INTRODUCTION

On February 13, 2016, Justice Antonin Scalia died in his sleep at the age of seventy-nine. At the time of his death, he was staying at Cibolo Creek Ranch, a remote resort in the Chinati Mountains of West Texas, for a weekend of hunting and sightseeing. An avid hunter, Scalia had joined other guests on a quail hunt the previous afternoon and turned in early after dining with the owner of the ranch. He was discovered the following morning, dead of natural causes.

Justice Scalia's death was a pivotal event in the history of the Supreme Court, not least because he was an epochal figure. On the bench, he exhibited a dominating personality, often playing for laughs. In his opinions, he was a brilliantly lively writer. Scalia also exerted an intellectually paradigm-shifting influence on Supreme Court decision-making. Both in his opinions and in extrajudicial writing, Scalia championed two interpretive methodologies that had previously seemed outrageous to mainstream thinkers both on the bench and in leading law schools. One was "originalism" – the idea, roughly, that the Constitution should nearly always be interpreted in the twentieth and twenty-first centuries in ways consistent with its original eighteenth- or nineteenth-century meaning. The other was "textualism" – the idea, roughly, that the meaning of legal texts, including both the Constitution and federal statutes, not only depends on but is also exhausted by what their words actually say. According to Scalia, legislative history purporting to record what the drafters of texts meant to say or achieve is a

legal irrelevancy. Because only the written texts were enacted into law, judges should confine their intention to the meaning of those texts in the context of their promulgation.

It is a reflection of Scalia's influence that today even "liberal" justices – including Elena Kagan and Ketanji Brown Jackson – sometimes claim to embrace originalist methodologies.[1] In a similar acknowledgment, Justice Kagan said in November 2015 that "we are all textualists now."[2]

During Scalia's nearly thirty years on the Supreme Court, the substantive content of constitutional law changed a lot, too. Developments included rulings that the First Amendment encompasses a right of corporations to spend money on political advertising, that the Second Amendment protects individuals' rights to possess guns for purposes of self-defense (not just service in a "well regulated Militia"[3]), that the Establishment Clause does not preclude cities and towns from beginning public meetings with prayers, and that Congress's regulatory powers are subject to a variety of previously undefined constitutional limitations.

Nonetheless, during Scalia's years on the Supreme Court, constitutional law did not change as much or always in the ways that he would have liked. He argued repeatedly but futilely for the overruling of *Roe v. Wade* (1973)[4] – a development that came only later, after his death. He failed to persuade a majority of his colleagues to hold that race-based affirmative action policies were per se unconstitutional.

[1] Justice Jackson said in her confirmation hearings that "the Constitution is fixed in its meaning," and it is appropriate to look at its "original public meaning" to interpret it. Robert Barnes and Ann E. Marimow, "Ketanji Brown Jackson Declares Herself a Modest Jurist, Defends Record against Republican Criticism," *The Washington Post* (Mar. 22, 2022), www.washingtonpost.com/politics/2022/03/22/ketanji-brown-jackson-hearing-day-2/. Justice Kagan similarly asserted in her confirmation hearings that "we are all originalists." Confirmation Hearing on the Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary, 111th Cong. 62 (2010) (statement of Elena Kagan). Justice Kagan has more recently qualified that statement, insisting that she is not "an originalist in the conventional sense of the word" and that the "original meaning" of the Constitution is that it is supposed to "evolve[]" with time. Josh Gerstein, "Kagan Hopes Supreme Court's Ideological Divide on Precedent Isn't Permanent," *Politico* (Sept. 22, 2023, 6:02 p.m.), www.politico.com/news/2023/09/22/elena-kagan-supreme-court-precedent-speech-00117760.

[2] Harvard Law School, "The 2015 Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes," *YouTube*, at 08:29 (Nov. 25, 2015), https://youtu.be/dpEtszFT0Tg.

[3] U.S. Const., Amend. II.

[4] 410 U.S. 113 (1973).

He dissented when the Court refused to reconsider *Miranda v. Arizona* (1966),[5] a pathbreaking decision that effectively requires police to notify criminal suspects of their rights to remain silent and to have the assistance of a lawyer prior to the commencement of custodial interrogations.

The reasons for Scalia's failures along these and a number of other dimensions are complex. Through Scalia's years on the Supreme Court, "conservative" justices always outnumbered those typically counted as "liberals." As of 1992, when Scalia had served on the Court for six years and the Court reaffirmed *Roe*'s "central holding" over his vehement dissent in *Planned Parenthood v. Casey*,[6] Republican presidents had appointed eight of the Court's nine justices. At the time of Scalia's death in 2016, Republican presidents had appointed five of nine. Yet in 2016, as in 1992, the conservative majority included moderate or swing justices who sometimes voted with the Court's liberals in politically salient cases.

When Justice Scalia died, the Supreme Court's future hung in the balance. With nearly a full year left in Democratic President Barack Obama's term of office, it appeared that Obama would be able to nominate, and secure Senate confirmation of, a replacement justice who would tip the Court's longstanding conservative majority to a 5–4 liberal margin. If events had unfolded in that way, abortion rights and affirmative action would have remained safe. Liberals would have hoped for the overruling of a number of decisions of the Rehnquist and Roberts Courts – so called in reference to Chief Justices William Rehnquist (1986–2005) and John Roberts (2005–) – including *Citizens United v. Federal Election Commission* (2010),[7] which found that corporations have free speech rights to spend money on political campaign ads.

Instead, politics intervened. Even before President Obama had had time to nominate a successor to Justice Scalia, the Republican Senate majority leader Mitch McConnell announced that the Senate would refuse to consider any nomination that Obama might submit so close to the 2016 presidential election, which was approximately nine months away. After McConnell and his Senate Republican colleagues

[5] 384 U.S. 436 (1966).
[6] 505 U.S. 833 (1992).
[7] 558 U.S. 310 (2010).

stalled confirmation hearings until after the November election and the inauguration of President Donald Trump, Trump nominated and the Senate confirmed the conservative originalist Neil Gorsuch as Scalia's successor. As a result, no substantial realignment in the Court's 5–4 conservative balance of power took place.

A subtle but highly significant shift in the Court's ideological center then occurred when the "moderate" conservative Justice Anthony Kennedy retired in July of 2018. Kennedy was an ardent supporter of gay rights and had cast "swing" votes to save *Roe v. Wade* from being overruled and to preserve affirmative action. As Kennedy's successor, Trump chose Brett Kavanaugh, a judicial conservative who, like Gorsuch, had been recommended by the Federalist Society, an influential organization of conservative law students, lawyers, and judges. During Kavanaugh's confirmation process, women who had known him during his high school and college years lodged allegations of past sexual misconduct. At that point, the confirmation proceedings turned rancorous. Despite lingering questions in many minds, McConnell, still leading a Republican Senate majority, brought his party into line to support the nomination, and Kavanaugh – who was expected to be more reliably conservative than Kennedy – was confirmed on nearly a party-line vote.

A little more than a year later, the iconic liberal Justice Ruth Bader Ginsburg died on September 18, 2020. When Justice Scalia died substantially further in time before a presidential election, majority leader McConnell took the position that the opportunity to nominate a justice should go to the winning candidate, not the incumbent president. McConnell adopted a different stance when, following Ginsburg's death, Trump swiftly nominated Judge Amy Coney Barrett – another favorite of the conservative Federalist Society – to take Ginsburg's former seat. Within thirty-nine days of Ginsburg's death, and only weeks before a presidential election that Trump would lose, Barrett was confirmed.

With Barrett's appointment, the nation entered a new era of Supreme Court and thus of constitutional history. Acting in conjunction, Mitch McConnell and Donald Trump had arranged the creation of a 6–3 conservative supermajority. The era of that conservative supermajority is not new merely because it has begun to bring change. As this book will emphasize, change is more nearly a constant than an anomaly in Supreme Court interpretation of the Constitution.

The distinction is that we have already begun to witness conservative changes of unprecedented scope and consequence. These include the overruling of a right to abortion, a holding that the Equal Protection Clause prohibits public colleges and universities from practicing race-based affirmative action, a dramatic expansion of already broad gun rights under the Second Amendment, a further loosening of restrictions on governmental support for religious institutions, and an unprecedented holding that a website designer's free speech rights entitle her to an exception from a state law barring people engaged in commercial activities from discriminating on the basis of sexual orientation. More dramatic developments are surely in the offing.

The successful efforts of President Trump and Senator McConnell to shape the Supreme Court, when viewed in conjunction with the changes in constitutional law that the new conservative supermajority has already begun to implement, both provide the occasion for this book and illustrate a number of its central themes. The first of those themes, which I have prefigured already, is that change is a historical constant in US constitutional law. It is impossible to understand constitutional law without understanding the dynamics that render it vulnerable to change. We have a very old Constitution that is difficult to amend. Much of its language is cryptic and vague and invites interpretation. And interpretations not only can vary but have varied over time.

The possibility of reasonable disagreement about how to interpret the Constitution is what makes the Supreme Court as important an institution as it is today. Through its power to authoritatively interpret both constitutional language and judicial precedents that are themselves subject to reasonable interpretive disagreement, the Supreme Court functions as an ongoing agent of constitutional evolution. Indeed, to function as a change agent is perhaps the Court's central modern role. Unlike other federal courts, the Supreme Court gets to choose its cases. It typically agrees to decide about 70 cases a year out of roughly 5,000 requests. And the Court determines which cases to decide with an eye toward possibly changing the law. Sometimes, perhaps most often, the changes involve efforts to make the law clear on a point where it previously was not clear. When lower courts have reached disparate decisions about how either the Constitution or a federal statute should be interpreted, the Supreme Court may agree to review one or more of the conflicting rulings for the purpose of clarifying what the law (in its

view) requires. But sometimes the Court takes cases in order to overturn its own prior decisions and, for all practical purposes, to reshape the constitutional law of the United States. It did so, for example, when it agreed to review the lower court decision in the *Dobbs v. Jackson Women's Health Organization* (2022),[8] which overruled *Roe v. Wade*, and in the cases that effectively overruled prior precedents upholding affirmative action programs involving university admissions.

A second theme is that although the Supreme Court is in many ways a lawmaking institution, which often chooses its cases for the purpose of contemplating or effecting changes in our constitutional law, it is not a lawmaker in the same sense as Congress, the state legislatures, or the conventions that drafted and ratified the Constitution. Depictions of the justices as so many "politicians in robes,"[9] merely executing party political programs, are therefore misleading in most if not all cases. Even when the Court considers whether to overrule decisions that bind all lower courts until the justices vote to reverse them, the nature of the judicial process requires the Court to justify its rulings as interpretations either of the Constitution's language or of prior cases interpreting it. In this sense, the Court's decisions, unlike those of legislatures, are necessarily and inherently backward-looking, grounded in texts that were written in the past. In addition, norms of legal argumentation subject the justices to disciplines, including requirements of publicly reasoned decision-making, that can be tested for principled consistency.

But if constitutional interpretation is always backward-looking, it is also, simultaneously, forward-looking. The justices both are and ought to be concerned about whether the interpretations that they reach, and the formulations that they articulate to implement those interpretations, will produce fair, reasonable, and workable patterns of decisions in the future. Insofar as the justices' eyes are on the future, concerned with the practical consequences of possible decisions that they might make, the justices are and have to be lawmakers. And nothing could be clearer than that their values inform the way that they decide many of their most important cases.

It is important to make neither too little nor too much of the banal truth that the justices' values influence and sometimes determine

[8] 597 U.S. 215 (2022).

[9] Richard A. Posner, *How Judges Think* (Cambridge, MA/London, UK: Harvard University Press, 2008), 8.

their decisions – which, it should be recalled, sometimes elicits vehement denials rather than nods of assent, especially at the justices' confirmation hearings. (Chief Justice John Roberts famously compared the job of a Supreme Court justice with that of an umpire in a baseball game.[10] And Justice Kagan maintained that judicial rulings are determined by law "all the way down" to the point of decision,[11] apparently even in the most controversial cases.) Recognizing that the justices of the Supreme Court are, willy-nilly, lawmakers – though not, I repeat, in the same sense as legislators – people who dislike Supreme Court rulings sometimes rail that we have "government by judiciary." But we clearly do not.

Although there are some domains in which the Supreme Court has stunning power, there are many more areas in which it has almost none – over the size of the federal budget, for example, or the interest rates set by the Federal Reserve Board, or what US policy toward China or Russia should be. In response to the question of why this should be so, political scientists sometimes say that judicial power, including the power of the Supreme Court, exists within "politically constructed bounds."[12] As I shall explain more fully in this chapter, history teaches that there are some claims of judicial power that the public and the nation's political leaders would not accept. Over time, the justices have internalized a series of unwritten and frequently unspoken understandings of what judges and justices can and cannot do. These boundaries have changed from one historical era to another. They may be changing right now. But at any particular time, the justices are very much constrained in their lawmaking capacities. (Try to imagine the justices ordering Congress to increase or decrease the size of the defense budget.)

A third theme, highlighted by Justice Scalia's championing of originalism and textualism, involves the relationship between the

[10] Confirmation Hearing on the Nomination of John G. Roberts Jr. to Be Chief Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary, 109th Cong. 55 (2005) (statement of John G. Roberts Jr.).

[11] Confirmation Hearing on the Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary, 111th Cong. 103 (2010) (statement of Elena Kagan).

[12] Keith Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton, NJ: Princeton University Press, 2007), 4; Matthew C. Stephenson, "'When the Devil Turns …': The Political Foundations of Independent Judicial Review," 32 *Journal of Legal Studies* 59, 60–61 (2003); Mark A. Graber, "Constructing Judicial Review," 8 *Annual Review of Political Science* 425, 425 (2005).

methodologies that the justices apply in interpreting the Constitution and their normative beliefs and commitments. No one can understand the current Supreme Court without understanding the individual justices' varied degrees of commitment to originalism and textualism, especially originalism. But the Court is not now and never has been consistently originalist. The Court's own precedents remain an important basis for the Court's decisions, including by justices who hold themselves out to be originalists. For example, in the recent case in which the Court held that race-based affirmative action in college admissions violates equal protection norms,[13] the majority opinion – which all six of the conservative justices joined – was almost entirely devoid of reference to the original meaning of the Fourteenth Amendment. As the outcome in that case would tend to indicate, the justices' normative values also influence their decisions – which, almost self-evidently, explains why we can so readily describe the justices as "conservative" and "liberal." Still, it would be equally mistaken to think that methodological premises never help to shape outcomes. Among other influences, some of the conservatives' commitments to originalism may fortify their sense of righteous resolve in overruling past nonoriginalist decisions even in the face of predictable outrage from liberals and moderates.

A fourth theme has a more dominant influence on this book's architecture than any other. It is that the changes that the justices of the Supreme Court effectuate in our constitutional law occur against and are gauged in relation to a framework of prior decisions that, up until their overturning, had enjoyed the status of constitutional law binding lower courts and other public officials throughout the nation. At any particular time, there is a lot of constitutional law, the details of which would not be obvious to anyone who just read the written Constitution. Much of that law ought to interest engaged citizens. My aim in this book is to array the Court's decisions – including ones that are lesser known or sometimes forgotten – into patterns that collectively constitute the current constitutional law of the United States. For the most part, I do so on a topic-by-topic basis.

Sometimes the patterns of decisions are coherent and, at least for now, stable. Aspects of free speech doctrine furnish a good

[13] *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

illustration. Over the past fifty years or so, the Supreme Court has established that statutes that single out speech for prohibition based on its content are virtually per se unconstitutional under the Free Speech Clause of the First Amendment unless the speech falls into a constitutionally unprotected category (such as obscenity, "fighting words," or true threats). There is a plausible, stable rationale for this rule, which David Strauss has dubbed the "persuasion principle": It would be a constitutionally intolerable affront to citizens' autonomy for the government to deny them access to speech based on the premise that citizens cannot be trusted to assess the truth or value of speech for themselves.[14] Though big chunks of free speech law seem settled for the time being, in other areas, the current pattern of Supreme Court decisions reveals tensions or inconsistencies. Such inconsistencies often signal that changes are underway. Sometimes such changes are easy to predict, but sometimes they are not.

A fifth theme is among the most challenging to develop and confront. It is that although constitutional change is a constant in the unfolding history of the United States, and although we can look to history for lessons about how change is likely to continue going forward, we are now in a new and unprecedented era. In the past, historians and political scientists broadly agree, the Supreme Court's stance toward the leading political and constitutional controversies of the day has frequently, perhaps typically, tended to track mainstream public opinion.[15] Among other factors, the explicitly political process by which justices are first nominated and then confirmed by politically accountable presidents and senators has tended to produce this result. Also, the Court has often adjusted its course of decisions in order to render them acceptable to aroused political majorities.

In our currently divided climate, however, it is unclear that there is a coherent mainstream of public opinion that the Supreme Court could please, even if it set out to do so. It is also far from clear that a majority of the current justices – whose methodological commitments

[14] David A. Strauss, "Persuasion, Autonomy, and Freedom of Expression," 91 *Columbia Law Review* 334, 334 (1991).

[15] For a pioneering development of this thesis, see Robert A. Dahl, *A Preface to Democratic Theory* (Chicago, IL: University of Chicago Press, 1956), 109–12. For a more recent reformulation, see Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York, NY: Farrar, Straus, and Giroux, 2009).

to originalism and textualism may fortify their senses that there are "right" constitutional answers to controversial questions that they are duty-bound to reach – would want to conform their decisions to public opinion anyway. As a result, it is easy to imagine a future in which the Supreme Court careens to the right in a way unprecedented in our history.

At the same time, there are countervailing forces whose influence on the justices remains to be seen. Among them, the Court's public approval ratings hover close to an all-time low.[16] Some of the justices appear worried by this development. It thus seems imaginable that they will slow the pace of change – though likely not its direction – in response. From our current temporal vantage point, the most I can say with confidence is that we inhabit a new era in which we have to expect quite rapid changes in the substantive content of constitutional law, nearly all in a conservative direction, but that the details of change are often harder to predict.

A sixth theme, partly overlapping with several of those that I have advanced already, is that the justices of the Supreme Court view themselves as custodians of "the rule of law," and the public, by and large, looks to them to play that role. The Court's law-changing power raises questions, which will sometimes loom in the background of this book and sometimes demand explicit attention, about the nature of law in the nation's highest tribunal. In what sense is the Constitution law? Do the justices take seriously their obligation of constitutional fidelity? What mechanisms are there, if any, through which the justices' obligations of fidelity to law can be enforced? Anyone who wants to understand what we want to call constitutional law must confront these questions, even if they defy pat answers.

Having introduced six themes, I should now explain how they relate to each other and inform the plan of the book. This is a book about current constitutional law and about the dynamics of change that have shaped it in the past and will almost certainly reshape it in the future, including the very near-term future in which the Supreme Court must be expected to continue under the dominance of a supermajority of very conservative justices. The book is about constitutional law as it

[16] Jeffrey M. Jones, "Supreme Court Approval Holds at Record Low," *Gallup* (Aug. 2, 2023), https://news.gallup.com/poll/509234/supreme-court-approval-holds-record-low.aspx.

exists today. But it is written based on the humbling premise that the present is a fleeting moment shaped by dynamics that make change – sometimes for the better and sometimes for the worse – inevitable.

The book's narrative unfolds as follows. Chapter 1 outlines the content of the written Constitution and describes the emergence of "judicial supremacy," or the dominant role of the Supreme Court, in interpreting it. The Constitution of the United States was the first written national constitution in the history of the world. At the time of its ratification, many people believed that each of the branches of the national government would interpret the Constitution for itself. Moreover, the Supreme Court was not initially regarded as a particularly important institution. The first chief justice resigned his position, and later declined to accept reappointment, on the ground that the office lacked dignity and importance. Besides describing the events through which it came to be broadly accepted that the Court is the Constitution's definitive interpreter, Chapter 1 begins to flesh out the idea that the Court's power exists within and is constrained by politically constructed boundaries. To a first approximation, those boundaries are constituted by the willingness of other institutions and ultimately the American people to accept the Court's rulings as authoritative.

Chapter 2 provides a capsule history of the role that the Supreme Court has played over the course of American history. It divides that history into five eras, beginning with the Court's uncertain early years and ending with the moderately conservative period that immediately preceded the installation of the current conservative supermajority. Throughout, Chapter 2 emphasizes the ways in which political and cultural currents have influenced the Court.

Chapter 3 provides a preliminary sketch of the Supreme Court as it exists today. This chapter describes the distinctive political environment in which the sitting justices were appointed and in which they function. It highlights the role that a conservative legal organization, the Federalist Society, has played in vetting potential nominees and in ensuring that the sitting justices who were appointed by Republican presidents are reliably conservative in their commitments. Chapter 3 also discusses the rise of originalism as a theory of constitutional interpretation and frames issues about the relationship between originalist methodology and substantively conservative values that will be a focus of attention through the remainder of the book. Finally, it gives introductory, capsule biographies of each of the current justices. As

subsequent chapters will emphasize, "the Supreme Court is a 'they,' not an 'it,'"[17] and it is impossible to understand the Court's dynamics without a grasp of how the individual justices, taken one by one, approach their jobs.

Chapter 4 traces the arcs of change that are visible in the interpretation of the First Amendment's Establishment and Free Exercise Clauses. To a rough approximation, the Supreme Courts over which Earl Warren and Warren Burger presided as chief justice (from 1954 to 1969 and 1969 to 1986, respectively) sought to enforce a "wall of separation" between church and state. That wall has crumbled in the decades since. As Chapter 4 details, the current Court has embraced the originalist position that historical understanding and practice define the exclusive limitations on the government's acknowledgment of and support for religion. Among the outstanding questions under the Establishment Clause is whether the Warren Court's iconic decisions banning prayer in the public schools will survive the ongoing doctrinal reconstruction.

The pattern of decisions under the Free Exercise Clause is complex, but current trends reflect a fascinating reversal of positions by judicial conservatives and judicial liberals alike. Justice Scalia epitomized the conservatives of his generation in holding that while the Free Exercise Clause shields religious institutions and practices from affirmatively hostile treatment, it does not require the government to exempt either religious organizations or individual believers from generally applicable laws that impede religiously motivated practices. When Scalia authored the majority opinion embracing that view in *Employment Division v. Smith* (1990),[18] the most prominent claimants to exceptions were members of relatively small minority religions. More recently, as the parties seeking exceptions have increasingly included conservative Christians, the current conservative supermajority has substantially revised the prevailing doctrinal structure to mandate more religious exemptions from otherwise valid laws. Chapter 4 summarizes and seeks to explain developments to date.

Chapter 5 considers First Amendment history and doctrine concerning the freedom of speech. It briefly discusses what can be

[17] See Adrian Vermeule, "The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division," 14 *Journal of Contemporary Legal Issues* 549 (2005).

[18] 494 U.S. 872 (1990).

gleaned about original understandings of the Free Speech Clause and reviews formative debates about how that clause should be interpreted, largely in cases growing out of an Espionage Act that Congress enacted during World War I. Chapter 5 then moves briskly forward to provide an overview of more recent developments, mostly occurring since the 1960s and 1970s. Since then the United States has progressively recognized broader speech rights than any other country in the world. Prior to the 1960s, defense of free speech rights was widely recognized as a "liberal" position. The defining issues included stances toward the regulation of obscenity and protections for speech by Communists and anarchists. Over subsequent decades, support for expansive speech protections has migrated to the political right, with conservative justices embracing the position that, outside of a few historically defined and exceptional categories, all content-based regulation of speech is constitutionally suspect. As Chapter 5 explains, the resulting doctrine provides robust protection not only for a good deal of "hate speech" and some outright lies but also for commercial advertising and corporate expenditures to promote the election of political candidates. Revealingly, the current conservative supermajority has seldom sought to justify its doctrinal innovations – which recently included recognition of an absolute right of a commercial website designer to refuse to design a website celebrating a same-sex wedding[19] – as reflecting the original understanding of the Free Speech Clause. Rather, the principles that the Court has invoked to explain the central elements of modern doctrine are rooted in the libertarian skepticism of governmental regulation of speech "markets" that the "persuasion principle" embodies.

Chapter 6 considers the Supreme Court's approach to the Second Amendment right "to keep and bear Arms." The Second Amendment prefaces that guarantee with a clause referring to militia service: "A well regulated Militia, being necessary to the security of a free State ...." In light of that preamble, prior to 2008 the Court had never held that the Second Amendment protects a personal right to bear arms for self-defense or for other purposes unrelated to militia service. Chapter 6 describes the Court's controversial readings of the language and history of the Second Amendment as supporting personal rights to keep and bear arms in a string of cases beginning in

[19] *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

2008. Among the diverse subfields of constitutional law, in none is the current Court's approach more devoutly originalist. In appraising the permissibility of regulating the exercise of many constitutional rights, including under the First Amendment, the Court frequently asks whether restrictions are "narrowly tailored" to important or "compelling" governmental interests. In interpreting the Second Amendment, the Court now insists that the permissibility of modern restrictions on gun ownership and carriage should depend exclusively on analogies to historically tolerated forms of firearms regulation. Chapter 6 explores the difficulties that the conservative supermajority has encountered in applying that approach, which may or may not furnish a paradigm for future application in other doctrinal areas.

Chapter 7 canvases the Supreme Court's historically evolving interpretation of the Fourteenth Amendment guarantee that no state may "deny to any person within its jurisdiction the equal protection of the laws." The Court's implementation of the Equal Protection Clause has seldom purported to be originalist, including in its most recent decisions. Chapter 7 examines the strands of doctrinal history that once tolerated governmentally enforced race discrimination under the notorious "separate but equal" formula; that initiated a reversal of course in *Brown v. Board of Education* (1954);[20] and that have produced a body of modern precedents with few roots in the original history of the Fourteenth Amendment. In a recurring pattern, the justices have historically condemned forms of discrimination – first on the basis of race, then sex, and then sexual orientation – only when public opinion began to view them as unjustifiably bigoted. Chapter 7 also surveys a branch of equal protection doctrine that strictly scrutinizes deprivations of rights that the Court deems "fundamental" under the Equal Protection Clause, centrally including voting rights. It explains continuities, but also revealing disparities, between the approaches to voting rights of the liberal Warren Court, on the one hand, and the conservative Roberts Court, on the other.

Chapter 8 analyzes the Supreme Court's practice, over approximately a century and a half, in identifying some rights that the Constitution does not specifically list as being protected against substantive abridgment by the Due Process Clause of the Fourteenth Amendment. The Due Process Clause stipulates that no state shall

[20] 347 U.S. 483 (1954).

"deprive any person of life, liberty, or property, without due process of law." On the surface, it looks like a guarantee of procedural, rather than substantive, rights. But the Court has repeatedly held otherwise. For roughly fifty years, a conservative Court protected contract rights in cases emblematized by *Lochner v. New York* (1905).[21] After an embarrassed climbdown from that approach in the 1930s, the Court reembraced the Due Process Clause as a source of "unenumerated" substantive rights in *Roe v. Wade*. When the current Court overturned *Roe* in *Dobbs v. Jackson Women's Health Organization*, many observers read *Dobbs* as condemning *Roe* on originalist grounds. As Chapter 8 explains, however, a close reading demonstrates that the *Dobbs* Court avoided a strictly originalist approach. It continues to affirm that the Due Process Clause protects a set of fundamental substantive rights that are grounded in tradition. Chapter 8 explores the conservative justices' reasons for adopting that position and its implications for issues likely to arise in the future.

Chapter 9 discusses the Supreme Court's decisions defining and circumscribing the powers of Congress, which can permissibly legislate only in domains in which the Constitution authorizes it to do so. The Court's rulings on the scope of Congress's authority present a case study in constitutional change. For a long span of constitutional time extending into the Great Depression and the New Deal, the Court struggled, often uncertainly, to cabin Congress's regulatory and taxing and spending powers under Article I. But the Court, seemingly in response to political pressures, substantially abandoned that effort beginning in 1937. Over ensuing decades, the justices upheld assertions of congressional power to prescribe minimum wages and maximum hours, protect the environment, regulate all activities with substantial effects on the national economy, pass national civil rights laws, and create largesse-dispensing programs that the Founding generation could never have imagined. At least since the 1980s, however, a substantial strain of conservative thinking has maintained that the modern, swollen, national government could find no legitimate justification in the original Constitution, which contemplated a Congress of limited powers only, and that a constitutional counterrevolution is called for. Chapter 9 addresses the Supreme Court's so-far halting efforts to implement such a counterrevolution and identifies the considerations

[21] 198 U.S. 45 (1905).

that have given pause even to conservative justices. It also describes the Court's more aggressive efforts to limit congressional power under the Thirteenth, Fourteenth, and Fifteenth Amendments, all of which include express authorizations of Congress to "enforce" their substantive guarantees with "appropriate legislation."

Chapter 10 addresses the Supreme Court's recent, partly paradoxical, lines of cases involving issues of presidential power. On the one hand, the Court has held that Article II of the Constitution and the Constitution's overall structure endow the president with sweeping authorities and prerogatives. These include powers to control the conduct of a "unitary" executive branch by removing officials who refuse to do the president's bidding and, separately, a prerogative-like "immunity" from prosecution for many unlawful official acts, including ones that would constitute serious crimes if committed by anyone else. On the other hand, the Court has sought to limit the powers of agencies within the executive branch, which the president heads, on the theory that post–New Deal agency officials were allowed to assume functions that the Constitution reserves either to Congress or to the courts. Nowhere, Chapter 10 explains, has the Court's conservative supermajority pursued, or does it seem more likely to continue to pursue, a doctrinally revisionist agenda with more sweeping practical consequences.

Chapter 11 takes a step back to consider the nature of constitutional "law" in the Supreme Court. If constitutional law is as amenable to Court-driven change, revolution, and counterrevolution as previous chapters suggest, in what sense is it law at all? Chapter 11 advances an answer to that question that many find unsettling. The Constitution is our nation's supreme law not because it says it is, nor just because the Founding generation adopted it, but because various relevant constituencies in the United States today accept it as the supreme law. The Constitution would cease to be law here, just as the dictates of the British Parliament did in the past, if enough people began to reject its claims to authority. To express one of the central claims of Chapter 11 in a single affirmative sentence, the foundations of law, and especially constitutional law, lie in acceptance. Moreover, because the Constitution does not include all necessary rules for its own interpretation, many of the most important norms that mark the limits of legally permissible constitutional interpretation by the Supreme Court must depend for their lawful status, just as the Constitution

itself does, on patterns of acceptance by justices and judges and the acquiescence of a broader public. In other words, some of the most important legal norms that define and limit the scope of legally permissible constitutional interpretation by the Supreme Court, including the doctrine of stare decisis, are rooted in contemporary understandings of what are acceptable modes of constitutional interpretation. Those understandings are enforceable through various formal and informal mechanisms that could include defiance of Court decisions that were sufficiently widely perceived as beyond the justices' lawful authority to render. As even this abbreviated summary should suffice to convey, the legal norms that apply to constitutional interpretation by the Supreme Court bear few similarities to the kinds of binding law – ranging from stop signs to the tax code – that most of us encounter in our daily lives. In thinking about "law" in the Supreme Court, we need to recognize the distinctive nature of constitutional law and the capaciousness of the interpretive authority that the Court lawfully possesses.

Chapter 11 also ventures tentative normative assessments of the two principal stories of constitutional change – one focused on the long-term, the other on the current era – that earlier chapters tell. It offers a generally positive appraisal of the long-term narrative, which highlights adaptive judicial interpretations of an old Constitution to changing conditions across historical time. By contrast, Chapter 11 presents a more troubled assessment of the current period in the history of the Court and the country.