# REGIME POLITICS, JURISPRUDENTIAL REGIMES, AND UNENUMERATED RIGHTS

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For more than four decades the topic of unenumerated rights has fueled extensive normative and prescriptive commentary, usually about proper methods of textual interpretation, the proper role of an unelected judiciary in a representative political system, and the proper understanding of fundamental rights and liberties. However, constitutionalism in the United States is not merely a normative or theoretical practice. It is also a distinctive form of politics. Thus, if we want to understand the past of so-called unenumerated rights jurisprudence,[1] and if we want to speculate about its future, then it is essential that we pay some attention to the ways in which our evolving political order has influenced how courts have interpreted such rights.

To explore this influence I want to introduce two analytic frameworks that are being used by empirically-minded constitutional analysts within law and political science. The first is the idea of "regime politics" and the second is the idea of a "jurisprudential regime."

"Regime politics" refers to the various ways in which governing coalitions organize their power and advance their political agenda within a system of interrelated institutions.[2] Within the empirical study of law and courts the point of departure for this research tradi-

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[1] While I do not intend to offer a normative-jurisprudential argument, I should probably make it clear that I do not consider the idea of unenumerated rights to raise any special theoretical questions of judicial legitimacy or textual integrity. It is easy, even simplistic, to give all so-called unenumerated rights a textual hook, and once this is done then arguments about particular decisions raise the same mundane questions of appropriate textual inference as are raised by any interesting case of constitutional interpretation.

[2] At the risk of contributing to "lexicon overload" I should note that the idea of "regime politics" closely resembles Mark Tushnet's conception of a "constitutional order," which he defines as "a reasonably stable set of institutions through which a nation's fundamental decisions are made over a sustained period, and the principles that guide those decisions." MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 1 (2003). There may be parochial disciplinary reasons why I am not following his lead, but I would also add that: (a) the "regime politics" approach to constitutional decision-making is an established research tradition within political science in a way that a "constitutional orders" approach is not, *see infra* note 9; and (b) Tushnet's concept of "constitutional orders" blends some political and jurisprudential elements that I would like to keep analytically distinct.

tion is Robert Dahl's classic discussion of the Supreme Court as a partner in the national governing coalition and Martin Shapiro's treatment of national courts as an extension of the authority of central regimes.[3] Because courts, like executive branch agencies, have policy-making authority, members of the governing coalition have an interest in influencing what might be called their decision-making bias, or the general political and ideological predispositions that they bring to their institutional responsibilities. In the United States this is mostly accomplished within a self-consciously partisan appointment process—that is, a process controlled by party leaders in the White House and Senate who supplement their concerns about the professional qualifications of judges with explicitly political and/or ideological criteria.

The influence of regime politics ensures that federal judges, especially at the top of the judicial hierarchy, will have concerns and preferences that are usually in sync with other national power holders. Of course there are circumstances that complicate this picture, including periods where partisan realignments cause a rapid switch in the character of the prevailing governing coalition (and thus a potential conflict with an inherited judiciary, as was the case immediately after 1932) and where extended periods of divided government prevent a clear programmatic restructuring of the judiciary—in which case the federal judiciary tends to reflect the same fissures and divisions that characterize national politics more generally (as with our recent political history). Most of the time, though, it is natural for us to think in terms of the normal case, which is why we quickly understand each other when we talk about the Federalist Court, the Jacksonian Court, the laissez-faire Court, the New Deal Court, and so on.

This starting point has been used by scholars to study many different features of judicial politics, including the relationship between judicial empowerment and party competition,[4] the politics of partisan

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[3] Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 279–95 (1957) ("The Supreme Court is . . . an essential part of the political leadership."); Martin Shapiro, *Political Jurisprudence*, 52 KY. L.J. 294, 296 (1963–64) ("The core of political jurisprudence is a vision of courts as political agencies and judges as political actors."); *see also* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 22–24 (1981) (noting that throughout history, "[c]onquerors [have] used courts as one of their many instruments for holding and controlling . . . territories"); MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE 331 (1964) (noting that the Justices of the Supreme Court often "act like other governmental decision-makers" and are "involved in the routine processes of government").

[4] *See, e.g.*, TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 248–49 (2003) (arguing that if one party is dominant in the constitutional drafting process, courts likely will have more limited power than if two or three parties of similar strength were working together); John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 382 (1999) (noting that the diversity of

entrenchment into the judiciary,[5] the use of courts to overcome political entrenchment in competing institutions,[6] the utility for elected officials of delegating politically-sensitive questions to the judiciary,[7] the tendency of national courts to impose national norms on "regional outliers,"[8] and the role of courts in refereeing boundaries in federal systems.[9] In the field of constitutional history this sort of

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political parties helps preserve judicial independence); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 894 (1975) (arguing that courts "enforce the 'deals' made by effective interest groups with earlier legislatures" rather than "moral law or ideals of neutrality, justice, or fairness"); Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 INT'L J. CONST. L. 446, 474 (2003) (arguing that "judiciaries in unitary political systems" are "less likely to develop and maintain the capacity for strongly independent constitutional review").

[5] *See* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 1, 169–223 (2004) (noting that constitutional reform in many countries has shifted significant amounts of power from representative bodies to judiciaries, and that protects politicians from having to make politically unpopular decisions); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 521 (2002) (providing a case study on how the post-Civil War Republican Party was able to "transform[] the judiciary into a programmatic stronghold"); Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 140 (Ronald Kahn & Ken I. Kersch eds., 2006) [hereinafter *Party Politics*] (examining "the use of the appointment power to fundamentally alter the decision-making bias of the federal judiciary").

[6] *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 497–98 (1997) (developing the "anti-entrenchment" theory of judicial review). Legislatures may "act in antimajoritarian ways" because: (1) representatives want to "perpetuate their hold on office;" and (2) "a temporary political majority . . . may seek to extend its hold on power into the future, when its members may no longer enjoy majority status." In these contexts, judicial review could be more majoritarian than legislative decision-making. *Id.* at 498.

[7] *See* GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY 252–53 (2003) (noting in summary that judges sometimes resolve interpretive controversies because Congress has not made a policy determination); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 41–45 (1993) ("Courts offer . . . opportunities for pushing unwanted political fights off the political agenda.").

[8] *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 489–92 (2000) (listing several areas where national standards were forced on regional outliers, such as race, obscenity, and criminal procedure); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6 (1996) (arguing that the countermajoritarian Supreme Court is a myth, that the Court only "[i]nfrequently . . . resolves a genuinely divisive issue," and often "takes a strong national consensus and imposes it on relatively isolated outliers").

[9] *See* Martin Shapiro, *The Success of Judicial Review*, *in* CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE 193, 195 (Sally J. Kenney et al. eds., 1999) (noting that under the federalism-English hypothesis, federalism requires "some institution to police its complex constitutional boundary arrangements"). For a recent discussion of the federalism, entrenchment, and delegation issues, see Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583 (2005). For a more general discussion of this literature, see Cornell Clayton and David A. May, *A Political Regimes Approach to the Analysis of Legal Decisions*, 32 POLITY 233 (1999), and Howard Gillman, Elements of a New "Regime Politics" Approach to the Study of Judicial Politics, Paper Presented at the Annual Meeting of the American Political Science Association (Sept. 2–5, 2004), *available at* http://64.112.226.69/one/apsa/apsa04/

framework has been used in recent work to explain the Supreme Court's review of federal legislation during the *Lochner* era,[10] the Supreme Court's civil rights decision-making,[11] the transformation of civil liberties during the expansion of the regulatory state,[12] the relationship between the "mature" Warren Court and the Great Society,[13] the Rehnquist Court's federalism decision-making,[14] and even the general dynamics of constitutional change.[15]

Does this concept of "regime politics" shed any light on the character of unenumerated rights in American constitutional development? At first glance it appears so, although (as we will see) the question is complicated by ongoing disagreements about what counts as an unenumerated right. For those who would include Justice Chase's reference in *Calder v. Bull* to certain "vital principles in our free Republican governments" that were not "expressly restrained by the Constitution," such as an act "that takes property from A. and gives it to B.," it is easy enough to associate this statement with the interest of the early Federalist Party in establishing strong judicial protections for property rights.[16] The same conclusion applies to John Marshall's allusion to unwritten constitutional principles as an alternative basis for his decision in *Fletcher v. Peck*.[17] Those who believe that Chief Justice Taney's due process discussion in *Dred Scott v. Sanford* amounted to an unenumerated protection for traveling slave owners would undoubtedly attribute to him a strong motivation to undermine the agenda of the emerging Republican Party so as to protect the Southern slaveocracy.[18] Justice Field's (dissenting) discussion of "the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons" can be attributed to

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[10] *See* Keith E. Whittington, *Congress Before the* Lochner *Court*, 85 B.U. L. REV. 821, 823 (2005) (noting that the *Lochner* Court "rarely, if ever, pitted [itself] against a clear majority of elected officials," even when it invalidated federal legislation).

[11] *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 446 (2004) (explaining that "all judicial decisions are products of the intersection between the legal and the political axes").

[12] *See* KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW 359–61 (2004) (noting that the regulatory state spawned new constitutional arguments).

[13] POWE, *supra* note 8, at 445–62.

[14] J. Mitchell Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSP. POL. 233 *passim* (2004).

[15] Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 *passim* (2001).

[16] Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (emphasis removed).

[17] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810).

[18] Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 450 (1856).

his commitment to "free labor" principles, and the Court's late-nineteenth century "liberty of contract" doctrines can be seen as reflecting the anti-regulatory sensibilities of the conservative wing of the Republican Party.[19]

It is more common to think of the jurisprudence of unenumerated rights as a twentieth-century phenomenon, starting especially with the Court's decisions in *Meyer v. Nebraska* and *Pierce v. Society of Sisters*.[20] Here we get a litany of various rights and liberties recognized by the Justices—not just the freedom to teach a foreign language or send one's child to private school, but more generally (as discussed in *Meyer*):

> [T]he right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[21]

On the one hand there is nothing in the substance of these particular freedoms that we would associate with the specific policy agenda of the 1920s Harding/Coolidge Republican Party; party platforms in 1920 and 1924 did not specifically talk about marrying, teaching foreign languages, or attending private schools. Then again, a central feature of the national governing coalition in the 1920s was a reaction to the expansion of government authority during World War I.[22] That vision was reflected in the more libertarian features of the Taft Court's jurisprudence, especially in what Randy Barnett would call the "presumption of liberty" in cases such as *Meyer* and *Pierce*.[23] The conservative Supreme Court performed its role in

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[19] See Field's dissent in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 97, 110 (1872), and the Court's opinion in *Allgeyer v. Louisiana*, 165 U.S. 578, 589–91 (1897), for the idea that liberty includes the right to contract free of government interference. In this paragraph I talk about "those who believe" that these are examples of unenumerated rights. For a different way of characterizing eighteenth- and nineteenth-century due process jurisprudence (discussed later in this article), focusing on an aversion to "class politics" and the "public purpose" requirement, see HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 8–11 (1993) [hereinafter THE CONSTITUTION BESIEGED], and Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 640–48 (1994) [hereinafter *Preferred Freedoms*].

[20] Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[21] *Meyer*, 262 U.S. at 399.

[22] *See* Robert C. Post, Lecture, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1491 (1998) ("It was . . . inevitable that . . . 1920s constitutional adjudication would become a central site for the national struggle to contain and assimilate the powerful ideological implications of the War.").

[23] RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 259–69 (2004) (explaining that the presumption of liberty places "the burden on the government to establish the necessity and propriety of any infringement on individual freedom" rather

this regime by acting as the front-line supervisor of state regulation (a function that national courts perform very well and national legislatures perform poorly), thus ensuring that the governing ethic of national elites was imposed on regional centers of power (such as Nebraska legislators in an unreasonable huff about teaching German to American kids). Of course, it should be quickly added that 1920s "libertarianism" was dramatically bounded by traditional concerns about public morality and the need for a disciplined working class; hence their (nonparadoxical) commitment to legislation that promoted conservative understandings of public safety and morality and that continued progressive-era restrictions involving speech, prohibition, and forced sterilization of "imbeciles."[24]

More modern and archetypical formulations of unenumerated rights also trace the developing preferences of national governing elites. In 1927 a near-unanimous Court had no trouble concluding that a state could sterilize Carrie Buck; however, by 1942 national elites were at war with genocidal totalitarian regimes that embraced theories of eugenics and had practiced systematic sterilization against minority populations, and not surprisingly a unanimous Supreme Court decided that the fundamental right to procreate was an unenumerated trump against a state's asserted interest in controlling "habitual criminal[s]."[25] The right of association was recognized in 1958 just as the federal government was committing itself to confront southern resistance to integration, and was used to protect the NAACP against potentially murderous harassment by Alabama authorities.[26] The right of married couples to a zone of privacy when deciding whether to use contraceptives was recognized—with no significant public outcry—only after the sexual revolution had transformed attitudes about the relationship between sexual pleasure and procreation, and only when such restrictions had been abolished in all but two states with large Roman Catholic populations.[27] The extension of the right to non-married individuals occurred seven years later and was declared by a near-unanimous bipartisan Court reflecting a national consensus about the value of birth control.[28] The right to marry, or not to marry, was recognized around this same time, capturing 1960s attitudes about personal freedom and a recently

than requiring an individual to show that "the exercise of a particular liberty is a 'fundamental right'"). Professor Barnett argues that *Meyer* and *Pierce* would both be wrongly decided under the latter approach. *Id.* at 253–54.

[24] Buck v. Bell, 274 U.S. 200, 207 (1927).

[25] Skinner v. Oklahoma, 316 U.S. 535, 536 (1942).

[26] NAACP v. Alabama, 357 U.S. 449 (1958). The decision was handed down just a few months before Eisenhower sent federal troops to Little Rock.

[27] Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

[28] Eisenstadt v. Baird, 405 U.S. 438 (1972). Only Chief Justice Burger dissented in *Eisenstadt.*

achieved civil rights consensus about the bigotry of antimiscegenation laws.[29] The right to travel was first recognized in 1969 in a case that protected a piece of the Great Society from state efforts to restrict welfare eligibility.[30] The right to the presumption of innocence, and proof beyond a reasonable doubt in a criminal proceeding, came after national elites took an interest in the quality of state criminal justice systems.[31] Later on the freedom of competent patients to refuse life-preserving medical treatment also reflected a national consensus; conversely, the Court's refusal some years later to recognize a right to assisted suicide occurred in the absence of such a consensus.[32]

From the vantage point of a regime politics perspective, the idea of unenumerated rights is one way in which national governing elites express their evolving and contested constitutional visions. When conservatives controlled national institutions it was easy enough for them to identify general constitutional principles that promoted conservative values. As national officials became more committed to civil rights and personal liberties, constitutional principles were articulated that gave expression to more liberal views. This is not to say that these constitutional principles amounted to mere conventional politics. After all, our conventional political commitments often reflect our attachment to cherished values, and to that extent it may be just as accurate to say that our constitutional views influence our political views. Still, however we conceptualize the relationship, it should be clear (and uncontroversial to note) that the nature of unenumerated rights in constitutional law is largely determined by the interests and ideologies of the prevailing national governing coalition.

Then again, it is not quite as simple as that. Appellate court decision-making is (incontrovertibly) influenced by a judge's ideology and political identity, but this does not necessarily mean that judges are free-floating policy makers, or that constitutional law is merely a reflection of the preferences of governing elites. Like all power holders, judges must reconcile their world views with the norms, procedures, and missions of the institutions with which they are affiliated.[33]

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[29] Loving v. Virginia, 388 U.S. 1 (1967). The *Loving* decision was handed down the same year that the film GUESS WHO'S COMING TO DINNER (Columbia Pictures 1967) was released (later nominated for 10 Academy Awards).

[30] Shapiro v. Thompson, 394 U.S. 618 (1969).

[31] *In re* Winship, 397 U.S. 358 (1970).

[32] *Compare* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990), *with* Washington v. Glucksburg, 521 U.S. 702 (1997).

[33] This is one of the central tenets of a research tradition within political science known as "the new institutionalism." For background on this tradition, see SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 5–7 (Cornell W. Clayton & Howard Gillman eds., 1999); THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS 2–11 (Howard Gillman & Cornell Clayton eds., 1999); *Party Politics*, *supra* note 5, at 140–41,

The law professorate may, at times, overstate the constraints on ideology imposed by these institutional norms and processes, but political analysts sometimes make the opposite mistake by underestimating a judge's obligation to organize her or his decision making into a set of relatively stable rules, concepts, doctrines—in short, into a jurisprudence that "structures the way in which [judges] evaluate key elements of cases in arriving at decisions in a particular legal area."[34] This obligation is not only central to a rule-of-law culture; it is also an essential step if appellate courts are going to instruct other members of the judicial hierarchy on how certain kinds of cases should be processed—which is, after all, part of their distinctive institutional responsibility in the organization of a political regime.

This brings me to the second concept that I want to introduce into the analysis of unenumerated rights, and that is Richards and Kritzer's idea of a "jurisprudential regime."[35] As I use the term here, a jurisprudential regime refers to the way in which judges translate their political ideologies and identities into a preferred legal analysis. This legal analysis is made up of a set of rules, concepts, doctrines, precedents, and tests that collectively establish a standard operating procedure for the treatment of certain kinds of claims. These jurisprudential regimes are related to regime politics because they are designed to influence decision making in a favored direction; consequently, they attract political/legal adherents and opponents. When judges from a new governing coalition view the inherited tests and approaches as inconsistent with new values and priorities they dispose of the old and create new ones; e.g., the "bad tendency" test for free speech is replaced by a more protective standard,[36] minimal scrutiny for gender discrimination is replaced by intermediate scrutiny,[37] implicit deference to Congress's authority to regulate commerce is replaced by the considerations announced in *Lopez*[38] and *Morrison*,[39] and so on. Jurisprudential regimes are also related to regime politics be-

158–59; and Rogers M. Smith, *Political Jurisprudence, the "New Institutionalism," and the Future of Public Law*, 82 AM. POL. SCI. REV. 89 (1988).

[34] Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 308 (2002).

[35] *Id.*

[36] Herndon v. Lowry, 301 U.S. 242, 256–59 (1937) (rejecting a "dangerous tendency" standard); Thornhill v. Alabama, 310 U.S. 88, 104–05 (1940) (embracing a "clear and present danger" test).

[37] Craig v. Boren, 429 U.S. 190, 199–204, 210 (1976) (concluding that "the gender-based differential . . . constitutes a denial of the equal protection of the laws").

[38] United States v. Lopez, 514 U.S. 549, 551 (1995) (determining that enactment of the Gun-Free School Zones Act of 1990 "exceed[ed] the authority of Congress").

[39] United States v. Morrison, 529 U.S. 598, 601–02, 619 (2000) (holding that Congress does not have power under the Commerce Clause to enact legislation "provid[ing] a federal civil remedy for the victims of gender-motivated violence").

cause party leaders in the White House and the Senate often evaluate the appropriateness of candidates for judgeships based on whether they believe a judge will try to fortify (or undermine) certain favored (or despised) precedents that represent these regimes.[40]

I make this point because, in my judgment, the debate about unenumerated rights arises out of some distinctive features of the post-New Deal jurisprudential regime. As I have argued elsewhere,[41] before the New Deal the basic jurisprudential framework for analyzing government interference with rights and liberties focused on the question of whether the legislature was operating within the proper sphere of its limited and delegated powers, rather than whether the legislature was interfering with certain fundamental rights. The federal legislature's powers were enumerated in Article I and required a jurisprudence that focused on the boundaries of that enumeration. For state legislatures the assumption was that their general "police powers" could only be used if the regulation actually promoted public health, safety, or morality (as the Justices understood those concepts) of the community as a whole, and were not merely arbitrary (that is, inefficacious) or partial (class-based) regulations. This required a jurisprudence that focused on the *character of the legislation* rather than the *importance of the restricted liberty*; that is, did the regulation promote the public welfare? When "yes" then the regulation was

[40] My discussion of "regime politics" and "jurisprudential regimes" might remind some of the debate between constitutional historians who take an "internal" review of constitutional decision-making and those who take an "external" review. *Compare* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 5 (1998) (rejecting the "externalist" approach in support of the "internalist" approach), *with* Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165, 2165 (1999) (characterizing herself as an "externalist" historian), *and* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000) (also taking an "externalist" approach). However, as currently framed, this "internal v. external" debate is unnecessarily dichotomous. No one should doubt the influence of external political considerations on the broad contours of constitutional decision-making; at the same time, people associated with particular institutions often develop distinctive institutional points of view. This means, for example, that one can simultaneously appreciate the nuances of police powers jurisprudence at the turn of the last century, as well as the sophisticated professional views of the Justices, while at the same time acknowledging that those particular Justices were empowered because conservatives controlled the appointment process in the latter part of the nineteenth century. Compare my account of the jurisprudence in THE CONSTITUTION BESIEGED, *supra* note 19, with my "regime politics" discussion of the appointment process in *Party Politics*, *supra* note 5. One of the goals of new institutionalist analysis is to provide a framework within which we can account for both kinds of influence. *See* Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 LAW & SOC. INQUIRY 89, 92 (2005) (seeking to "supplement the emerging new institutionalist literature" by "harmoniz[ing] the internal and external views of Supreme Court decision making").

[41] *See Preferred Freedoms*, *supra* note 19, at 623–25.

upheld despite its effect on liberty;[42] when "no" the regulation was struck.[43]

The results in *Meyer* and *Pierce*, for example, did not turn on whether a vital "liberty" was under assault. The *Meyer* Court had listed "the right of the individual to contract" as falling within the word "liberty" of the Fourteenth Amendment,[44] but nevertheless recognized that this freedom could be regulated by a legitimate exercise of the police powers. Rather, the decisions turned on the question of whether the legislation at issue actually promoted community health, safety, or morality. With respect to the law prohibiting the teaching of modern foreign languages to elementary school children the Justices concluded that "[m]ere knowledge of the German language cannot reasonably be regarded as harmful" and thus "[w]e are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State."[45] Precisely the same analysis was applied to the law in *Pierce*, with McReynolds concluding that running a private school is "a kind of undertaking not inherently harmful, but long regarded as useful and meritorious"; thus, the legislation bears "no reasonable relation to some purpose within the competency of the State."[46]

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[42] *E.g.*, Muller v. Oregon, 208 U.S. 412, 421 (1908) (the "abundant testimony of the medical fraternity" supported the legislature's conclusion that "the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race"); Holden v. Hardy, 169 U.S. 366, 395 (1898) ("[I]f it be within the power of a legislature to adopt . . . means for the protection of the lives of its citizens, it is difficult to see why precautions may not also be adopted for the protection of their health and morals."); Munn v. Illinois, 94 U.S. 113, 125 (1876) ("Under these [police] powers the government regulates the conduct of its citizens . . . and the manner in which each shall use his own property, when such regulation becomes necessary for the public good."); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 110 (1872) (holding that "[t]he State may prescribe such regulations for every pursuit and calling of life as will promote the public health").

[43] *E.g.*, Lochner v. New York, 198 U.S. 45, 57, 64 (1905) ("[W]e think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. . . . It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives.").

[44] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[45] *Id.* at 400, 403.

[46] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534, 535 (1925). Note also the Court's World War I free speech cases, where the majority consistently framed the issue not as whether individuals had a right to express themselves, but whether it was within the powers of Congress to prevent draft obstruction, and whether it was reasonable for a jury to conclude that a particular speech act might facilitate the obstruction that Congress was empowered to prevent. *See generally* Debs v. United States, 249 U.S. 211, 215–15 (1919) (noting evidence that the speech's "natural and intended effect would be to obstruct recruiting"); Frohwerk v. United States, 249 U.S. 204, 206 (1919) ("[A] person may be convicted of a conspiracy to obstruct recruiting by words of persuasion."); Schenck v. United States, 249 U.S. 47, 51–53 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

One of the central characteristics of the transition from pre- to post-New Deal jurisprudence was the Court's abandonment of this "jurisprudence of powers" in favor of a new "jurisprudence of rights." As long as the jurisprudential regime focused on the nature and scope of the government's limited and delegated powers there was no need for elaborate arguments about the specification of especially important freedoms. However, the Justices' shift away from close scrutiny of delegated powers and legitimate public purposes created the conditions for the establishment of a new model for civil liberties protections, one that identified special pockets of freedom that should be insulated from the expanded powers of the modern New Deal state. In essence, our jurisprudential regime shifted from a model of limited powers and residual freedoms to a model of general powers and "preferred freedoms."[47]

Around the time of the New Deal not every Justice embraced this new vision. Some, like Frankfurter, preferred Holmes's orientation of deferring to the power of the modern state and argued against special judicial protections for a discrete set of favored rights and liberties. Justices who associated themselves with this orientation established an ethos of "judicial restraint" as one model for proper judicial behavior in the post-New Deal era. Other Justices followed Brandeis's more civil libertarian lead by attempting to identify those freedoms that deserved special protection from all exercises of authority that were not truly "compelling." This sensibility found expression in Justice Stone's *Carolene Products* opinion, where he mentioned rights that might deserve "more exacting judicial scrutiny,"[48] and eventually in his advocacy for a jurisprudence of "preferred freedoms."[49]

Since the New Deal, the basic dynamics of regime politics have determined which of these jurisprudential regimes would command a majority on the Supreme Court. The formative years of the preferred freedoms rubric came to an end in 1949 when Murphy and Rutledge left the Court and were replaced by Clark and Minton, who were self-consciously selected by Truman because they were not civil libertari-

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The contours of this jurisprudence, and the changing nature of the Justices' understandings of the "public purpose," are elaborated in THE CONSTITUTION BESIEGED, *supra* note 19, *passim*, and *Preferred Freedoms*, *supra* note 19, *passim*. For an alternative reading that associates *Meyers* and *Pierce* as the beginnings of modern "fundamental rights" jurisprudence, see David E. Bernstein, Lochner *Era Revisionism Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 58–60 (2003). For a more elaborate defense of my reading of the jurisprudence against Bernstein's view see Barry Cushman, *Some Varieties and Vicissitudes of* Lochner*ism*, 85 B.U. L. REV. 881 *passim* (2005).

[47] *See also* KERSCH, *supra* note 12.

[48] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[49] Jones v. Opelika, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting); Thomas v. Collins, 323 U.S. 516, 530 (1945). Justice Frankfurter launched an attack on the phrase "preferred freedoms" in a concurrence in *Kovacs v. Cooper*, 336 U.S. 77, 90 (1949).

ans. In the early 1960s Whittaker and Frankfurter were off the Court and by the middle of the decade new liberal Democratic Justices joined forces with moderate Republican Justices to establish a working majority in favor of a jurisprudential regime that acknowledges a judicial role in the protection of fundamental rights or preferred freedoms—including a small collection of very popular "unenumerated" ones, such as the freedom to marry, procreate, and use contraceptives.

And this brings us to the modern debate about the legitimacy of unenumerated rights. From a regime politics perspective it is noteworthy that this jurisprudential regime—wherein Justices declare that the Constitution limits the government's power to control the most personal and intimate decisions of a person's life—has survived a very long succession of Republican appointees. In some respects this reflects the fact that Republican presidents have frequently had to face a Democratic Senate, which (formally anyway) was in a position to prevent the appointment of justices (such as Robert Bork) who expressed hostility to the idea of judicial protection for fundamental freedoms. Yet it also reflects the general and ongoing influence of civil libertarian principles among Democrats and moderate Republicans, and the fact that, at this time in our constitutional history, those sentiments are embodied in this post-New Deal jurisprudential regime. After all, this tradition originally drew strength from such Republican appointees as Stone, Warren, Brennan, Stewart, and Harlan, whose dissent in *Poe v. Ullman* (four years before *Griswold*) offered an impassioned plea in favor of judicial protection against "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life."[50]

Whatever the state of theoretical arguments among legal scholars, it is clear that the basic rubric of unenumerated rights is sufficiently popular among the public and governing elites that it will remain an ongoing feature of the Court's jurisprudence. The best evidence for this comes, not only in the number of post-Warren Republican appointees who have embraced and even expanded this tradition, but most recently in the confirmation hearings of John Roberts and Samuel Alito. In each case, jurists with impeccable conservative credentials felt that it was necessary to counteract the accusation that they were "out of the mainstream" of modern constitutional thought. In the words of Jack Balkin, this led them to "recite a catechism of belief" consisting of the following:

> The nominee must state that he or she (1) believes that there is a right to privacy[;] (2) that *Griswold* correctly protected this right of privacy at least

[50] Poe v. Ullman, 367 U.S. 497, 539 (1961).

> as to the right of married persons to purchase and use contraceptives; (3) that *Eisenstadt*—which extends *Griswold* to single persons—is correctly decided as to its result; (4) that *Brown v. Board of Education* was correctly decided[;] (5) that *Plessy v. Ferguson* was incorrectly decided[;] and (6) that the one person one vote principle in *Reynolds v. Sims* is correct.[51]

It is at moments like these that the foreseeable future of jurisprudential regimes is determined. Of course, it is also foreseeable that there will be ongoing disagreements about what unenumerated rights should be treated as matters "involving the most intimate and personal choices a person may make in a lifetime."[52] No one would be surprised if abortion rights received less protection from "burdensome" regulation, or were even taken off the list entirely. Liberals and conservatives will continue to propose new candidates for important unenumerated rights. Given the political leanings of the (politically constructed) federal judiciary, we will likely see some "ideological drift" in this tradition.[53] Moreover, if libertarian scholars get their way and new Court appointees put more teeth into the *Lopez-Morrison* jurisprudential regime, we may see a return of some features of the pre-New Deal tradition of finding some protection of liberty (e.g., gun ownership, the use of medicinal marijuana) via a more restrictive jurisprudence of delegated powers.[54] But if this occurs then this revitalized tradition for the protection of liberty will lie alongside the tradition of unenumerated rights, rather than displace it. The future of the doctrine of unenumerated rights will unfold like the past, in concert with the dynamics of regime politics as they influence the construction of jurisprudential regimes. The rubric will be retained. The old rights that stay on the books, and the new ones that find protection, will be those that have solid support in public opinion or that reflect the sentiments of that wing of the governing coalition that controls the Supreme Court.

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[51] Posting of Jack Balkin to Balkinization, http://balkin.blogspot.com/2006/01/constitutional-catechism.html (Jan. 11, 2006, 18:11).

[52] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (joint opinion).

[53] *See* J.M. Balkin, *Ideological Drift*, *in* ACTION AND AGENCY: FOURTH ROUND TABLE ON LAW AND SEMIOTICS 13 (Roberta Kevelson ed., 1990) (defining "ideological drift" as "the changing political meaning of positions that people take concerning fundamental rights and interests"); J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 870 (1993) (arguing that "theories of jurisprudence, and theories of constitutional interpretation" change over time as they are applied "in new contexts and situations").

[54] This was Randy Barnett's hope when he unsuccessfully argued *Gonzales v. Raich*, 125 S. Ct. 2195 (2005). But compare Circuit Judge Samuel Alito's dissenting opinion in *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996) (Alito, J., dissenting).