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**Jonathan F. Mitchell,  
George Mason University School of Law**

*Legal Workshop (University of Chicago Law  
Review May 4, 2009), online at  
<http://legalworkshop.org/2009/05/03>*

**George Mason University Law and Economics  
Research Paper Series**

**09-26**

This paper can be downloaded without charge from the Social Science  
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## Modernization, Moderation, and Political Minorities: A Response to Professor Strauss

Jonathan F. Mitchell\*

The Supreme Court is frequently accused of declaring laws unconstitutional based on little more than the justices' ideological preferences. This is an especially common criticism of the Court's capital-punishment, equal-protection, and substantive-due-process jurisprudence, where the justices have made little effort to tie their decisions to anything resembling a neutral principle.<sup>1</sup>

In *The Modernizing Mission of Judicial Review*,<sup>2</sup> Professor Strauss argues that the Supreme Court's decisions in these areas are efforts to "modernize" the law by facilitating and accommodating developments in popular opinion, rather than actions that merely entrench the justices' ideological viewpoints or personal whims. A modernizing court decision must satisfy two conditions. First, it invalidates a law only if it "no longer reflects popular opinion" or if "trends in popular opinion are running against it."<sup>3</sup> Second, the Court "must be prepared to change course" if "popular sentiment has moved in a different direction from what the court anticipated."<sup>4</sup> In one sense, the Supreme Court is always prepared to respond to developments in popular opinion, because the president and the Senate will use their appointment prerogatives to bring the Court into line. But Professor Strauss describes something different from these external constraints on judicial decisionmaking. A modernizing court *itself* designs principles and doctrines that are responsive to future developments in popular opinion.

No one can deny that the justices' beliefs regarding future popular opinion are factors in the Court's decisionmaking. Justices care about their legacies and future reputations; they would prefer to be remembered as a prescient jurist, such as the first Justice Harlan,<sup>5</sup> rather than as Roger Taney.<sup>6</sup> And these forward-looking influences have undoubtedly produced some Supreme Court decisions that fit within the modernizing paradigm that Professor Strauss describes.

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\* Assistant Professor of Law, George Mason University School of Law. Thanks to Richard Epstein, Ashley Keller, Adam Mortara, David Schleicher, and David Strauss for comments.

<sup>1</sup> See, for example, *Atkins v Virginia*, 536 US 304, 338 (2002) (Scalia dissenting) ("Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members." [CQ]). See generally John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L J 920 (1973) (criticizing *Roe v Wade* on similar grounds).

<sup>2</sup> 76 U Chi L Rev (forthcoming 2009).

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> See *Plessy v Ferguson*, 163 US 537, 552–64 (1896) (Harlan dissenting).

<sup>6</sup> See *Dred Scott v Sandford*, 60 US (19 How) 393, 399–469 (1856).

But it is hard to accept Professor Strauss's descriptive claim that modernization is the Court's "dominant" or "central" approach in its capital-punishment and modern substantive-due-process jurisprudence.<sup>7</sup> His analysis overstates the Supreme Court's willingness and ability to accommodate future public opinion at the expense of judicial preferences; the Supreme Court simply has not displayed the level of modesty, or the respect for popular opinion, that Professor Strauss seeks to attribute to it. Nor can the modernization framework reconcile the Court's capital-punishment and substantive-due-process cases with principles of democratic government. On the normative side, there are reasons to object to modernization as a theory of judicial review in addition to those that Professor Strauss identifies.

## I. Capital Punishment

Professor Strauss invokes the Supreme Court's refusal to declare capital punishment unconstitutional per se in *Gregg v Georgia*<sup>8</sup> as evidence of its "willingness to retreat" from its earlier decision in *Furman v Georgia*.<sup>9</sup> *Furman* had declared capital punishment (as then practiced) to be unconstitutional, and prompted thirty-five states to reenact legislation authorizing the death penalty. But *Gregg* is only a small part of the Court's post-*Furman* capital-sentencing jurisprudence. After *Gregg*, the Court continued to impede capital punishment by allowing multiple rounds of habeas corpus review,<sup>10</sup> and imposing new procedural requirements that hinder prosecutors' efforts to secure death sentences.<sup>11</sup> The Court eventually established contradictory constitutional requirements that states eliminate arbitrariness while giving sentencers unfettered discretion to dispense mercy;<sup>12</sup> this empowered lawyers to mount credible constitutional challenges to any capital-sentencing regime. And the same Court that decided *Gregg* invalidated mandatory capital-punishment regimes in North Carolina and Louisiana, which the legislatures had enacted only two years earlier in direct response to *Furman*.<sup>13</sup> It is hard to characterize these post-*Furman* obstacles to capital punishment as "modernizing";

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<sup>7</sup> The sex-discrimination cases that Professor Strauss cites fit more comfortably into his modernizing framework. But the lack of political pushback in response to many of those decisions makes it impossible to determine whether the Court was truly "prepared to change course" if popular resistance ensued.

<sup>8</sup> 428 US 153 (1976).

<sup>9</sup> 408 US 238 (1972).

<sup>10</sup> See, for example, *Panetti v Quarterman*, 127 S Ct 2842, 2852–55 (2007) (adopting a dubious textual reading of 28 USC § 2244(b) that allowed certain capital defendants to pursue additional rounds of habeas corpus proceedings).

<sup>11</sup> See, for example, *Bullington v Missouri*, 451 US 430, 444–46 (1981); *Booth v Maryland*, 482 US 496, 501–02 (1987); *Mills v Maryland*, 486 US 367, 384 (1988).

<sup>12</sup> Compare *Furman v Georgia*, 408 US 238, 239–42 (1972), with *Eddings v Oklahoma*, 455 US 104, 113–15 (1982).

<sup>13</sup> See *Woodson v North Carolina*, 428 US 280, 301 (1976); *Roberts v Louisiana*, 428 US 325, 335–36 (1976).

popular support for capital punishment grew steadily from 1972 through 1994, and exceeded 60 percent in every Gallup poll taken since 1976.<sup>14</sup> And few, if any, of these rulings suggest that the justices relied on an honest but mistaken belief that popular support for capital punishment was waning, or that the sentencing procedures that they invalidated were “outliers” or relics of a bygone era.<sup>15</sup> Yet the Court continues to impose heavy costs on states with capital-punishment regimes, which allow only a fraction of condemned inmates to be punished in accordance with popular opinion.<sup>16</sup> When one considers the Court’s death-penalty jurisprudence as a whole, the decision in *Gregg* looks less like an effort to accommodate the popular backlash to *Furman* and more like a strategy shift by the justices to undermine capital punishment through more subtle, underhanded means.

*Atkins v Virginia*,<sup>17</sup> which prohibited executions of mentally retarded inmates, is another decision that appears to support Professor Strauss’s modernization thesis. Crucially, *Atkins* left the task of defining “mental retardation” to legislatures,<sup>18</sup> which established a clear mechanism for the Court to accommodate political-branch pushback. If future popular opinion turns against *Atkins*, legislatures can establish high (or insurmountable) thresholds for “mental retardation.” This will enable prosecutors to seek capital punishment against mentally retarded defendants, and the justices can reconsider their stance if the condemned inmates challenge their death sentences in court.

*Thompson v Oklahoma*<sup>19</sup> also appears to be a modernizing decision. The petitioner in *Thompson* was a fifteen-year-old murderer who argued that his death sentence violated the Eighth Amendment. Four justices wanted to impose a constitutional ban on capital punishment for those who were under sixteen years of age when they committed their crime. But Justice O’Connor refused to join their opinion, and opted for a narrower holding that prohibited fifteen-year-old offenders from being executed pursuant to a capital-punishment statute that fails to specify a minimum age. This allowed future legislatures to respond by explicitly authorizing capital punishment for fifteen-year-old murderers, in the event that the Court’s decision had misconstrued the “evolving

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<sup>14</sup> See, for example, Lydia Saayd, *Support for Death Penalty Steady at 64%*, (Gallup Dec 8, 2005), online at <http://www.gallup.com/poll/20350/Support-Death-Penalty-Steady-64.aspx#2> (visited April 21, 2009).

<sup>15</sup> A possible exception is *Simmons v South Carolina*, 512 US 154 (1994), where the Court disapproved South Carolina’s refusal to inform juries of a capital defendant’s parole ineligibility. *Id.* at 168 n 8 (plurality) (noting that “only two States other than South Carolina have a life-without-parole sentencing alternative to capital punishment for some or all convicted murderers but refuse to inform sentencing juries of this fact”).

<sup>16</sup> From 1977 through 2007, 7,547 inmates were sentenced to death, but only 1,099 of those were executed. See DOJ, Bureau of Justice Statistics, *Capital Punishment, 2007 - Statistical Tables*, online at <http://www.ojp.usdoj.gov/bjs/pub/html/cp/2007/tables/cp07st10.htm> (visited April 21, 2009).

<sup>17</sup> 536 US 304 (2002).

<sup>18</sup> *Id.* at 317.

<sup>19</sup> 487 US 815 (1988).

standards of decency” in American society. Like *Atkins*, Justice O’Connor’s approach in *Thompson* provided a mechanism to accommodate political-branch pushback in the near or distant future.

Yet *Atkins* and *Thompson* show that *Roper v Simmons*<sup>20</sup> and *Kennedy v Louisiana*<sup>21</sup> cannot possibly fit within the modernization framework that Professor Strauss describes. In those cases, the Court decreed an end to executing juveniles and child rapists, but left no mechanism for future cases that could test the Court’s “willingness to retreat.” Even if a large number of legislatures defied the Court and enacted statutes authorizing the death penalty for juveniles and child rapists, every trial-court judge, bound to follow the Supreme Court’s rulings,<sup>22</sup> would bar prosecutors from seeking capital punishment in those cases. Without the ability to secure a death sentence against a juvenile or a child rapist at trial, there would never be an Article III “case” that would enable the Supreme Court to reconsider *Roper* or *Kennedy*. Even if the justices are “willing to retreat” from these decisions in the future, they would be unable to do so.

If the *Roper* and *Kennedy* Courts were truly engaged in modernization, they would have adopted the approach that Justice O’Connor used in *Thompson*: invalidate the existing death-penalty statutes, but leave the door open for legislatures to reauthorize capital punishment for juveniles and child rapists. The justices were aware that this was an available option, there was Court precedent to support it, yet they chose not to use it. One can only conclude that the purpose and effect of these decisions were to entrench the justices’ ideological preferences, rather than to accommodate present or future popular opinion.<sup>23</sup>

## II. Substantive Due Process

Here, too, Professor Strauss is too quick to characterize the Court as willing to accommodate political pushback. Although *Lawrence v Texas*<sup>24</sup> disclaims any ruling on same-sex marriage, or other gay-rights issues, it also contains broad, sweeping language

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<sup>20</sup> 543 US 551 (2005).

<sup>21</sup> 128 S Ct 2641 (2008).

<sup>22</sup> Lower courts are forbidden to anticipate that the Supreme Court will overrule one of its precedents. See *Agostini v Felton*, 521 US 203, 237–38 (1997). See also *Cooper v Aaron*, 358 US 1, 18 (1958) (declaring that “the federal judiciary is supreme in the exposition of the law of the Constitution,” and that “[e]very state legislator and executive and judicial officer” is bound to support the Supreme Court’s interpretations of the Constitution).

<sup>23</sup> The Supreme Court’s refusal to reconsider *Kennedy* after its belated discovery that Congress, the president, and both major-party presidential candidates supported capital punishment for at least some child rapists confirms this. See *Kennedy v Louisiana*, 129 S Ct 1 (2008); Robert Barnes, *Court Won’t Reconsider Ban on Execution for Child Rape*, Wash Post A2 (Oct 2, 2008) (noting that both presidential candidates criticized the *Kennedy* opinion).

<sup>24</sup> 539 US 558 (2003).

that could easily be read to support more expansive constitutional rights for homosexuals.<sup>25</sup> Professor Strauss predicts that this “open-ended” opinion will enable the Court to decide future gay-rights controversies in accordance with evolving trends in popular opinion. He interprets the Court’s abortion jurisprudence in a similar manner. Despite *Roe v Wade*’s<sup>26</sup> rigidity, Professor Strauss believes that *Planned Parenthood v Casey*’s<sup>27</sup> “undue burden” test is a device to accommodate future developments in public opinion.

But one could just as easily surmise that the vague language in *Lawrence* and *Casey* is designed to accommodate *judicial* preferences at the *expense* of future popular opinion. Applications of loose standards, or open-ended opinions, are impossible to falsify. This empowers the justices to decide cases in accordance with their own preferences, as they can invoke Court precedents to support almost any result. And they need not spell out the full range of their ambitions until later, which avoids the public backlash that a more transparent or rule-like decision might provoke.

We have at least one data point that corroborates this view of the Court’s substantive-due-process jurisprudence. After *Casey* established the undue-burden regime, thirty-one states enacted laws against the procedure known as “partial-birth abortion,” and refused to allow broad exceptions when the mother’s health was endangered. Indeed, more states had outlawed partial-birth abortion than the juvenile death penalty. Yet *Stenberg v Carhart*<sup>28</sup> invalidated these statutes, disproving any notion that the vague “undue-burden” test was meant to accommodate future trends in popular opinion. Instead, the vagueness empowered the Court to impose its own preferences against the political branches. As for “willingness to retreat,” the Court later upheld a federal statute banning the procedure,<sup>29</sup> but that was only after the Court’s membership had changed. And the dissenters in *Gonzales v Carhart*,<sup>30</sup> far from showing a “willingness to retreat” in the face of this federal statute, threatened to overrule the majority’s decision at the earliest opportunity, without any regard for how future public opinion might evolve.<sup>31</sup> None of this is “modernization”; the justices are voting according to their own views without any regard to trends in popular opinion. If “modernization” were driving the Supreme Court’s substantive-due-process decisions, then one would expect the Court to

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<sup>25</sup> See, for example, Nelson Lund and John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 Mich L Rev 1555, 1601 n 175 (2004).

<sup>26</sup> 410 US 113 (1973).

<sup>27</sup> 505 US 833 (1992).

<sup>28</sup> 530 US 914 (2000).

<sup>29</sup> See *Gonzales v Carhart*, 127 S Ct 1610, 1627 (2007).

<sup>30</sup> 127 S Ct 1610 (2007).

<sup>31</sup> *Id* at 1653 (Ginsburg dissenting) (“A decision so at odds with our jurisprudence should not have staying power.”).

have invalidated Florida's unique-in-the-nation ban on adoptions by homosexual parents,<sup>32</sup> rather than the partial-birth abortion bans that thirty-one states had enacted.

### III. Should Courts Modernize?

Professor Strauss expresses some doubts as to whether modernization is a normatively desirable role for the Court to play.<sup>33</sup> There are additional reasons to look askance at modernization as a theory of judicial review.

First, a modernizing court discourages compromise, moderation, and nuance in the political branches. Consider moderate conservatives who oppose same-sex marriage, yet support (or at least tolerate) other legal reforms, such as civil unions, that give some legal recognition to same-sex couples. These individuals must confront the very real possibility that a modernizing court will use their toleration for civil unions as evidence to support a constitutional right to same-sex marriage. Similar quandaries exist for moderates who support capital punishment but want it used sparingly. The rarity of juvenile executions led to their extinction by court decree; capital punishment might suffer a similar fate if elected officials allow the execution rate to fall. Former Attorney General John Ashcroft was criticized for pursuing death sentences in federal prosecutions against the recommendation of US attorneys.<sup>34</sup> Yet such behavior is rational in a world where the Supreme Court anticipates trends in public opinion and entrenches them as constitutional law, even if it produces wasted government resources and gratuitous loss of life.

Modernization forces politicians, interest groups, and informed citizens to extremes. It induces them to oppose beneficial reforms solely out of fear that such reforms might cause a modernizing Court to impose a more radical solution that they oppose.<sup>35</sup> "Slippery slope" concerns, so often contrived or exaggerated in political discourse,<sup>36</sup> become real and salient with a modernizing court. Interest groups will fight with even more ferocity when they know the Supreme Court will use a political compromise as evidence that the country is ready for more radical change—because yielding an inch today may surrender a mile tomorrow. None of this is conducive to rational policymaking.

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<sup>32</sup> See *Lofton v Department of Children and Family Services*, 125 S Ct 869 (2005) (denying certiorari).

<sup>33</sup> Strauss, 76 U Chi L Rev (forthcoming 2009).

<sup>34</sup> Richard B. Schmitt, Ashcroft is Undeterred in Push for Capital Cases, LA Times A1 (Sept 29, 2004).

<sup>35</sup> Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S Cal L Rev 119, 126–31 (2000).

<sup>36</sup> See Eugene Volokh, *The Mechanism of the Slippery Slope*, 116 Harv L Rev 1026, 1075–77 (2003).

Modernizing courts also erode the protections that the Constitution confers on political minorities. The Constitution does not establish rule by national political majorities (much less emerging majorities); it establishes a federal republic that provides extensive protections to political minorities. The federal government's powers are confined to the enumerated provisions in Article I; this enables national political minorities to migrate to local jurisdictions with more agreeable laws. Article I's bicameralism-and-presentment requirements effectively create supermajoritarian requirements for national political majorities that seek to impose their will. And Article V's amendment process establishes an extraordinary supermajority hurdle before a political majority can constitutionalize its preferences and remove issues from the normal political process. All of these provisions are designed to protect political minorities, empowering them to block majoritarian initiatives, or to insist on compromise in exchange for their assent.

The modernization theory enables the Supreme Court to circumvent these protections from national-majority rule by constitutionalizing emerging trends in popular opinion, in the guise of interpreting vague constitutional language such as "cruel and unusual punishments" or "due process of law."<sup>37</sup> This not only leads to the "bias toward centralization"<sup>38</sup> that Professor Strauss describes, it also threatens to undermine the rule of law. Almost everyone acknowledges that constitutional text, at the very least, serves as a "focal point" that enables a diverse society to agree on what qualifies as law.<sup>39</sup> Today's national majorities accept the Constitution's limits on national-majority rule on the understanding that those limits will protect them if they become a national minority in the future. But when the Supreme Court uses loose construction to subvert the explicit constitutional limits on national-majority rule (or emerging-majority rule), then a national majority's decision to accept constitutional limits on its power begins to seem less like a social contract and more like an act of unilateral disarmament. There is far less risk of this happening when courts use judicial review merely to correct defects that undermine the lawmaking processes that the Constitution establishes,<sup>40</sup> to enforce established and accepted understandings of constitutional provisions, or to adopt a plausible (even if disputed) interpretation of the Constitution's original meaning. Indeed, many, though not all, of the modernizing cases that Professor Strauss describes can be defended on such grounds.<sup>41</sup> It is quite another matter, however, when the Supreme Court transparently

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<sup>37</sup> Not every modernization will have such centralizing effects. See Strauss, 76 U Chi L Rev (forthcoming 2009) (noting that the Rehnquist Court's Commerce Clause decisions could fit within the modernization framework). But most of them will.

<sup>38</sup> See Strauss, 76 U Chi L Rev (forthcoming 2009).

<sup>39</sup> See, for example, David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 Yale L J 1717, 1733–1735 (2003).

<sup>40</sup> See, for example, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 8 (Harvard 1980).

<sup>41</sup> See *Id.* at 164–170 (sex discrimination); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va L Rev 947, 1092–1110 (1995) (school desegregation).

circumvents the explicit constitutional limits on emerging-majority rule and the Constitution's criteria for creating or changing federal law. The danger is that those who find themselves on the losing end of such modernizing court decisions will be less willing to uphold their end of the bargain by adhering to the Constitution's limits on emerging-majority rule when they control one of the other branches of government.<sup>42</sup> Indeed, one need only read the Bush Administration's legal memoranda to see how the executive branch, just like the Supreme Court, can use loose interpretation to erode the Constitution's limits on emerging-majority rule and its procedures for enacting or amending federal law.<sup>43</sup> One should expect the constitutional focal points that protect political minorities from national-majority rule to further unravel if the public tolerates, or if academic elites rationalize, the notion that "modernization" is a proper or legitimate role for the Supreme Court to play.

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<sup>42</sup> Compare Strauss, 112 Yale L J at 1734–35 (cited in note 39) ("Every time the [Constitution's] text is ignored or obviously defied, its ability to serve as common ground, as a focal point, is weakened. . . . It may be that if one person cheats, by failing to follow the text, others are more likely to cheat too, and soon the ability of the text to coordinate behavior will be lost, to everyone's detriment.").

<sup>43</sup> Here, the weapon of choice is the Commander-in-Chief Clause, which the Bush Administration interpreted to disable Congress from regulating the conduct of warfare. See DOJ, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan 19, 2006), online at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf> (visited April 21, 2009); DOJ, Office of Legal Counsel, Office of the Assistant Attorney General, *Memorandum for Alberto R. Gonzales, Counsel to the President: Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A* (Aug 1, 2002), online at [http://www.washingtonpost.com/wp-srv/politics/documents/cheneytorture\\_memo\\_aug2002.pdf](http://www.washingtonpost.com/wp-srv/politics/documents/cheneytorture_memo_aug2002.pdf) (visited Apr 21, 2009).