

On Reading the Constitution

LAURENCE H. TRIBE

THE TANNER LECTURES ON HUMAN VALUES

Delivered at
The University of Utah

November 17 and 18, 1986

LAURENCE H. TRIBE is the Ralph S. Tyler, Jr., Professor of Constitutional Law at Harvard Law School, where he has been a faculty member since 1968. Born in China of Russian Jewish parents, Tribe came to the United States at the age of five, attended public schools in San Francisco, and entered Harvard College in 1958 at the age of sixteen. He received his A.B. from Harvard summa cum laude in mathematics in 1962 and his J.D. from Harvard Law School magna cum laude in 1966. Following graduation, he served as a law clerk for Justice Mathew O. Tobriner of the California Supreme Court and then for Justice Potter Stewart of the United States Supreme Court. In 1980 he was elected a Fellow of the American Academy of Arts and Sciences.

Tribe, the recipient of four honorary doctor of laws degrees, has written or edited fifteen books and more than eighty-five articles. His major books include *American Constitutional Law*, which received the Coif Award in 1980 for the most outstanding legal writing in the nation and is widely said to be the leading modern work on the subject; a completely revised second edition of that treatise, published in 1988; *Constitutional Choices*, a book of essays published in 1985; and *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History*, also published in 1985. During the past decade Tribe has been a frequent and successful litigator before the United States Supreme Court and has testified often as an expert witness before Congress on constitutional matters.

I. CHOICES AND CONSTRAINTS*

On the door to my office I have taped a cartoon that shows two people talking at a cocktail party. One of them says to the other: “No, I don’t know the preamble to the Constitution of the United States of America. But I know *of* it.”

That nicely captures the situation of most of us. We know *of* the Constitution, and no one fails to have plenty of opinions *about* it, but what “it” is somehow tends to elude us. The text is very brief. It can fit into a small pocket. So what is all the fuss about? Why does Justice John Paul Stevens of the United States Supreme Court say, in a speech delivered in 1984 at the University of San Diego, that “[t]he Constitution of the United States is a mysterious document”?¹ What’s the mystery about?

One way to put the question is to ask: What does it mean to *read* this Constitution? What is it that we do when we *interpret* it? Why is there so much controversy over *how* it should be interpreted — and why is so much of that controversy, these days in particular, not limited to the academy or to the profession, but so public that it makes the evening news and the front pages?²

* This essay is a lightly edited version of the Tanner Lectures given at the University of Utah in November 1986. A measure of informality has been retained to preserve the flavor of the original lectures. Although no significant substantive points have been added, occasional references to especially relevant subsequent developments have been made in footnotes.

I wish to thank the Trustees of the Tanner Lectures for inviting me to give these lectures, and to thank the faculty and students at the University of Utah for their hospitality in making the lectures a pleasant and enriching experience. Thanks are also due to Kenneth Chesebro, J.D., Harvard Law School, 1986, for assistance in preparing the final manuscript.

¹Stevens, “Judicial Restraint,” 22 *San Diego L. Rev.* 437, 437 (1985).

²This question might seem self-answering after the hearings on the nomination of Judge Robert H. Bork to serve as a Supreme Court justice, held in fall of 1987, which revealed with specificity the depth of national support for vigorous protection of civil rights and civil liberties by the federal judiciary. But these lectures were delivered in November 1986.

It's no secret, of course, that the Supreme Court's school prayer decisions in the 1960s, its abortion decision in 1973, its reaffirmation of those controversial decisions in the mid-1980s, and its refusal to accept the Reagan administration's quite stark anti-affirmative-action views have all given administration spokesmen — particularly Attorney General Edwin Meese and William Bradford Reynolds, the assistant attorney general for civil rights — and those who sympathize with them ample incentive to criticize the Court's interpretation of the Constitution.³ But that is hardly new. Disagreement with the Supreme Court's laissez-faire rulings of the early twentieth century and the Court's invalidation of key New Deal measures into the 1930s provided ample motive for people to attack the Court during those years.⁴ Disagreement with the desegregation and the reapportionment decision decades later spurred loud reactions against the jurisprudence of the Warren Court.⁵ But the *level* and *tone* of the public debate has reached, I think, something of a new pitch — that has not been heard at this intensity in so sustained a way since Franklin D. Roosevelt's assault on the “Nine Old Men” in the presidential election of 1936.

In any case, it is my intention to take the dispute seriously—not to regard it simply as a mask for disagreement with the Court's results on particular issues, or as a mere excuse to oppose one or

³*Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), and *Engel v. Vitale*, 370 U.S. 421 (1962) (school prayer); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion). On the Court's reaffirmation, see *Wallace v. Jaffree*, 472 U.S. 38 (1985) (school prayer); *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169 (1986), and *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (abortion). On the Court's refusal to accept administration views, see *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987); *United States v. Paradise*, 107 S. Ct. 1053 (1987).

⁴See Laurence Tribe, *American Constitutional Law*, 2d ed. (Mineola, N.Y.: Foundation Press, 1988), § 8-6, p. 580. Although that treatise was still being completed when these lectures were delivered, I refer to it from time to time in these footnotes for those readers who might wish to examine a fuller and more current treatment of doctrinal matters briefly addressed in text.

⁵See *ibid.*, § 13-7, p. 1074, and § 13-8, p. 1076 (reapportionment); § 16-18, p. 1488 (desegregation).

another judicial nominee, although to some extent it *is* simply a matter of whose ox has most recently been gored. Recognizing that such substantive disagreement plays a large role in bringing critics out into the open, in other words, does not justify inattention to the content of that disagreement. So I proceed from the premise that there is a real dispute over ways of interpreting the Constitution, and I want to try to understand what the structure of that dispute is.

If there is genuine controversy over how the Constitution should be read, certainly it cannot be because the disputants have access to different bodies of information. After all, they all have exactly the same text in front of them, and that text has exactly one history, however complex, however multifaceted. Is it that different people believe different things about how that history *bears* on the enterprise of constitutional interpretation?

Thomas Grey of Stanford, in a wonderful essay entitled “The Constitution as Scripture,” builds on some earlier work by Sanford Levinson of Texas, Robert Burt of Yale, and the late Robert Cover of Yale.⁶ Grey asks provocatively whether some individuals regard the history of the Constitution, both prior to its adoption and immediately thereafter, and even the history subsequent to that, as somehow a *part* of the Constitution — in much the same way that some theologians consider tradition, sacrament, and authoritative pronouncements to be part of the Bible. And he asks whether perhaps others regard the history, and certainly the post-adoption tradition and the long line of precedent, as standing entirely apart from the Constitution, shedding light on what it means, but not becoming *part* of that meaning — in much the way other theologians consider the words of the Bible to be the sole authoritative source of revelation, equally accessible to all

⁶Grey, “The Constitution as Scripture,” 37 *Stan. L. Rev.* 1 (1984); Levinson, “‘The Constitution’ in American Civil Religion,” 1979 *Sup. Ct. Rev.* 123; Burt, “Constitutional Law and the Teaching of the Parables,” 93 *Yale L.J.* 455 (1984); Cover, “Foreword —The Supreme Court, 1982 Term: ‘Nomos’ and Narrative,” 97 *Harv. L. Rev.* 4 (1983).

who read it, in no need of the intervention of specialized interpreters and thus not to be mediated by any priestly class.

Perhaps the disputants agree, or at least many of them do, on what *counts* as “The Constitution” but simply approach the same body of textual and historical materials with different visions, different premises, different convictions. But that assumption raises obvious questions: How are those visions and premises and convictions relevant to how this brief text ought to be read? Is reading the text just a *pretext* for expressing the reader’s vision in the august, almost holy terms of constitutional law? Is the Constitution simply a mirror in which one sees what one wants to see?

The character of contemporary debate might appear to suggest as much. Liberals characteristically accuse conservatives of reading into the Constitution their desires to preserve wealth and privilege and the prevailing distribution of both. Conservatives characteristically accuse liberals of reading into the Constitution their desires to redistribute wealth, to equalize the circumstances of the races and the sexes, to exclude religion from the public realm, and to protect personal privacy. A once largely scholarly debate conducted almost exclusively in the pages of the law journals and the journals of cognate disciplines, and occasionally in the pages of the *United States Reports*, where Supreme Court opinions appear, now erupts regularly into a flurry of charges and countercharges between persons no less august than the attorney general of the United States and a growing list of Supreme Court justices speaking outside their accustomed role as authors of formal opinions. How are we to understand such charges and countercharges?

It might help to begin at the beginning — and I really mean at the beginning. One astute observer of language and law, James White of the University of Michigan English Department and the Michigan Law School, has noticed an important difference

between the Declaration of Independence and the Constitution.⁷ The Declaration, he points out, is a proclamation by thirteen sovereign states at a moment of crisis. It is a hopeful cry. It is an attempt to justify revolution. It is addressed to the king of England and even more significantly to the conscience of Europe. It is a call for assistance and support. One can read it and understand who is speaking and who is being spoken to.

The Constitution makes a stark contrast. It is neither a justification nor a plea. It is a proclamation issued in the name of “We the People of the United States.” It has a familiar preamble declaring its purpose: “to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity.” It then proceeds to “ordain and establish this Constitution for the United States of America” by setting forth a blueprint for the distribution of powers and by declaring various limits on those powers.

If you think about it, that seems a supremely confident and courageous act—to create a nation through words: words that address no foreign prince or distant power but the very entity called into being by the words themselves, words that address the government that they purport to constitute, words that speak to succeeding generations of citizens who will give life to that government in the years to come.

The idea that words can somehow infuse a government with structure and impose limits on that structure—that language can directly power the ship of state and chart its course—has played an important role in what Americans, particularly in our early years but to some extent (although less consciously) even today, have tended to think about the Constitution. As James Russell Lowell wrote in 1888, “[a]fter our Constitution got fairly into

⁷James White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago: University of Chicago Press, 1984), 231–47.

working order it really seemed as if we had invented *a machine that would go of itself*.”⁸

Justice Oliver Wendell Holmes drew on a similar image, but had no similar illusions, when he chose his words in 1920 in the case of *Missouri v. Holland*.⁹ He wrote:

when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to . . . hope that they had created an *organism*; it has taken a century and has cost their successors much sweat and blood to prove that they created a *nation*.

“The case before us,” Holmes went on, “must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. . . . We must consider what the country has become in deciding” what the Constitution means.¹⁰ Holmes had no doubt that the very *meaning* of the thing we call “the Constitution” — even though its words, as marks on parchment carefully preserved at the National Archives, remain unaltered — was a reality partly reconstructed (some might say “deconstructed”) by each generation of readers. And he had no doubt that that was as the framers of the Constitution themselves originally intended. They were, after all *framing* the Constitution, not painting its details. (Why else call them the “framers”?)

How different an image that is from the originalist image suggested by Garry Wills in his book *Inventing America*.¹¹ Wills writes that to recapture the true meaning of a text, we must forget

⁸Quoted in Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Knopf, 1986), 125 (emphasis added).

⁹252 U.S. 416 (1920).

¹⁰*Ibid.*, 433-34 (emphasis added).

¹¹Garry Wills, *Inventing America: Jefferson's Declaration of Independence* (New York: Doubleday, 1978), xxiv-xxvi.

what we learned, or what occurred in the interval between our time and the text's. There is every reason to see a paradox in that vision, because many of those who wrote the text of the original Constitution or voted to approve it, or wrote or voted to approve some of its amendments, supposed that the meaning, at least of the more general terms being deployed, was inherently variable. They supposed that the examples likely to occur to them at the time of the creation would not be forever fixed into the meaning of the text itself.

Dean Paul Brest of Stanford University, in an article called "The Misconceived Quest for the Original Understanding," suggests that, once we take into account the elaborate and thick evolution of constitutional doctrine and precedent, we cannot avoid seeing the original document and its history recede as a smaller and smaller object into a distant past.¹² He says it's "rather like having a remote ancestor who came over on the *Mayflower*."¹³ Of course, Brest is offering only a description of the way things are. Even if the description is accurate, some might say it's not a very good *prescription* of the way things *ought* to be. Perhaps the Court, and commentators, should return more often to the *Mayflower* and pay somewhat less attention to all the accumulated barnacles. But as with the sailing ship, this *Mayflower* is venerated less because of the vessel it was than because of the voyage it began. Return to the source, and we find an invitation not to linger too obsessively in the past.

Consider, for example, the framers who thought that the very common practice of disqualifying the clergy from public office was consistent with the Constitution. They included at the time Thomas Jefferson, who thought that the clergy ought to be excluded from legislatures. I suspect those framers would have been surprised by any suggestion that clergy disqualification there-

¹²Brest, "The Misconceived Quest for the Original Understanding," 60 *B.U. L. Rev.* 204 (1980).

¹³*Ibid.*, 234.

fore could *never* be declared unconstitutional. In fact, some of the framers, including Jefferson, later concluded that clergy could not validly be excluded. And when the Supreme Court finally held in a case from Tennessee in the late 1970s that disqualifying clergymen from public office is indeed unconstitutional, Justice William J. Brennan, Jr., was entirely correct to observe in his concurring opinion that “[t]he fact that responsible statesmen of the day, including some of the . . . Constitution’s Framers, were attracted by the concept of clergy disqualification . . . does not provide historical support for concluding that those provisions are harmonious with the Establishment Clause.”¹⁴

Or consider those who voted to propose the Fourteenth Amendment to the states, or voted to ratify it. There is very little doubt that most of them assumed that segregated public schools were, at the time, entirely consistent with the Fourteenth Amendment. And yet I doubt that many of them would have said, if pressed, that the Fourteenth Amendment could *never* be invoked, as events unfolded, to reach a different conclusion about segregated public schooling. And I have no doubt that the Supreme Court was entirely correct when in 1954 it finally held that it could not turn the clock back to 1868, that it had to consider what public education had *become* — to examine its status “in light of its full development and its present place in American life” — to decide whether segregation could still be deemed constitutional.¹⁵ In fact, it is not that the *meaning* of the Fourteenth Amendment had changed; the concept was the same: subjugating an entire race with the force of law was understood to be unconstitutional. It took us longer than it should have to figure out that segregating people in the public schools *amounted* to subjugating an entire race by force of law. But the basic principle remained con-

¹⁴*McDaniel v. Paty*, 435 U.S. 618, 637 (1978). See Tribe, *American Constitutional Law*, § 14-8.

¹⁵*Brown v. Board of Education*, 347 U.S. 483, 492-93 (1954).

stant.¹⁶ My conclusion is that many of the original framers and those responsible for enacting subsequent amendments, although perhaps not all, would have been aghast at the prescription of amnesia as part of the proper method of applying their words to a changing reality.

Indeed, not even the most “conservative” justices today believe that the type of amnesia which Wills described — and which Attorney General Meese has occasionally prescribed — as medication for the Constitution’s supposed ills is really possible or desirable. Consider the following statement made by a Supreme Court justice in 1976: “The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live. . . . Where the framers . . . used general language, they . . . [gave] latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.”¹⁷ The author was not Justice William J. Brennan or Justice Thurgood Marshall but then-Justice William H. Rehnquist. Or consider the statement by Justice Byron R. White, joined by Justice Rehnquist in a 1986 dissenting opinion: “As [our] prior cases clearly show, . . . this Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the ‘plain meaning’ of the Constitution’s text or to the subjective intention of the Framers. The Constitution,” says Justice White, “is not a deed setting forth the precise metes and bounds of its subject matter; rather, it is a document announcing fundamental principles in value-laden terms that leave ample scope for the

¹⁶Ronald Dworkin, *Law’s Empire* (Cambridge, Mass.: Harvard University Press, 1986), 387-89. See also Tribe, *American Constitutional Law*, § 16-15, pp. 1477-78; § 16-21, p. 1514.

¹⁷Rehnquist, “The Notion of a Living Constitution,” 54 *Tex. L. Rev.* 693, 694 (1976).

exercise of normative judgment by those charged with interpreting and applying it.”¹⁸

So the “conservatives” on the Court, no less than the “liberals,” talk as though reading the Constitution required something much more than passively discovering a fixed meaning planted there generations ago. Those who wrote the document, and those who voted to ratify it, were undoubtedly projecting their wishes into an indefinite future. If writing is wish-*projection*, is reading merely an exercise in wish-*fulfillment* — not fulfillment of the wishes of the *authors*, who couldn’t begin to have foreseen the way things would unfold, but fulfillment of the wishes of *readers*, who perhaps use the language of the Constitution simply as a mirror to dress up their own political or moral preferences in the hallowed language of our most fundamental document? Justice Joseph Story feared that that might happen when he wrote in 1845: “How easily men satisfy themselves that the Constitution is exactly what they wish it to be.”¹⁹

To the extent that is so, it is indefensible. The authority of the Constitution, its claim to obedience, and the force that we permit it to exercise in our law and over our lives would lose all legitimacy if it really were only a mirror for the readers’ ideas and ideals. We *have* to reject as completely unsatisfactory the idea of an empty, or an infinitely malleable, Constitution. We must find principles of interpretation that can anchor the Constitution in some more secure, determinate, and external reality. But that is no small task.

One basic problem is that the text itself leaves so much room for the imagination. Simply consider the preamble, which speaks of furthering such concepts as “Justice” and the “Blessings of Liberty.” It is not hard, in terms of concepts that fluid and that plastic, to make a linguistically plausible argument in support

¹⁸*Thornburgh v. American College of Obstetricians*, 106 S. Ct. 2169, 2193 (1986) (White, J., dissenting).

¹⁹Kammen, *A Machine That Would Go of Itself*, xxiii.

of more than a few surely incorrect conclusions. Perhaps a rule could be imposed that it is improper to refer to the preamble in constitutional argument on the theory that it is only an introduction, a preface, and not part of the Constitution *as enacted*. But even if one were to invent such a rule, which has no apparent grounding in the Constitution itself, it is hardly news that the remainder of the document is filled with lively language about “liberty,” “due process of law,” the “privileges or immunities” of citizens, and the guarantee of a “Republican Form of Government” — words that, although not *infinitely* malleable, are capable of supporting meanings at opposite ends of virtually any legal, political, or ideological spectrum.

It is therefore not surprising that readers on both the right and left of the American political center have invoked the Constitution as authority for strikingly divergent conclusions about the legitimacy of existing institutions and practices, and that neither wing has found it difficult to cite chapter and verse in support of its “reading” of our fundamental law. As is true of other areas of law, the materials of constitutional law require construction, leave room for argument over meaning, and tempt the reader to import his or her vision of the just society into the meaning of the materials being considered.

In a recent book, *Constitutional Choices*, I argued that as a result of this fluidity, judges *have* to acknowledge, as they read the Constitution, that they cannot avoid making at least *some* basic choices in giving it content.²⁰ For Judge Richard Posner, who reviewed my book, that was heresy. In his view, the moment I openly avow the need for choice, it follows that I argue “in effect . . . that the Constitution is exactly what we want it to be.”²¹ And

²⁰Laurence Tribe, *Constitutional Choices* (Cambridge, Mass.: Harvard University Press, 1985).

²¹Pomer, “Book Review,” 84 *Mich. L. Rev.* 551, 551 (1986). But see Posner, “What Am I? A Potted Plant?” *New Republic*, Sept. 28, 1987, p. 23 (debunking “strict constructionist” pretensions and noting that “[t]here has never been a time and demonstrating that, for reasons of pragmatics and policy, “nor could [there be

his particular complaint is that he suspects that I want it to be “the charter of a radically egalitarian society.”²²

What, then, is Judge Posner to make of the fact that the sort of Constitution I would want, the sort that I would probably set out to write if I had the responsibility, differs in significant respects from the Constitution that I feel bound to acknowledge is the one we have — a Constitution which I have no doubt was written in significant part to protect the propertied minority from those with less wealth? What other meaning can one possibly give to the contract and property clauses of the Constitution? And what are we to make of the fact that Judge Posner seems to read in the Constitution as it exists a sweeping ban on race-specific affirmative action, even though the text says absolutely nothing and, so far as I can determine, the history does not support, requiring government to be color-blind when it seeks to eradicate historic discrimination?²³ Are we to suppose that Judge Posner’s Constitution is what *he* wants it to be?

If I were writing a Constitution for the United States — as I helped the Marshall Islands write one several years ago — I would probably favor a constitutional provision guaranteeing decent housing and employment for every person. I might even favor a constitutional provision setting a ceiling on the intergenerational transmission of wealth. But, having read and reread the document as it exists, and having thought hard about it, I have found it quite impossible to read *our* Constitution as including either of those principles. If someone made an argument to the contrary I would listen respectfully; but the fact that I *wanted* to believe it would not greatly incline me to take it more seriously. On the contrary, the fact that I wanted to believe — my sense

—
 a time,] . . . when the courts of the United States, state or federal” could merely “find and apply” the law).

²²Posner, “Book Review,” 551

²³See Posner, “The DeFunis Case and the Preferential Treatment of Minorities,” 1974 *Sup. Ct. Rev.* 1, 25, and Tribe, *American Constitutional Law*, § 16-22 p. 1526.

that, in the ideal society, a constitution would do well to include such provisions — might well lead me to discount the argument and any appeal it might have for me by my fear that I was in fact satisfying myself, as Justice Story would have it, that “the Constitution is exactly what [I] would wish it to be.”

In this sense, although I agree with much of what Ronald Dworkin has written in his powerful new book, *Law's Empire*, I am troubled by the breadth of his notion of interpretation. In his view, to “interpret” a cultural or social practice, or a legal text, is to make of it the best thing of its kind that one believes it is capable of being. As Dworkin would have it, for example, the interpreter of a play or a poem seeks to understand it so that it becomes the best play or the best poem that it can be. And so he urges that the interpreter of a constitutional concept like “due process of law” or “equal protection of the laws” should seek to understand that concept in accord with the interpreter’s larger vision of what a good constitution should be like. This approach is certainly not excluded in any a priori way by the meaning of the concept of “interpretation”; work in interpretive theory, or hermeneutics, suggests that the concept is indeed broad enough to take in what writers like Dworkin have in mind.

Yet I believe that the enterprise we are or should be about when we advance an argument in the Constitution’s name must be more bounded and less grandiose than all that. The moment you adopt a perspective as open as Dworkin’s, the line between what, perhaps to your dismay, you think the Constitution *says* and what you wish it *would* say, becomes so tenuous that it is extraordinarily difficult, try as you might, to maintain that line at all. The question becomes how one can maintain the line — given the ambiguity of the Constitution’s text, the plasticity of its terms, the indeterminacy of its history, and the possibility of making noises in the Constitution’s language that *sound* like an argument for just about anything. What does it mean to suggest that the Constitution imposes constraints on choice — serious constraints?

How can one maintain, in other words, a stance in which reading the Constitution differs from writing one?

One thing that is plain is that there would *be* no real difference between those two enterprises if what we meant by “the Constitution” included not only the text and the history and tradition of its interpretation but also something as vague and ineffable as the essence of the American spirit — what Thomas Grey has described as the “grand and cloudy Constitution that stands in our minds for the ideal America, earth’s last best hope, the city on the hill.”²⁴ Well, *that* Constitution, which seems to me to be the one that some commentators like Michael Perry of Northwestern evoke even when they purport to be discussing something more modest, may be the stuff of bicentennial celebrations, but it is hard for me to think of it as binding law — law that unelected judges should be entrusted to expound in an enforceable way.²⁵ I am evidently regarded by some as an admirer of that gauzy sort of Constitution. Indeed, I figure as one of the chief villains in such derisive works as Henry Monaghan’s essay, “Our Perfect Constitution.”²⁶ Monaghan there accuses me of always seeing a silver lining even in the gray and sometimes bleak language of the document. But I want to distance myself from anything quite as mystical as all that. “Mysterious,” as Justice Stevens would have it, the Constitution may be. Mysterious, but not mystical — and not even lost in the mists of the ideal.

Still, there is the haunting fact that linguistic possibility cannot be denied: the words of the Constitution are broad enough to make the loftiest claims possible. Now enter Edwin Meese and others of the “originalist” or “intentionalist” school. They say: “We have a solution. Our solution is to domesticate the words of

²⁴Grey, “The Constitution as Scripture,” 19.

²⁵See, e.g., Michael Perry, *The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (New Haven, Conn.: Yale University Press, 1982).

²⁶Monaghan, “Our Perfect Constitution,” 56 *N.Y.U. L. Rev.* 353 (1981).

the Constitution with the addition of history. History will do the trick.” But notice what they do with history. *Brown v. Board of Education*, Mr. Meese says, is a wonderful example of a correct decision.²⁷ Notice the more than slight embarrassment: the history doesn’t particularly support it; the history shows that those who wrote and ratified the Fourteenth Amendment thought, as I indicated earlier, that segregated public education was perfectly fine. So how does history solve the problem if one has a convenient bit of amnesia when history doesn’t point to results that one feels in retrospect are surely right?²⁸ The history would also suggest that it is permissible to disqualify the clergy, to say that priests and ministers cannot serve in state legislatures or hold public office. That history, too, we would have to forget.

The fact is that history, including the history of what people expected or wished for or intended or feared — especially when it is a history of *collective* beliefs, beliefs of hundreds of members of Congress who proposed an amendment and hundreds of state legislators who voted to ratify it — is fundamentally indeterminate and can be described at a great many levels of generality and abstraction. It seems to me that, however helpful it is — and although it is indefensible to ignore it — history alone cannot serve to domesticate, discipline, and bind down text. History alone cannot eliminate in an airtight and demonstrable way the possibility of constructing out of the Constitution’s phrases an argument of sorts for nearly any desired conclusion.

I say an argument “of sorts.” But it would not necessarily be an argument that would deserve to be taken seriously, much less an argument that could fairly persuade. That really is the point. It may not be possible to “prove,” in the way you prove a mathe-

²⁷347 U.S. 483 (1954).

²⁸Some have proposed ignoring as a mere assumption, or as a clearly subordinate intent, the ratifiers’ expectation that racial segregation in public schools would not be outlawed by the Fourteenth Amendment. See, e.g., Bork, “Neutral Principles and Some First Amendment Problems,” 47 *Ind. L.J.* 1, 14–15 (1971).

mathematical conjecture to be true or false, that a particular fanciful, ingenious argument about the Constitution simply doesn't count as a plausible interpretation. But from the impossibility of that sort of proof, all that follows is that law, like literature, is not mathematics — that judicial deliberation, like all legal discussion, cannot be reduced to scientific processes of deduction and induction. And that should not be terribly surprising, although some people apparently continue to be surprised by it.

The impossibility of that kind of airtight “proof” does not, however, translate — as some seem to believe it does — into a claim of such total indeterminacy that *all* interpretations of the Constitution are equally acceptable and that the only test of which interpretation you favor should be whether it advances or retards your vision of the good society. I think it is possible to do much better than that, although not nearly as well as some might wish.

Part of the answer — the part that lies beyond the scope of these two lectures — is in no sense peculiar to *constitutional* law but relates, rather, to the deep and abiding problem of how to imagine, conceptualize, and understand the process and the practice of giving reasons — of engaging in rational persuasion — without leaning on notions of timeless, universal, and unquestionable truth. A great many people have lost faith in the idea of the timeless, the universal, and the unquestionable. And yet somehow, in their ordinary lives, they can still distinguish what sounds like a good argument from what sounds like a spurious argument. And it does not require placing judges or other interpreters of the Constitution on a phony, quasi-mathematical pedestal to conclude that, for reasons of a practical kind, it makes sense to entrust to people removed from the political fray the process of reason-giving, even in an environment where we lack the metric — the external measure — to prove conclusively that reason X is no good, that reason Y is decisive. A number of philosophers, most notably Hilary Putnam, have made extremely useful contributions to the enterprise of elaborating what reason-

giving consists of in a world unbolstered by ultimate truth.²⁹ But the processes of constitutional interpretation and adjudication obviously cannot be called off while that enterprise is being pursued, especially if you believe, as I do, that that enterprise will go on forever.

The part of the answer that *is* peculiar to constitutional interpretation depends not on any general thesis about knowledge or interpretation but rather on features of the Constitution that we actually have. And in beginning to sort out good and bad ways of arguing about what *this* Constitution means, I think we can make considerable headway by inquiring what it is about some modes of discourse, some modes of conversation that are put forth as “constitutional argument,” that makes them suspect from the start. What is it about some purported modes of constitutional analysis that makes them implausible candidates for ways of reading the Constitution we actually have?

In effect, I want to offer some *negative* observations about ways *not* to read the Constitution, before turning in the second of these lectures to the more affirmative project of *reading* the Constitution, against the backdrop of several actual cases and two hypothetical cases I will posit. Two ways *not* to read the Constitution are readily apparent. I call them reading by *dis*-integration and reading by *hyper*-integration.

When I say reading by “*dis*-integration,” I mean approaching the Constitution in ways that ignore the salient fact that its parts are linked into a whole — that it is a *constitution*, and not merely an unconnected bunch of separate clauses and provisions with separate histories, that must be interpreted.

²⁹See Hilary Putnam, *Reason, Truth and History* (Cambridge: Cambridge University Press, 1981); Michelman, “Justification (and Justifiability) of Law in a Contradictory World,” in *NOMOS; Justification*, vol. 28, ed. J. R. Pennock and J. Chapman (New York: New York University Press, 1986). Cf. the discussion of nihilism in Friedrich Nietzsche, *The Will to Power*, trans. A. Ludovic (New York: Russell and Russell, 1964).

When I say reading by “*hyper-integration*,” I mean approaching the Constitution in ways that ignore the no less important fact that the whole contains distinct parts — parts that were, in some instances, added at widely separated points in American history; parts that were favored and opposed by greatly disparate groups; parts that reflect quite distinct, and often radically incompatible, premises. In the beginning the Constitution as proposed by Congress in 1787 was ratified by the requisite number of states in 1787 and 1788. Twenty-six amendments were added, ten of them in 1791, the remainder from 1795 to 1971 — and so became “valid,” under Article V, “to all intents and purposes, as part of this Constitution.”³⁰ The Constitution of the United States is thus simultaneously a single entity or structure *and* a collection of enactments by the people; the whole is not a unitary, seamless proclamation. These observations may seem too obvious to be worth making. But they serve to disqualify much of what passes as constitutional argument and interpretation. Those who try to see in this complicated collage of compromise over time one single vision, and who then proceed to argue from that vision, have lost sight of the constraints imposed by our experience under a written constitution. They are not reading the Constitution we *have*, but a hyper-integrated constitution for which they yearn.

Consider more closely, then, the first fallacy — that of disintegration. Let me begin with a straightforward example, one which was a favorite of Chief Justice Warren E. Burger. The Fifth Amendment says that “no person . . . shall be deprived of life, liberty, or property, without due process of law.” Chief Justice Burger used to argue, as have others, that the authors of that language obviously must have contemplated that, *with* “due process of law,” a person *may* be deprived of life. Therefore, the argu-

³⁰How to deal with the problematic nature of the Fourteenth Amendment’s ratification, viewed strictly in terms of Article V, is a problem now being addressed by Bruce Ackerman, whose important work on informal amendments is still in progress. For an early phase of that work, see Ackerman, “The Storrs Lectures: Discovering the Constitution,” 93 *Yale L.J.* 1013 (1984).

ment goes, capital punishment is constitutional. It's very simple; why should the Court struggle over it?

The conclusion may or may not be right; I find the question whether the death penalty is constitutional to be among the most perplexing. But the proposed method of resolving that question is profoundly disintegrated and is not really a way of interpreting *this* Constitution, because the Fifth Amendment is only part of the document. There is also the Eighth Amendment, ratified as a separate part of the Constitution. It says that "cruel and unusual punishments" shall not be imposed. Is the death penalty, then, cruel and unusual? The answer must be: it depends. Quite clearly, it was not considered cruel and unusual in 1791, when both the Fifth Amendment and the Eighth Amendment were ratified. But it might be so today? That another constitutional clause evidently contemplates that death might be inflicted by government without offense to *that* part of the Constitution doesn't answer the question. Indeed, if the Fifth Amendment *did* answer it, we would be left with another dilemma, since it also seems to sanction hacking off people's limbs — by its command that no person shall be "twice put in jeopardy of life or limb." Yet no one would seriously argue today that bodily mutilation, employed on occasion as a punishment during colonial times, could withstand scrutiny under the Eighth Amendment. Again, it seems to be that what the Fifth Amendment suggests as an answer becomes only a question once the Eighth Amendment is consulted.

Consider another example. It has been urged by some, including Mark Tushnet of Georgetown University, that we ought to read the Constitution as requiring socialism — as obliterating the institution of private property. How else, he asks, can we make sense of the ideal of equality which underlies the constitutional

³¹For one argument that the death penalty today is cruel and unusual, see Brennan, "Constitutional Adjudication and the Death Penalty: A View from the Court," 100 *Harv. L. Rev.* 313, 323-31 (1986). Compare the evolution in the social meaning attributed to segregating schooling culminating in *Brown v. Board of Education*, 347 U.S. 483, 492-93 (1954), discussed in text accompanying notes 15 and 16, above.

mandate of the equal protection of the laws?³² If all the Constitution contained was an equal protection clause, I suppose something might be said for that view. But the view becomes untenable if we also remember that, in various of its parts, the Constitution expressly affirms, sanctifies, and protects the institution of private property. It says that neither the state nor the federal government may deprive anyone of property without “due process of law,” and that “private property [shall not] be taken for public use without just compensation.”³³ It is a disintegrated “reading” of the Constitution to lift one provision out, hold it up to the light, see how far you can run with it, and forget that it is immersed in a larger whole.

Or consider this slightly more subtle illustration. Raoul Berger has argued that the original intent of the framers is “as good as written into the text” of the Constitution.³⁴ That viewpoint has become something of a manifesto, as is widely known, for the current attorney general, who speaks often of a “jurisprudence of original intent.” But look at how Raoul Berger applies the theory. He looks at the Fourteenth Amendment, a text proposed to the states by Congress and voted on by thirty-seven state legislatures.³⁵ He purports to know that the original purpose of the Fourteenth Amendment was far less noble than some of us have come to believe; the primary intended beneficiaries of the Fourteenth Amendment, he tries to show, were racist white Republicans.³⁶

³²See Tushnet, “Book Review,” 78 *Mich. L. Rev.* 694, 696-702 (1980).

³³Amends. 5 and 14, § 1 (due process), amend. 5 (private property). Many state constitutions about the time of the revolution, perhaps reflecting a view that all property ultimately belongs to the state as custodian for the people as a whole, included no such clause. Its inclusion in the *federal* constitution marked a significant rejection of the model of “state as ultimate owner.” See Tribe, *American Constitutional Law*, § 9-7, pp. 607-08.

³⁴Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, Mass.: Harvard University Press, 1977), 7.

³⁵See *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. 92-82, 92d Cong., 2d sess. (1972), p. 31, n. 6.

³⁶Berger, *Government by Judiciary*, 10-19.

And therefore, he says, giving the Fourteenth Amendment the meaning that the modern Court has given it is ahistorical and illegitimate. Suppose that Berger's history were correct — that one really could make that confident an assertion about something as fleeting and elusive as collective intent. In fact, suppose that the *real* purpose of those who wrote the Fourteenth Amendment had been to *deny* equality to the freed slaves to whatever degree would prove politically possible. That is, suppose the Fourteenth Amendment had been a palliative designed to preserve peace but that the reason for not writing so racist a credo into the Constitution's *text* was a sense that some of the amendment's support might not withstand such candor.

Even if you assume that, and even if you *believe* in original intent, it still does not follow that it would be legitimate to read the Fourteenth Amendment to effect that purpose. Why not? Because the Fourteenth Amendment became “part of th[e] Constitution” in accord with Article V — a specific provision of the Constitution which describes the way amendments become law. They become law when they are ratified through a specified process by a certain number of states. There is nothing in Article V about ratifying the secret, hidden, and unenacted intentions, specific wishes, or concrete expectations of a group of people who may have been involved in the process of enacting a constitutional guarantee.

It does violence to the text and the history of another part of the Constitution — the part that specifies how it is that the Constitution becomes law — to look at original intent with respect to some provision in isolation, even assuming that “original intent” could be captured in the laboratory, bottled, and carefully inspected under a microscope. When the claims of specific intent surrounding any particular constitutional provision are invoked to give that provision a reading very different from what its text manifestly suggests, a disintegrated approach to the Constitution is at work — and it is an approach we should feel confident in rejecting.

Consider this final example. From time to time, the Supreme Court has invoked the Tenth Amendment as a basis for saying that some powers that are delegated to the Congress by the Constitution nonetheless violate the reserved rights of the states. Justice Brennan and a number of others on the Court have replied that this is a linguistic impossibility, because the Tenth Amendment says that all “powers *not* delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”³⁷ It appears to follow that, if a power *is* “delegated to the United States” — delegated to Congress by Article I in the field of interstate commerce, for example — then the power in question *can’t* be reserved to the states. Thus, the states have *no* reserved rights, no matter how big the federal government becomes, no matter how sweeping its powers come to be.

If the Tenth Amendment stood alone, the argument — although not logically compelled — would have considerable force. But think about the Tenth Amendment embedded in a Constitution which includes other provisions as well. What is it the framers assumed when they wrote the Tenth Amendment the way they did, expressly reserving to the states only those powers with respect to which the national legislature was *not* delegated authority by the Constitution? One of the things they assumed was a national legislature structured so as to represent, directly, the institutional interests of the states — since, at the time the Tenth Amendment was added to the Constitution, the United States Senate was composed of two senators from each state “chosen by the Legislature thereof.”³⁸ It was not until the Seventeenth Amendment was ratified in 1913 that senators were “elected by the people” directly.

³⁷See *National League of Cities v. Usery*, 426 U.S. 833, 856 (1976) (Brennan, J., joined by White and Marshall, J. J., dissenting).

³⁸Art I, § 3, cl. 1.

Thus, part of what the Tenth Amendment's structure presupposed was altered in 1913. That alteration in turn seems relevant to how the entire question of the reserved rights of the states should be considered in the latter part of the twentieth century. If the states can no longer directly represent their institutional interests in the Senate, perhaps there is room to reexamine the premises underlying the pre-1913 structure. Whether this is so raises complex questions of interpretive method that I will take up in the second lecture; to make sense of the Tenth Amendment, in addition to considering the effect of the Seventeenth Amendment, we must focus on a great deal more. The basic point, however, is that whatever our overarching theories about knowledge and interpretation might be, we can make real progress in reading the Constitution by eliminating at the start arguments that are not eligible for treatment as constitutional interpretation because they entail reading not *this* Constitution, but a desiccated, disintegrated version of it.

At the other extreme there stands the fallacy of *hyper*-integration — of treating the Constitution as a kind of seamless web, a “brooding omnipresence” that speaks to us with a single, simple, sacred voice expressing a unitary vision of an ideal political society. Of course, that would have been an impossible view to maintain early in our history: the fugitive slave clause; the Constitution's prohibition on any interference by Congress with the slave trade until the year 1808; the apportionment formula for the House of Representatives, which regarded a slave as equal to three-fifths of a person; and the other accommodations to the institution of slavery that were written into the text would have been difficult to square with many of the ideals found elsewhere in the document.³⁹

³⁹See Bell, “The Supreme Court, 1984 Term — Foreword: The Civil Rights Chronicles,” 99 *Harv. L. Rev.* 4–7, 7 n.9 (1985). See generally Marshall, “Commentary: Reflections on the Bicentennial of the United States Constitution,” 101 *Harv. L. Rev.* 1 (1987).

But it would be a fundamental mistake to suppose that, after ratification of the Civil War amendments, all such basic contradictions were eliminated from the Constitution, which suddenly became a coherent, consistent document. Conflicting visions — of liberal individualism on the one hand and civic republicanism on the other; of national supremacy as opposed to states' rights; of positivism as opposed to natural law — pervade the Constitution throughout its many parts. The notion that the Constitution embodies an immanent, unitary, changeless set of underlying values or principles — whether procedural or substantive or structural — seems an extraordinary intellectual conceit, one inconsistent with the character of the Constitution's various provisions as concrete political enactments that represent historically contingent, and not always wholly coherent, compromises in a document which was made in stages, incrementally, over a period of two centuries.

I do not quite share the view expressed by Bruce Ackerman of Yale, who proposed in his Storrs Lectures that we have *several* "Constitutions," some of them essentially unwritten but reflected in such national crises and readjustments as the Great Depression and the New Deal.⁴⁰ To be sure, the Constitution viewed as a historically evolving set of principles and premises has undergone crucial discontinuities at several such junctures. For me, there is nonetheless but one Constitution of the United States. Yet that Constitution cannot be confused with the unitary expression of a single idea — whether that idea be a grand Newtonian design of checks and balances or a great Darwinian vision of moral evolution or a Burkean construct for the perpetuation of tradition or a scheme for the perfection of representative democracy or any of the large number of other ideals to which commentators over the years have sought to subordinate the considerably less tidy Constitution *as it actually exists*. I would go further: the undeniably

⁴⁰See Ackerman, "The Storrs Lectures."

plural and internally divided nature of the Constitution is not a sad reality; it may well be among the Constitution's greatest strengths.

It seems to have become a professional habit of constitutional commentators to superimpose their own preferred vision of what the Constitution is "really" meant to do and then to sweep aside all aspects of its text, history, and structure that do not quite fit the preferred grand design. That is not constitutional interpretation as I would wish to practice it. Perhaps I, too, have at times come close to reducing the Constitution to some central unity, the better to derive corollaries from whatever core vision I thought I saw there. In one essay published several years ago, I even went so far as to propose that, but for the manifest institutional unacceptability of its doing so, the Supreme Court might, in theory, hold a constitutional amendment incompatible with the grand design of the Constitution — the norms and premises pervading the document as a whole.⁴¹ Although I never suggested that the Court could properly strike down a duly ratified amendment (I was careful to say the opposite), I came quite close to the view that had been advanced by Walter Murphy of Princeton — that the Constitution, correctly understood, expresses a vision sufficiently coherent that amendments radically incompatible with that vision are not law.⁴²

That sort of view is a clear symptom of *not* interpreting the Constitution; little could better illustrate the hyper-integrationist fallacy. To attribute *any* unitary mission to the Constitution "as a whole" is to cross the line between *reading* the document and *writing* one of your own. My former colleague John Hart Ely, in an elegant and brilliant but I believe deeply flawed work, *Democracy and Distrust*, may have crossed that line when he

⁴¹Tribe, "A *Constitution We Are Amending: In Defense of a Restrained Judicial Role*," 97 *Harv. L. Rev.* 433, 438-43 (1983).

⁴²Murphy, "An Ordering of Constitutional Values," 53 *S. Cal. L. Rev.* 703, 755-56 (1980).

proposed reading the entire document as having the central, non-substantive aim of perfecting democracy by reinforcing the effective workings of representative government.⁴³ From that perspective, there turn out to be some especially problematic clauses in the Constitution. There is one clause in particular that sounds awfully substantive, saying that no state “shall abridge the privileges or immunities of citizens of the United States.”⁴⁴ And there is the Ninth Amendment, about which I will have much to say in the second of these lectures. Ely does *not* say that the text of these clauses, or their history, shows them to be concerned only with representative government. He says, rather, that — since the general point of the Constitution as a whole is to preserve representative government, and since judicial activism is most readily defended when it reinforces rather than undermines representation — we ought to squeeze those clauses into that vision.

But reading things *out of* the Constitution in order to bring the document into line with a theory, however noble and coherent, of what the structure as a whole is for, seems no more defensible than reading things *into* the Constitution for the same reason. To paraphrase Ely’s remarks made in another context, a representation-reinforcing, democracy-perfecting form of judicial review — one which finds judges crusading *only* to make representative government work better and *never* to protect substantive human rights independent of representative government — may be “a thing of beauty and a joy forever,” but, if it’s not part of the Constitution, we have no business proclaiming it in the Constitution’s name.⁴⁶

Dean Jesse Choper of the University of California at Berkeley seems to me to be guilty of much the same fallacy when he powerfully develops the position that judicial review should be excluded

⁴³John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980).

⁴⁴Amend. XIV, § 1.

⁴⁵Ely, “The Wages of Crying Wolf: A Comment on *Roe v. Wade*,” 82 *Yale L.J.* 920, 949 (1973).

altogether in matters of federalism and the separation of powers, primarily so that the federal judiciary in general, and the Supreme Court in particular, can conserve their resources for the cases that Choper believes really require active judicial involvement — cases in which the Court must protect despised minorities and unpopular claims of human rights — inasmuch as the separate branches of the national government, and the states, are capable of taking care of their own interests without such judicial help.⁴⁶ I find this sort of political analysis unpersuasive even on its own terms: I doubt that people inclined to protest the Court's protection of some downtrodden group would be much appeased if the Court were to remove itself scrupulously from disputes about the separation of powers and federal-state relations. The idea that the Court could husband its resources in that way seems rather naive.

But even if I accepted Choper's premises, I could not accept his conclusion. Constitutional protection for one branch of the federal government against another — the sort of thing we saw in the Supreme Court's legislative veto decision of 1983, and in its Gramm-Rudman decision of 1986 — or constitutional protection for state sovereignty, which I will consider in more detail in the second of these lectures, cannot properly be subtracted from the text on the instrumental ground that the Supreme Court believes, however plausibly, that its resources are better spent elsewhere?⁴⁷ Whatever else it may be, the Constitution certainly is *not* a charter for maximizing the influence of the federal judiciary in defense of liberal — or, for that matter, conservative — causes. Any mode of “interpretation” that distorts constitutional parts in support of any such goal is really not a mode of interpretation at all.

Neither the political left nor the political right has any monopoly on special-pleading versions of the constitutional enterprise.

⁴⁶Jesse Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago: University of Chicago Press, 1980).

⁴⁷*Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (veto decision), *Bowsher v. Synar*, 106 S. Ct. 3181 (1986) (Gramm-Rudman).

One of the most extraordinary examples in recent decades is found in a book called *Takings*, by Richard Epstein of the University of Chicago.⁴⁸ Epstein makes an extremely clever but stunningly reductionist argument that the whole Constitution is really designed to protect private property. Thomas Grey has aptly dubbed this “the Malthusian Constitution.”⁴⁹ It is a Constitution in whose name Epstein would be prepared to strike down progressive taxes; the Social Security system; minimum wage laws; and, indeed, *all* laws that “general economic theory” condemns as tending to reduce overall wealth.⁵⁰ It is inconceivable to me that a Constitution reflecting as diverse an array of visions and aspirations as ours could be reducible to so sadly single-minded a vision as that.

But even if that vision were an elevated and lofty one, the idea that the whole Constitution could be harnessed to it seems wrong. David Richards of New York University, in a recent book entitled *Toleration and the Constitution*, works mightily to advance a constitutional vision in which the many provisions of the document expressing respect for personal dignity and individual diversity are woven into a unified fabric.⁵¹ His ultimate ambition is to “take seriously the larger historical meaning of a written constitution as an expression of a coherent political theory.”⁵² But the Constitution, in my view, could not *possibly* express “a coherent political theory,” however sympathetic and humane I might find its substance. It seems to me almost a contradiction in terms to suppose that one could read a Constitution composed as ours has been as though it were an expression of any unified philosophy.

⁴⁸Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass.: Harvard University Press, 1985).

⁴⁹See Grey, “The Malthusian Constitution,” 41 *U. Miami L. Rev.* 21, 22 (1986).

⁵⁰Epstein, *Takings*, 200-01.

⁵¹David Richards, *Toleration and the Constitution* (New York: Oxford University Press, 1986).

⁵²Richards, “Interpretation and Historiography,” 56 *S. Cal. L. Rev.* 489, 542 (1985).

There is a suggestive analogy from the fields of algebraic topology and algebraic geometry, in which I once worked. The multidimensional curved space in which we find ourselves probably has no unified simple geometry. Locally, the space may have a Euclidian structure while globally, at large distances, its structure may be Riemannian or Lobachevskian. It may even be that the local topology is very different from the global topology. The Constitution is similarly multidimensional, and its global structure need be no more congruent with its local structure than is that of physical space. The web is not seamless. The parts do not always cohere. Anyone who says “I have here a little hologram embodying the essence of the Constitution, which can be turned round and round, revealing a seamless web,” should incur your suspicion.

That insight has significance well beyond the negative. Instead of simply serving to *disqualify* otherwise attractive candidates for methods of constitutional interpretation, the insight might also provide something of an answer to those who would attack particular approaches to interpretation as subject to internal contradictions and anomalies. Many critical legal scholars, for example, have developed elaborate and often very insightful analyses designed ultimately to show that what they call “liberal constitutional scholarship” cannot meet various demands of coherence — it will have an internal contradiction here and there.⁵³ And it has been a commonplace in constitutional commentary for a long time to deride various approaches as insufficiently democratic or insufficiently majoritarian in character and, therefore, as contradicting some supposed need of the Constitution *as a whole* to affirm democracy.⁵⁴ But where is that “need” of the Constitution “as a whole”? When all of the supposed unities are exposed to scrutiny,

⁵³See, e.g., Tushnet, “The Dilemmas of Liberal Constitutionalism,” 42 *Ohio St. L.J.* 411 (1981).

⁵⁴For a brief review of such commentary, see Brest, “The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship,” 90 *Yale L.J.* 1063 (1981).

criticisms of that kind become considerably less impressive. Not all need be reducible to a single theme. Inconsistency — even inconsistency with democracy — is hardly earth-shattering. Listen to Walt Whitman: “Do I contradict myself? Very well then, I contradict myself.” “I am large, I contain multitudes,” the Constitution replies.⁵⁵

II. TEXTS AND TACIT POSTULATES

As we celebrate the Constitution’s bicentennial, it seems only natural that we ask ourselves the sorts of basic questions to which these two lectures are addressed. Those questions are, in fact, so basic and so difficult that I hope you will forgive me for the necessarily halting and tentative character of this effort to sketch my answers. More often than not, I have no answers; and those I offer, whether here or in my other writings, are almost never held with certitude, even when my tone may sound certain.

It is to be expected during this anniversary period that many people, throughout our country and around the world, will be taking an unusually close look at the sorts of answers our system has given, and continues to give, to questions of constitutional interpretation. In some countries those questions tend to be submergled because no judicially enforceable written constitution exists to be interpreted and applied. In England, for example, it is still true, as a British court put it with striking modernity more than 285 years ago, that “[a]n Act of Parliament can do no wrong, though it may do several things that look pretty odd.”⁵⁶

But an ever larger number of nations in the post–World War II period have chosen our more rebellious path rather than England’s traditional one. More nations would do so, William

⁵⁵Walt Whitman, “Song of Myself,” *Leaves of Grass*, 9th ed. (1891-92), lines 1324-26. Cf. Emerson, “Self-Reliance,” *Essays: First Series* (1841) (“A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines”).

⁵⁶*City of London v. Wood*, 88 Eng. Rep. 1592, 1602 (1700).

Van Alstyne of Duke University has suggested, if they could somehow be assured that judges would not be too ingenious in their reading of constitutional texts.⁵⁷ The notion is that, witnessing the controversy over what our courts have done with the relatively brief text of our Constitution, others may find it best simply to say: “No thank you, we would rather avoid all of that.”

But the lesson of our first two centuries under a written constitution, I believe, is really quite different from the lesson Van Alstyne suggests some people in other countries might perceive. The lesson, rather, is that judicial ingenuity, along with statesmanship of many other sorts, has probably been indispensable to our success as a constitutional democracy, and that the lines of precedent that most of us deeply regret — including decisions like the infamous *Dred Scott* opinion and others which are now almost universally castigated as disasters — followed at least as often from overly mechanical, wooden, or insensitive interpretations as from overly creative and ingenious ones.⁵⁸ The further lesson is that there exists, in any event, no formula that could eliminate altogether the need for judicial choice, although there are certainly formulas that try to *hide* that need behind proclamations of “original intent” or of the “clear meaning” of the text. And finally, the lesson is that the best way to achieve wisdom in constitutional interpretation is to subject all constitutional arguments and decisions to constant analysis and continuing critique in terms of the text, and in terms of our traditions for construing it.

For the Constitution, despite Lowell’s vivid description in 1888, is *not* “a machine that would go of itself.”⁵⁹ It is, rather, a text to be interpreted and reinterpreted in an unending search

⁵⁷Van Alstyne, “Interpreting *This* Constitution: The Unhelpful Contributions of Special Theories of Judicial Review,” 35 *U. Fla. L. Rev.* 209, 209-10 (1983).

⁵⁸*Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (outrageously holding that blacks were not capable of being citizens of the United States and gratuitously announcing the unconstitutionality of the Missouri Compromise, thereby helping to provoke the Civil War).

⁵⁹Kammen, *A Machine That Would Go of Itself*, 125.

for understanding. The fact that this search cannot be rendered perfect and infallible by any agreed-upon definition of a unitary goal, or by any single mode of proceeding, was a central theme of my argument in the first of these lectures. In that lecture, in fact, I closed by *celebrating* our Constitution's multiplicity — its character as a text containing distinct but not always consistent subtexts. I praised our Constitution's resistance to reductionist analyses designed to squeeze it into any single philosophy of state or of society.

Part of what follows from the Constitution's irreducibly plural and multiple character is that those who would demand of constitutional interpreters that they offer a perfectly coherent solution to the perennial problems of freedom and order, of individual and of community, are making a pointless request. It is one thing to say of a reader of the Constitution, including a Supreme Court justice, that she has not made a sensible, convincing argument. To say that is to level a serious critique. But to say that she has not come up with an airtight, seamless, contradiction-free argument — one that wipes away all possibility of opposition, one that demolishes every contrary view — is pointless. It's almost like criticizing Einstein for never having found a unified field theory for physical phenomena, or like criticizing a friend, to whom you go for advice on an intractable problem, for not having eliminated *all* your doubts.

It is important to see that this feature of how the text of the Constitution guides interpretation, how it *channels* choice without *eliminating* choice, is fully present even when we are applying the most seemingly specific of constitutional clauses. It is a fundamental mistake to suppose that weighty problems of interpretation arise only in the hardest cases — only where the issue is one as to which the text is unusually vague or unusually ambiguous. That's a favorite gambit of certain Supreme Court commentators. They point to a division among justices on an issue and say, "Look how they disagree, five to four. It must be that they're not really

reading the Constitution, but just seeing in it a mirror of what they want to believe.” But consider briefly, before turning to more involved illustrations, a couple of examples in which the text is quite clear — as clear as these things get, at any rate — and in which disagreement is nonetheless unavoidable.

Consider the prohibition in Article I of the Constitution on “Bills of Attainder.”⁶⁰ Now that is a term of art, widely understood to mean that legislatures may not single out those whom they wish to punish. After President Nixon left office under well-known circumstances, Congress passed a statute identifying Richard Milhous Nixon *by name* and providing that, unlike *other* ex-presidents, he could not have access to his White House papers and tapes until they had been fully catalogued and reviewed by the General Services Administration. Congress was evidently unwilling to generalize its rule to cover any future president who might resign during impeachment proceedings.

A divided United States Supreme Court nonetheless concluded that this Act of Congress was no Bill of Attainder.⁶¹ The Court reasoned that Mr. Nixon was not being punished, even though this was a somewhat humiliating restriction — one to which no past president had ever been subjected, and one which, by its terms, could apply to no future president. Besides that, the majority of the Court said, Richard Nixon is “a legitimate class of one.”⁶²

Several dissenters took the position that this law has all the earmarks of a forbidden Bill of Attainder: it imposes a stigmatizing disability on someone driven from power, whether justly or not, in a way that explicitly identifies the individual or individuals to be so penalized.⁶³

⁶⁰Art. I, § 9, Cl. 3: “No Bill of Attainder or ex post facto Law shall be passed.”

⁶¹*Nixon v. Administrator of General Services*, 433 U.S. 425, 468–84 (1977).

⁶²*Ibid.*, 472.

⁶³See *ibid.*, 536–45 (Burger, C.J., dissenting).

I am inclined to think the dissent had the better of the argument. But my point is that conscientious readers of the Constitution may differ in their understanding in a case like this, involving even a fairly narrow and precise constitutional provision. It does not follow from this that the justices were simply reading their personal or political views into the text. In fact, knowing the specific justices and how they voted, I am quite confident that some justices on each side of the *Nixon* case would have preferred to read the Constitution the way the other side in fact read it. They were not voting their political preferences, or even their general ideology, but were voting on the basis of conscientiously differing readings of what the Bill of Attainder Clause reaches, and how far it goes.

Or examine another phrase that is at least relatively specific, compared with some of the grand and cloudy clauses with which we sometimes deal in constitutional law: the First Amendment's prohibition against "any law abridg[ing] the freedom of speech or of the press." Consider the following situation. A state statute of New York authorizes the closure of any building determined to be a public health nuisance, upon the finding that the building is being used as a place for "prostitution" or "lewdness." The Village Books and News Store, an adult bookstore in Kenmore, New York, owned by Cloud Books, Inc., sells sexually explicit, but not quite obscene, books and magazines. A deputy sheriff observes patrons of the store engaging in sex acts on the premises within plain view of the proprietor. Prostitutes are also seen soliciting business there. The store is found at trial to be a "public health nuisance" under the statute. Pursuant to the statute, the premises are ordered closed for a year.

As you might imagine, this scenario led to litigation. Everyone involved agreed that the books and magazines being sold on the premises were "speech," entitled to First Amendment protection. The question was whether closing the bookstore for a year under these circumstances amounted to forbidden "abridgement" of

speech. Specifically, did the state have to meet the standard, which is imposed in First Amendment cases, of showing that its legitimate objectives required something as drastic as closing this store down for a whole year? In other words, did the state have to prove that a less restrictive remedy would have been inadequate to abate such nuisances? Was this a gratuitously wide-ranging suppression of speech?

The highest court of New York State said that this suppression did go too far.⁶⁴ It held the First Amendment applicable, required the state to meet a least restrictive remedy test, and found that the test was not met. In its view, the legitimate purposes of the state of New York could be served by something less drastic than closure of the bookstore for an entire year. And, in fact, the state court was able to invoke the original intent of the First Amendment's framers in partial support of its view. Original intent arguably supported the result, since a central purpose of the First Amendment, everyone agreed, was to prevent the government from imposing prior restraints on publication — and an order closing a bookstore or a movie theater obviously restrains a publishing activity in advance.

When the case reached the United States Supreme Court, three justices agreed with that view.⁶⁵ The other six justices saw the case differently. To them, it was merely incidental that this happened to be a bookstore. After all, the statute itself had nothing at all to do with speech. Its use against this business was triggered not by the *books* being sold, but by the *sex* being peddled. The case is *Arcara v. Cloud Books, Inc.*; the reason you may not have heard of it is that the opinion was handed down on the same day the Supreme Court struck down the Gramm-Rudman Balanced

⁶⁴*People ex rel. Arcara v. Cloud Books, Inc.*, 65 N.Y.2d 324, 491 N.Y.S.2d 307, 480 N.E.2d 1089 (1985).

⁶⁵*Arcara v. Cloud Books, Inc.*, 106 S. Ct. 3172, 3178–81 (1986) (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting).

Budget Act, which tended to attract all the media attention that day.⁶⁶

Although I am said to be a First Amendment liberal, I agree completely with Chief Justice Warren E. Burger's majority opinion in this case. If the First Amendment requires New York State to show that a one-year closure is the least restrictive alternative simply because a bookstore was involved, then consider what follows. If, for example, a TV anchorman like Tom Brokaw or Dan Rather, to avoid being late for the evening news broadcast, decides to drive at eighty miles per hour or run ten red lights in a row, and the state says "you go to jail overnight," the anchorman could say, "but you're suppressing speech! You have to prove that jail is necessary! How about just a fine?"⁶⁷ The First Amendment would become involved whenever the enforcement of otherwise valid and neutral laws happens incidentally to restrict speech. It seems to me that that is not a sound, sensible reading of the First Amendment.

Justice Sandra Day O'Connor, concurring separately in an opinion joined by Justice John Paul Stevens, was quite sensitive: she agreed that the state court had gone too far, but she quite properly left open the possibility of a First Amendment claim if a city were to use a nuisance statute like this as a *pretext* for closing down a bookstore because of the books it sold.⁶⁸ There was nothing in the record of this case suggesting that that had been done.

Three justices went the other way: Justices William J. Brennan, Thurgood Marshall, and Harry A. Blackmun dissented. They said, in effect: As far as we're concerned, whether there's a pretext or not this is unconstitutional. It goes too far; there is no showing that this much suppression of speech is necessary to achieve the

⁶⁶*Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

⁶⁷This example was inspired by Justice O'Connor's concurring opinion, 106 S. Ct. at 3178.

⁶⁸*Ibid.*

legitimate aims of New York. “Until today,” they wrote, “this Court has never suggested that a State may suppress speech as much as it likes, without justification, so long as it does so through generally applicable regulations” unrelated to expressive conduct.⁶⁹ I think the dissenters made a respectable argument. But, with respect, I think that they and the state court were wrong.

Now, does that mean that I am more personally offended than those three justices were by the sexual activity on the premises in that case? I don’t think so. Does it mean that I’m less concerned than they are about the value of free speech? That I’m more of a strict constructionist? Less concerned with original intent (after all, the state court invoked “original intent”)? I doubt it. Like the case involving Richard Nixon, I think this case nicely illustrates how honest and conscientious readers of a quite specific constitutional provision, engaged in the process of genuine interpretation, can reach entirely opposite conclusions. The existence, in other words, of room for disagreement is not proof that what is going on does not deserve to be called interpretation — that there is something sinister or illegitimate going on, that we’re watching some kind of shell game — any more than the existence of differences in the interpretation of any other text suggests that something is going on that doesn’t deserve to be called interpretation.

It might be argued that these two cases that I happened to pick for illustration don’t really test the proposition that something other than interpretation must be going on when there are differences, because in both of them the critically relevant text was relatively precise — although it did raise thorny problems of interpretation, problems in which where you end up does not necessarily depend in any obvious way on your political leanings or even your overall constitutional philosophy. But how about situations where the text itself is famously imprecise, where it may

⁶⁹Ibid., 3179.

not even be clear which *part* of the constitutional text applies? It is situations of that kind on which I want to spend the remainder of this lecture, to ask what we can do with situations in which the constitutional nostrils flair — where there is a sense that there may be something wrong, but one flips through the document and can't quite pin down where that sense comes from.

To illustrate such a situation, one impacting on federal-state relations, consider the following hypothetical case. Assume an act of Congress, the Home-Rule Act of 1987, abolishing home rule in all the states that now have it, centralizing state and local governance in the state capitals —telling the states, in other words, that they cannot delegate a common kind of blank-check authority to their cities and counties, towns and municipalities. Analysis of such a case must examine the various reasons Congress might have for doing such a thing. But quite apart from the reasons, one must ask, in thinking about possible challenges to the validity of a federal statute which cuts this deeply into the way state and local governments decide to structure themselves, whether the statute seems to offend any relevant text in the Constitution.

Many people would gravitate toward the Tenth Amendment. It's short; it reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." I suppose the very first question that a constitutional interpreter would ask is whether the Home-Rule Act of 1987 might be invalid under the Tenth Amendment on the ground that it attempts to exercise a power "not delegated to the United States by the Constitution."

To answer that question you have to ask what power Congress might be exercising here. Most likely, it is exercising the commerce power of Article I—Congress's power "[t]o regulate Commerce . . . among the several States."⁷⁰ To someone in 1920,

⁷⁰Art. I, § 8, cl 3.

that might not have seemed so obvious, but in the period from 1937 to the present the Supreme Court has seen in the Commerce Clause an extraordinarily broad authority for Congress to regulate virtually everything, however local, that might have any impact on interstate commerce.⁷¹ And obviously, the exercise of power by localities pursuant to home rule provisions might have such an impact.

Indeed, there are some important Supreme Court decisions upholding application of the Sherman Antitrust Act to the actions of cities and towns. Boulder, Colorado, for example, acting under the Colorado home rule provisions, restricted competition among cable franchises. The Supreme Court held that, when Boulder did that, its actions were subject to the Sherman Act.⁷² The actions of Colorado itself are exempt from the act; the Supreme Court in 1943 interpreted the act as not reaching action by the sovereign states.⁷³ But in *Boulder*, the Supreme Court held that, when municipalities exercise power pursuant to home rule provisions, they do not inherit the state's immunity from the Sherman Act. They are left out in the cold.

A sequel to *Boulder* arose in Berkeley, California, in a case in which property owners argued that Berkeley's rent control ordinance was a violation of the Sherman Act, because it too was passed pursuant to a home rule provision. Therefore, they claimed that Berkeley did not step into California's shoes — did not inherit California's immunity from the antitrust laws. In representing the city of Berkeley in the Supreme Court, I argued that the immunity issue did not have to be reached because, in fact, municipal rent control simply does not violate the antitrust laws, even though a private rent-fixing cartel would. The Court, by an 8-1 vote, upheld that view.⁷⁴

⁷¹Tribe, *American Constitutional Law*, § 5-4 to 5-6.

⁷²*Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982).

⁷³*Parker v. Brown*, 317 U.S. 341 (1943).

⁷⁴*Fisher v. City of Berkeley*, 106 S. Ct. 1045 (1986). Justice Marshall wrote for the majority. Justice Brennan dissented. *Ibid.*, 1053.

But the Commerce Clause would certainly have *allowed* Congress to reach such municipal action had it so chosen. And, as the *Boulder* case illustrates, the Commerce Clause apparently allows Congress to regulate the way in which the states relate to their municipalities. For if the state itself had *mandated* an anti-competitive stance by Boulder, that municipal action would have been immune from all challenge under the Sherman Act. It is only because the state chose to let Boulder roll on its own, as it were, that the immunity evaporated.

But where under the Commerce Clause does Congress get the power to regulate the relationship between a state and its municipalities? How might the very *existence* of home rule have an impact on interstate commerce? Here one must perhaps be a bit imaginative, but the Court has done that to sustain all kinds of laws having less relation to commerce than this. Congress, for example, might have decided that unfettered, autonomous home rule cities are less likely to take the national economic interest into account than are cities that are kept on a short leash by the state legislature. And, being less likely to take the national interest into account — more likely therefore to act parochially — such home rule jurisdictions are more likely, cumulatively, to pose a threat to the smooth flow of interstate commerce.

As I have said, the Court has upheld, as falling within the reach of Congress's commerce power, actions founded on rationales far less tenable than that. But notice that, even though it is clear that Congress is indeed acting pursuant to power expressly delegated by the Constitution, it is still cutting deeply into the very *structure* of state government. The question you then might want to ask is this: Does the Constitution somehow reserve to the states any residual sphere of autonomy — a core of fundamental sovereignty — or must we conclude, simply because Congress is exercising a nationally delegated power, that there is no room left to make a states' rights argument? The structure of the Tenth Amendment may appear to indicate that there is no room left.

For that amendment creates a binary, either/or system: the powers *not* delegated to the United States are reserved to the states. Either a power is delegated to the United States, or it's not. If it is delegated, it cannot be reserved. End of argument.

Not quite. For one thing, the text does not say that *only* the powers not delegated are reserved. And, in any event, with another provision, sitting right next to the Tenth Amendment, the Court has not been stopped cold by the text. In construing the Eleventh Amendment, the Court has indeed *ignored* part of the text. By its terms, the Eleventh Amendment excludes from the general federal judicial power lawsuits that are brought against a state without its consent in federal court "by Citizens of another State." But the Supreme Court has had no trouble amending that language over the years to read, in effect, "by Citizens of another State *or of the same State*."⁷⁵ Indeed, the garden-variety use of the Eleventh Amendment is to prevent, for example, a citizen of Utah from suing the state of Utah in a federal district court.

That the Court has occasionally rewritten the Constitution, however, doesn't make such a practice right. Many commentators, myself included, have severely criticized the Court's recasting of the Eleventh Amendment.⁷⁶ But by comparison, a reading of the *Tenth* Amendment to bar congressional interference with home rule provisions would appear to be a far more radical judicial usurpation. After all, it is one thing to expand an amendment a little — to say that its purposes require grafting something on in order to *restrict* judicial power. It is quite another to *rewrite* it so as to change its structure and *expand* judicial power. The apparently binary structure, if not the literal text, of the Tenth Amendment would go out the window if the Court were to hold that, under that amendment, there can be powers delegated to the United States and *nonetheless* reserved to the states.

⁷⁵See Tribe, *American Constitutional Law*, § 3-25, pp. 174-75 and n. 8.

⁷⁶See *ibid.*, §§ 3-25 to 3-27.

Of course you might say, as I indicated in my first lecture, that the Tenth Amendment does not sit in majestic solitude in the Constitution. Things have changed since it was written in 1791. Congress's powers have expanded radically. And the Seventeenth Amendment in 1913 stripped the states of their direct representation in the Senate, replacing legislative appointment of senators with direct election of senators. Given such changes, I suggested previously, there might be room to reexamine the meaning of the Tenth Amendment. I still believe that. But however much you reexamine the amendment, it still looks as though it creates a binary structure. Revising a specific constitutional provision *that* radically, on the ground that the surrounding circumstances have changed, really *does* expose the Court to the charge that it is not interpreting the Constitution but rewriting it.⁷⁷

How about simply ignoring the Constitution's text? That's what the Supreme Court did in 1976 to articulate a sphere of state sovereignty protected from federal legislative incursions, in *National League of Cities v. Usury*.⁷⁸ There, the Court didn't really rely on the Tenth Amendment; the amendment was mentioned only as an illustration.⁷⁹ Instead, by a five-to-four margin, the Court relied on the general structure of the Constitution and its presupposition of state sovereignty. And it did that in order to hold that Congress, even though exercising its affirmative powers under the Commerce Clause when it extended minimum wage, maximum hour, and overtime protection to state and municipal employees, was violating state sovereignty when it did so. That was the holding of *National League of Cities*. But the doctrine lasted less than a decade.

National League of Cities was overturned in 1985 in the *Garcia* decision,⁸⁰ but not because the Court was embarrassed at

⁷⁷See, e.g., Field, "Comment: *Garcia v. San Antonio Metropolitan Transit Authority*: The Demise of a Misguided Doctrine," 99 *Harv. L. Rev.* 84 (1985).

⁷⁸426 U.S. 833 (1976).

⁷⁹*Ibid.*, 842-43.

⁸⁰*Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985).

having ignored the Tenth Amendment, or at having rewritten it. Rather, Justice Blackmun reversed his vote to form a new 5-4 majority largely for the quite pragmatic reasons that, for ten years, the Court hadn't proven capable of drawing very well the lines called for by *National League of Cities*, and that, as a political matter, states probably didn't need the Court's help — they could fight it out for themselves through their elected representatives. Justice Lewis F. Powell, Jr., in a powerful dissent, asked in effect: What kind of an argument is that? Would you liberals, who make that argument in this case, say that individual rights don't need this Court's protection because *individuals* are, after all, represented in the legislature? If you take rights seriously, they are rights *against* the majority. They cannot be forgotten simply because, as a practical political matter, those who hold them might also have a lot of political clout.⁸¹

What is to be said for *National League of Cities* itself? The decision overruling it wasn't very persuasive, as I have just suggested. But then *National League of Cities* itself was problematic. What about the idea of relying on the whole structure of the Constitution — not the Tenth Amendment considered alone but the entire structure? That idea was most powerfully advanced in Charles Black's book *Structure and Relationship in Constitutional Law*.⁸² He essentially urged that meaning should be found not only in the four corners of the document but, as it were, in the angles and shapes of its corners — reading not only the lines of the text but between the lines, focusing as closely on how the pieces fit together as on their individual shapes.

One would not suppose that so-called “strict constructionists” would find that notion very appealing. But the justices who *have* found it appealing include Justice — now Chief Justice — Rehnquist, and former Chief Justice Burger. In *Nevada v. Hall*, the

⁸¹*ibid.*, 564-67 and n. 8 (Powell, J., joined by Burger, C.J., and Rehnquist and O'Connor, J.J., dissenting).

⁸²Charles Black, *Structure and Relationship in Constitutional Law* (Baton Rouge: Louisiana State University Press, 1969).

Court faced the question whether states should be immune from suits brought against them by citizens of sister states suing in their own state, not federal, courts.⁸³ The majority of the Court found no such constitutional immunity, holding that the Constitution confers no protection against such suits in state court. Justice Rehnquist taking the position that such protection was implicit in the very *structure* of the Constitution, argued that “[t]he tacit postulates [of the constitutional plan] are as much engrained in the fabric of the document as its express provisions.”⁸⁴

Is this reliance on the “tacit postulates” of the whole plan “strict constructionism”? In my last lecture, I described the trouble with what I called the fallacy of “hyper-integration”—of purporting to find in the “brooding omnipresence” of the Constitution one seamless system of tacit postulates, not subject to any discipline that such postulates be anchored in any particular constitutional text. I continue to regard such an undisciplined approach as fallacious. But if Chief Justice Rehnquist’s technique of seeing the tacit postulates afloat in the heavens above, or seeing them swim in the melted core beneath the Constitution, is a bit too “loose constructionist” for you, as it is for me — and if trying to anchor the tacit postulates to the text of the Tenth Amendment won’t quite do because that text must be mangled in order to achieve the goal — does it follow that we must give up? In our hypothetical case, do states possess the power to decide on home rule only at the whim of Congress?

I suggested yesterday that the Constitution is a kingdom of many mansions. There are many subtexts. To paraphrase the post-structuralist, we might therefore ask: Is there another text in the room, one that might be relevant and helpful? Perhaps there is. When Justice O’Connor dissented, for example, from part of the Supreme Court’s 1982 decision in *Federal Energy Regulatory Com-*

⁸³440 U.S. 410 (1979).

⁸⁴*Ibid.*, 433 (Rehnquist, J., joined by Burger, C.J., dissenting).

mission v. Mississippi, a case in which Congress had told the public utility regulatory commissions of the states how to structure their agendas, she wrote that “federalism enhances the opportunity of all citizens to participate in representative government.”⁸⁵ And she quoted Alexis de Tocqueville: “[T]he love and the habits of republican government in the United States were engendered in the townships and in the provincial assemblies.” She spoke of the republican spirit, meaning not “Republican” with a capital R, but civil republicanism — the public spiritedness of community.⁸⁶

Consider Article IV, section 4, of the Constitution, an explicit text: “The United States shall guarantee to every State in this Union a Republican Form of Government.” How about *that* provision as our text for protection of states’ rights? There are two major obstacles. The first is that the Supreme Court held long ago that the Republican Form Clause does not create judicially enforceable rights for individuals. An individual cannot go into court and say, “The government of my state is not representative enough. I want it restructured.”⁸⁷ But there are two answers to that. First, the Court has allowed individuals to go into court and make that very argument under the Equal Protection Clause of the Fourteenth Amendment in the reapportionment decisions, extended in 1986 to cases of political gerrymandering, in *Davis v. Bandemer*.⁸⁸ Second, although the Republican Form Clause may not guarantee enforceable rights to *individuals*, it does not follow that it fails to guarantee enforceable rights to *states*. After all, it says that “[t]he United States *shall guarantee to every State* in this Union a Republican Form of Government.” There is a power-

⁸⁵456 U.S. 742, 789 (1982). (O’Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment in part and dissenting in part).

⁸⁶*Ibid.*, 789-90.

⁸⁷See Tribe, *American Constitutional Law*, § 3-13, pp. 98-99.

⁸⁸See *ibid.*, §§ 13-2 to 13-8; 106 S. Ct. 2797 (1986) (*Davis*), discussed in Tribe, *American Constitutional Law*, § 13-9.

ful argument that the clause should be enforceable in an otherwise proper suit by a state against the federal government.⁸⁹

The second obstacle to the argument is that home rule is not itself required by the Republican Form Clause. Many states do not have home rule; surely we cannot say that *they* have given up representative government. My answer is that, although home rule is not required by the Constitution's guarantee of a republican form of government, the ability to *choose* between home rule and centralization arguably *is* so required. The authority to decide, consistent with the Equal Protection Clause of the Fourteenth Amendment, how one's people will represent themselves and participate in their own governance — how their system of government will be structured — is the essence of self-government and is protected, or should be deemed protected, by the Republican Form Clause. Indeed, in the second edition of my treatise, I urge courts, when they again take up arms for states' rights, to rely on the admittedly modest limits that might be found in the Republican Form Clause.⁹⁰ The three-part lesson I draw from this example is that: (1) relying on an amendment written so that it doesn't seem to apply won't quite do, and (2) relying on an overall, unstructured system of tacit postulates is too loose, but (3) searching the Constitution for other applicable texts is always an available option.

Now consider the second of my two hypothetical examples. Suppose a municipality has enacted a local ordinance requiring all families to eat at home at least once each month, with only family members present, and to precede that meal with a "moment of thankful silence." Is there any text in the Constitution that might be invoked to challenge such an ordinance?

Of course one could turn to the Establishment Clause of the First Amendment. This "moment of thankful silence" looks sus-

⁸⁹See Tribe, *American Constitutional Law*, § 5-23.

⁹⁰*Ibid.*

piciously like prayer; for the government to command such a moment entails government endorsement of religion. In *Wallace v. Jaffrey*, the Supreme Court struck down, as a forbidden establishment of religion, an Alabama statute which did not even require a moment of silence but simply *permitted* teachers to schedule such a moment of silence “for meditation or voluntary prayer” at the start of each public school day.⁹¹ Nobody was required to pray, and no teacher was required to set aside the moment.

Nonetheless, the Supreme Court held that this statute violated the Establishment Clause as applied to the states through the Fourteenth Amendment. The Court’s majority stressed two features of the statute absent in the imaginary family law case that I have posited. The Court stressed that, in its debate over the statute, and in the statute’s text, the Alabama legislature had explicitly referred to prayer in a manner obviously designed to endorse that religious practice. The Court also stressed that the issue arose in the context of the public schools — so that the power of government, which forced students to attend, was harnessed by religion, and so that a governmental institution, the public school, *borrowed* part of its authority from sacred symbols, in a dubious mix of church and state.

In his dissent, then-Justice Rehnquist pointed out that the wall of separation between church and state is more a judicially created metaphor than anything to be found in the text of the Constitution.⁹² Notice how readily the “tacit-postulate” justice becomes a strict constructionist! The early presidents, he stressed, proclaimed Thanksgiving ; despite that holiday’s religious significance, there was no suggestion that they were violating the Establishment Clause. And, he indicated, there is no evidence that the framers would have objected even to voluntary prayer in public

⁹¹472 U.S. 38 (1985).

⁹²*Ibid.*, 91-114 (Rehnquist, J., dissenting).

schools. Yet, as he noted, this was not even *prayer* — just a moment of silence for meditation *or* prayer.

Justice O'Connor, concurring with the majority, offered a powerful rejoinder to Justice Rehnquist.⁹³ She argued that this history was inconclusive: public schools barely existed when the First Amendment was written; they were not a powerful presence even when the Fourteenth Amendment was written and ratified. We might recall the observation from Chief Justice Rehnquist, noted in my first lecture, that we must apply the framers' basic concepts to unforeseen circumstances.⁹⁴ If one takes that reminder seriously, then Justice O'Connor seems to have the better of the argument.

But what follows in my hypothetical? In the hypothetical, no public school is involved; there is no reference to prayer; it is only an expression of thanks that the law says must be given before the evening meal. Yet one can look at history from a somewhat different angle: Madison's Thanksgiving proclamations don't prove much since, after his presidency was over, he argued that, on reflection, even those Thanksgiving proclamations had improperly mingled government and religion.⁹⁵ And requiring Thanksgiving proclamations monthly by families could well be deemed a violation of the Establishment Clause.

But this isn't an official proclamation. The law just tells the family to give thanks in its own way, and it doesn't say they have to give thanks to anyone in particular; it simply says there should be a "moment of thankful silence." The law doesn't involve the *government* doing anything; it only tells the *family* what to do. And, in a sense, that cuts against the Establishment Clause argument. But, although government is not officially proclaiming religion through the ordinance, a different kind of argument becomes

⁹³Ibid., 67-84 (O'Connor, J., concurring in the judgment).

⁹⁴See Rehnquist, "The Notion of a Living Constitution," 694.

⁹⁵See Tribe, *American Constitutional Law*, § 14-3, p. 1163, n. 40.

apparent — an argument about intrusion into the freedom of the family, perhaps its free exercise of religion.

Leaving these questions aside, I want to focus on what seems to me the most interesting aspect of this case by extracting religion from the picture altogether. Let's delete the requirement of a moment of thankful silence. Let's have a simpler law: once a month, at least, every family must sit down and have dinner together — just the family members, no friends. They don't have to say anything; they can just sit there and munch. Conversely, they don't have to be silent. But they *must* eat together as a family at least once a month. The maxim underlying such a requirement might be, I suppose, that "a family that eats together stays together."

How are we to analyze such a law? In the early 1970s the Supreme Court confronted a case not entirely unrelated to such a situation, one involving food stamps.⁹⁶ Congress had passed an amendment to the food stamp statute providing that, if a family invites nonmembers to live in, it loses its food stamps, even though the family is otherwise eligible; if there is anyone in the household who is unrelated by blood or marriage to anyone else, no food stamps are available. The Court held that Congress had violated the Due Process Clause of the Fifth Amendment. It ruled that this is an entirely irrational law — perhaps motivated by animosity to hippy communes but, in any event, irrational. The purpose of Congress in this context was to meet nutritional requirements. There is no rational relationship, said the Court, between meeting nutritional needs and insisting on a certain kind of relationship between people who happen to live together. Perhaps it occurred to the Court that if six unrelated judges lived together, they too would have been ineligible for food stamps under this provision.

But, of course, the example I have hypothesized is a bit different from that in the food stamp decision. In the food stamp

⁹⁶*United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973).

case, Congress was essentially *starving people out* unless they conformed their living patterns to the requisite national norm. In my hypothetical case no one is being deprived of nutrition. No one is being told, “we’ll kick you out of public housing,” or “we won’t let you eat, if you don’t comply.” Everyone is being told, regardless of circumstance, that their family must eat together once a month. If they don’t, I suppose they are subject to a fine or might get thrown in jail. This general requirement can’t be said to be quite as vicious, quite as irrational; the purpose of this even-handed law isn’t nutrition: it is family togetherness as such.

But that really does bring us to the heart of the matter. What about the fact that the law invades the realm of family life? Is there anything about *that* which enables us to invoke the Constitution of the United States? True, there is not a word in the Constitution about family or family life. But there is a series of decisions under the Fourteenth Amendment, stretching back to the 1920s, recognizing a realm of autonomy for the family. Nebraska said that people couldn’t have their children learn a foreign language; the Supreme Court struck that down in 1923.⁹⁷ Oregon said that parents couldn’t send their children to private schools, either religious or military; the Supreme Court struck that down in 1925.⁹⁸ Oklahoma said that certain blue-collar as opposed to white-collar criminals — people repeatedly convicted of ordinary larceny instead of embezzlement — would be sterilized; the Supreme Court held that procreation, although not mentioned in the Constitution, is a fundamental right, and it struck the Oklahoma law down.⁹⁹ Connecticut said that no one can use contraceptives; in 1965, the Supreme Court in *Griswold v. Connecticut* held that that law, as applied to married couples, was an impermissible

⁹⁷*Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁹⁸*Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Pierce v. Hill Military Academy*, 268 U.S. 510 (1925).

⁹⁹*Skinner v. Oklahoma*, 316 U.S. 535 (1942).

invasion into the privacy of the family.¹⁰⁰ In 1967 the Supreme Court held that it is unconstitutional to tell people whom they may and may not marry, striking down Virginia's law against interracial marriage, in a case aptly named *Loving v. Virginia*.¹⁰¹ In 1969 the Supreme Court extended the *Griswold* contraception decision to unmarried couples in *Eisenstadt v. Baird*.¹⁰² In 1973 the Court extended these precedents to protect a woman's right to obtain an abortion, in *Roe v. Wade*.¹⁰³

In 1977 a prosecutor in East Cleveland, Ohio (bless his heart for having brought this wonderful — or perhaps more accurately, infamous — test case) threatened to put a grandmother in jail for living with her two grandchildren because, under the family-law zoning code of East Cleveland, you could live with your two grandchildren only if they were siblings, and these two happened to be *cousins*. The mother of one of the grandsons had died when he was one year old; he had nowhere else to live, so his grandmother took him in. The city said, in effect, “Kick him out or go to jail!”

The Supreme Court, in *Moore v. City of East Cleveland*, struck that law down under the Fourteenth Amendment.¹⁰⁴ That's the good news. The bad news is that the decision was five to four. And why not? The Constitution says nothing about grandmothers, parents, children, or family — it doesn't even mention the word “privacy.” In fact, there is a mounting attack from Chief Justice Rehnquist and others on that entire line of decisions.¹⁰⁵ But it

¹⁰⁰381 U.S. 479 (1965).

¹⁰¹388 U.S. 1 (1967).

¹⁰²405 U.S. 438 (1972).

¹⁰³410 U.S. 113 (1973).

¹⁰⁴431 U.S. 494 (1977).

¹⁰⁵It was in part because of his prominence in spearheading this attack that Judge Robert H. Bork, nominated by President Reagan in July 1987 to fill the Supreme Court vacancy created by the resignation of Justice Lewis F. Powell, Jr., was rejected by the Senate, 58–42, on October 23, 1987.

would be very hard to roll them back selectively. They are all grounded on notions of family privacy, family autonomy, reproductive freedom, and marital choice that simply are not mentioned at all in the Constitution.

What, then, of the “tacit postulates” of the constitutional plan? Perhaps we can use those, citing none other than then-Justice Rehnquist, dissenting in *Nevada v. Hall*.¹⁰⁶ But I have argued that he went too far in abandoning the text in that case; without the Republican Form Clause, I might have concluded that there is no constitutional basis for protecting states’ rights in our first hypothetical. I’m not about to fight fire with fire by adopting methods that I find unacceptable. If the *best* argument one could make from our Constitution is to say that somewhere, somehow there *must* be a tacit postulate ensuring that grandmothers don’t get thrown into jail for living with the wrong grandchildren, I’d say we need a constitutional amendment to protect grandmothers. But I would not necessarily be prepared to protect them under *this* Constitution.

Fortunately, that is not the best available argument. For here we do have a text: the Due Process Clause of the Fourteenth Amendment. It says that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.” For a long time, the Supreme Court has agreed — and all nine members of the Court as of mid-1987 agreed — that this clause entails at least *some* substantive protection as well as protection for fair procedure.¹⁰⁷

And, perhaps even more helpfully, we have another portion of the Fourteenth Amendment: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

¹⁰⁶*Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., joined by Burger, C. J., dissenting).

¹⁰⁷See *Turner v. Safley*, 107 S. Ct. 2254, 2265 (1987) (unanimously striking down a virtually total ban on marriage by prison inmates, stating that “the decision to marry is a fundamental right,” even for prisoners).

the United States.” It is true that, over a century ago, in the *Slaughterhouse Cases*, the Court emptied that language of nearly all its meaning.¹⁰⁸ The Court there held that this clause means only that, when one is exercising a right that is especially related to the federal structure, like the right to travel to Washington, D.C., to present grievances against the federal government, one is protected — a strained and strange reading indeed. The history makes quite clear that the “privileges or immunities” of United States citizenship were not meant to be limited to rights bearing peculiarly on one’s relationship to the national government. They were supposed to refer to *some* set of fundamental human rights, and we still have to decide what those are.¹⁰⁹

Some people have been willing to say that the privileges or immunities of United States citizenship include only those rights that are mentioned in the Bill of Rights. Such readers would construe the enumeration of certain rights in the Bill of Rights to deny or disparage others retained by the people. The framers were afraid the Bill of Rights might boomerang in exactly that way. But these statesmen were farsighted fellows. James Madison, in fact, proposed the Ninth Amendment for just that purpose — to deal with exactly that boomerang; the history shows clearly that this is why he proposed it.¹¹⁰ The Ninth Amendment says: “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”

Now notice: the Ninth Amendment does not *create* any rights of its own force. Those who talk of “Ninth Amendment rights” are making a kind of category error. The Ninth Amendment

¹⁰⁸83 U.S. (16 Wall.) 36 (1873).

¹⁰⁹See Tribe, *American Constitutional Law*, §7-2, pp. 548-53.

¹¹⁰See e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579-80 and n. 15 (1980) (plurality opinion of Burger, C.J.); Ely, *Democracy and Distrust*, 34-41; Redlich, “Are There ‘Certain Rights . . . Retained by the People?’,” 37 *N.Y.U. L. Rev.* 787, 810-12 (1962).

creates and confers no rights; it is a rule of interpretation. It is the *only* rule of interpretation explicitly stated in the Constitution, and it tells us that, whatever else you're going to do to explain why "liberty" does not include the grandmother's right to live with her grandchild — whatever else you're going to say to conclude that the "privileges or immunities" of national citizenship do not include the right to use contraceptives — you *cannot* advance the argument that those rights are not there just because they're not enumerated in the Bill of Rights.

Lots of people have avoided relying on the Ninth Amendment, perhaps fearing how much it might unleash. But recall my argument in the first lecture that it is illegitimate to subtract something from the Constitution just because it's out of phase with your vision of the overall plan. You may not *like* the Ninth Amendment, but it's *there*. In 1965 Justice Arthur J. Goldberg, concurring in the Connecticut birth control case, relied on the Ninth Amendment as a rule of construction.¹¹¹ And in 1980, when I argued the *Richmond Newspapers* case in the Supreme Court, on the issue of whether the First Amendment guarantees the press and the public a right of access to criminal trials, I relied primarily on the First Amendment.¹¹² But I thought it hard to argue that the freedom of speech is involved when people want to observe a trial and when the speakers at that trial, including the prosecutor and the accused, want it to occur in private. Freedom of speech does not include the right to hear something that a speaker doesn't want you to hear. So it was my sense that the freedom of speech argument was not conclusive in *Richmond Newspapers*, and I therefore relied in part on the Ninth Amendment. In the only other Supreme Court opinion to date relying on the Ninth Amendment, Chief Justice Burger, writing for a plurality of the Court, treated the Ninth Amendment as supporting

¹¹¹*Griswold v. Connecticut*, 381 U.S. 479, 48693 (1965) (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring).

¹¹²*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

the existence of a presumed right of the press and the public to be present at criminal trials.¹¹³

But there has never been a Supreme Court *majority* opinion relying on the Ninth Amendment. And, despite its unique place in the Constitution as the only rule of interpretation in that entire document, quite a few people don't take it very seriously. Senator Charles E. Grassley of Iowa, for example, during the confirmation hearings on Justice Rehnquist's elevation to be chief justice, questioned the future chief about this issue and said, "do not smile when I refer to the Ninth Amendment." I was watching — Justice Rehnquist wasn't smiling at that point. But the senator assumed that the Ninth Amendment wouldn't be taken seriously.

Senator Grassley continued: "I would like to focus on . . . the protection of unenumerated rights for just a minute. No specific right is actually mentioned in that amendment as you obviously know. Exactly what specific rights do you think the framers intended to protect under [the Ninth] Amendment?" Justice Rehnquist recalled the concurrence by Justice Goldberg in the *Griswold* case. And he also recalled the case of *Bowers v. Hardwick*, the Georgia sodomy case that had been decided exactly a month earlier.¹¹⁴ As to the *Hardwick* case, Justice Rehnquist said, "[I] forget whether the Ninth Amendment was directly involved, but it was the same type of case."¹¹⁵ Indeed, it was much the same type of case, and the Ninth Amendment *was* very much involved. Justice Rehnquist concluded in his answer to the senator, "I just feel I can't answer as to my personal views because I have participated in some cases and they are bound to come up again."¹¹⁶

¹¹³*Ibid.*, 579-80 (plurality opinion of Burger, C.J., joined by White and Stevens, JJ.).

¹¹⁴106 S. Ct. 2841 (1986).

¹¹⁵Transcript of the Hearings before the Senate Judiciary Committee on the Nomination of William H. Rehnquist to be chief justice of the United States, July 30, 1986, pp. 181-83.

¹¹⁶*Ibid.*, 183.

Of course, you don't need to look at his answer to that question in order to know where he stands on this issue. Chief Justice Rehnquist has persistently dissented from the entire line of privacy decisions and, in fact, he joined Justice White's majority opinion in the *Hardwick* case, where the Court held that the state of Georgia could criminalize consensual adult sodomy in private — at least where homosexual conduct was involved — without giving any reason beyond its moral revulsion to that act.¹¹⁷

The majority opinion for the Court in that case is worth pausing over briefly, because it could be the harbinger of an overruling of the entire line of privacy decisions going back to the 1920s. Attorney General Meese, in the cover story about him in a 1986 issue of the *New York Times Magazine*, is quoted as saying that the Reagan administration regards the Georgia sodomy decision as its major victory of the Supreme Court's 1985 term — even though it had not been a party to the case and had filed no brief.¹¹⁸

The reason the Reagan administration regards that ruling as a major victory is that the majority opinion explicitly adopts the theory that the administration has advanced for overruling *Roe v. Wade* — the theory that was accepted completely by Justice White

¹¹⁷The role of the Ninth Amendment in constitutional jurisprudence gained major public currency subsequent to the delivery of the lectures on which this essay is based, in the hearings before the Senate Judiciary Committee on the nomination of Robert H. Bork to be an associate justice of the Supreme Court, held in September and October of 1987. A number of senators on the committee and experts who appeared before it, including the author of this essay, criticized Judge Bork for his continued refusal to acknowledge the Constitution's protection of unenumerated rights, and his statement that the Ninth Amendment appears so uncertain in meaning that it should be regarded as a "water blot" or "inkblot" on the document. The issue of Judge Bork's attitude toward the Ninth Amendment was so central to debate over the nomination that it led to an unusually extensive dialogue between the *Wall Street Journal* editorial board and the author of this essay. See "Biden's Spite," *Wall St. J.*, Sept. 24, 1987, p. 26, col. 1 (editorial); "Reply and Rebuttal on Bork," *Wall St. J.*, Oct. 5, 1987, p. 23, col. 1 (letter of Laurence Tribe); "The Bork Disinformers," *Wall St. J.*, Oct. 5, 1987, p. 22, col. 1 (editorial); "More on the Ninth Amendment," *Wall St. J.*, Oct. 7, 1987, p. 35, col. 1 (letter of Laurence Tribe, followed by editor's note).

¹¹⁸"Mr. Power: Attorney General Edwin Meese," *New York Times*, Oct. 12, 1986, § 6, pp. 18, 92.

in dissent from the 1986 *Thornburgh* case,¹¹⁹ where the Court refused to overrule *Roe v. Wade*. The theory was that such unenumerated rights as privacy really do not deserve much protection. Justice White, in dissenting from *Thornburgh* and then again in writing for the majority in *Hardwick*, said that the Court is on pretty firm ground when it protects rights spelled out in the Bill of Rights, but when it comes to these unenumerated rights, the Court really shouldn't do much, because it opens itself to the accusation that it is just imposing its values on the people of the United States.”

In my view, the Supreme Court must *always* try to avoid imposing its values on the people. But refusing to recognize a right so as to protect the Court's reputation against such accusations seems very much like what Dean Jesse Choper advocated in the position I criticized in the first lecture — that the Court shouldn't protect states' rights and shouldn't protect the separation of powers, because in that way it can build up a store of capital that it can use to protect unpopular personal rights. I do not think it is legitimate to read the Constitution from the perspective of maximizing the Court's political clout.

It seems to me that, if the Court refuses to protect a particular right of personal privacy on the ground that it's not quite as traditional, not quite as widely approved by the majority, as are the family rights that have been protected from the 1920s through the 1977 grandmother case, then it is effectively giving these unenumerated rights *less* protection than the provisions of the Bill of Rights get. Those provisions protect rights *from* majorities. They are protected *most* when they are least popular. To say that a right has to have a majority of the country behind it before it gets protection when it's not one of the explicitly enumerated

¹¹⁹*Thornburgh v. American College of Obstetricians and Gynecologists*; 106 S. Ct. 2169 (1986).

¹²⁰*Ibid.*, 2194 (White, J., joined by Rehnquist, J., dissenting); 106 S. Ct. 2844, 2846 (*Hardwick*).

rights is surely to disparage the right *because* it's not enumerated. The word "disparage" is derived from an old French verb meaning "to marry out of the peerage or beneath one's social class." To say that unenumerated rights deserve protection only when enough people think those rights ought to be protected is to relegate them to a distinctly lower and more suspect status.

In the *Hardwick* case, by a five-to-four vote the Court refused to find a right of privacy protective of the sexual activity at issue there. It turns out that Justice Powell initially voted *with* the right of privacy in *Hardwick* but then changed his vote, as he admitted in a public speech to the American Bar Association shortly after the decision was announced.¹²¹ The Court in effect held that the state of Georgia has no obligation to say anything beyond "we find this conduct immoral." What we end up with is an unstable line between some kinds of privacy and others, not a line turning on the existence of commerce or of coercion or of demonstrable harm but a line turning on popular approval.

Obviously I'm not an unbiased observer of the *Hardwick* case; of the three cases that I have lost in the Supreme Court, that is the one I find hardest to accept — not because I thought I would win (I was too realistic for that) but because I at least hoped the Court would offer a reasoned explanation for the line that it drew. The Court ended up drawing a line between the traditional intimacies that were protected by the contraception decisions, and the less traditional intimacies — at least when homosexuals were involved — that it regarded as being at issue in the Georgia case. What of the same acts of sodomy involving heterosexuals? It is unclear what the law is in such a case, for the Court thereafter denied review in a case from Oklahoma involving the same acts by people of different sexes.¹²²

¹²¹See "Powell Changed Vote in Sodomy Case," *Washington Post*, July 13, 1986, p. A1, col. 4.

¹²²*Post v. State*, 715 P.2d 1005 (Okla.Cr. 1986), *reh'g denied*, 717 P.2d 1151 (1986), *cert. denied*, 107 S. Ct. 290 (1986).

What emerges is a largely arbitrary fiat. The Court will protect unenumerated, traditional, family-oriented rights, even outside of marriage — as in the case of *Eisenstadt v. Baird*.¹²³ It will protect such rights even among unmarried teenagers, as in a case from New York, *Carey v. Population Services International*.¹²⁴ But anatomical combinations that do not seem as traditional to the Court will not be protected. Somewhere among the “tacit postulates” of the Constitution there is apparently an anatomical catalog which the Court consults.

That seems to me the wrong way to go about developing principles of privacy. The right way, I think, would be to ask whether the Constitution’s textual commitment to privacy of the home, strongly evidenced by the Third Amendment and the Fourth Amendment, and its textual commitment to freedom of assembly, which the Court has had little difficulty extending to freedom of association under the First Amendment, together create a zone of privacy for associational intimacies in the home — not a zone of total immunity from government regulation but a zone that the state cannot enter without special justification. I think that was the issue — and I don’t think it should depend on which body parts are involved, or on whether the individuals are of the same sex or of different sexes.

So how about our hypothetical? The city says: “We find it immoral for a family not to have at least one meal a month as a family. We find it repellent that they can’t get together for at least one meal a month.” My prediction is that the Supreme Court would strike down that local ordinance. There would be several justices who would wring their hands and probably dissent, but there would be a majority to hold the law unconstitutional. As

¹²³405 U.S. 438 (1972).

¹²⁴431 U.S. 678 (1977) (invalidating ban on sale or distribution by any person of contraceptives to children under age sixteen, along with a ban on sale or distribution by anyone but a licensed pharmacist to persons age sixteen).

Thomas Grey wrote in a 1980 article deftly titled, “Eros, Civilization, and the Burger Court”:

[T]he Court has consistently protected traditional familial institutions, bonds and authority against the centrifugal forces of an anomic modern society. Where less traditional values have been directly protected, conspicuously in the cases involving contraception and abortion, the decisions reflect not any Millian glorification of diverse individuality, but the stability-centered concerns of moderate conservative family and population policy.¹²⁵

The observation is a realistic one. But I regard such an approach as standing for something very different from constitutional interpretation. I do not think that the basic liberties, or the privileges and immunities of national citizenship, should be defined by a Court applying the views of the Mayo Clinic or of Planned Parenthood, whether or not one regards those views as socially enlightened. My method would be to draw on other parts of the text, coupled with history. In a landmark 1962 article about the Ninth Amendment, Dean Norman Redlich of New York University proposed looking to the *rest* of the Constitution’s text to see what *sorts* of unenumerated rights the framers might have been concerned not to deny or disparage.¹²⁶ If we look at the First, Third, and Fourth Amendments, they suggest a tacit postulate with a textual root — namely, that consensual intimacies in the home are presumptively protected as a privilege of United States citizens.

In fact, the framers took for granted such “natural rights,” as they would have called them, as the right to marry anyone who consents. Francis Hutcheson, father of the Scottish Enlighten-

¹²⁵Grey, “Eros, Civilization, and the Burger Court,” 43 *Law and Contemp. Probs.* 83, 90 (Summer 1980).

¹²⁶See Redlich, “Are There ‘Certain Rights . . . Retained by the People?’”, 810–12.

ment, put it that way in a widely read eighteenth-century tract.¹²⁷ And it turns out that James Madison attended a series of lectures by John Witherspoon of Princeton, who was lecturing, based on the work of Hutcheson, about things like the right to marriage. He treated that as a special case of a right to associate if you so incline with any person you can persuade.¹²⁸ It seems to me that this historical background, when linked to the explicit textual protections for the home and for assembly, provides a plausible basis for affirming the Supreme Court's privacy decisions from the 1920s through 1977, and for concluding that those decisions are right and that *Hardwick* is probably wrong.

What, then, about the hardest case of all? For me, that remains *Roe v. Wade*, upholding a woman's right to end her pregnancy until the fetus is viable. I think it's worth asking what makes that case especially difficult. It is not the argument that the woman's side of the equation should find *no* protection in the Constitution. I think those who have said that the Court just *invented* the woman's right to bodily integrity out of whole cloth cannot have been attentive to legal developments with respect to personal privacy dating to the 1920s.¹²⁹ I would suppose that protecting your ability to control your own body would have to be on *anyone's* short list of basic liberties or privileges and immunities in our system of government. It took no great leap beyond the 1942 sterilization case and the contraception cases to say that the woman's interest in avoiding what is, after all, *involuntary* pregnancy — a pregnancy she either did not want in the first place or once wanted but no longer wants to continue — is fundamental, not to be taken lightly.¹³⁰

¹²⁷See Richards, *Toleration and the Constitution*, 232–33. The tract was *A System of Moral Philosophy* (1755).

¹²⁸See Richards, *Toleration and the Constitution*, 233. See also Karst, "The Freedom of Intimate Association," 89 *Yale L.J.* 624, 667–73 (1980).

¹²⁹See, e.g., Ely, "Wages of Crying Wolf," 927–37.

¹³⁰*Skinner v. Oklahoma*, 316 U.S. 535 (1942) (sterilization); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception).

I think what makes *Roe v. Wade* extraordinarily difficult is the question: Why cannot the state *nonetheless* restrict this fundamental liberty in the interest of protecting the unborn? It is quite clear, of course, that the framers of the Fourteenth Amendment did not think of fetuses as persons, entitled to special protection. Indeed, the amendment includes in its definition of “citizens” “[a]ll persons *born* . . . in the United States.”¹³¹ But so what? The state can surely take note of the fact that fetuses soon *will* be “citizens,” and that some persons *think* of them as already entitled to the protections of personhood. So why cannot a state act on that perception, however controversial it may be?

I think part of the answer — and I’m not sure that I have yet found a satisfactory resolution — may lie in the *uniqueness* of the resulting impositions on women. Senator E. J. Garn of Utah commented in 1986, when donating a kidney to his daughter, that “[h]er mother carried her for nine months, and I am honored to give her part of me.”¹³² I thought that his was a moving, feeling, admirable remark. But notice: the law did not *compel* Senator Garn to donate his kidney in order to keep even his own offspring alive. And yet, if his “pro-life” views on abortion prevailed, the law would have *compelled* his wife to remain pregnant over her objection. It seems to me that, if the Supreme Court was justified in protecting women from being compelled by law to remain pregnant, the justification draws support not only from traditional notions of liberty but also from the textual command of equal protection of the laws. Without some such equality argument, *Roe v. Wade* would probably have been unwarranted.

Some would say that, because this equality argument is so difficult to make, and because such strong and incommensurable values are arrayed on both sides, the correct solution is to pass the buck to the states. Why not simply let each state decide for itself? Fetuses would have superior rights in some states, women

¹³¹Amend. XIV, §1(emphasis added).

¹³²*New York Times*, Sept. 10, 1986, p. A13, col. 1.

would have them in others. That could well mean that the state of Utah, if it wished, not only could have forced Senator Garn's wife to carry her pregnancy to term against her will; it also could have forced her to *terminate* the pregnancy against her will, as they do in China. If the Constitution's silence on the balance between the rights of the woman and those of the unborn means that the entire matter should be resolved by the states, that may be a knife that cuts both ways.

In this entire area, and in all of the related areas that biomedical technology is bound to serve up as problems for the constitutional allocation of decision-making authority — whether with respect to organ transplants or surrogate parenthood or the prolongation of life or the protection of defective newborns — in all of these areas, the option of simply *extracting* constitutional argument from the picture, and passing the buck to someone else, is nonexistent. Even deciding that the matter should be left for the states to decide is nonetheless a decision. Deciding that the fate of fetuses or of women or of organ donors should be left to the local majority in each state is a fateful and an important decision. It might be justified, but it's not a nondecision.

And *if* such a decision is made, then it just postpones the question which every state legislator who takes an oath to uphold the Constitution must ask himself or herself: What does the Constitution permit or compel me to do in this area? Does it permit me to override this or that freedom of choice? Does it permit me to decree the death of this or that person or future person?

These are profoundly troubling questions. The fact that there is disagreement about them, as I have suggested earlier, doesn't mean that, in talking about them, we are somehow getting beyond the outer limits of interpretation. For there is disagreement even at the very core of constitutional provisions. What the difficulty of these issues *does* tell us is that courts would do well to proceed with caution and humility — to avoid the rush to sweeping, global, across-the-board solutions.

It is in this respect that I think the Supreme Court in hindsight may be criticized for its performance in *Roe v. Wade*. The Court's sweeping, quite legislative, trimesterized solution — going vastly beyond the facts of the case before it — subjected it to severe criticism. After all, the record in the case, although one wouldn't know it from reading the Court's opinion, indicated that the woman involved had apparently been the victim of a gang rape (a claim she retracted in 1987), and yet the state of Texas had required even her to carry her pregnancy to term. Surely the Court could have said that, in those circumstances, it violated her rights to be forced to remain pregnant; the Court could have left for another day the difficult problems of line-drawing among degrees and sources of involuntariness.

Apart from the advice of going slow — of proceeding by a common-law-like method of case-by-case formulation and reformulation — is there anything more that can be said about these tragic choices, these truly difficult puzzles? I think there is. I think we can urge one another, along with the judges who bear a special responsibility in constitutional matters, to engage in reasoned conversation with as open a set of minds as we can possibly muster. I do not think we should lament the close divisions within the Court over the most difficult issues. I think we should instead welcome the opportunity that such divisions create for a dialogue within the Court that is visible outside its walls. I think a great opportunity is wasted when the justices talk past one another rather than grappling seriously with the divergent premises and perspectives that the nine of them bring to the interpretive mission. As I indicated in the first lecture, the Constitution *itself* embodies a multitude of irreconcilable differences.

Thus I believe that we should welcome forthright clashes within the Court and should resist anything that would tend to homogenize its membership or tilt the entire tribunal too uniformly in any one direction. Of course, it's sometimes nice to have a clear majority opinion, and many lawyers and lower-court judges

are sometimes confused by the multiplicity of voices. Sometimes, as in *Brown v. Board of Education*, it is crucial that the Court speak with unanimity. And in some contexts like the military, it may be important for there to be less dissent than elsewhere.

But there are higher values than that of clear signals from the top. And one of those higher values is the open ventilation of conflicting views on the meaning of the Constitution, both as a way of engaging the nation in debate and as a way of modeling what such a debate at its best can be. To have a chance to add one's voice to that process — as a teacher and scholar commenting on constitutional issues, and as an advocate arguing constitutional cases — seems to me to be among life's greatest honors.

