

# THE SUPREME COURT 1999 TERM

## FOREWORD: THE DOCUMENT AND THE DOCTRINE

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From the Founding to the Millennium, the Constitution has often proved more enlightened and enlightening than the case law glossing it. The millennial year itself has exemplified this general pattern. Indeed, the year's prominent Court decisions and political controversies provide a rather nice set of detailed case studies allowing us to measure the document against the doctrine.

The document, of course, must be interpreted. But some modes of constitutional interpretation focus more directly on the Constitution than do others. Consider, then, two broad camps of constitutionalists transcending the divide between liberals and conservatives.<sup>1</sup> Those in the first camp — call them documentarians — seek inspiration and discipline in the amended Constitution's specific words and word patterns, the historical experiences that birthed and rebirthed the text, and the conceptual schemas and structures organizing the document. I have in mind interpreters like Justice Hugo Black, Dean John Hart Ely, and Professors Steven Calabresi and Douglas Laycock.<sup>2</sup> Those in the second camp — call them doctrinalists — rarely try to wring every drop of possible meaning from constitutional text, history, and struc-

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<sup>1</sup> Professor Bobbitt has skillfully mapped six interpretive modalities commonly used by constitutional lawyers. PHILIP BOBBITT, *CONSTITUTIONAL FATE* 9–119 (1982). My focus today on two broad camps no doubt simplifies, but I hope it also illuminates. In pondering these camps, I have benefited from Professor Levinson's provocative account of "protestant" and "catholic" modes of constitutional interpretation. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 27–53 (1988).

<sup>2</sup> See, e.g., HUGO LAFAYETTE BLACK, *A CONSTITUTIONAL FAITH* (1968); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995); Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343 (1981) (reviewing ELY, *supra*); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992).

ture. Instead, they typically strive to synthesize what the Supreme Court has said and done, sometimes rather loosely, in the name of the Constitution. For them, the elaborated precedent often displaces the enacted text. Prominent doctrinalists include the younger Justice Harlan, Dean Kathleen Sullivan, and Professors Richard Fallon and David Strauss.<sup>3</sup>

The difference lies in emphasis and attitude. Those who privilege the document do not ignore precedent altogether. (How could they, given that the text itself suggests a role for judicial exposition?<sup>4</sup>) Conversely, those who privilege precedent concede that the text does sometimes matter — on rare occasions, they have even been caught reading the Constitution. (Hasn't the Court itself suggested that constitutional precedents must often yield if later adjudged contrary to the document?<sup>5</sup>) In some sense, we are all documentarians; we are all doctrinalists.<sup>6</sup>

But some of us are documentarians first, and doctrinalists second. And rightly so, I shall argue. What the American People have said and done in the Constitution is often more edifying, inspiring, and sensible than what the Justices have said and done in the case law. Even if we are not legally bound by every scrap of meaning that can be mined from the document, we would do well to study our amended Constitution with care, because it can teach us a great deal about who We are as a People, where We have been, and where We might choose to go. Conversely, to put doctrine first is to miss the point of many constitutional rights and structures — to spend too much time pondering arid formulas and not enough time recalling the world the Constitution rejected and imagining the world it promised. Even worse than doctrine's regular sterility is its recurrent perversity. Judges have often transformed sound and widely accepted constitutional principles into normatively insensitive or outlandish lines of case law. Genuine doctrinal improvements on the document have been less common.

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<sup>3</sup> See, e.g., Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 5 (1991); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

<sup>4</sup> See U.S. CONST. art. III, §§ 1–2 (vesting the federal judiciary with “judicial Power” over “all Cases, in Law and Equity, arising under this Constitution”).

<sup>5</sup> See *infra* note 28 (collecting and discussing cases); *cf. infra* pp. 81–84 (noting the Rehnquist Court's apparent drift away from these cases).

<sup>6</sup> For recent examples of scholarship elegantly synthesizing the two approaches, see Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119 (1995); and Laurence H. Tribe, *The Supreme Court, 1998 Term—Comment: Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future — Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110 (1999).

Granted, even after close study the document itself will often be indeterminate over a wide range of possible applications. Within this range, judicial doctrine can work alongside practical resolutions achieved by other branches to specify particular outcomes and thereby concretize the Constitution. Judicial precedent and nonjudicial practice can also serve important epistemic and default functions, helping us to find the best documentarian reading in cases of doubt. Moreover, pure textualism can risk serious instability if not chastened by attention to the legal status quo. Thus, even the best documentarian reading must sometimes yield in court to brute facts born of earlier judicial and political deviations. It may even be that today's Justices are institutionally ill-equipped to be good documentarians, and that matters would be even worse, in our second-best world, if they tried to be more documentarian. If so, this sobering fact might suggest that some of the rest of us, especially law professors and law students, can play useful roles in helping our fellow citizens learn things about the document that they cannot learn merely by reading the *United States Reports*.

My aim, then, is not to banish doctrine from courts and classrooms, but merely to affirm some of the underappreciated virtues of the document.

In the pages that follow, we shall first consider some general theoretical arguments for and against the document. These arguments are suggestive, but not decisive; plausible theoretical claims can be made on behalf of both the document and the case law. When we turn from theory to history, however, we shall see a striking pattern over two centuries, in which the document has tended to outshine the doctrine across a wide range of issues. With the lessons of theory and history in mind, we shall then ponder seven representative cases decided by the Court in this eventful Term, and three prominent constitutional issues that dominated Y2K's headlines but did not reach the Court.<sup>7</sup> These ten case studies will enable us to test text-based against precedent-based modes of constitutional interpretation in today's world.

## I. THEORY AND HISTORY

### A. *Textualism, Broadly Defined*

I mean to defend a spacious but not unbounded version of constitutional textualism. On this view, textual analysis dovetails with the study of enactment history and constitutional structure. The joint aim

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<sup>7</sup> Attention to issues outside the Court is important: we seek not merely an account of judicial interpretation, but also a view of the Constitution more generally, and its lessons for those of us who are not judges — academics, politicians, and the citizenry at large.

of these related approaches is to understand what the American People meant and did when We ratified and amended the document.

This is not the only way to define textualism, but it seems the best way. Epic events gave birth to the Constitution's words — the American Revolution, the Civil War, the Woman Suffrage Movement, the 1960s Voting Rights and Youth Movements. The document's words lose some of their meaning — some of their wisdom, some of their richness, some of their nuance, some of their rigor — if read wholly apart from these epic events.<sup>8</sup> Textualism presupposes that the specific constitutional words ultimately enacted were generally chosen with care. Otherwise, why bother reading closely? By pondering the public legislative history of these carefully chosen words, we can often learn more about what they meant to the American People who enacted them as the supreme law of the land. Thus, good historical narrative, in both a broad (epic-events) sense and a narrow (drafting/ratification) sense, should inform good textual analysis; with uncanny economy, the text often distills hard-won historical lessons and drafting insights. Although one could imagine a brand of textualism that seeks only the present-day meaning of words, severing textual from historical argument,<sup>9</sup> I endorse a different approach. What counts as text is the document as understood by the American People who ratified and amended it, and what counts as history is accessible public meaning, not secret private intent.

Similarly, although some might seek to divorce textual from structural arguments, there are sound reasons to keep them wed. The American People ratified the Philadelphia Constitution not clause by clause, but as a single document. Later generations of Americans have added amendments one by one, but no amendment stands alone as a discrete legal regime. Each amendment aims to fit with, and be read as part of, the larger document. Indeed, because the People have chosen to affix amendments to the end of the document rather than directly rewrite old clauses, a reader can never simply look to an old clause and be done with it. Rather, she must always scour later

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<sup>8</sup> See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) (“No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic . . .”); see also 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) (discussing key “constitutional moments” in American history); Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 96–107 (1999) (discussing a “narrative of constitutional unity”). As I shall emphasize later, the original “Constitution” and later “Amendments” are deeds as well as texts, and the words must be read in light of the acts.

<sup>9</sup> See, e.g., BOBBITT, *supra* note 1, at 26, 36; see also Strauss, *supra* note 3, at 920 (arguing that the text need only serve as an ordinary language focal point, and suggesting that linguistically plausible but anachronistic readings of text suffice for this purpose). As shall become clear, I see the text as serving more functions than Strauss acknowledges.

amendments to see if they explicitly or implicitly modify the clause at hand. To do justice to these basic facts about the text, we must read the document holistically and attend to its overarching themes.<sup>10</sup>

For example, the phrases “separation of powers” and “checks and balances” appear nowhere in the Constitution, but these organizing concepts are part of the document, read holistically. Each of the three great departments — legislative, executive, judicial — is given its own separate article, introduced by a separate vesting clause. To read these three vesting clauses as an ensemble (as their conspicuously parallel language and parallel placement would seem to invite<sup>11</sup>) is to see a plain statement of separated powers. And a close look at the interior of these three articles reveals a variety of interbranch checks, such as the executive’s veto check on the legislature’s lawmaking in Article I and the legislature’s advice and consent check on the executive’s appointments in Article II.<sup>12</sup> For present purposes it matters little whether we label such readings “textual” (because they begin by parsing language), “structural” (because they seek larger organizing schemas), or “historical” (because ratifiers generally understood the document to embody these schemas). The key point is that these readings are documentarian, aiming to mine as much meaning as possible from the Constitution itself.

Documentarian analysis ponders important word patterns in the Constitution, even if such patterns emerged over the course of centuries rather than at a single moment. Both Article IV and the Fourteenth Amendment, adopted eighty years apart, speak of “privileges” and “immunities” of “citizens,” though in different textual formations.<sup>13</sup> Are these similarities and differences significant? The words “the People” chime boldly in the Preamble, then echo in Article I and reverberate five more times in the later-adopted Bill of Rights — more fre-

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<sup>10</sup> Professors Black, Ely, and Ackerman all preach holism, though with different accents. See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7 (1969) (contrasting reliance on a “particular textual passage” with the preferred method of examining “the constitution in all its parts or in some principal part”); ELY, *supra* note 2, at 12, 88 n.\* (rejecting “clause-bound” interpretation in favor of a method pondering the “general themes of the entire constitutional document”); ACKERMAN, *supra* note 8, at 86–99 (calling for intergenerational synthesis of constitutional texts adopted over the centuries).

<sup>11</sup> See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress . . .”); *id.* art. II, § 1 (“The executive Power shall be vested in a President . . .”); *id.* art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and . . . inferior Courts . . .”). On the differences as well as the similarities in these formulations, see Calabresi & Rhodes, *supra* note 2, at 1175–85.

<sup>12</sup> See U.S. CONST. art I, § 7, cl. 2; *id.* art. II, § 2, cl. 2.

<sup>13</sup> Compare *id.* art. IV, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”), with *id.* amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”).

quently than any other phrase in the Bill.<sup>14</sup> What are we to make of this musical motif? Four separate amendments, adopted over the course of a century, proclaim in virtually identical words that “[t]he right of citizens of the United States . . . to vote . . . shall not be denied or abridged by the United States or by any State on account of [X].”<sup>15</sup> How do these amendments fit together? Several amendments authorize Congress to “enforce” their respective provisions in almost identical language.<sup>16</sup> Shouldn’t these provisions be read *in pari materia*, as having similar meanings? Whether we call such observations and inquiries “intratextual,” “structural,” or something else, they are all documentarian — textual in a broad sense.<sup>17</sup>

This is the sense in which most self-described textualists (myself included) understand our interpretive practice. Most of us seek to braid arguments from text, history, and structure into an interpretive rope whose strands mutually reinforce. By contrast, doctrinalists aim to do something rather different. They start with decisions found in the *United States Reports*, decisions often penned decades or centuries after the relevant constitutional texts were enacted, and sometimes authored by Justices indifferent or even hostile to the vision originally inscribed in these texts.

If this is the basic divide, it will not do for doctrinalists to define textualism narrowly. Consider for example David Strauss’s claim that neither *Marbury v. Madison*<sup>18</sup> nor *McCulloch v. Maryland*<sup>19</sup> “has a particularly clear textual basis.”<sup>20</sup> This assertion seems doubtful, un-

<sup>14</sup> *Id.* pmb. (“We the People of the United States . . . do ordain and establish this Constitution . . .”); *id.* art. I, § 2 (stipulating that the House of Representatives is to be elected biannually “by the People of the several States”); *id.* amend. I (“right of the people peaceably to assemble”); *id.* amend. II (“right of the people to keep and bear Arms”); *id.* amend. IV (“right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”); *id.* amend. IX (“rights . . . retained by the people”); *id.* amend. X (“powers . . . reserved . . . to the people”); see also *id.* art. IV, § 4 (“Republican Form of Government”); *id.* amend. VI (“public trial[s]”). On the etymological and conceptual links between the words “people,” “public,” and “republican,” see 12 OXFORD ENGLISH DICTIONARY 778 (2d ed. 1989); 13 OXFORD ENGLISH DICTIONARY, *supra*, at 673; and Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 760 (1994) [hereinafter Amar, *The Central Meaning of Republican Government*].

<sup>15</sup> U.S. CONST. amend. XV, § 1 (race); *id.* amend. XIX, cl. 1 (sex); *id.* amend. XXIV, § 1 (poll tax); *id.* amend. XXVI, § 1 (age). The language of the Twenty-Fourth Amendment varies slightly from that of the others.

<sup>16</sup> *Id.* amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2; *id.* amend. XIX, cl. 2; *id.* amend. XXIII, § 2; *id.* amend. XXIV, § 2; *id.* amend. XXVI, § 2.

<sup>17</sup> Elsewhere, I have offered my own views on the significance of the word patterns mentioned in the preceding sentences. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998) [hereinafter AMAR, *BILL OF RIGHTS*]; Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) [hereinafter Amar, *Intratextualism*].

<sup>18</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>19</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>20</sup> Strauss, *supra* note 3, at 897.

less Professor Strauss is defining textualism in an exceedingly narrow way. *Marbury*'s argument for judicial review is from start to finish an argument about the Constitution's structure, history, and text. The argument rests on two basic propositions. First, the written document is supreme law, enacted by the sovereign American People and thus superior to statutes enacted by ordinary legislatures. Second, judges should follow this supreme law even if it conflicts with a congressional statute. The clean textual foundation for the first proposition is the Article VI clause proclaiming "[t]his Constitution" to be the "supreme Law of the Land"; and the clear textual basis for the second proposition is the language of Article III vesting federal courts with "judicial Power" over "all Cases . . . arising under this Constitution." *Marbury* explicitly invokes both clauses.<sup>21</sup> Indeed, although Marshall does not highlight the point, these two clauses feature interlocking language suggesting that they were designed to be read together, intratextually, in a kind of one-two punch for judicial review.<sup>22</sup> Marshall makes several other textual points on behalf of judicial review, but each is merely a piece of a grand documentarian mosaic in which historical and structural arguments are even more vivid.<sup>23</sup>

Missing from this mosaic, interestingly, is precedent. Although Marshall could have invoked various judicial decisions in support of his analysis of judicial review — prior state court invocations of state constitutions against state legislatures, a famous circuit court ruling striking down a federal statute, an earlier Supreme Court case invalidating a state statute on Supremacy Clause grounds — he does not.<sup>24</sup> Much the same could be said of *McCulloch*. Elegant arguments from constitutional structure, history, and text brighten almost every page of the opinion, but Marshall cites no cases by name. Professor Strauss's narrow view of textualism, it seems, has led him to get these two great cases precisely backwards on the central issue of document versus doctrine. Of course, *Marbury* and *McCulloch* themselves generate doctrines, such as the doctrines of judicial review and proper federal supremacy. But these doctrines are themselves firmly rooted in, and

<sup>21</sup> *Marbury*, 5 U.S. (1 Cranch) at 178–80.

<sup>22</sup> For details, see Amar, *Intratextualism*, *supra* note 17, at 765–66. Judicial review, properly understood, does not equal judicial supremacy. Other branches retain important interpretive competence, and indeed may sometimes be "the last word." For illustrations and analysis, see AMAR, *BILL OF RIGHTS*, *supra* note 17, at 98–104.

<sup>23</sup> Marshall's analysis of the original jurisdiction issue is also quintessentially documentarian. See Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705, 707 (1975).

<sup>24</sup> See 1 DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT* 69–70, 74 (1985) (concluding that Marshall had "a marked disdain for reliance on precedent" and "often paid little heed to precedents even when they squarely supported him"). Others have accused Marshall of actively mangling precedent. See Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 WIS. L. REV. 301.

based on direct appeal to, the text, history, and structure of the document itself. Thus, *Marbury* and *McCulloch* are admirably *documentarian* decisions, as opposed to *doctrinalist* decisions based on appeals to precedents of uncertain documentarian strength.

### B. Testing Textualism

With the issue thus defined, let us compare the document and the doctrine.

1. *Positivism and Social/Legal Convention.* — “This Constitution . . . shall be the supreme Law of the Land . . . . The Senators and Representatives . . . , and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .”<sup>25</sup> With these words, the Constitution crowns itself king; judges and other officials must pledge allegiance to the document. These crowning words recapitulate the Constitution’s basic architecture and enactment history. Indeed, *Marbury* suggests that the Constitution’s supremacy would have been clear even without specific language because of the very nature of the document as approved by the American People: “Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation . . . .”<sup>26</sup>

Of course, any document can *claim* to be supreme law. Something more is needed to make it so. That something, according to legal positivists, is social convention.<sup>27</sup> Undergirding the Constitution’s self-proclaimed supremacy is the basic social fact that Americans generally accept the document’s pretensions. Ordinary citizens seem to view the Constitution as authoritative; and power-wielding officials everywhere take solemn oaths to support the Constitution, as commanded by the document itself. In particular, Supreme Court Justices take these oaths, and in the pages of the *United States Reports* the Justices regularly pledge allegiance to the document, in principle.<sup>28</sup>

<sup>25</sup> U.S. CONST. art. VI, cls. 2–3.

<sup>26</sup> *Marbury*, 5 U.S. (1 Cranch) at 177.

<sup>27</sup> See H.L.A. HART, *THE CONCEPT OF LAW* 97–120 (1961).

<sup>28</sup> See, e.g., *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) (“[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we [Justices] have said about it.”). Overrulings based on the priority of the document over the doctrine have occurred in many areas of constitutional law in the modern era. See, e.g., *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932) (overruling *Long v. Rockwood*, 277 U.S. 142 (1928)) (federal immunity from state taxation); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)) (federal common law); *O’Malley v. Woodrough*, 307 U.S. 277 (1939) (overruling *Evans v. Gore*, 253 U.S. 245 (1920); and *Miles v. Graham*, 268 U.S. 501 (1925)) (taxation of Article III salary); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940)) (free expression); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (overruling *Hodges v. United States*, 203 U.S. 1 (1906)) (congres-



In principle. But in practice? Here the matter is more complex. Ordinary Americans generally accept what government officials do, and these officials, including members of the Supreme Court, often depart from the best reading of the document. But even in departure, Justices and other officials regularly *claim* to be following “the Constitution” and often profess that their decisions are dictated (and not merely permitted) by the document itself. Other constitutional interpreters — Senators in debates over legislation and impeachment, White House attorneys in opinion memos, law professors in law reviews — routinely engage in documentarian argumentation across a vast range of constitutional questions. Textualism, broadly understood, is woven into the fabric of conventional constitutional interpretation.<sup>29</sup>

But so are other less documentarian threads, and to the extent that I am urging interpreters to use the text more than they already do, I must go beyond convention. Perhaps the best place to begin the case for the document is with the Constitution’s own theory of its supremacy.

2. *Popular Sovereignty*. — The document opens with a ringing pronouncement of its democratic mandate: “We the People of the United States . . . do ordain and establish this Constitution . . .” Before it tells us anything else, it tells us why we should sit up and take notice — why, indeed, the document deems itself supreme. This paper comes from the People. In contrast, ordinary decisions by ordinary government officials, including judges, occupy a lower level. “We the

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sional power under the Thirteenth Amendment); *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) (overruling *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1871)) (state taxation of imports); *Daniels v. Williams*, 474 U.S. 327 (1986) (overruling *Parratt v. Taylor*, 451 U.S. 527 (1981)) (due process). To be sure, in situations involving weighty reliance interests or other special factors, the Court has declined to overrule cases later deemed constitutionally erroneous. Indeed, at times (and with increasing frequency in recent years), the Court has suggested that the mere incorrectness of a precedent is never enough to overrule it; at other times, as in the above-cited cases, the Court has stated or implied that clear documentarian error suffices to make out a *prima facie* case for overruling. See *infra* section I.D, pp. 78–89 (discussing modern cases and precedent’s proper place under the document).

<sup>29</sup> Consider, for example, one of the twentieth century’s biggest doctrinal developments: the incorporation of the Bill of Rights against the states. The key judicial figures driving this development were the first Justice Harlan and Justice Black, both of whom based their arguments on text and history rather than precedent. Incorporation ultimately required overruling many settled cases; this development thus marked a triumph of the document over the doctrine. Indeed, textual arguments feature prominently in some leading cases often described as wholly nontextual. See, e.g., Amar, *Intratextualism*, *supra* note 17, at 773–78 (discussing a textualist passage in *Roe v. Wade* denying that fetuses are “persons” within the meaning of the Constitution). Nevertheless, modern doctrine often pushes text into the background. See *infra* pp. 87–88.

People” do not speak directly in these decisions, and so such decisions, in case of conflict, must yield to the People’s pronouncements.<sup>30</sup>

Many modern readers have greeted the Constitution’s democratic pretensions with skepticism bordering on derision. *We the People?* What about the exclusion of all slaves and of many free blacks from the franchise? What about property qualifications? Women generally did not vote; weren’t they “people” too? How can “people” long dead govern us, the living?

Excellent questions, especially from the vantage point of the twenty-first century. But let us try to envision the eighteenth-century world giving birth to the Preamble’s bold words. In 1788, the “Constitution” is not just a text, but a real-world act, a constituting: “We the People . . . do ordain and establish . . . .” This performative act of ordainment is *at the time* the most democratic and inclusive act in world history, and is so understood by those doing it.<sup>31</sup> Hundreds of thousands of ordinary folk are being invited to vote, via elections for special ratification conventions, on the basic ground rules for their government. This momentous, broad, and explicit popular consent in the New World is unfolding against the backdrop of an Old World dominated by unelected monarchs and inegalitarian customs. Even where some form of republican self-government exists or has existed in the world, it has never gone as far as the Preamble is now going. None of the ancient republics of Greece or Rome had allowed the citizenry to vote on the constitution itself.<sup>32</sup> In Britain, no one had voted for George III, nor had the vaunted English Constitution ever been reduced to writing and put to a popular vote. No state constitution in 1776 or 1777 had been submitted to the People for their explicit assent; nor had the Declaration of Independence or the Articles of Confederation, for that matter.<sup>33</sup> In word and deed, the Constitution is toppling

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<sup>30</sup> Cf. I ACKERMAN, *supra* note 8, at 3–33, 295–319 (presenting the core idea of a “dualist democracy” in which the People’s particularly momentous and deliberative pronouncements, on special occasions marked by extraordinary votes and visibility, constitute a higher law democratically superior to lower-track decisions of ordinary officials on ordinary occasions, reflecting lower visibility and softer popular mandates). One can embrace this core idea without necessarily accepting Ackerman’s additional claims about non-Article V amendments and the status of the New Deal.

<sup>31</sup> See James Wilson, Oration Delivered on the Fourth of July 1788, in 2 THE WORKS OF JAMES WILSON 773, 773–74 (Robert Green McCloskey ed., 1967); RICHARD HOFSTADTER, THE PROGRESSIVE HISTORIANS 270–75, 283–84 (1968); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 532–35 (1969); JACK N. RAKOVE, ORIGINAL MEANINGS 131–32 (1996). *But see* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913) (trivializing the Constitution’s commitment, in word and deed, to popular sovereignty).

<sup>32</sup> Rubinfeld, *supra* note 6, at 1143. Leading Founders took great pride in their democratic improvement upon the founding procedures of ancient republics. See THE FEDERALIST NO. 38 (James Madison); Wilson, *supra* note 31, at 773–74.

<sup>33</sup> In 1780 and 1784, Massachusetts and New Hampshire, respectively, had enacted new constitutions based on popular ratification. The federal Constitution builds on and dramatically extends

the old order: Here, We the People rule, not Kings or Czars or Emperors or Tradition. Slaves and women are excluded from this moment, but they had never been included elsewhere. What is unique about this act of constitution is thus not the extent of its exclusion but the breadth of its inclusion. Modern skeptics miss a great deal of what this democratic document meant and means — what is distinctive and inspiring about it — when they read it anachronistically. They see the Framers only as dead white men (in 2000) who failed to go far enough, and not also as radical revolutionary republicans (in 1788) who are going further than anyone has ever gone before.

Now consider the early nineteenth-century world, the 1803 milieu of *Marbury*. At this point, the document itself still looks more democratic than anything around — more democratic than any statute passed by a state legislature (because the Constitution derives from the whole union, not a mere part); more democratic than any congressional enactment (because the Constitution's dramatic popular mandate is far more focused and momentous than ordinary congressional elections); and surely more democratic than any doctrine that might be crafted by the handful of lawyers comprising Marshall's Court. Small wonder, then, that Marshall builds judicial review on the rock of the document and popular sovereignty. Indeed, had he challenged the document as insufficiently inclusive, he would have undercut the platform upon which he and his brethren stood, given that they owed their commissions to a political process that also excluded the votes of slaves and women.

Now fast forward to the early twentieth century. Broad popular movements mobilize to authorize progressive federal income taxes, mandate the popular election of Senators, abolish the disfranchisement of women, and narrow the terms of lame-duck officials. These Amendments — the Sixteenth, Seventeenth, Nineteenth, and Twentieth, respectively<sup>34</sup> — are democracy in action, with broad democratic processes leading to dramatic democratic results.

Consider next the Constitution at mid-century. Women and blacks have now become part of the voting People via the Fifteenth and Nineteenth Amendments, although Court doctrine in this era underenforces both Amendments.<sup>35</sup> (No blacks or women yet sit on the Court.) When Americans constitutionally cap the President's term in the Twenty-Second Amendment, this cap could be criticized as anti-

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(in terms of numbers of people involved) these precursors. Note that ratifying convention elections importantly differ from ordinary elections of legislatures. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1459 n.147 (1987) [hereinafter Amar, *Of Sovereignty and Federalism*].

<sup>34</sup> I omit the Eighteenth and Twenty-First Amendments, which cancel each other out.

<sup>35</sup> See *infra* pp. 65–67, 70–72, 75.

democratic: It does limit the people's choices on election day. But it does so to prevent entrenchment in America's most powerful office and to promote a healthy rotation. Most important, whatever limit this Amendment imposes on the people is self-imposed, resulting from a broadly inclusive democratic process featuring a series of extraordinary votes. Imagine instead a hypothetical 1951 case in which five, or even all nine, Justices simply announce that Presidents should be limited to two terms lest they become too powerful. Such a hypothetical judicial ruling would surely seem less democratic than an explicit amendment endorsed by legislatures representing millions of voters. So too, the textual Amendments adopted still later in the century — extending the vote to the poor and the young (in the Twenty-Fourth and Twenty-Sixth Amendments), mitigating the disfranchisement of residents of Washington, D.C. (in the Twenty-Third Amendment), and creating more accountable systems of presidential succession and congressional salary (in the Twenty-Fifth and Twenty-Seventh Amendments) — are all impressively democratic in both process and outcome.

Finally, return to the year 2000. Some Americans are calling for more constitutional safeguards of the rights of crime victims. Other Americans are opposed. There are plausible policy arguments on each side. Wouldn't an explicit Victims' Rights Amendment, enacted in a highly public process by extraordinary votes in Congress and state legislatures across America, be far more democratic than if five Justices simply announced new constitutional rights for victims? (Imagine a Court opinion waving in the direction of the document but lacking a sound documentarian basis.) If We the People did succeed in amending the document, after extensive political conversation and mobilization, wouldn't we be entitled to insist that the Court treat this Amendment with utmost respect? If we took care in drafting its language, wouldn't we want the Court to read it with care? If we added it for reasons we deemed weighty, to cure historical evils that we had seen with our own eyes, shouldn't the Justices heed those reasons and that history whenever this Amendment came before the Court?

3. *Excluded Populations.* — The democratic argument for documentarianism is hardly airtight. Its biggest hole is that the document is hard to amend, and many of the provisions at issue today were adopted long ago.<sup>36</sup> Although We the People can amend the Constitu-

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<sup>36</sup> See ELY, *supra* note 2, at 11–12. In previous work, I have suggested that We the People may lawfully devise a new constitution by following the basic popular sovereignty rules under which the Constitution itself was adopted in the late 1780s. Such a new constitution, the suggestion runs, could legitimately be adopted by following the protocols of the Preamble and Article VII rather than the rules of Article V. My analysis today in no way depends on this controversial suggestion. Indeed, those who reject this suggestion might have additional reason to embrace my view, discussed below at pp. 49–53, that more modern amendments should be construed expansively in or-

tion today in a process that includes blacks and women on equal terms with white men, the baseline for amendment remains a document whose democratic pedigree looks rather ragged, at least in retrospect. The Constitution of 1788 was perhaps more democratic than Marshall's Court in 1803; and a 2001 Amendment might trump the 2001 Court on democracy grounds; but how should a 2001 Court approach a 1788 provision, or an 1868 Amendment for that matter, that women never explicitly voted for? The holistic documentarian has an answer to this hard question, as we shall soon see,<sup>37</sup> but consider the following doctrinalist response: The Court should act as a rolling constitutional convention, with an open mandate to fashion doctrine correcting for past exclusions and deviating from the document in the name of those who were excluded from the Philadelphia moment and the Appomattox settlement.

Perhaps Court doctrine could in theory do this. But will it do this? Has it done this? Courts have always been, and remain today, considerably more male and more white than the voting citizenry. Twentieth-century judges generally underenforced the document-supported rights of blacks and women while overenforcing various nondocumentarian claims of rich and powerful interests.<sup>38</sup> To the extent that current doctrine, across a wide range of issues, has drifted away from the best documentarian reading, it is doubtful that this drift has benefited blacks and women.<sup>39</sup> Even if the Court were to create new inclusionary rules unsupported by the document, the new inclusion would occur by an exclusionary process based on the votes of a handful of lawyers

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der to offset the retrospective democracy deficit of the earlier text. The more difficult it is for later generations of Americans to change the Constitution's text, the more generously we should construe those textual changes that the modern, and more inclusive, People succeed in making. A similar concern may motivate Professor Ackerman's willingness to view the New Deal as a modern amendment to the Constitution.

<sup>37</sup> See *infra* pp. 49–53.

<sup>38</sup> This broad claim challenges the basic story line internalized by many lawyers and legal academics who see *Brown v. Board of Education*, 347 U.S. 483 (1954), as the jewel in the modern judicial crown, emblematic of the Court's progressive leadership on issues of constitutional equality. Before the Justices condemned apartheid in *Brown*, however, they upheld apartheid in *Plessy v. Ferguson*, 163 U.S. 537 (1896); and before *Plessy*, they invalidated a key congressional civil rights law outlawing various apartheid practices. More generally, for many decades the Court utterly failed to enforce blacks' voting rights under the Article IV Republican Government Clause, Section 2 of the Fourteenth Amendment, and the Fifteenth Amendment. See *infra* pp. 65–67, 70–72. For much of the twentieth century, most American blacks were disfranchised; had they been allowed to vote at the state and federal level, it is unclear that the Court's "leadership" in *Brown* would even have been necessary. See Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 788–814 (1991). On the judicial underenforcement of women's rights, see below at pp. 67, 75. On the simultaneous overprotection of the rich and powerful, see below at pp. 72–73, 76–77.

<sup>39</sup> Here too, I realize that I am swimming against the general tide of lawyerly opinion in making this claim. I present my evidence for it in section 1.C.3 below at pp. 74–78.

named for life. Imagine instead congressional efforts to pass new rules aimed at undoing the present effects of past exclusions of blacks and women. Such efforts would involve many more participants, including both sexes and all races in the process. Such efforts would also draw strength from the document, especially its Reconstruction Amendments. Yet the Supreme Court over the last century and a half has often thwarted such democratically superior and document-supported efforts by Congress to atone for past exclusions of blacks and women. The 1999 Term was no exception to this general story.<sup>40</sup>

4. *Deliberation.* — An attractive democracy aims to promote the quality as well as the quantity of participation. Is the decisionmaking process a deliberative one, conducive to thoughtful discussion and sharp crystallization of issues? The case for the document on this score is straightforward. Much of the Constitution is the product of considerable incubation. At the extreme, consider the Nineteenth Amendment, which gestated for decades after the convention at Seneca Falls conceived its basic idea in 1848. More generally, democratic proponents of a given constitutional provision are obliged to give their ideas a crisp textual formulation and submit that text to a separate group of democratic ratifiers. At the Founding, the Philadelphia Convention carefully crafted a text ultimately approved by independently elected ratifying conventions. Thereafter, congressional supermajorities carefully crafted amendments that required ratification by a broad array of independently elected democratic bodies. This two-step procedure promotes good deliberation. Proposers can never be assured of ratification and thus face strong incentives to draft well so as to maximize their prospects. The gap between proposers and ratifiers creates a healthy uncertainty, a kind of veil of ignorance. In turn, ratifiers have no particular pride of authorship, and thus feel free to vote down flawed proposals.<sup>41</sup>

The deliberative virtues of Supreme Court doctrine are less clear. Professor Michelman has famously depicted the Court as the very embodiment of a deliberative (if tiny) polis, a role model of republican virtue for the rest of us who can experience fully deliberative self-government only vicariously.<sup>42</sup> But Professor Hart has painted an

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<sup>40</sup> See *infra* pp. 65–67, 70–71, 102–09.

<sup>41</sup> Some might suggest that drafting incentives will encourage overly vague phraseology that pleases the ear without clarifying key issues. But critics of any proposed phrasing can pounce on such defects, and a certain level of generality is appropriate for a document designed for the long run. See *infra* section I.B.5, pp. 42–43.

<sup>42</sup> See Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 17, 33–36, 60–77 (1986). Another celebratory view of judges, highlighting their dialogic engagement with parties and their tradition of reason-giving, is at the heart of Professor Fiss's work. See, e.g., Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 5–17 (1979).

equally famous and rather different picture in which Justices have remarkably little time to think through what they are busily decreeing.<sup>43</sup> I am with Hart on this one. The current Justices, for example, hold quick oral arguments and spend little time discussing each case in conference. Then they vote. Surprisingly meager meaningful dialogue occurs thereafter. A tentative Court opinion will circulate and often win a majority within days, before a dissent has even had a chance to circulate. The dissent may be far more powerfully reasoned, but no matter. The votes are already in. Rarely does a Justice change his or her vote after conference. Law clerks, who bring little expertise in constitutional law and face severe time constraints, play large roles in researching and drafting opinions. Granted, this stylized account describes doctrine case by case rather than as a whole. But if each building block is thus constructed, how sturdy can the edifice be? Compounding the problem is the tendency of some Justices in later cases to treat all the words, and not merely the basic factual holdings, of prior cases as holy writ. Indeed, many doctrinalists often lavish more respect upon the language found in case law than upon the language found in the Constitution itself. This tendency is especially unfortunate when early case law ignores various lines of promising documentarian argument because they were not raised by the parties. When later parties try to press these points, the Court often brusquely dismisses them as foreclosed by precedent.

In contrast to the two-step process of documentarian proposal and ratification, a judicial opinion is often written, as a practical matter, with the requisite votes already in hand and without the veil of ignorance created by the need to win approval of some separate body. Taking a longer view of the matter, however, we might see the future Court as the ultimate “ratifiers” of any given opinion. On this view, each case is a kind of “proposal” whose ultimate success will depend on the way future Justices will receive (“ratify”) it. Because this reception/ratification is not fully predictable — the veil of ignorance idea — opinion writers have incentive to draft well.

But even on this view, there are major breakdowns of democratic deliberation. Justices join the Court one by one and at a trickling rate, blurring the desired distinction between the proposing body and the ratifying body. Instead, the Court sees itself as a single continuous body; Justices casually refer to what “we” the Court decided a century ago. Thus, a later Court that rejects an earlier “proposal” must admit that “we” made a mistake. This is psychologically harder to do than to

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<sup>43</sup> Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959). For a more recent suggestion that the Justices spend rather little time deliberating with each other, see Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 40 (1998).

say that “they” — some other institution — erred. Ambition is not cleanly counteracting ambition. In fact, the Court has been rather bad at forthrightly admitting error. Many important admissions have never occurred; others have been grudging and indirect.<sup>44</sup> It is not hard to see why. Every confession of past error invites readers to question the infallibility of the Court, including the *current* Court: “You say you were wrong before — perhaps you are wrong now?” The Court’s general disinclination to confess error has distorted the path of the law and the state of current doctrine, as will become more evident later in our story.

Also, unlike a system that guarantees judicial independence via determinate terms of office — say, fifteen years or until mandatory retirement at age seventy-five — Article III life tenure means that the American electorate can never be sure who will next leave the Court, or when. This uncertainty makes it difficult to structure a democratic dialogue around specific judicial doctrines, even during presidential election years such as the present one.<sup>45</sup> Depending on which Justice leaves when, very different doctrinal “proposals” might face “nonratification” by a future Court, and the permutations are so varied and speculative as to confound conversation. Frank discussions about who might leave when are awkward at best. (No one wants to hover over the Court like a vulture on a deathwatch.) Even when a vacancy does arise, democratic deliberation is blurred because nominees piously decline to discuss specifics. Each nominee is a large bundle of views

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<sup>44</sup> For example, *Brown* did not explicitly overrule or even criticize *Plessy*, but merely pronounced *Plessy* inapplicable to education. *Brown v. Board of Education*, 347 U.S. 483, 495 (1954). Then the Court proceeded to apply *Brown*, and disregard *Plessy*, in a series of short and unexplained per curiams involving contexts other than education. See, e.g., *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (beaches); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (golf courses); *Gayle v. Browder*, 352 U.S. 903 (1956) (buses). Here was no honest *mea culpa* from a Court that had blessed Jim Crow for decades. Similarly, the incorporation of the Bill of Rights took place under a textually obtuse and logically contorted theory of substantive due process, rather than on the straightforward basis of the Privileges or Immunities Clause. This gambit found favor with the Justices because the Court might otherwise have been obliged to eat some of its erroneous dicta in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). See *infra* note 327. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court quietly overruled various lesser-known cases while loudly pledging allegiance to precedent in general and the more prominent case of *Roe* in particular. *Casey* suggested that the Court simply could not afford too many honest admissions of past error and that the more a case is generally viewed by the public as wrong, the greater the Court’s need to stand firm — even if the critics are right and the case is indeed wrong. See *id.* at 861–69. Even a case as obviously overruled as *Lochner* was not overruled forthrightly. Pop quiz: Which case explicitly overrules *Lochner*?

For a discussion of the willingness of “We the People” to admit past error, see section I.B.8 below at pp. 48–53.

<sup>45</sup> For other criticisms of life tenure as opposed to fixed terms, see L.H. LaRue, *Neither Force Nor Will*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 57, 57–60 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998); and L.A. Powe, Jr., *Old People and Good Behavior*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, *supra*, at 77, 77–80.



wrapped in a human skin, making it hard to see confirmation as a genuine popular ratification of each view. Even if nominees were more candid, they must remain free to change their minds if later confronted with arguments or evidence they had not fully appreciated before; and the issues they will face ten years after confirmation can rarely be precisely foreseen. Once confirmed, some Justices, especially in their early years, may feel obliged to “ratify” even past “proposals” they deem incorrect, so as to maintain the perceived integrity of the Court and its autonomy from politics — to prove that they have not been “bought.”<sup>46</sup> Later in each Justice’s tenure, this concern may fade, only to be replaced by a different dynamic that also tends to privilege erroneous precedent: The case law increasingly reflects a given Justice’s own personal input as he gains seniority and clout on the Court. Thus, the sharp focus on a proposed textual amendment that may be cleanly and without embarrassment voted up or down has no true doctrinal analog.<sup>47</sup>

5. *Temporal Extension.* — Drafting a Constitution or an Amendment, Chief Justice Marshall observed in *Marbury*, is “a very great exertion; nor can it, nor ought it to be frequently repeated.”<sup>48</sup> The document, he argued in *McCulloch*, is “intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”<sup>49</sup> The majestic temporal sweep of the document — its epic extension forward in human history, governing “ourselves and our Posterity”<sup>50</sup> — generates an important psychological dynamic. Viewed ex post, this dynamic might seem like the arrogance of the dead hand of the past improperly holding back the living.<sup>51</sup> But viewed ex ante, the temporal ambition of the document may lift the People’s eyes upward, inclining Americans to imagine a better world for their grandchildren and to embrace language and principles capable of withstanding the test of time. Here, too, there may be an attractive veil of ignorance at work.<sup>52</sup> Simply put, the Constitution is monumental. Those erecting a

<sup>46</sup> See, e.g., *Casey*, 505 U.S. at 864 (1992) (condemning major doctrinal change triggered merely by recent changes in Court membership).

<sup>47</sup> See 1 ACKERMAN, *supra* note 8, at 52–53.

<sup>48</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

<sup>49</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis omitted).

<sup>50</sup> U.S. CONST. pmb. The importance of self-government *over time* has been a major theme of Professor Rubinfeld’s pioneering project. See Rubinfeld, *supra* note 6.

<sup>51</sup> See ELY, *supra* note 2, at 11–12; Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997).

<sup>52</sup> Vivid examples of this idea of an intergenerational veil of ignorance were at work in the Philadelphia Convention. See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 49 (Max Farrand ed., rev. ed. 1937) [hereinafter RECORDS OF THE FEDERAL CONVENTION] (remarks of George Mason) (arguing that the rich should care about the poor because the posterity of the rich will one day come to fill even the lowest social ranks); *id.* at 531 (remarks of Gouverneur Morris) (advocating that Americans should rise above parochialism because they or their posterity

monument are moved to reflect deeply about the past and think hard about the future, rather than simply flit through the present moment. Constitution writing encourages the citizenry to render rooted judgments rather than register passing preferences.<sup>53</sup>

There is an analogous dynamic within judicial doctrine, but the amount of time and thought devoted to any single case is quite modest. An obvious problem arises if one or two ill-considered cases (or even worse, one or two scraps of dicta) can displace a constitutional provision reflecting a superior understanding of the past and a truer vision of the future.<sup>54</sup>

6. *Wisdom.* — Two heads are often better than one, and multitudes may be far wiser than five or nine. We should envision the People who have written and rewritten the document not merely as America's Supreme Legislature, but also as our Ultimate Court and Grandest Jury. The Constitution should be read as collecting the solemn judgments of this Court, inscribing the lived experiences and wisdom — the reason and not merely the will or whim — of a great many people. We should study this document with care, even if we are not strictly bound to follow it, because we can learn from it. Even if Justices were free at the end of the day to deviate from this document — and as a practical matter, there is little to stop them — they miss much when they race past the greatest opinion of the Highest Court to spend their time musing on the lesser opinions of their own lesser court.

This is an epistemic argument on behalf of the document. Later, I shall offer an epistemic argument on behalf of judicial precedent. The Court may presumptively adhere to its past constitutional precedents not because precedent, right or wrong, binds, but because precedent can teach and help find the right answer.<sup>55</sup> Justices may properly accord prior Supreme Court precedents a rebuttable presumption of correctness because the circumstances under which the precedents were rendered give the Justices plausible epistemic grounds for this presumption. The precedents reflect the earnest efforts of thoughtful members of the nation's highest court deliberating together about im-

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will one day likely inhabit other states). For similar remarks from James Wilson, James Madison, Alexander Hamilton, and Gouverneur Morris, see *id.* at 405, 413, 421–23, 424, 529; and 2 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 125.

<sup>53</sup> This idea is an important theme in Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. REV. 893, 941, 951–52 (1990).

<sup>54</sup> For the argument that enduring doctrinal structures promote a temporally extended system of constitutional governance, see Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1152–53 (1994); and Fallon, *supra* note 3, at 106–39. I do not dispute the need for doctrine. See *infra* section I.D, pp. 78–89. I do dispute elevating the doctrine over the document, which has its own, more admirable, temporally extended project worthy of our respect and allegiance.

<sup>55</sup> This is not the only reason for adherence to precedent. See *infra* section I.D, pp. 78–89.

portant issues with their minds focused by the real-world facts before them.

But all this is generally true in spades of the judgments collected in the Constitution itself. The American People who birthed and re-birthed this text did so with their minds wonderfully concentrated by the epic events they experienced and the palpable evils they endured: an arrogant monarchy that gave way to an armed Revolution and an unsatisfactory regime under early state constitutions and the Articles of Confederation; an 1801 electoral crisis spawned by the failure to anticipate the rise of national presidential parties; a bloody Civil War triggered by a repressive slaveocracy that at the war's end posed an ongoing threat to the liberty of all and the equality of blacks; a series of lingering disfranchisements that mocked the democratic promise of the Preamble; an out-of-touch gerontocracy obliging teenagers to fight in Vietnam while barring them from voting on the war's wisdom; and so on. Judges who did not see all these evils with their own eyes and feel them deep in their bones have often missed the basic point of words born in blood, toil, tears, and sweat. An inspired document has thus regularly given rise to obtuse doctrine.<sup>56</sup> Courts would have done far better to seek out and ponder what Professor Rubinfeld calls the "paradigm cases" underlying many a constitutional provision:

Those who enacted our foundational constitutional commitments knew the core evils that demanded a constitutional transformation — what was worth fighting against, what particular oppressions were worth remaking the nation's legal order to eliminate — in a way that later generations cannot. For this reason alone, the framers' judgment of what was to be prohibited by virtue of a constitutional right deserves deference.<sup>57</sup>

Consider also the words of Dean Ely meditating on a remark of Professor Alexander Bickel:

[T]here are reasons for supposing that our moral sensors function *best* under the pressure of experience. Most of us did not fully wake up to the immorality of the war in Vietnam until we were shown pictures of Vietnamese children being scalded by American napalm. . . . "The effect [of watching vicious white supremacists spewing racist epithets at black children] must have been something like what used to happen to individuals (the young Lincoln among them) at the sight of an actual slave auction, or like the slower influence on northern opinion of the fighting in 'Bleeding Kansas' in 1854-55." It is thus no surprise that the case that our "isolated"

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<sup>56</sup> The point here is not that doctrine is often modestly over- and underinclusive vis-à-vis the Constitution itself. See Fallon, *supra* note 3, at 117-18. Rather, the point is that judges over the centuries have often misread the main message of the document, which is usually more morally inspiring than the doctrinal substitute. If this point is right — a huge if — then constitutional scholarship that simply takes the doctrine as given and works within it also risks obtuseness.

<sup>57</sup> Rubinfeld, *supra* note 6, at 1171-72.

judiciary has done a better job of speaking for our better moral selves turns out to be very shaky historically.<sup>58</sup>

7. *Public Accessibility.* — Ours is a government of, by, and for the people. Thus our Constitution is written in remarkably compact prose. The full text, including amendments, runs less than 8000 words — a half-hour's read for the earnest citizen. The document thereby invites the general public — the people — to read and reread it. This is the basic thrust of an oft-quoted but seldom understood passage of *McCulloch*:

A constitution . . . [cannot properly] partake of the prolixity of a legal code [because such a code] *would probably never be understood by the public.* Its nature, therefore, [as the people's document] requires, that only its great outlines should be marked. . . . [W]e must never forget, that it is a *constitution* we are expounding.<sup>59</sup>

Admittedly, some of the Constitution's words at first strike modern readers as odd or archaic. *Letters of marque and reprisal?*<sup>60</sup> But if one rereads the document regularly — which is not hard to do but which many doctrinalists (and, truth be told, most Americans) never do — much of its text becomes more transparent, especially when viewed in light of the grand narrative of American history that gave rise to it. Indeed, the document's basic organization encourages us to read its text in this light. Each amendment lays down a separate tier of text atop its predecessors, with each layer bearing a distinct date and appearing in precise chronological order. Casual readers can tell at a glance which changes were made when, and can easily trace the story of documentary accretion. An alternative word-processing regime whereby later generations rewrote the Philadelphia Constitution directly, interweaving old and new language, would have been less transparent along this dimension. Like the Grand Canyon, the Constitution exposes its epic history to the eye of the ordinary observer.

The document's language is also more forthright and vivid than the bland doctrinal jargon into which it is typically translated. For example, its text highlights the basics of a republican social structure: "We, the People" governing "ourselves and our Posterity" over time, repudiating the relics of aristocracy and "Title[s] of Nobility," committing ourselves to "Republican" government, forswearing the hierarchy of a national religious "establishment," eventually renouncing the caste

<sup>58</sup> John Hart Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 35–36 (1978) (quoting ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 267 (1962)).

<sup>59</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (first emphasis added); see also *id.* at 405 (noting that ours is a government "of the people," "emanat[ing] from them," with "powers . . . granted by them" and "exercised directly on them, and for their benefit").

<sup>60</sup> See U.S. CONST. art. I, § 8, cl. 11 (vesting Congress with power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures").

system of “slavery” and “involuntary servitude,” promising equal “citizen[ship]” and its associated “privileges” to all Americans, and later embracing an expanding “right . . . to vote.”<sup>61</sup> Thickly descriptive historical words conjure up an embodied world of “Attainder[s]” and “Corruption[s] of Blood” that must be banished, “Arm[ies]” and “Soldier[s]” that must be limited, a citizen “Militia” that must be nourished, and “Jur[ies]” that must be preserved.<sup>62</sup>

Contrast this compact and concrete document with the more than 500 volumes of the *United States Reports*, filled with a mindnumbing array of formulas, tests, prongs, and tiers, often phrased in highly abstract legal jargon — “overinclusiveness and underinclusiveness,” “narrow tailoring,” “intermediate scrutiny,” and so on — that insulates and anesthetizes.<sup>63</sup> Some of these concepts may well be necessary once we understand the document’s big ideas. But often doctrine-speak becomes an end in itself, displacing candid discussion of substantive constitutional values and distancing the people from our supreme law.<sup>64</sup>

<sup>61</sup> U.S. CONST. pmbl.; *id.* art. I, § 9, cl. 8; *id.* art. I, § 10, cl. 1; *id.* art. IV, § 4; *id.* amends. I, XIII, XIV, XV, XIX, XXIV, XXVI. For more on our Constitution’s basic theme of republican equality, see Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Richard Delgado, *Inequality “From the Top”: Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 UCLA L. REV. 100 (1984); Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297 (1994); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994); and J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997).

<sup>62</sup> U.S. CONST. art. I, § 9, cl. 8; *id.* art. I, § 10, cl. 1; *id.* art. III, § 3, cl. 2; *id.* art. I, § 8, cl. 12; *id.* amend. III; *id.* amend. II; *id.* art. III, § 2, cl. 3; *id.* amends. V, VI, VII.

<sup>63</sup> See Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 165 (1985). For a similar but more muted critique, see BOBBITT, *supra* note 1, at 49, 52–57. There are of course exceptions. For two especially accessible judicial narratives from last Term, see *Rice v. Cayetano*, 120 S. Ct. 1044 (2000) (Kennedy, J.); and *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1316–31 (2000) (Breyer, J., dissenting). *Rice* also featured a powerful dissent. See *Rice*, 120 S. Ct. at 1062–73 (Stevens, J., dissenting). Whichever side one ultimately embraces, *Rice* is a fine example of an accessible conversation about the American Constitution and the history of the American People. For an elegant meditation on the idea of public accessibility, see JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION* (1992).

<sup>64</sup> Cf. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Penned by an eminent doctrinalist, this famous Foreword features a grand tour of equal protection case law — a veritable vale of tiers. The Foreword urges the “avoidance of ultimate value judgments” via a refined doctrine that “concern[s] itself solely with means, not with ends.” *Id.* at 21. The vice here is aloofness from the substantive ends of the Constitution, a model of equal protection that tells us too little about the substantive idea of equality and how it came to be a central concern of the document and the American People. This vice is not inherent in doctrinal analysis; consider, for example, Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); and Karst, *supra* note 61. But aloofness from vital value judgments is an occupational hazard for those who think and talk in doctrine-speak.

For example, a concept like “scrutiny” does not tell us what we should look for, and why. Is the aim to see whether a right has been outweighed by a government interest, or whether the right was never violated (because, for example, the government action was not improperly motivated)?

Some of the Constitution's most important and inspiring provisions, including several of the clauses mentioned in the preceding paragraph, have received little doctrinal elaboration, even though they form much of the spine of the document itself. Throughout this Foreword, I seek to highlight some of these important clauses and the ligaments that tie them together, offering a more vivid view of the document than the one projected by doctrine.

The brevity and bluntness of the document and its intimate relation to the central narrative of the American people make it a brilliant focal point drawing together ordinary citizens coming from all directions.<sup>65</sup> The genetic forebears of today's Americans arrived in the New World at different times from different lands, professing different faiths, speaking different tongues, and bearing different skin colors. Yet in the Constitution itself, we can all find a common vocabulary for our common deliberations, and a shared narrative thread — a history of ordinary and ever more inclusive Americans helping to bind us into one people, one posterity. Even if the blood of the Founding Fathers does not literally run in each American's veins, we are all children of the Revolution (and the Civil War, and the Suffrage Movement, and so on), and the Constitution is and should be our national bedtime story.

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In the context of, say, affirmative action, is the point of scrutiny to protect whites from unfair favoritism, or minorities from discrimination in sheep's clothing, or both? For all its talk of tiers, the Court has not always been clear on this key question. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). Another example: Unless we specify the shape and purpose of a given right, we cannot talk sensibly about impermissible "burdens" on it. Some rights may protect only against coercion, others against any kind of interference. Though the government may not coerce confessions, it may lawfully run ads encouraging citizens to confess their crimes. But it may not lawfully run ads encouraging citizens to vote Republican. The First and Fifth Amendments have different logics. To use the same all-purpose buzzwords across different rights is to risk confusion and to beg the question of what a given right means, and why.

Last Term, Justice Ginsburg's dissent in *Portuondo v. Agard*, 120 S. Ct. 1119, 1129–35 (2000), fell into this trap. The dissent spent too much time making question-begging and one-size-fits-all claims about "burdening" constitutional rights generally, and too little time precisely defining the scope of the specific right at issue. Such a precise discussion would have better focused the relevant fairness concerns. The case involved a prosecutor who, in summation, drew the jury's attention to the fact that the defendant had taken the stand after hearing all the other witnesses — a unique litigation advantage enabling him to cleverly tailor his own testimony. The dissent found it unfair that this comment came after the defense had rested; but future defense counsel are now on notice and can adjust their own strategy accordingly. The dissent also noted the unfairness of a system in which New York *required* defendants to attend their trial, only to tax them with this attendant in closing argument. This was a good point, but it had little to do with the dissent's chief (and overly formulaic) argument about an impermissible "burden" on a defendant's Sixth Amendment "right" to attend his trial.

<sup>65</sup> See H. Jefferson Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 IOWA L. REV. 1427 (1986). This advantage of the document is most pronounced when interpretation sticks close to the text and the highly visible historical events underlying the text. Details of legislative history invisible to ratifiers and later generations of ordinary Americans should never trump the text itself, though drafting history can at times help highlight certain features of the text.

Some have described judicial doctrine as a useful focal point;<sup>66</sup> and the added specificity of doctrine can indeed make it a good basis for coordination among Justices, lower court judges, officialdom, lawyers, litigants, and perhaps the general citizenry. But the document will often prove a superior focal point. It addresses important issues that are not justiciable (impeachment standards, for example) or that are, for sound reasons, judicially underenforced. On these subjects, officials and citizens ought to focus on what the Constitution requires rather than on what they can get away with in Court.<sup>67</sup> Many doctrinal tests seem better designed for in-court application than out-of-court edification. Such tests may be helpful coordination devices for judges and litigants, but unhelpful educational instruments for the general citizenry or officialdom. Elsewhere, the problem with doctrine is not judicial humility and underenforcement but judicial hubris and overreaching: judicial doctrine may be biased toward judicial power and against the legitimate interpretive competence of other branches.<sup>68</sup> If there is any doubt whether the document or the doctrine should be the ultimate focal point for constitutional conversation, another look at Article VI may be in order. It obliges all officials to take an oath to uphold the exact same thing. When all pledge allegiance to the same object, an obvious focal point arises for coordination among officials and between government and citizenry. And that focal point is “this Constitution,” not “Supreme Court doctrine.”

8. *Making Amends.* — Despite its grand claims, the document in 1788 was deeply flawed — indeed, conceived in the sin of slavery.<sup>69</sup> The document is still flawed.<sup>70</sup> But it has improved over time. Virtually every amendment has genuinely made amends, even if imperfectly and incompletely, for the sins and flaws of the prior system.

<sup>66</sup> See, e.g., Fallon, *supra* note 3, at 110.

<sup>67</sup> Cf. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 625 (1984) (differentiating “conduct” rules addressed to the public from “decision” rules addressed to the officials who enforce conduct rules); Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1357 (1985) (articulating a similar distinction).

<sup>68</sup> See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997). For criticism of *City of Boerne*, see Amar, *Intratextualism*, *supra* note 17, at 818–26; and PAUL BREST, SANFORD LEVINSON, J.M. BALKIN & AKHIL REED AMAR, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 546–50 (4th ed. 2000) [hereinafter BREST ET AL.].

<sup>69</sup> See Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987); Raymond T. Diamond, *No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 VAND. L. REV. 93 (1989); see also Derrick Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 4–7 (1985).

<sup>70</sup> For examples, see CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, *supra* note 45.

There is nothing logically inevitable about this. There is no supernatural destiny driving America toward a guaranteed happy ending. We the People could backslide tomorrow. But to read the actual amendments as they have in fact accreted over two centuries is to see successive generations of Americans repeatedly and consciously choosing to redeem and expand some of the inspiring promises made (or at least suggested) but not kept by the 1788 Preamble. Over time, the American People have been helping the document “work itself pure,” to borrow a phrase.

This borrowed phrase has usually been used to describe the process by which case law becomes refined over time. But along what dimensions, and using what criteria, can it be said that the Taney Court’s case law was better than the Marshall Court’s, and that the Fuller Court’s was better still? That the Rehnquist Court is better than the Warren Court, which was in turn better than all its predecessors? By contrast, with the exception of the Prohibition and anti-Prohibition Amendments, which simply cancel out, I think it is fair to say that virtually every amendment has made the Constitution better. The Bill of Rights cured various lapses in the Philadelphia document; the Eleventh Amendment (rightly read) reined in an overreaching judiciary that had overprotected moneyed interests against a state that had violated no federal law; the Twelfth Amendment adjusted the system of presidential election to accommodate the unforeseen emergence of presidential political parties; the Reconstruction Amendments began the long process of making amends for slavery and racism; and the twentieth-century amendments made America more democratic, inclusive, equal, and just.<sup>71</sup>

When we read the document as a whole, it makes sense to construe ambiguous Founding language so as to redeem the vision of later amendments that are more inclusive in both process and result. For example, at the Founding, the ideal of republican government could be read narrowly or broadly. Narrowly, it might be said that the republican ideal is static, fixed in 1788: if a given group — such as free

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<sup>71</sup> The Seventeenth Amendment, which took Senate elections away from state legislatures, might be faulted for removing a useful pillar of federalism that had helped prevent the undue centralization of power. But this pillar had been crumbling before the Amendment, as various states devised systems that allowed voters to express their senatorial preferences and pressured state governments into ratifying these popular expressions. See Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1354–55 (1996).

Note also that various Amendments — the Twelfth, Fourteenth, Twentieth, Twenty-Second, and Twenty-Third — have tinkered with the “electoral college” system while leaving intact its basic, democratically deficient structure. The college itself is a relic of slavery, see *infra* pp. 61–62, and replacing it with a system of direct national election would make a good document better still. This example — there are many others — reminds us that there is still room for documentary improvement, and much work to be done by the People in the new millennium.



blacks, or women, or propertyless citizens — did not have the right to vote in 1788 in state *A*, then *A*'s continued exclusion of this group in the future could never be deemed unrepresentative. Broadly, it might be countered that the goal of constitutional republicanism (implicit in the Preamble and many other constitutional references to “the people,” the “public,” and “republican” government<sup>72</sup>) is to have the most participatory regime the world has ever seen, subject only to obvious constraints imposed by practicality. On this dynamic view, the republican ideal might sometimes require the abolition of various 1788 disfranchisements if their original real-world justifications later lose force, or if they mutate into exclusions more reactionary than the original ones. For example, the enfranchising experiences of sister states might ultimately prove that some of state *A*'s continued disfranchisements are not in fact necessary to maintain stable government. Or state *A*'s continued disfranchisements might end up excluding more citizens than at the Founding, say, because the percentage of free blacks or propertyless citizens sharply increases. In such situations, a dynamic approach might condemn state *A*'s exclusions despite their pedigree. Howsoever we might resolve this ambiguity if we merely consulted the Founders' story, later chapters of the constitutional saga shed strong light on the problem.<sup>73</sup> Many amendments have explicitly expanded suffrage to include the once excluded, and no amendments go the other way.<sup>74</sup> Indeed, the very enactment of the Civil War Amendments visi-

<sup>72</sup> See *supra* note 14.

<sup>73</sup> Others have used the metaphor of adding chapters to a chain novel to describe judicial opinion writing, but the metaphor also fits the Constitution itself: We the People write and live out an extended and intergenerational saga in which each generation consciously seeks to leave posterity with an improved version of the document it inherited. See J.M. Balkin, *The Declaration and the Promise of a Democratic Culture*, 4 WIDENER L. SYMP. J. 167, 175–80 (1999). Thus, when we today fault the Philadelphia document for its exclusions, we are judging it not by some purely external standard of democracy and justice, but by the standards of the document itself, as amended. Later chapters of the story begun at Philadelphia invite readers to view the first chapter more critically and to be open to efforts to make amends. This critical stance toward early chapters and their exclusions is wholly missing from cases like *United States v. Morrison*, 120 S. Ct. 1740 (2000). See *infra* section II.A.3, pp. 102–09. The “later chapter” metaphor highlights another attractive feature of constitutional amendments: They do not whitewash the past. The earlier mistake remains visible in the text for all to see. In this way, the document is admirably honest about its past sins. By contrast, the Court has often been less forthright in confessing error. See *supra* note 44. Many casebooks airbrush out the Court's greatest mistakes. See *infra* pp. 88–89. Here, too, *Morrison* is illustrative of a general inclination on the part of Justices to cover up the sins of their predecessors — in this case, the Justices who decided *Prigg v. Pennsylvania*, *Dred Scott v. Sandford*, and the *Civil Rights Cases*. See *infra* pp. 69–71, 104–09.

<sup>74</sup> See U.S. CONST. amend. XIV, § 2 (imposing a penalty for disfranchisements); *id.* amend. XV (protecting black suffrage); *id.* amend. XVII (guaranteeing popular election of Senators); *id.* amend. XIX (protecting woman suffrage); *id.* amend. XXIII (enfranchising residents of Washington, D.C., in the electoral college); *id.* amend. XXIV (protecting suffrage of poor persons); *id.* amend. XXVI (protecting young adult suffrage). *But cf. id.* amend. XIV, § 3 (limiting the ability of certain oathbreaking Confederate traitors to hold office).

bly pivoted on procedural improvisations explicitly based on a dynamic reading of the republican ideal.<sup>75</sup> (As with the Constitution itself, we must understand an amendment as an embodied act as well as a written text. Thus we must attend to the theory implicit in what the American People did, as well as said, when enacting the Civil War Amendments.) Given all this, shouldn't we read republicanism broadly rather than narrowly, dynamically rather than statically, with the grain of the document rather than against the grain?<sup>76</sup> We the People today must be expansive even if We the People at one time were less so.

The entire Bill of Rights takes on new meaning when viewed through the prism of the later Fourteenth Amendment,<sup>77</sup> but the Constitution's story hardly ends there. For example, the Fourteenth Amendment itself must be read in light of the later Nineteenth Amendment. If we simply parsed the Fourteenth in isolation, the status of women's equal civil rights might be unsure. On one hand, the Amendment's opening section affirms the rights of all "citizens" and "persons" and says nothing in particular about "race" as distinct from "sex." Its language in fact resembles language that Elizabeth Cady Stanton herself endorsed in 1865, which she in turn borrowed from the Seneca Falls Declaration of 1848.<sup>78</sup> The Amendment's first sentence proclaims that all Americans are "born" free and equal "citizens," implicitly discountenancing laws heaping disadvantage upon a

<sup>75</sup> Representatives from the Old South were barred from the Reconstruction Congress that proposed the Civil War Amendments, and the Fourteenth and Fifteenth Amendments' ratification depended on black suffrage imposed by Congress on the Old South. Both of these congressional actions rested on a broad, dynamic reading of the Article IV guarantee of republican government. One prominent congressional theory was that once slaves became free, southern governments could no longer exclude free black males from the franchise; exclusions of so large a percentage of free male citizens rendered these governments insufficiently republican. For details, see Amar, *The Central Meaning of Republican Government*, *supra* note 14, at 779–86; 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 106–08, 197, 236–37 (1998); and also ELY, *supra* note 2, at 238 n.57.

<sup>76</sup> Here, I stand on the shoulders of John Ely. See ELY, *supra* note 2, at 6–7, 99, 123. Though later Amendments do not in so many words redefine "republican" government, they do suggest a presumptive baseline "right of citizens . . . of the United States . . . to vote," *supra* p. 31 & n.15, that did not explicitly exist in the Philadelphia Constitution. In pondering disfranchisements other than those specifically mentioned by the Amendments, an inclusionary strategy of *ejusdem generis* seems more apt than an exclusionary strategy of *expressio unius*. Connecting the dots among various voting Amendments to infer a broad reading of republicanism resembles connecting the dots among the first three Articles to infer a general separation of powers. See *supra* p. 30 & n.11. This dot-connecting approach draws further support from the Ninth Amendment, which explicitly warns against *expressio unius* readings of textually enumerated "rights of the people." See Vikram Amar, *The 20th Century — the Amendment and Populist Century*, *FED. LAW.*, May 2000, at 32 (emphasizing the populist themes and cumulative weight of the twentieth-century amendments).

<sup>77</sup> See AMAR, *BILL OF RIGHTS*, *supra* note 17. As an analogy, we might consider how Christians strive to read the Old Testament in light of the New Testament.

<sup>78</sup> For details, see *id.* at 260–61 & n.\*.

person because of that person's birth status — as slave, black, poor, female, or illegitimate, for example.<sup>79</sup> Some of the basic concepts organizing the Amendment — full and equal “civil rights” as opposed to “political rights” (like voting and jury service) — themselves drew upon the model of women's rights: Unmarried white women enjoyed most civil rights but not political rights, and the Fourteenth Amendment can thus be seen as giving blacks the historic rights of these women.<sup>80</sup> On the other hand, it is doubtful that all discriminations against women were henceforth to be viewed in exactly the same way as discriminations against blacks. Traditional marriage law subordinated the woman to the man; but a law allowing a black and a white to join together as business partners only so long as the white was the senior partner would plainly violate the Amendment. Regardless of this original ambiguity, after the Nineteenth Amendment becomes part of the document, we have strong documentarian warrant to construe the Fourteenth Amendment in favor of women's rights. Once the Constitution vests women with full and equal political rights, shouldn't entitlement to the full and equal enjoyment of lesser civil rights follow a fortiori? Discriminations that might once have seemed legitimate based on an old-fashioned view of woman's role and capacities become illegitimate when *the Constitution itself*, in a later amendment, affirms a very different and more robust vision of women as full and equal members of the political People who govern America.<sup>81</sup>

Arguments based on the Constitution's chronological trend and the tug of later amendments on earlier clauses reflect the textual architecture of the document itself. Instead of directly rewriting Articles I through VII via deletions and insertions, later generations of Americans have chosen to make amends at the end of the document in a series of postscripts inscribed in chronological order. Although this mode

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<sup>79</sup> For a superb general discussion, see Karst, *supra* note 61. *Romer v. Evans*, 517 U.S. 620 (1996), snugly fits this framework: The Court there condemned a law that heaped disability on mere status — on sexual orientation apart from conduct. (Hence the irrelevance of a conduct case like *Bowers v. Hardwick*, 478 U.S. 186 (1986).) For the argument that this is indeed *Romer's* theory, see Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203 (1996) [hereinafter Amar, *Attainder and Amendment 2*]. Note that most heterosexual laws are also sexist laws logically and sociologically, and thus should properly trigger the same kind of skepticism that other formal sex-discrimination laws receive. *Id.* at 205 n.7, 231–32.

<sup>80</sup> See AMAR, *BILL OF RIGHTS*, *supra* note 17, at 217 n.\*, 260–61.

<sup>81</sup> See generally Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning About “the Woman Question” in the Discourse of Sex Discrimination*, in *HISTORY, MEMORY, AND THE LAW* 131 (Austin Sarat & Thomas R. Kearns eds., 1999) (proposing a “synthetic reading” of the Fourteenth and Nineteenth Amendments in which the latter is read not merely as a rule but also as a generative “source of norms” challenging the old regime of “status” law). For an early example of a case reading the Fourteenth Amendment rights of women more sweepingly in light of the Nineteenth, see *Adkins v. Children's Hospital*, 261 U.S. 525, 553 (1923).

of textual alteration has generated certain ambiguities that direct re-writing might have avoided,<sup>82</sup> there is an offsetting virtue in the post-script approach: The practice of inscribing amendments in chronological order visually dramatizes the distinct improvements of each generation and makes the temporal trajectory of the overall document much easier to identify at a glance. The document itself thus takes pains to draw attention to the vector of constitutional change, to highlight the arc of constitutional history. Sensitive documentarians should not ignore this arc.

9. *Determinacy and Continuity.* — As the preceding examples illustrate, constitutional textualism (broadly defined) is not mechanical. It requires judgment, and good interpreters will often disagree. On this count, the document is neither better nor worse than the doctrine; good doctrinalists will often disagree about how best to read a given case or a broad line of cases.<sup>83</sup> To interpret the document, or the doctrine for that matter, is to engage in an act of construction; the interpreter tries to weave together a coherent account from tangled data. Further wrinkles arise when the faithful interpreter tries to apply the document's precepts to a world that is in many respects different from the world that generated the constitutional texts in question. As Professor Lessig has taught us, this "translation" is no easy task; even interpreters who fundamentally agree (in step one) about the dictates of the document as written and amended may disagree (in step two) about how best to apply those dictates to a changed world.<sup>84</sup> The same is true of the dictates of doctrine.

The case for the Constitution is thus not that it alone uniquely constrains judges. Documentarianism aims not to constrain more, but to constrain better, by focusing judges on America's most attractive legal norms as a matter of pedigree and substance. Maximal judicial constraint is not the goal; a mandatory coin flip in every litigated case might constrain the judiciary, but to what end? Law not only constrains but empowers; and the document aims to empower judges by directing their attention to a wise and democratic set of judgments as

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<sup>82</sup> Madison predicted that this mode of amendment would make it "difficult to ascertain to what parts of the [Philadelphia Constitution] the amendments particularly refer." 1 ANNALS OF CONG. 708 (Joseph Gales ed., Aug. 13, 1789). For further discussion, see 1 ACKERMAN, *supra* note 8, at 86–99; AMAR, BILL OF RIGHTS, *supra* note 17, at 292 n.\*; Edward Hartnett, *A "Uniform and Entire" Constitution; Or, What if Madison Had Won?*, 15 CONST. COMM. 251 (1998); and Price Marshall, "A Careless Written Letter" — *Situating Amendments to the Federal Constitution*, 51 ARK. L. REV. 95 (1998).

<sup>83</sup> In the short run, doctrine might seem rather determinate, encouraging judges to decide the case at hand incrementally by analogy to precedents with similar facts. But in the long run, pure doctrinalism looks less determinate — an extended game of judicial "telephone" in which even very clear mandates can become garbled beyond recognition over the course of time, with each case modifying the message of preceding cases.

<sup>84</sup> See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

food for thought. More generally, documentarianism is not uniquely a theory of judicial review or judicial role. It is a theory of the Constitution itself, and of the norms that those of us who are not judges — legislators, executives, civil servants, jurors, law professors, law students, journalists, citizens — should regard with the highest respect.

Though not wholly determinate, documentarianism is nonetheless disciplined. It seeks not merely a modestly plausible reading of the Constitution, but the most plausible reading, the reading that best fits the entire document's text, enactment history, and general structure. Considerations of justice are not wholly foreign to the enterprise of close reading and the goal of tight fit. The document itself begins by trumpeting its aim to "establish justice"<sup>85</sup> and we fail to best fit the document if we simply ignore this aim. But a proper justice-seeking reading of the document does not warrant an interpreter to invent his own theory of justice and call it "the Constitution." The documentarian quests after the American People's particular sense of justice as embodied in the unfolding words, deeds, and spirit of the Constitution and its Amendments.<sup>86</sup>

These words and deeds provide a root narrative for today's diverse citizenry, giving us a shared history as a remarkably self-governing and increasingly inclusive people over time. This narrative provides a thread of continuity enabling us today to see ourselves as the legitimate heirs of earlier Americans, with all the rights and responsibilities — and debts, too — that come with that legacy.

It is sometimes argued that the idea of continuity should incline us against the document and toward the doctrine. Fidelity to the document, the argument goes, may threaten existing arrangements that are working well and that have generated important reliance interests or tightly woven themselves into the social fabric. In response to this important criticism, pragmatic documentarians may at times be obliged to yield to deeply entrenched and widely accepted practices. Some-

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<sup>85</sup> U.S. CONST. pmb. Although most modern interpreters skate past the Preamble, it features prominently in early expositions such as Hamilton's opinion on the first national bank, and Marshall Court landmarks such as *Marbury v. Madison*, *Martin v. Hunter's Lessee*, and *McCulloch v. Maryland*. This is no accident. The Preamble launches the Constitution: Its eye-catching and accessible prose is the first thing people read, and we should construe all that follows in its light. For historical evidence supporting such use of the Preamble, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). For an intriguing invocation of the Preamble last Term, see *infra* note 292.

<sup>86</sup> Some interpreters do most of their serious thinking outside the document (say, by musing on their favorite philosophers) and when their work is done, they return to see if the Constitution's words are supple enough to fit their independently derived result. For a particularly impressive example of this genre, see Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). Such approaches are perhaps document-constrained, but not truly document-centered. They miss the ways in which the document itself is a rich source of inspiration as well as constraint.

times, an effort can be made to return gradually to the path marked out by the document, not posthaste, but with deliberate speed. Other times, a documentarian must acknowledge that it is too late to go back.

But the problem of discontinuity is not unique to documentarianism. The doctrine may at times be at war with current practices and social norms that the document, rightly read, would not condemn. In such cases, the doctrine may disrupt the social fabric more than the document would. Imagine, for example, a case (call it *Carmell*) in which today's Justices squarely rest on dictum from an old case, and a string of later dicta, to strike down a commonsensical application of a modern state law. Imagine further that *Carmell's* specific holding runs counter to other deeply held current values, like the equal status of women and the importance of reliable evidence, reflected both in the Constitution and in many areas of modern law and society. Indeed, imagine that, although the Court has dicta on its side, the document does not really support the Court's invalidation of state policy; and that most ordinary citizens today, if told about the Court's ruling, would shudder. In this imaginable scenario, the document would seem more respectful of continuity values than the doctrine. Or suppose instead a case (call it *Morrison*) in which today's Court relies on an erroneous nineteenth-century opinion to strike down a recent act of Congress, adopted after years of deliberation and supported by most state governments, on the ground that this act violates states' rights. Suppose further that the Constitution supports what Congress has done and that, like *Carmell*, *Morrison* runs counter to a strong modern trend affirming women's equality. In this scenario, reliance on an old and incorrect case to block recourse to the document itself would once again seem more disruptive, not less. Finally, let us hypothesize a case (call it *Mitchell*) in which three dissenting Justices vote to require the government to discriminate against religion. Let us also hypothesize that this discrimination has no sound basis in the Constitution, but is nevertheless strongly supported by precedent. Indeed, assume that in order to reach a nondiscriminatory and sensible result, upholding a longstanding and respectable government practice, the *Mitchell* majority must overrule precedents that are squarely on point. In this hypothetical scenario, too, the doctrine seems more disruptive than the document. As many readers will have no doubt surmised, these scenarios are not wholly hypothetical. They happened last Term.

10. *Consequences.* — Perhaps the strongest criticism of documentarianism has come from scholars who recoil from its projected results. According to the standard bill of particulars — a composite sketch of claims found in prominent works by distinguished scholars — an honest reading of the Constitution leaves us with a First Amendment preventing prior restraint but providing no other protection of free expression; a Fourteenth Amendment permitting Jim Crow at both the

state and federal level; no right of blacks to serve on juries; no incorporation of the Bill of Rights against states; no strong protections of women's equality rights, or those of gays, lesbians, and bisexuals; no muscular prohibitions on state malapportionments; no guarantee of appointed counsel for indigent defendants; and several other disastrous results.<sup>87</sup>

My own research over the years leads me to think that almost every item on this antidocument indictment is incorrect.<sup>88</sup> Indeed, if this list reflects a good consequentialist index of important issues, the document far excels the doctrine. In virtually every one of these areas, the Constitution, honestly read, provides an attractive regime that the Court ignored for decades or more, and that today's Court sometimes still fails to honor. In this space I cannot prove all this and rebut each item on the critics' list, but a few extended examples may illustrate what I mean by an honest reading of the document on these issues.

(a) *Freedom of Expression*. — Although in England the phrase "freedom of the press" may well have meant only freedom from prior restraint, the First Amendment is not best read as similarly limited. In England, Parliament was sovereign. Rights in this system sensibly ran only against executive and judicial officials, such as Crown-appointed licensers, rather than against Parliament itself. But in a system proudly based on popular sovereignty, as trumpeted by the Preamble's word and deed, we should beware rules based on an utterly contrary premise. Don't We the sovereign People of America necessarily have the same inherent rights of free political expression enjoyed by mem-

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<sup>87</sup> See, e.g., Grey, *supra* note 23, at 711–13; Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 224, 232–33 (1980); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 787–92 (1983); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 728–29 (1988); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 96–98 (1993); Strauss, *supra* note 3, at 920, 922, 929. For general discussions of the need to consider systemic consequences when evaluating questions of interpretive method in constitutional law, see Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535 (1999); and Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636 (1999).

<sup>88</sup> I am today making many substantive claims about constitutional meaning whose full plausibility can be assessed only by weighing evidence and arguments I have tried to amass elsewhere. My substantive claims have their critics; ultimately readers must judge for themselves, keeping in mind that no constitutional interpretation perfectly accounts for all data. The test is: Which reading best fits all the evidence in a coherent and legally suitable way? Unlike the leading scholars cited above in note 87, whose consequentialist claims generally rely on work done by others, I have tried to examine most of these issues in detail myself. If I am wrong, I have no one but myself to blame.

Another general caveat: This Foreword seeks to elucidate documentarianism by proliferating examples of the method in action. My aim is to prevent the methodological discussion from becoming overly abstract. I do not expect that every example and interpretation offered today will persuade all readers or even all documentarians. The general methodology does not stand or fall with each proffered application or misapplication, but readers are entitled to see, concretely, the general kind of constitutional analysis I endorse.

bers of the sovereign Parliament in England? If so, the First Amendment must mean more than mere freedom from prior restraint.<sup>89</sup>

To put the structural point textually: The old phrase “freedom of the press” takes on new meaning when fused, as it never was in England or the colonies, with “freedom of speech,” which never meant mere freedom from prior restraint. Rather, “freedom of speech” derives from the landmark English Bill of Rights of 1689: “[T]he Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.”<sup>90</sup> Robust, wide-open, and uninhibited political speech in the sovereign legislature is the core idea here. Parliament (from the French *parler*, to speak) is a speech spot, a parley place to discuss political matters free from the threat of various after-the-fact sanctions like seditious libel prosecutions. The extension of this well-established right of “freedom of speech” to ordinary citizens in the First Amendment is thus a textual recognition of the structural truth of American popular sovereignty. Here the ultimate rulers are the People, not Parliament, and these rulers must be free to voice opinions on all things political.

To see the point intratextually: A linguistic and conceptual bridge links the First Amendment “freedom of speech” with the Article I, Section 6 clause guaranteeing Senators and Representatives freedom of “speech and debate” in Congress. Under the Article I Speech Clause, congressional incumbents must have broad freedom to criticize their political adversaries without fear of outside censorship; and under the Amendment I Speech Clause, their adversaries must have broad freedom to criticize incumbents without fear of inside censorship.

Or to grasp the point historically: James Madison, on the very day he introduced the Bill of Rights, explained the key difference between the British system of governmental sovereignty and the American system of popular sovereignty.<sup>91</sup> In 1794, he was emphatic: “If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.”<sup>92</sup> A few years later, he famously detailed the blatant unconstitutionality of the self-dealing Sedition Act of 1798, which allowed congressional incumbents to criticize their challengers,

<sup>89</sup> See generally ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960).

<sup>90</sup> An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., c. 2, § 9 (Eng.).

<sup>91</sup> 1 ANNALS OF CONG. 436 (Joseph Gales ed., June 8, 1789).

<sup>92</sup> 4 ANNALS OF CONG. 934 (Nov. 27, 1794).



but forbade challengers from criticizing incumbents.<sup>93</sup> (The Act, of course, sought to punish the government's critics after the fact rather than via prior restraint.)

The basic idea here — that the entire American project of popular self-rule requires that citizens have broad freedom to condemn government policies and policymakers — is also valid at the state level. Thus, the Article IV Republican Government Clause is best read as protecting this structural freedom.<sup>94</sup> Also, when citizens seek to speak out on matters of federal concern, any state effort to muzzle them would seem vulnerable on *McCulloch*-like federalism grounds: If a state may not properly shut down a national bank, neither may it properly shut down a national debate — say, a debate about slavery in 1850.

But antebellum states tried to do just that, just as Congress had tried to silence its critics in 1798.<sup>95</sup> Across the South, mere criticism of slavery became a crime, and the Republican Party was in effect outlawed via the threat of after-the-fact punishment rather than prior restraint. In response, Republicans insisted on broad protections of expression. Their 1856 party slogan was “Free Speech, Free Press, Free Men, Free Labor, Free Territory, and Fremont.” Fremont lost in 1856, but four years later Lincoln won. And the war came. In its wake, Reconstruction Republicans insisted that the South end its regime of antirepublican (and anti-Republican) censorship of opposition speech. Free folk — black and white, male and female, Republican and Democrat, Northern and Southern — must all be guaranteed the right to speak their minds about interlinked issues of law, politics, religion, morality, and even literature. (Reconstruction Republicans viscerally understood the importance of protecting a literary work like *Uncle Tom's Cabin*.) The Fourteenth Amendment thus commanded that all states observe citizens' fundamental rights and freedoms, with a broad right of free expression, ranging far beyond freedom from prior restraint, at the Amendment's very core. It is thus no surprise that the Fourteenth Amendment borrows, intratextually, from the words of the First — “shall make no law abridging” — in its key command that “[n]o state shall make or enforce any law which shall abridge the

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<sup>93</sup> JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS (1800), reprinted in 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 569–77 (Jonathan Elliot ed., 2d ed. 1888).

<sup>94</sup> See Amar, *The Central Meaning of Republican Government*, *supra* note 14, at 755, 761–66.

<sup>95</sup> For elaboration and documentation of the claims made in this paragraph, see AMAR, BILL OF RIGHTS, *supra* note 17, at 231–46, and the sources cited therein, especially the pathbreaking work of Professor Michael Kent Curtis. For his most recent exposition, see MICHAEL KENT CURTIS, FREEDOM OF SPEECH, “THE PEOPLE'S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (forthcoming 2000).

privileges or immunities [that is, the fundamental rights and freedoms] of citizens.”

If all of this seems to belabor the obvious, rehashing self-evident truths about the American Constitution and the history of the American People, consider Court doctrine in this area. Supreme Court Justices riding circuit two centuries ago cheerfully enforced a Sedition Act that made mere criticism of certain incumbents a federal offense.<sup>96</sup> When one printer tried to argue law to the jury, à la Zenger — a venerable tactic related to the no-prior-restraint rule — Justice Samuel Chase ruthlessly cut him off.<sup>97</sup> Chase was later impeached for his illiberal handling of the case and for other abuses. (About half the Senate voted to convict, several votes short of the two-thirds necessary to oust him.<sup>98</sup>) Federal courts did nothing to prevent southern states from effectively criminalizing the antebellum Republican Party, and for sixty years after the Civil War the Court refused to concede that the Fourteenth Amendment barred states from abridging free expression. When the Court assumed the point arguendo in 1907, it did so only to insist that free expression meant no more than freedom from prior restraint. Over the dissent of the first Justice Harlan, the Court (per Justice Holmes) thus allowed state judges to fine a newspaper publisher who had done no more than satirize the very judges in question.<sup>99</sup> In 1919, Holmes wrote again for the Court, this time upholding the extended imprisonment of Eugene Debs, a man who received almost a million votes for President, because Debs had criticized federal war policy in a peaceful speech.<sup>100</sup> Prior to 1930, free expression had *never* prevailed in the Supreme Court, though property rights had won out countless times. Not until 1964 did the Supreme Court squarely repudiate the infamous (and long defunct) Sedition Act of 1798; and the first time the Court struck down a live congressional statute on free expression grounds was 1965.<sup>101</sup> The Court’s doctrine today is of course more protective of “speech” than ever, but is it perhaps too protective? When money is “speech,” and liquor and gambling ads are core “speech,” and porno films are “basic speech,” are we in danger of

<sup>96</sup> See, e.g., *United States v. Callender*, 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709) (Chase, J.).

<sup>97</sup> See AMAR, *BILL OF RIGHTS*, *supra* note 17, at 23–24, 98–103. In a nutshell, the no-prior-restraint rule reflected concern not merely about *when* censorship should occur but also about *who* should do it — namely, juries rather than judges.

<sup>98</sup> 14 ANNALS OF CONG. 666–67 (Mar. 1, 1805).

<sup>99</sup> *Patterson v. Colorado*, 205 U.S. 454 (1907). The state judges had proceeded without a jury and without express statutory authorization in a manner that reeked of conflict of interest and role conflation — in effect, they acted simultaneously as legislature, prosecutor, complaining witness, judge, jury, and executioner. No problem, said Holmes and the Court.

<sup>100</sup> *Debs v. United States*, 249 U.S. 211 (1919).

<sup>101</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273–74 (1964); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965).

obscuring the main idea for which so much blood was shed in the Revolution and the Civil War?<sup>102</sup> And so I ask, which has generally been better, document or doctrine?

(b) *Racial Segregation*. — Now consider American apartheid.<sup>103</sup> The Jim Crow system aimed to create two hereditary classes of Americans, with whites on the top and blacks on the bottom. This class system was a throwback to aristocracy, assigning Americans unequal and intergenerationally entrenched places on the basis of birth status. Can all this be squared with the deep democratic social structure implied by the Philadelphia Constitution? Above and beyond the broad democratic language of the Preamble and the Article IV Republican Government Clause, the bans on federal and state titles of nobility in Article I, Sections 9 and 10<sup>104</sup> explicitly condemn the trappings of aristocracy: The document promises a democratic republic, and renounces a feudalism based on birth and blood.<sup>105</sup> Consistent with these clauses

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<sup>102</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (money); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (liquor ads); *Greater New Orleans Broad. Ass'n v. United States*, 119 S. Ct. 1923 (1999) (gambling ads); *United States v. Playboy Entm't Group*, 120 S. Ct. 1878 (2000) (porno films). For some anxious thoughts about such developments, see J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375. It might be suggested that nude dancing and pornographic films are akin to literature; but of course there are important differences as well. Are graphic sexual performances, whether live or on film, with sights and sounds and real-life actors and actresses, more like the words (the pure "speech") of *Uncle Tom's Cabin*, or more like prostitution itself — sex for sale? In the First Amendment, the document's big ideas revolve around democratic deliberation and the freedom of the human intellect; but today's doctrine seems altogether too focused on g-strings, pasties, and sex flicks. See, e.g., *Playboy Entm't*, 120 S. Ct. at 1886, 1888–89, 1893 (treating extended on-screen sex as "speech alone," indistinguishable from political pamphlets or novels); cf. *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000) (treating erotic dancing as within the First Amendment's outer ambit, but noting its lesser constitutional status).

<sup>103</sup> The material over the next few pages borrows from my April 18, 2000, Foulston-Siefkin Lecture at Washburn University Law School in Topeka, Kansas.

<sup>104</sup> U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States."); *id.* art. I, § 10, cl. 1 ("No State shall . . . grant any Title of Nobility."). The documentary centrality of this pair of clauses — one of only three bans repeated in two sections so as to apply to both state and federal governments at the Founding — should not be missed. The Articles of Confederation had imposed similar restrictions on both states and Congress, a striking fact given how few limits that document imposed on "sovereign[]" states. See ARTICLES OF CONFEDERATION art. VI (1781).

<sup>105</sup> This is the central theme of Madison's *The Federalist No. 39*, which offers a ringing defense of the Constitution as "strictly republican" in contradistinction to "aristocracy and monarchy." THE FEDERALIST NO. 39, at 240–41 (Clinton Rossiter ed., 1961). The Constitution, Madison argues, derives all power from "the great body of the people," as opposed to "a favored class" of "nobles." *Id.* at 241. He concludes as follows:

Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility, both under the federal and State governments; and in its express guaranty of the republican form to each of the latter.

*Id.* at 242; see also THE FEDERALIST NO. 57, at 351 (James Madison) (Clinton Rossiter ed., 1961) (noting that voters will encompass "the great body of the people" — "[n]ot the rich, more than the poor" or the "haughty heirs of distinguished names, more than the humble sons of obscure and un-

and the broader constitutional ethos they embody, no government can name some Americans “lords” and others “commoners.” But isn’t this ethos violated by a de jure segregation system designed to perpetuate a hereditary overclass of fair-skinned lords atop a hereditary underclass of dark-skinned commoners? Not far from these Nobility Clauses we find another paired set of clauses in Article I, Sections 9 and 10 prohibiting the federal and state governments, respectively, from enacting “Bill[s] of Attainder.”<sup>106</sup> Legislatures may not single out persons by name and subject them to special disfavor or ridicule. More generally, legislatures may not stigmatize persons because of who they are (their status) as opposed to what they do (their conduct).<sup>107</sup> A related clause condemns efforts to taint or stain a person’s bloodline: “[N]o Attainder of Treason shall work Corruption of Blood . . . .”<sup>108</sup> If we take the nonattainder idea seriously, it bars laws designed to humiliate or demean all persons descended from slaves, or all persons with black (corrupt) blood.

When the Philadelphia Constitution is read for all it might be worth, it thus seems to prohibit a system that creates a hereditary aristocracy, a system aimed at humiliating persons based on their birth. Alas, this Constitution cannot be read so blithely, at least where slaves are concerned. Make no mistake: The Philadelphia Constitution made its peace with, and even propped up, a regime of chattel slavery.

The Framers were ashamed to use the words “slaves” and “slavery,” so the document is rife with euphemism. Thus, Article I, Section 2 elliptically speaks of “free Persons” and “all other persons” — that is, *unfree* persons. Under the rules of this section, the more slaves a state imported or bred, the more seats it got in the House of Representatives; and under Article II, it also got more clout in the electoral college. Indeed, the electoral college was largely designed to advantage slave states such as Virginia. In a system of direct national election, Virginia would have gotten no heft from her slaves, who of course could not vote. The electoral college thus enabled Virginia and other slave states to count for more than their share of total national voters.

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propitious fortune” — and that the voters may choose any officeholder regardless of “wealth” or “birth”); THE FEDERALIST NO. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (calling the ban on titles of nobility “the cornerstone of republican government”). For a brilliant general discussion of the American repudiation of the ancien regime, see GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1991).

<sup>106</sup> U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder . . . shall be passed [by Congress.]”); *id.* art. I, § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder . . .”).

<sup>107</sup> For explanation of all the links in this argument, see Amar, *Attainder and Amendment 2*, *supra* note 79, at 207–21.

<sup>108</sup> U.S. CONST. art. III, § 3, cl. 2. The Philadelphia Framers initially put the Federal Attainder Clause and the Corruption of Blood Clause side by side. See 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 52, at 571. The word “Attainder” in both clauses cues readers to the conceptual linkage.

Perversely, if Virginia were to free some of its slaves, who then moved elsewhere (say, Pennsylvania), Virginia would actually lose seats in Congress and the electoral college. And let us not forget the odious Article IV Fugitive Slave Clause, which obliged free states to return human beings to bondage when their owners came to claim them.

These and other constitutional protections of slavery suggest that we cannot simply read various clauses of the Philadelphia Constitution for all they might be worth. Slavery was a relic of the old order, rooted in intergenerational inequality based on blood and birth status. In the antebellum South, there were indeed lords and serfs notwithstanding the Nobility Clauses. Slave children were attainted at birth because of their corrupt blood, despite the language of the Attainder Clauses. Indeed, the point is hardly unique to these clauses. Slavery seemed to contradict a huge part of the Constitution if read blithely. How could persons born on American soil be deprived of their rights to worship and to assemble as they pleased? How could persons be sentenced to life imprisonment at birth without any due process, without any individualized adjudication of wrongdoing?

Perhaps the most honest and textually coherent solution to the seeming contradiction would hold that slaves were simply not part of "We the People." Rather, to the Founding generation, those in chains were more like enemy aliens, not entitled to be part of collective self-governance or the regime of constitutional rights.<sup>109</sup> On this reading, however, free blacks, many of whom were indeed citizens at the Founding, were quite different and had to be treated in accordance with the Preamble and the other clauses we have canvassed. But a racist and pro-slavery Supreme Court saw things differently. Indeed, Chief Justice Taney's infamous opinion in *Dred Scott* went so far as to proclaim that free blacks could *never* be citizens.<sup>110</sup> This was an outlandish reading of the document, and it set the stage for the American People's next great performance, in three acts. That performance, the trio of Reconstruction Amendments, casts the apartheid issue in a strong new light.

The Thirteenth Amendment abolishes slavery; and with this new birth of freedom our seeming contradictions evaporate. No longer must we read the Preamble or the other anti-aristocracy and anti-attainder clauses at less than face value. The Fourteenth and Fifteenth Amendments reiterate that our Reconstructed Constitution has been refounded on principles of free and equal citizenship. The first

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<sup>109</sup> This explanation does not account for all other forms of entrenched hierarchy at the Founding — for example, sex discrimination raises complex issues far beyond those of race and class implicated by English feudalism (with Normans over Saxons) and American slavery (with whites over blacks).

<sup>110</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406–23 (1857).

sentence of the Fourteenth Amendment, written to repudiate Taney, confers birthright citizenship on all born in America, black and white, male and female, rich and poor alike. As the first Justice Harlan put the point more than a century ago: “All citizens are equal before the law.”<sup>111</sup> (Note that this Citizenship Clause governs the federal government as well as the states.) In the next sentence, the word “equal” explicitly appears, promising that all persons will receive “equal protection of the laws.”<sup>112</sup> Finally, the Fifteenth Amendment throws voting booths open by inviting blacks to participate equally with whites in the grand project of American democracy.

With all these clauses in view, the basic argument against both state and federal apartheid is straightforward: Jim Crow was not truly equal. American apartheid was an effort to create a kind of subordinated caste in violation of the vision of the Thirteenth Amendment; to perpetuate two classes of unequal citizenship defying the logic of the first sentence of the Fourteenth Amendment; to deprive blacks of the genuinely equal laws commanded by the next sentence of the Fourteenth Amendment (and by the companion Fifth Amendment); and to keep blacks and whites apart in a manner that renounced the premise and the promise of the Fifteenth Amendment that Americans of different races must come together — at the polls, in the legislature, on the jury — as democratic equals in self-government.

Granted, various supporters of the Fourteenth Amendment stated that it would not prohibit segregation. How, then, can we read it to do exactly what they denied it would do? By not overreading the legislative history, or underreading the text.<sup>113</sup> The text calls for equal pro-

<sup>111</sup> *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896). The Citizenship Clause provides little comfort to aliens and to Native Americans living in tribes outside the “jurisdiction” of the state and federal governments. *Cf.* U.S. CONST. amend. XIV, § 2 (“excluding Indians not taxed” from congressional apportionment). The Fourteenth Amendment does, however, promise all “persons” — emphatically including aliens and Indians — due process and equal protection. On the citizen/person distinction, see AMAR, BILL OF RIGHTS, *supra* note 17, at 170–74, 181–82, 217–18 & n.\*, 273, 364–65 & n.42.

<sup>112</sup> Although this clause speaks explicitly of states, I have elsewhere shown how it was understood as declaring precepts that bound federal officials as well. In a nutshell, “due process of law” — a phrase in the Fifth Amendment as well as the Fourteenth — was reglossed by the Reconstruction Republicans, who stressed that “law” implied the idea of suitably general and equal commands. To put the point in a more familiar way, “due process of law” incorporated an “equal protection” component (made explicit in the Fourteenth Amendment, and left implicit in the Fifth). See AMAR, BILL OF RIGHTS, *supra* note 17, at 282–83 and sources cited therein.

<sup>113</sup> Several of the attractive properties of the document — for example, its pre-ratification percolation, precise draftsmanship, veil-of-ignorance virtues, and general accessibility to the people — are blunted when we slight the text itself and the level of generality at which it is pitched. Note also that we seek a coherent legal narrative explaining the relevant principles, a goal that may oblige us to dismiss some data as noise. To oversimplify, imagine that Reconstructionists fell into four groups. Group A, comprising 40%, insisted the Constitution would invalidate all stigmatic separations. Groups B, C, and D, each comprising 20%, disagreed, but each did so for a reason

tection and equal citizenship, pure and simple. There is no textual exception for segregation, no clause that says “segregation is permissible even if unequal.” Nor did the Amendment’s supporters argue that there was such a categorical exception. They merely argued that separation was not ipso facto unequal and unconstitutional. As a matter of logic they were right — it is logically possible to imagine forms of separation that are not unequal. For example, separate bathrooms for men and women today are not widely understood, by either men or women, as stigmatizing or subordinating. But in some places and at some times, separate bathrooms might indeed be a way of keeping women down. In Jim Crow America, racially separate trains, bus seats, schools, bathrooms, drinking fountains, and the like were engines of inequality in purpose, effect, and social meaning. They were a way of keeping blacks down, creating a pervasive legal system of un-touchability and uncleanness. A law whose preamble explicitly proclaims that “blacks are hereby declared inferior” surely violates the Constitution; and so does a vast apartheid regime that proclaims this message in deed rather than in word.

Admittedly, Jim Crow had a different legal form than the infamous 1860s Black Codes. But it had the same substance: subordinating blacks and depriving them of equal status. The 1860s Black Codes, which the Fourteenth Amendment framers clearly aimed to prohibit as a paradigm case of impermissible legislation, were formally asymmet-

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squarely rejected by every other group (totaling 80%). For example, Group *B* deemed the Fourteenth Amendment wholly inapplicable to symmetric discrimination formally limiting whites as well as blacks; Group *C* believed that blacks themselves preferred separation, so no stigma existed; and Group *D* did not view the government’s irregular support of schools as sufficient “state action,” and deemed state-subsidized schools a “social” as opposed to a “governmental” space. Interpreters seeking to weave a coherent legal narrative from this jumble must offer a *reason* for upholding Jim Crow, and each of the 60% “majority’s” reasons is narratively troubling, as each one was clearly rejected by an even more lopsided 80% majority. In this hypothetical, no matter what view we embrace, a “majority” could be found on the other side; but Group *A*’s views may be more narratively coherent, and may also square better with constitutional text and structure. For more analysis of narrative coherence in the law, see Nesson, *supra* note 67, at 1377–90. For detailed discussions of the jumbled history surrounding segregation, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); and Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995).

The Reconstruction Congress continued to fund the preexisting segregated schools in the nation’s capital, but did not explicitly vote for segregation as such. In general, the Reconstruction Congress’s overall pattern of legislative and constitutional conduct (which included various race-conscious affirmative action efforts) aimed to lift blacks up from a historical baseline of degradation and bring them quite explicitly into a circle of equal citizenship. *Cf.* Rubinfeld, *supra* note 6, at 1169–79 (emphasizing the importance of the past evils that a given constitutional provision aimed to repudiate, rather than the failure of the repudiating generation to complete the task it began). By contrast, the later regime of Jim Crow upheld by the Court was a pervasive and tentacular system designed not to improve the plight of blacks, but rather to demean them and mock their equal citizenship.

ric: they heaped disabilities on blacks but not whites. Jim Crow was formally symmetric: blacks could not go to School *X*, but whites were symmetrically barred from attending School *Y*. But formal symmetry does not mean the law is automatically valid; it just means the law is not automatically invalid, as were the Black Codes. The simple question remains: Were Jim Crow laws truly equal? It is possible to imagine some parallel universe where blacks as well as whites sought separation, where no stigma attached to separation, where separation was not an instrument of subordination. But that was not the world of Jim Crow to any honest observer.<sup>114</sup>

On this account, certain forms of affirmative action need not, perhaps, be deemed the constitutional equivalent of Jim Crow. Consider, for example, the kind of educational affirmative action Justice Powell was willing to endorse in *Bakke*.<sup>115</sup> Does this kind of affirmative action make racial minorities a favored aristocracy? In purpose, effect, and social meaning, does it demean or attain whites or keep whites down? Is its ultimate aim a society of unequal castes, of first-class and second-class citizens? Is it the legal and moral equivalent of the 1860s Black Codes? These are some of the questions that a holistic documentarian should ask.

Now compare the document with the doctrine. The Philadelphia Constitution was pro-slavery, but the Taney Court was far worse, and grossly dismissive of the rights of free blacks. The Waite/Fuller Court damned government-sponsored integration in the *Civil Rights Cases*<sup>116</sup> and blessed government-sponsored segregation in *Plessy v. Ferguson*.<sup>117</sup> The pairing of these two cases is far from idiosyncratic: had

<sup>114</sup> Charles Black taught us this lesson long ago. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421 (1960). Nor can Jim Crow be defended as simply respecting whites' "social" rights and freedom not to associate. First, apartheid laws forbade even blacks and whites who wanted to associate together from doing so in trains, schools, bathrooms, etc. The government created only two boxes, "white" and "colored," denying persons the choice of a third "mixed" train car, school, or restroom. Cf. *Berea Coll. v. Kentucky*, 211 U.S. 45 (1908) (upholding a law imposing segregation on a private college that wanted to be integrated). Second, this category of "social" rights does not appear in the text of the Reconstruction Amendments. Of course, certain guarantees, like equal protection, apply against the state, but not against private persons. Thus, private citizens remain free to discriminate at their dinner parties. But a state school or state-regulated railroad is not a "social" dinner party. Third, the Fifteenth Amendment, which exerts an important gravitational pull on the best reading of the Fourteenth, presupposes that blacks and whites must associate together in the jury room as equals, side by side, deliberating together as fellow citizens. A vast state-mandated regime of stigmatic separation outside the jury room is hard to square with this constitutional vision.

<sup>115</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315–19 (1978) (expressing approval of Harvard College's affirmative action admission program, in which race was a factor but no quota was set).

<sup>116</sup> 109 U.S. 3 (1883).

<sup>117</sup> 163 U.S. 537 (1896); see also *Pace v. Alabama*, 106 U.S. 583 (1883) (upholding a segregation law imposing extra punishment on interracial sex); *Cumming v. Richmond County Bd. of Educ.*,



the Court upheld the federal integration law, the state segregation law could have been condemned on simple preemption grounds. In both cases, of course, the first Justice Harlan famously dissented. In this upside-down world of Court doctrine, apartheid was proclaimed "equal," and the law with the stronger democratic and documentarian mandate was pronounced unconstitutional. After all, the 1875 Civil Rights Act struck down by the Court derived from a national legislature representing both white and black voters and claiming explicit textual warrant to enforce the ideal of equal citizenship. Louisiana's Jim Crow law, by contrast, came from a state legislature infamous for massive electoral fraud and constitutional chicanery.<sup>118</sup> *Plessy* reigned for decades, and even *Brown*, the doctrinalists' knight in shining armor, did not apologize for *Plessy* or openly overrule it. Until 1986, certain openly race-based exclusions of blacks from juries had the blessing of the Court,<sup>119</sup> and today the practice often continues covertly because the Justices have refused to condemn peremptory challenges as inherently discriminatory. Meanwhile, modern doctrine seems keen on protecting whites from affirmative action<sup>120</sup> and on voiding certain apportionment maps that might enhance minority representation in legislatures.<sup>121</sup> These maps do not formally classify in racial terms, nor do they impose any actual racial separation or racial stigma on citizens. In fact, they aim to *integrate* legislatures, and all voters are wholly free to vote for candidates of all races; yet the Rehnquist Court calls this regime "apartheid."<sup>122</sup> And the *Civil Rights Cases* remain good law in the year 2000, paving the way for the Court to invalidate yet another congressional civil rights law in one of the year's most noteworthy decisions, *United States v. Morrison*.<sup>123</sup> Again I ask, which seems more inspiring: the document or the doctrine?

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175 U.S. 528 (1899) (upholding a separate and unequally funded education regime); *Berea Coll.*, 211 U.S. at 45 (upholding a law imposing segregation on a private college desiring integration); cf. *Gong Lum v. Rice*, 275 U.S. 78 (1927) (Taft Court) (unanimously reaffirming *Plessy* and applying it to the educational segregation of Chinese-Americans).

<sup>118</sup> See, e.g., J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910*, at 26, 46-47, 153-54 (1974).

<sup>119</sup> See *Swain v. Alabama*, 380 U.S. 202 (1965) (upholding race-based peremptory challenges), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>120</sup> See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Rice v. Cayetano*, 120 S. Ct. 1044 (2000). Some of these opinions can be read to cast doubt on the permissibility of the kind of carefully limited, diversity-enhancing race consciousness in education that Justice Powell blessed in *Bakke*.

<sup>121</sup> See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993); *Bush v. Vera*, 517 U.S. 952 (1996).

<sup>122</sup> *Shaw*, 509 U.S. at 647. I suspect that the district maps at issue in recent cases may well be suboptimal policy, and that there are probably better ways to integrate legislatures. But my objections are not constitutional ones; and the Court has failed to identify attractive and coherent doctrinal principles justifying the invalidation of these maps.

<sup>123</sup> 120 S. Ct. 1740 (2000). For discussion, see section II.A.3 below at pp. 102-09.

(c) *Other Rights*. — Similar stories could be told about most of the other items on the critics' list of documentarian defects. The letter and spirit of the Fifteenth Amendment vested black men with the political right to "vote" on juries, as did Congress in 1875, but the Court did not clearly recognize such a global right, regardless of the race of the parties to the lawsuit, until late in the next century.<sup>124</sup> Likewise, the Nineteenth Amendment right of women to vote equally on juries found little support in judicial doctrine for most of the century.<sup>125</sup> The Fourteenth Amendment was designed to make the Bill of Rights applicable against states (in a refined way),<sup>126</sup> yet the Court ignored this core command for decades while using the Amendment for many other, less noble, purposes far from the core.<sup>127</sup> We have already briefly touched upon the documentarian case for protecting the equality rights of women, gays, and lesbians; here, too, doctrine lagged far behind the document and indeed has yet to catch up.<sup>128</sup>

Gross malapportionments that threaten systematic frustration of majority rule violate the core values of the Article IV Republican Government Clause, especially when construed in light of later amendments. A prophylactic rule generally preventing government officials from assigning equal citizens unequal votes also seems defensible when the clause is read in light of later egalitarian amendments and when issues of judicial administrability are factored in.<sup>129</sup> Here, early doctrine lagged behind the document, but more recent doctrine has surged past it. To the extent that modern doctrine prevents even the statewide electorate, in special referenda, from accommodating the

<sup>124</sup> On the Constitution and Congress, see Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 222–41 (1995) [hereinafter Vikram Amar, *Jury Service*]. In the case law, see *Carter v. Jury Commission*, 396 U.S. 320 (1970); and *Powers v. Ohio*, 499 U.S. 400 (1991). Thus, the Court's landmark Reconstruction decision banning racial discrimination in juries in trials with *black defendants*, *Strauder v. West Virginia*, 100 U.S. 303 (1880), should not be hailed as a generous (mis)reading of the Fourteenth Amendment, but rather critiqued as a miserly (mis)interpretation of the Fifteenth Amendment. See AMAR, BILL OF RIGHTS, *supra* note 17, at 268–78.

<sup>125</sup> On the Constitution, see Vikram Amar, *Jury Service*, *supra* note 124, at 241–42. In the case law, see *Taylor v. Louisiana*, 419 U.S. 522 (1975) — which effectively overturned *Hoyt v. Florida*, 368 U.S. 57 (1961) — and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

<sup>126</sup> See AMAR, BILL OF RIGHTS, *supra* note 17, at 162–283.

<sup>127</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (holding efforts to redress economic inequalities illegitimate); *Coppage v. Kansas*, 236 U.S. 1 (1915) (similar). My diagnosis of *Lochner's* main message and vice tracks the reading of America's preeminent student of the Court. See Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 6–7, 12–13 (1973).

<sup>128</sup> See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986). For further discussion, see above at note 79.

<sup>129</sup> See Amar, *The Central Meaning of Republican Government*, *supra* note 14; Akhil Reed Amar, *The Constitution Versus the Court: Some Thoughts on Hills on Amar*, 94 NW. U. L. REV. 205, 209–13 (1999) [hereinafter Amar, *Amar on Hills*].

special needs of geographic subunits, doctrine may well go too far — the document may have gotten things just right.<sup>130</sup>

The specific Sixth Amendment right to counsel, and the overall architecture of the Sixth Amendment more broadly, aimed to save innocent defendants from erroneous convictions and to promote a parity of courtroom rights between the defendant and the government.<sup>131</sup> At the Founding, an indigent defendant was entitled to government-paid counsel — namely, the judge — but as the adversary system sharpened and criminal law and procedure became more intricate, separate counsel became necessary to redeem the Amendment's promise and purpose.<sup>132</sup> Due process meant fair and equal procedures to the Fourteenth Amendment framers who reglossed the Founders' text and made Sixth Amendment rights applicable to states;<sup>133</sup> yet here, too, the doctrine took a long time to catch up to the document and may still lag behind.<sup>134</sup>

But perhaps the critics' list is not the best way to assess consequences. The list catalogues only areas where the thin document allegedly allows bad laws that the thicker doctrine rightly rejects. What about areas where doctrine is thicker but worse — where the document would allow good laws that the doctrine wrongly condemns? How about other areas where the thicker document would ban practices that the thinner doctrine approves, for better or worse? A whirlwind history lesson seems in order, identifying some of the areas where the document and the doctrine appear to have diverged most dramatically over the last two centuries.

### C. An Ounce of History

1. *The Antebellum Era.* — The two most significant issues to reach the pre-Marshall Court Justices involved property and democracy. Property fared better. In *Chisholm v. Georgia*,<sup>135</sup> the Court tried to

<sup>130</sup> See, e.g., *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964) (striking down an apportionment scheme approved by statewide referendum and seemingly posing little threat to systemic frustration of popular will). For more discussion, see Amar, *Amar on Hills*, *supra* note 129, at 212.

<sup>131</sup> AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 89–144 (1997) [hereinafter AMAR, *CRIMINAL PROCEDURE*]; AMAR, *BILL OF RIGHTS*, *supra* note 17, at 114–17.

<sup>132</sup> AMAR, *CRIMINAL PROCEDURE*, *supra* note 131, at 138–41.

<sup>133</sup> See AMAR, *BILL OF RIGHTS*, *supra* note 17, at 270 n.\*, 278–79. Indeed, several antebellum northern states provided appointed counsel to alleged fugitive slaves in lawsuits that were technically civil, but in which bodily liberty was obviously implicated. *Id.* at 279.

<sup>134</sup> Not until *Gideon v. Wainwright*, 372 U.S. 335 (1963), did the Court recognize the appointed counsel rights of all indigents faced with serious accusations. For the suggestion that the modern Court has in fact failed to keep *Gideon*'s promise, see William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 69–74 (1997).

<sup>135</sup> 2 U.S. (2 Dall.) 419 (1793). For more discussion of this case, and elaboration of my claims today, see Amar, *Of Sovereignty and Federalism*, *supra* note 33, at 1466–92.

turn a naked grant of diversity jurisdiction into a license to create fiercely pro-creditor federal common law. The Court's ruling threatened to hold states liable for various debts to moneymen, even when no violation of the federal Constitution or federal law had occurred and applicable state law disallowed recovery.<sup>136</sup> By contrast, in the wake of the Sedition Act, the Justices showed little interest in protecting core rights of political expression.

The Marshall Court generally read the document in apt ways, but consider *Fletcher v. Peck*<sup>137</sup> and *Dartmouth College v. Woodward*,<sup>138</sup> both of which invalidated state laws by invoking the Article I, Section 10 Contract Clause. The clause, which bans state legislation "impairing the Obligation of Contracts," was clearly designed to prevent state impairments of preexisting legal obligations between private persons. But was it also designed to create legal obligations where none had previously existed? At common law, contracts with a state itself were not legally binding against the state; and it is far from clear that the Contract Clause, fairly read, changed this common law rule.

The most momentous constitutional issue in antebellum America was slavery. As bad as the document was on this issue, Taney Court doctrine was far worse, as evidenced by its three biggest slavery cases. In *Prigg v. Pennsylvania*,<sup>139</sup> the Court upheld a federal fugitive slave law, even though it was doubtful that the Constitution empowered Congress to pass such a law. Article IV pointedly grants Congress power to legislate concerning full faith and credit, but pointedly fails to grant Congress like power to legislate concerning fugitive slaves.<sup>140</sup> Even more troubling, the *Prigg* Court struck down a state law that in no way violated the federal Constitution or the federal statute, but simply sought to prevent the kidnapping of *free* blacks. The Founders' Constitution required Pennsylvania to return fugitive slaves to their lawful masters, but doubtless the state was entitled to ensure that a black man was in fact a fugitive slave before allowing him to be

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<sup>136</sup> The result of this overreaching was the Eleventh Amendment, repealing the relevant grant of diversity jurisdiction while leaving intact the federal judiciary's plenary power to hear all federal questions and remedy all state violations of genuine federal rights. As we shall see, today's Court has badly misread this Amendment, giving states unattractive license to violate the civil rights of discrimination victims and other vulnerable federal rights-holders. See *infra* section II.C, pp. 114–18.

<sup>137</sup> 10 U.S. (6 Cranch) 87 (1810).

<sup>138</sup> 17 U.S. (4 Wheat.) 518 (1819).

<sup>139</sup> 41 U.S. (16 Pet.) 539 (1842).

<sup>140</sup> Perhaps federal power might be sustainable under an Interstate Commerce Clause theory that whenever persons (slave or free) cross state lines, Congress may regulate; but this clause was not invoked in *Prigg*. Moreover, we should pause before extending the general language of interstate commerce to address a unique and uniquely contentious issue discussed in much greater detail in Article IV, which has the feel of a carefully crafted compromise between free and slave states that omits all mention of a possible federal fugitive slave law.

dragged off in chains. Yet the Court held otherwise and gave Congress power to legislate directly upon private parties even though Article IV speaks only of states.

Emboldened by *Prigg*, Congress passed another fugitive slave law in 1850. The statute was a constitutional travesty, but the Court in *Abelman v. Booth*<sup>141</sup> breezily upheld it. Even if an alleged fugitive slave claimed mistaken identity, he was forbidden to testify, and relegated to a summary juryless proceeding in which the magistrate would pocket ten dollars if he found for the slave catcher but only five dollars if he found for the black man. Anglo-American law had long condemned financially biased adjudicators,<sup>142</sup> but free blacks apparently had no rights which the Taney Court was bound to respect.

Which brings us to Taney's lead opinion in *Dred Scott v. Sandford*.<sup>143</sup> According to doctrine's dictionary, "due process of law" somehow did not mean juries, fair procedures, or nonbribed magistrates for free blacks claiming mistaken identity; but evidently it did mean that federal laws excluding slavery from various federal territories — laws akin to the Northwest Ordinance and the Missouri Compromise — were unconstitutional. From a documentarian perspective, this was absurd, as was Taney's further proclamation that free blacks could never be citizens.<sup>144</sup>

To get some perspective, consider what the antebellum Court could have done had it been a lover of freedom instead of a supporter of slavery. A hypothetical Court ruling mandating freedom in all federal territories would have deviated from the Philadelphia document, but no more (and probably less) than the Court's actual ruling mandating slavery. Yet not a single Justice ever suggested such a pro-freedom ruling. The debate on the Court was between mandatory slavery and complete congressional discretion.

2. *The Gilded Age*. — After the Civil War, the document aimed to atone and make amends, but the doctrine was less penitent. Through unfriendly statutory construction or outright invalidation, the Court reined in a great many federal civil rights laws that sought to protect blacks, laws that the amended Constitution's new enforcement clauses

<sup>141</sup> 62 U.S. (21 How.) 506 (1859).

<sup>142</sup> See, e.g., *Dr. Bonham's Case*, 77 Eng. Rep. 638, 8 Co. Rep. 107 (C.P. 1610); *THE FEDERALIST* No. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961) ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.")

<sup>143</sup> 60 U.S. (19 How.) 393 (1857). According to the Chief Justice, blacks "had no rights which the white man was bound to respect; and . . . the negro might justly and lawfully be reduced to slavery for his benefit." *Id.* at 407.

<sup>144</sup> Justice Curtis's dissent exposed many of Taney's lapses. *Id.* at 572–88, 605–33 (Curtis, J., dissenting).

explicitly authorized in sweeping language.<sup>145</sup> *Prigg* had upheld broad congressional power to protect slave masters, even in legislation over private parties. Yet the *Civil Rights Cases* denied equally broad congressional power to protect ex-slaves. The elder Justice Harlan wrote a brilliant dissent, exposing the Court's cheat: Reconstruction Republicans had openly relied on *Prigg*, crafting constitutional language far more explicit than the Article IV language deemed sufficient in that case. Unlike Article IV, the Fourteenth Amendment's first sentence proclaimed a norm of equal citizenship that went beyond a mere ban on state law; and Section 5 was an explicit congressional empowerment that Article IV lacked. In holding that this language was not clear and broad enough, the Court moved the constitutional goal posts five yards right and ten yards back after the People put the amendment ball in the air.

As for the other Reconstruction provisions, the Court made light of the Privileges or Immunities Clause and refused to apply the Bill of Rights against states, thus disregarding much of the Fourteenth Amendment's core meaning.<sup>146</sup> The Justices never enforced Section 2 of the Amendment, which requires that any state disfranchising blacks (whether openly or pretextually) lose some of its seats in the House, and all but abandoned the Fifteenth Amendment. In a line of cases that reached its nadir in *Giles v. Harris*,<sup>147</sup> the Court presided over a regime of massive, and in many places near-total, black disfranchisement mocking the People's promises in Reconstruction. The Court also winked at widespread exclusions of blacks from juries;<sup>148</sup> it re-

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<sup>145</sup> See, e.g., *Blylew v. United States*, 80 U.S. (13 Wall.) 581 (1872); *United States v. Reese*, 92 U.S. 214 (1876); *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Harris*, 106 U.S. 629 (1883); *The Civil Rights Cases*, 109 U.S. 3 (1883); *James v. Bowman*, 190 U.S. 127 (1903); *Hodges v. United States*, 203 U.S. 1 (1906). On the sweeping nature of congressional empowerment, borrowing from the Founders' sweeping Necessary and Proper Clause as glossed by *McCulloch* and *Prigg*, see AMAR, BILL OF RIGHTS, *supra* note 17, at 175 n.\*; Amar, *Intratextualism*, *supra* note 17, at 822–26; and Stephen A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115 (1999).

<sup>146</sup> See, e.g., *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873); *Cruikshank*, 92 U.S. at 542.

<sup>147</sup> 189 U.S. 475 (1903). The elder Justice Harlan dissented. *Id.* at 493–504 (Harlan, J., dissenting); see also Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 347–70. Although the *Giles* Court professed itself powerless to thwart massive state defiance, a Court more inclined to act had options. For example, the unconstitutional exclusion of blacks from the ballot box also unconstitutionally denied them access to the jury box. This latter exclusion, in turn, rendered suspect all criminal convictions of blacks, even under the restrictive rules of *Strauder*; yet the Court never threatened to leverage its power over criminal sentences to force the South into compliance under a “no black voting, no black convictions” approach. An even broader approach would have threatened to toss out all convictions on the ground that groups excluding all blacks were simply not properly constituted grand and petit juries.

<sup>148</sup> In addition to limiting the rights of black jurors to cases involving black parties, see sources cited *supra* note 124, the Court made it difficult to prove race-based exclusion from juries. After a

fused, in a series of decisions known as the *Insular Cases*, to extend the benefit of jury trials to brown-skinned folk in various island territories;<sup>149</sup> and, as noted earlier, it fell far short in combating censorship and segregation.

Contrast these underenforcements with the Court's simultaneous overenforcements. Instead of protecting blacks and liberty, the Justices protected corporations and property.<sup>150</sup> The Reconstruction Amendments did not aim to condemn all conscious governmental efforts to redress economic inequality. Indeed, the Thirteenth Amendment itself expropriated legal "property" — that is, slaves — without compensation, and Section 4 of the Fourteenth Amendment went a step further in prohibiting future compensation. Granted, a structural argument could be made that egalitarian redistribution offended the deep spirit underlying various Founding provisions, such as the Contract Clause and the Takings Clause. But these clauses dealt with attempted redistribution at the expense of a few discrete individuals, not broad-based legislation burdening a large group like the wealthy in general. And however plausible a general constitutional objection to redistribution might have been in 1905, it became wholly implausible as a matter of constitutional structure after the People enacted the Sixteenth Amendment in clear anticipation of a permissively progressive income tax aimed at reducing economic inequality.<sup>151</sup> Yet the Court

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promising start in *Neal v. Delaware*, 103 U.S. 370 (1881), the Court sat on its hands for the next half century. As a result of state disfranchisement, discretion, and subterfuge, black jurors were nowhere to be found in many jurisdictions, while the Court sitting atop the judicial pyramid did almost nothing until Chief Justice Hughes's opinion in *Norris v. Alabama*, 294 U.S. 587 (1935). For overviews, see RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 168–80 (1997); and Klarman, *supra* note 147, at 370–78.

<sup>149</sup> *Downes v. Bidwell*, 182 U.S. 244 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904). The first Justice Harlan dissented in all these cases. Even after Puerto Ricans became U.S. citizens by statute, the Court continued to deny them the constitutional right to jury trials. See *Balzac v. Puerto Rico*, 258 U.S. 298 (1922).

<sup>150</sup> All told, the *Lochner*-era Court invalidated "roughly two hundred regulatory statutes without clear constitutional warrant." Klarman, *supra* note 38, at 748–49. For more discussion, see *id.* at 749 n.4, and the sources cited therein.

<sup>151</sup> Previous federal income taxes had been designed to take proportionately more from the rich than the poor; and the general idea of an income tax was prominently associated with progressive tax rates and special taxes on the very rich. The first tax imposed under the Sixteenth Amendment was openly progressive, and upheld as such by the Court without dissent in *Brushaber v. Union Pacific Railroad*, 240 U.S. 1 (1916). For general discussions, see EDWIN R.A. SELIGMAN, *THE INCOME TAX* 430–49, 508–18 (1911); WALTER J. BLUM & HARRY KALVEN, JR., *THE UNEASY CASE FOR PROGRESSIVE TAXATION* 6–12 (1953); ALAN P. GRIMES, *DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION* 66–74 (1978); and Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 28–32, 39–40 (1999). Here, as elsewhere, I stress the public meaning of a constitutional text, not the private intent or subjective motivation of individual legislators.

continued to oppose redistribution for another generation.<sup>152</sup> (And let us not forget the Court's implausible pro-property ruling in *Pollock*,<sup>153</sup> the case that made the Sixteenth Amendment necessary.) Despite an explicit Amendment designed to give Congress sweeping power to eliminate slavery and slave-like labor conditions, as well as a Founding clause empowering Congress to regulate goods crossing state lines, the Court also prevented the federal government from restricting interstate shipment of the fruits of exploitative child labor.<sup>154</sup> Criminal procedure rules of this era also reflected class bias, benefiting many rich defendants, even when guilty, while slighting the problems of poor defendants, even when innocent.<sup>155</sup>

Once again it is useful to imagine what a truly democracy-loving Court, willing to stretch the document in different ways, might have done instead. Imagine a lawsuit brought in, say, 1915, demanding general woman suffrage on the ground that recent enfranchisements in various states had demonstrated women's obvious political capacity, and that the failure of other states to follow suit violated deep principles of republican government and popular sovereignty, construed in light of later constitutional and factual developments. It is difficult to imagine the *Lochner*-era Court accepting this theory; yet this very same Court embraced many anti-democracy and pro-property claims that were far more outlandish from a documentarian perspective.<sup>156</sup>

<sup>152</sup> For example, see the post-Sixteenth Amendment case of *Coppage v. Kansas*, 236 U.S. 1 (1915), in which the Court sharply condemned legislative efforts to level "inequalities of fortune." *Id.* at 17–18.

<sup>153</sup> *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895). The *Pollock* Court held certain income taxes to be "direct" taxes, despite a wealth of documentary evidence to the contrary. The first Justice Harlan dissented, along with three other Justices. For a general discussion, see Ackerman, *supra* note 151.

<sup>154</sup> See *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922). Like the *Lochner-Coppage* line of cases, see *supra* note 127, *Hammer* condemned government efforts to "equalize" economic inequalities — here, the "economic advantage" that some states might enjoy over others. *Hammer*, 247 U.S. at 273. On the relevance of the Thirteenth Amendment to exploitative forms of child labor, an early opinion authored by anti-slavery crusader and Chief Justice Salmon P. Chase is highly instructive. See *In re Turner*, 24 F. Cas. 337 (C.C.D. Md. 1867) (No. 14,247) (invalidating a coercive apprenticeship). The 1874 Padrone statute designed to prevent various forms of child exploitation under the Thirteenth Amendment is also important. Act of June 23, 1874, ch. 464, 18 Stat. 251 (codified as amended at 18 U.S.C. § 1584 (1994)). *But see* Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5, 42–43 (1988) (defending *Hammer*).

<sup>155</sup> For a perceptive explanation of the links between *Lochner* and criminal procedure cases like *Boyd v. United States*, 116 U.S. 616 (1886), and *Counselman v. Hitchcock*, 142 U.S. 547 (1892), see William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 419–33 (1995). For a critique of the documentarian basis of these decisions, see AMAR, CRIMINAL PROCEDURE, *supra* note 131, at 22–25, 46–88.

<sup>156</sup> Granted, creditors lost in two important *Lochner*-era cases, but neither marked a major deviation from the document. In the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871), the Court's ultimate decision to allow federal paper money seems highly defensible. The Constitution nowhere



3. *The Modern Era.* — The story of modern Court doctrine is less bleak. But this is not, as the standard doctrinalist account might run, because a sensible Court finally began to break free from a generally reactionary document. Rather, it is largely because doctrine in many areas moved closer to a generally enlightened document. Abolishing Jim Crow at both state and federal levels, incorporating the Bill of Rights against states, outlawing entrenched antidemocratic malapportionments, shielding political dissenters, guaranteeing criminal defendants (including indigents) fair and equal courtroom procedures, affirming the status of women as equal citizens, protecting the rights of all Americans to vote and serve on juries as democratic equals — all these developments have deep roots in the People's amended Constitution.<sup>157</sup>

Indeed, to accomplish many of these goals, the Justices were obliged not to follow precedent, as good doctrinalists synthesizing past judicial pronouncements, but rather to repudiate precedent (even if the Court often did so *sotto voce*). In the 1960s alone, for example, the Court explicitly overruled about thirty constitutional cases, compared to about twenty overrulings in the entire period from 1789 to 1936, and another twenty or so overrulings between 1937 and 1949.<sup>158</sup>

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forbids federal paper money, in obvious contrast to its rules prohibiting states from coining money, emitting bills of credit, or making anything other than gold or silver coin legal tender for debts. U.S. CONST. art. I, § 10. The document explicitly empowers Congress to coin money, without limitation on the kind of metal or material it may use, in obvious contrast to the rules about "silver" and "gold" binding states. *Id.* art. I, § 8, cl. 5. If Congress can coin copper money, as it began doing in the early 1790s, why not paper money? Nowhere does the Constitution demand that federal coins be worth their weight in precious metal, and such a rule would be hard to maintain in practice. Indeed, Congress is explicitly empowered to "regulate the [v]alue" of its money. *Id.* If Congress may use a small amount of silver for a coin bearing a large denomination, how is paper money decisively different? Note that in order to reach a sound documentarian result, and one that avoided widespread financial upheaval, the Court was obliged to overrule itself, and renounce the overly exuberant pro-creditor precedent of *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870). Note also that this issue is largely moot today. The *Hepburn* Court objected to the use of paper money as legal tender for preexisting debts; nowadays all business dealings presuppose paper money as valid tender.

The Court's decision to uphold a state mortgage moratorium in the middle of the Depression also seems defensible on documentarian grounds. On the unique facts of *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), the Court held that the affected creditors as a group plausibly benefited from the moratorium and, therefore, the law was not an impermissible effort to redistribute from creditors to debtors in violation of the Contract Clause. *Id.* at 442, 446. For more discussion of this reading of *Blaisdell*, see BREST ET AL., *supra* note 68, at 425.

<sup>157</sup> Doctrinalists might proclaim William Brennan the lead architect of this new constitutional edifice; but I would nominate the great documentarian Hugo Black, whose opinions in the 1940s and 1950s laid the intellectual foundations for the 1960s revolution.

<sup>158</sup> Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 app. at 147-59 (1991). The Warren Court's frequent repudiation of precedent was widely noted at the time, and often sharply condemned. See, e.g., Phillip B. Kurland, *The Supreme Court, 1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government"*, 78 HARV. L. REV. 143, 163-65, 170 (1964).

But even when the modern Court has reached sound results, it has often given suspect reasons. In *Griswold v. Connecticut*,<sup>159</sup> for example, the Court outlandishly listed the Fifth Amendment right against compelled self-incrimination as one of several fonts of constitutionally protected privacy.<sup>160</sup> Yet this Amendment allows the government to compel even the most private and embarrassing of disclosures, and to broadcast those disclosures to the world, so long as the witness receives a certain kind of immunity in any subsequent criminal prosecution.<sup>161</sup> (Anyone doubting this should ask Monica Lewinsky.) The Court's misstep was nonetheless telling: Doctrine has read the Self-Incrimination Clause far too broadly and has slighted the constitutional language closest, etymologically and conceptually, to privacy — namely, the Fourteenth Amendment language of “privileges or immunities.”<sup>162</sup> Wholly apart from privacy, women's equality would have furnished an apt alternative basis for *Griswold*. The anti-contraception law in question was adopted before women had the vote, and imposed serious risks on women — risks of unwanted pregnancy — that men did not bear. Indeed, the law specifically exempted contraceptive devices designed to prevent venereal disease. A condom was okay (as it might protect the man from unwanted infection), but a diaphragm was not (as it would only protect the woman from unwanted pregnancy). Thus, men could shield themselves from future *disease*, but women could not equally shield themselves from future *dis-ease*. (Pregnancy and childbirth are not exactly *easy*.) The law entrenched traditional gender roles, implicitly treating women as baby machines and using their unique biology as a basis for legal disadvantage. Yet none of the Justices saw the gender issue. No women then sat on the Court, and even as late as the 1960s, there was little in doctrine to affirm women's rights, and much in doctrine that trivialized women's rights. For example, women still did not serve equally on juries, half a century after the suffrage amendment had promised them equal political rights.<sup>163</sup>

<sup>159</sup> 381 U.S. 479 (1965).

<sup>160</sup> *Id.* at 484–85.

<sup>161</sup> The question is exactly what sort of immunity? For an extended analysis, see AMAR, CRIMINAL PROCEDURE, *supra* note 131, at 46–88, arguing for narrow testimonial immunity. *But see* *United States v. Hubbell*, 120 S. Ct. 2037 (2000) (embracing broader notions of immunity). Note that other constitutional provisions, such as the Fourth Amendment, may protect privacy in these contexts even though the Fifth Amendment does not.

<sup>162</sup> On the overreading of the Self-Incrimination Clause, see AMAR, CRIMINAL PROCEDURE, *supra* note 131, at 46–88; on the underreading of the Privileges or Immunities Clause, see above at note 44 and p. 71.

<sup>163</sup> *See Hoyt v. Florida*, 368 U.S. 57 (1961); *see also Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873); *Breedlove v. Suttles*, 302 U.S. 277 (1937); *Goesaert v. Cleary*, 335 U.S. 464 (1948). “[U]ntil 1971, the Supreme Court had never invalidated a state or local law that differentiated on the basis of sex.” William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword*:

Later cases like *Roe*<sup>164</sup> compounded *Griswold*'s error, labeling abortion a privacy issue — thereby trivializing the moral status of the fetus — rather than a question of women's equality.<sup>165</sup> Granted, seeing abortion laws through the prism of women's equality does not answer every question in this agonizing area, and committed documentarians may disagree about exactly how far a women's equality approach can take us.<sup>166</sup> But an equality discourse would have been more legally honest and morally sensible than what the Court gave us in its opinion. On the facts of *Roe* itself, an equality approach would have noticed that, as in *Griswold*, the Court had before it a sex-based law predating women's suffrage, a law that restricted women's choices but had not earned women's votes. Rather than rushing to constitutionalize a trimester framework that may not be the most sensible solution for all time, a sounder — more democratic, less hubristic — approach would have identified the issue of women's equality and remanded abortion to a political process in which women's voices and votes would count equally.<sup>167</sup>

Other areas where modern doctrine has diverged from the document also attest to the superior wisdom of the document. We have al-

*Law as Equilibrium*, 108 HARV. L. REV. 26, 54 (1994). For good discussions of "the woman question" in the twentieth century, see LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES (1998); and Siegel, *supra* note 81.

<sup>164</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>165</sup> *Roe* does offer textual reasons for not treating the unborn as "persons" within the meaning of the Constitution. *Id.* at 157–58. But even nonpersons may have interests deserving legal protection. A pet dog is not a person, yet the law may protect it from cruelty; we do not view this purely as a question of the owner's "privacy."

<sup>166</sup> Compare John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (sharply criticizing *Roe*), with Guido Calabresi, *The Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 95–96, 146–48 (1991) (identifying various equality issues raised by the abortion debate), Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1308–24 (1991) (elaborating an egalitarian defense of abortion rights), Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) (tracing the gendered roots of anti-abortion laws), and Reva B. Siegel, *Abortion as a Sex Equality Right: Its Basis in Feminist Theory*, in MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 43–72 (Martha Alberton Fineman & Isabel Karpin eds., 1995) (cataloguing arguments for an abortion right based on women's equality).

<sup>167</sup> As the Court's most recent struggle with the abortion issue makes clear, a remand would hardly have ended the issue; and so we shall revisit this vexing question. See *infra* section II.B, pp. 109–14. Note that some documentarians might be tempted to read the Nineteenth Amendment more narrowly, insisting that if women disagree with nineteenth-century laws that place special burdens on their sex, they must get these laws repealed. But:

To put on the group affected the burden of using its recently unblocked access to get the offending law repealed would be to place in their path an additional hurdle that the rest of us do not have to contend with in order to protect ourselves — hardly an appropriate response to the realization that they have been unfairly treated in the past.

ELY, *supra* note 2, at 169 n.\*. See also *supra* note 73.

ready noted the current Court's odd approach to voting districts designed to integrate legislatures;<sup>168</sup> its approach to regulatory takings likewise seems troubling — driven, perhaps, more by hostility to environmental regulation than by anything fairly implicit in the document itself.<sup>169</sup> So too, modern standing doctrine has become a font of antidocumentary hostility to the legislative creation of new kinds of rights, especially in the environmental area.<sup>170</sup>

Consider next the cluster of constitutional issues raised by the independent counsel statute. Had the Court followed the document rather than inventing its own rules in *Morrison v. Olson*,<sup>171</sup> grand inquisitors picked by judges in secret proceedings and accountable to no one would not have run amok over the last two decades, at great expense to our political system. In short, the document's rules had much wisdom packed within them that the Court breezily ignored.

Likewise, the document's treatment of criminal procedure seems wiser than modern doctrine's treatment. As exemplified by modern cases like *Mapp*<sup>172</sup> and *Massiah*,<sup>173</sup> Court doctrine has spawned rules that are too dismissive of the role of truth in criminal proceedings. The tilt toward guilty defendants has often occurred at the expense of innocent defendants, and of crime victims — themselves disproportionately poor, black, and female.<sup>174</sup> While giving too much aid and comfort to the guilty, the Court gives too little assistance to innocent indigents with bad lawyers. Several cases from last Term confirm that criminal procedure doctrine remains resistant to the superior wisdom of the document and the sound instincts of ordinary Americans.<sup>175</sup>

<sup>168</sup> See *supra* p. 66.

<sup>169</sup> See, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). For criticism of these cases, see BREST ET AL., *supra* note 68, at 458–60.

<sup>170</sup> See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). For trenchant criticism, see Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992). See also William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988) (setting forth a sound documentarian framework); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 472–90 (1996) (similar). The current Court continues to cite and follow *Lujan*. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC)*, 120 S. Ct. 693, 704–08 (2000); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 120 S. Ct. 1858, 1861–65 (2000).

<sup>171</sup> 487 U.S. 654 (1988). For criticism of *Olson*, see Amar, *Intratextualism*, *supra* note 17, at 802–12. See also Akhil Reed Amar, *Nixon's Shadow*, 83 MINN. L. REV. 1405 (1999); Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 291–300 (1999).

<sup>172</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961) (imposing the exclusionary rule on states).

<sup>173</sup> *Massiah v. United States*, 377 U.S. 201 (1964) (excluding reliable evidence obtained wholly without coercion or documentarian impropriety from a post-indictment defendant bragging about his crimes while free on bail).

<sup>174</sup> For a detailed elaboration of these sweeping claims, see AMAR, *CRIMINAL PROCEDURE*, *supra* note 131.

<sup>175</sup> See *infra* section II.A.1–2, pp. 90–102.

Sovereign immunity is another area where what the document says seems far more attractive than what modern doctrine says. According to the document, the People are sovereign and governments are limited. According to modern doctrine, reiterated again this year, governments are sovereign and sovereignty means being able to violate the constitutional rights of small fry without making them whole.<sup>176</sup>

Finally, consider issues of church and state. Modern Establishment Clause case law has often required governmental discrimination against religion, discrimination both offensive to deep ideas of equality and wholly unsupported by the document. Here, the recent Term gives a glimmer of hope — six Justices agreed to overrule two of the most egregious anti-religion precedents<sup>177</sup> — but the Court has yet to squarely commit itself to a governing ideal of religious equality, an ideal that does justice to both the document and American political morality.

In sum, in domains where the doctrine has diverged from the document, the document is often more normatively attractive. This is not always the case. The preceding history lesson has highlighted one side of the story in order to counterbalance the widely held (but rarely detailed) view that the Court has in general been better than the Constitution. There are indeed places where the Constitution has been, and remains, deeply flawed. Even in these places, however, Court doctrine has not always been better.<sup>178</sup>

#### D. *Precedent's Proper Place*

What, then, is the proper role for judicial doctrine? A thoroughgoing commitment to the document would leave vast space for judicial doctrine, but doctrine would ultimately remain subordinate to the document itself. Case law would work to concretize the Constitution, not to amend or eclipse it.

<sup>176</sup> See *infra* section II.C, pp. 114–18.

<sup>177</sup> See *Mitchell v. Helms*, 120 S. Ct. 2530, 2532 (2000) (overruling *Meek v. Pittenger*, 421 U.S. 349 (1975); and *Wolman v. Walter*, 433 U.S. 229 (1977)). For a discussion of *Mitchell*, see section II.D below at pp. 118–21.

<sup>178</sup> For those of us who are troubled by America's widespread use of capital punishment in cases lacking incontrovertible proof of guilt or when strong mitigating factors may exist, there was a brief moment when doctrine outshone the document, prohibiting a form of punishment that was not clearly "unusual" within the meaning of the Eighth Amendment. See *Furman v. Georgia*, 408 U.S. 238 (1972). Whether doctrine today is much better than the document on this issue is another question.

Other examples of documentary defects might include the ongoing disfranchisement of residents of the District of Columbia, the gross malapportionment of the Senate, and the inherent glitches of the electoral college system. But doctrine has not been especially robust in erasing these particular patches of text. For a general catalogue of documentary flaws, see CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, *supra* note 45.

Article III proclaims that the Constitution is to be enforced as justiciable law in ordinary lawsuits.<sup>179</sup> The document thus envisions that in deciding cases arising under it, judges will offer interpretations of its meaning, give reasons for those interpretations, develop mediating principles, and craft implementing frameworks enabling the document to work as in-court law. These interpretations, reasons, principles, and frameworks are, in a word, doctrine.

Because the document does not and cannot properly partake of the prolixity of a legal code, doctrine helps fill in the gaps, translating the Constitution's broad dictates into law that works *in court*, in keeping with the vision of Article III. For example, the Fourth Amendment's central command is that all searches and seizures must be reasonable.<sup>180</sup> A close look at the Amendment can help identify some of the dimensions of constitutional reasonableness. Thus, the need for special sensitivity to values of bodily autonomy, privacy, and free expression can be teased out of the Amendment's explicit mention of "persons, houses, [and] papers" above all other "effects." (Searches and seizures of one's "person" raise unique issues of bodily integrity, dignity, and liberty; "houses" are the most private of all buildings; and governmental rifling through "papers" implicates censorship issues.) Other parts of the document can help identify additional aspects of holistic constitutional reasonableness — nondiscrimination, property-protection, democratic authorization, and so on. A careful look at text, history, and structure will also make clear that the Amendment does not (nor could it, sensibly) require warrants for all searches and seizures. The ultimate constitutional test is reasonableness, not warrants. But even after judges have derived as much meaning as possible from the document, they will be faced with a broad outline leaving a vast number of details unspecified. In making "reasonableness" a concept workable in court, how much should be decided case by case, and how much should be specified by bright-line rules? If certain institutions (say, police departments) pose distinct threats to Fourth Amendment values, should special rules be crafted to address these institutions? If so, what should these rules look like? And so on. Many of the issues here call for strategic, pragmatic, empiric, institutional, and second-

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<sup>179</sup> U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . ."). See generally Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 449–50, 472–82, 489–504, 523–32 (1994) (linking this clause to the need for judicial exposition and elaboration of federal law).

<sup>180</sup> U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."). For more general discussion of this Amendment, elaborating some of my claims in this paragraph, see AMAR, *CRIMINAL PROCEDURE*, *supra* note 131, at 1–45; and AMAR, *BILL OF RIGHTS*, *supra* note 17, at 64–80, 267–68.

best judgments as to which the document gives rather little specific guidance.<sup>181</sup> Judicial doctrines, working alongside rules laid down and practices built up by other branches, properly fill in the document's outline, making broad principles workably specific in a court and in the world.

Free speech provides another example of the large role for doctrine even under a strict documentarian regime. A proper understanding of the document gives us some clear paradigm cases of the kinds of speech that must be protected and the sorts of laws that cannot stand. But exactly how far should these paradigm cases be extended by analogy? How should judges treat cases involving a mixture of expression and conduct? Even if judges properly agree that political speech ranks higher than purely literary speech, which in turn ranks higher than corporate commercial speech, exactly how should doctrine reflect this documentarian ranking in a world where the lines between these forms of speech are often blurred? A documentarian judge does not begin and end with the document. Rather, she begins with the document and then ponders how best to translate its wisdom into workable in-court rules, as contemplated by Article III.

Article III authorizes these doctrinal decisions to be made by "one supreme Court," which presides over various "inferior" federal courts and state courts in federal question cases.<sup>182</sup> The document's import is that "inferior" courts should generally be bound by the interpretations, reasons, mediating principles, and implementing frameworks — the doctrine — of the "[S]upreme" Court. This is so even if lower courts think that the higher court is wrong about the meaning of the document. Lower courts are free to say that the high court has erred, and to offer their reasons for so believing, but disagreement does not justify a general right of disobedience; an inferior may tell his boss that she is wrong, but must nevertheless follow her instructions.<sup>183</sup>

What weight should erroneous Supreme Court doctrine carry in the Court itself? If the current Court now believes that a past decision

<sup>181</sup> Several recent Forewords have made this point well. See, e.g., Fallon, *supra* note 3; Dorf, *supra* note 43; see also Strauss, *supra* note 3.

<sup>182</sup> U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in [various] inferior Courts . . ."); *id.* art. III, § 2 (specifying that in "all Cases . . . arising under this Constitution" the "supreme Court shall have appellate Jurisdiction" subject to congressional exceptions and regulations); see also *id.* art. I, § 8, cls. 1, 9 ("Congress shall have Power To . . . constitute Tribunals inferior to the supreme Court"). For a thoughtful general analysis, see Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

<sup>183</sup> To put the point textually, although Congress may make exceptions to the Supreme Court's appellate jurisdiction, it may not make exceptions to the Supreme Court's supremacy itself, vis-à-vis other courts, in federal question cases. Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 828–37 (1994).

misconstrued the document, should this belief be *prima facie* grounds for overruling the past decision? If so, what might overcome this *prima facie* showing? In seeking to answer these hard questions, a documentarian should begin — where else? — with the document itself. Though it does not provide all the details, here too it gives us the broad outlines of the proper approach.

Article III envisions the Court as a continuous body. The Court never automatically turns over, as the House turns over every two years and the Presidency every four. A continuing body would seem intentionally structured so as to give some weight to its past and some thought to its future. It does not invent itself anew each day. Given the Court's clear constitutional design, it seems permissible for the Court to give its past decisions a rebuttable presumption of correctness. A past case may properly control until proved wrong, with those challenging it saddled with the burden of proof. Furthermore, a Justice may rightly give a precedent epistemic weight in deciding whether the burden is met. Even if her first reaction is that the precedent is wrongly decided as a documentarian matter, the very fact of the prior decision may persuade her that her first reaction is mistaken: "If John Marshall and his brethren thought *X*, perhaps *X* is right after all, despite initial appearances to the contrary." (For similar reasons, a deferential Justice might choose to give Congress, a coequal branch, the benefit of the doubt in certain cases.) The precise epistemic weight of a past case will vary. Not all Justices are John Marshall, and it may be relevant that a particularly sound Justice dissented in the allegedly erroneous case. Sometimes, a later Court will find wisdom in certain language of a past case even if its result seems wrong on the facts. Other times, its fact-specific result may distill great wisdom even if its language, on reflection, does not persuade. Both as a default rule and as an epistemic weight, a prior Supreme Court case counts for much more than, say, a typical law review article or lower court opinion.

But should it count for even more? Should the Court generally feel permitted or bound to follow a past case even after it has been shown to reflect an erroneous understanding of the document? The Rehnquist Court has been moving, in fits and starts, in the direction of insulating even erroneous cases from plenary reconsideration. In 1992, the majority in *Planned Parenthood v. Casey*<sup>184</sup> proclaimed that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."<sup>185</sup> Asserting that such a view had been "repeated in our cases," the Court oddly cited

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<sup>184</sup> 505 U.S. 833 (1992).

<sup>185</sup> *Id.* at 864.



two dissents (neither of which was squarely on point),<sup>186</sup> leaving the careful reader with a sneaking suspicion that perhaps this view was not well established in pre-*Casey* case law. Indeed, a glance at earlier doctrine reveals quite a few prominent overrulings based simply on the belief that the prior case was wrongly decided.<sup>187</sup> But the current Court seems to think that some special justification beyond mere error is generally required.<sup>188</sup> For the *Casey* majority, it was unclear that even egregious documentarian error would constitute special justification;<sup>189</sup> instead *Casey* and later Rehnquist Court opinions have generally sought special justification elsewhere — for example, in the general unworkability of a precedent (as made clear by subsequent experience), in its inconsistency with other cases decided before it or after it, or in its incompatibility with later factual developments. These grounds for overruling tend to submerge the document and privilege the doctrine: A case may be tossed out if it does not fit well with the other cases, but may be retained if it simply does not fit well with the document. The result is a vision of constitutional law more Court-centered than Constitution-centered, a vision strikingly vivid in *Casey* itself. Indeed, several of the current Court's special justifications identify situations in which the Justices can downplay admission of past error: The past case was perhaps sensible when decided, but has been eclipsed by later legal and factual developments that could not have been perfectly foreseen.<sup>190</sup> Alongside a stronger commitment to even erroneous precedent, the Rehnquist Court has also been fond

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<sup>186</sup> *Id.* (citing *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting); and *Mapp v. Ohio*, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting)). The Stewart dissent focused only on overrulings linked to changing Court membership; and the Harlan dissent merely urged full briefing and argument before overruling, stressing the unwisdom of overruling based on a contrary "disposition" as opposed to a settled and deliberately reached sense of prior error.

<sup>187</sup> See *supra* note 28. See also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16–17, 31 (1959) (arguing that Court precedents should depend wholly on the force of their intrinsic persuasiveness, and embracing "the long tradition of the Court that previous decisions must be subject to reexamination when a case against their reasoning is made").

<sup>188</sup> See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200, 231 (1995); *United States v. IBM Corp.*, 517 U.S. 843, 856 (1996); *Agostini v. Felton*, 521 U.S. 203, 235–36 (1997); *Dickerson v. United States*, 120 S. Ct. 2326, 2336 (2000).

<sup>189</sup> Compare *Casey*, 505 U.S. at 854 (asserting that "if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed" then overruling would become a "necessity"), with *id.* at 982–83 (Scalia, J., concurring in the judgment in part and dissenting in part) (noting that in the majority's "exhaustive discussion" of when precedent should be overruled, the majority never asks "how wrong was the decision on its face?" (internal quotation marks omitted)). Cf. *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 653 (2000) (Stevens, J., dissenting in part and concurring in part, joined by Souter, Ginsburg, and Breyer, JJ.) (arguing that "the reasoning of [an earlier precedent] is so profoundly mistaken and so fundamentally inconsistent with the Framers' conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court").

<sup>190</sup> For a classic analysis, see Jerold H. Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 219–29, 242–70.

of sweeping assertions of judicial supremacy, regularly proclaiming itself the Constitution's "ultimate" interpreter,<sup>191</sup> a self-description that nowhere appears in *Marbury* and never appeared in the *United States Reports* until the second half of the twentieth century.

These developments should worry documentarians. To see why, imagine an even stronger view of the binding character of erroneous precedent than anything that the Court has yet put forth. The work of Professors Strauss and Ackerman may help give us a Maximalist Model of precedent. Strauss contends that most constitutional law today is a kind of common law.<sup>192</sup> If so, why can't this law properly evolve away from the document, just as ordinary common law evolves? Ackerman has yet to develop fully his theory of precedent, but the first two volumes of his grand trilogy suggest an exceedingly robust view.<sup>193</sup> Even if, say, *Plessy* were wrongly decided, Ackerman seems to hold that it should not have been overruled absent a formal constitutional amendment or informal amendment-equivalent. So too with the pro-property and anti-regulation precedents of the *Lochner* era. Even if the Court ultimately deemed these decisions erroneous on documentarian grounds, Ackerman implies that they must bind later judges unless and until We the People overrule the error. In general, Ackerman treats the repudiation of certain important precedents, even erroneous precedents, as a kind of constitutional amendment requiring special popular consent, rather than as a proper restoration of original meaning requiring only judicial confession of error.

A close look at the document suggests the implausibility of this Maximalist Model of precedent. If judges generally felt free (or obliged!) to follow erroneous case law, the Constitution might ultimately be wholly eclipsed. Rather than simply filling the Constitution's gaps, judicial doctrine would erase its outlines. If the document indeed contemplated this momentous and odd result, one would expect to see a rather clear statement to that effect: "This Constitution may be wholly superseded by conceded judicial misinterpretations; all branches are oath-bound to follow these misinterpretations." But the Constitution says nothing of the sort. On the contrary, it explicitly obliges all officials to swear oaths to the document, not to conceded misinterpretations of it. The Constitution establishes a system of coordinate powers. If neither the legislature nor the executive may unilaterally change the document's meaning, why may the judiciary? The Constitution details elaborate checks and balances. If conceded misin-

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<sup>191</sup> See, e.g., *Nixon v. United States*, 506 U.S. 224, 238 (1993); *Miller v. Johnson*, 515 U.S. 900, 922 (1995); *United States v. Morrison*, 120 S. Ct. 1740, 1753 n.7 (2000).

<sup>192</sup> See Strauss, *supra* note 3.

<sup>193</sup> See 1 ACKERMAN, *supra* note 8, at 53, 65 & n.\*, 145-46; 2 ACKERMAN, *supra* note 75, at 381, 389-403.

terpretations become the supreme law of the land, what checks adequately limit judicial self-aggrandizement? Prior to the Constitution's ratification, none of its leading friends put forth anything like the Maximalist Model. Moreover, some judicial misinterpretations generate considerable political resistance. To treat such misinterpretations as the equivalent of proper amendments warps the basic structure of the document, which contemplates that what We the People have deliberately laid down cannot be changed except by a later amendment reflecting broad consensus of the People. If, as *Marbury* observed, the acts of constitution and amendment require great popular exertion that cannot be expected to occur routinely, it seems perverse to insist that We the People must repeat what We said whenever judges garble what We said the first time. Thus, the foregoing reading of the document nicely coheres with what John Marshall and his brethren said in a case of no small epistemic or doctrinal significance.

Simply put, the basic structural argument against the Maximalist Model of precedent is that *Marbury*-style judicial review presupposes that judges are enforcing the People's document, not their own deviations. Departures from the document — amendments — are to come from the People, not from the High Court. Otherwise we are left with constitutionalism without the Constitution, popular sovereignty without the People. This basic structural argument also helps us see what is wrong with the emerging judicial supremacy vision on the current Court. The Justices present themselves as “the ultimate interpreters” of the document, disdainful of the wisdom of other branches<sup>194</sup> yet often unwilling to subject their own past errors to candid scrutiny. *Casey*'s assertions are breathtakingly imperial: “The root of American governmental power” is the power conferred “upon this Court.”<sup>195</sup> (I would have thought the root was popular sovereignty.) Confessions that a “prior decision was wrong” should be kept to a minimum in order to maintain the Court's status.<sup>196</sup> (I would hope incorrect interpretations of the Constitution are also to be minimized.) Americans' belief in ourselves as a “people who aspire to live according to the rule of law” is inseparable from our belief in the Court.<sup>197</sup> (Don't Americans also believe in the Constitution itself, and mightn't we want to know if past cases have misconstrued it?)

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<sup>194</sup> In the last five years, the Court has struck down acts of Congress in twenty-four cases. Warren Richey, *New Era of Supremacy?*, CHRISTIAN SCI. MONITOR, July 3, 2000, at 1. By this measure, the Rehnquist Court is far more “activist” than any Court in history, including the Warren Court. Most egregiously, whereas the Warren Court regularly upheld congressional civil rights laws, the Rehnquist Court regularly invalidates them.

<sup>195</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992).

<sup>196</sup> *Id.* at 866.

<sup>197</sup> *Id.* at 868.

Does a documentarian view, then, require that erroneous precedents always be tossed aside and treated as nullities? No. The guiding structural principle may be stated as follows. Once We the People have struggled to put something in the document, it should not be altered except by the People themselves; erroneous precedents may stand if they have in effect been ratified not merely by the Court, but also by the People.

There are several circumstances in which public ratification can justify the Court in permitting an erroneous precedent to stand. First, recall the *Prigg* case.<sup>198</sup> Even if *Prigg's* view of sweeping congressional power under less-than-clear constitutional clauses were later deemed erroneous, surely the People in Reconstruction were entitled to rely on this precedent,<sup>199</sup> and to have that reliance respected when amending the document. At least insofar as the Reconstruction Amendments are concerned, the People ratified *Prigg's* view of broad federal power. Thus, the 1883 Court was wrong to change the basic interpretive ground rules *ex post facto*. In other words, assume that *Prigg* was wrong and that the 1883 Court was prepared to confess error and overrule *Prigg* on its facts (a moot point in 1883 — no fugitive slaves existed); even so, the Court could not properly use this new-found narrow view of congressional power to limit the Reconstruction Amendments.

Now consider cases not where Americans amended the document in reliance on precedent, but where Americans *declined* to amend in reliance on precedent. When the citizenry has widely and enthusiastically embraced an erroneous precedent, when even most initial skeptics have deemed it fundamental and admirable, it is sensible — and consistent with the document's emphasis on popular sovereignty — to view this precedent as sufficiently ratified by the American People so as to insulate it from judicial overruling. For example, even if *Brown's* documentarian credentials were doubtful, the American People came to embrace — to celebrate — this case in the late twentieth century. (Are there any prominent leaders today who oppose it?) Although the counterfactual cannot be proved with absolute certainty, if *Brown* were not already on the books, wouldn't We the People have explicitly inscribed its basic rule in the document alongside the other

<sup>198</sup> *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). For discussion, see above at pp. 69–70.

<sup>199</sup> And they did so rely. See CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866) (remarks of Rep. James F. Wilson); *id.* at 1836 (remarks of Rep. William Lawrence); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 78 n.124 (1993). For an analytically similar, if factually doubtful, suggestion that the Seventeenth Amendment may have reflected reliance on extant, if erroneous, Eleventh Amendment case law, see *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 30–35 (1989) (Scalia, J., concurring in part and dissenting in part).

inclusionary amendments of the late twentieth century?<sup>200</sup> Let us recall that blacks in many places finally got to vote and speak up during this era, after decades of massive disfranchisement and repression. White citizens and politicians could no longer refuse to heed these rising voices and votes. Consider also the Burger Court case law affirming women's equality. Had the Court not read this principle into the Constitution's existing equality language, would the Equal Rights Amendment have become far more urgent and likely prevailed? If so, even if this case law were deemed erroneous on documentarian grounds, it would be a kind of constitutional "harmless error."<sup>201</sup>

A third category of insulated precedent involves a different kind of reliance, not by the People with a capital We, but by litigants who come before the Court. Judicial power, by its nature, is retrospective; the Court applies law to transactions that have already occurred. Erroneous precedents create facts on the ground that properly influence the application of retrospective judicial power; these facts may in some cases limit the ability of the Court to abruptly change course, even if persuaded of past error. For example, even if the Court were tomorrow to deem erroneous its longstanding precedents upholding the constitutionality of paper money, surely the Justices could not ignore the vast economic system that has built up in reliance on paper. Erroneous precedents are not unique in this respect. Prior unconstitutional conduct of other branches may likewise create faits accomplis that courts cannot easily undo after the fact.<sup>202</sup> This feature of judicial underenforcement is built into the very structure of Article III, in which judicial review can sometimes occur long after certain practices have become settled and virtually impossible for courts to reverse.<sup>203</sup>

It is important to note, however, that this underenforcement may sometimes be unique to the judiciary. A prior erroneous ruling (unless ratified in the sense described above) does not properly amend the Constitution, and other branches of government may be able to return to a constitutionally proper regime by acting purely prospectively in a

<sup>200</sup> For a similar suggestion, see Klarman, *supra* note 38, at 814–15.

<sup>201</sup> This approach also helps explain the greater weight of *stare decisis* in statutory cases. Unlike the People, the legislature is regularly in session, busily enacting laws and declining to enact laws against the backdrop of judicial precedent; a much higher percentage of erroneous precedent might be thought to have been legislatively "ratified" by later actions and inactions.

<sup>202</sup> This fact is reflected in those prongs of the political question doctrine that speak of "an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 217 (1962). For a much earlier pronouncement, see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819). Note that this view of erroneous precedent tends to liken judicial errors to legislative and executive errors. The view is thus in keeping with a general vision of coordinate branches, and in opposition to the Maximalist Model. See *supra* pp. 83–84.

<sup>203</sup> James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135–36 (1893).

way that judges sometimes should not.<sup>204</sup> Imagine, for example, a statute proposing a gradual ten-year phase-in of a new regime. It is thus important for judges to tell us if they have indeed erred in the past so that the other branches may properly ponder their constitutionally permissible options.<sup>205</sup> Justices may not relish confessing error, but they have no proper warrant for refusing to do so when called to account. Notwithstanding recent self-serving pronouncements of judicial supremacy, other branches of government have important roles to play in constitutional conversation, and Court doctrine should not be confused with the Constitution itself. The Court's duty, then, is not, as *Casey* would have it, to affirm and extend precedent without deciding whether it is right or wrong. Rather, it is first to admit error whenever the Court finds that error has occurred, and then to consider whether special reliance factors apply and how those factors might limit the use of retrospective judicial power.

The foregoing view of precedent coheres with the classical Blackstonian conception that past judicial decisions are not themselves the law, but rather are good evidence of the law.<sup>206</sup> Thus, Justices may use past decisions as epistemic guides to the best meaning of the Constitution, subject to documentarian rebuttal. But a more straightforward approach would feature more regular and direct engagement with the document itself, probing and pondering its text, history, and structure. Steering mainly by the compass of precedent is a permissible practice, but is it truly the wisest? If the precedents have repeatedly misread the document over the last two centuries, wouldn't a wiser approach involve more frequent glances at the polestar document itself to prevent doctrine from drifting too far off course?

Yet several modern developments are conspiring to elevate doctrine over document. Even the most faithful documentarian must confront many issues on which the document is silent and the key issues are specified by doctrine. As doctrine becomes increasingly extensive and elaborate, it becomes easier to forget that all this exposition exists in subordinate relation to the document. Besides, Justices cannot be expected to constantly reinvent the wheel. For reasons of economy and vanity, they often begin thinking about a constitutional problem by

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<sup>204</sup> For a classic discussion, see Paul J. Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 60–62 (1965). For a more recent wrinkle, hypothesizing legislation with a delayed effective date, see Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1555 n.53 (2000).

<sup>205</sup> Cf. *United States v. Leon*, 468 U.S. 897, 925 (1984) (declaring that when definitive resolution of Fourth Amendment questions would inform law enforcement officials of the limits of their power, courts may properly decide these questions first before considering possibly dispositive issues of good faith immunity).

<sup>206</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*63–\*64, \*69–\*71.

considering what they or their colleagues have already said about it.<sup>207</sup> Most of the recent appointments to the Supreme Court have come from lower courts. A lower court judge's job is not to think directly about the Constitution, but rather to follow the dictates of the Supreme Court.<sup>208</sup> And so these judges typically come to the Court with a clearer sense of Supreme Court doctrine than of the Constitution itself. When they arrive on a Court whose more senior members are all talking doctrine, it is natural for the new appointees to do the same. In their first few years, they must take positions on a great range of issues they had not previously considered in detail — issues that their colleagues have long pondered — and they may naturally defer. Later in their tenure, they may have doubts about some of their early votes, but it is awkward to admit error.<sup>209</sup> As they mature, the doctrine increasingly comes to reflect their own contributions, and their self-love is thus bound up with it.<sup>210</sup>

If the Court privileges its own pronouncements, it behooves lawyers arguing before it to do so as well. Court decisions are news, and thus journalists, law professors, consultants, and others who seek to be relevant must master doctrinal discourse, even if there are better ways to analyze the issues. Prominent institutions in the legal academy, such as the *Supreme Court Review* and the annual Supreme Court issue of the *Harvard Law Review*, contribute to this focus on the Court and its latest doctrinal pronouncements as opposed to the Constitution itself and its enduring wisdom. (There is no annual issue of the *Harvard Law Review* devoted to the Constitution outside the Court.) Constitutional law casebooks are often edited by professors who began their careers as Supreme Court clerks, who maintain close ties to the Court, and who fantasize about being Justices. These casebooks highlight current case law — an economic boon to publishers who profit from supplements and new editions — but few give students an accurate picture of just how problematic Supreme Court doctrine has been

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<sup>207</sup> For similar reasons, law professors often rely heavily on their own past pronouncements and those of their colleagues and predecessors. For example, see this Foreword.

<sup>208</sup> See Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 847 (1993).

<sup>209</sup> For two admirable confessions this year, see *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1402–06 (2000) (Souter, J., concurring in part and dissenting in part); and *Apprendi v. New Jersey*, 120 S. Ct. 2348, 2379–80 (2000) (Thomas, J., concurring). Justice Souter's stylish confession would have been all the more admirable had his bottom line been more right the second time around. Alas, I have my doubts about whether nude dancing merits the kind of special constitutional solicitude that Justice Souter now proposes. See *supra* note 102. Justice Thomas's confession appeared in one of his most noteworthy opinions ever. See *infra* note 212.

<sup>210</sup> This stylized account may also explain why several of those who came to the Court with rather little judicial experience — Justices Black, Scalia, and Thomas, for example — have proved more disposed to the document than the doctrine. Associate Justice Rehnquist may also belong in this group, though Chief Justice Rehnquist does not.

over the last two centuries. For example, of the seven leading constitutional law casebooks published by Aspen, Foundation, and West, only one even mentions *Giles v. Harris* or the *Insular Cases*, or details the disgraceful law upheld in *Abelman v. Booth*, or has more than a page on *Prigg* or the Sedition Act of 1798, or more than five pages on *Dred Scott*.<sup>211</sup>

But how, precisely, might direct engagement with the document improve the Court's current decisionmaking? To what extent do other issues in today's headlines lend themselves to incisive documentarian analysis? To further test the claim that the document has much to offer more than two centuries after the Founding, let us turn, at last, to various case studies from the last twelve months.

## II. CASES AND CONTROVERSIES

The Term that just ended featured an extraordinary array of interesting constitutional decisions across a broad range of substantive issues — more significant statements and restatements, perhaps, than in any Term of the last decade. No single case or set of cases, however, towers above all others in significance. To do justice to a Term of this character, it seems best to tour several legal neighborhoods for some sense of the overall landscape. The seven cases I have selected for commentary are, I think, broadly representative of the current Court's output, though they are not a wholly random sample. Rather, I have tried to identify some of the cases in which documentarian and doctrinalist approaches diverge most clearly so that we may best compare their respective insights and consequences.<sup>212</sup>

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<sup>211</sup> Full disclosure: The casebook of which I speak is the one that I have used as a customer for fifteen years, and that I joined as a co-editor this year. See BREST ET AL., *supra* note 68. For discussion of *Giles* and the *Insular Cases*, see above at pp. 71–72; for discussion of *Abelman*, *Prigg*, and *Dred Scott*, see above at pp. 69–70.

<sup>212</sup> Several other cases are worth mentioning, if only briefly. In particular, *Dickerson v. United States*, 120 S. Ct. 2326 (2000), holding that *Miranda v. Arizona*, 384 U.S. 436 (1966), announced a constitutional rule that Congress may not supersede legislatively, exemplifies the current Court's extraordinary confidence in itself and its own precedents: The Great and Powerful Oz Has Spoken! See *Dickerson*, 120 S. Ct. at 2336. Even more noteworthy is *Apprendi*, 120 S. Ct. at 2348, which calls into question important aspects of judicial sentencing. The several opinions in *Apprendi* (especially Justice Thomas's ambitious concurrence) raise fascinating issues of method and substance. Indeed, the case is so rich that I simply pass over it today in the hopes of returning to it some other day. Many other cases from last Term are of great substantive significance but cast only indirect light on the methodological issues I seek to examine today. See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897 (2000) (campaign finance); *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000) (cigarette regulation); *Cal. Democratic Party v. Jones*, 120 S. Ct. 2402 (2000) (open primaries); *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000) (right of nonassociation).



### A. Violence Against Women

1. *A Curious Per Curiam.* — The 1999 Term started on a haunting note. In the first month of its session and its first significant opinion, the Court set aside the conviction of a man who murdered his wife.<sup>213</sup> The Court's holding drew little support from the document, and the way the Court announced its decision is also troubling — with no proper briefing, no chance for amici to weigh in, no public oral argument, no signed opinion, no more than a page of analysis, no careful consideration of counterarguments, no evidence of real collective deliberation, and no recorded dissents. It is the ultimate in Rehnquist Court efficiency. But to what end?

The uncontested facts were simple. James Michael Flippo and his wife Cheryl<sup>214</sup> were vacationing in an isolated cabin in a state park. Mr. Flippo called 911 to report that they had been attacked by an intruder wielding a log and a knife. When police arrived, they found Mrs. Flippo dead, her head covered with blood from an apparent bludgeoning. The police took Mr. Flippo to the hospital and proceeded to investigate the crime scene. They found an unlocked briefcase in the cabin and opened it. It contained photos that seemed to incriminate Mr. Flippo, photos that were ultimately introduced into evidence. A West Virginia jury found Mr. Flippo guilty of first-degree murder, and the state sentenced him to life imprisonment.

The Supreme Court, per curiam, reversed and remanded, reasoning as follows: A lawful search under the Fourth Amendment requires a warrant — except when it doesn't — and here the uncontested facts did not apparently qualify as a proper exception. In particular, the trial court made no factual finding that Mr. Flippo had somehow consented to the search of the briefcase and photos. (Actual consent would count as a proper exception to the warrant requirement.) Absent some special finding of this sort, the warrantless search was unconstitutional, and its fruits — the photos — should have been suppressed at trial regardless of their relevance and reliability. On remand, the trial court could sustain the conviction only by making additional factual findings (such as consent), or by determining that the photos clearly made no difference at trial and were thus harmless error. Otherwise, the conviction must be undone.

The *Flippo* case exemplifies how the Court has often taken a broadly acceptable constitutional text and turned it into dubious doc-

<sup>213</sup> *Flippo v. West Virginia*, 120 S. Ct. 7 (1999).

<sup>214</sup> The Supreme Court never tells us her name; nor does it ever get around to telling us about the conviction, the sentence, or the precise grade of the offense. For these and other facts, I have relied on the parties' briefs seeking and opposing certiorari.

trine.<sup>215</sup> The People's Fourth Amendment condemns unreasonable searches and seizures. Were the cops here unreasonable? Most citizens, I suspect, would say no; but the Court says yes (and without a recorded dissent). The People's Constitution contains nothing calling for the exclusion of reliable evidence. Most citizens, I think, shudder at the idea of springing a murderer and burying the evidence; but the Court blithely does just that (again, without dissent).

On this set of issues, the citizens seem wiser than the Justices. The text ratified by the People does not require warrants for all searches and seizures, nor would that be a sensible global requirement. As a matter of history, no one at the Founding — no Framer, no treatise writer, no judge — ever said that intrusions always require warrants. Arrests, for example, are obvious seizures of persons, yet they have never required warrants. Nor have searches incident to arrest, searches on the high seas, various inspection programs, border searches, or countless other intrusions. At the Founding, warrants were seen as dangerous devices in part because they immunized searchers from after-the-fact tort liability in trespass suits that searchees might otherwise have brought.

*Flippo* declared that the facts before the Court were squarely controlled by the 1978 case of *Mincey v. Arizona*.<sup>216</sup> *Mincey* in turn relied on earlier cases that simply misread the Fourth Amendment's text and history as requiring warrants.<sup>217</sup> *Mincey's* words, and the words of these earlier cases, should not be treated as gospel when proved erroneous. But epistemically, even if some of these cases' words should be discounted, their precise holdings on their facts may distill important insights. A precedent-sensitive documentarian might thus recast the cases as follows:

True, the text of the Amendment does not say that all intrusions require warrants, nor would that be a sensible global requirement. But police departments (which did not exist as such at the Founding) pose special threats in today's world, and these threats require special safeguards. Overzealous cops can overreact, with severe consequences for liberty, privacy, property, and equality. When a very intrusive and highly discretionary activity such as choosing to search a person's home is involved, we

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<sup>215</sup> Over the next several pages, I shall be making sweeping claims about constitutional meaning, claims that I have elsewhere tried to document in detail. See AMAR, CRIMINAL PROCEDURE, *supra* note 131; see also Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53 (1996) [hereinafter Amar, *Writs*]; Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097 (1998). This body of work has its critics, but I continue to stand by it. See *supra* note 88.

<sup>216</sup> 437 U.S. 385 (1978).

<sup>217</sup> *Id.* at 390 (citing, *inter alia*, *Trupiano v. United States*, 334 U.S. 699, 705 (1948)). For other cases rooting the warrant requirement in the alleged dictates of text and history, see Amar, *Writs*, *supra* note 215, at 73 n.81.

should generally, though not always, require the police to get preclearance from someone more detached like a magistrate or judge. Preclearance can help prevent police discrimination and abuse of discretion; it can also provide a record of what the police knew before the search. This fact-freezing makes it harder for cops to fabricate ex post rationalizations for their intrusions. In “exceptional” situations when there is a diminished risk of police abuse, or when there are strong reasons for bypassing preclearance, however, even warrantless intrusions may properly be upheld as reasonable.

Had the *Flippo* Court examined precedent from this more documentarian perspective, the Justices might have seen both *Mincey* and *Flippo* in a clearer light. *Mincey* on its facts was indeed a case of police overreaction. When ten cops tried to enter Mincey’s apartment in a drug bust, Mincey shot and killed one of them. The fallen officer’s comrades responded with a four-day search of the apartment, ripping up carpets and seizing hundreds of objects. There are obvious differences, as a matter of reasonableness, between *Mincey*’s facts and *Flippo*’s. *Flippo*’s search occurred not in his home, but in a cabin owned by the state, which surely had its own legitimate interests triggered by a murder on state grounds. In *Mincey*, the police had already nabbed the suspect; in *Flippo*, the police had been told that an unknown intruder had come and, for all the police knew, might soon return. Perhaps the intruder had been looking for something — maybe in the briefcase? — and the cops had good reason to search quickly before the trail went cold. In *Mincey*, the police themselves initiated the basic encounter (the drug bust); in *Flippo*, they were responding to a documented 911 call with a verbatim phone transcript of the facts as they knew them before they came on the scene. (Thus the facts were frozen and documented in far more detail than in a typical warrant.) Unlike the *Mincey* cops, the *Flippo* police were not overreacting to a fallen comrade or trashing a home. They were simply doing what most citizens would probably have wanted them to do.<sup>218</sup>

The state judge, who upheld the *Flippo* search in a terse paragraph, did not quite say all this, but the foregoing analysis is based on the uncontested facts of the case. Before reversing the lower court’s judgment, the Supreme Court should have explained why these uncontested facts did not suffice to uphold the decision below. Instead, the Justices brusquely reversed and remanded, seemingly of-

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<sup>218</sup> Midway between *Mincey*’s facts and *Flippo*’s are those of *Thompson v. Louisiana*, 469 U.S. 17 (1984) (per curiam), also decided without briefing or oral argument. To the extent that *Thompson* went beyond *Mincey*, my criticism of *Flippo* applies to *Thompson* too, but *Flippo* went well beyond even *Thompson*. *Flippo* cited *Thompson*, but the Justices, for good epistemic reasons, have insisted that “unargued summary dispositions” are not entitled to full precedential weight. See, e.g., *Parker v. Randolph*, 442 U.S. 62, 75–76 & n.8 (1979) (plurality opinion of Rehnquist, J.).

fended that “the trial court made no attempt to distinguish *Mincey*.”<sup>219</sup> Apparently, lower courts must not simply get it right, but must also talk Supreme Court talk.

What the trial court said, in its two-sentence paragraph, could be construed as suggesting that *Mincey* was wrongly decided. *Mincey* rejected a general “homicide crime scene” exception to the warrant requirement, and the trial judge might be read as embracing such a general exception. But a more charitable reading of the trial court’s common-sense ruling is that, on the facts of *this* homicide, a warrantless search was reasonable, even if warrantless searches might well be unreasonable in some other homicides (like the one in *Mincey*). Although the overall issue of reasonableness is not always clear-cut, and faithful documentarians will disagree in hard cases, there was I think more sense in the trial court’s instincts than the Supreme Court could admit when viewing the world only through the dark and twisted prism of warrant requirement doctrine.

The trial court’s approach aimed to bring the decedent into the Fourth Amendment frame. The Supreme Court, by contrast, failed to do this — indeed, it failed even to tell us her name.<sup>220</sup> If James Flippo’s consent would have made the search reasonable, as the Court admitted, what about Cheryl Flippo’s consent? She, too, had a lawful right to the premises (unlike, perhaps, the dead officer killed in *Mincey*’s apartment). Had she been able to whisper “avenge me” to the police before her life ended, would this have been enough? Might we infer her implied consent from her very body? These questions seem less outlandish when we recall that the key issue of consent here is not whether persons have waived their rights, but whether a search might be “reasonable” in light of all the signs and signals greeting the police.<sup>221</sup>

This brings us to the most troubling aspect of *Flippo*, namely the Court’s easy embrace of the exclusionary rule as the proper response to Fourth Amendment violations, even in cases of violent crime. Under this rule, crime victims are revictimized when those who hurt them walk free, grinning, because evidence is suppressed.<sup>222</sup> Nothing in the

<sup>219</sup> *Flippo v. West Virginia*, 120 S. Ct. 7, 8 (1999).

<sup>220</sup> *Supra* note 214; cf. Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 89–90 (1987) (calling upon judges to listen for and be moved by the voices of human beings and the stories of the silenced).

<sup>221</sup> The post-*Mincey* case *Illinois v. Rodriguez*, 497 U.S. 177 (1990), made this point clear, forthrightly recognizing that the ultimate Fourth Amendment touchstone is reasonableness, not warrants. *Id.* at 183–86.

<sup>222</sup> See Mary Jewell, Letter to the Editor, CHARLESTON DAILY MAIL, Oct. 23, 1999, at 5A (from the victim’s mother) (“I am appalled by the U.S. Supreme Court’s decision. This is very upsetting. It causes her family more pain and grief. . . . This whole situation is a nightmare, and now it starts all over again.”); Anita Jewell Pratt, Letter to the Editor, CHARLESTON DAILY MAIL, Oct. 25, 1999,

Constitution's text, history, or structure supports the exclusionary rule as the most plausible reading of the document. (Though there are many hard questions of interpretation, there are also easy ones.) The text nowhere calls for exclusion, and a close reading in fact reveals that it presupposes civil remedies for innocent searchees rather than criminal exclusions for guilty ones: it is tort law and property law that make us "secure in [our] persons, houses, papers, and effects." Historically, the Amendment built on prominent paradigm cases of civil damages; and no court in America, state or federal, ever excluded evidence on Fourth Amendment-like grounds for the first hundred years after independence. When exclusion eventually entered Court doctrine, it did so under an erroneous *Lochner*-era fusion of the Fourth Amendment and the Fifth Amendment's Self-Incrimination Clause, a fusion that has since been properly repudiated. Structurally, exclusion warps the general architecture of the Bill of Rights, several provisions of which were designed to ensure that truth will out at trials, even if defendants prefer otherwise. In short, nowhere does the Constitution embrace exclusion of this sort, and in several places the document actually attests to the importance of truth-seeking and reliability.<sup>223</sup>

What We the People have said in the document makes more sense than what the Justices have said in the doctrine. To the extent that the exclusionary rule is claimed to deter violations, it is a bad fit, and no wonder — it was originally designed by *Lochner*-era judges with entirely different goals in mind. (For example, it works only when cops find evidence, and thus offers no protection for a known innocent whom the cops seek to harass. It does nothing to cure police brutality and many other forms of unreasonable action that have no causal link to evidence-finding. It is not properly tailored to the actual scope of the violation, and it imposes direct and sometimes massive demoralization costs on faultless victims.) Other remedial systems, closely tracking the Founders' paradigm cases, can offer more effective deterrence at less social cost.<sup>224</sup>

Exclusion is also said merely to restore the status quo ante, to prevent government from profiting from its own wrong. Had the government not unconstitutionally intruded, the argument runs, the evidence never would have come to light, so it should be suppressed. But this argument fails both normatively and factually. Normatively, society should not return stolen goods to a thief. Rather, the government

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at 4A (from the victim's sister) ("The evidence convicted him. Why should we have to go through that hell again?").

<sup>223</sup> *Stare decisis* should not properly preclude reconsideration of the exclusionary rule: ordinary citizens have never embraced or ratified this rule, and criminals have few legitimate reliance interests in truth-suppressing doctrines that help them get away with their crimes.

<sup>224</sup> See AMAR, CRIMINAL PROCEDURE, *supra* note 131, at 26–31, 40–45, 155–60.

should (and does) restore these goods to their rightful owner, even if the government found them in an unconstitutional search.<sup>225</sup> If the government found a kidnap victim, it would never give her back to her captor. It may retain illegal drugs and other contraband taken from drug dealers, and likewise it need not forgo the use of evidentiary fruits to which it has a legal right. (As a general matter, the “public . . . has a right to every man’s evidence.”<sup>226</sup>) Factually — and here we return to *Flippo* — exclusion often occurs even when the government clearly would have found the evidence anyway. Assume for argument’s sake that a warrant was required on the facts of *Flippo*. What magistrate in the world would have denied such a request? Wouldn’t a warrant have automatically issued, and if so, wouldn’t the cops have found the photos anyway? How, then, is exclusion proper? *Where’s the causation?* Doctrine has never answered, or even asked, this question.

To be sure, *Flippo* is a tiny case as Supreme Court cases go. But the case vividly illustrates a domain where doctrine seems far afield of the document. More generally, in *Flippo*’s small mirror, we see a Court that appears insufficiently deliberative, overly enamored of its own past pronouncements (which it tends to overread and treat as holy writ), and less wise than the document itself. The Court seems more concerned about affirming its own status than understanding the document it is charged with enforcing. The Court also seems insensitive to the gender issues raised by its dubious deployment of the Constitution in this case, and in criminal procedure cases more generally. Men are more likely to be violent offenders, women more likely their victims.<sup>227</sup> *Flippo* was a case about the violence done to a woman by a man, and the woman’s voice was not heard. Both in the cabin and the Court, Cheryl Flippo was silenced.

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<sup>225</sup> This result cannot simply be explained by the fact that to restore goods to the thief would be to abet an ongoing crime. If the thief gives the stolen goods to an innocent third party as a present, the government may nonetheless restore them to their rightful owner. The aim is not merely one of prevention but of rectification and restitution.

<sup>226</sup> *Trammel v. United States*, 445 U.S. 40, 50 (1980) (citation omitted) (internal quotation marks omitted); see also 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2192 (John T. McNaughten ed., rev. ed. 1961).

<sup>227</sup> For a provocative feminist critique of the Court’s Fourth Amendment case law, see Mary E. Becker, *The Politics of Women’s Wrongs and the Bill of “Rights”*: A Bicentennial Perspective, 59 U. CHI. L. REV. 453, 507–09 (1992). Many prominent criminal procedure cases have involved men who have killed or raped women or girls. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Brewer v. Williams*, 430 U.S. 387 (1977); *New York v. Quarles*, 467 U.S. 649 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *Vasquez v. Hillery*, 474 U.S. 254 (1986).

There was, perhaps, another gender issue implicated by *Flippo*, involving the precise nature of the photos in the briefcase. Nothing in the Court’s analysis, however, turned on this possible wrinkle.

2. *Rights, Structure, and Fairness.* — “K.M.,” a teenager sexually abused by her stepfather, was also silenced by the Court last Term. The sexual assaults occurred from 1991 to 1995; and in 1997, Texas prosecuted the stepfather, Scott Carmell, based on K.M.’s uncorroborated testimony. The jury believed K.M. and found Carmell guilty beyond reasonable doubt on fifteen separate counts. Because Texas had recently reformed its evidence laws, Carmell claimed that K.M.’s testimony, regardless of how persuasive it might be, could never suffice to convict on four of these counts. In an opinion by Justice Stevens over a dissent by Justice Ginsburg, a closely divided Court agreed, holding that the Constitution required the jury to ignore what K.M. had said under oath.<sup>228</sup>

The Court’s particular 5–4 lineup was unprecedented; never before or since have Justices Stevens, Scalia, Souter, Thomas, and Breyer joined together against the Chief Justice and Justices O’Connor, Kennedy, and Ginsburg.<sup>229</sup> Rarely do we find both Justices O’Connor and Kennedy in dissent.<sup>230</sup> This lineup alone thus signals that something noteworthy may be afoot. And the issue before the Court, implicating matters of both rights and structure, offers a good laboratory for measuring the document against the doctrine.

The case pivoted on the fact that, when the four relevant incidents of sexual abuse occurred, Texas had in place an old law providing that certain sexual assault defendants could never be convicted merely on the testimony of the victims. In these cases, there also had to be some physical evidence, or some timely statement or “outcry” by the victim — for example, to a friend, a relative, a counselor, or a doctor — to confirm that she was not later making things up. Texas changed this law in 1993,<sup>231</sup> and when it prosecuted Carmell in 1997, it applied the newer law. Carmell claimed that this application violated the Ex Post Facto Clause, and the Court agreed.

This result, I think, would puzzle if not shock most citizens. Texas did not change its basic rules of criminal conduct. It has been criminally wrong to abuse one’s stepdaughter since time immemorial. Texas merely changed the way this crime could be reliably proved in court. Once upon a time, females were not deemed sufficiently believable, but today we rightly treat them as no less believable than males. Applying these enlightened ideas about female credibility to all pro-

<sup>228</sup> Carmell v. Texas, 120 S. Ct. 1620 (2000).

<sup>229</sup> The statistics compiled at the back of the *Harvard Law Review* Supreme Court issues for the 1994 through 1999 Terms confirm this point.

<sup>230</sup> In the 1999 Term, for example, these two Justices were both in dissent only twice — in *Carmell* and in *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000).

<sup>231</sup> The new law did not completely eliminate all outcry requirements, a complexity I shall initially sidestep to simplify exposition, but one that I shall squarely confront later. See *infra* p. 102.

ceedings is not impermissibly *ex post facto*. The crime is committing the sexual assault itself, not getting caught.<sup>232</sup> Texas only changed the rules about getting caught, not about committing the crime itself.

Here too, the citizens are wiser than the Justices, who have taken a text that came from the populace and read it in an odd way that fails to do justice to the basic instincts of the American People in whose name the text speaks. A proper documentarian analysis would proceed as follows. We the People have embraced a document with not one but two *Ex Post Facto* Clauses, one limiting the federal government and the other limiting the states.<sup>233</sup> Only two other sets of prohibitions in the entire original Constitution are given similar status: the bans on bills of attainder and on titles of nobility.<sup>234</sup> From these facts alone, we may properly deduce that we deal here with a basic principle — one that the People from the beginning have believed should command near universal assent in a free republic. The core principle is this: The legislature may not make conduct that was wholly innocent at time *T1* retroactively criminal at time *T2*. Otherwise, the legislature could target known political opponents (who cannot change their past actions), invade the province of the judicial branch (by acting to punish known persons for what they have already done), and deprive citizens of fair notice of the basic norms of conduct they must observe. The *Ex Post Facto* Clauses stand back to back with the Bill of Attainder Clauses, which reflect a similar cluster of concerns.<sup>235</sup> These facts in turn confirm that we have properly deduced the core principle and its basic rationales. Further confirmation comes from the basic structure of the document as a whole, with its obvious emphasis on protection of political dissenters, separation of powers, due process, and fair notice. Historical evidence from Founding debates and pamphlets and Revolution-era state constitutions proves that *ex post facto* laws were generally defined as laws retroactively criminalizing conduct that was innocent when done.<sup>236</sup> Such laws were widely

<sup>232</sup> See generally sources cited *supra* note 67. If the crime were getting caught — being adjudged in court to have done wrong — then all adjudication would border on *ex post facto*, making people criminals rather than finding them to be so.

<sup>233</sup> U.S. CONST. art. I, § 9 (“No Bill of Attainder or *ex post facto* Law shall be passed [by Congress].”); *id.* art. I, § 10 (“No State shall . . . pass any Bill of Attainder, [or] *ex post facto* Law . . .”).

<sup>234</sup> Today the category is much broader as a result of the incorporation of the Bill of Rights against states and the reverse incorporation of equal protection principles against the federal government.

<sup>235</sup> For extended analysis, see Amar, *Attainder and Amendment 2*, *supra* note 79, at 208–211.

<sup>236</sup> See, e.g., 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 52, at 378–79 (paraphrasing remarks of Gouverneur Morris, James Wilson, and William Samuel Johnson) (“[T]hey shall not cause that to be a crime which is no crime . . .”); James Iredell, *Marcus V*, NORFOLK AND PORTSMOUTH JOURNAL, Mar. 19, 1788, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 394, 396 (Bernard Bailyn ed., 1993) (“[W]hat [a man] does innocently and



condemned as repulsive to all right-thinking folk — “contrary to the first principles of the social compact and to every principle of sound legislation.”<sup>237</sup>

What Texas did in changing its rules of evidence, however, was not repulsive at all, and would not be so seen by the American People at any point in our history. Why, then, did the Court condemn Texas? First, the Court defined the Ex Post Facto Clause very broadly, and then applied it quite rigidly. This is a classic two-step move in many areas of modern doctrine, but sometimes it reflects poor judgment.<sup>238</sup> It is often proper to construe a given clause as embracing both a hard

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safely to-day, according to the laws of his country, cannot be tortured into guilt and danger tomorrow.”); THE FEDERALIST NO. 84, at 511–12 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (condemning “the subjecting of men to punishment for things which, when they were done, were breaches of no law”); see also MD. CONST. of 1776, art. XV (equating ex post facto laws with “retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal”); N.C. CONST. of 1776, art. XXIV (same); cf. DEL. DECLARATION OF RIGHTS of 1776, § 11 (condemning “retrospective laws, punishing offences committed before the existence of such laws,” but not using the words “ex post facto”); MASS. CONST. of 1780, pt. I, art. XXIV (condemning “[l]aws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws,” but not using the words “ex post facto”). These formulations mesh well with and may have been borrowed from Blackstone, whose views on the proper meaning of ex post facto influenced leading Framers. See 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 52, at 448–49 (remarks of John Dickenson) (reporting to his colleagues on Blackstone’s definition). With Blackstone on their side, leading Federalists were on solid ground in denying Antifederalist claims that the Ex Post Facto Clauses would prohibit certain useful retroactive civil laws. *But cf.* N.H. CONST. of 1784, pt. I, art. XXIII (condemning all “[r]etrospective laws” even in “civil causes,” but not using the words “ex post facto”). The words of Blackstone himself perfectly cohere with the documentary framework that I propose:

There is still a more unreasonable method [than Caligula’s], which is called the making of laws *ex post facto*; when *after* an action “*indifferent in itself*” is committed, the legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it; here it is impossible that the party could foresee that an action *innocent when it was done*, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust.

1 WILLIAM BLACKSTONE, COMMENTARIES \*46 (third and fourth emphasis added). Note that the third italicized phrase did not appear until Blackstone’s second edition, published in 1766.

<sup>237</sup> THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961). Other language to this effect regarding ex post facto laws was common. See 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 52, at 376 (remarks of Oliver Ellsworth and James Wilson) (“void of themselves” and contrary to “first principles of Legislation”); Oliver Ellsworth, *The Landholder*, CONN. COURANT, Dec. 10, 1787, reprinted in 3 RECORDS OF THE FEDERAL CONVENTION 164, 165 (rev. ed. 1966) (“tyrannical”); THE FEDERALIST NO. 84, at 511–12 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“most formidable instrument[ ] of tyranny”); see also 1 BLACKSTONE, *supra* note 236, at \*46 (“cruel and unjust” and “still . . . more unreasonable [than what Caligula did]”); MD. CONST. of 1776, art. XV (“oppressive, unjust, and incompatible with liberty”); N.C. CONST. of 1776, art. XXIV (same); cf. DEL. DECLARATION OF RIGHTS of 1776, § 11 (“oppressive and unjust,” though not using the words “ex post facto”); MASS. CONST. of 1780, pt. I, art. XXIV (“unjust, oppressive, and inconsistent with the fundamental principles of a free government,” but not using the words “ex post facto”).

<sup>238</sup> For a similar move in the free speech context, see *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1886 (2000), discussed above in note 102.

core rule and a broader principle. But the penumbral principle cannot always be sensibly enforced with the same rigidity as the core rule itself.

The *Carmell* Court took its cue from Justice Chase's exposition of the Ex Post Facto Clause in his separate opinion in the 1798 case of *Calder v. Bull*.<sup>239</sup> Chase defined ex post facto laws to encompass not only laws that make actions criminal that were innocent when done (our "core" rule), but also all laws that retroactively increase the offense-grade or sentence, and all laws that "alter[] the legal rules of evidence, and receive[] less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender."<sup>240</sup> Many later cases, in dicta, have quoted Chase's definition, and the *Carmell* Court found these precedents dispositive. What Texas did, said the Court, was a textbook example of Chase's final prong — altering the rules of evidence in order to convict the offender with less than would have been required when he did the deed.

Though this appeal to a 1798 case may look like originalism — enough so to win the votes of Justices Thomas and Scalia — it in fact exemplifies modern doctrinalism and illustrates some of its pathologies. As an epistemic matter, Chase is hardly the most surefooted guide to the document — the man, after all, was impeached for his constitutional clumsiness — and later Court dicta parroting Chase are not particularly deliberative. But the current Court simply points to Chase and later dicta, treating the issue as dictated by precedent instead of giving us a careful account of the relevant constitutional values at stake. Tellingly, Chase's definition of ex post facto was not put forth by any leading Federalist speaker or pamphlet before the Constitution's ratification.<sup>241</sup>

Rather than insisting that *every* law that modifies the rules of evidence is *exactly* the same as one that makes a wholly innocent act retroactively criminal, it makes more sense to say that *some* evidence-altering laws might indeed violate the spirit — the animating principles — of the Ex Post Facto Clause. Imagine a law that retroactively imposes the burden of proof on defendants for a given affirmative defense in a regulatory context in which reliance issues are weighty and the conduct in question was not *malum in se*.<sup>242</sup> This law could in-

<sup>239</sup> 3 U.S. (3 Dall.) 386 (1798).

<sup>240</sup> *Id.* at 390 (separate opinion of Chase, J.) (emphasis omitted).

<sup>241</sup> Instead, the leading definition was the core rule that I have offered here. See *supra* note 236.

<sup>242</sup> I am assuming here that the new rule, applicable only to affirmative defenses, does not violate the *Winship* line of cases; otherwise, it could not be applied even prospectively. See *In re Winship*, 397 U.S. 358 (1970) (holding that the elements of the case-in-chief must be proved by a prosecutor beyond a reasonable doubt); *Patterson v. New York*, 432 U.S. 197 (1977) (holding *Winship* inapplicable to certain affirmative defenses).

deed be a case of political targeting, of legislative overreaching, or of improper frustration of legitimate reliance interests and the fair notice ideal. Not all evidence-altering laws, however, are like this. If lie detector or DNA tests at time  $T_1$  are unreliable, the law might forbid these tests from being introduced against defendants. But if technology improves, and the law changes at time  $T_2$ , tests done after  $T_2$  should properly be admissible even for crimes that occurred prior to  $T_2$ . This lie detector/DNA analogy perfectly describes what Texas did. At time  $T_1$ , the testimony of females in certain sexual assault cases was viewed as uniquely unreliable. At time  $T_2$ , Texas finally realizes that this testimony is no different in principle from any other testimony and should be treated the same way. For any other crime, a single uncorroborated witness can suffice; the same rule should apply to these sexual assault cases. This testimony should be immediately admissible, as were the new-technology lie detector and DNA tests in our hypothetical.

Justice Stevens has no good purposive or principled answer to this line of analysis, but he does have an ace up his sleeve, and he plays it with fanfare. To illustrate an impermissible evidence-altering law, Justice Chase, following a 1792 English treatise, had cited the trial of Sir John Fenwick in 1696.<sup>243</sup> At every tight spot in his opinion, Stevens plays the Fenwick card. Fenwick's trial, he implies, was a paradigm case of ex post facto violation and, he insists, is on all fours with Carmell's case. Fenwick committed treasonous acts in 1695 and was tried in 1696. At the time of his crime, the general rule was that a treason conviction required two witnesses. The prosecution could muster only one, but Parliament said that one would be good enough, and Fenwick was found guilty.

Alas, Stevens's ace is in fact a joker. No one in 1787–1789 ever invoked Fenwick's trial as an example of an impermissible ex post facto law. Not that Americans would have found Parliament's actions in that case acceptable. Regardless of retroactivity, the Framers made it clear elsewhere in the Constitution that unless a defendant confessed, a treason trial should *always* require two witnesses.<sup>244</sup> Furthermore, Fenwick was tried by the legislature itself, in a manner violative of anti-attainder principles the Founders held dear. Fenwick's case also raised serious issues of legislative targeting of political opponents (is-

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On the importance of the distinction between *malum in se* and *malum prohibitum* offenses when issues of fair notice are concerned, see Dan M. Kahan, *Ignorance of the Law Is an Excuse — But Only for the Virtuous*, 96 MICH. L. REV. 127, 151–52 (1997).

<sup>243</sup> *Calder*, 3 U.S. (3 Dall.) at 389 & n.†.

<sup>244</sup> U.S. CONST. art. III, § 3, cl. 1 (“No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”).

sues far removed from what Texas did to Carmell). Thus, there was much to condemn in Fenwick's case that has no bearing on Carmell's.

Stevens's overreliance on Chase's passing reference to Fenwick reflects a much larger problem of doctrinal self-absorption: As the Court creates ever more intricate doctrinal structures, it tends to miss the big ideas of the document. A more holistic documentarian approach to *Carmell* would examine the facts of the case in a larger context. Is there legislative targeting here, in which lawmakers are singling out known enemies for hostile treatment? This is an obvious concern of both the attainder and the *ex post facto* bans, but it is minimal when victims of assault have not spoken out and the legislature therefore does not know the names of those whom the victims may accuse. Though not purely prospective, the evidence-reform legislation was adopted behind a suitable veil of ignorance. (This feature alone decisively distinguishes Carmell's case from Fenwick's, in which Parliament adopted an *ad hoc* rule applicable only to Fenwick after the facts came to light.) Is there legislative invasion of the judicial function here? This is probably a greater concern at the federal level, where the *Ex Post Facto* Clause interacts with many other separation of powers provisions. But at the state level, this particular aspect of the *ex post facto* idea may have less bite, because the Constitution generally does not require that states follow a rigid separation of powers on the federal model. If Texas courts, acting on their own, had decided to recognize a common law offense of sexual assault and had allowed uncorroborated testimony to suffice, wouldn't this have been permissible? Wouldn't it be permissible for Texas courts to apply this common law modification retroactively? If so, the reason in part is that we think sexual assault is *malum in se*, and there are very few legitimate reliance interests at stake.<sup>245</sup> And if Texas courts could have chosen on their own to do what they did to *Carmell*, why is it a federal concern that they did it in partnership with their state legislature?

Another holistic question: Is there any basic unfairness here? After all, the main idea is to establish justice. The Court majority identifies no basic unfairness, and in a post-Nuremberg world, most Americans would probably not think that using new procedures to prove that bad men have done bad things that were always wrong is intolerably unfair or improperly retroactive. But there is, I suggest, a basic unfairness in silencing K.M. and treating her as an inherently untrustworthy witness.

This brings us to the final holistic question: Why wasn't the old Texas law itself unconstitutional? Documentarian analysis focuses not just on the Founding, but also on later constitutional moments.

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<sup>245</sup> See Kahan, *supra* note 242.

Wasn't Texas's old outcry rule an affront to Fourteenth and Nineteenth Amendment ideals of women's equality? No comparable rule existed for male victims of nonsexual assault. Unlike the two witness rule at issue in Fenwick's case and at the heart of the Constitution's Treason Clause, Texas's old rule, dating back to an era in which women did not vote, in effect singled out some persons on the basis of their birth status and declared that they, uniquely in our criminal justice system, were not fully reliable witnesses.<sup>246</sup> This old law was an obvious status insult to the equal citizenship of women. More than that, it denied them the genuine equal protection of laws, a concept that at its core affirms the rights of victims to be equally protected by government from criminals. (The Fourteenth Amendment thus barred a state from looking the other way when white Klansmen murdered and pillaged black folk.<sup>247</sup>) Texas's old law was also reminiscent of the infamous Black Codes that forbade the conviction of whites on the testimony of blacks.<sup>248</sup> Had the state judiciary struck down this old law on state or federal equality grounds, surely its ruling would have had full retroactive effect. The old law was itself no law at all; and the true law applicable when Carmell assaulted K.M. was one that treated her as a full and equal citizen. Thus, there was nothing remotely impermissible or genuinely retroactive about what Texas did to Carmell. The only real constitutional violation was of the rights of K.M. and others like her, a violation Texas has yet to fully cure (since it has retained vestiges of the outcry rule in other parts of its legal code). But not a single Justice identified Texas's true violation or openly discussed the obvious issue of women's equality.

3. *VAWA*. — Which brings us to the last of our trilogy of cases about male violence against females. Christy Brzonkala brought suit in federal court against two men who, she claimed, assaulted and raped her. Her suit was based on a 1994 congressional civil rights law, the Violence Against Women Act (*VAWA*), which among other things created a federal civil cause of action for victims of gender-motivated violence.<sup>249</sup> By a 5–4 vote, the Court once again sided against an ap-

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<sup>246</sup> See *Carmell v. Texas*, 120 S. Ct. 1620, 1646 (2000) (Ginsburg, J., dissenting) (discussing the history of the Texas sexual offense law). Although modern versions of this statute are formally gender-neutral, the law had its origins in an explicitly gendered set of rules about "female[s] alleged to have been seduced." *Id.* (discussing an 1891 version of the Texas statute) (internal quotation marks omitted).

<sup>247</sup> See JACOBUS TENBROEK, *EQUAL UNDER LAW* 201–33 (1965); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 *DUKE L. J.* 507, 567–70 (1991).

<sup>248</sup> See, e.g., *Blylew v. United States*, 80 U.S. (13 Wall.) 581 (1872); KENNEDY, *supra* note 148, at 36–41.

<sup>249</sup> 42 U.S.C. § 13981 (1994).

parent female victim of male violence.<sup>250</sup> Even if everything Brzonkala said was true, it did not matter because Congress had no business enacting the civil rights provision at issue.

So says the doctrine, per Chief Justice Rehnquist. The document, per the American People, says something different and more admirable: Women are equal citizens, and Congress has broad power to affirm the rights of equal citizens against social structures and forces, even private ones, that threaten a regime of equal citizenship.

The documentarian key to the case, then, is not the Commerce Clause, as the four dissenters seem to think. Yes, violence against women may be an economic issue of sorts. It is definitely a national problem — that is, a problem everywhere. But is it truly a *federal* problem — that is, an *inter-state* problem, a problem *among* or *between* the several states, a problem involving genuine interjurisdictional spillovers? If not, then the majority has a plausible argument that the *Interstate* Commerce Clause is an inapt basis for federal power.<sup>251</sup>

Candid supporters of VAWA can concede that the issue of violence against women is not mainly an economic one, or chiefly an interstate one. The deepest concern is not about GDP or about things that cross or spill over state lines.<sup>252</sup> Indeed, the main goal may not even be to ensure women's access to courtrooms. After all, state courts are generally open to hear garden-variety assault and other tort cases. Although state criminal courts have been inhospitable to women victims of male violence, so have federal criminal courts (beginning with the Supreme Court itself, as we have already begun to glimpse). This inhospitality has less to do with state courts as such and more to do with the inherent features of criminal courts. Criminal courts, federal no less than state, deny full agency to women victims, who must rely on professional prosecutors to take the lead. Criminal courts, federal no less than state, also feature a variety of rules — from the outlandish exclusionary rule to the proper reasonable doubt rule — that can make

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<sup>250</sup> *United States v. Morrison*, 120 S. Ct. 1740 (2000). Writing for the Court, the Chief Justice was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Souter authored the lead dissent, joined by Justices Stevens, Ginsburg, and Breyer. Justice Breyer also wrote a dissent joined in part by Justices Souter and Ginsburg and entirely by Justice Stevens. For more detailed analysis, see Catharine A. MacKinnon, *The Supreme Court, 1999 Term—Comment: Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135 (2000).

<sup>251</sup> See U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . .”). For further analysis of the distinction between national and federal problems, see BREST ET AL., *supra* note 68, at 470–71, 480, 532–33.

<sup>252</sup> I define spillovers broadly so as to encompass, for example, goods, services, pollution molecules, water, air, animals, and persons that cross state lines. For a case next Term that may probe the limits of congressional power over interstate affairs that are not narrowly economic, see *Solid Waste Agency v. U.S. Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000).

it difficult for victims to prevail, especially in “he said, she said” settings. To overcome the inherent limits of criminal proceedings, it is necessary to ensure that the victim herself can sue in a civil proceeding; but it is less clear why this proceeding needs to be a federal one if the only goal is to give women agency and a fair chance to recover damages.<sup>253</sup>

In other words, VAWA is largely symbolic. That does not make it unimportant or unconstitutional. We live by symbols. The Constitution itself is one of our greatest symbols. It helps bind Americans together by affirming our most precious ideals. (That is why it is so sad to watch the Court take admirable ideals and render them obscure or obtuse or contemptible.) The ideal of equal national citizenship for all, regardless of birth status, is one of the Constitution’s most profound precepts, and this ideal is what VAWA symbolically affirms. VAWA calls certain acts of violence not merely random, private assaults, but parts of a larger historically rooted system of insult and degradation. VAWA labels that system of insult a civil rights issue, an equality issue.

The Chief Justice says that Congress lacks such power under the Reconstruction Amendments. In part, he appeals to the “language and purpose” of the Fourteenth Amendment, which lead him to embrace “the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action.”<sup>254</sup> Precedents from the period “[s]hortly after the Fourteenth Amendment was adopted” confirm this reading, he says.<sup>255</sup> Foremost among these precedents are the 1883 *Civil Rights Cases*,<sup>256</sup> in which the Court invalidated those parts of Charles Sumner’s 1875 Civil Rights Act that banned racial discrimination by innkeepers, common carriers, theaters, and the like. These cases are especially valuable epistemically, says the Chief Justice:

The force of the doctrine of *stare decisis* behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur — and each of their judicial appointees obviously had

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<sup>253</sup> One answer might be that state evidence rules, even in civil cases, continue to tilt against a woman alleging sexual assault. Another answer might try to focus on some states’ rules that make it difficult for wives to sue their husbands generally, or for some kinds of marital rapes. A third answer might be that unless a law specifically names violence against women as a wrong, certain subspecies of assault will be casually dismissed by some jurors as private matters rather than as serious torts. For efforts to document gender bias in state courts, see *Morrison*, 120 S. Ct. at 1760 n.7, 1772–73 (Souter, J., dissenting).

<sup>254</sup> *Morrison*, 120 S. Ct. at 1755–56.

<sup>255</sup> *Id.* at 1756.

<sup>256</sup> 109 U.S. 3 (1883).

intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.<sup>257</sup>

Here are a few basic facts about the document and the doctrine that the Chief Justice omits. The first sentence of the Fourteenth Amendment has no explicit state action requirement in its language: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” This sentence was introduced to overrule the not-so-wise Supreme Court, whose lead opinion in the *Dred Scott* case proclaimed that blacks could never be “citizens.”<sup>258</sup> Ordinary Americans confronting the language of the first sentence in 1866–1868, and deciding whether to support or oppose the Amendment, understood Taney’s opinion as the paradigm case of what this sentence aimed to repudiate. Taney’s opinion focused not merely on the governmental aspects of citizenship — state action — but on the broader sociological and public meaning of the concept. Blacks, said Taney in notorious language, could not be citizens because they were widely regarded by the white race (and not merely by the government) as “beings of an inferior order, and altogether unfit to associate with the white race,” with “no rights which the white man was bound to respect.”<sup>259</sup> The white man, not just the white government. Thus when the Fourteenth Amendment explicitly repudiated Taney, it did so with words suggesting that Congress — which was explicitly given sweeping, *Prigg*-ish and *McCulloch*-like enforcement power in Section 5<sup>260</sup> — would have power to enact certain laws designed to affirm that blacks were equal citizens, worthy of respect and dignity. Such laws could not compel whites to invite blacks to their dinner parties — truly private consensual relations were outside the ambit of citizenship — but could regulate larger nongovernmental systems of exclusion in places such as hotels, theaters, and trains. Such laws could also seek to protect blacks from racially motivated violence, and thereby affirm that blacks did indeed have rights that white men (and not merely governments) were bound to respect.

Or, at least, so the Reconstruction Congress might reasonably have believed when it enacted various civil rights laws that the Court later struck down. Many of the Congressmen supporting these laws had

<sup>257</sup> *Morrison*, 120 S. Ct. at 1756.

<sup>258</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 406–23 (1857).

<sup>259</sup> *Id.* at 407.

<sup>260</sup> See Engel, *supra* note 145, at 141–45. The Section 5 language granting Congress the power “to enforce, by *appropriate* legislation, the provisions of this [Amendment]” was consciously modeled on the famous passage in *McCulloch* glossing the Necessary and Proper Clause: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate* . . . are constitutional.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (emphasis added).



been leading architects of the Fourteenth Amendment itself. Why doesn't Chief Justice Rehnquist accord *these* men any epistemic respect? Founders such as James Madison and Thomas Jefferson, who lived and died as slaveholders, are treated with reverence by the Court (even though Jefferson was not even in America at the Founding). Why are Reconstructionists like John Bingham and Charles Sumner, crusaders for racial justice, treated with so much less respect?

And what about the first Justice Harlan? After all, he dissented in the *Civil Rights Cases*, arguing that Congress had broad *Prigg*-ish power to address even certain private conduct,<sup>261</sup> and that the Citizenship Clause of the Fourteenth Amendment had no state action requirement.<sup>262</sup> This is the same Harlan who later dissented in *Plessy*. If he was right in *Plessy*, perhaps he was right here? To pass over him in silence, as Rehnquist does, is to disrespect a great Justice. In other opinions, Harlan insisted that the Fourteenth Amendment incorporated the Bill of Rights against the states; that the federal government was bound by the principle of equal citizenship (a kind of reverse incorporation); that free expression meant more than a ban on prior restraints; that the Bill of Rights protected brown-skinned folk in the territories; and that the Court could not simply ignore the Fifteenth

<sup>261</sup> In the words of Justice Harlan:

[P]rior to the amendments, Congress, with the sanction of this court, passed the most stringent laws — operating directly and primarily upon States and their officers and agents, as well as upon individuals — in vindication of slavery and the right of the master . . . [So now may Congress,] by legislation of a like primary and direct character, guard, protect, and secure the freedom established, and the most essential right of the citizenship granted, by the constitutional amendments. . . . [T]he national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the masters of fugitive slaves.

*The Civil Rights Cases*, 109 U.S. at 53 (Harlan, J., dissenting).

<sup>262</sup> Justice Harlan stated:

The first clause of the first section . . . is of a distinctly affirmative character. . . . The citizenship thus acquired . . . may be protected, not alone by the judicial branch of the government, but by congressional legislation of a primary direct character; this, because the power of Congress is not restricted to the enforcement of prohibitions upon State laws or State action. It is, in terms distinct and positive, to enforce "the provisions of this article" of amendment; not simply those of a prohibitive character, but the provisions — all of the provisions — affirmative and prohibitive, of the amendment. It is, therefore, a grave misconception to suppose that the fifth section of the amendment has reference exclusively to express prohibitions upon State laws or State action. . . .

. . . Congress is not restricted to the enactment of laws adapted to counteract and redress the operation of State legislation, or the action of State officers, of the character prohibited by the amendment. It was perfectly well known that the great danger to the equal enjoyment by citizens of their rights, as citizens, was to be apprehended not altogether from unfriendly State legislation, but from the hostile action of corporations and individuals in the States. And it is to be presumed that it was intended, by that section [5], to clothe Congress with power and authority to meet that danger.

*Id.* at 46, 54.

Amendment in the face of massive southern disfranchisement.<sup>263</sup> In all of these contexts, Harlan's opinions — often in dissent — have stood the test of time far better than the majority opinions of his Gilded Age colleagues whom the Chief Justice now privileges.

Here we begin to see the wages of a standard narrative presenting the Court as heroic while downplaying the document. None of the other Justices sees the serious problems with Rehnquist's basic storyline. Most casebooks omit *Prigg*, gloss over *Dred Scott*, and fail to teach students enough about men like John Bingham and Charles Sumner. Lawyers are dimly aware of *Plessy* in the background, but focus on *Brown* in the foreground. The many failings of the Court in the Gilded Age are largely repressed — most of these cases are simply omitted from casebooks. I suspect that most readers miss the irony when Rehnquist describes post-Redemption cases seeking to undo Reconstruction as rendered “[s]hortly after the Fourteenth Amendment.”<sup>264</sup>

Coming from William Rehnquist, this crabbed view of the Fourteenth Amendment is not wholly unexpected, for he has never been a particularly sympathetic or generous reader of Reconstruction. What is most surprising, and disheartening, is that no one on the *Morrison* Court squarely challenges Rehnquist on Reconstruction (though Justice Breyer raises an eyebrow<sup>265</sup>). The debate instead focuses on the Commerce Clause.

Rather than dwelling on Commerce Clause issues far removed from women's equality, the dissenters would have done better to begin with the Citizenship Clause,<sup>266</sup> and to explain how gender-motivated violence against women can pose a threat to equal citizenship in a manner analogous (though not identical) to the ways that other power structures have threatened the equal citizenship of blacks. The dissenters might have noted that race and sex are not isomorphic; and that in the case of equal citizenship based on sex, it is important to read the Fourteenth Amendment in light of the much later Nineteenth.

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<sup>263</sup> Regarding incorporation, see *Hurtado v. California*, 110 U.S. 516, 546 (1884) (Harlan, J., dissenting); and *Twining v. New Jersey*, 211 U.S. 78, 114–27 (1908) (Harlan, J., dissenting). Regarding reverse incorporation, see *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896). Regarding free expression, see *Patterson v. Colorado*, 205 U.S. 454, 463–65 (1907) (Harlan, J., dissenting). Regarding civil rights in the territories, see *Downes v. Bidwell*, 182 U.S. 244, 375–91 (1901) (Harlan, J., dissenting); *Hawaii v. Mankichi*, 190 U.S. 197, 226–49 (1903) (Harlan, J., dissenting); and *Dorr v. United States*, 195 U.S. 138, 154–58 (1904) (Harlan, J., dissenting). Regarding black disfranchisement, see *Giles v. Harris*, 189 U.S. 475, 493–504 (1903) (Harlan, J., dissenting).

<sup>264</sup> *United States v. Morrison*, 120 S. Ct. 1740, 1756 (2000).

<sup>265</sup> *Id.* at 1778–80 (Breyer, J., dissenting). Only Justice Stevens joined this part of Breyer's dissent.

<sup>266</sup> In emphasizing this clause and its proper application to certain relations among citizens, as opposed to those between citizens and the state, I stand on the shoulders of the great Charles Black. See BLACK, *supra* note 10, at 51–66.

But in the case of both race and sex, the dissenters could have argued, Congress may properly act to dismantle what it plausibly perceives to be large social structures creating and sustaining conditions of unequal citizenship, in which some citizens are systematically disrespected or mistreated on the basis of birth status. In the context of both race and sex, government has, by its actions and inactions, helped maintain these structures. In the case of race, the Black Codes, Jim Crow, lynchings, and disfranchisement have loomed large. In the case of sex, government has created marriage laws leaving women's property and bodies largely at the mercy of men;<sup>267</sup> and has erected unjustified obstacles to rape prosecution, such as the outcry requirement. Through such laws, government has historically invested men with an improper sense of entitlement over women's bodies.

But the past involvement of government is probably not necessary to uphold congressional action; it merely strengthens the case.<sup>268</sup> Though the documentarian issues are not free from all doubt, the best reading of the Constitution as a whole is probably this: To vindicate the vision of the Fourteenth Amendment (read through the prism of the Nineteenth), Congress may pass expressive laws affirming women's equal status and citizenship so as to make clear to all that women have rights that men are bound to respect. Congressional power is not plenary — wholly plenary power is hard to reconcile with the basic structure of enumerated power that the Reconstruction Amendments accept rather than repudiate. But when Congress can honestly be understood as affirming equal citizenship for those who have historically been denied equality on the basis of birth status, judicial review of enumerated power should be no less deferential than in *Prigg* or *McCulloch*, on which the Fourteenth Amendment's supporters justifiably relied.<sup>269</sup>

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<sup>267</sup> For example, at common law, a man could rape his wife with impunity and subject her to physical punishment. See Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990); Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 138–50 (1991); Reva B. Siegel, “The Rule of Love”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996). Husbands also had general legal control over their wives' earnings and property. See Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073 (1994); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127 (1994).

<sup>268</sup> For a graceful and forceful argument that VAWA was a proper response to governmental violations, see Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in Brzonkala v. Morrison*, 75 N.Y.U. L. REV. 150 (2000). Cf. Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 120 (1966) (defending broad congressional Reconstruction power to respond to state human rights violations by directly regulating private conduct).

<sup>269</sup> The VAWA section at issue speaks of “persons” rather than citizens. Violence Against Women Act of 1994 § 40302(b), 42 U.S.C. § 13981(b) (1994). To the extent that it sweeps beyond

A documentarian dissent along the lines suggested would not have been incontrovertible. However, it would have better illuminated the central civil rights that Congress sought to affirm, and the basic themes of the Constitution as a holistic document. Indeed, the dissenters might properly have noted the obvious democracy deficit created when a Court with only two women on it (only one of whom joins the majority) relies on old cases from an era in which no women voted, glossing even earlier constitutional texts, to strike down a post-Nineteenth Amendment law that a great many women strongly support today.

### *B. Violence Against Posterity: Partial Birth Abortion*

Abortion is perhaps America's most agonizing legal and moral issue. It has divided the country, and last Term it divided the Court deeply and down the middle. In *Stenberg v. Carhart*,<sup>270</sup> five Justices voted to overturn Nebraska's ban on partial birth abortions; four dissenters sharply disagreed.<sup>271</sup> Eight Justices wrote — more than in any case last Term, or indeed, in the last decade.<sup>272</sup> Some of the opinions contain passages that are gut-wrenching in their graphic descriptions of late-term abortions. Nothing that anyone could say about abortion law — on the Court, in the *Harvard Law Review*, or anywhere else — could soothe all sides or completely heal the nation's bleeding wounds. But I submit that doctrine's discourse, as exemplified by the opinions of the Justices in the majority, is insensitive and obtuse — more partisan, more cold, less conciliatory, and less wise than the document itself.

Whether couched in the bland language of Justice Breyer's opinion for the Court or the more confrontational prose of some of the concurring Justices, the basic approach of the majority is that the Court has spoken, and all must obey. Breyer begins, however, on a far more promising note, cautioning that "constitutional law must govern a society whose different members sincerely hold directly opposing views."<sup>273</sup> So far, so good: We need a focal point, a common ground,

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citizen-on-citizen violence, it may properly be justified by Congress's sweeping power to regulate and protect aliens.

<sup>270</sup> 120 S. Ct. 2597 (2000).

<sup>271</sup> Justice Breyer wrote for the majority, joined by Justices Stevens, O'Connor, Souter, and Ginsburg, each of whom, except Justice Souter, also wrote a short concurrence. Justices Kennedy and Thomas wrote the longest dissents — the former joined only by the Chief Justice and the latter joined by the Chief Justice and Justice Scalia. The Chief Justice and Justice Scalia also wrote short separate dissents.

<sup>272</sup> Last Term, the case with the next most opinions (six) was *Troxel v. Granville*, 120 S. Ct. 2054 (2000). For a discussion of *Troxel*, see section II.E below at pp. 121–24. To my knowledge, the last time eight or more Justices wrote in a single case was in *Furman v. Georgia*, 408 U.S. 238 (1972), when all nine Justices wrote.

<sup>273</sup> *Stenberg*, 120 S. Ct. at 2604.

something that respects the valid concerns of both those who care about women's equality and those who care about unborn human life. And that focal point, says Breyer, is doctrine: "[T]his Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose. *Roe v. Wade*; *Planned Parenthood v. Casey*. We shall not revisit those legal principles. Rather, we apply them to the circumstances of this case."<sup>274</sup>

There are several problems here. First, exactly where and how and why does "the Constitution" offer this basic protection? In other words, where is the first link in the chain of proper constitutional argument, connecting *Roe's* rules to something actually in the document? To properly apply "legal principles" to new facts, we need to know the reasons underlying the principles. In the year 2000, it is hardly a state secret that *Roe's* exposition was not particularly persuasive, even to many who applauded its result. *Casey* built on *Roe* without ever explaining why *Roe* was right. Now *Stenberg* builds on *Casey* and *Roe*, and critics may justly feel that this is a shell game with no pea. If all sides are being invited to come together in good faith, it is hard to ask them to cohere around *Roe* simply because "this Court" keeps incanting it without justifying it constitutionally. "We shall not revisit those legal principles." Shut up, he explained. Because I said so.

Second, even if *Roe's* documentary weaknesses were not so obvious or important, what *Roe* said was not particularly wise or sensitive. The case contained very little about women's equality, more about the rights of doctors, and rather a lot about privacy. But to talk about privacy is to beg the question of the moral status of the fetus.<sup>275</sup> How can all be asked to come together around a discourse that fails to acknowledge the basic moral insight of one side — that the fetus is a moral entity? Even if the moral nothingness of the fetus were obvious to most right-thinking folk when the fetus is a near-microscopic clump of cells, the issue in *Stenberg* is very different — late second-trimester abortions of recognizable humans, with hands, organs, dimensions, senses, brains.<sup>276</sup> When you prick them, they bleed.

Thus, *Roe's* privacy talk is not a promising way to find common ground. What about women's equality? Breyer's opinion contains ex-

<sup>274</sup> *Id.* (citations modified).

<sup>275</sup> *Roe* itself acknowledged that a "pregnant woman cannot be isolated in her privacy" and that the issue before the Court was thus "inherently different" from true privacy cases involving issues like contraception. *Roe v. Wade*, 410 U.S. 113, 159 (1973). This acknowledgment renders the opinion's exposition of abortion as a "privacy" right rooted in these earlier cases, *id.* at 152–53, almost incoherent. For more analysis and criticism, see Amar, *Intratextualism*, *supra* note 17, at 773–78.

<sup>276</sup> Cf. Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception"*, 43 STAN. L. REV. 599, 617–27 (1991) (discussing fetal development in utero).

actly one mention of equality, in its opening paragraph: “[M]illions [of Americans] fear that a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty and leading those with least resources to undergo illegal abortions with the attendant risks of death and suffering.”<sup>277</sup> On the facts of *Roe*, in which all abortions were banned by an old law for which no woman voted, the claims of women’s equality were indeed forceful, especially when we understand how law has often used women’s biology to limit women’s prospects and to channel them into circumscribed lives. But the law in *Stenberg* was quite different. It had been recently adopted in Nebraska, and in twenty-nine other states, in a process that involved women as full political equals. (In Nebraska itself, the bill passed the state legislature by an overwhelming margin among both male and female legislators.<sup>278</sup>) The law did not limit early abortions in any way; any woman wanting to end an unwanted pregnancy early on had complete freedom to do so. Thus, the law did not completely conscript women’s bodies or channel them into narrowly circumscribed lives.<sup>279</sup> As for late-term abortions of much more developed and recognizably human fetuses, the law, if narrowly construed, outlawed only a single procedure, leaving other methods of abortion unaffected.<sup>280</sup> Moreover, the American Medical Association has proclaimed that there are no situations in which the banned procedure is the only safe and effective option; safe alternatives are always available.

The majority counters that although the alternatives are safe, it is possible to imagine situations in which the banned procedure might, perhaps, be ever so slightly safer. But where, exactly, does the Constitution say that the government may never oblige citizens to incur some very small risk? If the document does not enact Herbert Spencer’s *Social Statics*, where does it enact Stephen Breyer’s *Risk Regulation Manual*? Would such a rigid *Manual*, constitutionalized so that no

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<sup>277</sup> *Stenberg*, 120 S. Ct. at 2604.

<sup>278</sup> Overall, the vote was 45–1, with three abstentions. 1997 NEB. LEGIS. J., 95th Leg., 1st Sess. 2609. Among female legislators, twelve voted for the ban and one abstained. *Id.* A nationwide Gallup Poll conducted in the spring of 2000 found that both men and women supported a ban on partial birth abortion by a margin of more than 2 to 1. Telephone Interview with The Gallup Organization (July 26, 2000).

<sup>279</sup> Cf. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784, 794 (1989) (arguing that privacy is an “anti-totalitarian right” that protects the “freedom not to have one’s life too totally determined by . . . [the] state”).

<sup>280</sup> Despite the law’s apparently narrow aim, critics claimed that its words swept more broadly than advertised. A majority of the Supreme Court agreed, over sharp dissent. Federal courts are not the definitive interpreters of state law; when possible, statutes should be construed so as to avoid constitutional doubts. Several other states have statutes with language narrower than Nebraska’s; to simplify exposition of the key constitutional issues, I thus assume a clean statute that prohibits only the “D & X” procedure, and not the “D & E” method of abortion.

legislature could ever properly modify it, be truly wise given that there is more to life than maximizing safety? Other values, such as minimizing cruelty and barbarism, are also important. If it could be proved that vivisectioning all murderers could make crime victims marginally safer, would this gruesome and dehumanizing capital punishment be mandatory? Of course, when only women are asked to bear serious risks without strong justification, equality principles should come into play; but once again, isn't it important, on an *equality* argument, that many women across the country have supported this ban on one particularly cruel form of abortion?<sup>281</sup>

The majority tries to sidestep the cruelty question — *Casey* said nothing about cruelty, so we the Court will assume it away<sup>282</sup> — but Justice Stevens addresses it head on in a concurrence joined by Justice Ginsburg. All forms of late abortion are cruel — “equally gruesome” — and so distinguishing between them is, in Stevens’s words, “simply irrational.”<sup>283</sup> So much, it seems, for trying to be sensitive to competing moral visions; just dismiss the millions of Americans who disagree with you as “irrational.” Granted, the document itself sharply condemns certain things; it is hardly neutral on everything. However, the things it does bluntly condemn — aristocracy and slavery, for example — generally deserve condemnation. Those who believe in White Supremacy and Black Codes deserve scorn; those who weep at partial birth abortions do not. Deep down, Justice Stevens himself must know this. Would he dismiss as “simply irrational” those who insist that capital punishment by electric chair should be banned in favor of death by lethal injection? At some level, all forms of capital punishment are gruesome, but a society that seeks to minimize barbarism draws fine distinctions. There are laws, for example, that prohibit mistreatment of corpses. Those who support a ban on partial birth abortion seek to use the law expressively — to find some way of saying in law that the unborn child late in a pregnancy is not nothing, that we recognize it and respect it, that we seek to minimize its insult and avoid dehumanizing ourselves even if we allow the mother to end its life.<sup>284</sup> In this sense, the law itself sought to protect choice while also expressing society’s sense of tragedy.<sup>285</sup> To dismiss this effort to find

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<sup>281</sup> See *supra* note 278. This is not to suggest that a very clear equality violation would always be cured by general support from the disfavored group, but surely the views of women are relevant when the alleged violation of women’s equality is not so clear.

<sup>282</sup> See *Stenberg*, 120 S. Ct. at 2609.

<sup>283</sup> *Id.* at 2617 (Stevens, J., concurring).

<sup>284</sup> The method of partial birth abortion can be seen as mocking the natural birth process, imitating it until the very point of death, with an intact human being largely outside the womb.

<sup>285</sup> Some of the reasons for late-term abortions are themselves quite tragic, involving wanted pregnancies complicated by late-discovered genetic abnormalities and other heart-breaking scenarios. None of the *Stenberg* opinions discusses these issues in any detail.

common ground as “simply irrational” is politically obtuse and morally insensitive.<sup>286</sup>

The rest of Stevens’s short concurrence is not much better. He adopts a dismissive tone toward the dissenters and exults in the fact that *Roe*’s central holding “has been endorsed by all but 4 of the 17 Justices who have addressed the issue.”<sup>287</sup> This statistic seems quite impressive — until one remembers how many Justices supported, say, censorship for the first 150 years. Past Court opinions are epistemically valuable, but a properly humble Justice should always be open to the possibility of past error. Those who seek to follow and extend a given precedent should be prepared to defend it on the merits, and here Stevens falls short. He distills *Roe*’s central holding as follows: “[T]he word ‘liberty’ in the Fourteenth Amendment includes a woman’s right to make this difficult and extremely personal decision.”<sup>288</sup> But of course the document says that “liberty” may be limited by “due process of law,” as may “property,” which stands alongside “liberty” in this clause.<sup>289</sup> Most property interests may be limited by general statutes and fair procedures; textually, it is hard to see why a qualitatively different approach should apply to liberty interests. When the government duly enacts evenhanded statutes and follows fair procedures, it has provided the requisite “due process of law.” Properly speaking, it is thus awkward to refer to a “Liberty Clause” as such, though Stevens is fond of doing so.<sup>290</sup> Stevens impatiently ends his opinion with “See U.S. Const., Amdt. 14.”<sup>291</sup> With all due respect, what is needed is a careful parsing of this and other constitutional text, not a dismissive wave.

Speaking of “liberty,” a holistic documentarian might note that the word appears three times in the Constitution. Two of these occasions are in the Due Process Clauses (or Liberty Clauses, as Stevens would have it) limiting the federal and state governments, respectively. The third is in the Preamble: “We the People of the United States, in Order to . . . secure the Blessings of Liberty to ourselves *and our Posterity*, do ordain and establish this Constitution.” This too is a Liberty Clause, and it suggests that the sensitive moral balance that Nebraska

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<sup>286</sup> Stevens also suggests, picking up on a point in Justice Ginsburg’s dissent, that Nebraska’s true motivation was simply to undercut *Roe*. *Stenberg*, 120 S. Ct. at 2617 (Stevens, J., concurring). This, too, is a doubtful and needlessly provocative statement and thin-skinned to boot, seeing only a possible insult to the Court rather than an avoidance of insult to innocent life.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> U.S. CONST. amend. XIV, § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law”).

<sup>290</sup> See John Paul Stevens, *The Bill of Rights. A Century of Progress*, 59 U. CHI. L. REV. 13, 20–38 (1992).

<sup>291</sup> *Stenberg*, 120 S. Ct. at 2617 (Stevens, J., concurring).



tried to strike between women and posterity was not a wholly irrational or counterconstitutional one.<sup>292</sup>

### C. Sovereign Immunity and Section 5

Justice O'Connor is often the current Court's swing voter — for example, she was the only Justice in both the *Morrison* and *Stenberg* majorities. In *Kimel v. Florida Board of Regents*,<sup>293</sup> the Court once again divided 5–4, and once again Justice O'Connor found herself in the majority. This time, she wrote for the Court, over a strong dissent by Justice Stevens.<sup>294</sup> The *Kimel* Court invalidated Congress's Age Discrimination in Employment Act of 1967 (ADEA) insofar as Congress authorized state employees to sue states for damages when victimized by state discrimination. Rightly read, the Constitution's text, history, and structure do not support the Court's result, nor does the Court's decision reflect an attractive normative vision. Here, too, the document is better than the doctrine.<sup>295</sup>

Citing the 1890 case of *Hans v. Louisiana* and the more recent case of *Seminole Tribe v. Florida*, among others, Justice O'Connor declares that “for over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States.”<sup>296</sup> This view, she stresses, is now supported by “firmly established precedent.”<sup>297</sup>

Doctrine to the contrary notwithstanding, the document unambiguously confers federal jurisdiction over all federal question cases, regardless of the identity of the parties: Article III, Section 2 expressly says that “the judicial Power shall extend to all Cases, in Law and Equity, arising under” the Constitution, laws, and treaties of the United States. And nothing in the Eleventh Amendment applies when a citizen sues his own state, or indeed, under a proper “diversity” reading,

<sup>292</sup> For a similar, if more forceful, suggestion quoting both the Preamble's liberty/posterity language and its “establish Justice” language, see *id.* at 2621 (Scalia, J., dissenting). Justice Scalia's willingness to invoke the Preamble's justice-seeking language should hearten those critics of originalism who see its methodology as insensitive to questions of justice. See, e.g., Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 CONST. COMMENT. 37 (1993). On the Preamble more generally, see above at note 85.

<sup>293</sup> 120 S. Ct. 631 (2000).

<sup>294</sup> Justice O'Connor's opinion was joined in full by the Chief Justice and Justice Scalia, and in part by Justices Kennedy and Thomas. Justice Stevens, though concurring in part, wrote a vigorous dissent that was joined by Justices Souter, Ginsburg, and Breyer.

<sup>295</sup> For more documentation and elaboration of my expansive claims in this section, see Amar, *Of Sovereignty and Federalism*, *supra* note 33, at 1466–92.

<sup>296</sup> *Kimel*, 120 S. Ct. at 640 (citing, *inter alia*, *Hans v. Louisiana*, 134 U.S. 1, 15 (1890); and *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996)).

<sup>297</sup> *Id.* at 643.

when a lawsuit arises under federal law.<sup>298</sup> Undergirding these basic textual points are two structural precepts. First, whenever federal law applies, federal courts must have matching authority to adjudicate. Federal judicial power is coextensive with federal legislative power. Second, where there is a right, there generally should be a remedy. The federal government has authority to create rights against states, and when these rights are violated, federal courts should be open to provide federal remedies.

The countervailing doctrine of state “sovereign immunity” invoked by *Hans* and by the *Kimel* majority is constitutional nonsense. It is, quite literally, the precise negation of the Founders’ root idea that the People are sovereign and governments are not. There is no constitutional right for government to violate the Constitution and get away with it, even if sovereign immunity was a traditional concept at the Founding. In important ways, the Constitution broke with preexisting traditions — of monarchy, of aristocracy, of permanent standing armies, of established national churches, of seditious libel laws, and of governmental (as opposed to popular) sovereignty. *Hans* and *Kimel* echo the very error that led Justices like Samuel Chase to support the infamous Sedition Act of 1798. (That law, too, was rooted in an inapt analogy to parliamentary sovereignty, as we have seen.<sup>299</sup>) When government is sovereign — the source of all law — logic suggests that government may not legally be sued unless it creates a law that allows the suit, and thereby “consents.” But in America, the People, not the government, are the source of law, and there is no such thing as governmental sovereign immunity when the government has violated the Constitution. In these situations, government is not “sovereign.”

Nor should it be “immune.” Even if some constitutional rights must go unremedied in the real world, the idea of full remedies is a regulatory ideal toward which the Constitution, when read in light of its history and structure, does and should aim. This ideal may be qualified — via statutes of limitation, laches, waivers, and the like — but it must not yield to an idea of sovereign immunity that is the logical negation of constitutionally limited government.

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<sup>298</sup> See U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”). Under the “diversity” reading of this Amendment, these words simply repeal the earlier grant of Article III citizen-state diversity jurisdiction at issue in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), but do not in any way limit the other fonts of Article III jurisdiction — for example, over federal questions and admiralty. In essence, *Chisholm*’s error was the creation of a pro-creditor federal common law in a diversity case, and the People responded by restricting diversity jurisdiction. For more details, see Amar, *Of Sovereignty and Federalism*, *supra* note 33, at 1474–75 & n.202.

<sup>299</sup> See *supra* pp. 56–57.

Justice Stevens, in dissent, takes his stand with the document against the doctrine:

Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent. First and foremost, the reasoning of that opinion is so profoundly mistaken and so fundamentally inconsistent with the Framers' conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court.<sup>300</sup>

Stevens adds a few other reasons for resisting the pull of *stare decisis*, but this first one contrasts markedly with his emphasis on judicial nose counting in *Stenberg*. After all, the "diversity" reading that he embraces in *Kimel* had many fewer judicial adherents in the twentieth century than the competing view. But this nose counting should not end the issue. The judicial noses are wrong and the "diversity" reading is right — at least if the Constitution itself is the touchstone. (Again, although many documentarian issues are hard, some are easy.)

There is, however, a remaining structural argument to address: Why should states be suable absent their consent when the federal government is immune absent its consent? When a mere violation of a federal statute is at issue, the answer is that the federal government may properly bind states, yet exempt itself. This greater power of total exemption subsumes the lesser power of subjecting itself to its own laws, but with limitations on lawsuits against itself. However, when the federal government has violated the federal Constitution — a source of law higher than government — then it should indeed be no more "sovereign" or "immune" than a state government. Alas, even the Justices who have challenged state sovereign immunity have yet to go this far. Until they do, they too have fallen short of the document's admirable vision of limited governments and full remedies.

In recent years, the Rehnquist Court has tried to revive federalism in a variety of contexts, often insisting, rightly, that the Framers envisioned federalism as a system for protecting liberty: "Perhaps the principal benefit of the federalist system is a check on abuses of government power. . . . 'If [the people's] rights are invaded by either [government], they can make use of the other as the instrument of redress.'"<sup>301</sup> "[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself. . . ."<sup>302</sup> Cases like *Kimel*, however, fail to check abuses or redress wrongs, instead allowing states to escape liability for their illegal acts. A sounder documentarian approach,

<sup>300</sup> *Kimel*, 120 S. Ct. at 653 (Stevens, J., dissenting in part and concurring in part).

<sup>301</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991) (quoting THE FEDERALIST NO. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

<sup>302</sup> *New York v. United States*, 505 U.S. 144, 181 (1992).

building on the very Founding sources that the Court has invoked but failed to follow, would use federalism to protect rights, not defeat them. Each government would have reciprocity not in shielding itself when it violates the Constitution, but in empowering citizens to gain full remedies when the *other* government violates the Constitution. In this view, the federal government should be recognized as having broad power to arm Americans with remedies against states when states violate the Constitution or valid federal laws. The reciprocal counterpart to this federal power is not sovereign immunity for lawless states but rather the right of states to arm citizens with remedies against the federal government when the feds violate the Constitution. For example, state property law helps give a citizen standing to sue when the federal government takes his property without due process or just compensation in violation of the Fifth Amendment; and state tort law helps provide a remedy when federal officials violate a citizen's Fourth Amendment rights in an improper search or seizure of his person or property.<sup>303</sup>

So much for the views of the Founders. Holistic documentarian analysis also ponders the meaning of later constitutional moments, like Reconstruction. Here, the *Kimel* Court's pronouncements become odder still. Surely, if the Fourteenth Amendment was about anything, it was about ensuring that states follow federal law. When a state flouts federal law, it thereby offends due process *of law*, in violation of Section 1. And when a state violates Section 1, surely Congress has power to act under Section 5, even under a very narrow reading of the section. Yet *Kimel*, following recent precedent, holds that Congress lacks Reconstruction power to insist that, when states trample federal rights, federal courts stand open to make victims whole.<sup>304</sup>

Finally, *Kimel* claims that although Congress may properly forbid age discrimination by states under its Commerce Clause power, it may not do so pursuant to its power under Section 5 of the Fourteenth Amendment. Building on the 1997 *Boerne*<sup>305</sup> case, *Kimel* seems to suggest that congressional power to recognize new civil rights exists only when there is a clear antecedent pattern of state misbehavior. Here, no such pattern of state misbehavior exists. (Indeed most states have banned age discrimination on their own.)

This new rule of doctrine, however, contrasts sharply with the text, history, and overall architecture of the Fourteenth Amendment. The

<sup>303</sup> For more analysis, see Amar, *Of Sovereignty and Federalism*, *supra* note 33, at 1492–519; Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983*, 64 U. COLO. L. REV. 159 (1993).

<sup>304</sup> *Kimel*, 120 S. Ct. at 645 (citing *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219, 2223 (1999)).

<sup>305</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Reconstruction Republicans aimed to give Congress broad power to declare and define the fundamental rights — the privileges and immunities — of American citizens above and beyond the floor set by courts.<sup>306</sup> Furthermore, the fact that many states deem a certain right important, like the right against age discrimination, may properly support a congressional determination that such a right is indeed fundamental today. Courts, for example, look at the actual practice of states to determine what punitive practices are “cruel and unusual” today.<sup>307</sup> Likewise, Congress may properly consult state practice in playing its assigned rights-protecting role under Section 5, as envisioned by the American People who ratified the Fourteenth Amendment. This documentary scheme, in which Congress may go above the judicially declared floor of fundamental rights, is, I submit, a more attractive one than the Court-centered regime exemplified by cases like *Kimel* and *Boerne*.

#### D. Religion

Consider next the only case of the Term to openly overturn a precedent, *Mitchell v. Helms*.<sup>308</sup> *Mitchell* involved a longstanding federal program that lent computers and other educational equipment to public and private schools, including private religious schools. By a vote of 6–3, the Justices upheld the program against an Establishment Clause challenge, although no single opinion commanded a majority of the Court.<sup>309</sup>

Here, at last, the Court got one right, though it remains to be seen if there are indeed five Justices on the current Court who are truly in sync with the spirit of the document.<sup>310</sup> To get it right, the Court was obliged to overrule two cases from the 1970s.<sup>311</sup> Proper realignment of doctrine and document in the future may require still more overrulings.

Led by Justice Souter, the *Mitchell* dissenters claim that the Constitution is offended whenever government aid goes directly to religious

<sup>306</sup> See generally AMAR, BILL OF RIGHTS, *supra* note 17, at 175 n.\*; Engel, *supra* note 145; BREST ET AL., *supra* note 68, at 546–50.

<sup>307</sup> See *Stanford v. Kentucky*, 492 U.S. 361, 370–71 (1989).

<sup>308</sup> 120 S. Ct. 2530 (2000). In *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), a case that could well have profound repercussions, the Court unsettled the law of sentencing but declined to openly overrule any of its prior cases.

<sup>309</sup> Justice Thomas authored a plurality opinion joined by the Chief Justice and Justices Scalia and Kennedy. Justice O’Connor, joined by Justice Breyer, concurred in the judgment. Justice Souter dissented, joined by Justices Stevens and Ginsburg.

<sup>310</sup> The plurality opinion by Justice Thomas is an admirable one; but it did not command the votes of five Justices, and there are troubling notes in Justice O’Connor’s swing opinion.

<sup>311</sup> See *Mitchell*, 120 S. Ct. at 2555 (overruling *Meek v. Pittenger*, 421 U.S. 349 (1975); and *Wolman v. Walter*, 433 U.S. 229 (1977)).

entities for religious purposes, even if this aid does not single out religious entities for any preferential treatment.<sup>312</sup> In other words, the government may not, pursuant to a genuinely secular law, give computers on a completely evenhanded basis to all public schools and private schools. To put it yet another way: The Constitution requires that if the government decides to give computers to private schools, it may give them to the Secular School and the Indifferent Institute but must withhold them from various religious schools. If a given private school eligible for certain computers later decides to add prayer to its curriculum, while otherwise continuing to teach all the basics, that school must forfeit the computers. The Constitution requires this discrimination, depriving religious schools, and only religious schools, of a benefit that all other schools receive.

The Constitution, however, requires no such thing, at least if the test is the best reading of its words, history, and structure, as opposed to the many outlandish (and contradictory) things that have been said about it in the *United States Reports*.<sup>313</sup> As a matter of text, the document renounces a national “establishment of religion.” Let us recall the world the Founders aimed to repudiate, a world where a powerful church hierarchy was anointed as the official government religion, where clerics *ex officio* held offices in the government, and where members of other religions were often barred from holding government posts. With this paradigm case in mind, we can begin to see how the First Amendment fits well with other ideas in the document repudiating the hierarchies and inequalities of the *ancien régime* — the kings and dukes and archbishops and permanent standing armies and parliamentary pomposities and sovereign immunities — in favor of a new world order in which no church would receive special treatment from the federal government. All citizens of all religions would stand equal before federal law and equal in eligibility to hold federal office. (Thus, in important ways, the opening words of the First Amendment build on the closing words of Article VI, which promise that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”) On this view, there are not two separate Religion Clauses that coexist in tension — an Establishment Clause discriminating against religion and a Free Exercise Clause limiting the discrimination. Rather, there is one Religion Clause, pro-

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<sup>312</sup> See *id.* at 2573 (Souter, J., dissenting). This theme is nothing new for Justice Souter, and much of my description and critique of his general approach is based on his earlier judicial statements in such cases as *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819, 863–99 (1995) (Souter, J., dissenting); and *Agostini v. Felton*, 521 U.S. 203, 240–54 (1997) (Souter, J., dissenting).

<sup>313</sup> For detailed documentation of my admittedly sweeping assertions in this section, see AMAR, BILL OF RIGHTS, *supra* note 17, at 32–45, 246–57.

claiming that the federal government should neither favor nor disfavor religion as such.

In fact, the subject of religion as such was in general simply beyond the proper enumerated powers of the federal government in the states: "Congress shall make no law" respecting — that is, on the topic of — religion qua religion. On close inspection, this phrasing is plainly an intratextual gloss on the enumerated power language of Article I, proclaiming that "*Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper*" to the Constitution's careful division of power. But to see this is to see how the Religion Clause, with its absolutist grammar, addresses only laws that regulate religion as such — for example, laws requiring or banning prayer, or naming some sect or sects for special treatment. The Amendment has nothing to do with the incidental effects on a religion of a law passed without regard to religion — for example, a law providing computers to all schools, regardless of their religious affiliation. Here, Congress does indeed have obvious enumerated power insofar as such aid to all schools helps promote the federal economy.<sup>314</sup> For Congress to distinguish between private schools that sponsor prayer and those that do not, as the dissenters insist Congress must, would be to violate this very enumerated power idea: Whether prayer takes place or not is simply none of Congress's business. Thus, the dissenters have turned the text precisely upside down.

And the history, too. In past church-state opinions, the *Mitchell* dissenters have tried to wrap themselves in the mantle of James Madison.<sup>315</sup> But the kind of governmental aid to religion that Madison and his allies opposed was aid to religion *as such*, through laws that explicitly singled out some religious sects or institutions or practices ("Protestants" or "Christians" or "churches" or "prayer," for example). Moreover, it is a category mistake to automatically equate an Amendment proposed by congressional supermajorities in 1789 and ratified by a great many states in the 1790s with what Madison personally believed or did in Virginia years before. Indeed, given that the text of the First Amendment most closely tracks the proposals of New Hampshire rather than Virginia, the *Mitchell* dissenters' history is off the mark.

As is their fundamental structural vision. In both logic and effect, this vision discriminates against religious entities as such. On a proper view of the matter, government need not give any aid to private schools at all; the distinction between aid to public schools and aid to

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<sup>314</sup> For discussion (and explanation of the interstate externalities that render education a proper subject for federal legislation), see BREST ET AL., *supra* note 68, at 532–33.

<sup>315</sup> See, e.g., *Rosenberger*, 515 U.S. at 868–73, 890–91 (Souter, J., dissenting); *Agostini*, 521 U.S. at 243 (Souter, J., dissenting).

private schools is itself a wholly secular and legitimate distinction. But if government does choose to give aid to private schools, it should not discriminate against religious schools by imposing a prayer tax. (If you pray, you must give up the computer that everyone else gets.) Even at the Founding, one of the core ideas of the First Amendment was equality: Government should not favor or disfavor any religion, just as it should not favor or disfavor any speaker because of his political viewpoint under the neighboring Free Speech Clause. The Fourteenth Amendment, which incorporates religious freedom principles against the states, powerfully reinforces this idea. The Citizenship Clause condemns governmental discrimination on the basis of birth status, and religious discrimination is closely akin to racial discrimination. (Indeed, some religions focus on birth itself — one is born a Jew, for example.) White or black; male or female; rich or poor; Jew, Protestant, Catholic, Hindu, agnostic, or atheist — we are all equal citizens. Yet the dissenters' logic requires — not just permits, but requires — the government to distinguish between the Secular School and the Morning Prayer Academy, whose three R's curricula are otherwise identical.

There is, I admit, a considerable amount of modern doctrine, especially from the 1970s and 1980s, that lends support to the dissenters' normatively unattractive vision. So much the worse for doctrine; so much the better for the document.

### *E. Unenumerated Rights*

The last case from the 1999 Term that we shall consider, *Troxel v. Granville*,<sup>316</sup> addressed the topic of unenumerated rights, an issue that might be thought particularly difficult for a documentarian. Acting under a broadly worded Washington state statute, a family court judge had ordered a mother to make her two minor children available for mandatory visitation with the children's paternal grandparents. As construed, the statute allowed anyone to petition at any time for compelled visitation, and authorized the judge to order such visitation whenever the judge decided that it would be in the best interests of the child, without any need to give the slightest deference to the contrary wishes of the parent or to make any finding of parental unworthiness. Invoking the doctrine of substantive due process, the Justices voted to strike down this breathtakingly open-ended grant of power to intrude upon parental authority in intact and functional families. As in *Mitchell*, however, the Justices were unable to cohere around a majority opinion. Justice O'Connor wrote the lead opinion for four Justices,

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<sup>316</sup> 120 S. Ct. 2054 (2000).



and Justice Souter concurred in the judgment on the basis of similar reasoning.<sup>317</sup>

Though they disagree on details, these five Justices find common ground in a series of precedents, beginning in the early 1920s, affirming the strong liberty interest of parents in the care, custody, and control of their minor children. This open appeal to *Lochner*-era cases like *Meyer v. Nebraska*<sup>318</sup> and *Pierce v. Society of Sisters*<sup>319</sup> is too much for Justice Scalia, who argues that such relics of a largely discredited judicial era have “small claim to *stare decisis* protection.”<sup>320</sup> What the trial judge did may well be stupid, says Scalia, but the Supreme Court does not sit to correct all stupidity.

If the debate here looks vaguely familiar — O’Connor against Scalia on the question of substantive due process methodology — it should. In some ways, the debate recalls the skirmish over this issue in *Michael H. v. Gerald D.*<sup>321</sup> and the battle royale in *Planned Parenthood v. Casey*,<sup>322</sup> and presages the fireworks in *Stenberg*.<sup>323</sup> It is also worth noting that the cases Scalia would thrust aside, *Meyer* and *Pierce*, featured prominently in *Griswold v. Connecticut*<sup>324</sup> and, later, *Roe v. Wade*.<sup>325</sup> In cases like *Roe*, *Casey*, and *Stenberg*, some critics might accuse the majority of inventing rules that appear nowhere in the document, while other critics might fault the dissenters for ignoring a principle that is definitely in the document, namely women’s equality. A similar point applies to *Troxel*. The majority insists on invoking the nonmammalian whale<sup>326</sup> of substantive due process, a

<sup>317</sup> The plurality (Justice O’Connor, joined by the Chief Justice and Justices Ginsburg and Breyer) struck down the statute as applied; Justice Souter voted to invalidate it on its face. Justice Thomas concurred in the judgment, and Justices Stevens, Scalia, and Kennedy filed separate dissents.

<sup>318</sup> 262 U.S. 390 (1923).

<sup>319</sup> 268 U.S. 510 (1925).

<sup>320</sup> *Troxel*, 120 S. Ct. at 2074 (Scalia, J., dissenting).

<sup>321</sup> Compare *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion of Scalia, J.) (setting forth a narrow view of substantive due process), with *id.* at 132 (O’Connor, J., concurring in part) (challenging Justice Scalia’s view as inconsistent with precedent).

<sup>322</sup> Compare *Planned Parenthood v. Casey*, 505 U.S. 833, 847–51 (1992) (joint opinion of O’Connor, Kennedy, and Souter, JJ.) (embracing an expansive, precedent-based view of substantive due process), with *id.* at 979–84 (Scalia, J., dissenting) (challenging this view as unconstrained).

<sup>323</sup> In *Stenberg*, Justice O’Connor writes a Court-centered concurrence — “Nebraska’s statute cannot be reconciled with our decision in . . . *Casey* and is therefore unconstitutional” — and Scalia likens the majority’s result to the one in *Dred Scott*. *Stenberg v. Carhart*, 120 S. Ct. 2597, 2618 (2000) (O’Connor, J., concurring) (emphasis added) (citations omitted); *id.* at 2621 (Scalia, J., dissenting).

<sup>324</sup> 381 U.S. 479, 481–82 (1965).

<sup>325</sup> 410 U.S. 113, 152–53 (1973).

<sup>326</sup> I borrow here from the incomparable wordsmith, Charles Black. See Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69, 70 (1967). Though Black in this passage is not describing

phantasmagorical beast conjured up by judges without clear textual warrant. Conversely, the Scalia dissent ignores the fact that there is indeed constitutional text that limits state power to restrict unspecified and substantive fundamental freedoms — namely, the Privileges or Immunities Clause.<sup>327</sup>

Does a documentarian gain anything by changing the label on the lid of the black box of unenumerated rights from “substantive due process” to “privileges or immunities of citizens?” Perhaps a little. Because the very phrase “*substantive due process*” teeters on self-contradiction, it provides neither a sound starting point nor a directional push to proper legal analysis. The phrase does not clarify thought. Granted, once the first due process cases are on the books, these decisions may launch the project (so long as we do not ask from whence they came). But given that the origins of substantive due process doctrine are not particularly admirable — *Dred Scott* and *Lochner* haunt this swamp — perhaps we can do better.

There was indeed a core set of fundamental freedoms that the People aimed to affirm in the Fourteenth Amendment’s Privileges or Immunities Clause: freedom of expression and of religion, protection against unreasonable searches, the safeguards of habeas corpus, and so on.<sup>328</sup> These clear instances of inclusion, with less tainted origins, give us paradigm cases from which we can properly begin the doctrinal process of generalization, interpolation, and analogic reasoning.

Moreover, the Privileges or Immunities Clause suggests a method for finding fundamental rights that is less Court-centered, and admirably so. The Fourteenth Amendment does not exhaustively list all the privileges and immunities of American citizenship, but it presupposes that such fundamental rights are catalogued elsewhere in documents that the American people have broadly ratified, formally or informally. In the eyes of those who drafted and ratified the Fourteenth Amend-

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substantive due process, he does elsewhere condemn it as “paradoxical, even oxymoronic.” CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM* 3 (1997).

<sup>327</sup> This clause does not escape Justice Thomas, however, who goes out of his way to flag the issue. *Troxel v. Granville*, 120 S. Ct. 2054, 2067 n.\* (2000) (Thomas, J., concurring in the judgment). Of course, reviving the clause might require repudiating some of the language of the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), which (on the most straightforward and conventional reading) basically read the clause — the central clause of Section 1! — out of the Amendment. Virtually no serious modern scholar — left, right, or center — thinks this a plausible reading of the Amendment. (The holding, on the facts of the case, is far more defensible than some of the overly broad language.) It is also worth noting that the Justices who decided the case in 1873 had not exactly been cheerleaders for the Amendment in 1867, and that the case was decided on a set of facts and at a time not especially conducive to a generous reading of the Amendment. See Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 655–78 (1994).

<sup>328</sup> For further elaboration of this claim and others in this section, see AMAR, *BILL OF RIGHTS*, *supra* note 17, at 137–230.

ment, the federal Bill of Rights was one of these catalogues, a compilation of fundamental rights that the Amendment would henceforth guarantee (“incorporate”) against states. But the Bill of Rights was not the only epistemic source of guidance. In other words, the Fourteenth Amendment incorporates more than the Bill of Rights. Magna Carta, the English Petition of Right, the Declaration of Independence, state bills of rights — all these, too, were proper sources of guidance for interpreters in search of fundamental rights and freedoms. Rather than a system in which Justices simply look to what they or their predecessors have declared fundamental in self-absorbed opinions, a more attractive and document-supported approach to the Privileges or Immunities Clause would invite the Court to canvass nonjudicial legal sources — the above-listed documents, state laws and constitutions, federal legislation, and so on — as critical sources of epistemic guidance.

This law-canvassing approach is hardly a novel method. For example, the younger Justice Harlan emphasized that the Connecticut contraception law later at issue in *Griswold* was utterly outlandish, as measured by the laws of all the other states.<sup>329</sup> Most important, law canvassing has the salutary effect of focusing the Justices not on themselves and their own wisdom, but on the wisdom of the American people more generally. On this approach, the key fact in *Troxel* was not so much that the Washington statute went beyond what the Court said in the 1920s, but that the statute, as construed and applied, was utterly outlandish when measured against the historical and current practices of every other state.<sup>330</sup>

### F. *The Constitution Outside the Court*

Documentarianism is a general method of constitutional interpretation, not just a strategy for judicial review. Constitutional interpretation, of course, often takes place outside courtrooms. Here too, the document continues to have a great deal to teach us, as illustrated by three of the year’s biggest headlines.

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<sup>329</sup> *Poe v. Ullman*, 367 U.S. 497, 554–55 (1961) (Harlan, J., dissenting); see also *Stanford v. Kentucky*, 492 U.S. 361, 370–73 (1989) (canvassing federal and state law about the execution of minors as the “primary and most reliable indication of consensus” on the issue). For more discussion of the law-canvassing method, see Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 590–605 (1993). For a superb account of this technique from a traditionalist perspective, see Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 681–701. I do not claim that this method is the only proper way to fill in the open texture of the Fourteenth Amendment; I claim only that it is one technique of central significance and usefulness.

<sup>330</sup> The adoption of similar laws by other states might properly trigger Supreme Court reconsideration of the issue, resulting in an openly dialogic and experimental model of unenumerated-rights adjudication.

1. *DNA*. — Amazing advances in DNA technology have posed new opportunities for and challenges to our criminal justice system. The document is often dismissed as an ink-quilled, horse-and-buggy-era parchment ill-suited to regulate an atomic, supersonic, human-genomic America. But where DNA is concerned, it is “modern” doctrine that is more hidebound.

Over the last year, many convicted defendants, especially in cases of rape and murder, have sought to use DNA to exculpate themselves. There is a recurrent legal problem when the convict’s DNA does not match the DNA from the crime scene, such as semen taken from the body of a murder or rape victim. The convict claims the test proves his innocence, requiring that he be set free or, at a minimum, retried. Prosecutors regularly counter that the DNA is logically compatible with his guilt: perhaps there were two perpetrators, and the DNA came from the convict’s unknown accomplice. Even to order a new trial, the prosecutors argue, is to unfairly burden the state. Years may have elapsed since the first trial, perhaps much of the original evidence has faded away, and the witnesses may now be dead or unavailable. A trial truly fair to the state as well as the defendant, they argue, is no longer possible.

The problem is that a negative DNA match is not always good enough. We need a positive DNA match as well, telling us not just that the DNA did not come from the convict, but also that it did come from John Smith. Once we make the positive match, we can usually decide whether the prosecution’s accomplice theory holds up. Is there any evidence linking the convict to Smith? Does Smith himself have a record of committing similar crimes wholly on his own? With a positive as well as a negative match, everyone wins (except the guilty): innocent defendants can be freed, past victims vindicated, and future victims protected. Indeed, if we could regularly make a positive match, most stranger rapes could be solved and thus, one hopes, deterred and prevented — a truly amazing prospect!

Regularly making positive matches would require a comprehensive DNA database. Technology makes this possible. Every child at birth now has a blood test for medical purposes. A few drops could be diverted to generate a DNA fingerprint. (These DNA fingerprints would also help prevent a now-prevalent form of identity fraud whereby criminals use other persons’ birth certificates, which lack unique identification markers such as fingerprints or footprints.) In addition, all adults could be required to submit to a quick cheek swab, perhaps when they get their driver’s licenses. This swab is all that would be needed to generate the genetic fingerprint.

There is, however, considerable danger in allowing the government unlimited access to each person’s entire DNA code, which contains a great deal of genuinely private information that could be used in sinister ways. For example, the complete code may reveal a person’s ge-

netic predispositions to various diseases, information that could compromise employability and insurability and that the person herself might prefer not to know. But there is a clean way of protecting private information of this sort by using only part of the DNA code, so-called “junk DNA,” that only identifies a person but tells us nothing truly private — the DNA equivalent of a fingerprint. The same law requiring mandatory blood tests and cheek swabs could provide that only the DNA fingerprint be done, with the rest of the biological sample destroyed.<sup>331</sup> The law could further provide for elaborate safeguards against the misuse of samples, including a statutory requirement that the whole program be headed by “a distinguished civil libertarian.”

Such a regime could be a genuine win-win affair. From the perspective of the document, this hardly seems an “unreasonable” search and seizure regime: the scheme is nondiscriminatory, relatively unintrusive, well justified, sensitive to legitimate privacy interests, and no broader than necessary. But it is far from clear that current doctrine would allow this scheme, because it contemplates intrusions for criminal law-enforcement purposes in the absence of probable cause and, indeed, in the absence of individualized suspicion. This is a category of search that doctrine strongly disfavors.<sup>332</sup>

Which is a more sensible way of governing an unknowable future that will confront a vast range of attempted searches and seizures of all sizes and shapes serving all manner of governmental interests: A rule that prohibits “unreasonable” intrusions, as defined by the values of the rest of the Constitution? Or a rule that says that each and every law enforcement search must be accompanied by a certain quantum of individualized suspicion?

2. *Arms.* — Gun control is one of the most controversial issues facing the country today. Is the Second Amendment an attractive provision? Does it really stand in the way of sensible gun control? If so, perhaps on this issue the modern Court, which has largely ignored the Amendment, has been wiser than the Framers.

But nothing in the Second Amendment, or the Fourteenth that reglossed it, prohibits the kinds of reasonable gun control measures now on the national agenda. And behind the words of the Second Amendment lie some important lessons about democracy and the military — lessons that we ignore at our peril.<sup>333</sup>

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<sup>331</sup> For a similar suggestion from a legal researcher and molecular biologist at the University of Melbourne, see David Keays, *DNA Should Be Recorded, Not Kept*, SYDNEY MORNING HERALD, Apr. 21, 2000, at 11.

<sup>332</sup> See, e.g., *Chandler v. Miller*, 520 U.S. 305, 308, 313 (1997).

<sup>333</sup> For more discussion of current gun control issues, see Akhil Reed Amar, *Second Thoughts*, NEW REPUBLIC, July 12, 2000, at 24. Some of what follows borrows from this essay. For more

“A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.” At root, these are words not about guns per se, nor about hunting and target shooting. Rather, they are about democracy and the military, about “the people” and “the militia.” According to the Amendment’s somewhat stilted grammar, in a sound republic the “people” and the “militia” are one and the same: those who vote bear arms, and those who bear arms vote. Indeed, an earlier draft of the Amendment linked the two clauses with linchpin language speaking of “a well regulated militia, composed of the body of the people.”<sup>334</sup> The linchpin was later pulled out as clumsy and redundant. To put in more modern language the key eighteenth-century concern underlying this linkage of “militia” and “people”: The Constitution must ensure that the people will rule, not the army; military power must remain subordinate to civilian control and civilian values.

The phrase “bear arms” is a military phrase. A deer hunter or target shooter carries a gun but does not, strictly speaking, bear arms. The military connotation was even more obvious in the earlier draft of the Amendment, which contained additional language that “no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.”<sup>335</sup> Even in the final version, the military phrase “bear arms” is sandwiched between a clause that talks about the “militia” and a clause (the Third Amendment) that regulates the quartering of “soldiers” in times of “war” and “peace.”<sup>336</sup> Likewise, state constitutions in place in 1789 consistently used the phrase “bear arms” only in military contexts, intertwining arms-bearing and militia clauses with rules governing standing armies, troop quartering, martial law, and civilian supremacy. Founding history confirms this. The Framers envisioned Minutemen bearing guns, not Daniel Boone gunning bears.

Textually, the rightsholders are not atomized, individualistic “persons,” each hunting in his own private Idaho, but rather “the people” collectively. Intratextually, when the Constitution speaks of “the people” rather than “persons,” the collective connotation is primary. “We the People” in the Preamble establish the Constitution as public citizens meeting together in conventions and acting in concert, not as private individuals pursuing our respective hobbies. The only other reference to “the people” in the Philadelphia Constitution of 1787 appears

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detailed discussion of the Second Amendment and its Fourteenth Amendment gloss, see AMAR, *BILL OF RIGHTS*, *supra* note 17, at 46–63, 257–68.

<sup>334</sup> THE COMPLETE BILL OF RIGHTS 173 (Neil H. Cogan ed., 1997).

<sup>335</sup> *Id.*

<sup>336</sup> U.S. CONST. amend. III (“No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”).

a sentence away from the Preamble and here, too, the meaning is public and political, not private and individualistic. Every two years, “the people” — that is, the voters — elect the House of Representatives.<sup>337</sup> To see the key distinction between “persons” and “the people” another way, recall that women in 1787 had the rights of “persons” (such as freedom to worship and protections of privacy in their homes) but did not directly participate in the acts of “the people” — they did not vote in constitutional conventions or for Congress, nor were they part of the militia/people at the heart of the Second Amendment.

The rest of the Constitution supports this reading. The core of the First Amendment’s Assembly Clause, which textually abuts the Second Amendment, is the right of “the people” — in essence, voters — to “assemble” in constitutional conventions and other political conclaves. So too, the core rights retained and reserved to “the people” in the Ninth and Tenth Amendments are the people’s collective rights to govern themselves democratically.<sup>338</sup> Later Amendments tighten the linkage between military service and voting as paired political rights. Thus, Section 2 of the Fourteenth Amendment defines a state’s presumptive electorate in a fashion roughly akin to its militia base of adult males; the Fifteenth Amendment confers suffrage on black men in part as a reward for their military service in the Civil War; and the Twenty-Sixth Amendment gives those old enough to fight the right to vote, too.

Underlying the Founders’ vision was a certain skepticism about a permanent, hierarchical standing army that might not truly look like America but would instead embody a dangerous culture within a culture, a proto-military-industrial complex threatening republican equality. If twenty-first-century Americans sought to learn from this vision rather than scoff at it, it might have interesting things to teach us, especially if we are open to ways of translating this vision into a world where military hardware is far more dangerous than at the Founding, and where voters no longer regularly muster on town squares.

As food for thought, consider the holistic argument that, in tandem with later Amendments and other changes in law and fact, the Second Amendment should inspire us to create an Army that truly looks like America. At the Founding, a standing army in peacetime was viewed with dread and seen as the Other — mercenaries, convicts, vagrants,

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<sup>337</sup> *Id.* art. I, § 2, cl. 1.

<sup>338</sup> For more documentation, see AMAR, BILL OF RIGHTS, *supra* note 17, at 26–32, 119–22. The Fourth Amendment is trickier, pairing the collective “people” with the more individualistic language of “persons.” And this Amendment’s words obviously focus on the private domain, protecting individuals in their private homes more than in the public square. Why, then, did the Fourth Amendment use the words “the people” at all? See *id.* at 64–77 (linking these words to the importance of juries in Fourth Amendment decisionmaking about reasonableness).

aliens — rather than as a group of ordinary citizens. Today, Americans view our professional Armed Forces with pride. These forces represent Us, not Them. In effect, the Founders' militia has begun to morph into today's Army. In light of this transformation, women and gays should play as equal a role as possible in today's institutions of collective self-defense. The militia celebrated by the Second Amendment should reflect the people, just as the jury celebrated by other Amendments should. To put the point another way, the Second Amendment says that voters should bear arms and that arms-bearers should vote. Since the Nineteenth Amendment has made women equal voters, the Second Amendment demands that they be given equal status in arms. (Allowing women to buy guns at the local Wal-Mart might make them equal in hunting, but it does not make them equal in arms-bearing; it fails to include them on equal terms in modern America's militia substitute.)

What is true for women may also be true for gay men: The Armed Forces' discrimination based on sexual orientation is, formally at least, discrimination on grounds of sex, in tension with the Nineteenth Amendment ideal. (If Leslie has sex with John, it is both logically and sociologically a form of sex discrimination to treat Leslie one way if she is a woman and a different way if he is a man.) Formal sex discrimination can be justified in some cases, but it should be closely interrogated. For example, separate bathrooms for men and women are formally a kind of sex discrimination, but this arrangement is widely seen as justified by legitimate privacy concerns. So, too, certain sex-based exclusions in military policy might be justifiable where these exclusions reflect real physical differences relevant to modern warfare. But where exclusions of women and gays are justified merely by the need to maintain "morale" and "unit cohesion," we should be wary; similar arguments were once used to maintain racial discrimination in our Armed Forces.<sup>339</sup>

The foregoing reading of the document is not open and shut; full elaboration would require much more discussion than I have offered. The document is not wholly determinate, especially when many important differences of law and fact separate us from the world of the Founders. But even with a clause as seemingly eighteenth-century as the Second Amendment, there is a great deal that twenty-first-century Americans could learn, if we would only listen.

3. *The Presidency.* — Perhaps the biggest story of the year has been the presidential election, inviting the American people to pick a

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<sup>339</sup> For a brilliant analysis of discrimination in the American military, see Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991). But see *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding sex discrimination in draft registration).



new leader for the next four years. The Constitution says rather little about presidential eligibility. Some of what it says is unattractive, discriminating against naturalized citizens.<sup>340</sup> But one of its most intriguing rules is that a President must be thirty-five years old.<sup>341</sup>

Though the clause is often brandished as a stiff prop in a distracting debate about constitutional determinacy, it is considerably richer and more interesting than conventionally recognized. Begin by asking why the Constitution might seek to regulate the age of the chief executive. An obvious structural approach would be to consider the thirty-five-year-old rule alongside two other age rules in the original Constitution. Members of the House must be at least twenty-five, according to Article I, Section 2; Senators must be at least thirty, according to Article I, Section 3. At first glance, then, the thirty-five-year-old-rule of Article II is simply part of an ensemble.

But closer structural analysis suggests that this superficial view may miss something important. Maturity in political leaders has advantages, but why cannot the voters themselves be trusted to give this virtue due weight? Where members of Congress are concerned, a structural answer might be as follows: The voters and politicians in a given state might seek to give their local favorite son a leg up in the competition for national reputation and honor. By sending someone very young to Washington, the state might hope to draw attention to its favorite son, who might later stand a better chance of becoming a congressional leader or a Cabinet head or even President.<sup>342</sup> But if some states did this, others might follow suit, leading to a kind of race to the bottom.

This answer creates a puzzle, for it is hard to imagine a similar dynamic for the President, who is elected nationally. We therefore might ask ourselves a slightly different question: What is the actual fear behind this clause? Or to put it more bluntly, in what possible scenarios might the people be unwisely tempted to vote for someone very young as President? When we ask this question, a rather different favorite-son scenario comes into focus.

Once again, it helps to recall the background of the ancien regime against which the Framers were operating, in which crowns passed down from fathers to sons. Our story of favorite sons thus begins with

<sup>340</sup> U.S. CONST. art. II, § 1, cl. 5 ("No person except a natural born Citizen . . . shall be eligible to the Office of President . . ."). For criticism of this clause, see Randall Kennedy, *A Natural Aristocracy?*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, *supra* note 45, at 54.

<sup>341</sup> U.S. CONST. art. II, § 1, cl. 5 ("[N]either shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years . . .").

<sup>342</sup> Cf. Vikram David Amar, *Underage Senators* (Oct. 2000) (unpublished manuscript, on file with the Harvard Law School Library) (discussing the Senate age rule).

George the elder and George W. the younger — that is, with King George III and George Washington.

During debates over the Constitution in the late 1780s, everyone understood that Washington would likely become America's first President. But America's George would be very different from England's George. As *The Federalist No. 69* emphasized with pointed italics: "The President of the United States would be an officer elected by the people for *four* years; the king of Great Britain is a perpetual and *hereditary* prince."<sup>343</sup> The American Constitution thus promised a new world order, repudiating the idea that political office should be handed down from father to son as inheritable property. The Title of Nobility Clauses, of course, are the most dramatic evidence of this Revolutionary idea.

But the Thirty-five-year-old Clause may also be read through this prism. In reassuring skeptics that the presidency would not degenerate into a monarchy, one Federalist pamphlet explained:

No citizen of America has a fortune sufficiently large, to enable him to raise and support a single regiment. The President's salary will be greatly inadequate either to the purpose of gaining adherents, or of supporting a military force: He will possess no princely revenues, and his personal influence will be confined to his native State. *Besides, the Constitution has provided, that no person shall be eligible to the office, who is not thirty-five years old; and in the course of nature very few fathers leave a son who has arrived to that age.*<sup>344</sup>

George Washington's unanimous election in 1789 — every voting member of the first electoral college supported him — reflected the Founders' strong apprehensions about father-son dynasties. Simply put, part of the reason why Washington became father of his country was that he was not father of his own children.<sup>345</sup> He sired no heirs, and his only stepson died in 1781. Americans could breathe easier knowing that their first General and first President would not try to create a throne and a crown to pass on to his namesake. (The man contemporaries most feared was Alexander Hamilton, who at times

<sup>343</sup> THE FEDERALIST NO. 69, at 422 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The contrast between the Constitution and ancient forms of hereditary political power is emphatic and pervasive in *The Federalist Papers*. For a few exemplary quotes, see above at note 105.

<sup>344</sup> OBSERVATIONS UPON THE PROPOSED PLAN OF THE FEDERAL GOVERNMENT (Apr. 2, 1788) (attributed to "A native of Virginia"), reprinted in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 655, 679 (John P. Kaminski & Gaspare J. Saladino eds., 1990) (emphasis added); see also RAKOVE, *supra* note 31, at 276 (highlighting this passage). Regardless of the actuarial accuracy of the pamphlet's claim, it suggests an important link between the clause and more general concerns about the hereditary successions of young princelings. For a reformulation of the link that avoids reliance on the precise actuarial claim of the pamphlet, see below at p. 132.

<sup>345</sup> For similar suggestions, see 1 JAMES THOMAS FLEXNER, GEORGE WASHINGTON: THE FORGE OF EXPERIENCE, 1732-1775, at 270-71 (1965); and WOOD, *supra* note 105, at 209.

played the role of the good son Washington never had.) Washington himself was extraordinarily self-conscious about the issue. In the first draft of his First Inaugural Address (which he later shelved, perhaps on the advice of James Madison), he wrote:

[I]t will be recollected, that the Divine Providence hath not seen fit, that my blood should be transmitted or my name perpetuated by the endearing, though sometimes seducing channel of immediate offspring. I have no child for whom I could wish to make a provision — no family to build in greatness upon my Country's ruins. Let then the Adversaries to this Constitution — let my personal enemies if I am so unfortunate as to have deserved such a return from any one of my countrymen, point to the sinister [sic] object, or to the earthly consideration beyond the hope of rendering some little service to our parent Country, that could have persuaded me to accept this appointment.<sup>346</sup>

The history of the early Presidency is striking. Thomas Jefferson had no surviving sons — at least no legitimate ones. Ditto for James Madison and James Monroe. John Adams, however, did have a son and namesake: John Q. And Q's eventual ascension to the Presidency, in 1824, can be seen as a transition from a premodern world of dynastic succession to the modern world of a democracy open to talent. A Phi Beta Kappa graduate of Harvard and later a Harvard professor; an accomplished diplomat fluent in several languages with decades of experience in foreign affairs, including a successful eight-year stint as Secretary of State — here was a man with impressive credentials and prodigious talents in his own right. And Q's entrance onto the presidential stage occurred a quarter-century after his father's exit. In 1801, when John the elder left office, Q was not even old enough to run. Thus we see again how one foreseeable effect, and perhaps purpose, of the Thirty-five-year-old Clause was to limit regency successions of young and possibly irresponsible (but politically tempting) favorite sons.

Through their names and their looks, the offspring of great leaders may conjure up images of past glory in the minds of their fellow citizens, but a genuine democracy should insist that lookalikes and soundalikes are truly persons of distinction in their own right before crowning them with high office. The Thirty-five-year-old Clause strikes a good balance — unlike, say, an absolute prohibition on father-son succession, which would have permanently denied the republic the option of picking someone who might be the ablest, most distinguished person, such as a mature John Q. Adams. Indeed, an absolute bar would eerily resemble an unconstitutional “Corruption of Blood” imposed on certain disfavored offspring.

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<sup>346</sup> 2 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 162–63 (Dorothy Twohig ed., 1987). Special thanks to Gordon Wood for kindly bringing this passage to my attention.

What is the relevance of all of this in the year 2000? Surely nothing in the Constitution's Thirty-five-year-old Clause would render any of the major candidates ineligible to the Republic's highest office. But it is a mistake to see the Constitution only in terms of constraint. The document can also edify and teach Americans about our history as a People. The issue of presidential primogeniture is hardly irrelevant, even two centuries after the Founding. Sensitively read, the document of course allows Americans so inclined to vote for George W. Bush for President but subtly encourages all citizens to focus on W's credentials and talents in his own right. And perhaps it is worth noting that at least George W. does not have any sons named George III.

### CONCLUSION

At the dawn of a new millennium, constitutional law is at risk of losing touch with the Constitution itself.<sup>347</sup> A dense doctrinal grid threatens to obscure the document, with generally unfortunate consequences. The Constitution is wiser than the Court.

In the short run, the Court is unlikely to mend its ways. Strong structural forces — judicial training and traditions, time constraints, institutional concerns, self-love — incline Justices to elevate the doctrine over the document. Even if today's Justices earnestly tried to be more documentarian, would they do a good job of it?

In the long run, prospects may be better. In the long run, "we" (the current generation) are all dead. But "We" (the People) are not. The document itself focuses on the long run, intergenerationally, and so should documentarians. As a teacher of the next generation of lawyers, law professors, politicians, and judges, I pin my hopes on posterity.

But posterity must be taught the constitutional truth. Casebooks should be revised to teach students more about the document, with less fixation on every detail of today's doctrine.<sup>348</sup> The document will outlast many of today's doctrines, and it provides a stable fulcrum from which to criticize some of the Court's less admirable adventures. To give students a truer sense of things, professors must stop feeding their wards a standard narrative that sugarcoats much of the Court's less-than-admirable history. Casebooks and courses should also focus more on the Constitution outside the judiciary. Many students will never be judges, but will someday be asked to make constitutional de-

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<sup>347</sup> John Ely said it well: "[T]hrough the identification of a constitutional connection is only the beginning of analysis, it is a necessary beginning. . . . [The Court] is under an obligation to trace its premises to the charter from which it derives its authority." Ely, *supra* note 166, at 948–49.

<sup>348</sup> For a more general treatment of casebooks and canons in constitutional law, see J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998).

cisions. Perhaps the *Harvard Law Review* should complement its annual November survey of the Supreme Court Term with an annual June issue devoted to the Constitution outside the Court.

Most fundamental of all, those who teach and study constitutional law should reacquaint themselves with the Constitution itself. It is a document rich with meaning, rewarding loving study. It is perhaps too much to ask the current Justices to read the Constitution regularly and carefully. But is this too much to ask of constitutional law professors and law students?