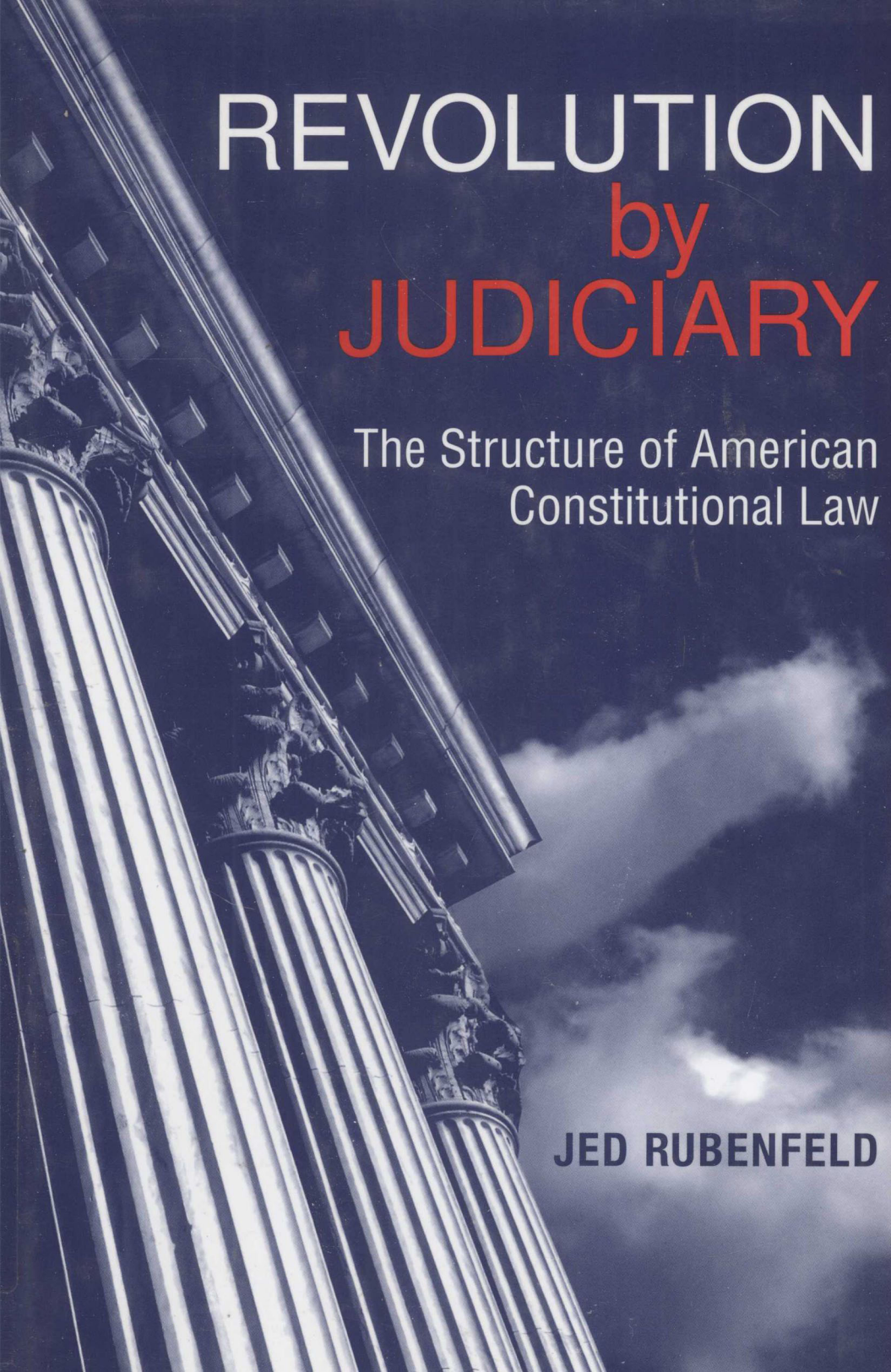
REVOLUTION
by
JUDICIARY
The Structure of American
Constitutional Law
JED RUBENFELD

Revolution by Judiciary

The Structure of American Constitutional Law

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Harvard University Press
Cambridge, Massachusetts, and London, England | 2005

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Rubenfeld, Jed, 1959–
Revolution by judiciary : the structure of American constitutional law / Jed Rubenfeld.
p. cm.
Includes bibliographical references and index.
ISBN 0-674-01715-3 (alk. paper)
1. Constitutional law—United States. 2. Law—United States—Interpretation and construction. 3. Judicial process–United States. I. Title.
KF4550.R83 2005
342.73—dc22 2005040211

Revolution by Judiciary

To Amy,
without whom nothing

Acknowledgments

Unfortunately I did not have an opportunity to acknowledge those who helped me with my previous book, *Freedom and Time.* Therefore to the many debts I incurred in writing the present book, I must add the compounded debts I owe in connection with the earlier one. Intellectually my greatest thanks and obligations are due to Bruce Ackerman, a man I only wish I could emulate, personally as well as professionally. Michael Sandel guided and encouraged me in more ways than he knows. Other friends and colleagues who provided invaluable help, comments, and criticism include Akhil Amar, Ian Ayres, Jack Balkin, Kate Bartlett, Yochai Benkler, Michael Bratman, Amy Chua, Jules Coleman, Anne Dailey, Chris Eisgruber, Stanley Fish, Owen Fiss, Jim Fleming, Bob Gordon, Don Horowitz, Paul Kahn, Harold Koh, Andy Koppelman, Tony Kronman, Daniel Markovits, Frank Michelman, Philip Pettit, Jeff Powell, Larry Sager, Chris Schroeder, Scott Shapiro, Reva Siegel, Nomi Stolzenburg, Jim Whitman, and Bill van Alstyne. I profited enormously from conversations all around the country at workshops whose organizers and participants are far too many to name. For brilliant, painstaking research and editorial assistance, I cannot thank Barbara Merz enough.

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The Structure of Constitutional Law

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Introduction: Radical Reinterpretation

It was a great century for constitutional law—wasn't it?—the third consecutive century of constitutional revolution in America.

As of 1900, the Supreme Court had not struck down a single statute under the First Amendment; today, that amendment is an inexhaustible font of case law. In 1900, states could keep blacks out of white train cars and women out of the legal profession; today, the Fourteenth Amendment renders such exclusions unthinkable. In 1900, Congress's commerce power reached buying and selling across state lines; a century later, the commerce power extended to virtually everything we do in our working lives and much of what we do in our own homes. At the same time, new fundamental rights continually emerged on the scene: the liberty of contract, the right of privacy, the freedom of expressive association.

The most extraordinary feature of these twentieth-century constitutional revolutions was this: they were accomplished without amendment. Each and every one came about through radical judicial reinterpretation.

There was just one problem: constitutional law has no account of radical reinterpretation. What, if anything, makes it legitimate for judges to re-read the Constitution radically, breaking profoundly from both past and present understandings? What, if anything, guides or structures this power? What, if anything, limits it? American constitutional law not only has no answers to these questions; it does not even ask them.

There was little need to do so prior to the twentieth century. After 1803, when *Marbury v. Madison* affirmed the power of judicial review, that power lay largely dormant for half a century. The Court did not invalidate another federal law until *Dred Scott v. Sandford,* decided in 1857—a decision that claimed to be based almost entirely on original

intentions. After the Civil War, the justices were too busy cutting back on the rights and powers created by the Fourteenth Amendment—that is, too busy vindicating *old* constitutional understandings—to impose on the nation radically new ones.

Hence when, in the twentieth century, the justices began in earnest to engage in radical reinterpretation, they had little preexisting practice, and no account of this practice, to call on. This lacuna was never filled. By 2000, constitutional law had developed to a point where it could no longer explain itself. It could not justify its most important cases as an interpretive matter. This was so both of the Court's unenumerated-rights decisions, such as *Roe v. Wade,* and of its purportedly enumerated-rights decisions, such as *Brown v. Board of Education, Miranda v. Arizona, Boy Scouts v. Dale* or *Bush v. Gore.*

Which is why, as the twentieth century passed into the twenty-first, it had become hard to believe in constitutional law. Hard to take it seriously—as law. We knew too much. We knew that the politics of our justices were inseparable from their decisions. We knew they could make it up as they went along. We knew they did. We had seen the rationalization, the greedy result-seeking barely disguised under a patina of pitiful legal reasoning—and not in trivial cases, but in cases of the greatest pitch and moment. To be sure, you and I might name different decisions from different decades as exemplars, but we can all name names.

Is it fair, however, to judge constitutional law by cases like *Roe v. Wade* or *Bush v. Gore*? Surely we will have a distorted view of constitutional law (it might be said) if we take stock of it by singling out its most controversial cases. Shouldn't we ask instead how constitutional law handles more standard or more conventional cases?

Here we come to the heart of the matter. American constitutional law lacks an accepted account not only of radical reinterpretation, but also "standard" interpretation. Incredibly, American constitutional case law has almost nothing to say about what judges are supposed to be doing when they go about the business of interpreting the Constitution.

A Subject on Which Constitutional Law Is Silent

When judges are called on to interpret *statutes,* well-known precepts apply. These precepts are not informal; they are not unspoken. They are matters of law, in the sense that they are expressly laid out in hundreds of cases, and lower court judges can be reversed for failing to follow them.

These interpretive precepts leave considerable room for maneuver, to be sure, but they do set out the basic shape and structure of statutory interpretation. The most important of them is this: when interpreting statutes, courts are supposed to ascertain and effectuate legislative intent. This rule, contestable though it often is, furnishes judges with a basic grasp of what it means to interpret a statute rightly.

In administrative law too, when the meaning of legal texts is challenged before a judge, well-known interpretive protocols are established. The general rule is that courts must defer to an agency's construction of the statutes and regulations it administers unless the agency's construction contradicts the plain meaning of the text. Again this rule supplies a tolerably clear picture of the business of interpretation.

In constitutional law, however, there are no such overarching interpretive precepts or protocols. There are no official interpretive rules at all. In any given case raising an undecided constitutional question, nothing in current constitutional law stops a judge from relying on original intent, if the judge wishes. But nothing stops a judge from ignoring original intent. Or suppose a plaintiff comes to court asserting an unwritten constitutional right. Under current case law, judges are fully authorized to dismiss the right because the Constitution says nothing about it. Another admissible option, however, is to uphold the right on nontextual grounds. Evolving American values? Judges can consult them or have nothing to do with them.

Practitioners know they can argue from text, precedent, original meaning, morality, tradition, structure, and so on. But there is no knowing why or whether or when or in what priority these "modalities" of argument will be considered in any given case.[1] There is no law of constitutional interpretation.

Thus is constitutional law, which speaks to so many issues today, silent on one subject: itself. It has nearly nothing to say about the connection between the Constitution and the enormous web of doctrine spun judicially around that document. It tells judges virtually nothing about what they are supposed to be doing when they go about the business of reading and applying the Constitution. Lacking an account of interpretation, constitutional law produces but cannot explain its acts of radical reinterpretation. It cannot explain when such revisions are justified, what they mean, or what is going on when they occur.

In 2000, five justices of the Supreme Court—the same five who have decided so many of the Court's groundbreaking cases since 1995—held

that the Boy Scouts had a constitutional right to expel a homosexual scoutmaster.[2] According to the Court, New Jersey's law prohibiting discrimination on the basis of sexual orientation violated the Boy Scouts' "First Amendment freedom of association." Within a few months, citing *Boy Scouts,* lower courts would be dutifully testing anti-discrimination laws under the "Freedom of Association Clause of the First Amendment."[3]

The only difficulty: there is no "Freedom of Association Clause" in the First Amendment (or anywhere else in the Constitution). The point is not that *Boy Scouts* was wrong because the word "association" does not appear in the Constitution. The point is not even that the Constitution has become so ill-read in standard American legal practice that no one apparently notices when courts refer to a clause that does not exist. The point is simply that this mistake makes no difference. Constitutional law today does not tell a judge to do anything differently depending on whether the actual text of the Constitution does or does not guarantee the right that the judge is supposed to be applying.

I am not condemning unenumerated rights. (Incidentally, the *Boy Scouts* justices were not the inventors of this one; the "First Amendment freedom of association" was a creation of the Warren Court.) But a court that enforces some unenumerated rights has a question to answer. Why did the justices in *Boy Scouts* recognize this particular unwritten right when they would not and do not recognize many others? There has to be some account of how this particular unwritten right gets read into the First Amendment, when the same judges reject most other unwritten rights in most other constitutional contexts. On this little question, constitutional law has nothing to say.

But *Boy Scouts,* it might again be objected, is one of those utterly controversial decisions like *Roe v. Wade* or *Bush v. Gore.* There is something misguided in asking for methodological or interpretive explanations when it comes to such cases, which in a sense stand at the edges or outer reaches of constitutional law. One should not generalize, someone might say, from such cases.

Cases like *Boy Scouts* or *Roe* or *Bush v. Gore* are not the problem; or, rather, they are not the only problem. Constitutional law's inability to account for itself is not limited only to "nonstandard" or "noncentral" decisions, or to holdings about which millions disagree. On the contrary, constitutional law cannot even say why its most widely accepted cases are rightly decided. Just consider *Brown v. Board of Education.*

The Strange Obscurity of *Brown*

No decision of the last century was more radical than *Brown;* none is more respected today. None is more central to the entire corpus of contemporary constitutional law. After fifty years, you might think there would be some well-reasoned or at least well-accepted account of why this explosive yet exemplary case was rightly decided. But there isn't.

Academics, of course, have numerous explanations of why the case was rightly decided as an interpretive matter, but their efforts to justify *Brown* are astonishingly obtuse and unsatisfactory. Originalists, for example, say that *Brown* "can be rested" on "the original understanding,"[4] which seems a bit of a stretcher, since *Brown* contradicted the original understanding.[5] Others claim the emergence in the 1950s of a majority consensus against segregation,[6] which may at least be factually correct, but which, if it is supposed to explain *Brown*'s rightness, makes majority will the predicate for minority rights—not a very appealing result, from a constitutional point of view. "Moral readers" of the Constitution condemn segregation on moral grounds,[7] which is easy to do, but this does not help much unless you think the equal protection clause licenses five justices to strike down virtually every law they deem immoral.

How unsettled is *Brown*'s interpretive pedigree? So unsettled that one eminent constitutional theorist says the case can be explained solely by the operation of unwritten constitutional amendments, which were apparently "enacted" around 1940, only to be discovered—by this same theorist—some fifty years later.[8]

Lawyers and judges, by contrast, are unpuzzled. For them, *Brown* is a given. It is a fixed juridical star, a holding to which all laws are answerable. But this givenness does not explain why *Brown* was right. Rather, it makes the absence of an explanation more glaring. Cutting anchor from original intent, but refusing to set sail into pure moralizing, twentieth-century constitutional law remained baffled by its most celebrated decision.

The really remarkable thing is that *Brown* was and is an easy case. Easy not only as a matter of justice, but as a matter of interpretation. No torturing of method is necessary to understand *Brown,* no unwritten amendments, no surrender to the idea that the Constitution must follow current majority will. There is a simple, enduring interpretive structure to American constitutional law, and *Brown* exemplifies it. In a moment, I will explain. First, I want to say a few words about how judges and scholars have tried to deal with the problem of radical reinterpretation—often by denying that it exists.

Denying or Domesticating Radical Reinterpretation

Here is what I have said so far: constitutional law presents us with a body of decisions unable to account for its own existence. In this unaccounted-for interpretive system, our justices periodically effect revolutionary doctrinal transformations. Five justices may be doing so again today. But we have no criteria by which—no framework within which—to evaluate these episodes of radical reinterpretation.

It should be no surprise, therefore, that the charge of judicial activism is cried anew in every generation. All that changes is the identity of the criers. We are so inured by now to such accusations that they hardly register, but the charge of activism will always have sting as long as constitutional law purports to be law. As a result, judicial revolutions, like political revolutions, are often clothed in a rhetoric of restoration.

The rhetoric of restoration explains radical changes in constitutional law by claiming that these changes merely restore the Constitution to its true, original meaning. The Constitution was lost, but now it's found. Because judges are merely rediscovering or enforcing original meanings, radical interpretive innovation is not in play.

But it is a nice trick to make this rhetoric stick when the Court restores the Constitution to a past it never had. There was no constitutional liberty of contract that the *Lochner* era Court could "recover." There was no pre-twentieth-century tradition of free speech law that modern First Amendment jurisprudence could "restore." *Brown v. Board* can be described as having found the lost meaning of the equal protection clause, but the fact is that segregated public schools had existed from the day of enactment of the Fourteenth Amendment. None of these doctrinal revolutions can be plausibly understood through a rhetoric of restoration.

Today's Court faces the same problem. Today's justices have held, for example, that all governmental measures employing explicit racial classifications, including measures designed to benefit racial minorities ("affirmative action"), must satisfy the usually fatal "strict scrutiny" standard of review. But Congress in the 1860s repeatedly made use of racial classifications, both to segregate blacks and in several instances to assist blacks in the allocation of benefits.[9] If, therefore, today's law is to be called a recovery of lost meaning, then we are dealing with a sense of "lost" that was lost on the framers themselves.

The point of the rhetoric of restoration is to deny that judges are engaged in radical reinterpretation, where this term implies the creation

of genuinely innovative constitutional law—decisions that break profoundly from both past understandings and present doctrines. The charge of activism is not the only reason why some judges and scholars have trouble embracing radical reinterpretation. Another is that in most standard accounts of legal interpretation, radical reinterpretation should never take place. If judges had read the Constitution rightly the first time around, on this view, there could be no occasion to re-read it. The rhetoric of restoration accepts this claim; it maintains, therefore, that earlier judges failed to read the Constitution correctly.

By contrast, at least three important tropes or ideas can be found in the American constitutional literature that do recognize the propriety of doctrinal change even when the Constitution may have been interpreted correctly the first time around.[10] None of them, however, gets quite to the heart of the matter. Instead, each finds a new way to tame or deny the phenomenon of radical reinterpretation.

The first, simplest thought is that changed circumstances sometimes require new doctrine in order to keep the law faithful to the Constitution's purposes. The federal commerce power provides an obvious example. Congress was always intended (it could be said) to have control over "truly national" commerce or "nationwide commercial problems." The sphere of "truly national" commerce may have been small in 1789, but it has expanded spectacularly in the last two centuries. Congress's commerce power must therefore expand with it.

The changed-circumstances idea is essentially originalist. It assumes that the judicial job is to effectuate original purposes; doctrinal change is permitted because these purposes sometimes require new outcomes in a changing world.[11] This may well be an improvement over more rigid forms of originalism, but it does not grasp the nettle of radical reinterpretation.

Radical reinterpretation is, precisely, a new interpretation of the basic principles or purposes behind a constitutional provision. Through this act of reinterpretation, new constitutional purposes or principles replace the original ones. The changed-circumstances idea provides no handle on, no conceptual space for, the introduction of radically new constitutional meaning.

A second idea, equally familiar in American constitutional jurisprudence, comes closer. It is the idea of "the living Constitution," which builds on the changed-circumstances idea but breaks away from its originalist moorings. A living Constitution (it is said) must evolve and adapt to contemporary needs and values. It must grow with the society that surrounds it, even if in the process it outgrows the original purposes.[12]

The metaphor of the living Constitution, limp though it has now become, had a real virtue. It captured, better than do the dominant academic schools of interpretation (originalism, textualism, proceduralism, and so on), the reality that constitutional law undergoes significant interpretive shifts over time, as a result of which new meanings come into play. Unfortunately, talk of a living Constitution is not much help in thinking through these shifts.

If the Constitution is alive, and our criteria for evaluating doctrinal innovations are those of evolution or organic growth, then there is little room for a distinctively *interpretive* account of radical change in constitutional law. The changed-circumstances thought is at least an interpretive thought; it demands doctrinal change in the name of fidelity to intended meaning. Demanding fidelity to intended meaning is one obvious way of demanding that a text be interpreted properly. But the natural measure for evaluating a living Constitution is naturalistic; it is pragmatic, not interpretive. If we believed in the living Constitution, we would ask whether our courts had generated doctrine well adapted to the country's needs.

Pragmatism is in vogue in many legal quarters today, but the turn to pragmatism is a turn away from the entire discipline of interpretation. As the chief contemporary proponent of legal pragmatism candidly acknowledges, a truly pragmatic judge denies that he has a "moral or even political duty to abide by constitutional or statutory text."[13] By contrast, a judge who considers himself engaged in reinterpretation understands that his first duty is, precisely, to abide by the Constitution: to deliver a just reading of that document according to interpretive criteria. Reinterpretation may be innovative—it may break profoundly from past and present understandings—but it remains an instance of interpretation; hence it must answer to the discipline, the norms, and the practices of constitutional interpretation. The metaphor of a living Constitution is not inconsistent with this aspiration, but offers little help in achieving it.

Finally, there is the idea, pioneered by Bruce Ackerman, of "constitutional moments," at which the law undergoes a "regime change," following periods of extraordinary political mobilization and decisive national electoral outcomes.[14] Ackerman may have been the first to try to systematize the reality and the legitimacy of periodic, radical doctrinal shifts in constitutional law. But his story is a story of amendment; it offers no account of radical reinterpretation in the absence of amendment.

At successful "constitutional moments," says Ackerman, the Constitution is amended, even if the formal requirements of Article V have not