological progression of legal interpretations. Instead, the point of synthesizing temporal layers is to apply the integrated understanding to practical or theoretical problems, striving for solutions, predictions, or the derivation of new approaches that bear on a wide-range of cases, and to understand how underlying trends and principles have influenced and shaped the Court's interpretations, thereby gaining insight into (and potentially broadening) the Court's historical consciousness.

Conducting this type of analysis would benefit the Court's decisions by ensuring they are neither detached from historical context nor blind to future impacts. Instead, this process could help demonstrate that the Court’s decisions are rooted in a nuanced understanding of the past but not shackled to it; that the decisions are

responsive to the exigencies of the present, and mindful of the potential implications for the future. Bergson's concept of simultaneity inspires this type of engagement with temporal dimensions by underscoring the dynamism and complexity inherent in legal interpretation.

C. Simultaneity, Temporal Synthesis, and Creating Meaning

The struggle between law's commitment to the past and its responsibility to the demands of the present are deeply embedded in law's history. In *The Common Law*, Justice Holmes described the law's connection to the past and present not as an either/or proposition, but as a dynamic relationship that recognized law's connection to the traditions of the past and its link to the current interests of the present. Holmes was aware, however, that the link between a given rule and its originating purpose or tradition can attenuate over time, eventually disappearing altogether, until the demand for following the rule is filled with an entirely new rationale. This, Holmes, suggests, is where law and the judges who interpret it enter the picture as creative forces.

> A very common phenomenon, and one very familiar to the student of history is this. The customs, beliefs, or needs of a primitive time establish a rule or formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground or policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time, even the form modifies itself to fit the meaning which it has received.[264]

[264] Oliver Wendell Holmes Jr. *The Common Law* (New York: Dover, 1991).

In *The Image of Law*, Alexandre Lefebvre relies on this passage to highlight Justice Holmes' assertion that legal rules, in their raw form, lack inherent meaning or context. Lefebvre argues that giving these rules a sense and context in order to make them comprehensible is central to the judicial task. For Lefebvre, Holmes's statement in *The Common Law* explains not only how, but *that* the process of judicial interpretation effectively creates a state of congruence between the rule and reason.[265]

Holmes's and Lefebvre's statement and analysis of law's inherently creative nature demonstrate how judicial interpretation operates within a temporal continuum. When judges interpret a rule, they do so within the context of past precedents and with an eye towards future applications, thus producing a nuanced understanding of the rule that changes over time. This interpretation is not static but is continually influenced by the flow of time and the accumulation of lived experiences, echoing Bergson's concept of duration.

As earlier indicated, a precedent case is one that sets a legal rule or principle that courts follow when deciding later cases with similar issues or facts.[266] Such a case becomes a constitutional event because the decision serves as a binding reference point for future legal decisions touching on constitutional doctrine. This

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[265] Alexandre Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza,* (Stanford: Stanford University Press, 2008), 102. "[T]his state of identity between rule and reason occurs each and every time a judgment is rendered, because only judgment can establish this identity by creating the rule, once again."

[266] Decisions made by the U.S. Supreme Court are binding on all lower federal and state courts, serving as precedents for future cases with similar issues or facts. This authority comes from the Supreme Court's role as the highest court in the federal judiciary, as established by Article III of the U.S. Constitution. The doctrine of stare decisis requires that lower courts follow the Supreme Court's legal interpretations, promoting consistency and predictability in the legal system. Therefore, unless the Supreme Court reverses an earlier ruling, its decisions stand as the ultimate legal authority nationwide.

means that the outcome of the precedent case, influenced by the context of its time and the then-accumulated judicial experience, sets a standard or guideline for interpreting and applying the law in future cases.

Analyzing a precedent case in time, understood as duration, requires an examination of the precedent's temporal synthesis. A temporal synthesis, in this context, involves a detailed analysis of the relationship between the precedent's time and experience and the current time and experience of the subsequent case(s) in which the precedent case is subsequently cited and discussed. This analysis uncovers the conditions and understandings framing the interpretations the Court applied to determine the scope of constitutionality captured by the decision and rationale in the precedent case. In other words, this analysis breaks down a precedent case into component parts to reveal those aspects that made the decision meaningful at the time it was decided. Similarly, it sheds light on what combination of time and experience in the subsequent cases – i.e., the cases where the precedent decision is subsequently cited and discussed – is deemed meaningful.

Each subsequent citation and discussion of the precedent creates a distinct chronological marker for the precedent case. Each chronological marker, in essence, represents a constitutional event (moment) at a standstill, denoting a unique intersection of time and lived experience in the continuum of constitutional interpretation. This moment of standstill captures the unique context and perspective of that particular constitutional interpretation. Mirroring this process, each chronological marker unfolds a unique meaning of the combination of time and lived

experience. (Precedent Meaning (PM), Meaning1 (M1), Meaning2 (M2), Meaning3 (M3), etc.). A temporal synthesis process allows for the identification of the underlying meaning of each constitutional event of the precedent case.

Following the identification of these meanings, the next step in the process involves evaluating the relationship between the precedent meaning (PM) and subsequent meanings (M1, M2, M3, etc.). If the subsequent meanings closely align with the precedent case's meaning, (i.e., the combination of time and lived experience that made the precedent case meaningful in the first place as a constitutional event), then the precedent stands and should control the interpretive framework of the case under review.

However, a divergence between the meanings of the precedent case and subsequent cases in which the precedent case is cited requires a different approach. The greater the disparity between the precedent case's meaning and subsequent meanings, the stronger the argument for (a) modifying or overruling the precedent or (b) omitting any reference to it in the subsequent case.

When analyzing the temporal synthesis of precedent through the lens of time as duration, it is important to understand how change and difference is measured. Fundamentally, this process requires understanding difference in qualitative terms. Contrary to measuring difference as an alteration in intensity or magnitude, the qualitative assessment of difference serves as an indicator of how the precedent's meaning has changed over time. This process involves a detailed examination of the

precedent's characteristics and properties, as well as its spatial and temporal positionality.

Moreover, the analysis is not confined to the precedent case, as such. The analysis extends to those subsequent cases that cite and discuss the precedent as a central aspect underlying the subsequent case's decision (i.e., the characteristics, properties, and positionality of the precedent case cited and discussed in those subsequent cases are also examined as part of the qualitative analysis). The goal is to understand the relationship between the meaning contained in the precedent case when it was decided and the meanings contained in the subsequent cases that cite and discuss the precedent case.[267] One must seek to determine whether (and if so, how) the subsequent interpretations align with or deviate from the time and experience that made the precedent case a meaningful constitutional event. In this way, the measure of qualitative difference emerges from a comprehensive examination of the precedent and its subsequent interpretations, providing insights into not only the fact of evolution of meaning over time, but more specifically, the nature of that evolution.

The temporal synthesis derived from Bergson's philosophy of time as duration allows for the emergence of novelty. Reading the analysis of precedent case law through a Bergsonian lens acknowledges the differentiation inherent in each reiteration of precedent based on the passage and flow of lived time. This aligns with

[267] Viewing precedent through the lens of time as duration, by conducting a temporal synthesis, is not necessarily the same as relativism. Relativism stems from presentism, which judges precedent by modern and contemporary standards. However, duration invites an immanent critique, where the judgment of precedent is based on whether its meaning can remain consistent and logically coherent within its defined socio-legal context.

the inherent creativity required in the practice of law. In other words, reorienting our understanding of time from a simple linear progression to Bergson's concept of duration uncovers an inherent feature of legal practice: each application of precedent is never merely a repetition, as such, but a qualitatively different event that is constructed by the judge or Justice drafting the case decision. The nuances of the present moment—shaped by the ever-changing societal and cultural contexts—imbue each instance a precedent is applied with a unique quality. Therefore, each repetition is a creative act, a new interpretation that considers the dynamic nature of lived experience. This understanding of time as duration thus provides a more accurate and insightful framework for understanding the application and evolution of constitutional law. The reorientation to thinking in time as duration reveals that precedent is never not new.

In the Supreme Court context, the formula "time + experience = a constitutional event" underscores the dynamic and fluid nature of constitutional law. It accurately describes the process through which legal precedents are established and reinterpreted, highlighting the integral role played by temporal progression and accumulated lived experience, both of which contribute to an evolving legal landscape. This continual evolution results in the emergence of new precedents either through their original establishment or through the reinterpretation of existing ones, thereby ensuring the law's ongoing relevance and adaptability to the continual differentiation of societal values and norms.

As a cornerstone of the legal system, precedent cases form the data set that constitutes what is often referred to as constitutional history. This is the narrative of the constitutional experience, crafted and guided by the Court over time. The Court's curatorial role in shaping this narrative is instrumental in defining collective constitutional memory, directly influencing the Court's interpretive activity.

D. Applying Simultaneity to *Brown v. Board of Education* and Its Progeny

To illustrate how Bergsonian simultaneity can be applied beneficially to Supreme Court cases, consider the Court's landmark ruling in *Brown v. Board of Education* (1954).[268] When this precedent is invoked in a contemporary setting, such as in the affirmative action opinion of *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (2023)[269] ("*SFFA*"), an instance of artificial simultaneity emerges. The following exploration will unpack the complexities of applying Bergson's concept of artificial simultaneity to the operation of legal precedents, shedding light on the possibilities of thinking time as duration in constitutional interpretation.

In this context, using Bergson's concept of simultaneity as a framework allows us to perceive the single material entity of *Brown* as an entity that differentiates over time. That differentiation creates the possibility of an artificial

[268] *Brown v. Board of Education,* 347 U.S. 483 (1954). *Brown* 1954, which repudiated the doctrine of 'separate but equal' in public education, captures the constitutional experience of a moment of decision creating a constitutional event within the American legal and social fabric. This case not only challenged the prevailing norms of official state racial segregation but also set a precedent that would echo through subsequent legal interpretations and societal transformations.
[269] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College,* 600 U.S. 181 (2023).

simultaneity, which allows us to qualitatively compare *Brown* 1954 and *Brown* 2023. *Brown* 1954 stands for the initial case decision where the Court ruled state action supporting segregation in primary schools for Black and white children was an unconstitutional violation of the Fourteenth Amendment's Equal Protection Clause. "*Brown* 2023" stands for *Brown* as a precedent case cited in *SFFA*, where a 6-3 majority of the Court significantly limited affirmative action in college admissions. In *SFFA,* the Court ruled that the admissions programs used by the University of North Carolina and Harvard College violated the Constitution's Equal Protection Clause, which prohibits racial discrimination by government entities.

On the surface, it seems odd, even irrational, for the Court to cite *Brown* as authority for shutting down efforts by universities to provide minorities better access to high-level college education programs. Yet, this rhetorical move by the Court is neither odd nor irrational; it may not even be cynical. To evaluate it, however, we must conduct an in-depth simultaneity analysis using Bergsonian duration.

If we focus on natural simultaneity defined as the coexistence of two different material things in the same time we would perceive *Brown* (1954) and *Brown* (2023) as representing one material thing, (i.e., the case of *Brown v. Board of Education* as that case was decided in 1954). In other words, Brown does not change, it is the same in 2023 as it was in 1954. However, employing Bergson's nuanced understanding of simultaneity and time as duration, we can appreciate the differentiation within *Brown* over time, leading to an artificial simultaneity within the case itself. In this light, *Brown* (1954) and *Brown* (2023) are perceived as two different material things

existing in the same time (2023), even though they reference the same legal case. Here, different means self-differentiated. This perception makes us aware of the artificial simultaneity within the thing itself and leads to an appreciation of the changes and evolution within the case over time.

Drawing from Bergson's philosophical framework, we can view the Court's ruling in *Brown* and the Court's subsequent citations and discussions of *Brown* in later decisions (e.g., *SFFA*) as instances of differentiation within the singular continuum of legal and societal evolution. From this perspective, simultaneity extends beyond the mere temporal coincidence of these legal events (such as the *Brown* ruling in 1954 and its citation and discussion in 2023). Instead, it describes the process by which the material of legal doctrine—embodied in the constitutional principles set forth in the original *Brown* decision—differentiates and evolves over time. This view implies that each subsequent citation and discussion of a precedent is in fact an interpretation of that precedent, ostensibly founded on the same constitutional principles, by which each interpretation contributes to the ongoing evolution of legal doctrine. As such, the constitutional narrative evolves not in a series of disjointed instances, but as a continuous, differentiated stream of legal interpretation within the temporal continuum.

Notwithstanding this notion of continuity, the interpretive act is inherently dynamic, and reflects the fluidity and complexity of legal and societal contexts over time. Thus, it is essential to acknowledge the potential for inconsistency within this continuity. The continuous stream is composed of individual acts of interpretation,

each shaped by the unique circumstances of a given case, jurisprudential philosophies, and societal and political pressures of its time. These individual interpretations, while contributing to the broader continuity, may not always align well with each other. They may even stand in contradiction, reflecting shifts in legal thought, societal values, and interpretive paradigms. This inherent potential for inconsistency does not undermine the continuity of the constitutional narrative. Instead, it enriches it, adding layers of complexity and dynamism to the ongoing process of legal interpretation. This nuanced understanding acknowledges the interplay of continuity and inconsistency in the development of constitutional jurisprudence, providing a more comprehensive and realistic depiction of the interpretive process.

Bergson's concept of artificial simultaneity fundamentally alters our understanding of time and perception, providing a way to analyze the operations of judicial review. In understanding the nuances of legal interpretation, particularly in the realm of constitutional law, Bergson's concept of artificial simultaneity proves helpful given his approach to the relation between time as duration, and history, memory, and experience. His philosophical framework can be used to illuminate how the judiciary, notably the Supreme Court, employs a dual process of simultaneity when revisiting and interpreting precedents over time. This dual engagement with time enables the Court to maintain both the continuity and adaptability of legal precedents.

The following exploration examines the processes by which the Court aligns historical and contemporary legal doctrines through the concept of Bergsonian simultaneity. As explained below, this act of alignment involves four distinct but connected phases, each of which is necessary to determine whether a precedent case remains controlling or at least relevant to the new case under review.

1. *First Phase of Simultaneity Process: Understanding* Brown's *Elemental Constitutional Principles*

In this case example, the first phase of the Bergsonian simultaneity process seeks to comprehend the 1954 ruling in *Brown v. Board of Education* as a pivotal constitutional event. This process enables the Court to understand the constitutional principles that drove the Court in 1954 to decide *Brown* in the way that it did.

In *Brown,* the Court revisited the "separate but equal" doctrine established by *Plessy v. Ferguson,* 163 U.S. 537 (1896). The Court undertook a critical dissection of the legal and moral dimensions of segregation, separating the immediate conditions of state-sanctioned segregation (i.e., the state's division of students into schools based on race) from their socio-legal origins (i.e., segregation as an extension of slavery; segregation as a manifestation of states' rights), thereby laying a foundation for the Court's legal reasoning. This separation also enabled the Court to delineate the existing harm posed by state-sanctioned segregation while simultaneously acknowledging the historical context that had perpetuated it, leading to a focused judicial intervention.

The Court was then able to synthesize these dissected elements into a coherent temporal reality - one that both acknowledges the continuity and discontinuity of

legal principles. The Court's approach in *Brown* transcended a mere historical review, and instead, it embarked on a critical re-contextualization of past jurisprudence, scrutinizing it through the lens of contemporary realities.

In its decision, the *Brown* Court integrated contemporary social sciences with the racially-based historical injustices to carve out a fresh legal understanding of equality and education. This comprehensive approach not only redefined the societal role of public education but also resulted in a legal decision that resonated profoundly with the broader Civil Rights Movement.

Bergson's idea that our perception of simultaneity is a synthetic construction allows us to understand this reevaluation as the Court synthesizing historical legal doctrine with prevailing moral and ethical standards. The justices recognized that societal understandings of equality in 1954 had transformed significantly from 1896, necessitating a legal interpretation that mirrored modern values. This re-contextualization underscores the synthetic nature of legal simultaneity where past rulings are integrated into the present not as static truths but as dynamic elements that evolve with societal progression.

Not surprisingly, *Brown* has spawned numerous discussions and debates regarding how to interpret its principles, purposes, and scope. Several approaches have been employed to decipher the bases and justifications for the ruling, with varying implications for our understanding of the Constitution's stance on race and public policy.

One interpretation is the “color-blindness” approach, suggesting *Brown* stands primarily for the proposition that race should never serve as a permissible basis for the allocation of public benefits or burdens. This perspective draws on the concluding passage of the decision, famously stating that "Separate educational facilities are inherently unequal."[270] This conclusion from *Brown* stems from Justice Harlan's dissent in *Plessy*, in which he wrote, "Our Constitution is color-blind."[271]

Another perspective is the "caste" interpretation, which posits that *Brown* makes race an impermissible basis for public policy when it leads to the social and psychological stigmatization or subordination of a racial group. This approach hinges on the portion of the ruling emphasizing the detrimental effect of separating Black and white schoolchildren on the basis of race, causing the Black children to develop "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[272] Under this interpretation, *Brown* does not prohibit all uses of race but only those perpetuating racial hierarchy or caste.

The "anti-white supremacy" interpretation suggests *Brown* holds that segregation laws are the impermissible products of white supremacy, characterized by legislative processes dominated by white voters with Black citizens largely disenfranchised. This perspective raises the question of whether all-Black schools would be permissible if predominantly Black political bodies voluntarily created them.

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[270] *Brown*, 495.
[271] *Plessy v. Ferguson*, 163 U.S. 537, 559, (1896) (Harlan, J. dissenting).
[272] *Brown*, 494.

The fourth interpretation, "integration," focuses on *Brown's* emphasis on "the importance of education to our democratic society." It posits that *Brown* was based on an empirical assumption that integrated schools would yield better educational outcomes for Black schoolchildren, promote desirable social policy, and foster broader societal integration.

2. Second Phase of Simultaneity Process – Two-Step Differentiation

Brown is not just a landmark U.S. Supreme Court decision: it represents a pivotal moment in the jurisprudential timeline that significantly reshaped public policy and societal norms regarding race and equality. Its influence on subsequent affirmative action cases makes it a crucial node in the web of legal precedent. Analyzing select high-profile cases that directly engage with *Brown* allows us to observe how this seminal case is actualized and recontextualized over time, demonstrating Bergson's idea of duration—where the past is continually folded into the present, altering its trajectory and significance.

Bergson's concept of simultaneity provides a theoretical framework to understand how the Court navigates the complex landscape of precedent. When high-profile affirmative action cases cite *Brown*, they are not merely referencing a historical artifact; rather, they are engaging in a Bergsonian coalescence of experience and synthesis of time, where past decisions (the virtual past) and present adjudicative challenges coexist in a decision-making moment. This process of simultaneity in legal reasoning shows how the "duration" of *Brown's* principles are stretched and modified

to align with contemporary issues in and attitudes about affirmative action, blending historical legal doctrine with modern values, circumstances, and positionality.

Moreover, focusing on high-profile cases that discuss *Brown* allows for a deeper examination of how major judicial decisions serve as focal points for temporal synthesis, where the past is not static but dynamically interacts with the present. This selective analysis helps elucidate how significant cases contribute to the evolution of legal doctrine, reflecting Bergson's idea that the continuity of experience and the transformative potential of memory (in this case, judicial memory as collective constitutional memory) shape ongoing legal and social realities. Thus, the justification for concentrating on such cases lies in their illustrative power to show how legal precedent, viewed through Bergson's philosophical lens, is not a linear path but a vibrant, ongoing dialogue between past and present.

To conduct the simultaneity analysis, the Court must register and analyze two distinct differentiations. The first occurs between the original *Brown* decision in 1954 and each subsequent case that cites or discusses *Brown*. I refer to this operation as actualizing the "virtual" *Brown.* The second differentiation occurs between the virtual *Brown* – i.e., the *Brown* that has been transformed by subsequent cases – and the original *Brown* in 1954. This second differentiation necessarily involves a backward-looking comparative assessment to determine (i) how much *Brown*, as a seminal Supreme Court decision, has been changed over time, and (ii) whether *Brown*, as deployed in contemporary jurisprudence, remains sufficiently faithful to the original

Brown to warrant continued use for those constitutional principles for which the original *Brown* decision was issued.

I will discuss each move in kind.

- First Differentiation: Constructing the "Virtual" *Brown*

In the first differentiation, the Court is tasked with reading the time in between the Court's original *Brown* decision in 1954 and the Court's most recent citation and discussion of *Brown* in *Students for Fair Admission* decided in 2023. This reading of the time in between includes, for example, understanding the meaning of *Brown* in 1954 (B), *Brown* as cited and discussed in *Grutter v. Bollinger,* (B1)[273], *Brown* as cited and discussed in *Parents Involved in Community Schools v. Seattle School District No. 1* in 2007 (B2)[274], and *Brown* as cited and discussed in *Fisher v. University of Texas at Austin* (*Fisher I* in 2013) and (*Fisher II* in 2016) (B3, and B4, respectively)[275]. This sequence of B to B4 collectively creates and forms the *Brown* that is cited and discussed in the Court's 2023 *SFFA* opinion (B5).

This first differentiation is essential to the simultaneity process because it allows the Court to identify the instances of differentiation that *Brown* has undergone over time. The goal of this reading is to understand the degree of difference between each iteration of *Brown* and the initial 1954 decision. In this first stage, difference is comprehended by how far each subsequent interpretation of *Brown* is from the central

[273] *Grutter v. Bollinger,* 539 U.S. 306 (2003).
[274] *Parents Involved in Community Schools v. Seattle School District No. 1,* 555 U.S. 701 (2007).
[275] *Fisher v. University of Texas at Austin,* 570 U.S. 297 (2013); *Fisher v. University of Texas at Austin,* 579 U.S. 365 (2016).

reading of *Brown's* initial opinion in 1954. This measure of difference in the lived experience of *Brown* through its treatment as precedent results in a chronological readout of difference.

This readout makes accessible a "virtual *Brown".* Indeed, *Brown* as it exists in 2023 (B5) is the representation of the original *Brown* from 1954 as perceived and read through the subsequent data points (B1 to B4).

Coalescing temporal experiences and synthesizing the temporal layers actualizes a virtual *Brown,* which refers to the process by which potentialities embedded within past experiences are realized in the present. The virtual, in Bergsonian terms, is comprised of all possible pasts and futures that are not currently actualized but are latent and capable of being brought into existence. This notion contrasts with a purely deterministic view of the past as a fixed series of events; instead, Bergson's idea of time as duration allows us to appreciate the past as a dynamic reservoir of possibilities that can be actualized in various ways depending on the present circumstances and action.

Bergson's concept of the "virtual past" is an integral component of his broader philosophical inquiry into the nature of memory and time. The virtual past, as Bergson articulates it, refers to the entirety of one's past experiences that continue to coexist with the present, not as mere recollections but as a dynamic and influential force. Unlike a fixed, objective past, the virtual past is subjectively experienced and constantly intermingles with current perceptions and future anticipations. This past is "virtual" in that it is not actively present before consciousness at all times, yet it

remains capable of being actualized according to the needs and context of the present moment.

The production of this virtual past is accomplished through memory, where past experiences are stored not as discrete and isolated events but as part of a continuous and evolving narrative. Each recall is not simply a retrieval of a static image but an active reconstruction that adapts and integrates these memories with new experiences and current circumstances. Thus, the virtual past is both a product and a producer, shaped by earlier events and shaping current perceptions and decisions. Bergson suggests that this fluid and permeable nature of the past makes it a living, transformative presence in our lives, continuously affecting our actions, decisions, and perceptions in the present. Through this framework, Bergson challenges the conventional view of time and memory, proposing instead a dynamic interplay where past and present are in constant negotiation.

Translating this into the context of judicial decision-making, actualization of a virtual *Brown* can be understood as the process by which the Court discerns and distinguishes between different temporal states—those of past legal interpretations and their potential implications for the present case. This involves perception and selection, where the Court must decide which aspects of past decisions are relevant and how they should be actualized in the current legal context. This judicial act of actualization is not merely a recall of past rulings, but an active, selective engagement with the virtual past—choosing certain interpretations and principles to inform the present legal issue.

During the first phase of differentiation, the Court would engage in a critical recontextualization of *Brown* at each new juncture of its evolution—the moments it is cited and discussed in subsequent cases. This exercise extends beyond a mere historical review to a dynamic reinterpretation of past jurisprudence through the prism of contemporary perspectives at each decision point. The exercise calls for the Court to trace the continuities and discontinuities of legal principles across the instances of *Brown*, thereby charting the trajectory of *Brown's* meaning as it navigates from one interpretation through and to the next. Conspicuously, the outcome of this recontextualization process reveals the Court's selective memory—what aspects of *Brown* are invoked and made operable in the present case, juxtaposed against what elements are relegated to obscurity and rendered inoperable through suppression or suspension. An awareness of the process of differentiation that an understanding of the nuances of time and memory that Bergson's ideas make possible explains how the Court's treatment of precedent transcends mere recall of past rulings and evolves into an active, selective engagement with the past, shaping how precedent cases, like *Brown,* are actualized in the contemporary legal context.

- Second Differentiation: Comparing "Virtual" *Brown* with *Brown* 1954

Once a virtual *Brown* is made accessible (through its representation of the meaning of *Brown* in 2023), the second phase of the simultaneity process begins. Here, the objective is to understand how the data set that marks the differences between B, B1, B2, B3, and B4. to create a representation of *Brown* in 2023 (B5), meaningfully compares to *Brown* as decided in 1954. In other words, after

synthesizing the Court's understanding of *Brown* as read through the data set of B1 to B4 to come to an understanding of what *Brown* as cited and discussed in 2023 (B5) means, this phase of the simultaneity process would require the Court to consider if *Brown* 2023 (B5) still represents the rationale underlying the constitutional protection prompted by the claimant's lived experience of the Constitution sought and provided in *Brown* 1954.

In essence, the second phase of Bergson's simultaneity process necessitates that the Court synthesizes its understanding of *Brown* through its various interpretations from B1 to B4, culminating in the 2023 representation. It is then incumbent upon the Court to assess whether *Brown* in its 2023 context still embodies the rationale that initially underpinned the constitutional protections established in 1954. This phase essentially involves a comparison of the claimant's contemporary lived experience of the Constitution with the protections originally intended by *Brown* in 1954. Therefore, Bergson's simultaneity process encourages the Court to examine the evolution of the interpretation of *Brown* across different temporal instances while ascertaining its continued relevance and applicability to current constitutional issues.

If there is a close or analogous comparison between *Brown* 2023 (B5) and *Brown* 1954 (B), then the Court has a strong justification for upholding *Brown* as precedent and using the legal reasoning in that case to apply to the contemporary case at the bar. A critical question that emerges in this context is whether the lived experience of the Constitution, which includes the constitutional violation that

instigated the current case, resembles the lived experience that the original *Brown* decision sought to protect. This query focuses on whether the constitutional violation in the current context is analogous to the violation addressed in the 1954 landmark decision. Bergson's concept of artificial simultaneity offers a robust analytical tool for conducting this qualitative assessment. It allows for a comprehensive exploration of the similarities and differences between the constitutional violations, taking into account not merely the surface-level similarities and differences, but probing into a deeper examination of the evolving societal context and legal landscape. This approach underscores the dynamism and fluidity inherent in constitutional interpretation, encouraging a continual dialogue between past and present that respects the historical significance of landmark decisions while also allowing for their evolution to reflect modern realities. In this way, Bergson's understanding of artificial simultaneity provides a valuable analytical tool for conducting a qualitative assessment and understanding whether the constitutional violations are similar.

3. Benefits of Integrating Simultaneity Into Judicial Decision-Making

The process of simultaneity could play a crucial role in judicial decision-making. One critical aspect of this process is that it inherently discourages loose or lazy judicial thinking, in that it requires the jurist to justify his or her interpretation of the complex interaction, or time synthesis, between multiple elements (B, B1, B2, B3, etc.). Historically, the judiciary has tended to oversimplify this first phase of interpretation by reducing it to a mere representation, typically through citation from previous cases or by substituting words to stand in for the temporal meaning of the

simultaneity of B, B1, B2, B3, etc. This reductionist approach bypasses the nuanced interpretation entailed in the first phase of the First Differentiation and prematurely shifts the focus to the Second Differentiation. By proceeding from the representation of the constitutional event (B), the Court overlooks the intricate temporal dynamics that underpin the First Differentiation. Such an approach not only simplifies the complexity of simultaneity but also potentially skews the understanding and interpretation of constitutional events. Therefore, it is essential to reevaluate this approach to fully appreciate the role of simultaneity in constitutional interpretation and its implications for judicial discretion.

Understanding the concept of simultaneity within the confines of constitutional law requires an appreciation of its mutable and ongoing nature. This is particularly evident when we examine precedents like the *Brown* ruling. The principles established in this landmark case are not static but continually evolve and are reinterpreted in subsequent legal debates, such as those surrounding affirmative action. This evolution represents a continuous process of legal and societal change, where the principles from *Brown* are not simply applied but are reshaped and recontextualized. Thus, the simultaneity in this context refers not to specific, discrete moments in time, but to the ongoing and dynamic nature of these changes. In essence, the Court's role in this process is integral, as it navigates the complexities of simultaneity by balancing the demands of historical precedents with the necessity for contemporary relevance and progress.

Bergson's concept of differentiation suggests a dynamic and continuous process of becoming, wherein an entity that appears monolithic, such as the legal understanding of equality and non-discrimination, undergoes internal evolution. This evolution reveals novel dimensions and implications over time, reflecting the organic nature of juridical concepts. A case in point is the original *Brown* case of 1954 and its subsequent citation and interpretation in 2023. These are not merely discrete legal events; instead, they epitomize the progressive unfolding of legal and moral principles over time. They manifest Bergson's notion of simultaneity as a continual differentiation within the temporal continuum. This perspective infuses a richer, more nuanced understanding of the evolving nature of constitutional law, underscoring the temporal dynamics inherent in the interpretative process.

What Bergson's philosophical ideas on time and memory reveal is that in its process of judicial review, the Roberts Court appears to bypass the first phase of a Bergsonian-type differentiation, neglecting to coalesce the temporal experiences. It fails to engage in an intuitive understanding of the lived experiences of the Constitution, thus missing the opportunity to merge timeframes and form a comprehensive narrative. The Court's perception of time is predominantly chronological, not durational, which leads to an oversight of the phenomenological stage of reading the "time in between." This omission results in the exclusion of critical aspects of the lived experience of the Constitution that are crucial for the Court to describe and articulate more precisely the nation's collective constitutional memory and experience in a way that reconnects the Court's articulation of the

constitutional experience with the lived experience of the Constitution. By viewing time solely as a linear progression, the Court overlooks the dynamism of jurisprudential development at the level of the precedent case and perpetuates the myth of a fixed historical consciousness.

E. A Deep Bergsonian Read of Post-*Brown* Decisions

The Supreme Court's interpretations of *Brown* vary significantly. As discussed below, some Justices in *Grutter*, *Parents Involved*, *Fisher I & II,* and *SFFA* suggested that *Brown* creates a bar to any use of race to classify or differentially treat citizens based on race, while others argue that *Brown* can justify remedies for second-generation and subtle racism, or voluntary attempts to combat racism preventatively.

To gain better understanding of how recent Supreme Court decisions have used (or misused) *Brown*, potentially damaging its original principles and weakening its ability to be useful in the future, I provide below a deep Bergsonian read of five Roberts Court cases, all of which involve race-conscious policies or programs in the educational sphere: (1) *Grutter v. Bollinger;* (2) *Parents Involved in Community Schools v. Seattle School Dist. No. 1;* (3) *Fisher v. University of Texas (Fisher I);* (4) *Fisher v. University of Texas (Fisher II); and* (5) *Students for Fair Admission v. President and Fellows of Harvard College (SFFA)*. As explained, these cases demonstrate the potential benefits of using Bergsonian analytical methods.

1. Grutter v. Bollinger

In *Grutter v. Bollinger*, the Court drew upon its earlier fragmented ruling in *University of California Regents v. Bakke*[276] to hold that limited consideration of race in higher education admissions did not violate the Fourteenth Amendment's Equal Protection Clause.[277] The principle of equal protection generally mandates that government bodies, including state-operated universities, avoid allocating benefits or burdens on the basis of race, unless those classifications can withstand the highest level of judicial review known as strict scrutiny. Strict scrutiny requires that the government identify a compelling interest and demonstrate that the applied policy is narrowly tailored to achieve that interest. This level of scrutiny is commonly noted by legal commentators as a hurdle which most government classifications based on race fail to overcome, resulting in their being held unconstitutional.[278]

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[276] *Regents of the University of California v. Bakke*, 483 U.S. 265 (1978) considered whether the University of California's affirmative action policy, which led to the repeated rejection of Bakke's application, violated the Fourteenth Amendment's Equal Protection Clause and the Civil Rights Act of 1964. The fragmented Court ultimately ordered Bakke's admission, with Justice Powell's pivotal vote and opinion asserting that the school's racial quota system breached the Equal Protection Clause. However, he, along with four other justices, maintained that race could be constitutionally used as one among several admission criteria.

[277] *Grutter*, 334-336.

[278] "Strict in theory, but fatal in fact" is a phrase that refers to the strict scrutiny standard of review in American constitutional law. Legal scholar Gerald Gunther coined the phrase in 1972 to describe the idea that strict scrutiny is an inflexible rule that invalidates every law it applies to. Gerald Gunther, "Foreword: In Search of Evolving Doctrine on A Changing Court: A Model for A Newer Equal Protection," *86 Harvard Law Review 1, 8* (1972). "At the beginning of the 1960's, judicial intervention under the banner of equal protection was virtually unknown outside racial discrimination cases. The emergence of the "new" equal protection during the Warren Court's last decade brought a dramatic change. Strict scrutiny of selected types of legislation proliferated. The familiar signals of "suspect classification" and "fundamental interest" came to trigger the occasions for the new interventionist stance. The Warren Court embraced a rigid two-tier attitude. Some situations evoked the aggressive "new" equal protection, with scrutiny that was "strict" in theory and fatal in fact; in other contexts, the deferential "old" equal protection reigned, with minimal scrutiny in theory and virtually none in fact."

Grutter illustrates an exception to this general observation. In that case, the Court recognized that colleges and universities may possess a compelling interest in fostering diversity within their student bodies.[279] This compelling interest justifies a limited use of race in admissions processes, specifically as a "plus" factor in a comprehensive and holistic evaluation of applicants.[280] However, the Court indicated that the invocation of race as a factor in admissions requires a two-step process. First, a university must demonstrate its vested interest in fostering diversity. Second, it must ensure that its policies incorporate race considerations only to the extent necessary to serve this interest.

The *Grutter* Court determined that a school's preference for race-based admissions can be deemed narrowly tailored if it does not resort to numerical targets or a quota system. Instead of using such deterministic methods that reduce students to mere numerical representations, the Court required that colleges and universities adopt an admissions strategy that is "flexible enough to ensure that each applicant is evaluated as an individual" to account for the unique circumstances and attributes of each application.[281] Grounded in its focus on the individual, the *Grutter* Court encouraged educational institutions to continue looking for race-neutral options to replace race-conscious policies so that, "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[282] The Court's statement reflects its conjecture on the future trajectory of educational policy,

[279] *Grutter*, 328-329.
[280] Ibid., 336-337.
[281] Ibid., 337.
[282] Ibid., 343.

that within a span of 25 years, the use of racial preferences would no longer be necessary to advance the interests previously approved and protected in cases like *Bakke*.

In the aftermath of *Grutter*, the Court revisited the issue of affirmative action in higher education, further elucidating the standards underpinning such policies via two cases, both named *Fisher v. University of Texas*.[283] However, before discussing *Fisher I* and *Fisher II,* it will be helpful to consider a case that dealt with race-conscious affirmative action policies in the context of K-12 education—*Parents Involved in Community Schools v. Seattle School Dist. No. 1*—as it puts the debate over the meaning of *Brown* and its proper application as precedent squarely on display.[284]

2. Parents Involved in Community Schools v. Seattle School Dist. No. 1

In *Parents Involved* the Court ruled that it is unconstitutional for a school district to consider race as a factor in student placement in order to bring its racial composition in line with the composition of the district as a whole, unless rectifying a history of explicit state-sanctioned (*de jure)* segregation.

The case emerged from the voluntary desegregation efforts in Seattle, Washington, and Louisville, Kentucky, where districts used racial classifications to facilitate diversity and prevent racial isolation. The Seattle School District implemented a policy that allowed students to apply to any high school within the

[283] *Fisher v. University of Texas at Austin,* 570 U.S. 297 (2013); *Fisher v. University of Texas at Austin,* 579 U.S. 365 (2016).
[284] *Parents Involved in Community Schools v. Seattle School District No. 1,* 555 U.S. 701 (2007).

district. However, this led to some schools becoming oversubscribed. To combat this issue, the district employed a system of tiebreakers, with a salient factor being race. This was used to maintain racial diversity by ensuring that the racial composition of each school did not deviate significantly from the district's overall student population, which was approximately 40% white and 60% non-white.

The Louisville School District was marred by a history of *de jure* racially segregated public schools. The District received a judicial decree ordering desegregation for failing to integrate its public schools in compliance with *Brown II*'*s* order to adopted a unitary school system through integration "with all deliberate speed."[285] Subsequent to the District's eventual compliance with the order, the court rescinded its desegregation mandate in 2001. Acknowledging the District's own historical context, and to prevent a reemergence of racial imbalances reminiscent of the erstwhile state-sanctioned segregation, the District took proactive measures. It implemented a voluntary student assignment plan, which factored race into initial assignments and transfer requests. The plan required all nonmagnet public schools to maintain a minimum Black enrollment of 15 percent, and a maximum Black enrollment of 50 percent. This plan was an earnest effort to maintain a racial equilibrium, acknowledging the historical context and the potential repercussions of ignoring it.

A parent group, Parents Involved in Community Schools, challenged the Districts voluntary student assignment plans in federal district court, claiming they

[285] *Brown v. Board of Education of Topeka,* 349 U.S. 294, 301 (1955).

violated the Equal Protection Clause of the Fourteenth Amendment. The matter eventually reached the Supreme Court on a writ of certiorari.

The Court joined the cases because they presented the same underlying issue: whether a public school that had not operated legally segregated schools (Seattle) or had been found to have complied with a prior desegregation order (Louisville) can voluntary choose to classify students by race when making student assignments. The Court posed three questions to resolve the issue. First, does the *Grutter* precedent apply in the context of public secondary education? Second, is the pursuit of racial diversity a compelling enough interest to warrant the use of racial considerations in the selection process for admissions to public high schools? Finally, does a school district, which typically allows a student to choose their preferred high school, violates the Equal Protection Clause if it denies a student's admission to their chosen school based on race, aiming to achieve a desired racial balance. The Court responded to those questions with: no, no, and yes. Applying a strict scrutiny legal framework, the Court ruled by a 5-4 vote that the Seattle District's racial tiebreaker plan failed to meet constitutional standards. Writing for the plurality, Chief Justice Roberts stated, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[286]

While the Court acknowledged the compelling state interests of promoting diversity and preventing racial segregation, it invalidated both Districts' assignment plans. Unlike higher education cases where individualized consideration of students is

[286] *Parents Involved,* 748.

paramount, the Districts' plans relied on a simplistic binary classification of students. The Seattle plan classified students as "white" and "non-white," and the Louisville plan classified students as "Black" or "other." Both plans lacked any individualized assessment. The Court ruled that the District's objective of preventing racial imbalance did not meet the criteria for a constitutionally legitimate use of race. It asserted, "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'"[287] Furthermore, the Court found the District's plan lacked the necessary narrow tailoring required for race-conscious programs. The plan was deemed to aim at demographic targets rather than any tangible educational benefits derived from racial diversity. Additionally, the District failed to demonstrate that its goals could not be achieved through race-neutral means.

Apart from the specific legal issues addressed in *Parents Involved*, a more significant aspect of the case lies in its debate over the meaning of *Brown*. The opinions of the various Justices in *Parents Involved* reveal a deep disagreement regarding the legacy and application of *Brown*, highlighting how each Justice invokes the landmark precedent to support their respective views.

Some Justices, particularly those opposing the use of race in integrating schools without a prior history of legal segregation, invoke *Brown* to argue that any race-based classifications are constitutionally unacceptable, deriving from a stringent application of the colorblind theory. However, other Justices hold that the Fourteenth

[287] *Parents Involved,* 732.

Amendment is designed to eliminate social hierarchies and prevent the establishment or perpetuation of caste-like systems in American society. These Justices invoke *Brown* to argue that race-conscious policies are sometimes necessary to rectify historical injustices and to ensure equal opportunities for marginalized groups. Allegiance to these theories of the Constitution affect the meaning and use of *Brown*.

The colorblind theory of the Constitution holds that the Fourteenth Amendment's Equal Protection Clause prohibits any form of racial discrimination by the government. Advocates of this theory insist on universal equality under the law, regardless of race or ethnicity. They argue that achieving racial equality and eliminating discrimination necessitates a race-neutral approach in all governmental actions and policies. Under this theory, laws and policies that differentiate individuals based on race, whether to distribute benefits or burdens, are always unconstitutional because they violate the Clause's underlying anti-discrimination principle, which seeks to ensure equal treatment. Consequently, even well-intentioned policies, such as affirmative action, which seek to redress historical injustices and promote diversity, are considered unconstitutional if they rely on racial classifications as these programs introduce new forms of discrimination. Critics of the colorblind theory, however, contend that it ignores the persistent and systemic nature of racial discrimination and inequality. They argue that race-conscious policies are sometimes necessary to rectify historical injustices and to ensure equal opportunities for marginalized groups. These critics support an anti-caste theory of the Constitution.

The anti-caste theory of the Constitution holds that the Equal Protection Clause of the Fourteenth Amendment is designed to eliminate social hierarchies and prevent the establishment or perpetuation of caste-like systems in American society. This theory argues that the Constitution aims not only to ensure formal legal equality but also to dismantle structures and practices that create and maintain social stratification based on immutable characteristics such as race, ethnicity, or ancestry. Proponents of the anti-caste theory argue that the Constitution's commitment to equality extends beyond mere anti-discrimination to include a principle of anti-subordination, which requires government to actively dismantle systems of social stratification. They believe that addressing historical and systemic inequalities requires a robust interpretation of the Equal Protection Clause that prevents any form of social hierarchy.

Critics, particularly those who favor a colorblind approach to constitutional interpretation, argue that the anti-caste theory can lead to preferential treatment and undermine the principle of treating individuals as equals before the law. They contend that focusing on group-based remedies can perpetuate divisions and detract from the ideal of individual merit. Although the Court has not consistently applied the anti-caste theory, it has greatly influenced various decisions. Indeed, the decision in *Brown* to desegregate schools was influenced not just by the unequal treatment of Black and white students, but also by the broader implications of segregation in maintaining a racial hierarchy. This is what makes the debate over the meaning of *Brown* so contentious.

Given that the interpretation of *Brown* serves as a battleground for constitutional ideologies shaping the future of racial equality in America, an adoption of supplementary frameworks is needed to transcend the containment of ideological closer and stalemate between constitutional interpretive theories, and fully grasp the lived experience of the Constitution. In this context, Henri Bergson's concept of thinking in time offers a valuable perspective, as it allows the Court to conduct a temporal synthesis of the development of *Brown* as a precedent and more closely connect the Constitution with lived experiences. This approach can also enhance our understanding of how the Court's opinions declare constitutional experience, and in that declaration advance or thwart access to constitutional protection.

While *Parents Involved* is not a case about affirmative action within higher education, it gave the Justices an opportunity to engage in arguments and develop rationales pertaining to the use of race and the meaning of *Brown* that were not confined by the doctrinal framework set forth in *Grutter*. Although *Parents Involved* did not present a *tabula rasa*, the distinction between the educational contexts in *Grutter* and *Parents Involved* was substantial enough to give the Justices the freedom to candidly debate the nature of *Brown's* enduring legacy.

As Chief Justice Roberts stated in 2007, historical context cannot be ignored when it comes to assigning children to schools based on race:

> [W]hen it comes to using race to assign children to schools, history will be heard. In *Brown v. Board of Education* . . . , we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. . . . It was not the inequality of the facilities but the fact of legally

> separating children on the basis of race on which the Court relied to find a constitutional violation in 1954.[288]

In his reference to *Brown*, Roberts suggests that the crux of the constitutional violation identified in 1954 was not the disparity in facilities, but the fact that children were legally segregated based on race. This segregation, enforced by government classification and separation on racial grounds, imposed a false but real stamp of inferiority on Black children – something the Fourteenth Amendment could not countenance.

In his concurrence, Justice Thomas pushed the point further, noting, "Disfavoring a colorblind interpretation of the Constitution," he declared, "the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in *Brown v. Board of Education*."[289]

Notably, the dissenting justices in *Parents Involved* interpreted *Brown* as a judicial endorsement for the use of race to promote integration. As Justice Breyer stated, the school assignment policy at issue in *Parents Involved* underscored the longstanding commitment of a local school board to integrate its public schools. The integration policy under scrutiny resembles numerous others enacted in the past half-century by primary and secondary schools across the country. These policies collectively symbolize local initiatives aimed at achieving the racially integrated

[288] *Parents Involved,* 746.
[289] *Parents Involved*, 748 (Thomas, J., concurring).

education that *Brown* envisioned — initiatives that the Court has consistently mandated, permitted, and supported local authorities to undertake.[290]

Justice Stevens's dissent targets the colorblind theory of the Constitution underlying Roberts's majority opinion (and implicitly Thomas's concurrence). Stevens notes, "there is a cruel irony in the Chief Justice's reliance on our decision in *Brown v. Board of Education*," given that "only black schoolchildren" were prohibited from attending the schools of their choice.[291] "[T]he history books," he pointed out, "do not tell stories of white children struggling to attend black schools."[292] Steven's observation underscores the inherent asymmetry in the educational experiences of Black and white children, an aspect of the lived experience of the Constitution ignored by Roberts's majority and Thomas's concurrence.

The significance of *Parents Involved* cannot be overlooked in the context of affirmative action within higher education. The case provided the Justices with a unique platform to explore and express their perspectives on race usage and the interpretation of *Brown* outside the constraints of *Grutter*'s doctrinal framework. *Parent's Involved* shifted the discourse of *Brown's* meaning and use as precedent from a focus on integration to a focus on formal equality grounded in the colorblind

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[290] *Parents Involved*, 803 (Breyer, J., dissenting). "[T]hese cases consider the longstanding efforts of two local school boards to integrate their public schools. The school board plans before us resemble many others adopted in the last 50 years by primary and secondary schools throughout the Nation. All of those plans represent local efforts to bring about the kind of racially integrated education that *Brown v. Board of Education* . . . long ago promised -- efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake."

[291] *Parents Involved*, 798-799 (Stevens, J., dissenting).

[292] *Parents Involved*, 799 (Stevens, J., dissenting).

theory of the Constitution. *Fisher I, II,* and *Students for Fair* Admissions (*"SFFA"*) further develop the foundation established by *Parent's Involved*.

3. *Fisher v. University of Texas at Austin (Fisher I)*

The Court resumed its examination of affirmative action in higher education with the decision of *Fisher I* in 2013. In 1997, the Texas legislature passed a law mandating that University of Texas extend admission to all high school seniors who ranked within the top ten percent of their graduating class. This policy was subsequently revised when the University discerned disparities between the racial and ethnic composition of its undergraduate population and that of the state. While the revised policy continued to admit all in-state high-achieving students, it introduced race as a consideration for the remaining portion of the in-state freshman class.

This policy was contested in 2008 when Abigail N. Fisher, a Caucasian student who did not rank within the top ten percent of her high school class, was denied admission. Fisher filed suit against the University, alleging that the consideration of race in the admissions process violated the Fourteenth Amendment's Equal Protection Clause. The University defended its policy, asserting that its consideration of race was a narrowly tailored strategy aimed at enhancing diversity. The federal district court ruled in favor of the university, a decision subsequently upheld by the United States Court of Appeals for the Fifth Circuit. Dissatisfied with the outcome, Fisher appealed the decision to the Supreme Court, which granted certiorari.

Fisher I, however, did not prompt a reconsideration of *Grutter*. Instead, the Court mandated that in implementing a race-conscious admissions policy, universities must provide a concrete description of the diversity-related educational objectives their policies strive to serve.[293] Additionally, the Court held that a university must demonstrate the inability of any race-neutral alternative to achieve the desired level of diversity.[294] The Court's declaration in this regard was clear: "Once a university establishes that its diversity goals align with the strict scrutiny standard, there must still be a further judicial determination that the implementation of the admissions process meets this same standard."[295] The university is tasked with proving that the means chosen to attain diversity are narrowly tailored to meet that goal, a process for which the university receives no deference.[296]

This underscores a key tenet of *Grutter's* findings, namely, that it is the responsibility of the courts, not university administrators, to ensure that the means chosen to accomplish the government's asserted purpose must be specifically and narrowly framed to fulfill that purpose. While the Court can consider a University's experience and expertise in adopting or rejecting certain admissions processes, the University's obligation to demonstrate, and the judiciary's obligation to determine, that admissions processes fairly evaluate each applicant remains paramount.[297]

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[293] *Fisher I,* 311-312.
[294] Ibid.*,* 312.
[295] Ibid., 311.
[296] Ibid.
[297] Ibid., 311-312.

In the context of implementing race-conscious admissions policies, the reviewing court is tasked with verifying the necessity of using race to achieve the educational benefits associated with diversity.[298] This necessitates a meticulous judicial investigation into whether a university can attain an adequate level of diversity without employing racial classifications. Notably, while narrow tailoring does not mandate the exploration of every conceivable race-neutral alternative, strict scrutiny does require a court to meticulously examine, without deference, a university's serious and good faith consideration of viable race-neutral alternatives.[299] The Court indicated, The reviewing court must ultimately be convinced that no workable race-neutral alternatives could yield the educational benefits of diversity.[300] "If "'a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,'" the university is precluded from considering race.[301] The Court remanded the case to the United States Court of Appeals for the Fifth Circuit, which upheld the University of Texas program.

For the most part, the Court largely discusses *Brown* only indirectly through its reference to *Grutter*, but Justice Thomas's concurring opinion directly engages with *Brown,* setting forth his interpretation of the principles it upheld, and the broader implications of his interpretation of the meaning of *Brown* for educational policy and constitutional law. Thomas's understanding of *Brown* is steeped in a steadfast belief in constitutional colorblindness. He contends that *Brown* unequivocally disallows the

[298] *Fisher I*, 312.
[299] Ibid.
[300] Ibid.
[301] Ibid. (internal citations omitted).

use of race as a criterion for providing educational opportunities. He links his interpretation back to the original plaintiffs' stance in *Brown*, which asserted that states have no authority, under the equal protection clause, to consider race when affording educational opportunities to its citizens.[302] In his view, the Constitution does not yield to contemporary theories on the societal benefits of racial integration. The Equal Protection Clause, he argues, strips states of all authority to factor in race within the educational context. For Thomas, the principle of equality under the law is fundamental and absolute. No perceived benefit, regardless of its societal or educational value, can justify racial discrimination.

In his critique of the University of Texas's admissions policy, Thomas juxtaposes the university's arguments for diversity with those that were used to justify racial segregation in the 1950s, noting that the Court had emphatically rejected such arguments in *Brown*. He sees no meaningful distinction between the university's assertion that diversity yields educational benefits and the segregationists' claim that segregation produced the same benefits.[303] For Thomas, such arguments represent an uncomfortable echo of a discredited past. He extends his critique to the Court's decision in *Grutter*. He asserts that the Court's deference to the University's determination that diversity, achieved through racial discrimination, yields educational benefits, is fundamentally inconsistent with the principles enshrined in *Brown*. He perceives *Grutter* as planting the "seed of a new constitutional

[302] *Fisher I*, 326-327 (Thomas, J., concurring).
[303] Ibid., 320, 326 (Thomas, J., concurring).

justification" for racial segregation, a concept he regards as having been rightly rejected.[304]

In sum, Thomas's understanding of *Brown* is rooted in a strict interpretation of the Fourteenth Amendment's Equal Protection Clause. He rejects the use of race as a factor in educational opportunities and views any attempts to justify racial discrimination on the grounds of diversity or societal benefits as a departure from the principles upheld in *Brown v. Board of Education*.

4. Fisher v. University of Texas at Austin (Fisher II)

The *Fisher v. University of Texas* (*Fisher I*) case was remanded to the United States Court of Appeals for the Fifth Circuit, which subsequently upheld the University of Texas's admission program. The plaintiffs again appealed the case to the Supreme Court in 2016. The Justices delivered a 4-3 decision (known as *Fisher II*), upholding the University of Texas's race-conscious admissions policy.[305]

Writing for the majority, Justice Kennedy's opinion shows the complexity of achieving diversity in higher education and the need for carefully tailored admissions policies that consider more than just academic achievement. He wrote: "Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.

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[304] *Fisher I*, 326 (Thomas, J., concurring) citing *Grutter v. Bollinger*, 539 U. S. 306 (2003), 365–366 (Thomas, J., concurring in part and dissenting in part).

[305] In this instance, Justice Kagan recused herself due to her previous involvement in the case as the Solicitor General of the United States.

In striking this sensitive balance, public universities, like the States themselves, can serve as 'laboratories for experimentation.'"[306] The ruling was not without opposition. While not specifically citing to *Brown,* Justice Thomas's dissenting opinion, grounded in the colorblind theory of the Constitution, argued that the Equal Protection Clause of the Fourteenth Amendment categorically forbids the use of race as a consideration in higher education admissions. He contended that the use of race in admissions policies was a clear violation of the constitutional protections offered by the Fourteenth Amendment.

The *Fisher* rulings of 2013 and 2016, even in their absence of frequent or, in the case of *Fisher II*, any direct reference to *Brown*, are undeniably imbued with the specter of *Brown*. These cases operate within a legal landscape significantly shaped by the principles established in *Brown*. Consequently, the *Fisher* decisions, despite their silence, are intimately connected to, and significantly impact, the legacy of *Brown*.

This observation resonates with Jacques Derrida's concept of "hauntology," a philosophical idea introduced in his 1993 work, *Specters of Marx*.[307] Hauntology, a playful amalgamation of "ontology" and "haunting," encapsulates Derrida's depiction of the persistent influence of elements from the past in the present. This concept illuminates how these elements can shape and influence contemporary society and thought. Applying Derrida's hauntology to *Fisher I* and *II* unveils an interplay of past

[306] *Fisher v. University of Texas*, 579 U.S. 365, 388 (2016).
[307] Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International*, trans. Peggy Kamuf (New York: Routledge, 2006).

decisions, unresolved issues, temporal influences, and cultural memory within the judicial discourse. *Fisher I* and *II,* haunted by the specter of *Brown's* ruling and its progeny, must grapple with the precedent amid ongoing tensions between the ideals of a colorblind Constitution and the practical need for diversity in education.

Simply put, the Justices' opinions in the *Fisher* cases reflect a cultural memory haunted by previous rulings and societal shifts. Justice Thomas's dissent, for instance, heavily draws on the notion that *Brown* should lead to a colorblind approach, rejecting any racial classifications. This reflects a nostalgia for a perceived purity in constitutional interpretation that overlooks the nuanced needs of contemporary society. Such haunting in judicial philosophy and decision making underscores the enduring, spectral presence of past rulings within the present-day discourse on race, equality, and education.

5. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina et al.* ("*SFFA*")

The cases of *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina et al.*[308] (collectively referred to as "*SFFA*"), decided in 2023, represent a pivotal moment in the Supreme Court's discourse on the constitutionality of race-based affirmative action in both private and public academic institutions. The plaintiff, Students for Fair Admissions ("SFFA"), alleged that the admissions

[308] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College,* 600 U.S. 181 (2023).

procedures of both Harvard College and the University of North Carolina ("UNC") violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.[309] The crux of their argument was that these institutions intentionally discriminated against Asian American applicants on the basis of their race and ethnicity.

For nearly half a century, the Court has maintained that an applicant's race could be considered among a multitude of factors in college and university admissions decisions, particularly with the objective of fostering the educational benefits of diversity. However, SFFA challenged this long-standing jurisprudence, arguing that Harvard's and UNC's admissions policies, despite the superior academic qualifications of Asian American applicants compared to other racial groups, resulted in lower admission rates for this demographic. (FN) SFFA interpreted this disparity as an indication of discriminatory practices inherent in the schools' affirmative action policies. SFFA's lawsuit sought to prevent these universities "from using race as a factor in future undergraduate admissions decisions" and require them to "conduct all admissions in a manner that does not permit those engaged in the decisional process to be aware of or learn the race or ethnicity of any applicant for admission."[310]

On June 29, 2023, the Supreme Court issued its decision, holding that affirmative action based on race, where an applicant's race is a factor in admissions

[309] While *Grutter, Parents Involved*, and the *Fisher* cases considered constitutional constraints on public institutions, the same rules apply to private schools (like Harvard) that accept federal funds, as they are bound by the antidiscrimination requirements of Title VI of the Civil Rights Act of 1964 (Title VI).

[310] Complaint at 119, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 U.S. 2141 (2014) (No. 1:14-cv-14176).

decisions, especially to achieve educational diversity benefits, is unconstitutional. This move effectively overruled nearly half a century of legal precedent, fundamentally altering the landscape of educational policy. Chief Justice Roberts's majority opinion, detailed three key reasons why the affirmative action policies at Harvard and UNC violated the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964. The three reasons were: (1) the lack of clear and focused objectives that legally justify the use of race in these policies; (2) the negative application of an applicant's race; and (3) the absence of concrete points of termination for these policies.[311]

According to Roberts, *Brown* unequivocally affirmed that public education should be equally accessible to all, irrespective of racial backgrounds. He perceives *Brown* as a cardinal decision that outlaws racial discrimination and demands the provision of equal educational opportunities devoid of racial considerations.[312] Said Roberts, "[t]he time for making distinctions based on race had passed." *Brown*, he observed, "declar[ed] the fundamental principle that racial discrimination in public education is unconstitutional."[313] Roberts asserts that the dissenting opinions selectively interpret case law, neglecting aspects that express reservation about racial preferences, and disregards the stringent requirements of the Equal Protection Clause and the calls for an end to race-based admissions programs.[314]

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[311] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College,* 600 U.S. 181 (2023), 214-222.
[312] Ibid., 204.
[313] Ibid.
[314] Ibid., 229.

Justice Thomas's understanding of what *Brown* means in the context of *SFFA* aligns with his long-established constitutional interpretation that emphasizes colorblindness. Thomas interprets *Brown* as a repudiation of race as a factor in distributing educational opportunities. In this way, Thomas's concurrence in *SFFA* echoes his concurrence in *Parents Involved,* where he asserted that *Brown* rejected any authority to use race as a factor in affording educational opportunities. ("It was the view of the Court in *Brown*, which rejected "'any authority ... to use race as a factor in affording educational opportunities.'").[315] Thomas sees the educational benefits of diversity as an insufficient justification for racial discrimination today, much as the supposed educational benefits of segregation failed to justify racial discrimination in the 1950s. This perspective recalls his concurrence in *Fisher I* (2013), where he argued that the alleged educational benefits of diversity cannot legitimize racial discrimination in the contemporary era.[316]

Furthermore, Thomas—like Roberts—insists that the era for making distinctions based on race has passed. He argues that what was deemed unconstitutional in *Brown* in 1954—i.e., race-conscious educational policies—cannot be deemed constitutional today. Thomas's interpretation of *Brown* in light of *SFFA* reveals his steadfast commitment to a colorblind Constitution, underscoring his belief that the Constitution prohibits any form of racial discrimination, irrespective of its purported benefits or justifications. Moreover, is Thomas's conviction that the

[315] *Students for Fair Admissions*, 233 (Thomas, J., concurring)(citing *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007), 747 (Thomas, J., concurring)).
[316] *Fisher I*, 320, (Thomas, J., concurring).

concept of colorblindness is the one, perhaps the only, element of *Brown* that remains relevant to contemporary life and should be brought forward as a legal principle.

Drawing from Bergson's philosophy, particularly his notions of memory, experience, and duration, one can discern both congruities and dissonances with the interpretations of *Brown* put forth by Roberts and Thomas. Bergson's conceptualization of memory as a dynamic process that is intricately intertwined with present experience could find resonance with Roberts's and Thomas's readings of *Brown* as a landmark decision that repudiates racial discrimination and calls for equal educational opportunities, irrespective of race. This aligns with Bergson's view that the past, embodied in memory, directly influences the present and the future, akin to how *Brown* has shaped contemporary understandings of racial equality in public education.

However, in their reliance on a colorblind interpretation of the Constitution, Roberts and Thomas encounter critique from a Bergsonian perspective. Bergson's concept of duration, as the continuous and indivisible flow of time, implies an inherent dynamism and fluidity in human experience. Applying this to racial matters, it suggests that race, as a lived experience, cannot be neatly divorced from considerations of social justice and equality. Therefore, a colorblind approach might oversimplify the complexities of racial realities and inadvertently perpetuate systemic inequalities.

Furthermore, Bergson’s philosophical approach emphasizes the uniqueness of individual experiences and the importance of multiplicity. This challenges Thomas's

dismissal of the educational benefits of diversity. From a Bergsonian lens, diversity is not simply a tokenistic aim but a crucial aspect of a holistic, rich, and multi-faceted educational environment that accounts for the diverse experiences of individuals. On a broader level, the strict adherence of Roberts and Thomas to the colorblindness element in their interpretations of *Brown* could be seen as antithetical to Bergson's philosophy, which emphasizes the importance of intuition and experience beyond rigid intellectual frameworks. Thus, by applying a Bergsonian analysis, we can both appreciate the foundational principles of racial equality that *Brown* represents, including the colorblindness element emphasized by Roberts and Thomas, while critiquing Roberts and Thomas for failing to acknowledge the complexities of racial experiences and the fluid, evolving nature of societal progress towards true equality.

It should come as no surprise that Justices Sotomayor and Jackson dissented in *SFFA*, sharply distinguishing their positions from those adopted by Roberts, Thomas, and the rest of the majority. As discussed below, however, Sotomayor's and Jackson's analyses of *Brown* still fall short of robust applications of duration and simultaneity on the Bergsonian model.

Justice Sotomayor's dissent in *SFFA* asserts that *Brown* was a race-conscious decision that emphasized the essential role of education in our society. This perspective holds that *Brown* recognized the constitutional necessity of a racially integrated system of schools in light of the harmful effects of entrenched racial subordination on racial minorities and American democracy.[317] Sotomayor goes on to

[317] *Students for Fair Admissions*, 327 (Sotomayor, J., dissenting).

note that the ultimate goal of *Brown* was not to impose a formalistic rule of race-blindness, but to achieve a system of integrated schools that ensured racial equality of opportunity.[318]

She observes that opponents of integration who insist on a colorblind interpretation of the Constitution are misinterpreting *Brown's* mandate. She writes:

> [T]his Court's post-Brown decisions rejected arguments advanced by opponents of integration suggesting that "restor[ing] race as a criterion in the operation of the public schools" was at odds with 'the Brown decisions." Those opponents argued that Brown only required the admission of Black students "to public schools on a racially nondiscriminatory basis." Relying on Justice Harlan's dissent in Plessy, they argued that the use of race "is improper" because the "Constitution is colorblind." They also incorrectly claimed that their views aligned with those of the Brown litigators, arguing that the Brown plaintiffs "understood" that Brown's "mandate" was colorblindness. This Court rejected that characterization of "the thrust of Brown." It made clear that indifference to race "is not an end in itself" under that watershed decision. The ultimate goal is racial equality of opportunity. Those rejected arguments mirror the Court's opinion today. The Court claims that Brown requires that students be admitted "on a racially nondiscriminatory basis." It distorts the dissent in Plessy to advance a colorblindness theory. The Court also invokes the Brown litigators, relying on what the Brown "plaintiffs had argued."[319]

Brown, according to Sotomayor, was not about mandating colorblindness, but about acknowledging and addressing racial inequality. It was about recognizing that segregation perpetuates a caste system where Black children receive inferior education opportunities.[320] She asserts that indifference to race will not equalize a society that is racially unequal and that equality requires acknowledgment of inequality.[321]

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[318] *Students for Fair Admissions,* 328 (Sotomayor, J., dissenting).
[319] Ibid., 327 (Sotomayor, J., dissenting) (internal citations omitted).
[320] Ibid., 327-328 (Sotomayor, J., dissenting).
[321] Ibid., 333-334 (Sotomayor, J., dissenting).

In Sotomayor's view, subsequent cases, including *Grutter*, and *Fisher I* and *II*, extend *Brown's* legacy by recognizing the benefits of diversity in education and authorizing limited use of race in college admissions to enhance such diversity. From *Brown* to *Fisher*, the Court has sought to equalize educational opportunity in a society still struggling with the historic cultural structures of racial segregation. These cases, writes Sotomayor, expressly advanced the Fourteenth Amendment's vision of an America where racially integrated schools guarantee students of all races the equal protection of the laws.[322] Sotomayor thus perceives the prohibition of race-conscious admissions policies as more than just contrary to precedent and our historical experience. She sees it as borne out of the illusion that racial inequality belongs to a past generation.[323]

Justice Sotomayor's perspective, as revealed in the *SFFA* decision, asserts that *Brown* was a race-conscious decision—not a colorblind one—that emphasized the essential role of education in our society. This perspective holds that *Brown* recognized the constitutional necessity of a racially integrated system of schools in light of the harmful effects of entrenched racial subordination on racial minorities and American democracy.[324] Sotomayor goes on to note that the ultimate goal of *Brown* was not to impose a formalistic rule of race-blindness, but to achieve a system of integrated schools that ensured racial equality of opportunity.[325]

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[322] *Students for Fair Admissions*, 333 (Sotomayor, J., dissenting).
[323] Ibid.
[324] Ibid., 327-328 (Sotomayor, J., dissenting).
[325] Ibid., 328 (Sotomayor, J., dissenting).

Justice Jackson's dissent in *SFFA* offers the most nuanced interpretation of *Brown* in the context of the complex racial dynamics in America's educational institutions.[326] Jackson challenges the majority's assertion that the Fourteenth Amendment's Equal Protection Clause necessitates an approach of legal colorblindness, criticizing this perspective as detached from America's lived racial realities. Jackson articulates a critique of the majority's position, stating, "With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces 'colorblindness for all' by legal fiat. But deeming race irrelevant in law does not make it so in life."[327] This statement underscores Jackson's belief that the majority's colorblind approach is not only ill-suited to address the complicated racial dynamics present in contemporary America, but it also risks impeding racial progress by legally mandating the disregard of race as a relevant consideration. Jackson further notes that this approach "has a wholly self-referential, two-dimensional flatness" which fails to account for the historical and ongoing disparities shaped by race.

In contrast to the majority's view, Jackson interprets *Brown* not as a mandate for colorblindness, but as a call to acknowledge and address the reality of racial disparities. She argues, "race still matters to the lived experiences of all Americans in innumerable ways, and today's ruling makes things worse, not better."[328] Her critique

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[326] Justice Jackson filed a dissenting opinion in the second case (*Students for Fair Admissions, Inc., Petitioner v. University of North Carolina, et al*.) and took no part in the consideration or decision of the first case (*Students for Fair Admissions, Inc. v. President and Fellows of Harvard College)*. Jackson recused herself from participating in the case against Harvard, where she earned her bachelor's from Harvard College, her law degree from Harvard Law School, and served on Harvard's Board of Overseers.
[327] *Students for Fair Admissions*, 407 (Jackson, J., dissenting).
[328] Ibid., 408 (Jackson, J., dissenting).

of the majority suggests that she interprets *Brown* as a directive to work towards eliminating racial disparities, rather than merely erasing race from legal considerations. She argues that ignoring race does not eliminate racism; instead, it prolongs its existence and intensifies its relevance.

When compared to the opinions issued by Chief Justice Roberts and Justice Thomas, the dissents by Justices Sotomayor and Jackson show a closer alignment with a durational or Bergsonian approach. However, neither dissent analyzes the temporal interpenetration of experience to the extent that Bergson's philosophical framework permits.

Bergson's philosophy emphasizes the importance of lived experience and the continuity of time, suggesting that memory and experience are intertwined and shape our understanding of reality. This aligns with Sotomayor and Jackson's emphasis on the lived racial realities and experiences underlying the interpretation of *Brown*. They reject a colorblind interpretation and instead argue that *Brown* recognized the need to address racial disparities, a stance that resonates with Bergson's focus on the importance of acknowledging and learning from past experience.

However, Sotomayor and Jackson's understanding of *Brown* can also be critiqued for not fully applying a Bergsonian analysis. While the dissents recognize the relevance of past racial experiences, they nevertheless interpret *Brown* as a static legal precedent that is simply applied the same way case after case, regardless of time or context. They treat the *Brown* decision as a fixed point of reference, interpreting it strictly based on its original context and meaning without considering the potential

for that meaning to evolve over time. This approach will tend to limit the scope and effectiveness of *Brown* when pressed into service to address some new, unforeseen issue of racial inequality in education. A Bergsonian analysis would hold that *Brown* should not be fixed by its initial position or meaning, but should evolve with time to reflect changing societal contexts and racial dynamics, provided the originary principles for which *Brown* stands remain undamaged.

Still, while Sotomayor's and Jackson's interpretations of *Brown* may be critiqued as overly static, both dissents nevertheless recognize that the principles established by *Brown* remain significant and relevant over time. Their interpretations underscore the reality that racial discrimination and inequality remain pervasive issues in contemporary America, affirming the need for the continued application of *Brown's* ethos.

I suggest that a Bergsonian perspective invites opportunities for transcendence. In the context we've been considering—a chance to break the stalemate created by the colorblind versus anti-caste ideologies of *Brown*. Instead of relegating constitutional protection to a contest between ideologies—choosing one ideology over the other in a constant tug of war—Bergson's philosophy could be used to push for a more dynamic, evolving analysis of the qualitative elements of constitutional principles.

E. The Dangers of "Monumentalizing" Supreme Court Decisions

The process of comparing the "virtual *Brown*" with the original *Brown* ruling in 1954 is a critical aspect of the Bergsonian simultaneity approach to judicial review.

This comparison is not simply a matter of tracing legal changes over time, but rather requires a thoughtful and nuanced understanding of how the principles and rationale of the original *Brown* have been interpreted, reinterpreted, and adapted in subsequent rulings. It is crucial to maintain a degree of fidelity to the principles and rationale of the originary *Brown*, regardless of how significantly its interpretation may have morphed over time. This fidelity ensures the integrity of the legal process and the continuity of legal principles over time.

When the "virtual *Brown*" becomes too far removed from the originary *Brown*, challenging the fidelity of the principles, the Court is presented with several options. One option is to choose not to use *Brown* as precedent in resolving the contemporary legal dispute. Another option is to overrule *Brown* entirely, marking a clear break from the precedent. A third option is to reinterpret the principles and rationale of the originary *Brown*, offering a revised interpretation that better aligns with contemporary legal and societal contexts.

However, if the Court continues to rely on *Brown* as controlling in a contemporary case, despite the discrepancies or infidelities between the "virtual *Brown*" and the originary *Brown*, this suggests that *Brown* may be serving a purpose beyond protecting the rule of law under the doctrine of stare decisis. In such instances, *Brown* may function as a monument—a symbol of the Court's power, authority, and credibility. This monumentalization of *Brown* underscores the power dynamics inherent in judicial review and the ways in which precedent can be used not only as a legal tool, but also as a strategic instrument of judicial authority.

In her law review article on *Youngstown Sheet & Tube Co. v. Sawyer,* Professor Patricia Bellia explains that judicial opinions often transcend their immediate legal context to become constitutional monuments.[329] Bellia's analysis illuminates the symbolic significance of *Youngstown Sheet*, framing it as a paradigm that both constrains and legitimates executive power. Moreover, she underscores its role in exemplifying judicial legitimacy and authority. These constitutional monuments, thus, serve an influential function beyond their immediate legal impact, shaping broader discourses around power, legitimacy, and constitutional interpretation.

Monumentalizing judicial opinions has significant ramifications for the dynamism and evolution of constitutional law. Such monumentalization tends to render these decisions static, enshrining them with symbolic significance that often transcends their doctrinal utility. This can lead to a disconnect between the monument, that is the case as a symbolic entity, and the underlying issues the decision was originally intended to address. Moreover, the symbolic significance of such monumentalized cases can often be co-opted to support a particular interpretive methodology, such as originalism or living constitutionalism.

However, recognizing the temporal aspect of judicial action provides a more nuanced understanding of how judicial opinions operate. Rather than fixed monuments, they serve as dynamic repositories of constitutional memory that capture

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[329] Patricia L. Bellia, "Executive Power in Youngstown's Shadows," *19 Constitutional Commentary*, *87* (2002). (discussing *Youngstown Sheet's* symbolic significance as a paradigm to constrain and legitimate executive power, and as an example of judicial legitimacy and authority).

the lived experience of the Constitution at specific moments in time. This perspective acknowledges the inherent dynamism of these 'monuments', emphasizing their role as reflections of constitutional understanding at a certain point in time rather than as unchanging edifices.

This dynamic understanding is essential because it acknowledges that while a decision may momentarily capture the experience of the Constitution (i.e., resulting in the Court's articulation of constitutional experience at a standstill), it does not fix that experience for all time. As repositories of memory rather than static monuments, these decisions can be revisited, reinterpreted, and reshaped through the judicial process of reading the time in between. This process provides the capacity for constitutional law to adapt and evolve, ensuring that it remains responsive to shifts in societal values, attitudes, and understanding. It is through this dynamic engagement with constitutional memory that the law can continue to reflect and shape the evolving constitutional experience.

One of the distinguishing features of judicial opinions, particularly in the context of constitutional law, is their written nature. The act of documenting these opinions renders them susceptible to becoming monumentalized, a process that carries profound implications for our understanding and interpretation of the law. Judicial opinions encapsulate the experience of legal conflict as well as the method of constitutional interpretation used to resolve it. They articulate the state of constitutional meaning or, in other words, the experience of the Constitution itself. Consequently, these documented opinions relieve subsequent readers from the burden

of maintaining the memory of the specifics of the experiences that gave rise to the legal issues.[330] The opinions carry the memory-work, acting as a repository of precedent and legal reasoning.

However, this transfer of the memory burden is not without its problems. The key issue is not the act of transference itself, which is inevitable in any system of precedent, but the degree of transference that occurs. The act of monumentalizing judicial opinions, of turning them into fixed points of reference, can lead to a form of forgetfulness. The opinion, as a monument, stands in for the experience that created the legal issue. This process of monumentalizing can inadvertently transform historical experience into myth, obscuring the nuanced realities that underpin the legal decisions.

This draws attention to a critical distinction between the Constitution as a lived experience and the Constitution as a fetishized document. The fetishization of judicial opinions, through the process of monumentalizing, can result in an over-reliance on the fixedness of the written word at the expense of the fluidity of lived experience. This is a crucial insight offered by Bergson, who suggests that we instinctively solidify our impressions in order to express them in language, thereby risking the confusion of the fleeting duration of our inner self with its external and permanent representation.[331]

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[330] James E. Young, "The Counter-Monument: Memory against Itself in Germany Today," *Critical Inquiry*, (18), no. 2 (Winter, 1992), 273.
[331] Bergson, *Time and Freewill,* 97.

The danger of monumentalizing judicial opinions thus lies in the tendency of monuments to induce a form of forgetfulness. Under the illusion that these monumentalized opinions will always be there to remind us of the legal principles and precedents they embody, we may become neglectful of the original experiences and contexts that gave rise to these decisions.[332] To the extent that we allow monuments to do our memory-work for us, we become more forgetful.[333] Paradoxically, the initial impulse to monumentalize events may stem from a desire to forget them.[334] Monuments may not so much remember events as bury them altogether under layers of myths and explanations.[335] As cultural reifications, monuments can reduce or "coarsen" historical understanding.[336] Thus, it is essential to approach monumentalized judicial opinions with a critical eye, mindful of the complexities and nuances they may obscure.

[332] James E. Young, "The Counter-Monument," 273.
[333] Ibid.
[334] Ibid.
[335] Ibid.
[336] Ibid. (citing Pierre Nora, "Between Memory & History: Les Lieux de mémoire," trans. Marc Roudebush, *Representations*, no 26 (Spring 1989): 13).

CHAPTER 6

CONSTRUCTING CONSTITUTIONAL TIME: *KAIROS* AND SEIZING THE "NOW"

I began this dissertation by characterizing the Roberts Court as locked in a "present-past" orientation. The Court's fixation on tradition and its obeisance to historical policies, practices, and mores that are out of step with contemporary life have stymied its creative powers. It seems unable to imagine the Constitution as anything other than an artifact of great political power – a haunting specter in the true Derridean sense. It does not see the Constitution as an intertemporal force capable of differentiation.

A. Walter Benjamin: Messianism and Dialectics at a Standstill

With the help of Henri Bergson and a host of other continental thinkers, I have suggested a means by which the Court could, when prompted by the right case at the right moment (i.e., a constitutional event), adopt a "present-future" orientation and push the law forward to meet the constitutional challenge that has been placed before it. This, however, takes more than the ability to recognize a potential moment for judicial action; it requires the will to intercept and suspend homogenous time and seize the "now". It requires an understanding of the Greek concept of *kairos*—"interruption"—as applied to contemporary life. For this, we turn to Walter Benjamin.

Central to Benjamin's conceptualization of "dialectics at a standstill" is his notion of "messianic time." He posits that historical time is not homogenous and can

be interspersed with moments of crisis and revelation. These moments of interruption, referred to as "kairos," allow us a glimpse into messianic time – a realm beyond the continuous flow of historical time.

The project for Benjamin is to construct a conception of history and time to challenge the traditional concept of the history continuum informed by the Enlightenment ideal of progress, which is itself borrowed from Judeo-Christian theology. Benjamin's move here relies on Carl Schmitt, though the amount of attribution here, if any, is unknown. Schmitt argues in *Political Theology* that all key concepts of the modern doctrine of the state are secularized theological concepts.[337] He writes:

> All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development . . . but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts. The exception in jurisprudence is analogous to the miracle in theology. Only by being aware of this analogy can we appreciate the manner in which the philosophical ideas of the state developed in the last centuries.[338]

This proposition implies the necessity of a theological grounding for any political theory that employs these concepts.[339] As Benjamin's methodology of historical materialism produces opportunities for political action by the people, Benjamin, in line with Schmitt's implication, adopts a foundational and explanatory theological framework, albeit with some alteration. That theological foundation, in a

[337] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab, (Cambridge: MIT Press, 1985), 36.
[338] Ibid.
[339] Ibid. 36-52.

word, is messianism. "Messianism, is in Benjamin's view, at the heart of the Romantic conception of time and history."[340]

The use of an overtly religious term like "messianic" may sound to the American legal ear as inappropriate to an investigation of judicial review in a secular state, but American legal scholars routinely secularize religious concepts to explain their constitutional theories. This is nothing new. In fact, two such works quickly come to mind. The first is Sanford Levinson's *Constitutional Faith* where he investigated the religious content of the Constitution—not in terms of the Religion Clauses, but from a structural perspective: specifically examining the ways various methods of constitutional interpretation are similar to strains of religious interpretation of scripture and sectarian doctrine.[341] His examination led him to create a typology of constitutional interpretation that mapped onto "Protestant" and "Catholic" approaches to religious interpretation.[342] He concludes that religious faith, which impacts the interpretation of religious doctrine, is structurally analogous to various strains of interpretative constitutional methodologies. The second work is Jack Balkin's *Constitutional Redemption* where Balkin argues that the legitimacy of the Constitution presupposes and requires that its interpreters—not only officials and legal theorists, but the citizenry at large—have faith that the Constitution's promises of justice can eventually be redeemed.[343] Both of these works secularize religious

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[340] Michael Löwy, *Fire Alarm: Reading Walter Benjamin's 'On the Concept of History,'* 2nd ed., trans. Chris Turner, (London: Verso, 2016), 33.
[341] Sanford V. Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1988).
[342] Levinson, *Constitutional Faith*, 23-27 (coining the phrase *constitutional protestantism*).
[343] Jack M. Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Cambridge: Harvard University Press, 2011).

concepts and structure in order to explore notions of commitment, legitimacy, interpretation, and liberation in the American constitutional context. Similarly, by secularizing messianism, I am using its ontological framework as a paradigm through which to think through the judicial review paradox.

Before investigating Benjamin's presentation of messianic concepts in his Theses, it is important first to identify the object on which the people's revolutionary action, as enabled by the messianic interruption, operates: the catastrophe that is history. In his Ninth Thesis, Benjamin writes of the Angel of History that, "Where a chain of events appears before *us, he* sees one single catastrophe, which keeps piling wreckage upon wreckage and hurls it at its feet."[344] In *Fire Alarm*, Benjamin scholar Michael Löwy notes that this concept of catastrophe has appeared before in Benjamin's writing. "[I]n this passage from the 1938 text 'Central Park,'…[Benjamin] writes: 'The concept of progress must be grounded in the idea of catastrophe. That things are the 'status quo' *is* the catastrophe."[345] In other words, the passage of homogeneous time – and the waiting for change, for so-called progress – is the catastrophe of the human condition, at least the modern version.

This idea of catastrophe was also developed in *The Arcades Project,* the collection of Benjamin's notes on theories of knowledge and progress. Benjamin defines "catastrophe" as "to have missed the opportunity."[346] One way in which the

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[344] Walter Benjamin, "On the Concept of History," in *Selected Writings Volume 4: 1938*-1940, trans. Harry Zohn, ed. Howard Eiland and Michael W. Jennings (Cambridge: Harvard University Press, 2003), 392.
[345] Löwy, *Fire Alarm*, 33.
[346] Walter Benjamin, *The Arcades Project*, trans. Howard Eiland and Kevin McLaughlin (Cambridge: Harvard University Press, 2002), 463.

term catastrophe is typically deployed is to describe an external occurrence that happens to someone or something. Natural disasters are some of the term's most common referents. What is interesting here is that Benjamin's definition plays on this traditional understanding and use of catastrophe and reorients the gaze inward. In other words, rather than describe "catastrophe" in reference to an external occurrence, Benjamin defines the term as a stand-alone predicate and, in the process, implicates the absent human agent, the one who lets the opportunity to act pass by. This opens up the meaning of the term to make visible the element of human action missing from the traditional understanding. Thus, one may read Benjamin's use of "catastrophe" in Thesis IX with this implied but unstated human actor, positioned in such a way as "to have missed the opportunity."

This acknowledgment of an unstated human actor implied in Benjamin's use of "catastrophe" in Thesis IX connects back to the theme and requirement of redemption in Thesis II. He writes, "[T]here is a secret agreement between past generations and the present one…. [L]ike every generation that preceded us, we have been endowed with a *weak* messianic power, a power on which the past has a claim."[347] As Löwy points out, Benjamin's Thesis II "conceives of redemption…as historical remembrance of the victims of the past."[348] What is also evident in Thesis II, especially when read along with the above-mentioned understanding of catastrophe in Thesis IX, is that the redemptive messianic task is individualized and

[347] Benjamin, "On the Concept of History," 390.
[348] Löwy, *Fire Alarm*, 31.

exclusively assigned to human beings. In other words, Benjamin offers a twist to orthodox Judaism's conception of messianism in that he locates the messianic function in humanity rather than in the divine. The effect of this move is to create two ways of thinking about messianism: one which emphasizes deferral of the messianic moment and one which stresses the need to seize it.

The classical conception of messianism, the one that focuses on waiting and deferral, is well articulated in an essay by Gershom Scholem titled *Towards an Understanding of the Messianic Idea in Judaism*.[349] In this essay, Scholem described the essential tension inherent in messianism: that between restoration and renewal.[350] Scholem explained that on the one hand, messianism is understood as a means through which to restore the origin. On the other hand, messianism is also the means through which one imagines an as-yet unrealized future renewal. This contradiction, Scholem remarked, resulted in the antinomies of messianism and its essential character: "a life lived in deferral and delay," in which life is lived in perpetual unfulfillment.[351] This traditional concept of messianism as delay and deferral is what Benjamin attempts to rethink in his Theses so as to convert messianism into a means of political praxis that humanity may actively use: "The historical materialist … remains in control of his powers – man enough to open the continuum of history."[352]

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[349] Gershom Scholem, *Towards an Understanding of the Messianic Idea in Judaism,* trans. Michael Meyer (New York: Schocken Books, 1972).
[350] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), 46.
[351] Giorgio Agamben, "The Messiah and the Sovereign: The Problem of Law in Walter Benjamin," in *Potentialities*, ed. and trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1999), 166.
[352] Benjamin, "On the Concept of History," 396.

Rather than arresting our understanding of messianism in these two irreconcilable tendencies of restoration and renewal that Scholem articulated, Benjamin's Theses provide an opportunity to look beyond the mere identification of messianism's aporias to investigate instead what the structure of those aporias can tell us about the problem of law in *its* originary structure, which is likewise characterized by aporias that resist resolution (as Benjamin demonstrates by his analysis of the state of exception).[353] This, in turn, allows one to confront and decisively reckon with the law in ways that demystify its operations. To that end, Benjamin's deployment of the term *jetztzeit* (roughly translated as "now-time") produces a more progressive notion of messianism, rooted in "the time of the now," a non-chronological conception of time.

The mainstream or dominant conception of historical time is chronological. It is sometimes referred to as "linear" or "clock" time.[354] This standard view comprehends time as a succession of instants, existing in linear and irreversible

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[353] See, Gershom Scholem, "Letter to Walter Benjamin: September 20, 1934," in *The Correspondence of Walter Benjamin and Gershom Scholem, 1932-1940*, ed. Gershom Scholem, trans. Gary Smith and Andre Lefevre (Cambridge: Harvard University Press, 1992), 142; Giorgio Agamben, "The Messiah and the Sovereign: The Problem of Law in Walter Benjamin," in *Potentialities,* ed. and trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1999), 169-70. Benjamin's approach to the status of law in messianic time likewise emanates from his correspondence with Gershom Scholem on the same subject. In a discussion about Kafka's use of the law, Scholem wrote to Benjamin that the conception of law in Kafka's work could best be understood as the Nothing of Revelation, meaning "a state in which revelation appears to be without meaning, in which it still asserts itself, in which it has validity but no significance." This description of *being in force without significance* provides support for Benjamin's understanding of the status of law that exists in the state of exception and likewise supports his demystification of "law," which allows him to transfer the capacity to change it from the sovereign/state to the people.

[354] See Walter Benjamin, "Trauerspiel and Tragedy," in *Selected Writings Volume 1: 1913-1926*, ed. Marcus Bullock and Michael W. Jennings (Cambridge: Harvard University Press, 1996), 55-58.Walter Benjamin, "The Concept of Criticism in German Romanticism," in *Selected Writings Volume 1: 1913-1926*, ed. Marcus Bullock and Michael W. Jennings (Cambridge: Harvard University Press, 1996), 116-200.

progression. Clock time is ordinal. It proceeds in equal periods by numerical progression, and as a result, is indifferent to its contents. This chronological, homogeneous time is theorized as empty in contrast to *fulfilled* time. This time is homogeneous because it is composed of identical, equivalent, and interchangeable units. It is empty because it is not given meaning in special moments; time simply passes and is neutral to the meaningful content with which people fill it.

Theses XIII presents this distinction between clock time and *jetztzeit*: "The concept of mankind's historical progress cannot be sundered from the concept of its progression through a homogeneous, empty time. A critique of the concept of such a progression must underlie any criticism on the concept of progress itself."[355] Likewise, Thesis XIV continues the attack on the dogma of an empty, homogeneous temporality: "History is the subject of a construction whose site is not homogeneous, empty time, but time filled full by now-time [*Jetztzeit*]."[356]

Messianic time is not homogeneous, empty time. Scholars have compared Benjamin's use of messianic time—now-time—to *kairos*. The comparison has been noted in a letter Adorno wrote to Horkheimer shortly after he received a copy of the Theses.[357] This comparison has also been made by Giorgio Agamben, a thinker whose own work on messianic time is strongly connected to and influenced by

[355] Benjamin, "On the Concept of History," 394-95.
[356] Ibid. 395.
[357] Löwy, *Fire Alarm*, 87 (noting, "In a letter to Horkheimer, written in 1941 shortly after receiving a copy of the 'Theses', Adorno compared the conception of time of Thesis XIV with Paul Tillich's *'kairos'*. The Christian socialist Tillich…contrasted *Kairos*—'full' historical time, in which each moment contains a unique opportunity, a singular constellation between relative and absolute—with *chronos*, formal time.").

Benjamin.[358] For Agamben, kairological time is more or less synonymous with messianic time.[359] Agamben borrows this concept from the Stoics who offered it against the dominant Greek conception of infinite, linear, astronomical time that divided the present into discrete instants.[360] The Stoics posited the liberating experience of time as something neither objective nor removed from our control, but something springing from the actions and decisions of man.[361] They modeled this conception on *kairos*, the abrupt and sudden conjunction where decision grasps opportunity and life is fulfilled in the moment.[362] Kairological time is the site of historical agency: it is a time filled with the present of the now. It is a time defined by praxis.

By releasing the operation of messianism from the sole authority of the divine, Benjamin's Theses imply that the messianic event has always-already occurred, which means that the only time we have to make decisions and to concretely experience life, is now. Thus understood, messianic time is active; it is a time that one can seize for purposes of fulfilling an as-yet unrealized potential, in order to have a concrete lived time of experience. It creates a political space for humanity where,

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[358] Cf. Ezra Delahaye, "About Chronos & Kairos: On Agamben's Interpretation of Pauline Temporality through Heidegger," *International Journal of Philosophy & History*, 77, no. 3 (2016): 85 (arguing, "that Agamben's understanding of messianic temporality, [which] hinges on the opposition between *kairos* and *chronos*, [can be traced] back to Heidegger's influence on Agamben. [Leading the author] to conclude that messianic temporality can be understood as a variation on Heidegger's idea of ecstatic temporality.").
[359] See Giorgio Agamben, *The Time That Remains: A Commentary on the Letter to the Romans,* trans. Patricia Dailey (Stanford: Stanford University Press, 2005), 74; Giorgio Agamben, *The Church and the Kingdom*, trans. Leland de la Curantaye (London: Seagull Books, 2016), 5-13.
[360] Agamben, *The Time That Remains*, 68-69.
[361] Ibid.
[362] Ibid.

rather than passively adopting the history of progress along the continuum created and perpetuated by the oppressors, each person – individually or in concert with others – uses history as a means to emancipation.[363]

Benjamin's nuanced philosophical concept of "dialectics at a standstill" is integral to his understanding of history and temporality. This intriguing idea offers a counter-narrative to the traditional Marxist view of history as a linear progression towards a predetermined goal. Benjamin critiques this teleological perspective as overly simplistic and one-sided, proposing instead, a view of history that is not continuously advancing but is capable of halting or standing still.[364] In other words, for Benjamin, history can and should occasionally jolt to a halt.

When viewed in the juridical context, Benjamin's concepts of dialectics at a standstill and messianic time suggests that the Supreme Court may on occasion be forced to reimagine and re-image the Constitution in response to an irruption within the cultural or political life of the Nation. More importantly, the Court will have to take action, to engage with the Now, or the moment will be lost, not to return.

[363] See Benjamin, "On the Concept of History," 391, (noting, "Articulating the past historically does not mean recognizing it 'the way it really was'. It means appropriating a memory as it flashes up in a moment of danger…Every age must strive anew to wrest tradition away from the conformism that is working to overpower it.").
[364] See Benjamin, "On the Concept of History."

B. Martin Heidegger: Moving the Constitution from Object to Process

In *Being and Time*, Heidegger made a critical distinction between "being" (with a lowercase "b") and "Being" (with an uppercase "B").[365] His philosophy is characterized by this differentiation, which forms the bedrock of his existential and phenomenological analysis.[366] Heidegger's distinction between "being" and "Being" provides a helpful perspective on how to approach and understand the Constitution. By viewing the Constitution's existence as a process of becoming (Being) rather than a static entity (being), we can more fully grasp the implications of this foundational document and its role in shaping the lived experiences of the people living under it.

Heidegger's distinction between the metaphysical entity (the Constitution as an object) and the ontological nature of its existence (the Constitution as a process) illuminates this perspective.

Heidegger's distinction between "being" and "Being" coupled with Bergson's notion of time as duration and the importance of thinking in time to perceive lived experience provides an insightful perspective on how to approach and understand the Constitution. Viewing the Constitution's existence as a process of becoming (Being) rather than a static entity (being) can provide tools to push constitutional interpretive analysis beyond the containment of ideology. Not only would this create

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[365] Martin Heidegger, *Being and Time*, trans. J. Macquarrie and E. Robinson (Oxford: Basil Blackwell, 1962), 19.

[366] Martin Heidegger, *The Basic Problems of Phenomenology*, trans. Albert Hofstadter, revised ed. (Bloomington: Indiana University Press, 1982), (discussing the basic articulation of being and ontological difference and the problem of the ontological difference).

opportunities to more fully understand the implications of this foundational document and its role in our lives. It would also create space to analyze the Constitution in ways that reconnect it with ordinary lived experience—shrinking the chasm between the Court's articulation of the constitutional experience and the lived experience of the Constitution.

CONCLUSION

Bergson's ideas on time, memory, simultaneity, and difference allow us to see the temporal dimensions of the Court's role in constitutional democracies. His concept of artificial simultaneity invites a reimagining of how the judiciary interprets and shapes law. By engaging in a double process of simultaneity, the Court is revealed as a temporal nexus that connects past, present, and future. It ensures legal continuity while simultaneously fostering innovation. This theoretical approach exposes the deep philosophical foundations of judicial decision-making, and underscores the intricate interplay between time, law, and justice within the realm of constitutional adjudication.

Applying Bergson’s concept of artificial simultaneity to judicial review uncovers the intricate dynamics underlying the Court's interpretive methodology. This perspective dispels the notion frequently perpetuated by traditional legal doctrines which often portray precedents as unchanging remnants of the past. Instead, it advocates for a fluid and adaptable legal practice, where laws and their interpretations are in a state of continuous evolution. This approach not only respects the historical roots of legal frameworks but also facilitates a progressive adaptation that resonates with modern values and societal expectations. Ultimately, Bergson's philosophy enriches the constitutional discourse by offering a framework that respects the continuity of legal tradition while promoting change when and where necessary.

Benjamin takes us a fateful step further, arguing that any human actor – whether an individual, group, or institution – must be able to recognize those moments when history and tradition, even a carefully curated *nomos,* no longer answer the existential questions of contemporary life and must be challenged by something heretofore unimagined and un-imaged. That is, there will be times when even something as past-bound as the United States Supreme Court must seize its kairological moment and take action that finds no support in the historical archives but is nevertheless necessary to save and advance a constitutional life worth living.

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