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ESSAYS

CONSTITUTIONAL REVOLUTIONS: A NEW LOOK AT LOWER APPELLATE REVIEW IN AMERICAN CONSTITUTIONALISM

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I. INTRODUCTION

Despite a culture that embraces judicial restraint as an article of faith in American constitutionalism, the United States Supreme Court has been a prime mover in effecting constitutional change throughout American history. By the skillful use of judicial review, the Court has been the architect of "constitutional revolutions," which continue to shape and reshape the relationship between American government and its citizenry.[1] Given the Supreme Court's preeminence in

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1. Robert Justin Lipkin, *Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism* (Duke U. Press 2000).

revolutionary adjudication,[2] the question naturally arises as to what role lower appellate courts should play in the American constitutional scheme. This essay presents a distinctly jurisprudential response to this question, one that concentrates on the role of the lower appellate courts in the transformation and growth of constitutional law.[3] Jurisprudential commitments will then determine, in part, the function of lower appellate courts and thus should be spelled out carefully.[4] Because my conception of constitutional law is committed to a particular theory of constitutional change—namely the theory of constitutional revolutions—my jurisprudential approach to lower appellate review will be explicated in terms of this theory.[5]

My overarching goal is to explain how lower appellate review operates ideally in a judicial regime committed to democracy and judicial review. More specifically, I focus on explaining lower appellate review in the American constitutional democracy.[6] This explanation functions as a normative

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2. Of course, both conservative and liberal jurists alike resist this description of the Supreme Court as engaged in revolutionary adjudication. *See generally* Bruce Ackerman, *We the People: Foundations* vol. 1 (Belknap Press 1991); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (Macmillan 1990); Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard U. Press 1996); Ronald Dworkin, *Law's Empire* (Belknap Press 1986); Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton U. Press 1997); *but see* Lipkin, *supra* n. 1, chs. 1-2.

3. This jurisprudential question queries whether lower appellate review is positivist, naturalist, coherentist, or pragmatist, or some integrated conception of these different theories. One's general jurisprudential commitments will affect how one answers this question. Other types of responses are, of course, possible and necessary. *See* Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. Rev. 67, 77-87. In general, discussions of the role of appellate courts may be legal, political, administrative, or some combination of these functions. *See generally* Daniel J. Meador, *The Federal Judiciary and Its Future Administration*, 65 Va. L. Rev. 1031 (1979); Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 376 (1982).

4. One result of this explication will be to describe and legitimize the important contribution lower appellate judges make in American constitutionalism.

5. *See generally* Lipkin, *supra* n. 1.

6. My explanation is only a partial explanation of lower appellate review. My interest centers on lower appellate review in constitutional cases, not cases of statutory construction.

interpretation of American constitutional law but one whose origins lie in actual judicial practice.[7]

Judicial review is a primary vehicle for bringing about constitutional change.[8] Thus, an interpretation of judicial review requires an interpretation of constitutional change. Both interpretations presuppose a certain conception of the role of the courts in a constitutional democracy. In my view, functionalist conceptions of the role of the judiciary are far more plausible than formalist conceptions.[9] Under a functionalist conception, the role of the judiciary is best evaluated by how well it contributes to the purposes of the governmental system under examination, in this case a democratic government.[10] According to this pragmatic approach, judicial review arguably has contributed toward rendering American democracy deliberative, reflective, and progressive.[11]

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7. A normative interpretation of judicial practice must provide an adequate description and explanation of that practice. Without such a description and explanation, a proposed normative interpretation is uninterestingly utopian. However, I do not mean to denigrate utopian interpretations of constitutional law, only those that have no currency in actual practice. For my views on utopianism, see Robert Justin Lipkin, *Liberalism, Radicalism and Utopian Ideals*, 19 Cap. U. L. Rev. 1033 (1990).

8. Yet, constitutional change comes about also through non-judicial activities. *See* Ackerman, *supra* n. 2; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988).

9. Functionalist conceptions attend to history, context, consequences, and constitutional efficacy, while formalist conceptions tend to emphasize sharp distinctions and exhaustive rules.

10. Elsewhere I present a framework for examining different conceptions of democracy and their relationship to judicial review. See Lipkin, *supra* n. 1, for an initial attempt to specify the framework for discussing constitutional democracy. *See also* Robert Justin Lipkin, *The New Majoritarians*, 69 U. Cin. L. Rev. 107 (2001) [hereinafter Lipkin, *New Majoritarians*].

11. This contention is now under attack from progressives who want to restrict the scope of judicial review. *See generally* Ackerman, *supra* n. 2; Richard Parker, *Here the People Rule: A Constitutional Populist Manifesto* (Harvard U. Press 1994); Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard U. Press 1999); Cass R. Sunstein, *The Partial Constitution* (Harvard U. Press 1993); Robin West, *Progressive Constitutionalism: Reconstructing the Fourteenth Amendment* (Duke U. Press 1994). The composition of the present Court, as well as that of the federal judiciary generally, may explain why progressives are now singing what in recent years was a conservative tune. It should be noted, however, that New Deal progressives, among others, often sought a limited role for the courts. Now some progressives seek to eliminate judicial review. For reasons why we should tread cautiously here, see Lipkin, *New Majoritarians*, *supra* n. 10.

Because my understanding of judicial review is functionalist and pragmatic, my conception of appellate review will follow suit. This essay presents a novel, controversial conception of lower appellate review that differs radically from the traditional and more familiar conception of appellate practice.[12] According to the theory of constitutional revolutions, appellate review has a more definitive and intelligible dimension than it has under the traditional conception. In this essay, I sketch the familiar and traditional conception of appellate judicial review and then contrast it with the theory of constitutional revolutions, thereby identifying a frequently unnoticed role of both state and federal appellate courts. My initial purpose is to describe and explain how lower appellate review in fact functions in the creation and articulation of constitutional revolutions. My second purpose is to urge lower appellate judges to appreciate their role in revolutionary adjudication so that they might more self-consciously perform this function in the future.

A constitutional revolution such as *Brown v. Board of Education*[13] is an abrupt shift or redefinition of a constitutional paradigm in constitutional law and throughout the American legal system. *Brown* was a quintessential constitutional revolution, creating a new constitutional paradigm of equal protection and thereby abandoning the reigning paradigm enunciated in *Plessy v. Ferguson*.[14] It applied the new paradigm to public schools and began the elimination of Jim Crow segregation throughout civil society.

Although every serious scholar tries to demonstrate the legitimacy of the reasoning behind the decision, no consensus exists over how *Brown*'s reasoning comports with ordinary methods of legal construction. Neither textualism, intentionalism, process theory, tradition, history, nor any other conventional constitutional methodology explains to everyone's

12. Although this conception is novel, revolutionary adjudication is not novel at all. Appellate courts already engage in revolutionary adjudication. The problem is that because constitutional culture implicitly rejects revolutionary adjudication, lower appellate judges, especially, often fail to recognize their role as harbingers of revolutionary adjudication. My hope is that this essay can begin a reexamination of the vital role of lower appellate review in revolutionary adjudication and, more importantly, in a deliberative democracy.

13. 347 U.S. 483 (1954).

14. 163 U.S. 537 (1896).

satisfaction the result in *Brown* without begging the question of the case's legitimacy. Legal pragmatism is the only explanation for *Brown*, because legal pragmatism warrants a decision if it promises a better future, not because it necessarily flows from the past. The problem is that while everyone valorizes *Brown*, few candidly acknowledge just how revolutionary its reasoning is. *Brown*'s reasoning sanctions, in certain circumstances, abandoning ordinary legal conventions in favor of a novel, normatively compelling paradigm. Yet, according to standard accounts of law, this is the epitome of illegitimacy. Thus, if we embrace *Brown*'s reasoning, we must revise or abandon the traditional view of legal legitimacy as a decision following from prior law.[15]

Such a revision has implications for lower appellate review. Scholars pay great attention to those revolutionary "landmark cases" created by the Supreme Court, but generally ignore the role lower appellate courts play in constitutional change.[16] This oversight can be remedied through attention to the fundamental role lower appellate review plays in the development and transformation of constitutional law. Before discussing this remedy, however, it is necessary to contrast revolutionary constitutional adjudication with the traditional conception of constitutional change. Part II of this essay sets out the traditional conception of constitutional change. Part III then discusses the role of appellate review in the traditional conception of constitutional change, and, contrastingly, part IV discusses the theory of constitutional revolutions. Part V concludes the essay by reviewing the role of lower appellate review in revolutionary adjudication.

II. THE TRADITIONAL CONCEPTION OF CONSTITUTIONAL CHANGE

The traditional conception of constitutional change reflects a similarly traditional conception of scientific and conceptual change generally. According to this conception, scientific and conceptual change is incremental and evolutionary. The present

15. See Lipkin, *supra* n. 1, which attempts to support this claim.

16. Unfortunately, while scholars pay great attention to landmark cases, they generally fail to recognize the revolutionary dimensions of these cases.

state of an intellectual domain, including the intellectual component of law, is revised and extended but never significantly abandoned. Similarly, constitutional change is evolutionary, not revolutionary. The present content of constitutional law has systematically evolved from original constitutional factors. What is now given in constitutional law results from an elaborate, systematic, and rationalist network of interlocking principles and rules that has never abandoned the original constitutional premises—except when amended through Article Five of the United States Constitution. Contemporary constitutional law may be the result of transformative processes, but these processes have never repudiated their canonical origins.[17]

Under this traditional view, constitutional conflicts have determinate answers that can be derived from the correct conception of constitutional interpretation or constitutional reasoning. This canonical conception of constitutional reasoning appeals to such conventional factors as text, intent, structure, tradition, and history. These conventional factors determine a constitutional given that is never repudiated but rather present in some form in the new landmark decision. Because this constitutional given always determines the new result, the latter is not new, but is already contained in the given.

Therefore, no genuinely revolutionary constitutional meaning is ever created legitimately through judicial interpretation. That is left for formal change through Article Five. Under the traditional view, constitutional change might expand constitutional meaning, but it never does, or never should, create new constitutional meaning. Constitutional conventions are always the basis for constitutional change; thus, all legitimate change is merely an elaboration, though

17. The term "transformative" is ambiguous; it might mean a complete change or a partial change. The former occurs when one principle contradicts and therefore replaces the original principle. For example, the Seventeenth Amendment completely "transformed" Article I, Section 3, clause 1, by rejecting the provision "chosen by the Legislature" outright. Less than complete transformations might occur when one principle extends the scope of another, as when *Brown* and subsequent decisions transformed the Equal Protection Clause. According to the theory of constitutional revolutions, both types of transformation are involved in constitutional change. Both types of transformation are also arguably revolutionary. However, the first type of transformation is paradigmatically revolutionary.

sometimes a surprising elaboration, of what is already there. In the traditional conception of law, questions of law are subject to the traditional metaphysical and epistemological conceptions of truth, objectivity, and justification. Judges, like other inquirers, are always seeking the true meaning of the law; they seek law that is real and objectively justified or justifiable.

III. THE ROLE OF APPELLATE REVIEW IN THE TRADITIONAL CONCEPTION OF CONSTITUTIONAL CHANGE

In the traditional conception of constitutional change, intermediate appellate review is a penultimate stage in the pursuit of legal truth.[18] A trial court's traditional role is to determine which law applies to the facts of the case and what that law means. This latter question, under the traditional conception, is understood to query what the law truly is.

In this manner, the notion of appellate review enters the legal universe as one more stage of truth-finding about the meaning of the law. The traditional conception of appellate review provides another level of judicial inquiry to decide whether the earlier judgments of law made by the trial court are correct.[19] This conception of judicial scrutiny is committed to a modernist conception of truth, reason, and reality in legal reasoning. In any system of law constructed along the lines of American federal and state practice, the appellate court is part of an integrated process of discovering truth. The trial court makes the first attempt to arrive at the truth, while the Supreme Court has the final say. The lower appellate court represents an intermediate stage in this three-tier approach to the truth. A conspicuously apt statement of the traditional conception can be found in the following:

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18. *See* Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?* 42 Md. L. Rev. 766, 768 (1983) ("[W]e want courts to make correct decisions on the myriad cases and motions they face. Basically, decisions should accurately reflect the facts in the record and existing law on the subject.").

19. In the American legal system, two well-developed sub-systems exist, namely, the federal system and the state system. The American system, however, could have developed without inferior federal courts, leaving the Supreme Court as the only federal appellate court over state courts. *See* Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (Macmillan 1927).

> Best understood, the policy justification of the appeal as of right is to improve only incrementally on the correctness of the trial court result. The system commits all those resources to the important task of sorting through the appeals to identify the relatively small minority of cases in which an error has occurred that needs remedying. Every appellate court practice and procedure can be justified solely insofar as it furthers this sorting task.[20]

This notion of "remedy" is the familiar idea that law has determinate meaning and sometimes judges misperceive what this meaning is. If judges had a God's eye view of the law in a given case, there would be no need for appellate review. Appellate review, therefore, is an attempt to get us closer to the true meaning of a given law than where we would be without this additional mechanism. Thus, the sole justification in a system of lower appellate courts lies in how well these courts contribute to getting the true or right answers to legal questions. Other purposes not explicable in terms of truth are irrelevant to this system.

This traditional view of law is a realist view that coheres with our common sense understanding of law as well as our intuitively entrenched conceptions of truth, reality, and reasoning.[21] We imbibe this realist conception of human inquiry with our mother's milk. Western metaphysics and epistemology ground this view through language, which incorporates these conceptions, rendering alternative views at best difficult to state and at worst unintelligible.[22] This language of realism might be inevitable on some level.[23] Nonetheless, this traditional realist

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20. Thomas E. Baker, *Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals* 26-27 (West Publg. Co. 1994).

21. *See generally* Robert Justin Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 Cornell L. Rev. 811 (1990); Robert Justin Lipkin, *Kibitzers, Fuzzies, and Apes without Tails: Pragmatism and the Art of Conversation in Legal Theory*, 66 Tul. L. Rev. 69 (1991).

22. Our language embodies particular methods of inquiry and ways of resolving controversies. If language is contingent, then these methods are also contingent, and therefore, could be different. Though contingent, they nevertheless represent *our* way of understanding the world. Alternative ways of understanding are difficult or impossible to state without changing or doing irreparable violence to our language.

23. *See* Robert Justin Lipkin, *Pragmatism—The Unfinished Revolution: Doctrinaire and Reflective Pragmatism in Rorty's Social Thought*, 67 Tul. L. Rev. 1561 (1993).

view is presently under attack in law as well as across intellectual inquiry.[24]

This traditional conception of law is unpersuasive because the traditional conception of metaphysics and epistemology upon which it depends is implausible and unproductive.[25] And, because it depends on the traditional conception of law, the traditional conception of appellate review is similarly unpersuasive. The traditional conception of metaphysics and epistemology inadequately explains conceptual change that relates the process through which new ideas or beliefs replace current ones. According to the traditional conception, new ideas are always added incrementally to old ideas. Thus, what we know now always includes what was true in the past. Knowledge never explodes onto the scene for pragmatic reasons, obliterating past ideas; rather, each new piece of knowledge carefully replaces some feature of our past conceptual scheme.

The problem with this familiar view is that it distorts the revolutionary dimension of conceptual change. Similarly, the traditional view of law obscures the creative and pragmatic role of courts in *changing* American constitutional law. American constitutional law is revolutionary in the sense that the great decisions of constitutional history do not follow conceptually from instances of prior law.[26]

I have written and defended this theory of constitutional revolutions elsewhere.[27] In these pages, I explain the implications this theory has for lower appellate courts. My alternative approach recommends a new lexicon for describing and explaining constitutional change. The value of this new

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24. *Id.*

25. What makes these notions implausible and unhelpful are the interminable philosophical debates about their proper meaning, as well as similar debates about whether realism or anti-realism is the appropriate basis of knowledge and language.

26. I should add two qualifications. First, the great constitutional decisions do not follow from prior law without expanding beyond recognition what counts as prior law. Second, and related, the great constitutional decisions do not follow in a non-question-begging manner from prior law. That is, these decisions do not follow from prior law unless one assumes that the prior law already contains these great decisions. This is the circular assumption.

27. *See generally* Lipkin, *supra* n. 1.

constitutional language is its pragmatic efficacy in understanding constitutional change.[28]

IV. THE THEORY OF CONSTITUTIONAL REVOLUTIONS

The received picture of constitutional change regards the Article Five process of amendment as the exclusive method of drastic change. By contrast, the theory of constitutional revolutions maintains that the engine of constitutional change has little to do with formal amendments. Instead, constitutional change occurs regularly through the acts of government and of the people.[29] The most controversial agent of non-Article Five change is the Court, but Congress and the Presidency create constitutional meaning at least as much as the judiciary.

For example, Congress's contemporary role has departed from its original role as stated in the 1787 Constitution. At that time, both the history and structure of the Constitution designated Congress as the prime mover of political leadership and change. The executive branch was devised to enforce law whose origin and content was largely legislative. Clearly, the executive played, with certain critical exceptions, a subordinate role.[30] Despite this beginning, and in spite of a formal limitation on the terms a president may serve, the Presidency has evolved to overshadow the legislature without any constitutional amendment, even in spite of formally limiting the terms the president may serve. More strikingly, the advent of the fourth (administrative) branch of government created by the New Deal is a radical change in the content and structure of American constitutional government. Moreover, the Constitution nowhere mentions judicial review, especially the capacious form of

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28. Even if one wishes to retain the traditional view's commitment to truth and evolutionary change, the pragmatist conception of judicial review can be viewed as augmenting the traditional conception. In that case, the dualist conception of judicial review provides an additional role for lower appellate courts in addition to their truth-seeking function.

29. Bruce Ackerman, among some other observers, has recognized that most constitutional change is informal. *See* Ackerman, *supra* n. 2.; *but see* Lipkin, *supra* n. 1, ch. 1.

30. Early in American constitutional history, the President's veto was rarely used. *See* Ackerman, *supra* n. 2.

review that permits non-Article Five alterations in constitutional law.

These, I submit, are facts of American constitutional life. Yet much judicial practice and academic scholarship is designed to reject these facts and show instead that constitutional change always occurs through some canonical, though perhaps non-obvious, method of justified transformation. However, no "non-question-begging" account of such transformation has ever been devised or is likely to be devised in the future. Consequently, some informal conception of constitutional change is necessary.

The theory of constitutional revolutions is designed to explain the informal but predictable methods of constitutional change that have occurred since the Republic's inception. My exploration of this theory has centered on the judiciary's role in creating constitutional revolutions, though the theory itself applies to all branches of government.[31] Since *Marbury v. Madison*,[32] the Court has considered itself the guardian of constitutional meaning.[33] Further, since the Constitution does not envision a legislative role for the Court, there must be a meta-legislative function, if any at all, that permits the Court to criticize or reflect upon the ordinary operations of legislative government. This meta-role then asks the Court to determine whether ordinary legislation coheres with the constitutional framework of American constitutional politics.

The theory of constitutional revolutions, as applied to the judiciary, denies that the great shifts in constitutional interpretation can be adequately explained by the concept of prior law or by some uncontroversial method of constitutional interpretation. Of course, judges and academics alike accept the myth, or more accurately the charade, that a legal decision is illegitimate unless it can be explained by such conventional constitutional factors as text, intent, structure, tradition, or history. Indeed, these conventional constitutional factors cannot

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31. It should be noted that the theory of constitutional revolutions, in its application to the courts, extends to the common law, statutory law, and constitutional law. Thus, revolutionary adjudication exists in common law adjudication and in statutory interpretation. My focus, however, is its role in explaining constitutional revolutions.

32. 5 U.S. 137 (1803). The doctrine of judicial supremacy in interpreting the Constitution is usually attributed to *Marbury*.

33. The Court has reaffirmed its role in interpreting the Constitution in *Cooper v. Aaron*, 358 U.S. 1 (1958).

even explain the practice (or the character) of judicial review itself. In fact, evidence exists that the Founders arguably rejected a judicial role in scrutinizing legislation.[34] Nevertheless, most observers would insist rightly that judicial review is a well-established and legitimate feature of American constitutional government. The Constitution's role as final arbiter of political controversy requires that someone interpret what it means. Designating the Court to fill this job was Chief Justice Marshall's great pragmatic legacy.

Rather than seeking external factors to legitimize the Court's role in American constitutionalism, judicial legitimacy should be reconceived in functionalist terms. A judicial decision is legitimate then when it contributes to the realization of some value fundamental to the constitutional system. The paramount value of American constitutionalism is self-rule or self-government.[35] Thus, a conception of judicial interpretation is legitimate if it contributes to the efficient and just operation of self-rule and self-government. To paint in broad strokes, the ideas of self-rule and self-government are best expressed by the concept of democracy.[36]

It should be kept in mind that this value of democracy can blunt the force of the charge that activist judicial review is undemocratic. Activist judicial review *is* counter-majoritarian.

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34. Several times during the constitutional convention, proposals were advanced (and defeated) to create a Council of Revisions, consisting of the President and members of the judiciary, who would review legislation before it went into effect. Erwin Chemerinsky, *Federal Jurisdiction* 6-7 (Little, Brown & Co. 1989). The justification for such a council "was defended as a check on legislative powers and as a vehicle to improve the legislative process." *Id.* (footnote omitted). In fact, "[o]pponents successfully argued that it was undesirable to involve the judiciary directly in the lawmaking process." *Id.* at 7. Of course, the rejection of this device for reviewing legislation does not entail a rejection of judicial review, but it makes the Framers' intent a doubtful evidentiary basis for justifying judicial review. Nevertheless, many commentators contend that the Framers intended judicial review. *See id.* n. 28. At best, the Framers' intent in this matter is inconclusive.

35. Self-rule and self-government are integrally related. Self-government is the collective rule of independent, equal persons, with each person having sovereignty over herself. This notion of self-sovereignty is as important in political theory as it is difficult to explicate. *See* Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard U. Press 2000). By using the ideas of independence and equality, I do not intend to denigrate the role of community in the idea of self-rule or self-government.

36. The verdict is still out regarding whether democracy or republicanism is at the heart of the American system. American politics, in my view, has never been entirely certain how to integrate these two concepts or, failing that, how to choose between them.

However, a counter-majoritarian method is not necessarily undemocratic. If a particular conception of judicial inquiry contributes more to the realization of an attractive conception of democracy than does an alternative conception, then it is democratic even if it is not majoritarian. The theory of constitutional revolutions describes and defends the judicial role as fully contributing to the democratic system underlying American constitutionalism. This theory also helps to discover a vital, though greatly overlooked, role for lower appellate courts.

Before getting too far ahead of my thesis, however, I should describe the theory in greater detail. The theory of constitutional revolutions distinguishes between two general categories of adjudication: revolutionary adjudication and normal adjudication.[37] In revolutionary adjudication, the Supreme Court, in a decision designed to quell a constitutional crisis,[38] makes new law by adopting a principle or rule that is the functional equivalence of an Article Five amendment and will be foundational or authoritative throughout the legal system. By "new law" I do not mean a principle or rule that no one ever heard of before or one that has not been present in American constitutional culture. Rather, I mean a principle or rule that cannot be explained or generated by such familiar constitutional conventions as text, intent, structure, tradition, or history. Of course, if one interprets these familiar conventions in a sufficiently broad manner, these conventions can always explain constitutional decisions, but that is because their broad interpretation already includes the possibility or necessity of

37. The terms "revolutionary" and "normal" are interrelated in the theory. A decision is the result of normal adjudication when reasonable judges arrive at the decision using conventional interpretive factors. In normal adjudication, agreement among different judges is generally achieved. When disagreement does occur in normal adjudication, its parameters are narrow and clearly identifiable. Revolutionary adjudication occurs when these conventional interpretive factors cannot explain the decision or when the explanation defies reasonable consensus.

38. The theory of constitutional revolutions understands a "constitutional crisis" to exist when an important constitutional or political controversy has no obvious resolution according to existing law. Unless the controversy simply disappears or is eliminated through Article Five, some governmental agency needs to resolve it. In the United States, that agency is typically the courts. This interpretation of "crisis" differs from the more popular sense of the term as illustrated in the recent election controversy.

revolutionary adjudication.[39] In other words, broadly interpreting these conventions renders all decisions potentially revolutionary. Admittedly, in a sufficiently broad interpretive framework, the importance of the distinction between revolutionary and non-revolutionary adjudication diminishes because conventional factors no longer determine a decision, and thus, can no longer be a constraint on adjudication. In such a framework, revolutionary adjudication, not based on prior law, is normal and legitimate.[40]

The causes of constitutional revolutions are typically constitutional crises. Crises reflect internal or external problems with the reigning paradigm in that area of constitutional law. Constitutional revolutions take place when a court cannot resolve a systemic or persistent conflict through conventional constitutional factors, or when it can resolve the conflict only by interpreting these factors in an expansive manner. Any vibrant deliberative democracy will inevitably require a conduit through which cultural and political changes affect constitutional law. In the American constitutional republic, judicial review is part of that conduit.

Constitutional revolutions inevitably occur when the constitutional system takes morality seriously, as any sufficiently democratic system must. In democratic societies, constitutional provisions include liberty, equality, and community, values that often conflict and which require interpretation through ethics and political philosophy.[41] Inevitably, such interpretation will include factors from the wider political and ethical culture.[42] This is not an argument for

39. In other words, if "textual interpretation" includes anything that *now* can be considered textual meaning, or if "Framers' intent" includes whatever we now think reasonably included in the Framers' intent, then every decision can be explained by these conventional factors, but only because their constraining influence has been drastically reduced or eliminated entirely.

40. Even in this situation, the theory of constitutional revolutions will still illuminate constitutional reasoning.

41. *See generally* Dworkin, *supra* n. 2.

42. When a constitutional value like equality is inextricably woven into the society's cultural fabric, it is difficult to separate it from the narrower constitutional concept. Moreover, equality as a cultural value has several different meanings. It means fairness, merit, desert, and so forth. Different people will be exposed to particular conceptions of equality depending on contingent features of their upbringing. This primary conception of equality will have a great influence over the individual. When such a person matures and

expansive constitutional interpretation. Rather, it is an acknowledgment that any interpretation concerning constitutional values requires political and moral judgments. Saying that the Equal Protection Clause excludes homosexuals is just as much a political and moral judgment as saying that it does not. Our judicial system concerns morality all the way down.

It is important to note that the distinction between narrow and expansive interpretation does not track the distinction between revolutionary and non-revolutionary adjudication. Furthermore, once revolutionary adjudication has a place in the democratic structure of constitutionalism, a call for abandoning it is itself revolutionary. Although it might be possible conceptually to call for one final revolution to end all further revolutions, it is difficult to see how, practically, such a final revolution can be made to stick. Even when such a final revolutionary decision is made, the next time constitutional crises promote challenges to the received interpretation of the moral and political concepts undergirding the Constitution, there will, quite naturally, be a call for revolutionary adjudication. This is especially true in a society where the institution of revolutionary adjudication has a long and distinguished history.

By contrast, in normal adjudication, conventional facts enable judges to be guided by the reigning constitutional paradigms through which members of the constitutional community determine the relevant facts, standards of review, analytic structures, and available remedies. Normal adjudication takes place in cases where no crisis is present, and the current paradigm suffices for resolving the particular constitutional conflict.

Revolutionary adjudication and normal adjudication are integrated in the theory of constitutional revolutions. Revolutionary adjudication seeks normalization, but not at any price. Instead, revolutionary adjudication seeks to resolve a constitutional crisis, to make the law right, to improve American political culture by constructing a new paradigm through which to decide conflicts. Only then does revolutionary adjudication

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becomes a judge, she becomes a member of a particular linguistic community with concepts and rules of inference of its own. This judge will nevertheless feel the force of her primary conception of equality whether she intends to or is even aware she is doing so.

achieve normalization. Once a revolutionary paradigm is created and stabilized, it becomes a part of normal adjudication. Recall that the revolutionary paradigm in *Brown* is now a constitutive feature of normal adjudication concerning equal protection.[43] Today's revolutionary adjudication becomes tomorrow's normal adjudication, creating a provisional closure in an area of the law.

Constitutional adjudication depends on paradigms for understanding and resolving constitutional conflicts. Paradigms are models that interpret foundational constitutional provisions. These paradigms first delineate which types of facts are relevant to a particular constitutional provision and which standard of review is to be used in examining the issue. Once the appropriate facts trigger the provision, the paradigm provides instructions for how courts, or any constitutional decisionmaker, should analyze the facts in question. The paradigm also states the rule or rules of law that ground the analysis and the available remedies. For example, in due process and equal protection cases, the paradigm tells courts to first determine whether a piece of legislation burdens a fundamental right or a suspect class. If legislation fails to burden either, but instead merely regulates economic or social welfare activities, then courts should resolve the conflict through a deferential form of rational basis scrutiny. If, by contrast, legislation burdens a fundamental or quasi-fundamental right or a suspect or quasi-suspect class, a higher level of scrutiny is required.

These instructions tell judges how they are to approach the abstract concepts of liberty and equality in the Constitution. Without paradigms, it would be impossible for judges or any constitutional decisionmaker to determine the constitutionality of a law without appealing arbitrarily and entirely to their personal preferences. Constitutional paradigms, like legal paradigms generally, are conceptual and practical, tying the paradigm's conceptual core to the facts of the case. Normal paradigms raise few conceptual problems, and judges can apply them to the facts of the case in a settled manner. Normal adjudication occurs when agreed-upon paradigms determine the resolution of the present case. Constitutional revolutions occur

43. Of course, we have yet to normalize equal protection concerning affirmative action, gay and lesbian rights, and other questions about political equality. Nevertheless, we have reached closure, at least for the immediate future, about ordinary racial discrimination.

when agreement on a paradigm's scope and content is no longer possible and when an alternative paradigm is likely to replace the normal one.

Therefore American constitutional law would not be revolutionary if a paradigm came uncontroversially with each constitutional provision. These paradigms would then constrain judges, and no revolutionary judicial decision would be possible. But constitutional provisions do not come with paradigms in hand. Nevertheless, constitutional revolutions do not come out of whole cloth. Prior constitutional adjudication often precedes the construction of a new paradigm or the elimination of an old one.

Typically, a special kind of adjudication precedes revolutionary decisions. This adjudication can be described as pre-revolutionary because it consists of decisions that are *precursors* to revolution. Pre-revolutionary adjudication consists of precursors that raise doubts concerning the continued viability of the current paradigm. Such precursors are decisions that formally retain the existing paradigm but modify it in ways that suggest further modifications or even sometimes the abandonment of the reigning paradigm.[44] Before *Brown*, several Supreme Court decisions were precursors to revolution, implicitly urging or suggesting that the paradigm of equal protection in *Plessy* was no longer viable.[45]

Pre-revolutionary adjudication is a central part of constitutional revolutions. The particular content of pre-revolutionary adjudication determines to a great extent the precise character and nature of the revolution. Additionally, pre-revolutionary adjudication sometimes contributes to stability by raising the question whether revolutionary adjudication is desirable in a particular area of the law. Once this issue is raised, the Court may either engage in revolutionary adjudication or quell the revolutionary furor by reaffirming the current paradigm

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44. Professor Rod Smith suggests the idea of nontransivity to explain this process. In pre-revolutionary adjudication, a series of precursors to the revolutionary decision begin to modify the reigning paradigm. As the series progresses, consistency with the reigning paradigm is less obvious until the (inconsistent) revolutionary case is decided. Revolutionary adjudication relies on a nontransitive process that creates new law.

45. *McLaurin v. Okla. St. Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Lum v. Rice*, 275 U.S. 78 (1927).

in that area of constitutional law. Pre-revolutionary adjudication is central to constitutional revolutions, and constitutional revolutions are central to the development of American constitutional law.[46]

After the Court creates or modifies a constitutional paradigm through a revolutionary decision, post-revolutionary adjudication occurs. During this phase of adjudication, the Court attempts to perfect, refine, extend, and stabilize the newly minted paradigm, determining its contours and considering how it affects other paradigms, as well as how it deals with similar but independent questions of law. Ideally, a paradigm is perfected when its scope and meaning are settled. At that point, the paradigm is stabilized and normal adjudication can then occur in that area of law.

V. THE ROLE OF LOWER APPELLATE REVIEW IN REVOLUTIONARY ADJUDICATION

Lower appellate review, according to the theory of constitutional revolutions, takes various forms, including normal adjudication, or following and applying paradigms created by the Supreme Court in all cases where a paradigm clearly reigns. According to the traditional conception, normal adjudication is the only kind of adjudication in which a lower appellate court, or any other court, should engage. In this view, a lower appellate court should simply ascertain which paradigm governs and decide the case accordingly.[47] However, normal adjudication is not the only role of lower appellate courts in the theory of constitutional revolutions. The theory identifies additional responsibilities for lower appellate courts as well.

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46. My concern is with American constitutional law. I do not insist that revolutionary adjudication is necessarily a part of the constitutional law in every conceivable political system. However, I would argue that when constitutional law is vibrant and part of the transformative processes in a deliberative democracy, that law is likely to develop according to the theory of constitutional revolutions.

47. It is not always acknowledged that giving a court the discretion to choose the relevant paradigm already sets the stage for revolutionary adjudication. Of course, we hope that any competent judge would know when the paradigm for speech, religion, or equal protection applies to a given set of facts. But there is no non-question-begging way to guarantee this. Therefore, revolutionary adjudication is likely to be a necessary feature of any system of adjudication.

Before specifying these additional responsibilities, it is important to recognize that only the Supreme Court may create new law by engaging in revolutionary adjudication. The reason for this restriction is not that Supreme Court justices are inevitably better judges than lower court judges. Indeed, history is replete with examples of great lower appellate judges with few, if any, peers among Supreme Court justices. Rather, the reason is institutional.[48] In a system of adjudication where the courts not only interpret but also necessarily *make* law, engaging in revolutionary adjudication should be the responsibility of a single court having the ultimate say in constructing the new paradigm.[49] Without such an institutional structure, different levels of the judiciary will vy with one another to construct new paradigms. Confusion and instability are the likely result of such a practice. The theory of constitutional revolutions, therefore, recognizes the importance of keeping the Supreme Court "supreme."

The theory of constitutional revolutions creates a secondary series of responsibilities for lower appellate review in a constitutional system such as that of the United States. Because revolutionary adjudication occurs only after pre-revolutionary adjudication takes place, lower appellate courts should be vigilant to determine whether current paradigms are sufficient to resolve the cases for which they were designed. Engaging in pre-revolutionary adjudication—responding to problems with the current paradigm—is a job that appellate courts are especially suited to do. In this way, a lower appellate court functions as a scout, so to speak, or a lookout for the Supreme Court, assaying the constitutional landscape for problems in the

48. Of course, state supreme courts similarly engage in revolutionary adjudication and generally have the final say over the proper interpretation of state law.

49. In the traditional conception of lower appellate review, judges generally concede the Supreme Court's final authority in interpreting the law. *See* J. Woodward Howard, Jr., *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits* 138 (Princeton U. Press 1981). In our judicial system, "the higher the court, the greater the freedom to innovate." *Id.* Similarly, in a system of revolutionary adjudication, circuit courts would likely defer to the Supreme Court in fashioning new constitutional paradigms. Even in the traditional conception of appellate review, however, courts of appeals have the final say in ninety-nine percent of the cases they hear. Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?* 44 Am. U. L. Rev. 757, 768 (1995).

paradigms currently governing constitutional law. The Supreme Court can acknowledge such pre-revolutionary adjudication in two ways. It can quash the pre-revolutionary decision, or it can respond by creating a constitutional revolution.

The theory of constitutional revolutions explains the conduct of lower appellate courts in several situations. Lower appellate courts engage in normal adjudication by applying the reigning paradigm to the case at hand. The vast majority of published and unpublished lower appellate court opinions are instances of normal adjudication. Appellate judges have the good sense, especially given the increase in appellate litigation, to stick to a consistent posture as courts of normal adjudication.

Nevertheless, most appellate judges, at least implicitly, appreciate the centrality of their additional role as courts of revolutionary adjudication. Adhering to a current problematic paradigm or modifying it slightly by using normal adjudication can suggest a problem. Consequently, sometimes even without mentioning the problem, by sticking to the reigning paradigm, the Supreme Court might be struck with the paradigm's inadequacy. Of course, mentioning the problem is usually preferable to letting the Court discover the problem on its own. Thus, lower appellate courts also engage in pre-revolutionary adjudication by alerting the Supreme Court to a needed revision in the reigning paradigm. Lower appellate courts then often engage in the post-revolutionary stage of refining, perfecting, extending, and finally stabilizing the newly formed paradigm.

The theory of constitutional revolutions explains the appellate court's role in revolutionary adjudication. The best recent example of revolutionary adjudication is *Brown*.[50] At the time of *Brown*, *Plessy*'s "separate but equal" doctrine governed social equality between the races. Decisions rendered in four states, however, helped trigger the revolution: Kansas, South Carolina, Virginia, and Delaware.[51] Three of the decisions were unfavorable to the plaintiffs, while the fourth ordered the

50. In *Brown*, several different cultural factors contributed toward triggering revolutionary adjudication. *See* Lipkin, *supra* n. 1, ch. 3 (discussing the role of cultural and moral factors in constitutional revolutions).

51. *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951); *Briggs v. Elliot*, 103 F. Supp. 920 (E.D.S.C. 1952); *Davis v. County Sch. Bd.*, 103 F. Supp. 337 (E.D. Va. 1952); *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952).

integration of the public schools. The Kansas decision held that segregated schools did not violate the equal protection guarantee.[52] The Virginia and South Carolina cases upheld the *Plessy* paradigm but ordered the school districts to equalize the facilities and/or curriculum of African-American public schools.[53] The decisions in the Kansas, South Carolina and Virginia cases were rendered by three-judge federal district courts.[54]

By contrast, the Delaware case ordered the integration of the public schools based on *Plessy*'s separate but equal doctrine.[55] Although *Plessy* had been deployed to order integration in cases involving higher education, the Delaware case was the first time elementary schools were ordered to integrate for failure to comply with *Plessy*. The Delaware Supreme Court decision is a good example of a genuine lower appellate court precursor to revolution. Had the Supreme Court vigorously enforced the doctrine in *Plessy*, half of the racial injustice problem in the United States would have been resolved. Because most school systems were separate but not equal, a *Plessy* with teeth would have integrated public schools, or guaranteed that all public schools would be equal.[56]

The lower courts, through normal and pre-revolutionary adjudication, played a pivotal role in this constitutional revolution. By indicating that the paradigm in *Plessy* was problematic in contemporary society, the lower courts

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52. *Brown*, 98 F. Supp. at 800.

53. *Davis*, 103 F. Supp. at 340-41; *Briggs*, 103 F. Supp. at 923. None of these courts issued injunctions to equalize the facilities, and thus they followed a tradition of inaction in rectifying racial inequality. Although not revolutionary in themselves, these instances of normal adjudication, given the times, highlighted the problem of racial segregation for the Supreme Court.

54. *Brown*, 347 U.S. at 486, n. 1. The three-judge courts were convened pursuant to 28 U.S.C. §§ 2281 (repealed 1976) & 2284 (1994). The Court also considered a related appeal before judgment issued in the Court of Appeals for the District of Columbia in which the same issue had been litigated under the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

55. *Gebhart*, 91 A.2d at 167, 172-73.

56. I say "half the problem" because segregation denied equality, a value that the Civil War amendments imply. Even if the races were equal but separate in terms of opportunity and accomplishment, the second half of the problem is that segregation in public schools creates and reinforces a caste system in American politics, which is anathema to American democracy. Alternatively stated, associational equality is a central feature of the Civil War amendments.

challenged the Supreme Court to re-evaluate the *Plessy* paradigm. These courts, by taking the *Plessy* paradigm seriously, especially in the Delaware case, indicated to the Supreme Court that the paradigm must be abandoned or revised to meet contemporary social reality. In effect, they were saying that there was trouble here that the Court must address, while leaving further change in the paradigm to the Court itself.

An even more recent example demonstrates the vital role an intermediate appellate court can play in contributing to a full-blown revolution. In *United States v. Lopez*,[57] the Supreme Court overturned, by a five to four vote, sixty years of Commerce Clause jurisprudence by invalidating a federal statute criminalizing handgun possession in a school zone. Because of the Court's 1937 revolution and the post-1937 revolutionary adjudication refining, perfecting, extending, and finally stabilizing that revolution, the Commerce Clause had become almost the functional equivalent of a constitutional provision giving Congress general police powers. Although it might be too soon to judge the extent of the *Lopez* revolution, the revolutionary dimension of this decision cannot be overestimated.[58]

Lost in standard discussions of *Lopez*, however, is Judge Garwood's appellate opinion from the United States Court of Appeals for the Fifth Circuit.[59] His opinion posed the issue with precision, enabling the Supreme Court to carefully confront the warring positions concerning the Commerce Clause and federalism.[60] Ultimately, the Supreme Court majority and dissenting opinions eloquently and forcefully express these warring opinions in *Lopez*. Here the lower appellate court played an instrumental role in revolutionary adjudication.[61]

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57. 514 U.S. 549 (1995).

58. *Lopez* could be seen as counter-revolutionary decision in reversing the 1937 revolution regarding the Commerce Clause. The terms "revolutionary" and "counter-revolutionary" are relative to what one regards as the baseline. Because the present constitutional community's baseline is a post-1937 understanding of the Commerce Clause, *Lopez* is revolutionary relative to that baseline.

59. *U.S. v. Lopez*, 2 F.3d 1342 (5th Cir. 1993).

60. *Id.* (invalidating federal law prohibiting firearm possession in a school zone).

61. This is not to say that the Court would not have engaged in revolutionary adjudication had the lower court engaged in normal adjudication. Sometimes a lower court's normal adjudication will convince the Supreme Court not to engage in

According to the theory of constitutional revolutions, the *Lopez* revolution should alert lower appellate courts to a further dimension of their role as courts of pre-revolutionary adjudication. As mentioned above, such courts function as scouts or lookouts in the revolutionary process. Lower appellate courts should attempt to identify additional circumstances to which the new *Lopez* paradigm applies. This is precisely what the Fourth Circuit did in *Brzonkala v. Virginia Polytechnic and State University*,[62] applying the new paradigm in *Lopez* to the Violence Against Women Act and striking down a provision giving victims of gender-motivated violence a civil cause of action in federal courts. Here the Fourth Circuit refined and extended the revolution in *Lopez* by striking down a federal law with some, but not all, of the same defects as the statute in *Lopez*. Subsequently, the Supreme Court then ratified the lower court's extension of the *Lopez* revolution in *United States v. Morrison*.[63] In addition to their primary role as courts of normal adjudication, *Lopez* and *Morrison* reveal the importance of lower appellate courts as courts of pre- and post-revolutionary adjudication.[64]

It is not always a majority lower court opinion that serves as a precursor to revolutionary adjudication. In *People v. Lochner*,[65] the highest state appellate court in New York argued persuasively for validating a state law limiting the working hours of bakers. Had the Supreme Court heeded this carefully reasoned appellate opinion, the *Lochner* era of economic substantive due process might not have occurred. Instead, the Court in *Lochner v. New York*[66] was more responsive to the state appellate court's dissents. This indicates how dissenting lower

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revolutionary adjudication while at other times a lower court's normal adjudication reveals the fatal problems with the reigning paradigm. In both cases, however, the lower appellate court plays an indispensable role in revolutionary adjudication either by encouraging the revolution or by convincing the Supreme Court to stick with the current paradigm.

62. 169 F.3d 820 (4th Cir. 1999).

63. 529 U.S. 598 (2000).

64. Just how far this revolution (or counter-revolution) in *Lopez* and *Morrison* will go in revamping American federalism remains to be seen. But judging from the present Court's Eleventh Amendment jurisprudence as well as its conception of intergovernmental immunities, it is a good bet that as we begin the third century of American constitutionalism, a revolutionary new federalism is emerging.

65. 69 N.E. 373 (N.Y. 1904).

66. 198 U.S. 45 (1905).

appellate court decisions also function as precursors to constitutional revolutions. Furthermore, this intra-level deliberative exchange shows the importance of published written opinions generally in the revolutionary process.

The Supreme Court also often quashes a revolutionary or post-revolutionary lower court opinion. In *Bowers v. Hardwick*,[67] the intermediate appellate court held that a Georgia statute criminalizing sodomy infringed Michael Hardwick's right to privacy.[68] According to the court, the right of intimate association—even when involving homosexual acts illegal under Georgia law—is a right protected by the Fourteenth Amendment's due process clause[69] as interpreted in *Griswold v. Connecticut*.[70] Indeed, the argument for this position generally is that one cannot value the privacy right in the *Griswold* case without including a privacy right to be free from the criminalization of homosexual sex. The dissent in the Eleventh Circuit opinion, by contrast, argued that the *Griswold* paradigm does not include a privacy right to be free from the criminalization of homosexual sodomy. Here the lower appellate court majority opinion attempted to perfect and refine the paradigm in *Griswold* by revealing that it extends beyond a heterosexual model of privacy. The Supreme Court in *Bowers* specifically rejected the lower court's extension of the privacy right to homosexual contexts. In this manner, closure and normalcy has been achieved, at least regarding the Fourteenth Amendment's protection of the right of intimate association.[71]

At the time of the decision, progressive voices throughout contemporary society insisted that the extension of the right of privacy is logically inevitable because the values of intimate association in *Griswold* are not distinguishable from the freedom of intimate association of homosexuals. The kind of sexuality involved, according to these voices, is irrelevant to the centrality

67. 478 U.S. 186 (1986).

68. *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985).

69. *Id.* at 1211.

70. 381 U.S. 479 (1965); *see also Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

71. This does not, of course, mean that the Court was either constitutionally or morally correct in excluding homosexual privacy interests in this way.

of intimate association in one's life.[72] The Court did not agree. Instead, the Court insisted that

> none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy. . . . [because n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent.[73]

In other words, the Court rejected the lower court's invitation to continue post-revolutionary adjudication by perfecting and refining the *Griswold* paradigm as stating a general moral imperative concerning intimacy. Instead, the Court ended or stabilized the post-revolutionary adjudication in the area of intimate association and returned this area to normal adjudication. Once again, the appellate court played a critical role in attempting to perfect, refine, extend, and stabilize the revolutionary paradigm by inviting the Supreme Court to extend the scope of privacy. The fact that the Court declined the appellate court's invitation should not detract from the importance of this deliberative dialogue between different levels of the judiciary in changing and developing constitutional law.

A conspicuously good example of the important role played by appellate courts in their deliberative interaction with the Supreme Court is *Roberts v. United States Jaycees*.[74] In this case, the Supreme Court decided that the First Amendment's protection of free association did not invalidate a Minnesota law requiring public accommodations to be free of gender discrimination. In upholding the law, the Court engaged in revolutionary adjudication because it permitted equality interests to trump the First Amendment's right of free association by allowing state regulation of private associations or clubs. This revolutionary decision overturned a lower court's decision invalidating the state law on the grounds of its incompatibility with free association.[75]

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72. Of course, conservatives reject that these two forms of intimate association are similar at all.

73. *Bowers*, 478 U.S. at 190-91.

74. 468 U.S. 609 (1984).

75. 709 F.2d 1560 (8th Cir. 1983).

What is so interesting about this case is that the lower court's decision was itself an example of revolutionary adjudication. In the lower court's decision, Judge Richard S. Arnold invalidated the Minnesota law by introducing a much broader conception of free association than the Supreme Court was willing to accept.[76] In Judge Arnold's opinion the constitutional guarantee of free association was akin to the free speech guarantee because just as free speech protects the speech we hate, so too free association protects the association we hate.[77] Here we have a battle of revolutionary paradigms between the lower court and the Supreme Court. Judge Arnold's decision advocated a revolution concerning the concept of liberty while the Court's decision in *Roberts* was revolutionary concerning equality.

Once again, the importance of the lower appellate court's role in revolutionary adjudication is apparent. By writing a revolutionary decision concerning liberty or association, Judge Arnold framed the issue in terms the Supreme Court could evaluate carefully. More importantly, by engaging in revolutionary adjudication, Judge Arnold alerted the Court to the importance of resolving the conflict between these two different paradigms. The Court declined Judge Arnold's invitation to embrace association over equality, but this should not detract from the important role Judge Arnold's revolutionary decision played in the Supreme Court case. The value of lower appellate revolutionary adjudication in this case is that it presented the Court with the importance of a revolutionary paradigm concerning free association. That the Court declined Judge Arnold's invitation to revolutionary adjudication regarding association and chose instead another revolutionary course is irrelevant to the importance of the lower appellate court's role in revolutionary adjudication. The importance here is the intra-judicial deliberation that is so vital to a deliberative democracy.

This last point is essential and should be emphasized. American judicial practice takes place in an inter-branch and intra-branch deliberative government. The Court functions as one of the lawmakers in this deliberative democracy. Within the

76. *See United States Jaycees v. McClure*, 709 F.2d 1560 (8th Cir. 1983).

77. *Id.* at 1576.

judiciary, the pre- and post-revolutionary operations of the appellate courts serve this deliberative function. It alerts the court to reasons for possible constitutional revolutions as well as signaling the need for refining, perfecting, extending, and stabilizing a revolution that has already begun. In this way, the appellate courts and the Supreme Court function synergistically in a deliberative democratic judicial system.

One final comment regarding the theory of constitutional revolutions as a legal theory is in order. Because a legal theory should have a descriptive component, whenever it explains an area of judicial practice it illuminates what is already taking place. For this reason, some observers like Stanley Fish denigrate theory for being superfluous to our practical decisions. Legal theory, according to Fish, cannot influence our conduct because it exists on a level divorced from what we actually do. If a theory is true, then it accurately describes what we *already* do. Consequently, if true, it is irrelevant to our practical reasoning. No one then can invoke a theory as a reason explaining and justifying judicial conduct. Rules of thumb are all we ever have and all we ever need in deciding what to do.[78] According to Fish, theories are irrelevant and talking about theories is a waste of time. Fish would then insist that if the theory of constitutional revolutions is true generally, or even if it is true only regarding the function of lower appellate courts, it is superfluous because lower appellate courts already engage in revolutionary adjudication. According to Fish, then, the theory has no practical effect.

The problem with this objection is that even if it is true, *recognizing* that lower appellate courts already engage in revolutionary adjudication, though described in terms of the traditional theory as merely looking for truth, helps judges to better appreciate their role in revolutionary adjudication. If the theory of constitutional revolutions is true or persuasive, then judges should use the theory to refine their jobs as judges. They should realize, in short, that lower appellate courts serve as courts of pre-revolutionary and post-revolutionary adjudication in addition to courts of normal adjudication. Even if a modernist conception of "theory" cannot influence our practical reasoning

78. Stanley Fish, *The Trouble with Principle* (Harvard U. Press 1999).

as theory, it can certainly guide these decisions as rules of thumb. Consequently, even if we agree with Fish that theoretical knowledge cannot determine our practical decisions from scratch, it nevertheless has an important role to play in practical reasoning. In the judicial context, the theory of constitutional revolutions should help judges refine their perception of what they already do, and therefore help them perform this function more self-consciously and with greater circumspection in the future.

VI. CONCLUSION

Lower appellate review has many important functions. According to the traditional conception of law, appellate courts are intermediate discoverers of truth. Appellate courts simply seek to fortify trial courts in the pursuit of truth. In this familiar conception, intermediate appellate review is one more stage in a review process theoretically ending with the final judgment of the Supreme Court. The theory of constitutional revolutions understands constitutional law differently. According to this theory, constitutional law changes in response to constitutional and political crises. The ultimate role of law, in this theory, is not some obdurate search for truth, whatever that would be, but is instead the attempt to render constitutional law more relevant to the political and cultural conflicts existing in American society. Three stages of revolutionary adjudication exist, according to this theory: pre-revolutionary, revolutionary, and post-revolutionary adjudication. Appellate courts are suited to engage in pre-revolutionary and post-revolutionary adjudication. In this manner, lower appellate courts assist the Supreme Court in fulfilling its important role of engaging in revolutionary adjudication.[79] This role enables lower courts to take their important and rightful place in our constitutional deliberative democracy.

79. The Supreme Court itself can also engage in these aspects of revolutionary adjudication.