Constitutional Time: The Temporal Dimension of Precedent in Constitutional Jurisprudence

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I. INTRODUCTION

The role of time in constitutional precedent lies at the heart of judicial decision making. While there is a consensus on the importance of precedent, the modalities of its application remain a subject of intense debate within legal circles. At the core of this discourse lies a fundamental tension: the imperative to maintain fidelity to established precedent, thereby ensuring legal stability and predictability, versus the necessity to re-evaluate and potentially overturn precedent in response to evolving societal norms or innovative constitutional interpretations. This dichotomy presents a fundamental challenge to the Supreme Court, requiring a delicate balance between continuity and adaptability in constitutional jurisprudence.

The Court's approach to precedent is deeply intertwined with its historical consciousness, shaping the trajectory of constitutional interpretation. While *stare decisis* presumably ensures stability and continuity, the Court's jurisprudence reveals a more contested relationship with time.[1] Courts rely on precedent to construct legal authority, but they also overturn past decisions when they deem it necessary, raising fundamental questions about the temporal dimensions of constitutional law.[2] The question is not merely whether

1. *See generally* Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281 (1990).

2. *Id.*; *see also* Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179 (2014) (discussing changes in interpretive theories and evolving constitutional understandings).

precedent should be followed or cast off, but rather how time itself is conceived in constitutional adjudication.

Traditionally, legal theorists have framed the evolution of constitutional precedent through two dominant paradigms: originalism and living constitutionalism.[3] Originalism, as a legal theory, proposes that constitutional rights should only be protected if they are explicitly stated in the text or were intended to be protected according to the original understanding of the Constitution.[4] In essence, originalism maintains that the interpretation of a constitutional provision is fixed at its time of adoption and can only be altered through formal amendment.[5] The arguments encapsulated by originalism have evolved over time.[6] Indeed, the constellation of originalist theories

3. *See* sources cited *infra* notes 4–8 and accompanying text.

4. For fuller discussions on the topic of originalist constitutional interpretive theory, see generally LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (2019) (arguing that the original meaning methodology of constitutional interpretation is morally justified because it aligns with natural law principles, which prioritize human flourishing and the common good); ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM (2017) (explaining originalism's historical foundations, theoretical justifications, and practical applications and arguing that originalism preserves the rule of law by ensuring constitutional meaning remains fixed until it is changed through formal amendment); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2014) (arguing for a libertarian originalism); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38–39 (1997) (arguing that constitutional interpretation should be grounded in the text's original meaning); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013) (providing an overview of different schools of originalism, including original intent, original understanding, and original public meaning originalism); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004). *But see* ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM (2022) (criticizing originalism); ERIC J. SEGALL, ORIGINALISM AS FAITH 147 (2018) (same).

5. LAWRENCE B. SOLUM & ROBERT W. BENNETT, CONSTITUTIONAL ORIGINALISM: A DEBATE 2–4 (2011).

6. For example, in the 1980s and 1990s, originalism underwent significant transformations, leading to the emergence of what scholars in the late 1990s and early 2000s began to call "the New Originalism." This term was popularized by scholars Randy Barnett and Keith Whittington. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999); Keith Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y, 599 (2004). The New Originalism can be considered a subset of originalist theories that retain certain core principles of earlier

includes, for example, Original Intentions Originalism, Original Methods Originalism, and Original Law Originalism.[7] Living constitutionalists, by contrast, emphasize the evolving nature of legal meaning. Advocates of this approach stress the importance of allowing the Constitution to evolve through interpretation beyond its explicit text to enforce broader underlying principles, rather than relying solely on the amendment process.[8] Despite their theoretical opposition, both

originalism, such as the fixation thesis and the constraint principle. *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning,* 91 NOTRE DAME L. REV. 1, 3–4, 7, 27–29 (2015) (asserting that the meaning of the constitutional text is fixed at the time of its enactment); *see generally* Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (April 13, 2019), available at SSRN: https://ssrn.com/abstract=2940215 or http://dx.doi.org/10.2139/ssrn.2940215 (maintaining that judicial decisions in constitutional cases should be constrained by, or at least consistent with, this original meaning). Unlike earlier forms of originalism, however, New Originalism rejects the idea that the specific intentions or expectations of the framers should be the primary guide in constitutional interpretation.

7. For Original Intentions Originalism, see generally Larry Alexander, *Simple-Minded Originalism, in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 87 (Grant Huscroft & Bradley W. Miller eds., 2011). For original methods Originalism, see generally John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1400–11 (2018), and John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction,* 103 NW. U.L. REV. 751 (2009). For Original Law Originalism, see generally William Baude & Stephen E. Sachs, *Grounding Originalism,* 113 NW. U. L. REV. 1455 (2019).

8. For treatments on living constitutionalism, see generally VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY (2016) (critiquing originalist methodologies and arguing for a constitutional interpretation that is more responsive to democratic and legislative processes); JACK M. BALKIN, LIVING ORIGINALISM (2011) (attempting to reconcile originalism and living constitutionalism, arguing that the Constitution's text and principles provide a framework that future generations must apply in an evolving legal and societal context); DAVID A. STRAUSS, THE LIVING CONSTITUTION (Geoffrey R. Stone ed., 2010) (arguing that constitutional interpretation should develop through common-law principles rather than rigid adherence to original intent); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005) (emphasizing a *pragmatic* approach to constitutional interpretation, advocating for an interpretation that promotes democratic participation and adapts to contemporary needs); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) (asserting that constitutional interpretation should be guided by moral principles of

frameworks share a common flaw: they conceive of legal temporality as either static or linearly progressive, failing to account for the fluid, self-differentiating nature of precedent.

This Article engages Henri Bergson's philosophy of time—specifically his concepts of "duration" and "simultaneity"—to propose a new theoretical framework for understanding the role of time in constitutional precedent.[9] Moving beyond the traditional dichotomy of originalism and living constitutionalism, this approach reconceptualizes precedent not as a fixed historical point or mere linear progression, but as a dynamic process of continuous self-differentiation. In so doing, I argue that both interpretive methods limit their heuristic potential by reducing constitutional temporality to a simple contextual reading, whether historical or contemporary. Instead, drawing on Bergson's temporal philosophy, I argue that the significance of precedent to constitutional meaning emerges through the fluid interaction between precedent and lived experience, where

justice and fairness, and arguing that judges must consider evolving ethical and political norms rather than static historical meanings); ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM (1994) (arguing for a moral reading of the Constitution that takes into account evolving social and political realities).

9. Henri Bergson (1859–1941) was a French philosopher known for his work on the nature of time, memory, and consciousness. Awarded the Nobel Prize in Literature in 1927, Bergson challenged mechanistic and deterministic views of time, arguing instead for a concept of "duration" (*la durée*), a continuous and qualitative experience of time that cannot be fully captured by spatialized, chronological measurement. Despite his early prominence, Bergson's influence declined significantly in the philosophical community following both Bertrand Russell's pointed critiques, BERTRAND RUSSELL, THE PHILOSOPHY OF BERGSON (1912); and Bergson's exchanges with Einstein regarding the nature of time and relativity, *see generally* JIMENA CANALES, THE PHYSICIST & THE PHILOSOPHER: EINSTEIN, BERGSON, AND THE DEBATE THAT CHANGED OUR UNDERSTANDING OF TIME (2015). However, contemporary scholarship has witnessed a resurgence of interest in Bergsonian thought, catalyzed largely by Gilles Deleuze. *See generally* GILLES DELEUZE, BERGSONISM (trans. Hugh Tomlinson and Barbara Habberjam 1988). Bergson "is [now] widely regarded as one of the most original and important philosophers of the twentieth century." THE BERGSONIAN MIND (Mark Sinclair & Yaron Wolf eds., 2021). Russell's misunderstanding of Bergson illustrates the broader epistemological divide between analytic and continental philosophical traditions. Likewise, Bergson's critique of Einstein's metaphysical assumptions exemplifies the continuing fundamental tensions between philosophy and science. His major works, include *TIME AND FREE WILL* (1889), *MATTER AND MEMORY* (1896), *CREATIVE EVOLUTION* (1907), and DURATION AND SIMULTANEITY (1922).

time itself becomes a subjective phenomenon—a force unto itself—that is intrinsically linked to evolving social and legal realities and the lived experiences that demand constitutional protection. In other words, a precedent's significance derives not from textual fixation or historical reference alone. This perspective challenges the conventional notion of chronological time as the sole or primary determinant of constitutional validity, suggesting instead that precedential authority derives from its capacity to engage meaningfully with contemporary constitutional demands while maintaining historical continuity

This reconceptualization offers a more complex and effective method for assessing a precedent's continued significance. It allows the Court to move beyond the binary choice of preservation or rejection, towards a more fluid understanding of constitutional interpretation that can adapt to societal changes while maintaining legal continuity. By embracing this temporal complexity, the Court can develop a more robust constitutional jurisprudence that honors the text's original meaning and its evolving significance in contemporary society.

By applying Bergson's temporality to constitutional law, this Article seeks to redefine the Supreme Court's use of history and understanding of the role of time in precedent. In particular, it critiques the Roberts Court's "present-past" approach to history, which often treats precedent as a static relic rather than a dynamic force.[10] For example, decisions such as *Dobbs v. Jackson Women's Health Organization*, *Shelby County*, *Alabama v. Holder*, and *Allen v. Milligan*, illustrate how the Court selectively engages with historical memory, either casting past rulings aside as outdated artifacts or fossilizing them.[11] Ultimately, I contend that such an approach misunderstands the temporal dimension of precedent, and in so doing, ignores an essential feature of precedent, which is to enable an

10. *See* discussion *infra* Part II.*A*.

11. Allen v. Milligan, 599 U.S. 1 (2023) (applying outdated precedent to modern racial gerrymandering cases without acknowledging changes in voter suppression tactics); Dobbs v. Jackson Women's Heath Org., 597 U.S. 215 (2022) (grounding the Court's decision in an 18th-century understanding of abortion law); Shelby Cnty. v. Holder, 570 U.S. 529, 550–51 (2013) (invalidating the Voting Rights Act's preclearance requirement based on a claim that racial discrimination had declined); *see infra* Parts I & II (discussing the use of historical meaning).

approach to constitutional interpretation that synthesizes historical fidelity with societal transformation.

This Article proceeds in five parts. Part II examines the traditional approach to *stare decisis*, exploring how conventional understandings of precedent rely on problematic temporal assumptions that reduce constitutional meaning to static historical moments. Part III analyzes how the Roberts Court's increasingly text-centric approach to precedent has reshaped constitutional interpretation, particularly through its selective use of history, treatment of precedential authority, and contemporary characterization of past decisions. Part IV introduces Bergson's philosophy of time, specifically his concepts of duration and simultaneity, to develop a theoretical framework that better captures the fluid nature of constitutional meaning. Part V analyzes two Supreme Court voting rights cases (*Shelby County, Alabama v. Holder* and *Allen v. Milligan*) in light of Bergson's key concepts, to demonstrate how the Court's rigid historicism fails to account for the dynamic nature of lived experience under the Constitution. Finally, Part VI explores the broader implications of understanding constitutional precedent through the lens of temporal complexity, offering a path beyond the traditional dichotomy between originalism and living constitutionalism. Part VII concludes the discussion. Through the temporal complexity analysis, this Article proposes a more nuanced approach to constitutional interpretation that recognizes both the enduring nature of constitutional principles and their capacity for meaningful evolution through lived experience.

II. STARE DECISIS AS A CONSTITUTIONAL SAFEGUARD: TRADITIONAL APPROACHES TO PRECEDENTIAL POWER

Constitutional interpretation in the modern era exists at a critical intersection of competing methodological and temporal approaches. The tension between maintaining fidelity to precedent and adapting to evolving societal norms has become increasingly pronounced, particularly as the Supreme Court grapples with the principle of *stare decisis* in an era of rapid social change. This tension has been exacerbated by a notable shift from time-centric to text-centric approaches to constitutional interpretation, a transformation most evident in the Roberts Court's embrace of originalist methodologies. The traditional binary distinction between originalism and living

constitutionalism has proven inadequate to address the complex temporal dimensions of constitutional interpretation, as both frameworks ultimately reduce constitutional meaning to textual analysis, albeit through different contextual lenses. While originalism anchors interpretation in historical understanding, and living constitutionalism advocates for contemporary adaptation, neither fully captures the dynamic nature of constitutional law as shaped by the interaction of historical practices, experiential contexts, and evolving traditions. This theoretical limitation becomes particularly apparent in cases involving fundamental rights, such as privacy, where the Court must navigate between historical practices and contemporary understandings.[12] While scholars like Jack Balkin have attempted to reconcile originalism and living constitutionalism through "framework originalism," such approaches remain trapped within existing interpretive paradigms.[13] A Bergsonian analysis offers a way beyond this impasse by reconceptualizing constitutional time itself.

A. The Problem of Temporality in Constitutional Interpretation[14]

The Supreme Court has long relied on history as a jurisprudential tool, but its treatment of time remains conceptually underdeveloped.[15] Modern constitutional adjudication is dominated by

12. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 217 (2022) ("*Roe* termed this a right to privacy, and *Casey* described it as the freedom to make 'intimate and personal choices' that are 'central to personal dignity and autonomy.'") (citations omitted).

13. JACK M. BALKIN, LIVING ORIGINALISM 21–34 (2011).

14. "In contrast to the measurable and calculated notion of time/chronology, temporality is concerned with the way in which a sequence of events, a kind of history, is physically experienced by those who live through them or experience them." *Temporality*, OXFORD REFERENCE ONLINE, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803103027785#:~:text=In%20contrast%20to%20the%20measurable,through%20them%20or%20experience%20them (last visited Apr. 12, 2025). Thus, temporality encompasses the broader theoretical framework through which we understand the relationships between past, present, and future as modes of being.

15. There is, however, a growing interest in considering the Court's relationship to and understanding of time. For examples of scholarship on the Court's treatment of time, see, e.g., JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME (2020) (identifying three cycles: the rise and fall of regimes, polarization and depolarization, and rot and renewal, the interaction of which generate constitutional

a "present-past" orientation, in which the Court anchors its rulings historically while failing to acknowledge how time itself transforms the experience of living under the Constitution.[16] A present-past

time. Balkin asserted that constitutional time is understood through and produced by political factors (dominant regimes, partisanship, and the health of republican government)); RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018) (using a three-tiered framework to describe constitutional history in three stages: the original meaning at T1, subsequent interpretations at T2, and the present implications at T3); David McNamee, *Fundamental Law, Fundamental Rights, and Constitutional Time*, 55 IND. L. REV. 319, 365 (2022) (arguing that claims of fundamental law are inherently temporal claims that relate present interpretations to moral understandings of both past and future, always oriented toward the achievement of constitutional justice); David A. Super, *Temporal Equal Protection*, 98 N.C. L. REV. 59, 59, 71 (2019) (noting that while legal analysis often involves "cross-sectional comparisons between analogous things at the same time and temporal comparisons involving the same thing at different times," equal protection doctrine has focused almost exclusively on the former and suggesting that a temporal approach to equal protection would reveal how dominant groups secure benefits through law and then foreclose similar opportunities for minorities.); Richard Alexander Izquierdo, *The Architecture of Constitutional Time*, 23 WM. & MARY BILL RTS. J. 1089, 1091 (2015) ("Constitutional time refers to the extraordinary historical events that destabilize the regime and open space for new interpretations and constructions to change or supplement constitutional meaning. The idea of constitutional time here draws inspiration from Stephen Skorownek's political time concept in his book *The Politics Presidents Make*, which provides a typology of presidential authority connected to particular political regimes."); Renisa Mawani, *The Times of Law*, 40 L. & SOC. INQUIRY 40, 253, 256 (2015) ("[A] growing number of legal historians, anthropologists, and legal theorists have questioned the temporality of law. Not conceptualizing law solely as historicity, as a single or linear telos, or as a surface on which change can be measured, some have examined how law produces and organizes multiple conceptions of time, in synchronicity and in tension with other nonlegal temporalities.") (internal citations omitted); *id.* at 262 ("In legal scholarship, the problem is not the inability to think about change but, rather, its conceptualization. The tendency is to view change as adaptation and response to circumstances exterior or other to law. Time is reduced to a baseline against which change can be measured.") (internal citations omitted).

16. ALEIDA ASSMANN, IS TIME OUT OF JOINT? ON THE RISE AND FALL OF THE MODERN TIME REGIME 4–5 (Sarah Clift trans., Cornell University Press 2020). In *Is Time Out of Joint?,* cultural memory scholar, Aleida Assmann examines how our understanding of time has evolved. She observes that society's once-optimistic view of the future has been eroded by challenges like environmental degradation and climate change. Meanwhile, there has been an "unprecedented return of the past," marked by nostalgia and atavistic narratives of nation, race, and tribe. *Id.* at 7. She contends that this shift in Western temporality reflects a declining interest in future

orientation to time is a backward-looking orientation to time. However, what the concept of present-past time orientation entails is more complex than that.

It is helpful to think about present-past temporal orientation in relation to its opposite, present-future orientation. Under a present-future orientation, decisions in the present are focused on actualizing a future understood as a space for creation and coming fulfillment.[17] Conversely, under a present-past orientation, decisions in the present are focused on restoring/recovering the traditions of the past.[18] Here, the future becomes the repository of a reversion to a previous state.

A present-past orientation treats history as a static repository of constitutional meaning, rather than recognizing that constitutional meaning evolves through its continuous application to new circumstances. We see this tension in the Roberts Court's decision-making, where historical references are often used to constrain or regress constitutional meaning rather than to explain its evolving significance. For example, in *Dobbs v. Jackson Women's Health Organization*, the Court overturned *Roe v. Wade* by grounding its decision in an 18th century understanding of abortion law, dismissing decades of precedent on the grounds that constitutional rights must be "deeply rooted in this Nation's history and tradition."[19] Similarly, in *New York State Rifle & Pistol Association v. Bruen*, the Court held that contemporary gun regulations are unconstitutional unless they have historical analogs from the 18th or 19th century.[20] The Court's

possibilities alongside an intensifying focus on the past. Her analysis aligns with cultural theorist Andreas Huyssen's earlier observations about this temporal reorientation:

> [T]he emergence of memory as a key concern in Western societies . . . stands in stark contrast to the privileging of the future so characteristic of earlier decades of twentieth-century modernity . . . . [M]odernist culture was energized by what one might call "present futures." Since the 1980s, it seems, the focus has shifted from present futures to present pasts, and this shift in the experience and sensibility of time needs to be explained historically and phenomenologically.

Andreas Huyssen, *Present Pasts: Media, Politics, Amnesia*, 12 *PUB. CULTURE* 1, 21 (2000).

17. ASSMANN, *supra* note 16, at 2.

18. ASSMANN, *supra* note 16, at 5–6.

19. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

20. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 45–46 (2022).

approach to these decisions paradoxically reinforces an ahistorical view of law, despite their heavy reliance on historical analysis. By treating specific moments from the 18th and 19th centuries as fixed reference points rather than part of a continuous historical flow, the Court fails to acknowledge how constitutional meaning evolves through lived experiences.

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

Bergson's critique of chronological time is directly relevant to the tension between constitutional experience and the experience of the Constitution.[21] His concept of "duration" challenges the assumption

21. Bergson's philosophy focused on the role of time, centering its generative role in dynamic systems. His temporal theory, first developed as a psychological

that time is merely a sequence of discrete, measurable units.[22] Instead, duration emphasizes the interpenetration of past, present, and future, which, in the American constitutional context, allows us to better understand how constitutional meaning is constantly reshaped by its application to ever-changing conditions and circumstances. Understanding time as duration means that precedent is not an inert record but a living force that undergoes transformation with each new adjudication. This insight compels a fundamental rethinking of the Court's engagement with history, urging a move beyond formalistic originalism and progressive revisionism toward a dynamic theory of legal temporality.

B. The Role of Precedent: The Traditional View of Stare Decisis

At the core of constitutional jurisprudence is the doctrine of *stare decisis*, the principle that courts should adhere to established precedent to maintain legal stability and predictability. The Supreme Court has historically justified *stare decisis* on both institutional and practical grounds: it ensures continuity, fosters public trust, and prevents arbitrary judicial decision-making.[23] This traditional view

framework in *Time and Free Will*, evolved into a more comprehensive philosophical system where Bergson's concept of time grounds an evolutionary theory in *Creative Evolution*, and supports a philosophical reading of Einstein's Special Theory of Relativity in *Duration and Simultaneity*. *See generally* HENRI BERGSON, TIME AND FREE WILL: AN ESSAY ON THE DATA OF IMMEDIATE CONSCIOUSNESS (F.L. Pogson trans., 1913) [hereinafter BERGSON, TIME AND FREE WILL]; HENRI BERGSON, CREATIVE EVOLUTION (Arthur Mitchell trans., 1911) [hereinafter BERGSON, CREATIVE EVOLUTION]; HENRI BERGSON, DURATION AND SIMULTANEITY WITH REFERENCE TO EINSTEIN'S THEORY (Leon Jacobson trans., 1965) [hereinafter BERGSON, DURATION AND SIMULTANEITY].

22. BERGSON, TIME AND FREE WILL, *supra* note 21, at 102; BERGSON, CREATIVE EVOLUTION, *supra* note 21, at 52–53.

23. *See, e.g.*, Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. Rev. 1711, 1722–23 (2013) ("Stare decisis protects reliance interests by putting newly ascendant coalitions at an institutional disadvantage. It doesn't prohibit them from rejecting a predecessor majority's methodological approach in favor of their own, but it makes it more difficult for them to do so. The doctrine thus serves as an intertemporal referee, moderating any knee-jerk conviction of rightness by forcing a current majority to advance a special justification for rejecting the competing methodology of its predecessor. It also channels disagreements into the less disruptive approach of refusing to extend precedent—an

treats past rulings as fixed references—decisions that should not be disturbed absent a compelling reason, lest the legitimacy of the Court be called into question. From this perspective, precedent is often understood spatially rather than temporally: it exists as a static point in history, and subsequent cases are expected to orient themselves around it, rather than engage with it in a process of continuous reinterpretation. This spatialization of precedent assumes that legal meaning remains constant across time, unaffected by the evolving social, political, and historical context in which it is applied.

In the 1992 *Planned Parenthood v. Casey* case, the Court noted that "[t]he obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit."[24] The Court marked that beginning with the understanding that "*the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.*"[25] The Court marked the outer extreme as the rare instance when a "prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed."[26] The Court cited *Payne* and other precedent,[27] in which it had previously stated that *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions,

approach that maintains better continuity with the past than does the abrupt turn of getting rid of it altogether."); *see also*, Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, l980 WIS. L. REV. 467, 484 (1980) (asserting that following precedent is essential because citizens will only trust and accept the Supreme Court's decisions if they believe that "in each case the majority of the Court is speaking for the Constitution itself rather than simply for five or more lawyers in black robes"); Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. REV. 1279, 1279 (2008) (asserting precedent's continued institutional relevance in the face of criticism because, "precedent shapes the Court's institutional practices and secures basic stability in constitutional adjudication," and normative relevance because "[p]recedent provides an independent, neutral source on which Justices may constrain or avoid reliance on their personal or political preferences.").

24. Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992).

25. *Id.* (emphasis added).

26. *Id.*

27. *Id.*

and contributes to the actual and perceived integrity of the judicial process."[28]

While adherence to *stare decisis* is not absolute,[29] *Casey* outlined "pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."[30] *Casey* noted that the Court should consider whether the rule is unworkable; "is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation;"[31] rests on outdated facts; or is inconsistent with later legal developments.[32] For institutional legitimacy reasons, the Court has historically proceeded with caution when asked to depart from it. As Justice O'Connor succinctly stated, "Liberty finds no refuge in a jurisprudence of doubt."[33]

The legal literature explores precedent from three dominant and intertwined perspectives.[34] The first views precedent as a way to address the counter-majoritarian nature of the Court, thus safeguarding democratic legitimacy.[35] The second perspective highlights

28. *See also* Payne v. Tennessee, 501 U.S. 808, 827 (1991); *see also*, United States v. In'l Bus. Mach. Corp., 517 U.S. 843, 855–856 (1996); Citizens United v. FEC, 558 U.S. 310, 377 (2010) (Roberts, C. J., concurring) (acknowledging that the Court will not overturn a past decision unless there are strong grounds for doing so).

29. *Payne*, 501 U.S. at 828 *("Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" (quoting *Helvering v. Hallock,* 309 U.S. 106, 119 (1940))). This is particularly true in constitutional cases, because in such cases "correction through legislative action is practically impossible." *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting); *see also* Pearson v. Callahan, 555 U.S. 223, 233 (2009); Lawrence v. Texas, 539 U.S. 558, 577 (2003); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997); Agostini v. Felton, 521 U.S. 203, 235 (1997); Seminole Tribe v. Florida, 517 U.S. 44, 63 (1996).

30. *Casey*, 505 U.S. at 854.

31. *Id.* (citing United States v. Title Ins. & Trust Co. 265 U.S. 472, 486 (1924)).

32. *Id.* at 854–55.

33. *Id.* at 844.

34. For a general overview of the interests served by adherence to precedent and the doctrine of *stare decisis*, see Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845 (2023).

35. *See, e.g.*, RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 98–101 (2018); MICHAEL J. GERHARDT, THE POWER OF PRECEDENT (2008); *see also* Powell, Jr., *supra* note 1, at 288 ("[E]limination of constitutional stare decisis

precedent's function as a constraint on judicial discretion, ensuring that judges' decisions are not arbitrary but bound by (or at least based on) previous rulings.[36] Additionally, literature in this category discusses the importance of precedent in preserving the stability of the rule of law, asserting that without the consistency provided by precedent, the law would be subject to fluctuation and unpredictability. The third perspective derives from how the various interpretive approaches to the Constitution confront the tension between *stare decisis* and the judicial responsibility to rectify erroneous constitutional interpretations.[37] This

would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is."); Maltz, *supra* note 23, at 484 (insisting that adhering to precedent is necessary because the public will not accept the Supreme Court's authority unless it believes that "in each case the majority of the Court is speaking for the Constitution itself rather than simply for five or more lawyers in black robes").

36. *See, e.g.*, MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE (2011); SCALIA, *supra* note 4, at 139 ("The whole function of the doctrine is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability."); *see also* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 570 (2001) ("The force of the doctrine . . . lies in its propensity to perpetuate what was initially judicial error or to block reconsideration of what was at least arguably judicial error.").

37. For discussion of living constitutionalists favoring weak *stare decisis* because constraint to overrule hinders progress, see, e.g., Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 SUP. CT. REV. 345, 398 (2011) (arguing that common-law theories of constitutional adjudication risk overemphasizing the importance of *stare decisis*, for judges should feel free to "cast aside their predecessors' outmoded thinking"). For discussion of originalists favoring weak *stare decisis* to avoid doctrine overriding the Constitution (i.e., arguing that the Court should never follow precedent that contradicts the Constitution's original meaning), see, e.g., Randy E. Barnett, Response, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1233 (2006) (describing himself as a "fearless originalist[ ]" because he is willing to reject *stare decisis* when it would require infidelity to the text); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 25–28 (1994), (arguing that it is unconstitutional to adhere to precedent in conflict with the Constitution's text). *Cf.* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (characterizing himself as a "faint-hearted originalist" because of his willingness to follow some precedents that may conflict with the Constitution's text); *see also* Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 179 (2014) ("This Article connects the scope of precedent with recurring and foundational debates about the proper ends of judicial interpretation. A precedent's forward-

tension is depicted in the ongoing "settled versus right" debate, where one side privileges adherence to established interpretations to maintain settled decisions, and the other contends that *stare decisis* should be followed only in those cases which the Court deems were correctly decided, i.e., "right" decisions.[38]

III. TEMPORAL DISSONANCE: HOW THE ROBERTS COURT'S TEXT-CENTRIC APPROACH RESHAPES CONSTITUTIONAL HISTORY

The Roberts Court's increasing embrace of text-centric precedent—an interpretive approach that prioritizes textual elements, including but not limited to, literalism and plain meaning analysis, and historical fixation and original public meaning (understanding at the time of enactment) over evolving constitutional interpretations—raises important questions for meaning under constitutional law.[39] This

looking effect should not depend on the superficial categories of holding and dictum. Instead, it should reflect deeper normative commitments that define the nature of adjudication within American legal culture . . . . Ultimately, what should determine the scope of precedent is the set of premises—regarding the judicial role, the separation of powers, and the relevance of history, morality, and policy—that informs a judge's methodological choices.").

38. *See generally* RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT (2017).

39. The phrase "text-centric" is meant as a general categorical description of and collective reference to the range of textualist interpretive methodologies embraced by the majority of Justices on the Roberts Court. *See, e.g.*, William N. Eskridge, Jr. et al., *Textualism's Defining Moment,* 123 COLUM. L. REV. 1611, 1614–15 (2023) (exploring the late-stage textualism of the post-Scalia era and Court's text-centric focus, "The Supreme Court is now dominated by devoted textualists: Justices Clarence Thomas, long an enthusiastic booster of the new textualism; Samuel Alito, whose Burkean jurisprudence has increasingly bent toward textualism; Neil Gorsuch, the boldest heir to Scalia's persistent, uncompromising textualism; Brett Kavanaugh, inspired by Scalia to focus "on the words, context, and appropriate semantic canons of construction"; and Amy Coney Barrett, Scalia's former clerk and sympathetic commentator. In addition, Chief Justice John Roberts presents himself as an umpire, applying statutory text according to established rules of interpretation. In constitutional cases, there are intense debates between these five or six red-blooded textualist Justices and the three true-blue pragmatic Justices on opposing sides in predictable conservative-liberal splits . . . ." (internal citations omitted)). *See* Kevin Tobia, *We're Not All Textualists Now*, 78 N.Y.U. ANN. SURV. AM. L. 243, 246 n.10 (2023) (referencing a survey of 42 federal appellate judges and reporting: "*None* of the judges is a 'textualist' in the extreme sense of that word, or even in the version of

approach, which privileges historical snapshots over the dynamic flow of legal evolution, introduces a form of temporal dissonance into the Court's jurisprudence. Rather than engaging with precedent as a phenomenon of *duration*—a continuously evolving force shaped by its interaction with contemporary experience—the Court increasingly treats history as a static artifact, a fixed repository of meaning to be retrieved and applied with mechanical precision. This methodological shift manifests in three distinct but interrelated expressions of the Court's temporal authority. First, by controlling the historical narrative, the Court selectively emphasizes particular historical moments while minimizing others, as evidenced in landmark decisions like *Dobbs* and *Bruen*.[40] Second, the Court's treatment of precedential authority, particularly in cases like *Janus v. AFSCME*, demonstrates a willingness to redefine the criteria for overruling established precedent.[41] Finally, the Court's text-centric focus is often tied to historical analogues, such as those discussed in cases like *Allen v. Milligan*, and this reveals how the Court's language choices fix meaning in particular time periods.[42] Each of these tendencies reflects a broader interpretive shift that prioritizes textual fixation over temporal fluidity, reinforcing a constitutional framework that resists adaptation to contemporary legal and social realities. By examining these shifts, this section illustrates how the Roberts Court's text-centric approach reshapes constitutional history, constraining the judiciary's

textualism that was practiced by Justice Scalia. Very few judges told us they read the entire statute, or even begin their analysis of statutory cases with the text of the statute. All of the judges use legislative history. Dictionaries are mostly disfavored. Even when asked to provide one word to describe their interpretive approaches, not one judge was willing to self-describe as 'textualist' without qualification. Even the *text-centric* judges described themselves in such terms as 'textualist-pragmatist' or 'textualist-contextualist.'" (emphasis added)); *see also* Tara Leigh Grove, *The Misunderstood History of Textualism*, 117 NW. U. L. REV. 1033, 1096 (2023) ("With a *text-centric* approach, a Justice may be difficult to predict in such ideological terms; she may issue some statutory decisions (such as *Bostock* or *Niz-Chavez*) that please progressive forces, and others that may satisfy more conservative or libertarian voices." (emphasis added)).

40. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022).

41. Janus v. AFSCME, 585 U.S. 878 (2018).

42. Allen v. Milligan, 599 U.S. 1 (2023).

capacity to mediate between past and present in a way that preserves both fidelity and adaptability in constitutional jurisprudence.

A. Controlling the Historical Narrative

The Roberts Court's text-centric approach to constitutional interpretation has positioned history as an authoritative constraint, selectively retrieving history as fixed moments to justify doctrinal shifts. This selective use of history functions as a mechanism of control—one that either entrenches past legal understandings or strategically discards them when they conflict with the Court's interpretive methodology.[43] Nowhere is this more evident than in the Court's treatment of precedent in *Dobbs v. Jackson Women's Health Organization*[44] and *New York State Rifle & Pistol Association v. Bruen*,[45] where historical analysis is wielded not as a neutral tool but as a means of shaping constitutional meaning in service of a rigid temporal framework. These cases illustrate how the Court's historical methodology both narrows constitutional possibilities and reinforces a particular vision of legal continuity that disregards the lived experience of constitutional time.

1. Dobbs v. Jackson Women's Health Organization

The Supreme Court has long professed allegiance to *stare decisis*, but in the past two decades it has shown a greater willingness to deviate from precedent. Increasingly, the Court has overturned or severely limited past rulings when they no longer align with its dominant interpretative methodology.[46] The Roberts Court, in particular, has embraced a disruptive approach to precedent, often treating prior decisions as historical artifacts to be discarded rather than

43. Angela Onwuachi-Willig, Comment, *Roberts's Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192, 193 (2023) ("The more lawyers accepted that the study of narrative in the law 'demands analytic consideration in its own right,' the more lawyers would see 'how narrative discourse is never innocent but always presentational and perspectival.'").

44. *Dobbs*, 597 U.S. at 215.

45. *Bruen*, 597 U.S. at 1.

46. *Dobbs*, 597 U.S. at 250 (holding that abortion rights are not "deeply rooted in the Nation's history and traditions.").

as poignant moments along evolutionary continuum of constitutional principles.

This trend is evident in *Dobbs v. Jackson Women's Health Organization*, where the Court overturned *Roe v. Wade*[47] and *Casey*[48] after nearly 50 years of precedent, despite the doctrine of *stare decisis* dictating reliance interests should weigh heavily against reversal.[49] Chief Justice Roberts, concurring in judgment but dissenting from the wholesale rejection of *Roe*, emphasized that the Court's increasing willingness to overturn precedent creates instability in constitutional law.[50] The *Dobbs* majority, however, dismissed these concerns, arguing that precedent should not be followed when it is "egregiously wrong"—a vague standard that effectively allows the Court to discard past rulings whenever they conflict with its preferred constitutional methodology.[51]

Constitutional time manifests through both production and construction processes within judicial decision-making.[52] Production

47. Roe v. Wade, 410 U.S. 113 (1973).

48. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

49. *Dobbs*, 597 U.S. at 231 (2022).

50. *Id.* at 348–49 (Roberts, C.J., dissenting).

51. *Id.* at 231–32.

52. The distinction between constitutional production and construction is a separate distinction from the distinction between constitutional interpretation and construction. On one hand are interventions that take issue with the distinction. *See* Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CAL. L. REV. 1, 44 n.37 (2018); Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739, 1747 n.25 (2013) (referring to Solum's approach as 'an idiosyncratic and unnecessary wrinkle that other originalists have not fully appreciated and are unlikely to find congenial'); Roderick M. Hills, Jr., *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. F. 173, 175 (2006) (arguing that no distinction exists where "the meaning of a constitutional provision *is* its implementation"); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 772–75 (2009) (objecting to the interpretation-construction distinction because original interpretive rules offer a plausible way to resolve ambiguity and because construction was not embraced by the founders); Mark Tushnet, Heller *and the New Originalism*, 69 OHIO ST. L.J. 609, 615–16 n.34 (2008) (citing the interpretation-construction distinction as an example of a new originalist distinction that is "hardly intuitive, whose precise application may lead to missteps"); *see also* Laura A. Cisneros, *The Constitutional Interpretation/Construction*

involves the Court's active generation of constitutional meaning through interpretive acts, while construction assembles and contextualizes meaning through historical, legal, and societal frameworks.[53] These processes, though distinct, often interweave in practice.

Distinction: A Useful Fiction, 27 CONST. COMMENT 71, 76–80 (2010) (describing differing views about the interpretation-construction distinction and concluding that the distinction is "neither obvious nor identifiable through the application of an accepted and uniform set of rules"); B. Jessie Hill, *Resistance to Constitutional Theory: The Supreme Court, Constitutional Change, and the "Pragmatic Moment"*, 91 TEX. L. REV. 1815, 1831 (2013) (observing that the "context dependency of language . . . throws into question' the interpretation-construction distinction").

On the other hand is scholarship that embraces the distinction. *See* Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 414 (2009) (explaining "[T]he distinction between 'constitutional interpretation,' understood as the enterprise of discerning the linguistic meaning or semantic content of the Constitution, and 'constitutional construction,' which we might tentatively define as the activity of further specifying constitutional rules when the original public meaning of the text is vague or underdeterminate"); *id.* at n.20. ("The distinction first became prominent in contemporary debates about originalism in the work of Keith Whittington."); RANDY BARNETT, RESTORING THE LOST CONSTITUTION 88 (2004); KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION 5 (1999); KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 5 (1999); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611–29 (1999). Another important early adopter of this distinction (in the context of constitutional theory) was Robert Clinton. *See* Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of 'This Constitution'*, 72 IOWA L. REV. 1177, 1265 (1987). For a brief introduction to the distinction, see *Legal Theory Lexicon 063: Interpretation and Construction*, LEGAL THEORY LEXICON (April 27, 2008) http://lsolum.typepad.com/legal_ theory_lexicon/2008/04/legal-theory-le.html.

53. The distinction between constitutional production and construction that I develop in this Article is my own, but it aligns with broader scholarly discussions of constitutional history and narrative. *See, e.g.*, Pamela Brandwein, *Dueling Histories: Charles Fairman and William Crosskey Reconstruct "Original Understanding"*, 30 L. & SOC'Y REV. 289, 290 (1996) (examining the social production of legal knowledge by analyzing how competing interpretive frameworks shape historical narratives of the Fourteenth Amendment. "By attending specifically to the social production of *constitutional* knowledge, [Brandwein] offer[s] a way of applying sociological thought to constitutional law." *Id.* Drawing from the sociology of knowledge, Brandwein critiques the standard legal debate over "original understanding," which "flattens out social phenomena" and seeks to reinsert historical context into the modern terms of constitutional interpretation.). *Id.*

As a production, *Dobbs* generated a new constitutional reality by overturning *Roe* and *Casey*. Simultaneously, as a construction, the decision assembled historical and legal materials to justify its conclusions, demonstrating the Court's "present-past" orientation in seeking to restore a historical understanding of constitutional rights.[54]

This interplay between production and construction reveals how constitutional time operates as a process rather than a fixed entity. This process necessarily involves judicial creativity in bridging what I have called, the "constitutional experience"—the Court's articulation of constitutional norms—with the "experience of the Constitution"—how individuals and communities live under these norms.[55]

The Court's approach in *Dobbs* exemplifies the limitations of rigid historical analysis in constitutional interpretation. *Dobbs* is both a production and a construction, but its production reflects a backward-looking redefinition of constitutional rights, and its construction relied on a selective historical methodology. By fixating on a narrow historical understanding of abortion rights at the time of the Fourteenth Amendment's ratification (1868), the Court demonstrated a problematic "present-past" orientation that fails to account for the dynamic nature of constitutional time. This approach freezes constitutional meaning in a particular historical moment, disregarding Bergson's insight that time operates as a continuous flow where past, present, and future interpenetrate.[56] The Court's construction of constitutional time in *Dobbs* prioritized historical recovery over the lived experiences of contemporary Americans, neglecting the essential role of judicial creativity in bridging constitutional experience with the actual experience of the Constitution. This rigid historicism ultimately undermines the Constitution's capacity to adapt to evolving societal

54. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 245–46 (2022) (drawing upon Blackstone's Commentaries and other foundational legal texts from the 18th century, colonial-era manuals for justices of the peace that restated common-law rules, and a collection of state and colonial court cases spanning from 1652 through the 19th century); *see supra* Part II.*A*.

55. *See supra* Part II.

56. For Bergson, duration is the "continuation of what precedes into what follows and the uninterrupted transition, multiplicity without divisibility and succession without separation . . . ." BERGSON, DURATION AND SIMULTANEITY, *supra* note 21, at 44. Indeed, rather than a combination of separate moments, duration is the "continuous progress of the past which gnaws into the future and which swells as it advances." BERGSON, CREATIVE EVOLUTION, *supra* note 21, at 4.

needs and effectively address present-day challenges, illustrating the dangers of allowing historical analysis to overshadow the dynamic, forward-looking aspects of constitutional interpretation.

2. New York Rifle & Pistol Association v. Bruen

The Court's decision in *New York State Rifle & Pistol Association v. Bruen* (2022)[57] exemplifies how the Roberts Court's rigid historicism exerts control over constitutional interpretation through a fixed, universal time framework that prioritizes historical analogs over contemporary realities or evolutionary progress.[58] Writing for the majority, Justice Thomas relied heavily on the historical context of the Second Amendment of the Constitution to support his legal conclusions.[59] The case involved a challenge to a 109-year-old New York state law that required individuals to show "proper cause" to obtain a license to carry a concealed firearm in public.[60] The plaintiffs, New York State Rifle & Pistol Association and others, argued that the law violated the Second Amendment's guarantee of the right to bear arms. Justice Thomas agreed, noting that the right to bear arms had been an important part of Anglo-American law and tradition for centuries, dating back to the English Bill of Rights of 1689 and the American Revolution.[61] He also cited several historical sources, including legal treatises and founding-era documents, to support his position that the Second Amendment protected the right to carry firearms in public for self-defense.[62] Finally, Justice Thomas criticized

57. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

58. The rise of originalism as the dominant legal theory has driven the Court's increased emphasis on historical interpretation. This shift, begun in the 1980s as a critique of mid-twentieth-century constitutional jurisprudence, has gained particular resonance during the current era of political division. For a discussion on the emergence of originalism in the 1980s as a response to the progressive substantive due process and pro-defendant criminal procedure decisions of the Warren Court, see generally AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2015). For a discussion on political polarization in the United States, see generally JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME (2020).

59. *Bruen*, 597 U.S. at 19–21.

60. *Id.* at 11–12.

61. *Id.* at 44.

62. *See generally id.*

the lower courts for failing to give proper weight to the historical context of the Second Amendment in their analysis, admonishing them for relying too heavily on modern policy considerations, such as public safety, rather than looking to the original meaning and purpose of the Second Amendment.[63]

The majority opinion in *Bruen* places the burden on the government to demonstrate that any gun law "is consistent with this Nation's historical tradition of firearm regulation,"[64] and advises that courts should determine the consistency of a modern-day gun regulation by drawing "historical analogies" to early American gun laws.[65] These statements suggest that such analogies must be drawn either to laws existing in 1791 when the Second Amendment was ratified, or to laws existing in 1868, when the Fourteenth Amendment that required States to comply with the Second Amendment, was ratified. Indeed, the opinion indicates that, "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment."[66] In other words, modern gun laws, even those that address problems that existed in the 1700s, are likely to fail, unless similar laws existed in the 18th century.

Overall, Justice Thomas' near-exclusive reliance on history in *Bruen* reflects a broader approach to constitutional interpretation—namely originalism—which has guided, in weaker or stronger forms, many of the Court's opinions since the mid-1980s.[67] Thomas' approach to originalism, however, involves an especially sharp turn to the historical context of the Constitution in determining the document's meaning and scope. Dissenting in *Bruen*, Justice Breyer lamented the majority's aggressive use of history: "Although I agree that history can often be a useful tool in determining the meaning and scope of constitutional provisions, I believe the Court's near-exclusive reliance on that single tool today goes much too far."[68]

63. *Id.* at 16–17.
64. *Id.* at 18, 24.
65. *Id.* at 27–30.
66. *Id.* at 26.
67. *See* HOLLIS-BRUSKY, *supra* note 58.
68. *Bruen*, 597 U.S. at 102–03 (Breyer, J., dissenting).

The Roberts Court's approach in *Bruen*, particularly through Justice Thomas' majority opinion, exemplifies a problematic temporal rigidity that fails to account for the dynamic nature of constitutional interpretation. By mandating that modern gun regulations must find direct historical analogues in 18th-century law, the Court artificially freezes constitutional meaning in a specific historical moment, displaying what Bergson would recognize as an over-reliance on "habit memory"—a mechanical repetition of historical precedent that fails to meaningfully engage with evolving social contexts.[69] This approach not only dismisses the fluid nature of constitutional interpretation; it also ignores the reality that legal principles are subject to Bergsonian duration and thus emerge through a continuous process of self-differentiation and interaction with contemporary realities.

B. Precedential Authority

The Roberts Court's shifting approach to precedential authority reflects a deeper reconfiguration of constitutional time, in which the Court selectively determines when history justifies adherence to precedent and when it demands its abandonment. The *Shelby County v. Holder* and *Janus v. AFSCME* cases illustrate how the Court wields precedential authority to reshape constitutional meaning, reinforcing its text-centric approach while discarding long-standing judicial frameworks that no longer align with its vision.

69. Bergson claimed there are two types of memory. The first he described as habit memory, which refers to the automatic repeating of learned past action. HENRI BERGSON, MATTER AND MEMORY 89 (1911). This type of memory is not recognized as representing the past as such. Instead, habit memory consists of those actions inscribed within the body that automatically respond to external stimuli. Habit memory functions in a utilitarian way for the purpose of acting in the present. The second type of memory Bergson identified as pure memory. This type of memory registers the past in the form of "image-remembrance," which represents the past as such. *Id.* at 7, 86–88. This type of memory is contemplative. Bergson used the example of learning a verse by rote to explain the difference between the two types of memory. *Id.* at 79–81. Habit memory results in the ability to mechanically and non-reflectively recite the verse. Here, memory functions to clarify the habitual behavior. Pure memory, by contrast, provides a remembrance of the lesson of learning the verse. It is the memory of the qualitative experience itself.

1. Shelby County, Alabama v. Holder

The Court's willingness to destabilize precedent reflects a broader shift in its relationship to time. Rather than treating *stare decisis* as a mechanism for continuity across generations, the Court now uses it as a tool for ideological realignment, discarding precedents that no longer serve its preferred legal framework, while retaining those that do.[70] The Court's decision in *Shelby County v. Holder*, which struck down the preclearance formula of the Voting Rights Act, provides another illustration.[71] There, Chief Justice Roberts acknowledged the effectiveness of the VRA in addressing racial discrimination in voting, but nevertheless concluded that the passage of time had rendered the Act's preclearance requirement obsolete.[72]

Importantly, *Shelby County* reveals the paradox of temporal reasoning: while the Court relies on historical analysis to justify its decisions, it simultaneously treats history as a completed process rather than an ongoing force.[73] This form of judicial temporality assumes that history reaches a fixed conclusion, allowing the Court to assert that past remedies—such as the Voting Rights Act—are no longer necessary. But constitutional time is not linear—it is a process of continuous differentiation. *Shelby County* exemplifies the Court's failure to recognize this reality, treating historical change as a justification for abandoning precedent rather than for re-evaluating its ongoing significance.

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70. Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

71. *Id.* at 550.

72. *Id.* at 556.

73. *Id.* at 557–78. There is an inconsistency in the way Roberts looks at historical change in the juridical context: he fails to recognize that just as factual conditions evolve, the law evolves as well, constantly stretching and applying itself to circumstances which, while unforeseen when the statute was enacted, nevertheless fall within its jurisdictional reach. Roberts fails to see or ignores this part of the equation. His opinion for the Court fixates on the kind of "[b]latantly discriminatory evasions of federal decrees" that characterized the Jim Crow south in the 1950s and 1960s, such as literacy tests for voters and poll taxes. *Id.* at 540. He is sufficiently contented by the fact that voter registration and voter turnout among Blacks in the former slave States has improved significantly since 1965, and that minority politicians now hold office in unprecedented number. *Id.* at 547.

2. Janus v. AFSCME[74]

The current Court has occasionally resisted the doctrine of *stare decisis*, signifying that it is under no obligation to follow "demonstrably erroneous" precedents; that when confronted with such a precedent, it is duty-bound to correct the error, even in the absence of other factors that support overruling it.[75] Justice Alito enshrined the Court's current approach to precedent in his 2018 opinion *Janus v. AFSCME*:

> Our cases identify factors that should be taken into account in deciding whether to overrule a past decision . . . the quality of [a precedent case's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.[76]

Two years later in *Ramos v. Louisiana*, Justice Brett Kavanaugh put his spin on the approach, stating that while precedent should not be overturned unless "grievously or egregiously" wrong,[77] the task of determining whether a prior decision was grievously or egregiously wrong is a highly subjective enterprise, performed by a subset of Justices on the Supreme Court (i.e., those making up the "majority" on any given case).

Thus, precedents that a majority deems clearly "incorrect," no matter how longstanding or settled, are fair game for reversal,

74. Janus v. AFSCME, 585 U. S. 878 (2018).

75. Ramos v. Louisiana, 590 U.S. 83, 133–34 (2020) (Thomas, J., concurring) ("[T]he Court's typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law." (quoting Gamble v. United States, 587 U.S. 678 (2019)). In the same term as *Gamble*, the Court in *Franchise Tax Board of California v. Hyatt*, 587 U.S. 230 (2019), overruled *Nevada v. Hall*, 440 U.S. 410 (1979), a 40-year-old precedent that held that states lack sovereign immunity in each other's courts. *Hyatt*, 587 U.S. at 236. In *Hyatt*, the Court held instead that states retain their sovereign immunity from private suits brought in courts of other states. *Id.*

76. *Janus*, 585 U.S. at 917.

77. *Ramos*, 590 U.S. at 121–22 (Kavanaugh, J., concurring).

irrespective of stability and rule-of-law concerns.[78] The strongest example of this maximalist approach is represented by *Dobbs v. Jackson Women's Health Organization*, where the Court overruled the fundamental right to an abortion protected by *Roe v. Wade* and *Planned Parenthood v. Casey*.[79] *In Dobbs*, the majority found that "*Roe* was egregiously wrong from the start."[80] Relying on *Janus* and *Ramos*, the *Dobbs* Court stated the Court's modern test for assessing whether precedent should be upheld or overruled:

> Our cases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in making such a decision. In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the "workability" of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.[81]

78. Scholars have suggested two reasons for the textualist jurists' proclivity to overrule precedent: (1) the often unspoken predicate assumption that there's a singular "correct answer" to every interpretive question; and (2) the political reality that some textualist jurists see themselves as "revolutionaries," whose function is to overthrow the old, corrupt jurisprudential order—including outmoded precedents reached through the use of illegitimate, atextual interpretive resources. Thomas' decision in *Franchise Tax Board of California v. Hyatt* fits within this framework, in that the five justices who voted to overrule did so on the grounds that *Nevada v. Hall* was clearly "erroneous" and therefore undeserving of adherence. *Hyatt*, 587 U.S. at 236. In the textualist-originalist justices' view, such certainty that a precedent got the constitutional question wrong provides sufficient reason to overrule, no matter how longstanding or settled the original decision. Indeed, Thomas' opinion laid bare the textualist-originalist justices' jurisprudential priorities when it dismissed the plaintiff's reliance-interest argument with a cursory comment. In other words, stability and predictability—and fairness to litigants who relied on the old rule established by the existing precedent—are secondary to getting to the "correct answer."

79. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

80. *Id.*

81. *Id.* at 267–68 (internal citations omitted).

The Supreme Court's approach in *Janus*[82] represents a troubling departure from the traditional, more nuanced treatment of *stare decisis*. While Justice Alito's opinion purports to provide a structured framework for overruling precedent, it effectively lowers the bar for dismantling established case law by emphasizing subjective factors like "the quality of reasoning" and "workability." *The Janus* framework, later reinforced by Justice Kavanaugh's "grievously or egregiously wrong" standard articulated in *Ramos*, creates a dangerously malleable test that allows the Court's majority to overturn precedent based largely on their own ideological assessments rather than the institutional and reliance interests that historically constrained such reversals. The subsequent application of this doctrine in cases like *Dobbs* demonstrates how this approach can be wielded to undermine even long-settled precedents, prioritizing what the majority views as the "correct answer" over the stability and predictability that *stare decisis* was meant to protect.

Through its interpretive authority, the Court exercises considerable control over which historical moments are deemed relevant, when societal conditions have evolved sufficiently to warrant legal change, and which precedents maintain their jurisprudential force. This temporal power allows the Court to shape the constitutional narrative. While the Court's temporal nature is inherent in its institutional design—as it must necessarily draw upon history and precedent to decide present cases and establish future precedent—this does not mandate a simplistic understanding of time as mere chronology or history as static artifact. Such reductionist approaches to temporal interpretation risk undermining the complex relationship between constitutional law and societal evolution.

C. Rigid Historical Analogues

In *Allen v. Milligan*, the Court's analysis of Alabama's congressional redistricting map demonstrates how judicial language can anchor constitutional interpretation in specific temporal moments.[83] While the Court preserved Section 2 of the Voting Rights Act by invalidating a map that created only one majority-Black district,

82. Janus v. AFSCME, 585 U. S. 878 (2018).

83. Allen v. Milligan, 599 U.S. 1 (2023).

it did so by linguistically tethering its analysis to two fixed points in time: the "traditional districting criteria" developed in the 19th century and the *Gingles* framework established in 1986.[84] This double temporal anchoring—to both historical districting practices and a decades-old analytical framework—creates a rigid interpretive structure that struggles to accommodate evolving forms of voter suppression. The Court's repeated invocation of "traditional districting principles" does not merely describe neutral criteria; it actively fixes the temporal frame through which racial vote dilution must be understood.

IV. A FLUID THEORY OF PRECEDENT: RECONCEPTUALIZING TIME IN CONSTITUTIONAL PRECEDENT

Time is often taken for granted, treated as a natural backdrop or simply as a periodization, rather than being critically examined as an independent force that shapes social and political reality.[85] Typically, when time is examined, it is understood through its historical context, observed in its tangible and visible effects on external materiality (bodies, objects, environments). In other words, when we inquire into time, we tend to convert time into space rather than to think of time as time.[86] However, it is important to recognize that time is ontological, meaning it is a fundamental part of life and the process of change.[87] Although historicity is closely related to temporality as it refers to the specific historical conditions in which events occur, temporality is a broader concept that encompasses the ontological nature of time and its influence on the unfolding of events and processes. One of the consequences of disregarding the relationship between time and history and instead treating time *as* history is that historicity can reduce time

84. *Id.* at 18; *see infra* Part VI.

85. *See generally* KATHLEEN DAVIS, PERIODIZATION AND SOVEREIGNTY: HOW IDEAS OF FEUDALISM AND SECULARIZATION GOVERN THE POLITICS OF TIME (2008); Renisa Mawani, *Law as Temporality: Colonial Politics and Indian Settlers*, 4 U.C. IRVINE L. REV. 65 (2014).

86. SUZANNE GUERLAC, THINKING IN TIME: AN INTRODUCTION TO HENRI BERGSON, *Preface* at x (2006) ("Bergson consistently challenges our assumptions and our habits of thought, to read Bergson is to relearn how to think—to think in time.").

87. ELIZABETH GROSZ, THE NICK OF TIME: POLITICS, EVOLUTION, AND THE UNTIMELY 4 (2004); *see generally* GUERLAC, *supra* note 86.

to mere periodization. When this happens, we fail to recognize time as a dynamic force that organizes and regulates social and political life. Problematizing time is central to investigating the Court's production and construction of constitutional experience.

On the one hand, understanding time seems relatively simple. For example, "[p]hysicists define time as the progression of events from the past to the present into the future."[88] Time in the natural world is irreversible and unidirectional, i.e., the "arrow of time."[89] This chronological understanding of time is not something we can see, touch, or taste, but we can quantitatively measure its passage with calendars and clocks. Time measured in this way, allows it to function as a universal constant.

On the other hand, we can understand time by considering it qualitatively through the subjective phenomena of experience. Experience allows us to differentiate among interchangeable units of chronological time (days, months, years, hours) and perceive certain moments within chronological time as meaningful and thus memorable.

Duration was the term Bergson used to describe aspects of time that could never be grasped quantitatively:

> In a word, pure duration might well be nothing but a succession of qualitative changes, which melt into and permeate one another, without precise outlines, without any tendency to externalize themselves in relation to one another, without any affiliation with number: it would be pure heterogeneity. But for the present we shall not insist upon this point; it is enough for us to have shown that, from the moment when you attribute the least homogeneity to duration, you surreptitiously introduce space.[90]

For Bergson, duration stood for our perception of the reality of time; it is this qualitative experience of time that enables us to perceive certain

88. Anne Marie Helmenstine, *What Is Time? A Simple Explanation*, THOUGHTCO., thoughtco.com/what-is-time-4156799 (last updated June 7, 2024).

89. JIMENA CANALES, THE PHYSICIST & THE PHILOSOPHER 286–87 (2015).

90. BERGSON, TIME AND FREE WILL, *supra* note 21.

moments as significant or meaningful.[91] He warned against confusing duration—the reality of time as it is experienced—with the artificial representations of time constructed externally through clocks and calendars.[92] He argued that such external representations rely on spatial analogies to measure, mark, and differentiate the flow of time in terms of the distance between one moment and another.[93] Time measured in this way would be an abstraction; an abstraction that could then be mistaken for (i.e., replace) the concreteness of experiential reality itself.

V. HENRI BERGSON'S PHILOSOPHY OF TIME: THE CONCEPTS OF DURATION AND SIMULTANEITY

The Roberts Court's model of *stare decisis* is fundamentally at odds with constitutional time understood as duration. Bergson's concept of duration challenges the very premise that legal principles can exist as fixed entities divorced from the flow of time.[94] Indeed,

91. Bergson pointed out the irreversibility of duration in one of the initial paragraphs of *Creative Evolution*: "From this survival of the past it follows that consciousness cannot go through the same state twice. The circumstances may still be the same, but they will act no longer on the same person, since they find him at a new moment of his history. Our personality, which is being built up each instant with its accumulated experience, changes without ceasing. By changing, it prevents any state, although superficially identical with another, from ever repeating it in its very depth. That is why our duration is irreversible. We could not live over again a single moment, for we should have to begin by effacing the memory of all that had followed." BERGSON, CREATIVE EVOLUTION, *supra* note 21, at 5–6.

92. *See, e.g.*, JIMENA CANALES, THE PHYSICIST & THE PHILOSOPHER 24–25 (2015) ("Bergson capitalized 'Time' in the forword to the second edition of *Duration and Simultaneity*. By capitalizing the term, he signaled to his readers that he was including something larger in the concept than if he had referred to mere, lowercase 'time.' The rest of the book made it clear that he was *not* referring to the same category used by physicists . . . . Time, [for Bergson and his students] included aspects of the universe that could never be entirely captured by instruments (such as clocks or recording devices) or by mathematical formulas. Confusing clock time with time-in-general, and judging one by the standards of the other, could not be more abhorrent for Bergson.").

93. BERGSON, TIME AND FREE WILL, *supra* note 21, at 106 ("[A]s soon as we try to measure [duration], we unwittingly replace it by space.").

94. *See* Gilles Deleuze, *Bergson's Conception of Difference*, *in* THE NEW BERGSON 52–53 (John Mullarkey ed., 1999). Gilles Deleuze's analysis draws attention to Bergson's rejection of finality or teleology. Unlike Plato's philosophy

time as duration places all phenomena—which for our purposes would include legal concepts—in constant motion, continuously differentiating as they are reapplied in new contexts. Precedents, therefore, do not remain static; they undergo internal differentiation as courts reinterpret their meaning, align them with contemporary realities, or, at times, discard them altogether. In either case, the basic fact is this: precedent is never not new.

The modern legal framework often treats time as a fixed, external sequence of discrete moments. Courts rely on historical interpretation and precedent as if past rulings exist independent of the present, waiting to be retrieved and applied as stable legal reference points. This approach presupposes a spatialized conception of time, in which precedent is a fixed artifact to be located and restored, rather than a force that continues to evolve each time it is cited in a new judicial decision.

A. Duration

In contrast to chronological time, which segments history into static moments, Bergsonian duration reveals the interpenetration of past, present, and future.[95] This insight alters how precedent can be understood in constitutional law: rather than existing as a fixed rule to be discovered, precedent continuously differentiates as it is applied to new contexts. Precedent is not only an accumulation of past decisions that bind future courts. Duration suggests that precedent operates as an active, living force within present judicial decision-making. Past decisions remain "immanent"—or inherently present—within current adjudication, creating a rich interplay between historical understanding and contemporary interpretation.

This understanding of precedent as a dynamic force rather than a fixed entity complicates the Court's reliance on history as a doctrine of stability. If legal meaning is not fixed in time, then the task of adjudication cannot simply be about "following" history—it must

which puts forth an external principle of finality (the Good), Bergson's philosophy avoids any recourse to finality. Difference, in Bergson's philosophy, is inherent in the thing itself, eliminating the need for an external end to explain it. Thus, in contrast to Plato's envisaged ideal form or telos guiding differentiation, Bergson advocates a more fluid, contingent process, devoid of predetermined endpoints. *Id.*

95. BERGSON, DURATION AND SIMULTANEITY, *supra* note 21, at 44.

involve actively constructing precedent in the present. In this sense, precedent is not a mechanism for preserving past meaning, but a process through which constitutional meaning is continuously recreated.

When the Court overturns precedent, it collapses time. This temporal collapse comprises two interrelated activities. The first lies in the Court's recognition of a shift in the lived experience of the Constitution. Overruling a precedent signals that the Court has discerned a change in the experiential fabric underpinning the prior ruling, a change substantial enough to warrant a distinct constitutional response. The second activity follows the first: the Court's declaration of a transformed constitutional experience. Every new decision the Court makes sets a baseline for constitutionality (i.e., identifying the boundary between constitutional and unconstitutional). When a precedent is overruled, it signifies a recalibration of this baseline, reflecting a new understanding of constitutional norms and principles as they apply to the lived experiences of the citizenry. This action signifies a temporal concentration, a moment where constitutional time contracts in response to the Court's decision. This contraction of time is not merely abstract; it alters the texture of our experience of constitutional life and reshapes our interactions with the Constitution as a political variable.

Conversely, when the Court defers to precedent, it expands time by postponing a change to constitutional experience. This temporal expansion preserves the current state of constitutional interpretation, extending the lifespan of existing meaning. In its various responses to precedent cases, the Court either contracts or expands the temporal scope of constitutional doctrine, demonstrating the dynamism of constitutional time.

Whether through temporal collapse in overturning precedent or temporal expansion in deferring to it, the Court's engagement with legal history is never merely interpretative but actively constitutive of constitutional meaning. This dynamic understanding of precedent, informed by Bergson's concepts of duration, reveals the limitations of a historical methodology grounded in one-dimensional retrieval and application of past principles. Instead, duration invites a more nuanced approach that recognizes the continuous interplay between past decisions and present constitutional experience.

B. Simultaneity

Bergson's concept of simultaneity, intricately linked to his broader philosophy of time as duration, presents a distinct perspective on how we experience and understand temporal progression. For Bergson, one can only grasp duration fully through the concept of simultaneity as *difference*, which emphasizes the qualitative transformation within duration or the continuous flow of time.[96] Within this framework, he redefines the concepts of succession, simultaneity, distinguishing between two ways time creates difference: through succession (novelty) and through simultaneity (diversity).[97]

Succession is generally understood to mean, "[t]he action of a person or thing in following and replacing another; the coming of a person or thing after another; (also) the passing from one act or state to another; an instance of this."[98] Read through a temporal lens, however, succession involves the passage of time, where one moment follows another, introducing novelty—the appearance of something qualitatively new rather than a mere repetition of the past.[99] In this way, succession refers to the way time creates difference by introducing newness rather than merely repeating the past.[100] Unlike the traditional view of time as a linear chain of causes and effects, Bergson emphasizes that each moment emerges with unique qualities that were not contained in previous moments.[101] This means that time does not simply pass—it differentiates.

In contrast, simultaneity produces a distinct form of difference: diversity—the coexistence of different things at the same moment.[102] While the conventional understanding of simultaneity hinges on the

96. BERGSON, TIME AND FREE WILL, *supra* note 21, at 229.

97. GUERLAC, *supra* note 86 ("These are the concepts Bergson has attempted to "purify" in [*Time and Free Will*] through the notion of duration, which reinvents an idea of time purified of all elements that belong to the way we think space.").

98. *Succession*, OXFORD ENGLISH DICTIONARY II.7.a., https://www.oed.com/dictionary/succession_n?tab=meaning_and_use#19807714.

99. Marlène Aumand & Guillaume Pigeard de Gurbert, *Bergson et al Simultanéité (Un chapter oublié du Rire)*, 4 REVUE PHILOSOPHONIQUE DE LA FRANCE ET L'ÉTRANGER 495, 495–506 (2018), https://doi.org/10.3917/rphi.184.0495.

100. *Id.*

101. BERGSON, TIME AND FREE WILL, *supra* note 21, at 227–28.

102. Aumand & Pigeard de Gurbert, *supra* note 99, at 495.

coexistence of events at a single point in time, Bergson juxtaposes this with a more nuanced conception of temporal simultaneity.[103] Simultaneity, in Bergson's philosophy, is not just the coincidence of events occurring at the same clock time. Instead, simultaneity is a mode of differentiation, where multiple realities co-exist within consciousness.[104] Bergson contrasts this lived simultaneity with the spatialized conception of time, which treats events as side-by-side occurrences in a homogeneous medium.[105] In Bergson's view, events or moments are deemed simultaneous not because they occur at the same moment on a spatialized timeline, but because they share a qualitative or lived duration.[106] While succession emphasizes transformation over time, simultaneity underscores the differentiation that exists in a shared temporal space.

In this context, Bergson's understanding of simultaneity is the difference between two things that exist at the same time.[107] He insists that true duration—the continuous, indivisible flow of time—should not be mistaken for a spatialized sequence of fixed points.[108] In this

103. *Simultaneity*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/search/advanced/Entries?q=simultaneity&sortOption=Frequency.

104. BERGSON, TIME AND FREE WILL, *supra* note 21, at 227; *see also* Deleuze, *supra* note 94, at 49 ("To think internal difference as such, as pure internal difference, to reach the pure concept of difference, to raise difference to the absolute, such is the direction of Bergson's effort.").

105. BERGSON, TIME AND FREE WILL, *supra* note 21, at 116 ("[When we quantify time] there is no question . . . of duration, but only of space and simultaneities.").

106. GUERLAC, *supra* note 86, at 96.

107. According to Marlène Aumand and Guillame Pigeard de Gulbert, "Bergson defines time by the succession that creates novelty. But he uses examples that do not depend on succession but on simultaneity as a ground for another kind of difference, that is the difference between two things that exist at the same time." Aumand & Pigeard de Gurbert, *supra* note 99, https://doi.org/10.3917/rphi.184.0495. The quotation in this footnote can be found by selecting the "Abstract in English" button.

108. BERGSON, TIME AND FREE WILL, *supra* note 21. Bergson's work makes visible the flaw in translating time into space and the need to rethink time as time—that time cannot be translated into space because it only moves in one direction. It is irreversible. "If I glance over a road marked on the map and follow it up to a certain point, there is nothing to prevent my turning back and trying to find out whether it

framework, time is not a neutral backdrop but an active force of differentiation,[109] where meaning and reality evolve continuously rather than being fixed by static references to the past.[110] This insight challenges traditional legal interpretations of history, which often treat time as a passive container rather than as an agent of transformation.

Simultaneity can be bifurcated into two types: natural and artificial simultaneity.[111] Understanding this bifurcation is crucial for seeing how Bergson's thinking time as duration impacts the nature and application of legal precedent. Natural and artificial simultaneity describe how different events or states can occur at the same chronological moment but represent different types and distinct forms of simultaneous existence and transformation. Understanding these distinctions allows for a more nuanced interpretation of how events and conditions coexist and influence each other within various contexts.

Natural simultaneity refers to the coexistence of distinct entities or events within the same temporal frame without any intrinsic or imposed connection. It is the simple, straightforward parallel occurrence of events as perceived in conventional time. Natural simultaneity acknowledges the concurrent existence of multiple states or events but does not necessarily imply an intrinsic interaction between them. Artificial simultaneity, on the other hand, involves a constructed layer of connection or relation between events or entities that may or may not have occurred at the same "clock" time but are nevertheless brought together in a single moment of human thought. Thus, artificial simultaneity is not necessarily about parallel occurrences; rather it encompasses the creation of a relationship or unity between these occurrences. This type of simultaneity is often

branches off anywhere. But time is not a line along which one can pass again." BERGSON, TIME AND FREE WILL, *supra* note 21, at 181.

109. GUERLAC, *supra* note 86, at 79.

110. Deleuze, *supra* note 94, at 49. Importantly, Deleuze highlights Bergson's concept of duration as a key element of internal difference. Duration is indivisible and self-differentiating, embodying the movement of difference. It is through duration that internal difference becomes perceptible, allowing the recognition of changes in nature or pure quality that are not captured in changes in quantity or magnitude.

111. Aumand & Pigeard de Gurbert, *supra* note 99, at 500–01. I am indebted to Aumand and de Gurbert's building on Bergson's ideas to introduce the concepts of natural and artificial simultaneity in the context of their analysis of Bergson's work on laughter. I expand on this introduction by applying these concepts to the notion of precedent in American jurisprudence.

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

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

Bergson's temporal approach reveals that history is not merely a record of the past but an active force shaping the present. The distinction between natural and artificial simultaneity demonstrates that the way the Court understands the qualitative multiplicity of a precedent case determines our perception of constitutional meaning. This insight is crucial for understanding the significance of the notion that precedent continuously self-differentiates. Each time a precedent is invoked in a new case, it does not merely reappear as a static rule; rather, it enters into a new legal situation, where it is read not only in light of the original decision but also through the lens of all subsequent cases that have interpreted it. This means that precedent is always in the process of becoming something different—it is continuously reinterpreted and reshaped as it interacts with evolving doctrinal landscapes. In legal discourse, past rulings, traditions, and ideas do not simply repeat; they are engaged in an ongoing process of dynamic re-actualization, ensuring that constitutional meaning is not fixed but fluid, responding to the lived experiences and societal transformations that demand constitutional protection.

In Bergson's approach, these nuances in simultaneity highlight the complexity of time and existence. While natural simultaneity aligns with a more traditional, linear perception of time, artificial simultaneity reflects Bergson's idea of duration, where time is an interwoven fabric of experiences and events, continuously differentiated by perception, interpretation, and action. As we turn to specific case studies, this theoretical framework reveals how the Court's narrow understanding

of history and time affects the very ability of the Constitution to protect the rights of those it governs.

VI. RETHINKING CONSTITUTIONAL PRECEDENT THROUGH TEMPORAL COMPLEXITY

The method by which the Roberts Court uses historical analysis reinforces a static and mechanical vision of constitutional time. This tendency is evident in cases where the Court either (a) discards precedent by treating history as a completed narrative or (b) rigidly applies past legal tests without contemplating evolving realities. This Part analyzes two recent voting rights cases—*Shelby County, Alabama v. Holder* (2013) and *Allen v. Milligan* (2023)—to illustrate how the Roberts Court's historical analysis fails to account for the temporal dynamism of constitutional meaning.[112] The Court's approach in *Shelby County* demonstrates what can be described as "vulgar originalism," reducing history to a fixed moment rather than acknowledging it as an evolving continuum.[113] In *Allen*, the Court preserved the Voting Rights Act ("VRA") but relied on a rigid application of the outdated *Gingles* test from 1986, failing to acknowledge the evolving nature of racial gerrymandering.[114] A

112. Shelby Cnty. v. Holder, 570 U.S. 529 (2013); Allen v. Milligan, 599 U.S. 1 (2023).

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

114. Thornburg v. Gingles, 478 U.S. 30, 45–51 (1986). *Gingles* set the criteria for future challenges to congressional districting under Section 2 of the VRA, and those criteria are based on so-called traditional mapping parameters: To succeed in proving a Section 2 violation under *Gingles*, plaintiffs must satisfy three "preconditions." First, the "minority group must be . . . sufficiently large and geographically compact to constitute a majority in a [reasonably configured] district." A district will be reasonably configured, our cases explain, if it comports with

Bergsonian perspective reveals the fundamental flaw in both decisions: constitutional meaning cannot be frozen in time, nor can precedent be mechanically applied without regard to its differentiation over time.

A. Shelby County, Alabama v. Holder*: The Roberts Court's Use of Historical Analysis as "Vulgar Originalism"*

In *Shelby County*, the Court reviewed Sections 4 and 5 of the 1965 Voting Rights Act, which required states with histories of racial discrimination to obtain federal approval before changing their voting laws.[115] Congress deemed this preclearance requirement of state election procedures necessary to combat Jim Crow-era voting restrictions.[116] The VRA's success in increasing minority voter registration and turnout was undeniable, yet the Court ultimately found Section 4's coverage formula unconstitutional, which effectively nullified Section 5.[117]

Chief Justice Roberts' opinion for the Court emphasized historical change, arguing that the extraordinary measures justified in 1965 could no longer satisfy constitutional requirements.[118] The Court acknowledged the VRA's effectiveness while simultaneously using that success to justify dismantling key provisions. "[T]hings have changed dramatically," Roberts wrote, citing improved voter turnout,

traditional districting criteria, such as being contiguous and reasonably compact. "Second, the minority group must be able to show that it is politically cohesive." And third, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." Finally, a plaintiff who demonstrates the three preconditions must also show, under the "totality of circumstances," that the political process is not "equally open" to minority voters.) (internal citations omitted). *Id.* at 45–51, 79.

115. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. § 10101). Combined, Sections 4 and 5 of the VRA require those states with a history of racial discrimination in voting to not only eliminate the most egregiously racist voting prerequisites, such as poll taxes and literacy tests, but to submit for federal approval any new voting-related law the state planned to enact and implement in future elections.

116. Shelby Cnty. v. Holder, 570 U.S. 529, 534 (2013).

117. *Id.* at 557.

118. *Id.* at 540 ("[T]hings have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009))).

registration rates, and minority representation in covered jurisdictions.[119]

Justice Ginsburg's dissent directly challenged this approach, emphasizing that history does not exist in static periods but unfolds continuously, and noting that "[s]econd-generation barriers" to minority voting had replaced more obvious restrictions.[120] These subtle mechanisms—such as redistricting schemes and polling place modifications—could effectively suppress minority votes while appearing race-neutral.[121] She observed that the success of the VRA in reducing racial discrimination was evidence of its necessity, not its obsolescence.[122] This insight aligns with Bergson's critique of mechanistic time, where legal principles are treated as historical relics rather than dynamic forces undergoing constant differentiation.[123]

The majority's reasoning reflects a fundamental misapplication of historical analysis. Rather than recognizing time as duration, the majority treated history as a standstill-point, where racial discrimination in voting was either entirely present or entirely absent. The majority's logic ignored the durational nature of time, and thus disregarded the evolving lived experiences of racial discrimination in voting. In so doing, it treated historical change as a completed process rather than an ongoing development. By assuming that current conditions had improved in relation to the conditions extant in 1965, the Court collapsed time into a single static moment, failing to recognize that racial voter suppression continues to mutate over time.

A fluid theory of precedent that understands time as duration is not content to rely on rigid adherence to historical events, but rather demands interdependent consideration of past conditions from multiple layers of time and then relates them to contemporary lived experiences. The Roberts Court's restrictive perspective—relying predominantly on 18th and 19th century history—freezes the significance of a precedent. In doing so, the *Shelby County* decision entrenched a static view of

119. *Id.* at 547.

120. *Id.* at 563 (Ginsburg, J., dissenting).

121. *Id.*

122. *Id.* at 590 ("Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.").

123. BERGSON, TIME AND FREE WILL, *supra* note 21, at 100–04.

history that disregarded the very legal mechanisms necessary to prevent the re-emergence of race-based voter suppression.

B. Allen v. Milligan*: The Court Applies Rigid Historical Analogies That Prevent Precedent from Adapting to New Social Conditions*

A decade after *Shelby County*, in *Allen v. Milligan,* the Court struck down Alabama's congressional redistricting map, which created only one majority-Black district despite Black voters comprising 28% of the state's population.[124] The Court found that Alabama's congressional map diluted Black voting power in violation of Section 2 of the VRA.[125] While the Court's holding may appear progressive, its reasoning was not. The Court's analysis hinged on the criteria established in *Thornburg v. Gingles* (1986), which required minority groups to demonstrate that their proposed voting districts met "traditional" mapping parameters before prevailing on a Section 2 claim.[126] These included geographic compactness, political cohesion, and white bloc voting.[127]

The *Gingles* test was formulated almost four decades ago, when racial gerrymandering operated through explicit district boundary manipulation.[128] However, modern voter suppression tactics have evolved significantly, incorporating subtler forms of racial vote dilution through the manipulation of voter ID laws, polling place closures, and restrictions on early voting.[129] By treating the *Gingles* framework as a fixed test, the Court failed to recognize that racial gerrymandering, and thus the lived experience of voter discrimination, has undergone qualitative differentiation over time. The conditions that existed in 1986 no longer accurately reflect contemporary racial vote suppression. Yet, instead of adapting the

124. Allen v. Milligan, 599 U.S. 1, 16 (2023).

125. *See generally id.*

126. *Id.* at 18.

127. *Id.* at 18 ("A district will be reasonably configured, our cases explain, if it comports with traditional districting criteria, such as being contiguous and reasonably compact.").

128. *See generally* Thornburg v. Gingles, 478 U.S. 30 (1986).

129. *See generally* James J. Sample, *Voting Rights or Voting Entitlements?*, 60 HOUS. L. REV. 51 (2022) (providing information about voter suppression tactics in recent years).

doctrine to account for these changes, the Court applied *Gingles* as if history had not progressed, reinforcing the erroneous assumption that legal precedent should be applied in its original form, rather than in its evolved state.

Allen represents a disconnect between (a) the legal standard the Court believes itself bound to apply, and (b) the ongoing lived experience of being a Black voter in many parts of the United States. Though the Court admits that minority voters, even when they make up a significant portion of a particular state's electors, can rarely put any of their preferred candidates into office, the Court refused to budge from the "traditional redistricting principles" established in *Gingles* nearly 40 years ago.[130] The *Gingles* criteria, initially intended to protect minority voting rights, now impede challenges to modern forms of discrimination.[131]

A Bergsonian approach would reject the assumption that precedent remains trapped in its initial formulation, without accounting for its differentiation over time. The failure to update the *Gingles* framework demonstrates the Court's rigid adherence to time as a universal constant and selective recognition of shifting forms of ongoing discrimination. Rather than mechanically applying a doctrinal framework from 1986, a court which understands time as duration would recognize the lived experience of voter discrimination and acknowledge that racial gerrymandering has changed in form but not in purpose. A jurisprudence informed by Bergsonian duration would acknowledge that precedent must evolve alongside the social conditions it seeks to regulate. In *Allen v. Milligan*, this required reconsidering how modern forms of voter suppression differ from those of the past, rather than rigidly applying a decades-old test.

Moreover, treating precedent as a dynamic rather than static force aligns with the Court's broader role in maintaining constitutional adaptability. The *Gingles* framework was originally designed to address racial vote dilution in a particular historical moment, but its continued application without modification ignores the fact that discriminatory practices evolve in response to legal constraints. A

130. *Allen*, 599 U.S. at 22.

131. Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L. J. 261, 279 (2020) (noting that traditional districting principles like geographic compactness, developed in a different era, may be ill-suited to address contemporary voting rights issues in increasingly integrated communities.).

Bergsonian analysis reveals that legal doctrines, like time itself, are subject to continuous differentiation; they accumulate new meanings and functions as they are reinterpreted in contemporary contexts. By refusing to adapt *Gingles* to the realities of modern voter suppression, the Court implicitly affirms a *present-past* orientation—one that regards precedent as a fixed reference point rather than a fluid interpretive tool. Recognizing constitutional time as duration, however, would allow the Court to engage in an interpretive practice that is both historically grounded and responsive to contemporary conditions, ensuring that the law remains capable of addressing the lived realities of those it purports to protect.

VII. CONCLUSION

The Roberts Court's present-past temporal orientation is one that overemphasizes the past as the singular reference point for constitutional meaning. This produces two significant distortions in constitutional jurisprudence. First, it treats constitutional text as historical artifact. By doing so, the text becomes trapped in the past, as though it exists outside the flow of the lived experience of the Constitution. Second, it judicially erases the present and the future. The Court's approach flattens the constitutional experience, denying the role that changing demographic, technological, and political realities play in shaping constitutional protections.

Understanding time as duration destabilizes the hierarchy that privileges quantitative metrics to evaluate the role of time in precedent. Time as duration prioritizes assessment of the continued importance of the simultaneity between time (the moment of decision) and the event (the lived experience that necessitated constitutional protection). I do not argue that a qualitative focus on temporal experience should replace quantitative metrics and spatial thinking, both of which are necessary to communicate ideas to others. Instead, thinking of time as duration reconfigures the relationship between time and space—between experience and language—insisting that time and space are interdependent and interpenetrative and are best approached that way.

Failing to recognize constitutional time as durational results in legal interpretations that artificially freeze precedent in its original context, as evinced by originalist jurisprudence, where Justices have relied on historical analogues divorced from the lived experience of the

Constitution.[132] Through a Bergsonian theoretical lens, precedential evolution emerges as a dynamic process that responds to societal changes while maintaining fundamental constitutional principles. The institutional implications of this approach are significant: courts must engage in transparent temporal analysis, carefully distinguishing between legitimate constitutional evolution and unwarranted deviation from established principles, while maintaining public confidence in the judiciary. This nuanced understanding of constitutional temporality transcends the traditional dichotomy between originalism and living constitutionalism, offering a more sophisticated theoretical framework for constitutional interpretation that recognizes both the enduring nature of constitutional principles and their capacity for meaningful evolution.

A Bergsonian approach reveals three critical dimensions of constitutional temporality. First, it understands precedential evolution as inherently dynamic, responding to societal changes while maintaining fidelity to core constitutional principles. Second, it requires that the judiciary recognize temporal complexity and carefully recalibrate constitutional principles when informed by changes in lived experience. Third, it highlights the institution's need for transparent temporal analysis in judicial decision-making, enabling courts to distinguish between legitimate constitutional evolution and unwarranted deviation from established principles. By understanding time's complex role in shaping legal meaning, courts can maintain constitutional fidelity while acknowledging inevitable evolution.

132. *See, e.g.*, Dobbs v. Jackson Women's Heath Org., 597 U.S. 215 (2022); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022); Shelby Cnty. v. Holder, 570 U.S. 529 (2013); Allen v. Milligan, 599 U.S. 1 (2023).