

HARVARD LAW REVIEW

ARTICLE INTRATEXTUALISM

Akhil Reed Amar

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INTRATEXTUALISM

Akhil Reed Amar*

*The full meaning of the Constitution's text often eludes textualists. By viewing the document's clauses in splendid isolation from each other — by reducing a single text to a jumble of disconnected clauses — readers may miss the significance of larger patterns of meaning at work. One underappreciated antidote to this brand of clause-bound textualism is an interpretive technique that Professor Amar calls intratextualism. Intratextualists read a word or phrase in a given clause by self-consciously comparing and contrasting it to identical or similar words or phrases elsewhere in the Constitution. Writing in the spirit of Charles Black's *Structure and Relationship in Constitutional Law*, Professor Amar urges interpreters to read the Constitution more holistically, illustrating his distinctive technique with a series of rich readings of canonical and contested cases.*

Interpreters squeeze meaning from the Constitution through a variety of techniques — by parsing the text of a given clause, by mining the Constitution's history, by deducing entailments of the institutional structure it outlines, by weighing the practicalities of proposed readings of it, by appealing to judicial cases decided under it, and by invoking the American ideals it embraces. Each of these classic techniques extracts meaning from some significant feature of the Constitution — its organization into distinct and carefully worded clauses, its embedment in history, its attention to institutional architecture, its plain aim to make good sense in the real world, its provision for judicial review (and thus judicial doctrine), and its effort to embody the ethos of the American people. Here is another feature of the Constitution: various words and phrases recur in the document. This feature gives interpreters yet another set of clues as they search for constitutional meaning and gives rise to yet another rich technique of constitutional interpretation. I call this technique intratextualism.

In deploying this technique, the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase. For example, few constitutional issues have been more significant, or more hotly debated, over the last year than the constitutional status of Independent Counsel Kenneth Starr. Constitutionally speaking, the Independent Counsel must be an "inferior" officer under the Appointments Clause of Article II, Section 2. But what exactly does "inferior" mean here? *To whom* exactly is Counsel Starr "inferior"? An intratextual analysis would look to two other clauses of the Constitution that use the word "inferior" — the Article I, Section 8 clause concerning "inferior" tribunals, and the Article III, Section 1

* Southmayd Professor of Law, Yale Law School.

clause concerning "inferior" courts — for guidance in understanding the *constitutional* concept of "inferior."

In what follows, I illustrate, critique, and apply the classic but underappreciated technique of intratextualism across a wide range of constitutional questions.¹

I. CASES AND COMMENTARIES

Intratextualism exists as an important form of constitutional argument bearing a distinguished legal pedigree, as is clear from a selective survey of canonical constitutional cases and commentaries. After examining the use (and nonuse) of the technique in landmark judicial opinions and scholarly works, we will be poised to ponder some of its distinctive features. By confining this survey to what are generally deemed the most canonical cases and commentaries, I aim to avoid stacking the deck. Instead of picking and choosing only those works from the last two centuries that show intratextualism at its best and most powerful, I seek to discover how universal the technique might be, to assess its pervasiveness as well as its power, to canvass instances in which it was used passingly or poorly along with those in which it was used emphatically or well. After we have seen a wide variety of its uses, abuses, and nonuses, we will be better positioned to theorize about what we have seen (in Part II) and to consider how powerful the technique can be at its best (in Part III).

A. Cases

1. *McCulloch*. — Let us begin with what many would deem the most central case in our constitutional canon: *McCulloch v. Maryland*.² *McCulloch*'s claim to primacy can of course be challenged — *Marbury*,³ *Brown*,⁴ and *Roe*⁵ probably stand as the three other leading contenders today, and so we shall eventually consider each of these three as well.⁶ Together these four cases mark the basic outlines of

¹ A more detailed roadmap may be helpful here. Part I illustrates intratextualism by surveying landmark cases and commentaries for traces of this technique in various forms. Part II critiques intratextualism by comparing and contrasting it to other modes of interpretation, and by candidly assessing the general strengths and weaknesses of this technique and its variations. Part III applies intratextualism by using it to rethink three of the most important and most challenging constitutional questions that have arisen over the last decade — an exercise designed to show how powerful and elegant the technique can be when used well.

² 17 U.S. (4 Wheat.) 316 (1819).

³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁴ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

⁶ A couple of other possible candidates are *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *Griswold v. Connecticut*, 381 U.S. 479 (1965), and I shall also offer a few passing thoughts about these cases. A superb general discussion of canonicity in constitutional law may be found in J.M. Balkin and Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 964 (1998). Specific evidence supporting my particular selection of canonical cases today may also be

conventional constitutional doctrine, characterized by judicial review of both legislative and executive action (*Marbury*); broad but theoretically finite federal power (*McCulloch*) that states may not obstruct (*McCulloch*, again, along with its cousin, *Martin v. Hunter's Lessee*⁷); emphatic norms against governmental efforts to subordinate or stigmatize racial minorities (*Brown* and its companion *Bolling*⁸); and broad protection of judicially defined fundamental rights that may or may not be clearly stated in constitutional text (*Roe*). *McCulloch*'s claim to canonical primacy, however, rests on more than its doubly significant substance affirming generous congressional power in the first half of the opinion and important limits on state governments in the second half. Perhaps uniquely among the four top contenders, *McCulloch* commands our attention not merely for *what* it says but for *how* it says, featuring a richer mixture of elegant constitutional arguments of various types than its rivals. To read *McCulloch* is to see (and for many beginning students, to learn) how to do constitutional argument.

(a) *McCulloch and constitutional argument generally.* — Before we examine *McCulloch*'s use of intratextual argument, it may be useful to review how Chief Justice Marshall's masterpiece deploys other, more familiar, types of constitutional argument.⁹ Consider first an argument exemplifying textualism in its classic clause-bound form. Maryland apparently claimed that the Necessary and Proper Clause, "though in terms a grant of power, is not so in effect; but is really restrictive," requiring the Court to construe the various enumerated powers in Article I *more strictly* than it otherwise would in the absence of this clause.¹⁰ In response to this claim, Marshall trumpets the text. Had the clause been designed to restrict rather than to enlarge or to confirm¹¹ the broad construction otherwise appropriate for enumerated powers, its text would have been worded differently. Instead of af-

found in this essay. See *id.* at 973-75 & n.43 (identifying the handful of cases that appear in all or virtually all major constitutional casebooks).

⁷ 14 U.S. (1 Wheat.) 304 (1816). Because of the towering importance of *Martin* in its own right, and alongside *McCulloch*, we shall closely examine Story's landmark precursor to Marshall's masterpiece.

⁸ *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁹ For a brilliant general discussion of these argument types, see PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982).

¹⁰ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 412 (1819).

¹¹ Note that, contrary to what many seem to think, Marshall does not claim that the Necessary and Proper Clause adds anything to congressional power or constitutes some free-standing font of federal authority; rather, he claims only that the clause does not diminish congressional powers conferred elsewhere in Article I. In the end, he professes to be agnostic whether the clause was designed to "enlarge" — or instead merely to confirm and "remove all doubts" about — the breadth of enumerated power conferred by earlier clauses. *Id.* at 420-21. The declaratory, doubt-removing reading of the Necessary and Proper Clause finds strong support in *THE FEDERALIST* NO. 33 (Alexander Hamilton) and NO. 44 (James Madison). For more discussion, see Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. (forthcoming 1999) [hereinafter Amar, *Clarifying Clauses*].

firmatively declaring that "Congress shall have the power . . . to make all laws which shall be necessary and proper,"¹² the clause would have been negatively written "in terms resembling these[:] . . . 'no laws shall be passed but such as are necessary and proper.' Had the intention been to make this clause restrictive, it would unquestionably have been so in [grammatical and syntactical] form as well as in effect."¹³

Marshall buttresses this narrow textual argument with a narrow historical argument. The friends of the Constitution in 1787, he notes, faced their main opposition from localists fighting the proposed federal government as too strong, not from ultranationalists attacking the new central regime as too weak.¹⁴ Had the Framers designed the Necessary and Proper Clause as a restriction on Congress, they would have openly advertised it as such to win their critics over: "No reason has been, or can be assigned for . . . concealing an intention to narrow the discretion of the national legislature under words which purport to enlarge it."¹⁵ Other passages in *McCulloch* also feature important historical arguments. For example, Marshall opens his substantive analysis of congressional power with a broad-brush narrative of the process by which the American people ordained and established the Constitution.¹⁶ A few paragraphs later, Marshall notes that even the Tenth Amendment does not limit Congress to powers "expressly" conferred, and he again turns to history for explanation: "The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word ['expressly'] in the articles of confederation, and probably omitted it to avoid those embarrassments."¹⁷

Intertwined with Marshall's appeals to text and history are sturdy structural arguments rooted in federalism and populism. Because the Constitution is not merely a league or treaty between sovereign states, federal powers should not be grudgingly construed, as were the powers conferred by the earlier Articles of Confederation. (Here we see the relevance of Marshall's broad-brush narrative of the Founding process, aimed at disproving the notion that the Constitution was in effect a mere compact created by sovereign governments.) Because the Constitution derives directly from the people, in whose name it speaks ("We, the People") and to whom it speaks, it must speak in broad terms. By its very nature as a populist document, a constitution cannot "partake of the prolixity of a legal code" — for such a code "would probably never be understood by the public" whose assent makes a constitution the supreme law.¹⁸ Thus Marshall argues that the *nature* of the

¹² U.S. CONST. art. I, § 8.

¹³ *McCulloch*, 17 U.S. at 420.

¹⁴ *See id.*

¹⁵ *Id.*

¹⁶ *See id.* at 402–05.

¹⁷ *Id.* at 406–07.

¹⁸ *Id.* at 407.

document repels the idea that every conceivable federal power — such as the power to create a bank — must be spelled out in minute detail rather than implied by and subsumed within the general structure of broadly crafted enumerated powers. Perhaps certain treaties should be strictly construed in a manner leaving nothing to implication — and so too perhaps for some legal codes. But for reasons of federalism and populism, Marshall is emphatic that the document at hand is inherently different from a *treaty* or a *code*: “we must never forget, that it is a *constitution* we are expounding.”¹⁹ Structural arguments also loom large in the second half of *McCulloch*, in which Marshall proclaims that Maryland may not tax the charter of a lawfully established federal bank. Where, a critic might ask, does the Constitution say *that*? Nowhere in so many words, Marshall cheerfully admits,²⁰ but as a matter of general structural logic, surely the part cannot control the whole. Surely Maryland may not tax those whom Maryland does not represent. If Maryland may lawfully tax the federal bank a little, surely she may lawfully tax the federal bank a lot; if she may tax a federal bank, surely she may tax all other federal instrumentalities; if she may pass tax laws, surely she may pass other obstructing laws.²¹ This structural logic nicely echoes the rallying cries of the American Revolution: “No taxation without representation!” and “No tax on tea!” (To the colonial patriots, the power of Parliament to pass a tiny tea tax implied the power to tax without limit, which in turn implied plenary parliamentary power in America.)

McCulloch also illustrates how structural argument often goes hand in hand with a certain kind of pragmatic argument.²² Stingy construction of the Constitution, Marshall argues, would offend the nature of the Constitution not merely as a suitably nationalist and populist document, but also as an inherently practical document. The Constitution was meant to *work* — and to work over long stretches of time, and vast reaches of space:

[A] constitution [is] intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute

¹⁹ *Id.*

²⁰ See *id.* at 426. Marshall's words here are memorable:

There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

Id.

²¹ See *id.* at 426–33.

²² See CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 22 (1969) (stating that to succeed, structural argument “has to make sense — current, practical sense”); BOBBITT, *supra* note 9, at 74 (stating that structural arguments often “embody a macroscopic prudentialism drawing not on the peculiar facts of the case but rather arising from general assertions about power and social choice”).

its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an *unwise* attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be *best* provided for as they occur. . . . [The restrictive approach is] so *pernicious* in its operation that we shall be compelled to discard it

. . . .

The *baneful* influence of this narrow construction on all the operations of the government, and the absolute *impracticability* of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples²³

Hear the voice of the pragmatist, weighing various readings by their consequences. For Marshall, the key fact for the case at hand is the huge sweep of the nation, ranging "from the St. Croix to the Gulph of Mexico, from the Atlantic to the Pacific."²⁴ Armies may be required to defend such an immense expanse, and soldiers must be paid wherever they may go. (As a Revolutionary War veteran who endured the winter at Valley Forge, Marshall viscerally understood the obvious practical importance of keeping soldiers well supplied and well paid, lest they desert or mutiny.) A highly convenient way to assure that federal soldiers will be paid on time and on site is to establish a system of federal banks with branches stretching across the continent. Because the Constitution plainly contemplates a federal army and federal fiscal operations of taxing and spending, federal ATMs (or their nineteenth-century equivalent) are appropriate — they are subsumed within and implied by the great powers of "[t]he sword and the purse" to tax, spend, regulate commerce, declare war, and raise and support armed forces.²⁵

Let us now turn to another form of constitutional analysis: doctrinal argument, based on judicial precedent. Many readers have noticed that Marshall cites no cases by name. However, in the first paragraph of his analysis of the first question in the case, Marshall reminds us that "the judicial department, in cases of peculiar delicacy," has repeatedly treated the statute creating a federal bank as "a law of undoubted obligation."²⁶ A casual reader might wonder what Marshall means here, but the answer is clear from *McCulloch*'s oral argument.²⁷ Judges in earlier cases had upheld criminal convictions for various frauds upon the bank, actions that would arguably have been immune from criminal sanction if the bank itself were an unconstitutional en-

²³ *McCulloch*, 17 U.S. at 415–18 (emphasis altered).

²⁴ *Id.* at 408.

²⁵ *Id.* at 407–08.

²⁶ *Id.* at 401.

²⁷ See *id.* at 353 (argument of Attorney General William Wirt), 380–81 (argument of William Pinkney).

tity. Why did Marshall soft pedal these precedents? Perhaps because the constitutionality of the bank was never explicitly raised as a defense in these earlier criminal cases. A good doctrinal judge pays exquisite attention to fine doctrinal distinctions between square holdings and less than square ones, and between holdings and dicta. When seen in this light, Marshall's handling of caselaw in *McCulloch* seems not cavalier, but deft — ever so softly invoking precedents that, as precedents go, were ever so soft. Later in his opinion, Marshall again shows his sensitivity to the dictates of doctrinal argument, this time as a precedent-setter rather than a precedent-follower. The rule to be laid down in the case at bar must be capable of being followed by lower courts and a later Court. Awkward attempts to judicially measure the precise degree of a law's pragmatic necessity should be avoided. They will not work, doctrinally, and will make judges look silly, as would efforts to draw principled doctrinal lines between small taxes that are permissible and large ones that are not. Legislators may be free to draw ad hoc lines, but doctrinally minded judges must respect the limits of principled adjudication and attend to the issue of justiciability:

[T]o undertake here to inquire into the degree of [an appropriate law's] necessity, would be to pass the line which circumscribes the *judicial* department, and to tread on legislative ground.²⁸

....

... We are not driven to the perplexing inquiry, so unfit for the *judicial* department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power.²⁹

Text, history, structure, prudence, and doctrine — these are the basic building blocks of conventional constitutional argument. But Philip Bobbitt suggests that a sixth form of constitutional argument exists and merits attention — what he calls “ethical argument.”³⁰ By “ethical,” Bobbitt has in mind not an argument from morality pure and simple, but an argument from the ethos, or character, of the American people and the American experience. In the vernacular, an ethical argument might declare a practice unconstitutional because it is “unAmerican,” or might affirm the constitutionality of a contested practice because it is part of “the American way.” We have already encountered an argument in *McCulloch* that might be seen as ethical: the idea of “no taxation without representation” is basic to the American identity and the American experience.³¹ Additional traces of ethi-

²⁸ *Id.* at 423 (opinion of the Court) (emphasis added).

²⁹ *Id.* at 430 (emphasis added).

³⁰ BOBBITT, *supra* note 9, at 93–119.

³¹ This argument might also be deemed structural, focusing on the relationship between the electors and the elected. We the voters have confidence in our representatives and let them tax us precisely because we chose to vote them in and can choose to vote them out (a fact that concen-

cal argument surface earlier in Marshall's exposition. He opens his opinion by reminding us that the 1791 bill creating the first bank was supported by "minds as pure and as intelligent as this country can boast."³² The reference here is to the sainted Washington, who added his name to the bill and thus made it law only after satisfying himself of its constitutionality. To contest this three decades later, Marshall hints, is to stain the name of our First Man — to be, if not unAmerican, at least unWashingtonian. If this rhetorical gesture strikes us as too personal to qualify as a proper ethical argument, Marshall later offers up another ode to the American experience that rings more true to modern ears, attuned as we are to an even more graceful expression of the same ethical argument some twoscore years later. "The government of the Union," says Marshall, "is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."³³ As a lawyer named Lincoln would distill Marshall's ethical point at a place called Gettysburg, America's is a "government of the people, by the people, and for the people."³⁴

(b) *McCulloch and intratextualism*. — So much then for *McCulloch*'s use of the most familiar techniques of constitutional interpretation. Let us now trace its equally adroit use of the technique of intratextualism. We have already noted that even before he turns to the Necessary and Proper Clause, Marshall argues that the earlier Article I, Section 8 "great powers" of "[t]he sword and the purse" are ample enough to sustain the creation of a federal bank.³⁵ But Maryland's counterargument, interpreted most charitably, is that the various enumerated powers should be construed far more strictly than Marshall has proposed, and that the specific words of the Necessary and Proper Clause confirm the imperative of strict construction. Congress should enjoy only those implied incidental powers that are logically "necessary" to carry out its express powers. A federal bank might be useful

trates their minds wonderfully): "The only security against the abuse of [taxation] power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation." *McCulloch*, 17 U.S. at 428 (emphasis added). There are also traces of this idea in specific constitutional clauses — for example, the Direct Tax Clause of Article I, Section 2, which provides that direct taxes and congressional representation be apportioned by the same formula. It should not be surprising that different techniques of constitutional interpretation often overlap and converge. The various types of argument are not sealed off from each other, and ultimately they are all mere tools to help us draw meaning from the same source — the American Constitution in word and deed.

³² *McCulloch*, 17 U.S. at 402.

³³ *Id.* at 404–05.

³⁴ Like all lawyers of his generation, Lincoln had surely read *McCulloch* as a young man, and perhaps many times thereafter. For a brilliant discussion of other sources of influence on Lincoln's famous phrasing, see GARRY WILLS, *LINCOLN AT GETTYSBURG* 107–08, 129–31, 281 n.24 (1992).

³⁵ *McCulloch*, 17 U.S. at 407–08.

and convenient, but it is not logically "necessary" to have a federal bank to, say, have a federal army. As a matter of logic, one can imagine an army without a bank. Thus a bank is, strictly speaking, not *necessary*. In response, Marshall concedes that the word "necessary" is sometimes used as a term of logic or math meaning strictly indispensable, *sine qua non*. But, Marshall counters, the word does not invariably (a wag might say "necessarily") mean this: "If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful . . . to another."³⁶ If the word were invariably a term of math or logic, it could never be modified by an adverb of degree. And yet, Marshall argues, in ordinary language, such adverbs do modify the word: "[A] thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases."³⁷

Thus far, Marshall's analysis seems methodologically unremarkable. It is a standard clause-bound exegesis appealing to plain meaning, ordinary language, and (perhaps implicitly) original intent. Ordinary Americans ratified the Constitution, and the word "necessary" should be understood in its ordinary sense as confirmed by usage "in the common affairs of the world, or in approved authors." But at precisely this point, Marshall makes an intriguing methodological turn. Rather than pointing to, say, Samuel Johnson's dictionary to prove his philological point, he turns to another passage in the Constitution itself, in effect using the Constitution as its own dictionary:

This comment on the word ["necessary"] is well illustrated, by the passage cited at the bar,³⁸ from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "imposts, or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely."³⁹

³⁶ *Id.* at 413.

³⁷ *Id.* at 414.

³⁸ As Marshall graciously acknowledges, the argument he is about to make borrows from William Pinkney's oral argument, *see id.* at 387-88, which Justice Joseph Story described as "brilliant and sparkling," and which the historian Charles Warren labeled "the greatest effort of [Pinkney's] life." 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 507-08 (1922). Marshall himself later called Pinkney "the greatest man I ever saw in a Court of justice." 14 *DICTIONARY OF AMERICAN BIOGRAPHY* 626, 628 (Dumas Malone ed., 1934) (citation omitted).

³⁹ *McCulloch*, 17 U.S. at 414-15.

With pointed italics (a font that he uses exceedingly sparingly in the opinion),⁴⁰ Marshall shows that the Constitution itself proves that "necessary" is not always a term of math or logic; that it sometimes takes an adverb that can modify its strictness; and that without an adverb such as "absolutely," the word as used in the Necessary and Proper Clause can be read flexibly not strictly, practically not mathematically. Here then we see a classic example of intratextualism: establishing the meaning of a word in one constitutional clause by analyzing its use in another constitutional clause.

Though Marshall does not mention the point, other constitutional clauses using the word "necessary" confirm his claim that the term is regularly used in a practical, nonmathematical way. In Article V, for example, Congress is empowered, "whenever two thirds of both Houses shall deem it necessary," to propose constitutional amendments.⁴¹ Context here seems to make abundantly clear that the test is practical not logical. Most of the first twelve amendments on the books at the time of *McCulloch* could not be deemed mathematically necessary and indispensable, but they could all be considered useful or convenient. Textually, if "necessary" here truly means logically required, then talk of "deeming" seems obtuse. As a matter of math and logic, either something is necessary or it is not. A similar analysis applies to Article II, Section 3, which empowers the President to recommend to Congress "such Measures as he shall judge necessary and expedient."⁴² Here too, we have a clear recognition — and in the Constitution itself, as a kind of dictionary — that "necessary" can often mean useful.

Marshall has another intratextual ace in hand, and he gracefully plays it, with a bit less flourish, over the next few pages. First, he nonchalantly reminds us that the word "necessary" is synonymous with the word "needful."⁴³ Then, a few paragraphs later, he quietly shows us his trump card by directing our attention, without any italics, to Article IV, Section 3:

The power to "make all needful rules and regulations respecting the territory or other property belonging to the United States," is not more comprehensive, than the power "to make all laws which shall be necessary and

⁴⁰ Apart from a pair of proper citational references to Publius's *Federalist*, and a few stray stylistic tics, the only words italicized in the opinion are *absolutely*, *necessary*, *proper*, and *constitution* (the latter in Marshall's celebrated reminder that "it is a constitution we are expounding"). *McCulloch*, 17 U.S. at 407, 413, 414, 418; see also *id.* at 408, 410, 415 (tics); *id.* at 431 (capitalizing word, "CONFIDENCE").

⁴¹ U.S. CONST. art. V.

⁴² U.S. CONST. art. II, § 3.

⁴³ *McCulloch*, 17 U.S. at 418.

proper for carrying into execution" the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.⁴⁴

If a territorial corporation is "needful" under one clause of the Constitution, Marshall needles, why isn't a bank corporation similarly "necessary" under another clause of that very same document? If "necessary" in Article I and "needful" in Article IV are synonymous in ordinary language and constitutional context, surely they should be construed the same way.⁴⁵ And when we accept Marshall's invitation to inspect the Necessary and Proper and Territorial Clauses side by side, we see further parallels of style and substance at work. Stylistically, both clauses open with absolutely identical phraseology ("The Congress shall have power"), a parallelism suggesting that the clauses are indeed designed as intratextual counterparts of sorts. Substantively, the first clause confirms broad congressional power in the existing states, and the second clause snugly complements it by conferring broad congressional power in the states-to-be. The two clauses are, as a fancy lawyer might say, virtually *in haec verba* and *in pari materia*.⁴⁶ Or to put the point in more popular prose, what's sauce for the Article IV, Section 3 goose should be sauce for the Article I, Section 8 gander. Here too, Marshall uses the document itself as a kind of dictionary and concordance, and to good effect.

2. Martin. — A single case can prove only so much, and even a case as great as *McCulloch* would, if it stood alone, fail to establish the pedigree of a basic form of constitutional argument. More broadly, we might well wonder whether the intratextual technique was unique to Marshall.⁴⁷ Let us then consider the most important and canonical early constitutional case *not* authored by John Marshall: Justice

⁴⁴ *Id.* at 422.

⁴⁵ Of course, a contrarian might concede that both clauses should be read the same way, but insist that both be read narrowly. But as Marshall argues, no one has taken this position regarding territorial corporations, which stand as fixed landmarks in the legal landscape. Note how Marshall's intratextual analysis here dovetails with an implicit argument from settled practice.

⁴⁶ Virtually, but not exactly. Whereas the Territories Clause confers plenary power on Congress — if Congress cannot legislate, no one else can — the Necessary and Proper Clause must be read against the backdrop of state legislative power to regulate. Indeed, Marshall admits that the Necessary and Proper Clause may not add any power at all to the preexisting enumerations, and he also admits that these enumerations fall short of granting Congress plenary legislative power in the states. See *McCulloch*, 17 U.S. at 405, 420–21. How might Marshall square all this with his intratextual linkage of "necessary" and "needful" in the two clauses? Perhaps by saying that the key constraints in the Necessary and Proper Clause exist not by dint of the flexible word "necessary," but because of the other words in the clause — "and proper for carrying into Execution the foregoing Powers." U.S. CONST. art. 1, § 8, cl. 18. For a general discussion of these other words and the constraints they may impose, see Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

⁴⁷ Or more precisely, to Marshall and the notable lawyer William Pinkney, see *supra* note 38.

Story's landmark decision for the Court in *Martin v. Hunter's Lessee*.⁴⁸ To be sure, *Martin* is written in a grand style that anticipates *McCulloch*. Story's own son paid *Martin* his highest compliment when he attributed to his father's opinion "clearness and solidity of argumentation" and "all the peculiar merits of the best judgments of Marshall, — compactness of fibre and closeness of logic."⁴⁹ But Story was no mere copycat. Rather, the man who would one day hold the Dane Professorship of Law at Harvard and write the most important treatise on constitutional law of the century (not to mention countless other distinguished works of legal scholarship) was a towering jurist in his own right; and if there is indeed a stylistic affinity between *Martin* and *McCulloch*, we do well to remember that Story's opinion came first.⁵⁰

As Marshall will do three years later, Story begins his substantive analysis with a broad-brush narrative of the nature and origin of the federal Constitution. The document is, Story insists, not a mere treaty or compact established by the "states in their sovereign capacities."⁵¹ Rather, it "was ordained and established . . . emphatically, as the preamble of the constitution declares, by 'the people of the United States.'"⁵² This point, Story emphasizes in the next paragraph, is confirmed by the language of the Tenth Amendment, which reserves powers not simply to the respective states, but also, Story stresses with italics, "*to the people*."⁵³ The intratextual move here — reading the first words of the Preamble alongside the last words of the Tenth Amendment, and harmonizing their invocations of "the people" — is rather subtle and slightly underdeveloped. Story does not quite drive the point home in a single sentence yoking the two clauses and exclaiming, "Look here, each clause must be seen alongside the other — both use the same phrase!" But this is precisely what Story does, over and over, with other constitutional clauses in the remainder of his opinion.

The first important clause confronting Story is the opening sentence of Article III, Section 1 declaring that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."⁵⁴ Are the words "shall be vested" to be understood as a kind of

⁴⁸ 14 U.S. (1 Wheat.) 304 (1816).

⁴⁹ 1 LIFE AND LETTERS OF JOSEPH STORY 275–76 (William W. Story ed., 1851).

⁵⁰ We cannot rule out the possibility — perhaps probability — that although Marshall had recused himself in the *Martin* case, he nonetheless discussed issues of substance and style with Story. But of course that possibility exists for every non-Marshall opinion handed down in the Marshall era. Thus we shall also examine more recent cases and legal commentary for traces of intratextualism, lest it be thought that the technique was unique to the Marshall Court.

⁵¹ *Martin*, 14 U.S. at 324.

⁵² *Id.*

⁵³ *Id.* at 325.

⁵⁴ U.S. CONST. art. III, § 1.

prediction, or as a mandate? Is "shall" here a future-tense verb or an imperative verb? Story begins with a series of intratextual claims, using italics to highlight other Article III phrases featuring the word "shall," and insisting that the same word should mean the same thing in all of these companion clauses:

The language of the article throughout is manifestly designed to be mandatory upon the legislature. . . . The judicial power of the United States *shall be vested* (not may be vested) in one supreme court, and in such inferior courts as congress may, from time to time, ordain and establish. Could congress have lawfully refused to create a supreme court, or to vest in it the constitutional jurisdiction? "The judges, both of the supreme and inferior courts, *shall hold* their offices during good behaviour, and *shall*, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office." Could congress create or limit any other tenure of the judicial office? Could they refuse to pay, at stated times, the stipulated salary, or diminish it during the continuance in office? But one answer can be given to these questions: it must be in the negative.⁵⁵

But Story is not finished with his intratextual exegesis of the Article III Vesting Clause. In the next paragraph, he places the clause alongside the similarly worded Vesting Clauses of Articles I and II.⁵⁶ Given that these other Vesting Clauses (which he dutifully italicizes) are manifestly mandatory, he insists that Article III's Vesting Clause must likewise be mandatory:

The same expression, "shall be vested," occurs in other parts of the constitution, in defining the powers of the other co-ordinate branches of the government. The first article declares that "all legislative powers herein granted *shall be vested* in a congress of the United States." Will it be contended that the legislative power is not absolutely vested? [T]hat the words merely refer to some future act, and mean only that the legislative power may hereafter be vested? The second article declares that "the executive power *shall be vested* in a president of the United States of America." Could congress vest it in any other person; or, is it to await their good pleasure, whether it is to vest at all? It is apparent that such a construction, in either case, would be utterly inadmissible. Why, then, is it entitled to a better support in reference to the judicial department?⁵⁷

The key intratextual claim here is that the same phrase (in this case, "shall be vested") should be similarly construed in each clause in which it appears — almost as if the Constitution contained an explicit directive to construe these particular clauses *in pari materia* or, more generally, to construe all like words and phrases alike. Though Story does not mention the point, his interlinkage of the three Vesting Clauses de-

⁵⁵ *Martin*, 14 U.S. at 328-29.

⁵⁶ *See id.* at 329-30.

⁵⁷ *Id.*

rives further support from their precisely parallel and prominent placement in the Constitution's organization chart, as the first sentence of Articles I, II, and III, respectively.

Story is on a roll here, and he returns to the intratextual technique a couple of pages later when confronting the meaning of the Article III, Section 2 clause that provides that the judicial power of the United States "shall extend" to various cases and controversies.⁵⁸ Once again he insists that "shall" means "must," not "will," and proves the point by appealing to the use of the word "shall" in other constitutional clauses, using the document itself as his law dictionary:

This imperative sense of the words "shall extend," is strengthened by the context. It is declared that "in all cases affecting ambassadors, &c., that the supreme court *shall have* original jurisdiction." Could congress withhold original jurisdiction in these cases from the supreme court? The clause proceeds — "in all the other cases before mentioned the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make." The very exception here shows that the Framers of the constitution used the words in an imperative sense. What necessity could there exist for this exception if the preceding words were not used in that sense? Without such exception, congress would, by the preceding words, have possessed a complete power to regulate the appellate jurisdiction, if the language were only equivalent to the words "may have" appellate jurisdiction. . . .

Other clauses in the constitution might be brought in aid of this construction; but a minute examination of them cannot be necessary, and would occupy too much time. It will be found that whenever a particular object is to be effected, the language of the constitution is always imperative . . .⁵⁹

So far, Story is ringing variations on a single intratextual theme: the same (or very similar) words in the same document should, at least presumptively, be construed in the same (or a very similar) way. But the flip side of the intratextual coin is that when two (or more) clauses feature different wording, this difference may also be a clue to meaning, and invite different construction of the different words. In *McCulloch*, Marshall shows us both sides of the coin when he argues that the word "necessary" in Article I, Section 8 should mean the same thing as the similar word "needful" in Article IV, Section 3, but should mean something different from the different words "absolutely necessary" in Article I, Section 10. Story also sees the flip side of the intratextual coin, as he makes clear in parsing the jurisdictional menu of Article III, which lists various types of lawsuits appropriate for federal courts:

⁵⁸ U.S. CONST. art. III, § 2, cl. 1.

⁵⁹ *Martin*, 14 U.S. at 332-33. In the middle of this passage, Story offers up a textbook illustration of the much misunderstood idea of "the exception that proves the rule."

It will be observed that there are two classes of cases enumerated in the constitution, between which a distinction seems to be drawn. The first class includes cases arising under the constitution, laws, and treaties of the United States; cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction. In this class the expression is . . . that the judicial power shall extend to *all cases*; but in the subsequent part of the clause which embraces all the other cases of national cognizance, and forms the second class, the word "*all*" is dropped seemingly *ex industria*. Here the judicial authority is to extend to controversies (not to *all* controversies) to which the United States shall be a party, &c. From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason; and it is not very difficult to find a reason sufficient to support the apparent change of intention. In respect to the first class, it may well have been the intention of the framers of the constitution imperatively to extend the judicial power either in an original or appellate form to *all cases*; and in the latter class to leave it to congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate.⁶⁰

In this important passage, Story is laying out what I have elsewhere labeled the "two-tier" theory of Article III, according to which Congress must allow federal courts to pronounce the last word on all federal question, admiralty, and ambassador-related cases, but may shift any or all diversity and other party-based lawsuits to state courts for final disposition.⁶¹ On other occasions, I have tried to defend Story's two-tier theory, but for now my interest is less substantive than methodological. Story's basic argument in this passage seems intratextual: he is emphasizing not merely the presence of the word "*all*" in some parts of the menu, or the absence of the word "*all*" in other parts of the menu — standard textual moves — but the strikingly *selective* use of the word. "*All*" is used not once, not twice, but three times in the menu, and then is twice omitted. The key here is the intratextual "*difference* in phraseology," the "*variation* in the language." (Although Story does not stress the point, the next passage in Article III, specifying the Supreme Court's original jurisdiction, follows this pattern by using the word "*all*" to refer to first tier ambassador-related cases and then omitting the word when referring to second tier state-diversity lawsuits.⁶²)

⁶⁰ *Id.* at 333–34.

⁶¹ See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 210–15, 240–46 (1985) [hereinafter Amar, *Two Tiers*].

⁶² See Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 478–88 (1989) [hereinafter Amar, *Marbury*]; Amar, *Two Tiers*, *supra* note 61, at 242–43, 254 n.160.

Alternatively, we could view the entire jurisdictional menu as a single clause — long, intricate, and varied, to be sure, but nonetheless one unified patch of text. Indeed, we might even view all of Article III, Sections 1 and 2 as a single (very long, multi-sentenced) clause of sorts. On this view, Story's parsing of one part of the menu in light of another part of the same menu, and his use of neighboring "shall[s]" within a single passage to illuminate each other, might seem less strikingly intratextual: we might call this interpretive approach paragraphism rather than full-blown intratextualism. But however we ultimately classify Story's interpretive moves within Article III,⁶³ we have seen at least two more dramatic exemplars of intratextualism, Story-style: the subtle intratextual bridge connecting the Preamble and the Tenth Amendment, and the strong intratextual chain linking together the three Vesting Clauses. In both examples, Story urges us to read one clause in light of another clause (or two) appearing many constitutional paragraphs away. And so it seems clear that Marshall was not alone in prominently deploying intratextualism.

3. *Marbury*. — A sound technique of constitutional interpretation can prove its worth not just in cases in which it was used well, but also in cases in which it could have been used and was not. If, upon reflection, we think that a given opinion that failed to use a particular technique is legally weaker and less satisfying than it otherwise would have been, then this too is evidence of the legal significance of that technique. With this in mind, let us turn to the great Marshall opinion that stands first in time, first in place (in most constitutional law casebooks), and first in the hearts of many modern lawyers and judges: *Marbury v. Madison*.⁶⁴

The particular constitutional issue in *Marbury* that prompts the Court's grand assertion of judicial review is a narrow one: may Congress expand the original jurisdiction of the Supreme Court? Here are the words of Article III:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.⁶⁵

Here is the nub of Marshall's analysis:

If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appel-

⁶³ As I shall explain later, I am ultimately less interested in classifying these moves and more interested in recognizing some of their strengths and weaknesses. See *infra* Part II.

⁶⁴ 5 U.S. (1 Cranch) 137 (1803).

⁶⁵ U.S. CONST. art. III, § 2, cl. 2.

late; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.⁶⁶

Over the course of five paragraphs, Marshall basically repeats this point over and over without illuminating it, claiming that any other reading of Article III renders its words regarding original jurisdiction "entirely without meaning," "form without substance," with "no operation at all," "without effect," and "inoperative."⁶⁷

As a matter of simple logic, however, there are two obvious possible alternatives to *Marbury's* reading of the Original Jurisdiction Clause as a constitutional maximum. First, the language in Article III could be read to prescribe only a minimum, not a maximum, amount of original jurisdiction. Second, the language might have been designed to establish neither a minimum nor a maximum but simply a starting point — a default rule — from which Congress may depart by statute in either direction. Neither of these alternative readings renders the Original Jurisdiction Clause meaningless — under both alternatives, the clause does some work. Marshall does not confront these other possible readings; he simply *assumes* that the clause must be a maximum or nothing and then chants over and over that it cannot mean nothing.

Leading scholars have not been kind to Marshall's exposition here, calling it "far from obvious,"⁶⁸ "clearly overstated,"⁶⁹ and "surely wrong."⁷⁰ But it is precisely at this point that a more elaborate intratextual comparison than Marshall offered would have enabled him to rebut his modern scholarly critics. The Appellate Jurisdiction Clause explicitly authorizes Congress to *subtract from* the Supreme Court's appellate docket; but the Original Jurisdiction Clause contains no comparable language authorizing Congress to *add to* the Court's original jurisdiction docket. Just as the Appellate Jurisdiction Clause confers jurisdiction "with such exceptions as Congress shall make,"⁷¹ so the Original Jurisdiction Clause should have conferred jurisdiction "with such augmentations (and exceptions) as Congress shall make" had it been designed as a minimum (or a default rule) rather than a maximum. The fact that the Original Jurisdiction Clause does not contain augmentation wording symmetric to the exception wording of

⁶⁶ *Marbury*, 5 U.S. at 174.

⁶⁷ *Id.* at 174-75.

⁶⁸ DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT* 68 (1985).

⁶⁹ William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 31.

⁷⁰ MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 11 (1980).

⁷¹ U.S. CONST. art. III, § 2, cl. 2.

the Appellate Jurisdiction Clause elegantly buttresses Marshall's conclusion that Congress has no power to add to the Court's original docket. The point here is not a standard textual point about the Original Jurisdiction Clause, but a Story-like intratextual point that emphasizes the *variation* in language between this clause and the next one.

Granted, comparison of adjoining clauses within a single Article — paragraphism — is a very modest form of intratextualism. And the original jurisdiction issue in *Marbury* is of course not the main attraction. If *Marbury* is our *Hamlet*, the Prince is judicial review.⁷² Yet when we turn to the star of the show, we see again that intratextualism — and this time, intratextualism of a less modest form — could have strengthened Marshall's exposition.

There are many arguments for judicial review, but perhaps the most elegant and forceful is the simple two-pronged notion that the Constitution is supreme law, and that judges must apply this law in cases within their jurisdiction. Marshall makes both of these points in *Marbury* and offers considerable support for each. Among other things, he invokes two specific constitutional clauses. In the middle of his exposition on judicial review, he supports the second prong by paraphrasing the words of Article III as follows: "The judicial power of the United States is extended to all cases arising under the constitution."⁷³ And a couple of pages later, at the very end of his opinion, he supports the first prong by paraphrasing the words of Article VI as follows: "[I]n declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank."⁷⁴ Each of these textual points is strong, but various twentieth-century critics of judicial review have remained skeptical. Even if each textual point makes sense in isolation, is it proper to conjoin them, to pull the two prongs together? Perhaps this kind of selective textualism cobbles a seemingly integrated whole out of parts that were not designed to be read together. The concern here brings to mind the joke about the fellow asked to quote a couple of passages of scripture who replied: "Judas went and hanged himself. . . . Go thou and do likewise."⁷⁵

⁷² For those with a special interest in the Rosencrantz-and-Guildenstern-size topic of original jurisdiction, see Amar, *Marbury*, cited above in note 62, at 453–63, featuring an intratextualist analysis of the Judiciary Act to cast doubt on the Court's reading of Section 13. This analysis illustrates that intratextualism can be used as a technique of statutory as well as constitutional interpretation. My topic today, however, is the latter, and some of the arguments I shall consider concerning constitutional intratextualism may not apply straightforwardly in the statutory context. See *infra* note 204.

⁷³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

⁷⁴ *Id.* at 180.

⁷⁵ The joke stitches together snippets of *Matthew* 27:5 and *Luke* 10:37.

But it is at precisely this point that an intratextual argument would have powerfully cross-braced Marshall's sturdy edifice in *Marbury*. Even though one clause appears in Article III and the other in far-away Article VI, intratextual analysis suggests that they were indeed designed to be read together, as interlocking parts of a coherent whole, two prongs meant to affirm one result: judicial review. The clauses are written in obviously parallel language, as is clear when we bring them side by side and quote them precisely. (*Marbury* did neither.) Article III vests federal courts with jurisdiction over all cases arising under "this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;" and Article VI proclaims as supreme law "[t]his Constitution, and the Laws of the United States . . . and all Treaties made, or which shall be made, under the Authority of the United States." Q.E.D.⁷⁶

4. *Brown and Bolling*. — Having considered a trilogy of great nineteenth-century cases, let us now ponder the most celebrated judicial event of the next century. On May 17, 1954, the Justices decided the companion cases of *Brown v. Board of Education*⁷⁷ and *Bolling v. Sharpe*,⁷⁸ invalidating de jure racial segregation in state and federal schools, respectively.

Brown seems easy enough to understand. The Fourteenth Amendment demands that "state[s]" give blacks "equal" protection, but black schools under Jim Crow are not equal. They are inherently unequal in purpose and effect and social meaning. But *Bolling* seems harder to explain. As the *Bolling* Court admits, "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an Equal Protection Clause as does the Fourteenth Amendment which applies only to the states."⁷⁹ It might be thought that even if *Bolling* were somehow suspect, *Brown* itself would emerge untouched. But are these fraternal twins, born on the same great day and sired by the same great Chief, really so easy to separate? Could the Court on May 17, 1954, tell states that they must abandon Jim Crow in education yet in the same breath uphold (segregated) business as usual in federal schools? The very idea was "unthinkable," according to the Court that day.⁸⁰ Had *Bolling* been decided in favor of segregation, would its

⁷⁶ Records of the Philadelphia Convention — not published until decades after *Marbury* — confirm that the parallel language here was no accident but part of a conscious design in contemplation of judicial review. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430–31 (Max Farrand rev. ed., 1937) (rewording the Supremacy Clause to render it "conformable" to wording of the federal question jurisdiction clause) [hereinafter FARRAND]. On the possible similarities and differences between intratextualism and standard forms of "original intent" jurisprudence, see Part II below.

⁷⁷ 347 U.S. 483 (1954).

⁷⁸ 347 U.S. 497 (1954).

⁷⁹ *Id.* at 499.

⁸⁰ See *id.* at 500.

companion *Brown* have meant the same thing that it did on May 17, 1954? Would *Brown* mean the same thing that it does today? To affirm the legal rightness of *Brown*, we cannot simply ignore *Bolling*. Like runners in a three-legged race, these cases are tied together, and if one is lame, the other cannot easily glide to victory.

But perhaps *Bolling* is legally right, and even easy, after all. The case takes up less than four pages in *United States Reports*, and so if we are to find the key to its rightness, we must read with great care. Chief Justice Warren nods toward judicial doctrine, but several of the cases he cites have nothing to do with race; two others — *Korematsu*⁸¹ and *Hirabayashi*⁸² — are just a tad less odious than *Dred Scott*,⁸³ and yet another wave to doctrine consists of an undeveloped one-sentence dictum from an 1896 Harlan opinion.⁸⁴ Warren mouths a couple of buzzwords from standard due process jargon — “liberty” and “arbitrary”⁸⁵ — but the effort seems forced and formulaic, as if he is simply going through the motions. And there is an obvious intratextual difficulty with Warren’s emphasis on due process: don’t the words “due process” in the Fifth Amendment mean the same thing as the words “due process” in the Fourteenth Amendment, which in turn mean something different than the words “equal protection” in the Fourteenth Amendment? Warren also says that racial classifications are “contrary to our traditions,”⁸⁶ but Jim Crow is, alas, a rather strong competing tradition in America, and one that in 1954 still enjoys the formal blessing of *Plessy*.⁸⁷ (*Plessy* is of course not formally overruled but merely distinguished away, as inapplicable to education, in the companion *Brown* case.⁸⁸) More promising is Warren’s reminder that various clauses of our Constitution stem from the same taproot, “our American ideal of fairness.”⁸⁹ Here we have the glimmerings of what Professor Bobbitt might call a proper ethical argument. But Warren does not develop the point, and a half-whispered ethical argument without more is not exactly rock-solid, legally speaking.

We come, then, to *Bolling*’s most passionate and powerful statement, which only strengthens its bond with *Brown*: “In view of our decision that the Constitution prohibits the states from maintaining ra-

⁸¹ *Korematsu v. United States*, 323 U.S. 214 (1944), cited in *Bolling*, 347 U.S. at 499 n.3.

⁸² *Hirabayashi v. United States*, 320 U.S. 81 (1943), cited in *Bolling*, 347 U.S. at 499 n.3.

⁸³ *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

⁸⁴ See *Bolling*, 347 U.S. at 499 (“[T]he Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race.” (quoting *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896))).

⁸⁵ *Id.* at 500.

⁸⁶ *Id.* at 499.

⁸⁷ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁸⁸ *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”).

⁸⁹ *Bolling*, 347 U.S. at 499.

cially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."⁹⁰ Here, we have a deep constitutional intuition: there is only one Constitution, and in the matter of school segregation, that document should mean no less for the federal government than for the states. "[T]he same Constitution" should mean the same thing here — what's sauce for the states should be sauce for the feds.

But where exactly does the Constitution say *that*? *Bolling* does not give us a great deal of guidance, but it does drop a couple of clues. First, perhaps Justice Harlan had something quite specific in mind when in 1896 he announced for the Court, in a dictum that *Bolling* quotes, that "the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race."⁹¹ Harlan's reference to the Constitution "in its present form" seems to point to the (then-recent) Civil War Amendments, as opposed to the document that emerged at the Founding. His reference to "political rights" plainly alludes to the Fifteenth Amendment, prohibiting both state and federal officials from abridging the right to vote on the basis of race. But *Brown* and *Bolling* are not voting cases, so let us pass over the Fifteenth. Harlan also said that even in cases involving civil rights — like access to government-run schools — neither state nor federal officials can discriminate "against any citizen because of his race."⁹² The giveaway word here is "citizen," a word that should immediately direct our attention to the first sentence of the Fourteenth Amendment: "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."⁹³ Here is a clause that plainly limits the feds as well as the states. And its particular application to the issue of race is plain. As every schoolchild learns (or should learn), this sentence was put in the Constitution to repudiate in the most emphatic way the vile holding of *Dred Scott* that black persons could never be citizens because blacks were beings of an inferior order, creatures that no "white man was bound to respect."⁹⁴ Government-sponsored efforts to stigmatize blacks, to relegate them to a kind of second-class citizenship, violate the core concept of the Citizenship Clause. All are declared citizens, and thus all are *equal* citizens. As Harlan himself put the point in the sentence immediately

⁹⁰ *Id.* at 500.

⁹¹ *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896), quoted in *Bolling*, 347 U.S. at 499.

⁹² *Id.*

⁹³ U.S. CONST. amend. XIV.

⁹⁴ *Scott v. Sanford*, 60 U.S. (19 How.) 393, 407 (1857).

following the one that *Bolling* quotes: "All citizens are equal before the law."⁹⁵

Standing alone, the Citizenship Clause gives us a clean textual argument that is enough to carry the day in *Bolling*. But nothing in this argument is particularly intratextual. And the Citizenship Clause is obviously limited to citizens, whereas the *Bolling* Court's emphasis on Fifth Amendment due process seems to sweep more broadly: under that Amendment, "no person" — rather than no citizen — shall be denied due process of law. So let us turn from Harlan and go back to Warren himself in search of further clues. Harlan deployed a single specific clause, but Warren seems to have something more general in mind when he pronounces it "unthinkable" that as to certain issues, the constitutional rules for states and feds should differ. Harlan focused on the Reconstruction Amendments, but in a pair of sentences, Warren gestures toward a Founding-era text. Liberty, he says, can be restricted only by a "proper" governmental objective, and "[s]egregation in public education is not reasonably related to any proper governmental objective."⁹⁶ This is *McCulloch* talk, with a subtle allusion to the Necessary and Proper Clause of the Founders' Constitution implied by Warren's repeated use of the word "proper."

In response, a critic could say that Warren's basic intuition — that it is "unthinkable" that the "same Constitution" would regulate the state governments and the federal government differently — is way off base. Under the Founders' Constitution, the rules were emphatically different for the two governments. For example, states could not impair the obligation of contract, but the federal government could. Conversely, the federal government could not compel self-incrimination, but the states could. And there are no sentences in the original Constitution that say "neither the federal government nor the states may"

It is precisely at this point that an intratextual analysis rides to Warren's rescue. True, there are no single-sentence clauses in the original Constitution that explicitly hold the two governments to the same standards. But there are indeed a handful (and only a handful)

⁹⁵ *Gibson*, 162 U.S. at 591. It might be asked whether this reading of the Citizenship Clause renders the neighboring Equal Protection Clause redundant. Technically, it does not — the former clause applies only to citizens, whereas the latter encompasses all persons, with a special concern for aliens. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 171–74 (1998) [hereinafter AMAR, *BILL OF RIGHTS*]. More generally, however, certain constitutional clauses may well be seen as declaratory, making explicit what is only implicit in other clauses. Marshall in *McCulloch* argued that the Necessary and Proper Clause, for example, might merely be declaratory. And so, I would argue, is the Tenth Amendment. In addition, many of the specific criminal procedure provisions of the Fifth and Sixth Amendments might be seen as declaratory glosses on the sweeping Due Process Clause. For more discussion of the ubiquity of declaratory clauses, see Amar, *Clarifying Clauses*, *supra* note 11. See also *infra* pp.

773.

⁹⁶ *Bolling*, 347 U.S. at 499–500.

of intratextually paired clauses that — *when read together, as their similar wording invites* — implicitly do so. Putting these clauses side by side for analysis, in good intratextual fashion, we have the following:

No Bill of Attainder or ex post facto Law shall be passed [by Congress].⁹⁷

....

No Title of Nobility shall be granted by the United States⁹⁸

....

No State shall . . . pass any Bill of Attainder, [or] ex post facto Law . . . or grant any Title of Nobility.⁹⁹

To an intratextualist, it is as if the Constitution here said explicitly, "As to the following three items, the state and federal governments must meet the same standards." In *Bolling's* phraseology, as to these three things at least, it is indeed "unthinkable that the same Constitution would impose" different duties on the two sets of governments. Remarkably, the result in *Bolling* could comfortably be defended by reference to two of the three items in this handful of clauses.

Consider first the Nobility Clauses. If we take these words and their underlying principles seriously, no government — state or federal — can name some Americans "lords" and others "commoners." Ours is a democratic republic, not an aristocracy based on birth and blood.¹⁰⁰ Of course at the Founding these words and their underlying principles were *not* taken seriously where blacks were involved — but after the Civil War Amendments, there is no good reason to ignore these Founding words, especially in light of the emphatic reaffirmation of their basic idea of republican equality in the Citizenship Clause itself. How does all this relate to the facts of *Bolling*? Here's how: if no government can name some (light-skinned) Americans "lords" and other (dark-skinned) Americans "commoners," surely it cannot do the same thing through racially segregated schools whose purpose and effect and social meaning is to create a blood-based and hereditary overclass and underclass.

Now turn to the paired Attainder Clauses. No legislature, state or federal, may single a person out by name and subject him to special penalty or ridicule or disadvantage. Legislatures may pass general and

⁹⁷ U.S. CONST. art. I, § 9, cl. 3.

⁹⁸ *Id.* at cl. 8.

⁹⁹ *Id.* at § 10, cl. 1.

¹⁰⁰ See generally GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992) (chronicling "the democratization of early America"); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) ("The central pillar of Republican Government . . . is popular sovereignty."); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2316 (1997) ("[T]he Constitution is committed to the realization of democratic culture, even though constitutional law . . . cannot realize this goal by its own efforts.").

prospective laws — “all who henceforth commit deed X shall suffer penalty Y” — but the legislature may not target human beings for disfavored treatment because of who they are as opposed to what they do. And there is a special historical link between attainders and “corruption of the blood” in which legislatures tried to taint or stain a person’s bloodline. (Note the intratextual link between the above-quoted Attainder Clauses, and the Article III, Section 3 rule that “No Attainder of Treason shall work Corruption of Blood.”¹⁰¹) If we take the nonattainder principle seriously, it bars lawmakers — federal no less than state — from passing laws designed to humiliate or demean all persons descended from slaves, or all persons with black (corrupt) blood.¹⁰² Of course the deep meaning of this principle was also disregarded, insofar as blacks were involved, before the Civil War Amendments — but once again there is no reason today to continue disregarding these clauses. Indeed, the NAACP explicitly relied on the Attainder Clause in *Bolling*¹⁰³ (following in the footsteps of the great Frederick Douglass, who insisted that slavery itself violated nonattainder principles¹⁰⁴). More recently, the most eminent constitutional scholar and litigator of our era, Harvard’s Professor Laurence Tribe, has noted in the pages of this *Review* that the nonattainder principle comfortably supports the result in *Bolling*.¹⁰⁵

Note that intratextualism itself does not compel a broad reading of the Title of Nobility and Attainder Clauses. The tool simply leads us to these clauses as among the handful of Founding-era texts using the same phrases to limit both state and federal governments. As we shall see in Parts II and III, intratextualism often merely provides an interpretive lead or clue, the full meaning of which will only become apparent when other interpretive tools are also brought to bear on the problem.

Having considered a couple of ways in which intratextualism would have confirmed *Bolling*’s most powerful constitutional instinct and buttressed its seemingly rickety structure, it remains to consider more carefully the most obvious intratextual issue in *Bolling* itself: the triadic relationship between the Due Process Clauses of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the latter Amendment. What the case *holds* is that “racial segregation in the public schools of the District of Columbia is a denial of the due process

¹⁰¹ U.S. CONST. art. III, § 3, cl. 2.

¹⁰² For more extended argument for, and analysis of, this claim, see Akhil Reed Amar, *Attainder and Amendment 2: Romer’s Rightness*, 95 MICH. L. REV. 203, 208–17 (1996).

¹⁰³ See RICHARD KLUGER, *SIMPLE JUSTICE* 522 (1994).

¹⁰⁴ See Frederick Douglass, *Speech Delivered in Glasgow, Scotland* (March 26, 1860), in 2 LIFE AND WRITINGS OF FREDERICK DOUGLASS 467–80 (Philip Foner ed., 1950).

¹⁰⁵ See Laurence H. Tribe, *Taking Text and History Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1298–99 n.247 (1995).

of law guaranteed by the Fifth Amendment to the Constitution.”¹⁰⁶ But there is an evident embarrassment in this argument, and it is an intratextual embarrassment: “due process” in the Fifth Amendment should presumptively mean the same thing as “due process” in the Fourteenth Amendment, and these latter words are apparently contradistinguished from the equality idea, which appears in a different Fourteenth Amendment clause. (We see both sides of the intratextualist coin here: “due process” is the *same* as “due process” which is *different* from “equal protection.”) Warren is aware of this embarrassment, and I suggest that this is in part why his opinion is so crabbed: the very awkwardness of his analysis is evidence of the powerful pull of intratextual argument.

But like all legitimate forms of argument, intratextualism can often be used on both sides of a given issue. Ironically, the best intratextual analysis¹⁰⁷ of the triadic relation of the three clauses in fact supports both Warren’s general intuition and his specific due process holding, providing yet another intratextual basis for affirming the rightness of *Bolling*. The framers of the Fourteenth Amendment believed that due process of law meant a suitably general evenhanded law.¹⁰⁸ “Law” in its nature was general, equal, impartial, and the “process” that generated law must respect that nature.¹⁰⁹ Thus, for the framers and ratifiers of the Fourteenth Amendment, the words of its Equal Protection Clause were not expressing a *different* idea than the words of the Due Process Clause but were elaborating the *same* idea: the Equal Protection Clause was in part a clarifying gloss on the due process idea. (Indeed, an early draft of the Amendment spoke of “equal protection in the rights of life, liberty, and property.”¹¹⁰) And here is the intratextual kicker: if equal protection really was implicit in the Fourteenth Amendment concept of “due process of law,” as its framers believed and said, then after the ratification of this Amendment, equal protec-

¹⁰⁶ *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

¹⁰⁷ The notion of a “best” intratextual argument, of course, presupposes a theory of intratextualism and a calculus by which to compare intratextual arguments. For discussion of how one would assess the strengths and weaknesses of a given intratextual argument, see Part II below.

¹⁰⁸ For more elaboration and documentation of this claim, and my other claims in this paragraph, see AMAR, *BILL OF RIGHTS*, cited above in note 95, at 280–83, and Akhil Reed Amar, *Constitutional Rights in a Federal System: Rethinking Incorporation and Reverse Incorporation*, in *BENCHMARKS: GREAT CONSTITUTIONAL CONTROVERSIES IN THE SUPREME COURT* 71 (Terry Eastland ed., 1995).

¹⁰⁹ Note that this is not full-blown substantive due process, in which the argument would be that because law is in its nature good and just, any enactment which (in the minds of judges) is not good is not “law.” By contrast, the equality argument sounds more in procedure — the legislative process must be suitably general and prospective. A proper lawmaking procedure may generate a broad range of substantive results, but must apply to all (or more modestly, must not single out individuals for special disfavored treatment). On this procedural view, due process of law focuses on both law-making procedure and law-applying procedure, on process writ large and process writ small.

¹¹⁰ CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866); see also *infra* p. 825 (quoting this draft).

tion should also be seen as implicit in the Fifth Amendment phrase "due process of law." What's sauce for the Fourteenth Amendment should intratextually be sauce for the Fifth.

Consider once again the 1896 Harlan opinion we have already noted, in which the great Justice likewise blends together the Due Process and Equal Protection Clauses. He proclaims that the "guarantees of life, liberty and property are for all persons within the jurisdiction . . . without discrimination against any because of their race."¹¹¹ Note how this formulation marries due process language ("life, liberty, and property") with equal protection language ("all persons within the jurisdiction," a phrase found only in the Equal Protection Clause) and equal protection norms against race discrimination. Taken seriously, this marriage supports an intratextual reading of the Fifth Amendment's due process clause as likewise banning invidious racial discrimination. Harlan understands this, as evidenced by his very next sentence: "Those guarantees . . . must be enforced in the courts, *both of the Nation and of the State*, without reference to considerations based upon race."¹¹²

A puzzle: In *McCulloch*, Marshall suggests that we read "necessary" differently from "absolutely necessary," yet here, I suggest that we read "due process" no differently from "due process plus equal protection." How can both be right? My answer: Where a particular clause is best read as declaratory, glossing earlier words and making explicit what these words only implied, the presence or absence of this gloss should generally make no difference. If I tell my child "Do it — I mean it!" the child should not automatically assume that when I merely say "Do it!" I don't mean it. (The situation might be different if the child and I were playing a variant of the game Simon Says.) Thus, when the Constitution says to states "Do due process (which of course includes doing equal protection)!" we should not automatically assume that when it says to the federal government "Do due process!" it must mean something different. Marshall himself thought that different wording might be a sign of different meaning, but not always. Otherwise, we could not explain his view that the Necessary and Proper Clause itself might merely be a clarifying gloss, with the enumerated powers properly read in exactly the same way whether or not the gloss was present.

5. *Roe*. — Consider next what most lawyers and citizens — even its many critics — would deem the most prominent judicial landmark of the modern, post-*Brown*, post-Warren Court era: *Roe v. Wade*.¹¹³ The opinion of the Court in *Roe* is often viewed as notably unconcerned about constitutional text. *Substantive due process*? The very

¹¹¹ *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896).

¹¹² *Id.* (emphasis added).

¹¹³ 410 U.S. 113 (1973).

phrase teeters on the edge of textual self-contradiction. Indeed, in perhaps the most famous passage in the entire opinion, Justice Blackmun seems almost uninterested in the precise textual location of the abortion right he announces. Whether the right of privacy "be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment[]" is not particularly important to him.¹¹⁴ What is important, Blackmun says, is that wherever this privacy right is grounded, it "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."¹¹⁵ And here is another striking fact about *Roe*: although Justice Blackmun quotes extensively from a great many sources — the Hippocratic Oath,¹¹⁶ various reports and pronouncements of the American Medical Association,¹¹⁷ the standards adopted by the American Public Health Association,¹¹⁸ utterances of the American Bar Association,¹¹⁹ and much more¹²⁰ — he never actually gets around to quoting the precise operative words of Section 1 of the Fourteenth Amendment.

Yet for all this apparent disregard of the text, it would be a mistake to think that *Roe* utterly ignores the words of the Constitution. In one noteworthy but often unnoticed passage in his opinion, Justice Blackmun lavishes attention on the document itself, invoking a cluster of constitutional clauses in a single paragraph. Even more remarkably, the passage is not simply a standard example of clause-bound textualism, but a classically intratextualist exegesis. The question that prompts this exegesis is simple: is a fetus a "person" within the meaning of the Fourteenth Amendment? If so, Blackmun argues, it would follow that the Amendment would affirmatively protect the fetus's right to life, and that the argument for a constitutional right to abortion would "of course, collapse[]." ¹²¹ To answer the question of fetal personhood, Justice Blackmun turns not to an ordinary dictionary, but to the Constitution itself as a dictionary:

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the

¹¹⁴ *Id.* at 153.

¹¹⁵ *Id.*

¹¹⁶ *See id.* at 130-31.

¹¹⁷ *See id.* at 141-44.

¹¹⁸ *See id.* at 144-46.

¹¹⁹ *See id.* at 146-47.

¹²⁰ *See id.* at 136-41 (discussing the general evolution of abortion rules under English statutory law and American law).

¹²¹ *Id.* at 156-57. Whether indeed this result would plainly follow is debatable. *See infra* pp. 776-77.

Constitution: in the listing of qualifications for Representatives and Senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3; in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.

All this, together with our observation . . . that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn.¹²²

At least in form, Blackmun seems to outMarshall Marshall and outStory Story in his enthusiastic embrace of intratextualism, pointing to more than a dozen different constitutional clauses that use the same word. He places particular emphasis on the intratextual link between the Fourteenth Amendment and the Census Clause, noting in a footnote that "[w]e are not aware that in the taking of any census under this clause, a fetus has ever been counted."¹²³ What's sauce for the Census Clause should be sauce for the Fourteenth Amendment.

A *Roe* critic, however, might challenge this approach. Sometimes the same word does sensibly mean different things in different contexts, and nowhere is this more plausible than with a chameleon word like "person." Corporations, for example, do not count as "persons" under the Census Clause, and yet they count as "persons" under the Fourteenth Amendment, entitled to due process and equal protection. What is needed in *Roe*, but what is arguably missing, is an implicit or explicit argument that the context of, say, the Census Clause is sufficiently similar to that of the abortion question at hand. For example, what would the Court say to a critic who points out that census takers are not medical experts capable of detecting pregnancy (especially in its early stages) whereas doctors are precisely such experts with training and equipment that allows them to know a fetus when they see one?¹²⁴

Even if the critic is correct, this would not mean that the intratextual technique itself is somehow improper or obsolete. All legitimate constitutional techniques can be used well or used poorly, and perhaps *Roe*'s use of the legitimate technique of intratextualism is more wooden and less compelling than *McCulloch*'s and *Martin*'s. In

¹²² *Id.* at 157-58 (citations omitted).

¹²³ *Id.* at 157 n.53.

¹²⁴ Note that the law at issue in *Roe* heaped its criminal sanctions not on the pregnant woman but on doctors and third parties. See *id.* at 117 n.1, 151 & n.49, 158 n.54.

McCulloch, for example, Marshall's ace — the intratextual link between the Necessary and Proper Clause and the Territories Clause — played so well precisely because, on closer inspection, the two clauses are remarkably similar in their logic as well as their language. Both clauses confer (or confirm) generous congressional power to regulate. Marshall's other intratextual argument, based on the word "absolutely" in the Imposts Clause, sought to prove only that "necessary" *could* mean useful, not that it *must* mean that. The remainder of Marshall's argument was that we should choose the more spacious reading of the word because such a reading makes more practical and structural sense, and fits better with other words in the Necessary and Proper Clause. Blackmun by contrast is seeking to convince us that "person" *must* mean a postnatal human. This is a tougher task, perhaps requiring more argument than he offers. In *Martin*, Story's two cleanest examples of intratextualism worked so brilliantly because a general popular sovereignty theme does indeed bridge the language of the Preamble and the Tenth Amendment;¹²⁵ and the Vesting Clauses do indeed interlock, a design evidenced not merely by their parallel phrasing and parallel placement but also by the larger unifying theory of separate and coordinate powers underlying these interconnected clauses. In short, as we shall see in more detail in Parts II and III, intratextual argument works best when it coheres with other types of constitutional argument and is part of a larger constitutional vision. If *Roe*'s intratextualism is a bit weak, could this be part of a more general methodological weakness and inadequacy of constitutional vision in the opinion as a whole?

Consider for example the assumption that launches Justice Blackmun's intratextual excursion: if the fetus is a Fourteenth Amendment "person," the argument for a constitutional right of a woman to control her own body would "of course, collapse[.]"¹²⁶ But this need not "of course" follow. A five-year-old girl is surely a Fourteenth Amendment "person" — and is most definitely counted under the Census Clause — but this fact does not necessarily mean that if she needs a kidney transplant to save her life and the only available donor is her father, then the father must give up his kidney. If a state tried to force the father to do so, the issue of her life versus his liberty would not "of course" be answered merely by insisting that she is a "person," constitutionally speaking. He is a person too, and much more would need to be said before we could reach sound constitutional conclusions here. What is true for the liberty of the father is of course also true for the liberty of the mother. And what is true of the kidney of the mother of a five-year-old girl could well be true of the uterus of the mother of a

¹²⁵ See AMAR, BILL OF RIGHTS, *supra* note 95, at 119–22.

¹²⁶ *Roe*, 410 U.S. at 156–57.

five-week-old fetus. In both cases, the state is seeking to force the adult to sacrifice her bodily liberty and body parts to sustain the life of her offspring.¹²⁷ The foregoing points are only sharpened when what is at stake is not merely the mother's liberty interest in controlling her own body but also her interest in preserving her own life. In a footnote Justice Blackmun suggests that if a fetus is indeed a Fourteenth Amendment "person," a state could probably not allow abortion even to save the life of the mother. Would not such a pro-mother rule "appear to be out of line with the [Fourteenth] Amendment's command?" he asks.¹²⁸ The only thing out of line here, I suggest, is Justice Blackmun's convoluted logic. Does he believe that when the law allows parents to withhold their kidneys from dying children — as is the general and perhaps universal rule in the states today — this law is "out of line with the [Fourteenth] Amendment's command?" Where a mother's life is at stake, what *exactly* in the Fourteenth Amendment would prevent the state from allowing her to save herself, even at the expense of the "person" she is carrying inside her?

The problems of *Roe* at this point merely reflect its larger inattention to the precise language of the Fourteenth Amendment, a lapse we have already noted. But *Roe*'s use of other techniques of constitutional argument is not much better. *Roe* features an extraordinarily expansive historical narrative¹²⁹ — a Cecil B. DeMille production ranging across centuries and continents — but the point of this grand tour is far from clear. There is no clean argument from the "original intent" of the Founding generation, or the Reconstructors, or the suffragists; and there is no strong tradition of immunity from state regulation that emerges with any clarity. If Blackmun means to offer up an account of the American ethos, erudite accounts of the ancient Greeks

¹²⁷ It is possible to imagine an omission/commission distinction here, but such a distinction would be problematic in considering a nine-month pregnancy involving tightly intertwined acts and omissions. If a woman engages in otherwise ordinary activities that threaten the health of the fetus — smoking, drinking, overexercising, and so on — are these "actions" really so different from the "inactions" of refusing to eat properly, or to take needed vitamins? What if, prior to conception, the woman has had doctors place under her skin a hormone-affecting implant that, unless actively removed, will cause the death of the fetus? Should we legally and morally distinguish between ingesting a pill that will withhold the mother's biological life-support from the fetus, and refusing to ingest a pill needed to save the life of the fetus?

Note also that in one of the most significant moral actions undertaken by parents-to-be — the sex act itself — men and women may not be identically situated. Sex in the absence of full consent by the woman is much more common than sex in the absence of full consent by the man. Thus one could argue that conscription of fathers' kidneys is actually easier to justify than conscription of mothers' wombs. By discussing kidneys rather than violinists, I mean to avoid some of the criticisms that Judge Posner, in the pages of this *Law Review*, has recently leveled at the famous abortion analysis offered by Judith Jarvis Thompson. See Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1675–76 (1998) (critiquing Judith Jarvis Thompson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971)).

¹²⁸ *Roe*, 410 U.S. at 157 n.54.

¹²⁹ See *id.* at 129–47.

and Romans seem somewhat beside the point without a tighter link to the New World. Of course, *Roe*'s main emphasis is neither textual, nor historical, nor structural, nor prudential, nor ethical: it is doctrinal. But here too it is a rather unimpressive effort. As a precedent-follower, *Roe* simply stringcites a series of privacy cases involving marriage, procreation, contraception, bedroom reading, education, and other assorted topics, and then abruptly announces with no doctrinal analysis that this privacy right "is broad enough to encompass" abortion.¹³⁰ *Ipsa dixit*. But as the Court itself admits a few pages later, the existence of the living fetus makes the case at hand "*inherently different*"¹³¹ — the italics here are mine — from every single one of these earlier-invoked cases. And as a precedent-setter, the Court creates an elaborate trimester framework that has struck many critics as visibly (indeed, nakedly) ad hoc — more legislative than judicial.

In the end, *Roe*'s many methodological lapses are simply evidence that the best theory supporting its result — a theory emphasizing gender and the particular ways in which abortion laws burden the liberty and equality of *women*¹³² — was not easily accessible to the Court in 1973. In light of these lapses, what are we to make of *Roe*'s excursion into intratextualism? Just this: Justice Blackmun's use of intratextual argument is, methodologically speaking, one of *Roe*'s more impressive moments. Though hurried and unreflective, *Roe*'s exuberant use of intratextualism is considerably more clever than its rather clumsy use of other types of constitutional argument elsewhere.¹³³ What's more, although dissenting Justices in *Roe* and later cases have sharply attacked much of Justice Blackmun's opinion, none has ever challenged his intratextual argument that a fetus is not a constitutional "person." On this point, it seems the Justices are unanimous, bringing this part of *Roe* further in line with other landmarks like *Marbury*, *McCulloch*, and *Brown*. In any event, even if some critics were to find Justice Blackmun's intratextual argument unpersuasive or incomplete, none should miss its prominence in this landmark opinion. Intratextualism lives.

B. Commentaries

Constitutional argument takes place outside courtrooms as well as inside them. Is the intratextual technique somehow unique to judges

¹³⁰ *Id.* at 153.

¹³¹ *Id.* at 159 (emphasis added).

¹³² See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 928–29 & n.4 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (analyzing abortion laws from the perspective of women's equality, and citing works by Professors Laurence Tribe, Reva Siegel, Cass Sunstein, Catharine MacKinnon, and Jed Rubenfeld).

¹³³ A critic might concede that *Roe*'s use of intratextualism is "clever," but might see it as "too clever by half" — more clever than wise or sound. For a more general discussion of this criticism, see section II.D below at pages 799–801.

and courtroom advocates? To answer this question, we could examine several possible sites of constitutional discourse: constitutional argument on the floor of Congress, constitutional analysis inside the executive branch, constitutional conversation among ordinary citizens (over the Internet, on street corners, at mass rallies, in jury rooms, and elsewhere), constitutional scholarship by nonlawyers (historians, political scientists, economists, and so on), and constitutional commentary of law professors. I propose to examine legal scholarship because constitutional argument here is *continuous* (whereas mass citizen involvement is often minimal in times of "ordinary politics"), *public* (unlike a good deal of internal executive branch analysis), *deep* (in a way that constitutional debates among Webster and Clay and Calhoun were deep, and that congressional debates today rarely are), and distinctively *legal* (in contrast to academic work produced outside law schools).

1. *Ely*. — Consider John Hart Ely's modern classic, *Democracy and Distrust*,¹³⁴ perhaps the most widely read work of constitutional law of the last three decades. Early on, Ely argues that we must reject narrow clause-bound textualism because the Constitution contains various broadly worded clauses that, if read in isolation, stand as empty vessels into which vast content might be poured but from which little determinate meaning can be drawn.¹³⁵ Included in this category are the Due Process Clause of the Fifth Amendment, the unenumerated rights language of the Ninth Amendment, and the various clauses of Section 1 of the Fourteenth Amendment. According to Ely, we cannot responsibly ignore these hugely important clauses, nor should we go beyond the Constitution in search of fundamental values *hors de texte*. What, then, do we do? Ely's proposed solution to this puzzle is to read the broad clauses in light of the general themes of the Constitution as a whole.¹³⁶ Ely does not specifically suggest that we attend to the patterns of words and phrases that repeat themselves in the document. But if his general methodological prescription is not quite intratextualism, as I have defined it, it is rather close. Like intratextualism, Ely's approach invites textualists to read clauses holistically, rather than in isolated, clause-bound fashion. Ely thinks that there are indeed larger patterns and structures implicit in the document as a whole and that careful examination of the entire text is the proper starting point for analysis.

What's more, in applying his general methodology, Ely repeatedly (though with minimal methodological fanfare) gestures toward intratextualism. In his important chapter on the open-textured

¹³⁴ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

¹³⁵ See *id.* at 11–41.

¹³⁶ See *id.* at 87–101.

clauses,¹³⁷ Ely makes at least six intratextual moves. First, he places the similarly worded Due Process Clauses of the Fifth and Fourteenth Amendments side by side for careful analysis.¹³⁸ In light of the obvious parallels of language here, this is a quite conventional move (as we saw in *Bolling*) and a sound one. Next, he analyzes the Fourteenth Amendment clause protecting "privileges" and "immunities" of "citizens" alongside the Article IV clause containing the same three clustered words, noting both the linguistic similarities and the important syntactical differences between these two nonadjacent clauses.¹³⁹ This maneuver in turn leads him to contrast the substantive rights language of the Fourteenth Amendment's Privileges or Immunities Clause with the equal rights language of its Equal Protection Clause.¹⁴⁰ Here too, Ely's moves are enlightened and enlightening.

His invocation of Article IV is especially promising, for there is even more insight to be gained by pondering its intratextualist links to the Fourteenth Amendment than Ely himself suggests. For example, we might at first be puzzled by the fact that every single one of the major proponents of the Fourteenth Amendment in 1866 denied that voting was a "privilege" or "immunity" of "citizens."¹⁴¹ Viewed in isolation, the words hardly seem to demand this reading. But under Article IV, a Massachusetts man temporarily visiting South Carolina could claim equality of civil rights — like the rights to own real property or to profess his religion — but not equality of political rights. Thus, he could be barred from voting in South Carolina elections, or serving on a South Carolina jury. With this understanding of Article IV in mind, we can see more clearly why the proponents of the Fourteenth Amendment insisted that its words would likewise encompass civil but not political rights. This is precisely the intratextual move at the heart of the Supreme Court's 1875 opinion in *Minor v. Happersett*,¹⁴² holding that the Fourteenth Amendment does not confer suffrage rights:

But if further proof is necessary to show [that the right to vote is not one of the privileges or immunities of citizenship in the Fourteenth Amendment,] it can easily be found . . . in . . . the Constitution. By Article 4, Section 2, it is provided that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." If suffrage is necessarily a part of citizenship, then the citizens of each State must be entitled to vote in the several States precisely as their citizens are. . . . This, we think, has never been claimed.¹⁴³

¹³⁷ See *id.* at 11–41.

¹³⁸ See *id.* at 15.

¹³⁹ See *id.* at 23–24.

¹⁴⁰ See *id.* at 24.

¹⁴¹ For documentation, see AMAR, BILL OF RIGHTS, cited above in note 95, at 217 n.*.

¹⁴² 88 U.S. (21 Wall.) 162 (1875).

¹⁴³ *Id.* at 174.

Consider next Ely's intratextual comparison of the use of the word "citizens" in one Fourteenth Amendment clause with the use of the different word "person" in neighboring Fourteenth Amendment clauses.¹⁴⁴ This is a linguistic point that many less sensitive readers of the Amendment have simply missed. Whether or not we ultimately embrace Ely's particular conclusions here,¹⁴⁵ we should applaud his methodological instincts. An attractive account of the Fourteenth Amendment should explain, rather than ignore, the intratextual contrast he notes.

In his next (fifth) intratextual gesture, Ely juxtaposes the language of the Fifteenth Amendment — which explicitly limits "the United States" as well as states — with the omission of similar language in the Fourteenth Amendment.¹⁴⁶ Ely suggests that this juxtaposition reinforces the notion that the Fourteenth Amendment cannot sensibly be read to require *federal* officials to obey its command of equal protection. Given our earlier analysis of *Bolling*, we can see that Ely is wrong about the meaning of the Fourteenth Amendment, but right in his instinct to examine the *Bolling* issue intratextually.

Finally, we should note that Ely reads the language of the Ninth Amendment in light of the language of the Tenth.¹⁴⁷ Once again, we need not agree in every respect with his substantive conclusions in order to admire his style and concur with his methodological insight that sound interpretation of the Ninth Amendment must take account of its relation to the Tenth Amendment.¹⁴⁸ Though he does not stress the point, the fact that these adjoining Amendments feature similar phrases — of rights and powers "reserved" and "retained" by "the people" — invites careful intratextual scrutiny.

Taken as a whole, the appearance of so many intratextual moves in so short a space (twenty pages) suggests that our best constitutional scholars are as fluent in intratextualism at the end of the twentieth century as were Marshall and Story at the beginning of the nineteenth.¹⁴⁹

¹⁴⁴ See ELY, *supra* note 134, at 24–25.

¹⁴⁵ For a different account, critiquing Ely, see AMAR, BILL OF RIGHTS, cited above in note 95, at 171–74, 364–65 n.42.

¹⁴⁶ See ELY, *supra* note 134, at 33.

¹⁴⁷ See *id.* at 34–35.

¹⁴⁸ For my own thoughts here, see AMAR, BILL OF RIGHTS, cited above in note 95, at 119–24.

¹⁴⁹ Several of our youngest generation of constitutional scholars have offered prominent and attractive examples of intratextualism. See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1175–86 (1992) (providing extensive intratextual analysis of the Vesting Clauses); Vikram D. Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 222–46 (1995) (providing extensive intratextual analysis of various similarly worded voting amendments) [hereinafter Vikram Amar]. Our most prominent constitutional scholar and litigator has also recently used intratextualism in a particularly powerful and elegant way to address one of the most important constitutional issues of the last quarter-century. See Laurence Tribe, *Dialogue: The Independent*

2. *Langdell and Lowell*. — If Professor Ely's book illustrates intratextualism at work in contemporary legal scholarship, what about legal scholarship in its early years? Consider a pair of articles that appeared in the pages of this *Law Review* exactly one hundred years ago, in volumes 12 and 13.¹⁵⁰ As the low volume numbers remind us, these articles sprang up at the dawn of law school scholarship. Their authors were eminent figures: Christopher Columbus Langdell, the former dean and father of the modern Harvard Law School (and holder of the Dane Professorship that Justice Story first held), and A. Lawrence Lowell, who would soon become President of Harvard University (a post he would hold for more than three decades). Both articles addressed constitutional issues of great moment, issues that promised to define the upcoming presidential election of 1900, and that would give rise to a hugely important (yet today almost forgotten) set of Supreme Court decisions in 1901.¹⁵¹ The constitutional questions at issue were these: How (if at all) did the Constitution apply to territories beyond state borders? How (if at all) was America's turn-of-the-century ambition for empire, as evidenced by the 1898 Spanish-American War, to be squared with a Constitution born in an anti-imperial revolution and dedicated to principles of popular sovereignty and self-determination?¹⁵² Were inhabitants of Puerto Rico and the Philippines entitled to all the protections of the Constitution? In pop jargon, did the Constitution "follow the flag"? Exactly one century after the Langdell and Lowell articles, the federal government and the inhabitants of Puerto Rico are still struggling with these questions. Modern constitutional scholarship has slighted these issues, and so the Langdell and Lowell articles (and the related *Insular Cases* of 1901) receive less attention than they deserve. Today, however, my interest is more methodological than substantive: what do these classic articles

Counsel, SLATE (Oct. 1, 1998) <<http://www.slate.com>> (online discussion with Akhil Reed Amar) (analyzing the Article II, Section 4 Impeachment Clause phrase, "Treason, Bribery, or other High Crimes and Misdemeanors," by intratextual contrast with the Article I, Section 6 Arrest Clause phrase, "Treason, Felony and Breach of the Peace," and the Article IV, Section 2 Interstate Extradition Clause phrase, "Treason, Felony or other Crime").

¹⁵⁰ See C. C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); Abbott Lawrence Lowell, *The Status of Our New Possessions — A Third View*, 13 HARV. L. REV. 155 (1899).

¹⁵¹ See *Downes v. Bidwell*, 182 U.S. 244, 248–85 (1901) (considering whether duties imposed on items imported from Puerto Rico were valid after the United States acquired Puerto Rico as a territory, and "the broader question of whether the revenue clauses extend of their own force to our newly acquired territories"); *Dooley v. United States*, 182 U.S. 222, 230–36 (1901) (examining the validity of various duties imposed on goods imported from the United States to Puerto Rico after the military took possession of the island); *De Lima v. Bidwell*, 182 U.S. 1, 174 (1901) (considering whether a United States territory acquired from a foreign power constituted a "foreign country" for the purposes of tariff law).

¹⁵² In Bobbitt's terminology, see BOBBITT, *supra* note 9, at 93–119, isn't there a strong ethical argument, deeply rooted in the Founding saga of America, that condemns imperial exploitation of colonies for mere commercial advantage?

tell us about the way that early legal scholars debated constitutional questions?

In the title and opening paragraph of his January 1899 article, Langdell asserts that to properly assess "the status of our new territories," we must "ascertain the meaning of the term 'United States.'"¹⁵³ In casual conversation and international affairs, he admits, the term may encompass federal territories governed by the national government, as well as the various (then, forty-five) states of the Union.¹⁵⁴ But, he boldly argues, the term as used in the Constitution excludes territories altogether and encompasses only the several states:

[T]he Constitution of the United States as such does not extend beyond the limits of the States which are united by and under it, — a proposition the truth of which will, it is believed, be placed beyond doubt by an examination of the instances in which the term "United States" is used in the Constitution.¹⁵⁵

What follows over the next six pages is an exhaustive — and exhausting — intratextualist extravaganza in which Langdell tries to identify every single constitutional clause (more than fifty in all) using the phrase "United States."

Over the course of these six pages, Langdell makes several fine-grained intratextualist claims. He begins with the opening phrase of the Preamble, "We, the People of the United States." Because only Americans in the thirteen states ratified the Constitution, Langdell argues that the phrase "United States" here cannot refer to Americans outside states (such as those residing in the Northwest Territory in the late 1780s): "According to the Preamble, therefore, the Constitution is limited to the thirteen States which were united under the Articles of Confederation . . ."¹⁵⁶

A couple of pages later, Langdell turns to the phrase "throughout the United States."¹⁵⁷ This phrase lay at the nub of various economic debates over the Philippines and Puerto Rico. If the federal government were to annex these territories and treat them as colonies, with a mercantile regime of special colonial taxes and tariffs, could such treatment be squared with Article I, Section 8's Tax Uniformity Clause, which demands that "all Duties, Imposts and Excises shall be uniform throughout the United States"?¹⁵⁸ To answer this question, Langdell turns to the two other clauses of the Constitution featuring

¹⁵³ Langdell, *supra* note 150, at 365.

¹⁵⁴ See *id.* at 371.

¹⁵⁵ *Id.* at 371.

¹⁵⁶ *Id.* at 373.

¹⁵⁷ *Id.* at 375 (internal quotation marks omitted).

¹⁵⁸ U.S. CONST. art. I, § 8, cl. 1. Note how, on one reading, this seemingly technical clause could be understood as a sweeping textual affirmation of America's anticolonialist, antimerchantilist ethos — a promise that Americans would never treat others as the British had once treated them. See *supra* note 152.

the identical phrase, "throughout the United States." One of these other clauses — the Article II, Section 1 clause empowering Congress to pick the day on which presidential electors shall be chosen "throughout the United States"¹⁵⁹ — cannot possibly apply outside the states, Langdell argues. And what's sauce for the Article II Presidential Election Day Clause, he claims, should be sauce for the similarly worded Article I Tax Uniformity Clause. Thus, neither clause applies in any way beyond the several states. In his words, "when the same phrase is used in different parts of the Constitution, a strong presumption arises that it is always used in the same sense."¹⁶⁰ This is intratextualism with a vengeance.

But with dubious constitutional judgment. Consider Langdell's claims about the Preamble. True, Americans in the Northwest Territory did not vote to ratify the Constitution — but neither did women. If, in theory, the men in the thirteen state ratifying conventions virtually represented women, perhaps these conventions likewise virtually represented Americans in the Northwest, who, in theory, were indeed part of "We the People of the United States" from the beginning. Can Langdell truly mean it when he says that under the Preamble, "the Constitution is limited to the . . . States?"¹⁶¹ If so, the Article VI Supremacy Clause, which speaks of the "Constitution, and the Laws of the United States," simply does not apply in Washington, D.C. (Given that this is where Congress, the President, and the Supreme Court all do their work, this result seems troubling, to put it mildly.) In a brief aside, Langdell appears to soften his point by suggesting that the "District of Columbia differs materially from a Territory, [because] the former is within the limits of a State, was once part of a State, and, therefore, the Constitution once extended over it; and it may not be easy to show that it has ever ceased to extend over it."¹⁶² But even if we bracket the District, is it sound to think that the words of the Supremacy Clause (and of the rest of the Constitution, for that matter) are simply inapplicable in territories destined for statehood, such as Arizona in 1899?¹⁶³ Contrast Langdell's crabbed view with Marshall's expansive attitude eighty years earlier, when, as we have already noted, the Chief Justice proclaimed that the vast American "republic"

¹⁵⁹ U.S. CONST. art. II, § 1, cl. 4.

¹⁶⁰ Langdell, *supra* note 150, at 375.

¹⁶¹ *Id.* at 373.

¹⁶² *Id.* at 382–83.

¹⁶³ Another anomaly: An American who was born in Michigan in, say, 1808 and spent his entire life there would apparently have been ineligible to be President at age forty because he had not been "fourteen Years a Resident within the United States" within the meaning of Article II, Section 1, Clause 5. (Michigan was part of the original Northwest Territory in 1787, was organized as a separate territory in 1805, and became a state in 1837.) For a fun exploration of these and related complexities, see generally Jordan Steiker, Sanford Levinson & J.M. Balkin, *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237 (1995).

extends "from the St. Croix to the Gulph of Mexico, from the Atlantic to the Pacific"¹⁶⁴ — most definitely encompassing territories that were not yet states. Writing only a year after *McCulloch* in a case arising under the Article I, Section 8 clause demanding that federal taxes be "uniform throughout the United States," Marshall spoke to the issue with more precision: "[The United States] is the name given to our great republic, which is composed of States and territories. The district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania."¹⁶⁵

Compare this to Langdell's intratextualist claim about the phrase "throughout the United States." True, this Article I Tax Uniformity Clause phrase also appears in the Article II Presidential Election Day Clause, which originally applied only in states (because only states chose presidential electors). But this Article II clause proves only that the phrase sometimes *can* sensibly mean "throughout the several states," not that it *must* always mean this. (Langdell here resembles Blackmun more than Marshall.) And what is really doing the territory-excluding work in this Article II clause is not the contested phrase itself, but the general context involving the electoral college. The Tax Uniformity Clause has nothing to do with this context, and so arguably it need not be read in the same way. Here is another way to put this point: after the adoption of the Twenty-Third Amendment in 1961, the voters in Washington, D.C., became part of the electoral college system, and so the Article II phrase "throughout the United States" now does clearly apply beyond the several states. The same thing would have been true if, in 1900, the country had adopted a constitutional amendment allowing Americans in the Arizona Territory to choose presidential electors. And all this makes clear that there is nothing in the simple phrase, "throughout the United States," that bars application beyond states, if such application is otherwise indicated by context.

More generally, the words "United States" may well be an unpromising prospect for intratextualism — or at least for an intratextualism that seeks a definitive answer to the territories question. Like the word "person," the phrase may be a clever chameleon whose precise hue will sensibly vary depending on the surrounding legal context. If we seek to go beyond a narrow clause-bound analysis, it seems inapt to limit our holistic textualism to those constitutional clauses that, for random reasons, happen to use the phrase "United States." Rather, we should examine the document as a whole, and its animating ideals. And when we do, the idea that the Constitution would not apply at all

¹⁶⁴ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819).

¹⁶⁵ *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820).

to territories on the road to statehood — such as Michigan in 1820 and Arizona in 1899 — seems outlandish.

This is precisely the point Lowell makes at the outset of his powerful reply to Langdell in the November 1899 issue of the *Harvard Law Review*. He observes:

[The Langdell thesis] allows Congress to confiscate property in the District of Columbia or in a Territory without compensation, or to take it arbitrarily from the owner and bestow it upon another person. It suffers the government to pass a bill of attainder against a resident of Washington or of Arizona, and order him hung without trial. According to this view, moreover, a person born of alien parents in a Territory is not a citizen of the United States either by the Constitution or by statute¹⁶⁶

But even in the course of rejecting Langdell's outlandish thesis, Lowell himself repeatedly makes intratextualist arguments. In the above-quoted passage for example, Lowell is implicitly arguing that the Fourteenth Amendment's first sentence most assuredly does encompass territories like Arizona in its sweeping grant of birthright citizenship to "[a]ll persons born . . . *in the United States*." Elsewhere, Lowell makes more explicit his claim that on various occasions the Constitution does use the phrase "United States" in clear contemplation of territories. If "United States" really means "several states," he asks, why doesn't the document use the latter phrase? Indeed, because in some clauses the document does use the latter phrase, shouldn't we assume that when the different phrase "United States" is used, something *different* was intended? (This is the standard flip side of the intratextualist coin.)¹⁶⁷

Lowell's use of intratextualism is considerably more adroit than Langdell's. For starters, the clauses that Lowell chooses to yoke together seem to share more context, making his clausal comparisons

¹⁶⁶ Lowell, *supra* note 150, at 156–57.

¹⁶⁷ In Lowell's words:

[I]n the first clause of Art. I., Sect. 2, for example, the Constitution speaks of "the People of the *several States*," and in the next clause a representative is required to be a "Citizen of the *United States*." Why this change of expression if a different meaning is not intended? . . . Again, it is provided that "direct Taxes shall be apportioned among the *several States* which may be included within this Union, according to their respective Numbers;" but that "all Duties, Imposts, and Excises shall be uniform throughout the *United States*." If the intention had been merely that these last taxes should be uniform throughout the States, while direct taxes were to be apportioned among them according to population, the framers of the Constitution would no doubt have said so. The same remark applies to the provisions requiring laws of naturalization and bankruptcy to be uniform throughout the United States, and to the clause prescribing that the President shall have "been fourteen years a Resident within the United States." It may be observed in this connection that if no one can be a citizen of one of the United States unless he is a citizen of the States, then foreigners can become citizens only by being naturalized in a State, and Congress either had no power to extend the naturalization laws over the Territories, or persons naturalized there acquire none of the rights of citizens.

Id. at 159–60 (emphasis added).

seem less contrived.¹⁶⁸ More generally, Lowell seems to recognize the limits of intratextual analysis as well as its strengths. Perhaps some uses of a phrase as protean as "United States," he suggests, might be "inadvertent[t]."¹⁶⁹ And Lowell understands that the key constitutional issues at hand are not best addressed by looking only, or even primarily, at constitutional clauses that happen to use this phrase. Thus he scores some of his most telling points by pondering clauses that do not use this talismanic phrase, yet nevertheless speak volumes to the question whether the Constitution applies outside the states:

Art. III., Sect. 2, Cl. 3, provides, for instance, that "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." This by its very terms applies to crimes committed outside of any State, and the provision was so framed with that very object. Another clause, speaking of members of Congress, provides that "for any Speech or Debate in either House, they shall not be questioned in any other Place." Surely this cannot mean only in any place within a State, for it would lose its whole value if a member could be sued or prosecuted in the District of Columbia on a charge of Libellous statements in Congress.¹⁷⁰

In the end, the Langdell-Lowell exchange evidences the prominence of intratextualism at the dawn of constitutional scholarship in places like the Harvard Law School. The exchange also reminds us that, as is true of all other legitimate techniques of constitutional interpretation, intratextualism can often be used on both sides of contested questions, and with varying degrees of deftness. In particular, Langdell's form of intratextualism should powerfully remind us of the dangers of mechanical formalism in deploying the technique, even as Lowell's form suggests more optimistic possibilities.

¹⁶⁸ Consider the passage quoted above in note 167. Precisely because the clauses that he points to in Article I, Section 2 stand back to back in the Constitution itself, the textual contrast he identifies seems potentially significant. And when he pairs the Direct Tax Clause of Article I, Section 2 with the Tax Uniformity Clause of the nonadjacent Article I, Section 8, the pairing seems highly plausible, linking clauses that obviously address the same subject (taxation). From this Tax Uniformity Clause, Lowell's next intratextual leap to the nonadjacent naturalization and bankruptcy uniformity clause also seems manageable — not because both clauses use the same bland and unpromising phrase "throughout the United States," but because both clauses seem plausibly to be about the same principle of national *uniformity*. (Langdell also seems to appreciate this point. See Langdell, *supra* note 150, at 380.) Lowell subtly reinforces the implicit substantive basis for his intratextual leap by closing this paragraph with an illustration of the oddities that would result from a nonuniform federal naturalization power.

¹⁶⁹ Lowell, *supra* note 150, at 158.

¹⁷⁰ *Id.* at 160. Lowell follows these two examples with a third from the Fifteenth Amendment. Though this Amendment does use the phrase "United States," he places no emphasis on this fact. Instead, he stresses that its ban on race discrimination in voting, insofar as this ban applies to federal officials, applies beyond states — in the territories and the District of Columbia — because these are the only places where the federal government is empowered to regulate suffrage. See *id.*

This concludes my selective survey of canonical cases and commentaries. Thus far I hope I have shown that intratextualism is a standard tool in the kitbag of the capable constitutional lawyer, a tool that can come in handy over a remarkably broad range of constitutional issues. Even in historical instances where the tool was not used, it often could have been used, and used powerfully. Of course, I do not claim that intratextualism is the only or even the best form of constitutional argument, or that it will work in every important case. I do claim that good constitutional lawyers neglect this tool at their peril.

Having seen intratextualism in action and inaction across a wide range of specific issues, let us now see if something a bit more general can be said about this form of argument — its distinctiveness, its variations, its strengths, and its weaknesses.

II. THEORY

A. *The Distinctiveness of Intratextualism*

Is intratextualism methodologically distinct from the other standard forms of constitutional argument? In important respects, yes. Textual argument as typically practiced today is blinkered (“clause-bound” in Ely’s terminology¹⁷¹), focusing intently on the words of a given constitutional provision in splendid isolation. By contrast, intratextualism always focuses on at least two clauses and highlights the link between them. Clause-bound textualism paradigmatically stresses what is explicit in the Constitution’s text: “See here, it says X!” By contrast, intratextualism paradigmatically stresses what is only implicit in the Constitution’s text: “See here, these clauses fit together!” But there is no clause in the Constitution that says, explicitly and in so many words, that the three Vesting Clauses should be construed together, or that the Article III grant of federal question jurisdiction should be read alongside the Article VI Supremacy Clause. Intratextualism simply reads the Constitution *as if* these implicit linking clauses existed. Clause-bound textualism reads the words of the Constitution in order, tracking the sequence of clauses as they appear in the document itself. By contrast, intratextualism often reads the words of the Constitution in a dramatically different order, placing textually nonadjoining clauses side by side for careful analysis. In effect, intratextualists read a two-dimensional parchment in a three-dimensional way, carefully folding the parchment to bring scattered clauses alongside each other.

Clause-bound textualism itself comes in different varieties, but neither of the two main strands of textualism looks quite like intratextualism. A plain-meaning textualist might look to today’s dictionaries to make sense of a contested term like “commerce” or “cruel” or “privi-

¹⁷¹ ELY, *supra* note 134, at 12.

leges" or "process," whereas an original intent textualist might look to eighteenth-century dictionaries. But intratextualism tries to use the Constitution as its own dictionary of sorts, yielding a third distinct approach. An intratextualist might read mid-nineteenth-century constitutional phrases like "due process" or "privileges or immunities of citizens" in light of similar constitutional phrases written in the late eighteenth century, or vice versa. Another example: does the Twenty-Sixth Amendment, ratified in 1971, protect the "right" of eighteen-year-olds to "vote" in juries as well as in ordinary elections? Plain-meaning and original-intent textualists would both consult the word "vote" in modern usage and modern dictionaries, but an intratextualist would use the Constitution as its own dictionary here. On no less than four occasions — the Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments — the Constitution uses the same highly elaborate set of words, "the right of citizens of the United States . . . to vote," and an intratextualist would be inclined to read these provisions *in pari materia*. Their strongly parallel language is a strong (presumptive) argument for parallel interpretation. If it seems clear (as, in fact, it does) that the Fifteenth Amendment, ratified in 1870, was drafted to encompass the political right of citizens to serve and "vote" on juries, this fact about word usage and constitutional meaning in 1870 would be relevant to an intratextualist confronting a different (but parallel) amendment adopted 100 years later.¹⁷²

For similar reasons, intratextualism also seems distinct from standard forms of argument based on history and original intent. An intratextualist might say that the words "due process of law" in the Fifth Amendment contain an equality component even though none of the Amendment's drafters or ratifiers in the 1780s and 1790s thought so. True, those who framed and ratified the Fourteenth Amendment did think that the Fifth Amendment phrase implied an equality component, but clause-bound practitioners of standard original intent analysis would not ordinarily look to the Fourteenth to construe the Fifth. And even though the framers of the Fourteenth Amendment incorporated their understanding of the words "due process of law" in a clarifying gloss, the equal protection words they drafted do not *explicitly* apply to federal action.¹⁷³ (Here we see again the differences between

¹⁷² See Vikram Amar, *supra* note 149, at 222–41.

¹⁷³ Note the possibility for certain kinds of cycles and Condorcet-like paradoxes here. Suppose those who draft clause 1 at time T_1 think it means X , and those who draft parallel clause 2 at time T_2 think it means Y . If we read clause 1 to mean X , and clause 2 to mean Y , we fail to do justice to the implicit idea that the two clauses are *in pari materia*. If we read both to mean Y , we fail to do justice to the intent of drafters at T_1 . Likewise, if we read both to mean X , we fail to do justice to the drafters at T_2 . One intentionalist approach to the paradox would be to pose a counterfactual: if the drafters of clause 2 had been made aware of the cycle, would they have rewritten clause 1 to mean Y , or would they upon reflection have decided that clause 2 should really mean X , or would they have said that the two clauses should not be interpreted *in pari materia*?

standard clause-bound textualism and intratextualism.) We should also note that intratextualism draws inferences from the patterns of words that appear in the Constitution even in the absence of other evidence that these patterns were consciously intended. Just as intratextualism, as a variant of textual argument, often focuses on what is merely implicit in the text, so too intratextualism, as a variant of historical argument, may highlight what is only presumed to be the specific intent.

It might be thought that intratextualism stands as a paradigmatic species of structural argument. However, the most typical forms of structural argument focus not on the *words* of the Constitution, but rather on the *institutional* arrangements implied or summoned into existence by the document — the relationship between the Presidency and the Congress, or the balance between the House and the Senate, or the interplay among sister states, or the direct bond between citizens and the federal government. Indeed, the most elegant practitioner and proponent of structural argument today, Professor Charles Black, has explicitly defined his brand of reasoning in contradistinction to those approaches that focus intently on text:

I am inclined to think well of the method of reasoning from structure and relation . . . above all, because to succeed, it has to make sense — current, practical sense. . . . [Textualism] may often — perhaps more often than not — be made to make sense, . . . [b]ut it contains within itself no guarantee that it will make sense [Structural argument focuses us on] the practicalities and proprieties of the thing, without getting out dictionaries whose entries will not really respond to the question we are putting We will have to deal with policy and not with grammar.¹⁷⁴

Of course, in important respects intratextualism does share much in common with its sister forms of argument. Like clause-bound textualism, it focuses on the words of the document. (And some forms of clause-bound textualism — like negative-implication arguments based on the interpretive maxim, *expressio unius est exclusio alterius* — do squeeze meaning from what is merely implied, rather than explicitly stated by the words themselves.) Like historical argument, intratextualism often makes claims about the implicit intent of the Framers based on their utterances. Like Blackian structuralism, intratextualism seeks to identify and draw meaning from larger constitutional patterns at work.¹⁷⁵ Like doctrinal argument, it seeks to promote a certain coherence in interpretation and avoid the appearance of ad hoc adjudication; absent a good reason for doing otherwise, similar consti-

¹⁷⁴ BLACK, *supra* note 22, at 22–23.

¹⁷⁵ Cf. *id.* at 31 (“There is, moreover, a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text.”).

tutional commands should be treated similarly for reasons analogous to the doctrinal principle that like cases should be treated alike.

In the end, so long as we recognize intratextualism as a valuable and important interpretive technique, while also recognizing its limitations, it may not matter how we formally classify it. Indeed, instead of viewing intratextualism as one distinct form of argument apart from six others, it may be useful to consider intratextualism as a cluster of at least three different kinds of constitutional claims.

B. *The Types of Intratextualism*

1. *Using the Constitution as a Dictionary: Intratextualism as Philology.* — Understood most literally, the idea of using the Constitution as a dictionary can be seen as serving a linguistic function. A dictionary tells us what a word can mean, with examples drawn from usage. Although the Constitution itself rarely defines a contested word self-consciously the way a dictionary does,¹⁷⁶ the Constitution does illustrate word usage, and thus serves a basic dictionary function. Indeed, the Constitution may be superior to ordinary dictionaries in several respects. Ordinary dictionaries may diverge — I like the *Oxford English Dictionary* (OED), you like *Webster's* — but the Constitution itself provides a common reference point¹⁷⁷ for all concerned: drafters composing constitutional language, ratifiers deciding whether to make such language supreme law, judges and other interpreters trying to expound such language thereafter, and subsequent generations of would-be amenders seeking to add postscripts to the prior text. Legal words and phrases can sometimes be used as terms of art, with nuances of meaning not well captured by standard dictionaries reflecting lay usage. Often we seek the meaning of a word cluster — a phrase — rather than of a single word, but ordinary dictionaries typically feature discrete entries for individual words. In contrast, the Constitution often offers up repeated use of similar word clusters, and these clustered uses may prove especially rich veins of insight. For example, if the key words of the Twenty-Sixth Amendment — “right,” “citizens,” and “vote” — were examined as discrete entries in a standard late-twentieth-century dictionary, it might seem dubious that these words, when conjoined, encompass the right of jury service. But if we instead consult the clustered use of these words as they first appeared in the Constitution (in the Fifteenth Amendment), we find abundant evidence that the phrase as a whole did indeed embrace the political right

¹⁷⁶ But see, e.g., U.S. CONST. art. III, § 3 (“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”).

¹⁷⁷ For a discussion of the concept of “focal points,” see THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 57–80 (1960).

to serve in the jury box and vote in the jury room.¹⁷⁸ The words "privileges," "immunities," and "citizens" in the Fourteenth Amendment provide another example. If we viewed these three words in isolation and consulted ordinary dictionary entries, we would be hard-pressed to explain how Reconstruction Republicans could be so emphatic and unanimous in their insistence that these words equaled "civil rights" and excluded political rights like voting.¹⁷⁹ But when we instead turn to the clustered use of these three words in Article IV, *à la Happersett*, we see the linguistic light (and link).

The lighter the load a given linguistic argument seeks to bear, the easier it is to defend this particular brand of constitutional intratextualism. If Marshall is seeking to establish only that "necessary" *can* mean convenient, a single constitutional example suffices to prove his point, and powerfully. By contrast, if Blackmun is seeking to prove that "person" *must* mean post-natal humans, or if Langdell is seeking to establish that "United States" *can only* mean the several states, even a slew of examples from the Constitution may prove unavailing. It is difficult to prove a universal linguistic negative with a less-than-universal linguistic database.

The matter is different when we consult a standard unabridged dictionary, like the multivolume OED, which purports to map exhaustively the possible meanings of a word, from the universe of accepted usage. If such a dictionary tells us that approved authors never (or almost never) use the word "person" prenatally, this may be much stronger evidence than if Blackmun tells us that outside the Fourteenth Amendment, the Constitution itself in a dozen or so clauses never uses the word this way. The more universal the database of word usage, the more plausible the claim that a given word simply cannot mean a certain thing. And so we are left with the following: When we seek to prove that a word *could* mean *X*, a single example from the Constitution illustrating this is *stronger* than an entry from a standard dictionary because the example proves that the authors of the Constitution itself — and not simply some "approved authors" somewhere — understood usage *X*. But if we try to prove that a word *cannot* mean *Y*, examples drawn from the Constitution are *weaker* than entries in standard dictionaries.

2. *Using the Constitution as a Concordance: Intratextualism as Pattern Recognition.* — If philologic intratextualism is best at proving what a word or phrase might mean, a different brand of intratextualism tries to show what the document as a whole is best read as meaning. Intratextualism allows the Constitution to function not merely as a special kind of dictionary, but also as a special kind of

¹⁷⁸ See Vikram Amar, *supra* note 149, at 222–41; AMAR, BILL OF RIGHTS, *supra* note 95, at 271–74 & n.*.

¹⁷⁹ See *supra* p. 780.

concordance, enabling and encouraging us to place nonadjoining clauses alongside each other for analysis because they use the same (or very similar) words and phrases. Once we accept the invitation to read noncontiguous provisions together, we may see important patterns at work. This will not always be the case — various all-purpose words may pop up in a random assortment of clauses that have little in common with each other, and upon reflection we may even say that certain chameleon words should sensibly mean different things in different clauses. But other times, the intratextual word link will be a surface sign of a much deeper thematic connection, a sympathetic vibration evidencing a rich harmony at work. Is it purely coincidental that the last words of the Tenth Amendment intratextually echo the first words of the Preamble? Story thought not, and after reflection and analysis, we see that Story was right. Both passages are part of a deep pattern, embroidering the fundamental constitutional principle of popular sovereignty.¹⁸⁰ (In fact, the last three words of the Amendment were added by the First Congress in explicit recognition of their connection to the Preamble.¹⁸¹) Further evidence of this deep pattern may be discerned when we ponder the fact — made easier to see by a concordance brand of intratextualism — that no phrase appears in more amendments in our cherished Bill of Rights than the phrase “the people.”¹⁸² If we seek further confirmation of this pattern, we find it in the power of Lincoln at Gettysburg, echoing Marshall, echoing Story, echoing the Bill of Rights, echoing the Preamble: “. . . the people, . . . the people, . . . the people.”

Oftentimes the patterns will be ones that the drafters specifically intended and that the ratifiers consciously considered — the interlocking words of the Article III grant of federal question jurisdiction and the Article VI Supremacy Clause, for example, or the obvious symmetry between the civil rights protected by the Article IV Privileges and Immunities Clause on the one hand and the Fourteenth Amendment’s Privileges or Immunities Clause on the other. Other times, the pattern that we discern upon reflection may not have been specifically intended, but is still far from random. Must Lincoln have had Marshall specifically in mind to be indebted to him? A great play may contain a richness of meaning beyond what was clearly in the playwright’s mind when the muse came; ordinary language contains depths of association that not even our best poets fully understand,

¹⁸⁰ For more general analysis of this pattern, see AMAR, BILL OF RIGHTS, cited above in note 95.

¹⁸¹ See *id.* at 119–21.

¹⁸² U.S. CONST. amends. I, II, IV, IX, X. Of course it is logically possible that “people” is an essentially unimportant chameleon word, like “person.” The intratextual issue can never be decided a priori. Rather, intratextualism merely poses the question whether a deep analytic pattern in fact ties together a repeated word or phrase, and to answer this question we will need to use other tools of interpretation to supplement intratextualism.

even as they intuit; and a judicial opinion may build better than its author knew. So too with the Constitution. Those who drafted and ratified the Article IV Territories Clause may not have consciously understood how perfectly its words ("The Congress shall have Power to . . . make all needful Rules and Regulations") mirror those of the Article I Necessary and Proper Clause ("The Congress shall have Power . . . [t]o make all laws which shall be necessary and proper"). But the pattern here is not constitutionally coincidental — monkeys randomly striking typewriter keys would not have produced it. Patterns like this are part of the genius of the document, and intratextualism can help us see this genius.

But is this "genius of the Constitution" a genius of its writers or a genius of its readers? The answer is, I think, both. As Jed Rubenfeld has powerfully reminded us, American-style written constitutionalism is a temporally extended intergenerational project calling for a sensitive collaboration between generations of writers and later generations of readers.¹⁸³ A sensitive reader does not simply make things up, but she does draw out meaning that may only be implicit in the text. And the kind of meaning she draws out will depend on the purpose for which she is reading. A great historian or deconstructionist might approach a great text in search of irony, polyphony, and even contradiction. (Think of the genius of Duncan Kennedy when interpreting the genius of Blackstone's *Commentaries*.¹⁸⁴) A great literary critic or classicist might read a text so as to reveal its artistic beauty. (Think of the genius of Garry Wills when interpreting the genius of Lincoln's Gettysburg Address.¹⁸⁵) A great lawyer or judge reading the Constitution *as law* will look for something slightly different: consistency rather than inconsistency, workability and ease of exposition to ordinary Americans rather than sheer beauty in the eyes of aesthetes. (Think of the genius of John Marshall in *McCulloch* when interpreting the genius of the Founders' Constitution.)

3. *Using the Constitution as a Rulebook: Intratextualism as Principle-Interpolation.* — A final species of intratextualism demands that two (or more) similarly phrased constitutional commands be read *in pari materia*. What's sauce for one must be sauce for the other, and so a principled interpreter must, for example, construe the Vesting Clauses of Articles I, II, and III with equal generosity, or the four voting rights amendments as coextensive in scope. Here we are dealing not merely with a recurring word, or even a recurring word-cluster,

¹⁸³ See Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1143-73 (1995); see also JED RUBENFELD, *FREEDOM AND TIME* (forthcoming). I consider these works to be among the most important current projects in constitutional theory.

¹⁸⁴ See Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979).

¹⁸⁵ See WILLS, *supra* note 34.

but with a complete, carefully elaborated command that appears in identical language with a single variation that (presumptively) should make no legal or moral difference: "The [fill in the blank] power shall be vested . . ." and "The 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 [fill in the blank]."

The key to this brand of intratextualism is interpolation: we read the commands *as if* a metacommand clause existed telling us to construe parallel commands in parallel fashion. Because such a metacommand clause does not in fact exist, this form of interpolation must remain open to the possibility that, upon reflection, there are sound constitutional reasons not to treat the individual commands as *in pari materia*. But unless such sound reasons are identified — explaining why two blank-filling words are really different at heart — an interpreter would seem wholly unprincipled if he refused to read like commands alike.

To oversimplify slightly: dictionary-like intratextualism tells us what the Constitution *could* mean; concordance-like intratextualism tells us what it *should* mean; and rulebook-like intratextualism tells us what it *must* mean.

C. Some Strengths of Intratextualism

Perhaps the greatest virtue of intratextualism is this: it takes seriously the document as a whole rather than as a jumbled grab bag of assorted clauses. To modify Marshall, it is *a* (single, coherent) Constitution we are expounding.¹⁸⁶ Granted, various strands of nontextual argument often aspire to holism. Within the method of historical argument, for example, narrow clause-bound stories coexist with epic sagas spanning the entire American constitutional experience, such as the towering trilogy Bruce Ackerman is in the process of building.¹⁸⁷ Structuralists like Charles Black invite us to go beyond the clause in search of larger institutional patterns of constitutional meaning.¹⁸⁸ Doctrinalists like Laurence Tribe organize individual cases and discrete lines of cases into comprehensive theoretical models and frameworks.¹⁸⁹ But none of these efforts is particularly textual — none seems to emphasize, as has Jed Rubenfeld in much of his fascinating work,¹⁹⁰ the Constitution's *writtenness*. In brief, clause-bound textu-

¹⁸⁶ Because I consider the Constitution a single text, I have here designated clausal comparisons within the document as *intratextual*, as distinct from *intertextual* comparisons between clauses in the Constitution on one hand and clauses in other documents on the other.

¹⁸⁷ See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); 3 BRUCE ACKERMAN, *WE THE PEOPLE: INTERPRETATIONS* (forthcoming).

¹⁸⁸ See BLACK, *supra* note 22.

¹⁸⁹ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988).

¹⁹⁰ See sources cited *supra* note 183.

alism tries to do justice to the Constitution's writtenness but not its wholeness; various other forms of argument try to do justice to wholeness but not writtenness; whereas intratextualism tries to do justice to both, and at the same time.

Emphasis on the Constitution's writtenness — its general textuality and its specific textual provisions — has certain democratic virtues. The Constitution is a compact document that most Americans can read. With modest effort, even layfolk can become familiar with its words and basic layout. As Marshall insists in *McCulloch*, one of the greatest strengths of the Constitution is that its words can be "understood by the public"¹⁹¹ — "We the People" for whom and to whom it speaks. The text of the document itself constitutes a democratic focal point¹⁹² — an open meeting hall, a common language — that can structure the conversation of ordinary Americans as they ponder the most fundamental and sometimes divisive issues in our republic of equal citizens. Certain forms of nontextual constitutional interpretation are often inherently exclusionary, requiring intimate familiarity with vast amounts of case law and the subtle arts of doctrinal analysis, or mastery of history writ large and writ small, or fluency in abstruse political philosophy. Of course, a holistic textualism also calls for special skill, seeing and showing how different clauses cohere into larger patterns of constitutional meaning, and those more familiar with the document itself will be advantaged. But new technology has made the particular brand of textual holism I am highlighting here easily accessible to layfolk. A simple constitutional concordance can show all citizens where various words and phrases appear and recur in the document; with this concordance in hand, even layfolk could begin to ponder the possible patterns and implicit principles that intratextualism highlights.¹⁹³ And such a concordance can easily be generated by computers with word-search capacity.¹⁹⁴

The particular type of intratextualism that I am highlighting here harmonizes nicely with other forms of holistic textualism. Even if adjoining clauses have no linguistic overlap, they often deal with related subjects, and each is often illuminated by careful comparison with its neighbors. This is the paragraphism technique that Marshall bungled in considering the original and appellate jurisdiction clauses in

¹⁹¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 406 (1819).

¹⁹² Cf. SCHELLING, *supra* note 177, at 57–80 (discussing focal points).

¹⁹³ Even though intratextual analysis will often lead readers to consider certain clauses and their possible interrelation, fully satisfying constitutional analysis will often require the use of other tools of interpretation once the relevant clauses and questions have been identified. Given that some of these techniques are less easily accessible to layfolk, the democratic advantages of intratextualism may be real but nonetheless limited.

¹⁹⁴ For those with access to the Internet, a concordance can be generated by visiting the website run by the Library of Congress, at <<http://lcweb2.loc.gov/const/constquery.html>>.

Marbury, and that Story acted in *Martin*. For an even more celebrated effort, consider the following passage from the case that (in retrospect, at least) put the Court on the road to *Roe*:

[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

....

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.¹⁹⁵

Even those of us who, as a substantive matter, disagree with some of what Justice Douglas writes here¹⁹⁶ should applaud his urge to try his hand — if all too quickly — at holistic textualism. Writing fifteen years later, Ely raised questions about Douglas's substantive result in *Griswold*, but embraced — indeed extended — Douglas's methodology, offering a textual "tour" not simply of the Bill of Rights but of the entire Constitution.¹⁹⁷

¹⁹⁵ *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (citation omitted).

¹⁹⁶ For example, I doubt that the Self-Incrimination Clause is as tightly linked to privacy as Justice Douglas implies. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 65–66 (1997).

¹⁹⁷ See ELY, *supra* note 134, at 88–101, 221 n.4. Another brand of holistic textualism squeezes meaning from the Constitution's organization chart — by drawing inferences from the fact that federal powers are conferred in Article I, Section 8, whereas restrictions on federal power appear in Section 9, see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 419 (1819); by observing that all the limits in Section 9, and the original Bill of Rights, were designed as limits on federal power, with Section 10 as the home of limits on states, see *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 248–49 (1833); and so on. Arguments in this tradition might point to the special place of textual honor held by the Constitution's first three words as evidence of popular sovereignty as the document's first principle; or to the very existence of separate Articles I, II, and III as evidence of the separation of powers and the coextensiveness of the three great federal departments; or to the firstness of Article I as evidence of Congress's primacy; or to the location of the Veto Clause in Article I as evidence that this presidential power is legislative in nature. By contrast, a Blackian structuralist arguing for these four propositions would point to institutional patterns rather than the organization of powers and the coextensiveness of the three great federal departments; or to the equality of the departments is proved by the fact that none is wholly dependent on the others for appointment and continuance in office, and their coextensiveness reflects the functional reality that one department makes federal law, which the other departments then enforce

When extended beyond paragraphism to encompass the entire document, holistic textualism has an obvious virtue: it invites readers to ponder connections between noncontiguous clauses that have no textual overlap, yet nevertheless cross-illuminate. But truly holistic textualism also has an obvious weakness: there are so many clauses to consider and an almost infinite number of interclausal comparisons that could be performed. Yet some interclausal comparisons are more likely to be promising leads than others.¹⁹⁸ Where and how does one start? Holistic textualism does not give us much guidance. Intratextualism has equal and opposite virtues and vices. It tells us when reading clause *X* to pay particular attention to similarly worded but nonadjoining clauses *Y* and *Z*. This focus narrows the field of view, but also gets us going and gives us direction. It leads the reader to comparisons that are particularly likely to be rewarding, because similar wording will quite often be a surface marker of a deeper analytic insight waiting to be found upon close inspection.

Douglas's paragraphistic tour and Ely's even more holistic tour are similarly motivated: each interpreter seeks to persuade us that he is not simply reading his personal preferences into the Constitution. Unlike *Lochner*,¹⁹⁹ privacy has roots in many parts of the Bill of Rights, Douglas insists; most of the Constitution is about process, Ely argues. These examples suggest another virtue of intratextualism and other forms of holistic textualism: their usefulness in constraining (or at least highlighting) interpretive cheating. Intratextualism invites us to ask how interpretation of clause *X* (affecting, say, judicial power) is to be squared with interpretation of similarly worded clause *Y* (affecting, say, executive power). For example, if the Supreme Court insists that lower courts cannot defy its precedents because these courts are "inferior" to it in Article III, why shouldn't the President likewise be able to insist that special prosecutors and Independent Counsels cannot defy his policies because these officers are supposed to be "inferior" officers in Article II? (What's sauce for the goose . . .) We shall return to this specific question later; for now it is enough to see that the intratextual tool alerts us to possible self-dealing in judicial interpretation, as the

and adjudicate, respectively. If Congress stands first among equals, it is because legislation temporally and functionally precedes execution and adjudication, or because the legislature is the largest branch and its lower House stands closest to the citizenry. If the veto is a legislative power, it is because functionally the President is involved in lawmaking, regardless of the textual placement of the Veto Clause.

¹⁹⁸ In addition, certain clauses may be especially rich with meaning and worthy of much more attention than other clauses. In deploying intratextual analysis in this Article, I have chosen to highlight various clauses that in my view are hugely important but understudied: the Preamble, the Article I Speech or Debate Clause, the Article I Attainder and Nobility Clauses, the Thirteenth Amendment, and the Fourteenth Amendment Citizenship and Privileges or Immunities Clauses.

¹⁹⁹ *Lochner v. New York*, 198 U.S. 45 (1905).

Court pumps up clauses that it favors or that empower it while deflating clauses that it disfavors or that empower others.

Finally, intratextualism also has a certain undeniable aesthetic attraction, appealing to ideals of symmetry and harmony. When done well, intratextualism is elegant. The use of linguistic links to trace thematic threads is a common feature of aesthetically pleasing interpretation of great works of literature, for example. However, the Constitution is not and should not become a mere objet d'art. Thus the aesthetic appeal of intratextualism could be reckoned a weakness as well as a strength. And there are other weaknesses to consider.

D. Some Weaknesses of Intratextualism

Carried to extremes, intratextualism may lead to readings that are too clever by half — cabalistic overreadings conjuring up patterns that were not specifically intended and that are upon deep reflection not truly sound but merely cute (if pro is the opposite of con, what is the opposite of progress?) or mystical. (If certain clauses turned out to be anagrams of other clauses, surely nothing important should turn on this fact.) As is apparent when we consult ordinary dictionaries, the same words sometimes sensibly mean different things in different contexts. As illustrated most vividly by Langdell, intratextualism can become a mechanical exercise that blunts good judgment and leads to outlandish outcomes. Given that sensible use of intratextualism will require us to consider the limits of the technique, the technique will not so much dictate results as suggest possible readings. Even when the intratextual tool can generate interpretive leads and clues, we still need other tools of interpretation to finally assess the plausibility of any reading suggested by intratextualism.

What's more, unless complemented by other tools of analysis, intratextualism may be too self-referential, even autistic. It highlights the document's intratextual links, but casts no light on its possibly illuminating *intertextual* links to other documents, such as the English Bill of Rights, state constitutions, the Declaration of Independence, and the Articles of Confederation. Consider, for example, the following passage from *McCulloch*:

[T]here is no phrase in [the Constitution] which, like the articles of confederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus [impliedly permitting implied federal powers]. The men who drew and adopted this amendment had experienced the embarrassments resulting

from the insertion of this word ["expressly"] in the articles of confederation, and probably omitted it to avoid those embarrassments.²⁰⁰

Just as Marshall would argue later in the opinion that the phrase "absolutely necessary" means something different from the simple word "necessary," so here he is suggesting that the phrase "expressly delegated" means something different from the simple word "delegated." But Marshall is contrasting the actual wording of the Constitution not merely with what it could have said (standard clause-bound textualism) or with what another clause of the Constitution does say (classic intratextualism). Rather, he is contrasting the text of the Constitution with what its *predecessor document* said. The language of Article II of the Articles of Confederation ("Each State retains . . . every Power . . . which is not . . . expressly delegated to the United States . . .") was an obvious model for the language of the Tenth Amendment ("The powers not delegated to the United States . . . are reserved to the States . . ."). The overall similarity of the phrasing²⁰¹ makes all the more remarkable the striking *intertextual* difference: the word "expressly" is notably present in the earlier text and notably absent in the later text.

Another possible weakness of intratextualism is that it invites strong inferences about constitutional meaning from the document's grammar and syntax. For example, interpolation-style intratextualism presumes that two clausal commands should receive identical treatment because they feature the same basic grammar and syntax. But even if two clauses were initially designed to work together, if their underlying problems have evolved in different ways, something must give. If we adapt each clause's doctrine to fit the new shape of problems, then the initial linkage between the two doctrines must give. If we preserve the linkage of doctrine by arguing that what's sauce for one is sauce for the other, maybe one sauce will taste bad (because one underlying problem has changed in some way that the other has not).²⁰²

Note, however, that many of these criticisms of intratextualism as an interpretive tool may prove too much — they also apply to other traditional techniques of constitutional interpretation. If intratextualism reads too much into patterns of word usage, perhaps standard

²⁰⁰ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819).

²⁰¹ I put aside here other important differences of phrasing marked by the ellipses.

²⁰² For example, the Fifteenth and Nineteenth Amendments are *in pari materia*, with the first addressing race and the second, sex. But the overall ratio of male voters to female voters is more likely to approximate fifty-fifty than the ratio of white voters to black voters. And although sex is conventionally understood as binary (male/female), the same is not true of race, given the emergence of more than two socially recognized "races" in America. Also, suppose racially polarized voting begins to emerge far more vividly than gender polarized voting. In such a world, perhaps doctrinal rules for implementing the Fifteenth Amendment (in, say, apportionment cases) should diverge from those doctrinal rules implementing the Nineteenth Amendment, despite their textually parallel form.

clause-bound textualism suffers from the same flaw. If intratextualism does not merely constrain interpretation but also at times loosens it by opening up interpretive possibilities, isn't the same true of other tools of interpretation?²⁰³ If changed circumstances sometimes call for disregarding an intratextual linkage that no longer makes sense, the same may be true of ordinary clause-bound textualism. In the end, these cautions remind us that no tool of interpretation is a magic bullet. But each tool can be a lens through which to read, an imperfect but still useful lens whose reading must be checked against readings generated by other lenses. And the ultimate proof of any given tool must be whether it in fact ever works: does the tool in real and hard cases ever help us to reach satisfying and sound legal results?²⁰⁴

²⁰³ Both Karl Llewellyn and Jack Balkin have observed that interpretive canons often come in opposing semiotic pairs. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950); J.M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 211, 216-18 (Peter Brooks & Paul Gewirtz eds., 1996). Intratextualism can also be seen in this light. Paired against the notion that the same words should mean the same thing (e.g., "shall be vested") is the idea that sometimes the same words should mean different things because the overall context of two clauses is different (e.g., chameleon words). Paired against the notion that different words should mean different things (e.g., "necessary" versus "absolutely necessary" and "all cases" versus "controversies" — what I have called the flip side of intratextualism) is the idea that sometimes different words should mean the same thing, either because they are in effect synonyms (e.g., "necessary" and "needful") or because a phrase is essentially an explanatory or declaratory gloss that only clarifies, but does not change, meaning (e.g., the equal protection gloss on due process). The fact that formally opposed pairs exist does not mean that anything goes or that interpretation is some sort of sham or shell game. Reasons must be given for choosing one or the other of an opposing pair. If we claim that same means same, we must be prepared to defend the underlying similarity of context; whereas if we claim that a given word is a chameleon, we must identify and defend the contextual difference. To pick another example, if we claim that the Necessary and Proper Clause and the Equal Protection Clause are essentially "declaratory" — adding emphasis but not new rules — then we must be prepared to defend that claim with evidence beyond the conclusory label. See *supra* note 11 and pp. 772-73 (offering historical evidence that supports a declaratory reading of these two clauses).

²⁰⁴ Like textual argument more generally, intratextual argument is by no means an inherently politically conservative interpretive tool. Today's foremost judicial champions of textualism (Justices Scalia and Thomas, for example) may be conservative, but in the Warren Court and Burger Court eras, some of the greatest champions of textualism (Justice Black and Professor Ely, for example) were leading liberals. All proper techniques of constitutional interpretation can be used by both liberals and conservatives alike.

Note also that intratextualism can be used in statutory interpretation as well as in constitutional law. Indeed, Professors Eskridge and Frickey have identified the following as a standard maxim of modern statutory interpretation: "Interpret the same or similar terms in a statute the same way." William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 app. at 99 (1994). I shall not here attempt serious analysis of statutory intratextualism. Some of the arguments I have offered — focusing on the Constitution as a compact, cleanly bounded, and easily accessible document, written for ordinary people and designed to endure over centuries — may not readily transfer to the realm of statutory interpretation. And in surveying canonical cases and commentaries, I have intentionally focused on issues of constitutional as opposed to statutory interpretation.

To answer this question, let us turn to three of the most difficult issues of our time and see if intratextualism can generate useful interpretive leads and clues, and thereby prove its worth in action.

III. CASES AGAIN

A. *Morrison and Starr*

The biggest constitutional story of 1998 took place mostly outside the Supreme Court, with Independent Counsel Kenneth Starr challenging President Bill Clinton across a range of issues.²⁰⁵ Counsel Starr undeniably wields prosecutorial powers — *executive* powers — and yet no executive officer appointed him, no executive officer directly supervises him, no executive officer can countermand him across the board, and no executive officer can remove him at will. How is this possible? The short answer is that this is exactly what Congress provided for by statute²⁰⁶ and what the Supreme Court upheld in its 1988 case, *Morrison v. Olson*.²⁰⁷ But the statute is unconstitutional and the case is wrongly decided. And intratextualism can help us see this more clearly.

Much of the debate in *Morrison* swirls around the Article II Vesting Clause.²⁰⁸ If all federal executive power is vested in the President, surely the Independent Counsel cannot wield federal executive power and yet be immune from presidential control (via at-will removal or some other countermand device). So argues Justice Scalia in his forceful but lonely dissent.²⁰⁹ The Court majority suggests that Independent Counsels do not constitute an *undue* interference with presidential power,²¹⁰ but Justice Scalia points out that the Vesting Clause is written in absolute language calling for rule-like enforcement rather than mushy balancing: "The executive power *shall be vested* in a President."²¹¹ How, Scalia asks, are judges to say what is undue, and where do they get the right to reword the Constitution? Shut up, the Court explains. Scalia also points out that the major Court precedents at hand — *Myers*²¹² and *Humphrey's Executor*²¹³ — allow exceptions to at-will removal only for quasi-legislative or quasi-judicial officers,

²⁰⁵ This is probably as good a place as any to acknowledge that Kenneth Starr is my friend. I consider him a scholar and a gentleman, and none of my criticism of the statute and the case that made his appointment possible should be construed as a criticism of him personally.

²⁰⁶ See 28 U.S.C. §§ 591–599 (1994).

²⁰⁷ 487 U.S. 654 (1988).

²⁰⁸ U.S. CONST. art. III, § 1, cl. 1.

²⁰⁹ See *Morrison*, 487 U.S. at 705, 724 n.4 (Scalia, J., dissenting).

²¹⁰ See *Morrison*, 487 U.S. at 691, 693.

²¹¹ U.S. CONST. art. II, § 1, cl. 1 (emphasis added). As we saw above at pages 760–61, Justice Story made much the same point for the Court in *Martin*.

²¹² *Myers v. United States*, 272 U.S. 52 (1926).

²¹³ *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

whereas prosecutors are purely executive creatures.²¹⁴ We are willing to rewrite these cases, replies the Court. We admit we cannot square our holding today with what these cases say, but we can square it with what these cases did on their facts.²¹⁵

But Scalia's position on the Vesting Clause has some problems of its own, even though the majority opinion fails to see them.²¹⁶ Scalia concedes that as long as the President retains the basic power to remove an executive officer at will, or otherwise countermand that officer's orders, the Vesting Clause command would be satisfied.²¹⁷ But on the facts of *Morrison*, the President has precisely this power of countermand. If the President truly disagrees with the Independent Counsel, the President can make the Counsel vanish with one stroke of the presidential pardon pen: no underlying targets of prosecution, no prosecutor. Poof! Anyone who today doubts this obvious presidential power should talk to Caspar Weinberger (who received precisely such a pardon) or Independent Counsel Lawrence Walsh (who was effectively poofed out of existence). As President Ford's pardon of Richard Nixon should remind us, pardon may occur at any time after the crime — before sentence, before conviction, before trial, and even before indictment.²¹⁸ A truly skillful chief executive can wield this mighty broadsword as a surgical scalpel by explaining the facts of life to an Independent Counsel (publicly or privately): unless she does *X* and *Y* and refrains from *Z*, the President will be obliged to pardon. Granted, such threats and deeds may make the President look bad politically, but so does the threat or deed of at-will removal — just ask Archibald Cox or Robert Bork — and Scalia concedes that the power of at-will removal suffices to satisfy the Vesting Clause.

This is what the *Morrison* majority should have said to Justice Scalia, but did not. The Court's weak opinion feels like the work not of the Chief Justice who signs it, but of a young law clerk with limited

²¹⁴ See *Morrison*, 487 U.S. at 723–27 (Scalia, J., dissenting).

²¹⁵ See *Morrison*, 487 U.S. at 685–93.

²¹⁶ One possible line of attack on Scalia's position would invoke the Federal Reserve System: under Scalia's logic, isn't the Federal Reserve unconstitutional because its head is not removable at will? But Scalia (or some other believer in the general concept of the unitary executive) might concede that the textual strictness of the Vesting Clause must be accommodated to two post-Founding phenomena that the Framers could not have anticipated — the rise of the plebiscitarian presidency and the discovery of Keynesian techniques allowing unscrupulous incumbent Presidents to artificially inflate the economy in election years (with disastrous effects perhaps setting in only after the election). But this concession hardly supports the Independent Counsel statute. Prosecutorial self-dealing is not something that the Framers failed to anticipate. And the solution they provided, based on publicity (via grand juries, the press, and legislative oversight) and impeachment (if necessary) still works and works well — better than the Independent Counsel statute, in fact. This, I suggest, is the lesson that emerges when we compare Watergate — where the Framers' system worked beautifully — with Whitewater, where the flawed statute has not.

²¹⁷ See *Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting).

²¹⁸ This practice is in keeping with the views propounded by Publius. See *THE FEDERALIST* NO. 74, at 448–49 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

constitutional vision.²¹⁹ Here is where intratextualism comes in, for one of its virtues is that it can help even novices see larger constitutional patterns at work. The Article II Vesting Clause speaks of “the executive Power” vested in the “President.” Using a concordance approach to this clause, a clerk should have tried to consult the other clauses — and there are remarkably few of them — that speak of the “Power” of the “President.” This would have begun to sharpen the clerk’s analysis of whether the Independent Counsel amounted to an “undue” interference (whatever that means) with presidential power. And when the clerk consulted the concordance-generated checklist of clauses, he would have quickly come to the Article II, Section 2 menu of presidential power that should be read alongside the (nonadjoining) Vesting Clause. Right at the beginning of this menu the clerk would have found the following words: “The *President* . . . shall have *Power* to grant Reprieves and *Pardons* for Offenses against the United States, except in Cases of Impeachment.”²²⁰ Intratextualism would have encouraged the clerk to ponder these words and their possible analytic connection to the Vesting Clause and the issues in the case at bar. Of course, there is no guarantee that the clerk would upon reflection have seen the obvious importance of the Pardon Clause for the issues in *Morrison*. But at least the intratextual tool would have led him to water, even if it could not have forced him to drink.

Had the *Morrison* Court pointed to the Pardon Clause as its best response to Scalia, it would have been clear to all in 1998 that Counsel Kenneth Starr is constitutionally a very different animal from Counsel Alexia Morrison. When the President himself is a possible target — as is the case in Starr’s investigation and was not in Morrison’s — he cannot simply make the prosecution (and thus the prosecutor) go away with a stroke of his presidential pardon pen, because he may not constitutionally pardon himself.²²¹ (To put the point in the *Morrison* Court’s own language, when the President is himself a target, an Independent Counsel can indeed dramatically interfere with his role.)

We have yet to see the full power of intratextualism as it bears on *Morrison* and Starr, however. The other major issue in *Morrison* concerns not the removal (or countermanding) of the Independent Counsel, but her initial appointment. The appointment question remains a lively one a decade later, as evidenced by one of the standard soundbites of President Clinton’s spinmeisters. Where, they ask, do supposedly judicial officers like David Sentelle get the power to pick execu-

²¹⁹ This candid comment might well be out of place in many contexts but seems appropriate to offer here, in a discussion that so plainly implicates issues of interpretive style and constitutional aesthetics.

²²⁰ U.S. CONST. art. II, § 2, cl. 1 (emphasis added).

²²¹ See Brian C. Kalt, Note, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 809 (1996).

tive branch prosecutors? The short answer is that the statute provides that the Chief Justice may pick a special panel of judges who in turn may pick Independent Counsels.²²² But can this part of the statute be squared with the Constitution? Yes, says the *Morrison* Court. No, says the Constitution when read with the aid of intratextualism.

The Article II Appointments Clause provides that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."²²³ Is an Independent Counsel an *inferior* officer within the meaning of the Constitution? The *Morrison* majority proclaims that the line between "inferior" and "principal" officers "is far from clear, and the Framers provided little guidance into where it should be drawn."²²⁴ The Court then says that Alexia Morrison "clearly falls on the 'inferior officer' side of that line."²²⁵ To prove this, the Court cobbles together an ad hoc test of "inferiority" with no real explanation of where the prongs of the test came from or how they fit with the Constitution's structure.²²⁶ In the first prong, for example, the Court argues that Independent Counsels are inferior because they can be removed from office, although not by the President directly, and not at will. But as Justice Scalia notes in dissent, Independent Counsels have *more* immunity from removal than even Cabinet members, who serve at the President's pleasure.²²⁷ Something has gone terribly wrong here. If removability is the test (or even a prong of the test), then Cabinet members would be more "inferior" than Independent Counsels. Yet surely heads of departments are not "inferior" within the meaning of the Constitution.

What, then, *does* "inferior" mean here? Just this: an Appointments Clause "inferior" officer must be *subordinate to* a superior officer or entity. When Congress chooses to allow unilateral appointment of an "inferior" officer, without the special check and safeguard of Senate confirmation, it must vest the power to appoint the "inferior" in his or her superior. The superior appointing authority must have broad power to direct or to countermand the decisions of the subordinate. Thus, a court of law may be vested with power to appoint its law clerks, magistrates, bailiffs, masters, and the like, but not prosecutors or diplomats or colonels whom it does not (and cannot in the nature of things) oversee and whose decisions it cannot overturn. The head of the State Department may appoint an assistant within her department,

²²² See 28 U.S.C. §§ 49, 593(a) (1994).

²²³ U.S. CONST. art. II, § 2, cl. 2.

²²⁴ *Morrison v. Olson*, 487 U.S. 654, 671 (1988).

²²⁵ *Id.*

²²⁶ See *id.* at 671-72.

²²⁷ See *id.* at 716 (Scalia, J., dissenting).

but not an assistant within the Justice Department, or within the judiciary.

Where, you might ask, did I come up with *that*? From ordinary dictionaries and from the Constitution as its own dictionary. As Justice Scalia notes, ordinary dictionaries in both the 1780s and today confirm that “inferior” often means “subordinate.”²²⁸ An *inferior* officer is not merely a minor, or a petty, officer, but a subordinate to his *superior* officer. A GS-3 clerk in the Justice Department might in some sense be *less than* a GS-4 clerk in the Commerce Department, but the former is not *subordinate to* the latter (even if a GS-3 is easy to remove and a GS-4 is not). If Kenneth Starr is paid *X*, and Janet Reno is paid *2X*, Starr might in some sense be *less than* Reno but he would not thereby become *inferior to* her. And this plain-meaning understanding of the word “inferior” receives a strong intratextual boost from the Constitution itself, if we turn to it as a dictionary, as does Justice Scalia:

At the only other point in the Constitution at which the word “inferior” appears, it plainly connotes a relationship of subordination. Article III vests the judicial power of the United States in “one supreme Court, and in such *inferior* Courts as the Congress may from time to time ordain and establish.” U.S. Const., Art. III, § 1 (emphasis added). In Federalist No. 81, Hamilton pauses to describe the “inferior” courts authorized by Article III as inferior in the sense that they are “subordinate” to the Supreme Court.²²⁹

Justice Scalia’s intratextual turn is elegant and incisive, but ever so slightly incomplete. Had the Justice used a computer to generate an intratextual concordance, he would have noted that the word “inferior” also appears in Article I, Section 8 — and in a way that beautifully drives home his point.²³⁰ He quotes Article III, which speaks of a “supreme” Court and various “inferior” courts in a manner precisely analogous to the Article II Appointments Clause, which speaks of unilateral appointing authorities (“the President alone,” “the Courts of Law,” and “the Heads of Departments”) and various “inferior” officers. Now, Article III does not in so many words say that inferior courts are subordinate *to* the Supreme Court. But this is precisely what the Article I clause that Scalia overlooks does say in so many words: “Congress shall have Power . . . to constitute Tribunals *inferior to* the supreme Court.”²³¹ Thus, when Article III speaks of “inferior” courts, it likewise means “inferior to” their superior — the Supreme Court. Sym-

²²⁸ See *id.* at 719.

²²⁹ *Id.* at 719–20.

²³⁰ In a later case, Justice Scalia explicitly calls attention to the intratextual link between the “inferior” tribunals language of Article I, Section 8, Clause 9, and the cognate “inferior” courts language of Article III, Section 1. See *Freytag v. Commissioner*, 501 U.S. 868, 902 (1991) (Scalia, J., concurring in part and concurring in the judgment).

²³¹ U.S. CONST. art. I, § 8, cl. 1, 9 (emphasis added).

metrically, when the Article II Appointments Clause speaks of "inferior" officers, it likewise means "inferior to" their superior — the relevant unilateral appointing authority.

Here we see a possible constitutional pattern at work. But the intratextual technique does not *demand* that we read the Constitution this way — it merely suggests that such a reading might be the most fitting and harmonious interpretation, the best way of reading the document as a whole. Intratextualism helps us see clearly a possibly attractive reading — it leads us to water. But should we drink?

Before we decide, let us revisit the *Morrison* Court's test of "inferiority." The first factor that the Court stressed was that Independent Counsels could be removed (although not at will and not by the President directly). We can now see how oblique and obtuse this factor is, constitutionally. Cabinet members are removable at will, but they are not constitutionally inferior, whereas lower federal judges have life tenure, and yet their courts are constitutionally inferior.²³² If we ponder these two data points, what concept of inferiority is at work in the Constitution? Not removability, but subordination: an inferior officer takes orders from his departmental superior. Inferior courts must follow what the Supreme Court says,²³³ but no Justice Department official can dictate to or countermand the Attorney General. (Of course, Cabinet officers answer to the President, but they are the heads of their respective *departments*.)

Let us now measure our intratextual reading of "inferiority" against the readings generated by other lenses of analysis. If we examine the text of the Appointments Clause in a standard clause-bound way, its words seem an apt way of conferring on appointing authorities the simple power to pick their own respective subordinates, without the bother of Senate confirmation. And there is no alternative wording of the clause that would have expressed this purpose more clearly with the same compactness of language. (If you doubt this, try to draft an alternative clause, as Marshall did in *McCulloch* when he argued that it would have been quite easy to draft a grammatically restrictive Nec-

²³² Note that if the judges on "inferior" courts were themselves deemed "inferior" officers — an issue on which I take no position here — this would mean that Congress could choose to allow lower federal judges to be appointed without Senate confirmation. At least one commentator has lent his support to this view. See Burke Shartel, *Federal Judges — Appointment, Supervision, and Removal — Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485, 488–89, 499–529 (1930). But see *Weiss v. United States*, 510 U.S. 163, 191 n.7 (1994) (Souter, J., concurring) (noting the long-standing tradition of judges of inferior courts as principal officers); Amar, *Two Tiers*, *supra* note 61, at 235 n.103 (1985) (noting Shartel's argument without endorsing it). Note further that on my proposed reading of the Appointments Clause, if "inferior court" judges are indeed "inferior" officers, their unilateral appointments could be vested in certain courts of law but not in the President or in the head of an executive department, as these latter officers would not be the relevant constitutional superior officer or entity of "inferior" judges.

²³³ See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 828–37 (1994).

essary and Proper Clause.) When we consult history, our proposed reading perfectly fits the drafting records of the Appointments Clause and its early implementation. The language permitting unilateral appointment of inferior officers emerged on the last day of the Philadelphia Convention, and with little debate — facts suggesting that it was viewed as a minor housekeeping measure.²³⁴ Allowing major officers to pick their own assistants keeps faith with this housekeeping reading. But authorizing judges to appoint prosecutors — or diplomats or colonels, for that matter — seems a far bigger deal. Had the delegates understood that the clause could be so applied, we would expect to find considerably more discussion. In keeping with the housekeeping reading, the First Congress in one of its earliest statutes vested the Secretary of the Department of Foreign Affairs with the power to appoint and supervise his own assistant: “[T]here shall be in the said department, an inferior officer, to be appointed by the said principal officer, and to be employed therein as he shall deem proper”²³⁵ Soon thereafter, Congress used similar language in allowing the Secretary of War to appoint and monitor his own assistant.²³⁶ The *Morrison* Court mentions almost none of this. The majority does quote a snippet from Joseph Story’s landmark constitutional treatise²³⁷ but misses the import of the following passage, which it fails to quote:

The courts of the Union possess the *narrow* prerogative of appointing *their own* clerk, and reporter The heads of department are, in like manner, generally entitled to the appointment of the clerks in *their respective* offices. . . . [And] the *postmaster general* . . . is invested with the sole and exclusive authority to appoint, and remove all *deputy post-masters*²³⁸

Six years after the publication of Story’s 1833 treatise, the Supreme Court expounded the Appointments Clause as follows in *Ex parte Hennen*:

The appointing power here designated . . . was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged. The appointment of *clerks of Courts* properly belongs *to the Courts* of law; and that a clerk is one of the

²³⁴ See 2 FARRAND, *supra* note 76, at 627–28. The only other recorded discussion of inferior officers occurred a week earlier and strongly supports the idea that the Framers simply meant to authorize the unilateral appointment of inferior officers by their respective superiors as a housekeeping matter to spare the Senate’s time. See *id.* at 537–39. In response to George Mason’s concern that the Senate would need to be in continuous session to approve all appointments, however trivial, see *id.* at 537, Rufus King stated that he “did not suppose it was meant that all the minute officers were to be appointed by the Senate, or any other original source, but by the *higher officers of the departments to which they belong*.” *Id.* at 539 (emphasis added).

²³⁵ Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29.

²³⁶ See Act of Aug. 7, 1789, ch. 7, § 2, 1 Stat. 49, 50.

²³⁷ See *Morrison v. Olson*, 487 U.S. 654, 671 (1988).

²³⁸ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1530, at 387 (Boston, Hilliard, Gray & Co. 1833) (emphasis added).

inferior officers contemplated by this provision in the Constitution cannot be questioned. Congress, in the exercise of the power here given, by the act of the 24th of September, 1789, establishing the judicial Courts of the United States. . . , declare that the Supreme Court, and the District Courts shall have power to appoint clerks of their *respective* Courts; and that the clerk for each District Court shall be clerk also of the Circuit Court in such district.²³⁹

When we turn from text and history to structural and practical arguments, our intratextual reading gains steam. Judges should never be in the business of picking prosecutors — this blurring of adjudicatory and prosecutorial roles ill fits the general liberty-enhancing architecture of separation of powers. Federal judges are given life tenure to remove them from daily politics, but the Independent Counsel statute risks politicizing the judiciary. (Consider all the partisan bickering spawned by the lunch between Judge Sentelle and Senators Faircloth and Helms.) Judges will not be good at picking prosecutors because they have inadequate information and weak incentives. Whereas the Attorney General has a wealth of information about the track record of prosecutors, judges do not and should not have access to this treasure trove of intra-executive intelligence, implicating various out-of-court activities that lie beyond the proper province of judicial supervision. And when an appointing authority is picking its own assistant, it obviously has strong incentives to pick well. If the subordinate does a bad job, other government officials and ordinary citizens will and should blame the boss. (This is why it is wholly proper to blame the Chief Justice for so shoddy an opinion in *Morrison*, even if it were clear that the opinion was written by a clerk whom the Chief simply picked and supervised.) But when Independent Counsels mess up, whom can we blame? Who is accountable?²⁴⁰ (Textually, *to whom* is

²³⁹ Ex parte Hennen, 38 U.S. (13 Pet.) 230, 257–58 (1839) (emphasis added); see also United States v. Germaine, 99 U.S. 508, 510–11 (1878) (describing inferior officers as “inferior to” their respective appointing authorities and as “mere aids and subordinates of the heads of the departments”); Collins v. United States, 1878 Ct. Cl. 568, 574 (1879) (“The word inferior . . . means subordinate or inferior to those officers in whom *respectively* the power of appointment may be vested — the President, the courts of law, and the heads of departments.” (emphasis added)).

²⁴⁰ Accountability was an overriding concern of the Framers in the appointments context. See, e.g., THE FEDERALIST NO. 70, at 428 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton explained:

Scandalous appointments to important offices have been made [in New York by a governor acting behind closed doors with his council]. . . . When inquiry has been made, the blame has been laid by the governor on the members of the council, who, on their part, have charged it upon his nomination; while the people remain altogether at a loss to determine by whose influence their interests have been committed to hands so unqualified and so manifestly improper.

Id.; see also THE FEDERALIST NO. 76, at 455 (Alexander Hamilton) (“The sole and undivided [appointment] responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation.”); THE FEDERALIST NO. 77, at 461 (Alexander Hamilton) (“The blame of a bad nomination would fall upon the President singly and absolutely.”). The Framers’ commitment to public accountability is mocked by a statute that gives a group of low-visibility judges

Counsel Starr inferior? How can there be an *inferior* without a *superior*?²⁴¹)

Doctrinal arguments give us additional reasons to think that the intratextual pattern we have identified is not merely clever but sound. The subordination principle and the 1839 *Hennen* case lay down a nice and easy bright-line test.²⁴² Instead of following this clean principle and this clear case, the *Morrison* Court slaps together a multi-factor test that has no square basis in precedent and that the Court admits might not sensibly bind a later Court. Indeed, less than a decade after *Morrison*, in an opinion for eight Justices authored by none other than Justice Scalia, the Court apparently abandoned *Morrison*'s ad hoc test. According to the Court:

Morrison did not purport to set forth a definitive test for whether an office[r] is "inferior" under the Appointments Clause.

....

Generally speaking, the term "inferior officer" connotes a relationship with some higher ranking officer or officers below the President: whether one is an "inferior" officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase "lesser officer." Rather, in the context of a clause designed to preserve political accountability relative to important government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.²⁴³

power to make important nonjudicial appointments behind closed doors, with no record of who said what to whom. *Morrison* ignored the key concept of accountability, but the Court has of late rediscovered this concept and restored it to its central place in proper Appointments Clause thinking. See *Edmond v. United States*, 117 S. Ct. 1573, 1579–81 (1997).

²⁴¹ Surely it would be odd to claim that Starr is "inferior" to his "superior" Reno, for Reno lacks broad power to tell Starr what to do. That of course is the whole point of a statute designed to make him *independent* of her. But precisely to the extent he is truly independent, he is not truly inferior. A truly inferior independent calls to mind a truly square circle.

²⁴² In 1880, the Court in *Ex Parte Siebold*, 100 U.S. 371 (1880), moved away from some of the language of *Hennen*. But as Justice Scalia notes, the facts of *Siebold* seem consistent with the clean bright-line subordination principle: the Court allowed judges to appoint special election supervisors whose duties were somewhat akin to marshals and ministerial clerks, and who presumably answered to the appointing court. *Siebold* treated the Appointments clause only in passing and laid down no general doctrinal test. See *Morrison*, 487 U.S. at 721–22 (Scalia, J., dissenting). In any event, whatever *Siebold* said or did, the modern Court has now clearly identified inferiority with subordination, see *Edmond v. United States*, 117 S. Ct. 1573, 1580–81 (1997).

²⁴³ *Edmond*, 117 S. Ct. at 1580–81. For scholarly recognition that *Edmond* in effect abandoned *Morrison*, see Nick Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103, 1117–20 (1998). Note that in requiring that a unilaterally appointed inferior officer be appointed by *his own* superior, I go a step beyond *Edmond*. (Even if the general in charge of American troops in Bosnia answers to other generals, surely Congress may not vest his appointment in courts of law.) Note also that where the President herself directly appoints an inferior officer — say, the White House Chief of Staff —

In short, *Morrison* gives us a doctrinal test good for one day only — precisely what sensitive doctrinalists and believers in neutral principles abhor. To make matters even worse, the *Morrison* test, if actually applied, is extraordinarily manipulable, featuring multiple factors with considerable wiggle room within each factor.

This leads to my final point. The overall judicial doctrine of inferiority seems remarkably self-serving. Over the last decade, the Court has repeatedly insisted that “inferior” courts must follow *its* orders,²⁴⁴ but it refuses to insist that “inferior” executive officers must similarly follow the orders of *executive branch* superiors. Perhaps there are good reasons for this inconsistency — but the *Morrison* Court never gives them. Intratextualism does not, I repeat, imperiously demand similar treatment here, but it does demand that the Court note the different treatment and justify it.²⁴⁵ The *Morrison* majority does neither: it never discusses “inferior” courts under Articles I and III and the light they might cast on “inferior” officers under Article II. And let us not overlook the fact that *Morrison*’s bottom line aggrandizes the judicial role in two more ways — by allowing judges to pick prosecutors and by allowing the Chief Justice (the nominal author of *Morrison*) to pick the judges who pick the prosecutors.

In the end, an intratextual analysis generates some remarkably promising leads and clues in thinking about both presidential power and the constitutional meaning of inferiority. I do not claim to have definitively resolved the complex issues raised by Independent Counsels in this short space. But I do claim to have put forth an analysis, powerfully informed by intratextualism, that highlights just how much is missed by the *Morrison* majority. Perhaps in the end, strong counterarguments might be raised, but readers will be hard-pressed to find any strong counterarguments in *Morrison* itself. Perhaps the rise of the modern imperial and plebiscitary presidency calls for new institutional checks unknown to the Founders.²⁴⁶ However, *Morrison* — like

the inferior need not be supervised by a Senate conferee, but indeed may be directly supervised by the President herself, who could then be held more directly accountable for her direct assistant. See Akhil Reed Amar, *Some Opinions on the Opinions Clause*, 82 VA. L. REV. 647, 666–68 & n.90 (1996).

²⁴⁴ See, e.g., *Agostini v. Felton*, 117 S. Ct. 1997, 2017 (1997); *American Trucking Ass’n v. Smith*, 496 U.S. 167, 180 (1990); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). On the significance of the word “inferior” for the issues raised here, see Caminker, cited above in note 233, at 828–38.

²⁴⁵ For example, even if inferiority means subordination within one’s proper branch, executive or judicial, the mode by which branch superiors supervise and command branch inferiors may sensibly differ, given the different traditions and functions of the branches. Executive supervision of inferiors may more often be informal and face to face than, say, the judicial supervision exercised by the Supreme Court over inferior courts. Executive superiors may also enjoy control over inferiors’ salaries in ways that would be inappropriate within the judicial branch hierarchy. And so on.

²⁴⁶ But see *supra* note 216 (suggesting that the Founders’ model of impeachment, legislative oversight, and press publicity remains more functional and attractive than the statutory innova-

several of the Court's recent opinions on separation of powers²⁴⁷ — focuses more on ancient constitutional text than on modern institutional structure. But the Court's textualism is embarrassing and blinkered — clause-bound and anything but holistic. If the Court is to place so much emphasis on text, it owes us a more sophisticated version of textualism.

B. *Free Speech*

It might be thought that the intratextual technique would be far more valuable in mapping out issues of structure than of rights — more constitutional clauses deal with the former, and there is thus more text to work with on the structural side. But consider the bright light that an intratextual approach could shed on many murky areas of current free speech doctrine.

In the most celebrated speech case ever decided, the Supreme Court famously proclaims that the First Amendment must be read “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”²⁴⁸ Elsewhere, *New York Times v. Sullivan* emphasizes the need “for free political discussion to the end that government may be responsive to the will of the people,”²⁴⁹ notes that the case at hand implicates “expression critical of the official conduct of public officials”²⁵⁰ concerning “one of the major public issues of our time,”²⁵¹ and proclaims that suppression of antigovernment speech by the infamous Sedition Act of 1798 violated “the central meaning of the First Amendment.”²⁵² The grand themes of this grand opinion resonate with the First Amendment approach of Alexander Meiklejohn,²⁵³ emphasizing the centrality of political speech, the intimate connection between free speech and democratic self-government, and the special need to protect political criticism of incumbent officialdom.

Today's Court, however, is drifting off course, away from the Meiklejohnian polestar. In a recent case involving liquor ads, for example, several Justices appear eager to shrink the doctrinal difference

tion at the heart of the present Independent Counsel statute, which injects judges into the highly political process of picking prosecutors)

²⁴⁷ See, e.g., *Clinton v. City of New York*, 118 S. Ct. 2091, 2103–05 (1998); *INS v. Chadha*, 462 U.S. 919, 944–59 (1983).

²⁴⁸ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

²⁴⁹ *Id.* at 268.

²⁵⁰ *Id.* at 269.

²⁵¹ *Id.* at 271.

²⁵² *Id.* at 273.

²⁵³ See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960) [hereinafter MEIKLEJOHN, *POLITICAL FREEDOM*].

between the protections accorded to political debate on the one hand and mere commercial advertising on the other.²⁵⁴ In a concurring opinion, Justice Thomas goes even further: "[There is no] philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech. Indeed, some historical materials suggest to the contrary."²⁵⁵ The move here is subtle but profound. The Justices are beginning to detach the First Amendment from democracy and to graft it onto property, moving from free speech to free markets. A similar trend is at work in cases involving cable television and campaign finance,²⁵⁶ with the Free Speech and Press Clause beginning to resemble the Fifth Amendment Takings Clause (property) more than the Article IV Republican Government Clause (equality and democracy). If free speech is not, at its core, about democracy — and therefore equality — then there is simply no constitutional problem when Ross Perot, Steve Forbes, and Bill Gates get to talk more than the rest of us put together if they own more than the rest of us put together. The First Amendment would prevent government from censoring those who can pay for their speech, but would inspire no obligation to provide public fora at government expense, where poor folks would have a turn at the mike. On this view — which reflects the instincts of at least a sizeable minority of the current Court, and sometimes a majority — free speech is not, well, *free*. So what exactly does the First Amendment prohibit, according to the emerging paradigm? Not merely laws that discriminate against speakers on the basis of their political *viewpoint*, as did the Sedition Act, but all laws that treat speakers differently on the basis of their *content*. The current Court's general drift is constitutionally troubling, and intratextualism can help us see why.

Begin with Justice Thomas's claim in *44 Liquormart, Inc. v. Rhode Island*²⁵⁷ that there is no "philosophical or historical basis" for treating commercial speech as less constitutionally worthy than political speech.²⁵⁸ Wrong. There is an obvious philosophical and historical basis — in the philosophy and history of the Constitution itself, a philosophy and history encoded in the words of the document. Justice Thomas obviously cares about the document and the words in it, as is evident from many of his thoughtful and disciplined opinions.²⁵⁹ But in *Liquormart* he fails to read these words for all they are worth.

²⁵⁴ See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

²⁵⁵ *Id.* at 522 (Thomas, J., concurring).

²⁵⁶ See, e.g., *Turner Broad. Sys. Inc. v. FCC*, 117 S. Ct. 1174 (1997); *Buckley v. Valeo*, 424 U.S. 1 (1976).

²⁵⁷ 517 U.S. 484 (1996).

²⁵⁸ *Id.* at 522.

²⁵⁹ Perhaps my favorite is Justice Thomas's outstanding concurrence in *White v. Illinois*, 502 U.S. 346, 358–66 (1992) (offering a sensible and textually acute analysis of the Sixth Amendment Confrontation Clause). For my own efforts to buttress Justice Thomas's textual argument with an

Consider how a typical clause-bound reader might view the words of the First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press." These words make no distinction between different types of "speech." And in ordinary language, "speech" typically includes more than political discourse. If we consult ordinary dictionaries, commercial speech and political speech are both subspecies of the same genus "speech," and neither seems linguistically privileged as more central or paradigmatic than the other. Granted, the grammatical absolutism of the First Amendment ("Congress shall make no law") is a textual embarrassment, and we cannot take it seriously, as all sophisticated lawyers know — "fire" in a crowded theater and all that. But whatever nonabsolute doctrinal structure judges fashion to translate the First Amendment into practice, this structure need not discriminate between different types of speech, which are all equally worthy, textually speaking. So might say a clause-bound reader. However, the words when read in clause-bound isolation do not tell the full story. We must also read them intratextually.

Begin with the phrase "Congress shall make no law." To the sophisticated clause-bound textualist, these words seem embarrassing in their naive absolutism. Thus, they must be quickly thrust aside, for surely no meaning can be squeezed from such an unpromising phrase. But the intratextualist is not afraid of or embarrassed by these words. She has seen them before. With her computer-generated concordance in hand, the intratextualist ponders the possible link between the opening words of the First Amendment and the words of the Necessary and Proper Clause: "Congress shall have Power . . . To make all Laws . . ." Is the linguistic link here — "Congress," "shall," "make," and "law" in the same order in two places — a clue or a dead end? When we consult the history of the First Amendment with clue in hand, we find that in the debates leading up to the Constitution's ratification, Federalists uniformly claimed that Congress lacked enumerated power to suppress free speech in the states.²⁶⁰ Nervous Anti-Federalists were skeptical: suppose Congress tried to use the Necessary and Proper Clause? The First Amendment was drafted to reassure all concerned that Congress lacked enumerated power to restrict speech and press (or to regulate religion, for that matter) in the states, notwithstanding the Necessary and Proper Clause.²⁶¹ Thus the textual interlock between the First Amendment and the Necessary and Proper Clause was no coincidence but part of a deep design.²⁶²

intratextual analysis, see Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045 (1998).

²⁶⁰ See AMAR, BILL OF RIGHTS, *supra* note 95, at 36.

²⁶¹ See *id.* at 35-41.

²⁶² The precise placement of the "First" Amendment (it was originally third, but amendments one and two went unratified in the 1790's) provides further evidence of the interlock. See *id.* (providing details). On organization-chart textualism more generally, see above note 197.

But note what this means. If everyone thought that Congress simply lacked all enumerated power to restrict "speech" in the states, the "speech" they all had in mind must obviously have been political discourse as opposed to mere commercial advertising. For no one denied that Congress did indeed have broad power to regulate commercial things for purely commercial purposes (so long as the commerce involved goods or services crossing state lines). Using the Constitution as a dictionary, we are quickly led to the idea that "speech" means something more precise than what ordinary dictionaries might suggest.

Intratextualism can offer still more precision, as we proceed to ponder what "speech" in the First Amendment might or might not mean at its core. Here, too, the intratextualist has seen the word before. With concordance in hand, she points to Article I, Section 6 protecting congressional "Speech or Debate." Is this, too, a clue? Might there be an analytic link here that can clarify constitutional thought? Indeed yes. When we turn to other important historical antecedents of the Constitution — reading intertextually to supplement our intratextual analysis — we find that the phrase "freedom of speech" first appears in the landmark English Bill of Right of 1689: "the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament."²⁶³ And here are the words of the Articles of Confederation: "Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress."²⁶⁴ Political speech is the core idea here. Parliament — from the French *parler*, to speak — is a speaking spot. But it is the home of a particular kind of speech: political discourse. A Parliament is a place for a parley — a political conference. So too with Congress. If a Senator takes the floor to advertise the low beer prices at his liquormart, such "speech" might be protected by a broad reading of Article I, Section 6 — but surely we would say that it was at the outer periphery of protection, as "speech" of distinctly lower value, constitutionally.

On this intratextual and intertextual view, the "freedom of speech" in the First Amendment is likewise about political discourse at its core. It is a reminder that in America, the people, not Congress, are sovereign. Our highest Parliament — our most exalted parley place — is not confined by Capitol walls. Under the Speech and Debate Clause, our servants in Congress may criticize their political adversaries free from outside censorship; symmetrically, under the *other* Speech Clause (the First Amendment), their adversaries may criticize incumbents free from inside censorship. This, of course, is the deep insight of the great case of *New York Times v. Sullivan*.

²⁶³ An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., ch.2, § 9.

²⁶⁴ Articles of Confederation of 1781, art. V, cl.5.

I can only briefly sketch a few of the implications of this way of thinking about constitutional "speech," with political discourse akin to legislative "speech and debate" as the central paradigm, and with public-minded speech outside the Capitol entitled to respect as part of the proceedings of America's High Parliament, its sovereign citizenry. A well governed parliament must never discriminate on the basis of political viewpoint. If *A* is free to take the floor to support the war, *B* must be free to take the floor to oppose it. *Speech* may be limited: five minutes per person. But *the freedom of speech* — understood here as a protection against viewpoint discrimination in the regulation of political discourse — is an absolute.²⁶⁵ And so the absolutist words of the First Amendment are not nearly so embarrassing after all, despite what sophisticated lawyers have been taught — hypotheticals about fires and theaters have almost nothing to do with "the freedom of speech" as the Constitution uses this term. Note, however, that *content*-based distinctions — reserving Tuesday for a campaign-finance debate and Wednesday for a discussion of nuclear proliferation — are often perfectly appropriate and quite different from *viewpoint*-based discriminations. Our parliamentary model of freedom of speech should also make clear that a working democracy requires not merely negative prohibitions against government censorship, but also affirmative government action to promote free speech — to create the assembly room or town hall or public forum or other parley place where the freedom of speech can truly take place. (So the First Amendment words make perfect sense: Congress may not *abridge*, but it may and indeed must *promote* the freedom of speech, if such freedom is to be made real.) Finally, we must consider the proper distributional rules at work in a proper parley place. Speech rights should not simply track property or wealth distributions — even if some Senators are rich and others poor, every Senator is entitled to be part of the great debate. Speech is not merely property; it is democracy, too.

If this First Amendment paradigm looks suspiciously familiar, it should. It closely resembles the model put forth by the great Alexander Meiklejohn. This fact should reassure us that, regardless of intratextual and intertextual pyrotechnics, there are many other thoughtful things to be said for this way of thinking about the First Amendment.²⁶⁶ Moreover, my claim here is not that intratextualism

²⁶⁵ For important elaboration of my qualifying phrase "regulation of political discourse," see ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995).

²⁶⁶ Meiklejohn himself also observes, and draws support from, the intratextual linkage between the two constitutional speech clauses. See MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 253, at 34–36; Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256 [hereinafter Meiklejohn, *The First Amendment*]. Elsewhere in his work, Meiklejohn features other important and elegant intratextual arguments. See, e.g., MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 253, at 53 (noting the intratextual linkage between the "abridge" wording

ineluctably leads to Meiklejohn. (Recall that intratextual arguments can often be used on many sides of a debate.) Rather, my more modest claim is that one remarkably straightforward and illuminating use of intratextualism leads us rather quickly towards the Meiklejohnian oasis.

A few quick qualifications are in order before we leave this oasis. The words of the First Amendment are not precisely *in pari materia* with those of Article I, Section 6, and I do not claim that every rule that makes sense in one place will make sense in the other. There are obvious practical differences of context between formal legislative assemblies on the one hand, and conversations among the people out of doors on the other.²⁶⁷ Intratextualism demands only that in thinking about the one clause, we should think about the other as well and justify differential treatment if upon reflection such treatment makes sense (as it sometimes will). Nor do I say that commercial speech should be cast out of the First Amendment. For example, it may be difficult for judges to draw lines that cleanly distinguish the political from the commercial in mixed cases. This doctrinal difficulty may argue for a two-tiered (or sliding scale) approach in which nonpolitical speech still gets some lesser protection, with less pressure put on the line-drawing than in an all-or-nothing approach. Nor do I say that campaign finance laws are utterly unproblematic, for we must always be wary of the ways that incumbents will try to draft rules that handicap their challengers. Nor do I say that content-based discriminations should escape scrutiny. Sometimes, a content-based rule will have an obvious viewpoint-based purpose and effect. (Imagine a 1969 rule that no one may use the word "babykilling" or a 1999 rule that no one may use the phrase "butchers of Beijing.") I do say, however, that content-based discriminations are not themselves (even presumptive) violations of the freedom of speech. Indeed, the entire edifice of First Amendment doctrine — full of distinctions like the one between obscene and nonobscene speech, or between political and commercial speech, for that matter — is *itself* content-based. For judges to say that judges may use certain content lines but no one else may use similar lines seems obtuse and self-dealing.²⁶⁸

My final qualification is the most important. Thus far, I have said nothing about the Fourteenth Amendment, which makes First Amendment speech and press rights applicable against states. As I

of the First and Fourteenth Amendments); Meiklejohn, *The First Amendment*, *supra*, at 253–54 (noting the popular-sovereignty linkage between the Preamble; Article I, Section 2; and the First and Tenth Amendments, all of which use the words "the people").

²⁶⁷ For a nice discussion, see Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95.

²⁶⁸ See, e.g., *City of Cincinnati v. Discovery Network Inc.*, 507 U.S. 410, 428–31 (1993) (invalidating a city newsrack policy that treated commercial speech as less worthy than ordinary newspapers).

have explained elsewhere, the Fourteenth Amendment's second sentence features no less than five intratextual cross-references.²⁶⁹ There is much meaning to be squeezed from these clues, as I have tried to show. But now is not the time, and this is not the place, for a detailed intratextual tour of the Fourteenth Amendment.²⁷⁰ For now, it suffices to say that nothing in the letter or spirit of that Amendment undercuts the view of free speech I have presented here. The abolitionist men and women who risked their lives against the Slave Power — who fought and bled and sometimes died for freedom of speech — had political and religious and literary speech at heart and in mind, not the right to push cut-rate beer.²⁷¹

C. Boerne

There is still one more hard nut to crack. Having seen intratextualism at work on a structural issue and on a rights issue, let us now consider a case that implicates both rights and structure. In *City of Boerne v. Flores*,²⁷² federalism, separation of powers, and rights intricately intertwine, making the case one of the most interesting of the last decade. As a matter of federalism, does Congress enjoy broad power under Section 5 of the Fourteenth Amendment to impose substantive obligations on states beyond those that the Supreme Court has identified in interpreting Section 1? As a matter of separation of powers, who within the federal government should have the last word on the meaning of Section 1? May Congress "overrule" a Supreme Court interpretation of Section 1 if Congress has a more expansive conception of a given right? As a matter of rights, what does the free exercise of religion (protected against Congress in the First Amendment and against states in the Fourteenth) mean? Simply that government may not intentionally target religion for disfavored treatment? Or, more broadly, that religious practice should sometimes trump a secular law that in practice happens to interfere with it?

On the question of religious free exercise, we must begin by backtracking to 1990. In that year, the Court held in *Employment Division v. Smith*²⁷³ that the First Amendment barred only laws designed to

²⁶⁹ See AMAR, BILL OF RIGHTS, *supra* note 95, at 163-74, 191.

²⁷⁰ *Cf. id.* (providing such a tour).

²⁷¹ As should be clear from my reference to literary and religious speech, my target today is not a reading of the First Amendment that stresses autonomy as a value, but Justice Thomas's view that commercial speech deserves full equality of status with political discourse. On important differences between autonomy and commerce in the First Amendment, see C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989).

²⁷² 117 S. Ct. 2157 (1997).

²⁷³ 494 U.S. 872 (1990).

penalize religious practice as such.²⁷⁴ Congress thought this approach too narrow and criticized *Smith* by name in its 1993 Religious Freedom Restoration Act (RFRA).²⁷⁵ RFRA provided that whenever a state or federal law imposes a substantial burden on religious practice, the law should not apply unless a "compelling governmental interest" is at stake.²⁷⁶ In effect, RFRA tried to codify the views of the dissenters in *Smith*. But in *Boerne*, the Court reaffirms *Smith* and strikes down RFRA as beyond the scope of proper congressional power.²⁷⁷

Justice O'Connor was one of the *Smith* dissenters,²⁷⁸ and in *Boerne*, she writes another dissent arguing that she has been right all along: the First Amendment was drafted to protect religion from the incidental impact of even neutral, secular laws.²⁷⁹ To the clause-bound reader, the argument might seem easy. The Amendment speaks not merely of laws *designed to* prohibit free exercise but laws that in fact do prohibit it, regardless of legislative purpose. But this cannot be right if we take the words of the Amendment seriously and read them intratextually. As we have seen, the words of the Amendment were designed to interlock with those of the Necessary and Proper Clause, and thus affirm that Congress simply lacked enumerated power to restrict speech or free exercise in the states.²⁸⁰ But if this is so, the Framers obviously had in mind laws targeted against religion — these laws were indeed not necessary and proper, and Congress had no enumerated power to regulate religion qua religion. Congress, however, did enjoy enumerated power to pass general secular laws, and these laws, even if they intruded on religious practice, were not addressed by the First Amendment. The First Amendment's first addressee — its first word — is Congress, and its initial directive is to that body to "make no law." A Congress attempting to regulate religion as such — either openly or furtively — is obviously aware of what it is doing, and the First Amendment speaks to it and says no: "Congress, Make No Law!" But a Congress passing a sincerely secular law pursuant to its legitimate enumerated powers might not even be aware that the law might adversely affect some religious group somewhere of whose practices it is ignorant, or of whose existence it is

²⁷⁴ See *id.* at 878 (rejecting the argument that "religious motivation for using peyote place[d] [respondents] beyond the reach of a criminal law that is not specifically directed at their religious practice").

²⁷⁵ Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb-2000bb-4 (1994)).

²⁷⁶ *Boerne*, 117 S. Ct. at 2162 (citing 42 U.S.C. §§ 2000bb(b), 2000bb-1 (1994)).

²⁷⁷ See *id.* at 2171-72.

²⁷⁸ Technically, the Justice concurred in *Smith's* judgment, but on the general constitutional issue of free exercise, she sided with the dissenters: like them and unlike the *Smith* majority, she argued that free exercise principles require religiously based exemptions from secular statutes. See *Smith*, 494 U.S. at 892-903 (O'Connor, J., concurring in the judgment).

²⁷⁹ See *Boerne*, 117 S. Ct. at 2178-85 (O'Connor, J., dissenting).

²⁸⁰ See *supra* pp. 814-15.

wholly unaware. (Indeed, the group or the religious practice may not yet exist.) And so there is an obvious difference, under the Necessary and Proper Clause and the interlocking First Amendment, between a law banning a despised religion by name (or through some clever sham), and a law banning the importation of an item that some religious group (unbeknownst to Congress) deems important to its religious life.

To see this intratextually inspired point from a more conventionally clause-bound perspective, consider the absolutism of the phrase "shall make no law." If the Amendment merely prohibits laws targeting religion qua religion for disfavored treatment, these absolutist words make perfect sense. But if the Amendment prohibits even secular laws that happen to intrude on the "free exercise" of some group or other, these absolutist words make no sense. Surely some religious practices — even if sincere — cannot trump a proper secular law. (Imagine a group that sincerely believes in sacrificing nonbelievers attempting to vote in federal elections.) Justice O'Connor invokes the idea that religious duties to God are superior to and come before all else,²⁸¹ but if so, religion (if sincere) must always prevail. In practice, of course, O'Connor does not believe this; she is willing to balance.²⁸² But once religion is judged by a secular standard — even a strict one that uses words like "compelling" — it is no longer logically superior and prior to civic duties. In any event, the words of the Amendment do not contemplate balancing. They are absolute precisely because they are also narrow.

But Justice O'Connor may be right after all, albeit for reasons different from the ones she puts forth. *Smith* and *Boerne* pivot on the Fourteenth Amendment not the First. Perhaps Justice O'Connor is looking for the right right, but in the wrong place. Indeed, there is something odd about an opinion that talks so much about the Founding in a case, like *Boerne*,²⁸³ that is so obviously about the meaning of Reconstruction. If she is to persuade, Justice O'Connor must turn from men like James Madison and Thomas Jefferson to ponder men like John Bingham and Charles Sumner and women like Harriet Beecher Stowe. What's more, in parsing the words of the Fourteenth Amendment, she should consider their intratextual links to the First.

The key words of the Fourteenth Amendment are simple: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens." In the minds of those who wrote and ratified

²⁸¹ See *Boerne*, 117 S. Ct. at 2184 (O'Connor, J., dissenting) ("[The] duty [owed the Creator] is precedent both in order of time and degree of obligation, to the claims of Civil Society" (quoting JAMES MADISON, 2 WRITINGS OF JAMES MADISON 184-85 (Gaillard Hunt ed., 1901)) (second alteration in original)).

²⁸² See *Smith*, 494 U.S. at 903-07 (O'Connor, J., concurring in the judgment).

²⁸³ See *Boerne*, 117 S. Ct. at 2181-85 (O'Connor, J., dissenting).

these words, First Amendment rights and freedoms — religious exercise, speech, press, petition, and assembly — stood as paradigmatic “privileges” and “immunities” that henceforth no state could abridge.²⁸⁴ Given this intent, expressed over and over in the relevant debates, it is unsurprising that the key sentence borrows so many words from the First Amendment itself — “shall,” “make,” “law,” and “abridge.”

However, careful intratextual analysis highlights linguistic differences as well as similarities, and some of these differences suggest that the Reconstructors may have had a more expansive vision of free exercise in mind than did the Founders. Begin by noting that the Fourteenth Amendment applies not only to the legislature, but to all branches of the state government — and focuses not only on the moment of lawmaking (when the religious practice may not even exist), but on the moment of law “enforce[ment,]” when the state-church conflict is clear to all. Now note that the Fourteenth Amendment may contain some textual tools to tell us when the church should prevail and when the state should. Consider two sincere religious practices. In the first, a church would like to use sacramental wine in its worship service despite a local dry law. In the second, the church would like to allow its members to kill endangered species. The words of the First Amendment cannot distinguish between these cases — if one is a sincere “exercise” of religion, so is the other. But the words of the Fourteenth are different. They speak of “privileges” and “immunities.” And perhaps these words would lend themselves to the following approach. If only co-religionists are involved (the wine case), a sincere religious practice is suitably private, self-regarding, internal, “privileged,” and “immune” from state interference. But if a religious practice imposes a harm²⁸⁵ on nonbelievers (the endangered species case), then a secular law should prevail. Other scholars have argued that this textual account of the Fourteenth Amendment, or something like it, draws support from the history of Reconstruction more generally.²⁸⁶ In glossing the First Amendment, the framers of the Fourteenth had a broader vision of free exercise as applicable even against some secular laws, these scholars suggest. I shall not today attempt to offer any final assessment of this tricky question. It suffices to say that the best argument for religious exemptions lies here, in the Reconstruction, and not in the Founding.

But who in the end should decide the meaning of Reconstruction — Congress or the Supreme Court? The Congress, says the Congress in RFRA. The Supreme Court, says the Supreme Court in *Boerne*.

²⁸⁴ See AMAR, BILL OF RIGHTS, *supra* note 95, at 231–57.

²⁸⁵ I am using “harm” here in the sense elaborated by John Stuart Mill and his followers.

²⁸⁶ See, e.g., Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994).

Who is right? This takes us to the relationship between Section 1 and Section 5 of the Fourteenth Amendment and the larger issues of separation of powers and federalism implicated therein.

The words of Section 5 seem simple enough: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Writing for the *Boerne* Court, Justice Kennedy approaches these words in standard clause-bound fashion. To "enforce" Section 1 means to provide remedies for violations of the rights guaranteed by Section 1 (as the Supreme Court has independently interpreted those rights):

Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]." ²⁸⁷

As standard clause-bound arguments go, this seems quite impressive at first. On reflection, however, we can see how a pro-Congress critic might see this passage as perfectly circular and exquisitely question-begging. Congress believes it is not *altering* or *changing* the meaning of free exercise — *Smith* wrongly altered the meaning and Congress is restoring it, *enforcing* its true meaning. Why does the Court's view of *Smith*'s rightness trump Congress's view of its wrongness? Quick allusions to *Marbury* do not easily answer the issue, for even under *Marbury* other branches of the federal government are sometimes allowed to have a broader view of a constitutional right, and to make that broader view stick. (Courts upheld the vile Sedition Act of 1798, but Jefferson deemed the Act unconstitutional and pardoned all concerned.)

Standing alone, the words of Section 5 seem to support Justice Kennedy, though not nearly so much as he thinks. But the words of Section 5 do not stand alone. They are part of a single coherent Constitution and must be read alongside the rest of the document. And when they are, a strong — perhaps devastating — objection to Justice Kennedy's overly confident assertions arises, an objection that he does not see because he is reading with blinkers on. Here are the words of Section 2 of the Thirteenth Amendment: "Congress shall have power to enforce this article by appropriate legislation." These words are *in pari materia* with the words of Section 5 of the Fourteenth Amendment. A very powerful intratextual presumption arises that these two parallel clauses must be interpreted in parallel fashion. What's sauce for one should be sauce for the other. But Section 2 of the Thirteenth Amendment has not been read simply to allow Congress to remedy

²⁸⁷ *Boerne*, 117 S. Ct. at 2164.

violations of Section 1 (of the Thirteenth). Acting under Section 2, Congress has passed broad substantive legislation ranging far beyond the self-executing rights under Section 1 (as defined by the Supreme Court). No court ever said, or ever would say, that when private person *A* refuses to deal commercially with private person *B* because *B* is black, this refusal is "slavery" or "involuntary servitude" within the meaning of Section 1 of the Thirteenth Amendment. And yet the Court in the famous case of *Jones v. Alfred Mayer Co.*²⁸⁸ upheld congressional laws banning this refusal under its Section 2 enforcement power.²⁸⁹

The *Boerne* Court says that once Congress goes beyond remedial enforcement of the Fourteenth Amendment Section 1, Congress would no longer be enforcing the Amendment "in any meaningful sense."²⁹⁰ If this is so for the Fourteenth, why not for the Thirteenth, too? Or to be more blunt, as this is *not* true for the Thirteenth, why is it so for the Fourteenth? The *Boerne* Court offers no answer to the obvious inconsistency here — it never even sees the issue. It is reading Section 5 of the Fourteenth and does not even see Section 2 of the Thirteenth.

Perhaps a defender of the Court might say that to the extent that *Jones* and *Boerne* are inconsistent, *Jones* should go. But the framers of the Fourteenth Amendment itself — the Thirty-Ninth Congress — had a broad view of Section 2 of the Thirteenth Amendment. We know this because they adopted the Civil Rights Act of 1866,²⁹¹ which swept far beyond merely prohibiting slavery and involuntary servitude, and the basis for their action was Section 2 of the Thirteenth Amendment. At the very moment that they were proposing another "enforcement" clause in the Fourteenth Amendment, they were speaking loud and clear about what the parallel enforcement clause of the Thirteenth Amendment meant.²⁹² And they said it meant more than mere remedial legislation.

This noteworthy fact about the Thirty-Ninth Congress — which, again, Justice Kennedy never notices because he never sees the freight train coming — seems much stronger than the facts about that Congress that he does mention. He stresses the fact that lawmakers rejected an early draft of the Fourteenth Amendment that in effect

²⁸⁸ 392 U.S. 409 (1968).

²⁸⁹ See *id.* at 439.

²⁹⁰ *Boerne*, 117 S. Ct. at 2164.

²⁹¹ Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

²⁹² Admittedly, Representative John Bingham, the father of Section 1 of the Fourteenth Amendment, did not share his colleagues' broad view of Section 2 of the Thirteenth. (Or if he did, he thought that even under a broad view, encompassing substantive and not merely remedial enforcement, Section 2 was still not broad enough to support the wide-ranging Civil Rights Bill.) But on this issue Bingham was outvoted by two-thirds of his colleagues, who overrode President Johnson's veto — the same two-thirds necessary to pass the Fourteenth Amendment on to the states.

would have given Congress plenary legislative power.²⁹³ But there is a large gap between plenary power on one extreme and only remedial power on the other. To reject the former is not to affirm the latter — as is clear if we spend just an instant thinking about Section 2 of the Thirteenth Amendment, under which Congress has less than plenary and more than remedial power. In the Thirteenth Amendment this middle ground is captured by the concept of “badges and incidents”²⁹⁴ of slavery, which Section 1 does not abolish of its own force, but which can be abolished by Congress under Section 2.

Are there comparable middle-ground possibilities for the Fourteenth Amendment? Here are a couple of obvious contenders. Congress could have power to define rights that in good faith it considers truly fundamental and basic, and these rights, once defined — “badges and incidents of freedom and citizenship” — would thereafter be enforceable, even against states, as “privileges” and “immunities” of American “citizens.” A more modest position is that even if Congress does not have this broad ontological power to *make* something a national privilege *ipso facto*, surely it should have the epistemic power to make known its views about what is truly fundamental, and have those views treated as powerful evidence of fundamentality in courts. Just as the Supreme Court looks to penal laws on the books to decide what is cruel and unusual in our culture,²⁹⁵ so it could look to congressional laws as evidence of what is truly fundamental in our culture. Thus in a close case, the Court might in the absence of a congressional declaration decide that a given right was not fundamental, but if Congress were to weigh in on behalf of the right, the Court would consider the issue afresh in light of this new evidence.²⁹⁶ The *Boerne* case itself, in which Congress sought to support a view of religious freedom that several Justices themselves had embraced in *Smith*, might have seemed an obvious candidate for such a respectful attitude toward the only branch of the federal government mentioned in the Fourteenth Amendment as its enforcer. But the *Boerne* Court would have none of this.

The legislative history that *Boerne* invokes supports my middle-ground positions. The early draft of the Fourteenth Amendment, which was rejected because it in effect conferred plenary power on Congress, read as follows:

²⁹³ See *Boerne*, 117 S. Ct. at 2164–66.

²⁹⁴ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968).

²⁹⁵ See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 369–71, 373 (1989) (calling “the pattern of enacted laws” the “primary and most reliable indication of consensus”).

²⁹⁶ For a powerful and elegant argument in support of this approach, see Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 189–95 (1997).

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.²⁹⁷

The objection to this draft was twofold: Congress would have power to legislate even in the absence of any state misconduct and even on private parties (the state action issue), and would have power over virtually everything, because everything implicates life, liberty, and property. But note how the middle ground I am proposing avoids both problems. First, it accepts the state action doctrine — Congress can legislate rights against states, not private persons. Second, it further limits Congress's power by focusing on privileges and immunities of citizens, not life, liberty, and property. Life, liberty, and property encompass almost everything, but the privileges and immunities of citizens that I am highlighting include only things that are in a real and sincere sense deemed truly fundamental.

The rejected draft is also noteworthy for its intratextual echo of the Article I, Section 8, Necessary and Proper Clause. This clause was associated with broad congressional power in *McCulloch*. It might be thought that the abandonment of this language in the final version of Section 5 signaled a retreat from a broad view of congressional enforcement authority. On the contrary, the framers saw the Enforcement Clause phrase "appropriate legislation" as *equivalent* to the Article I, Section 8 phrase "proper laws." Ordinary dictionaries confirm the obvious etymological link between "proper" and "appropriate."²⁹⁸ And in one of *McCulloch*'s most famous passages, Marshall cemented this etymological linkage in words that the Thirty-Ninth Congress knew and relied on: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate*, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."²⁹⁹ Only a couple of years after the Fourteenth Amendment became part of our supreme law, the Supreme Court itself quoted this famous passage in full and then declared that "[i]t must be taken then as finally settled, so far as judicial decisions can settle anything, that the words"

²⁹⁷ CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

²⁹⁸ 1 THE OXFORD ENGLISH DICTIONARY 586 (2d ed. 1989).

²⁹⁹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (emphasis added). For clear evidence that the 39th Congress had these key words from *McCulloch* in mind when they drafted the Fourteenth Amendment, see CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866) (remarks of Rep. James Wilson). Wilson was the House sponsor of the Civil Rights Act of 1866, which he defended under Section 2 of the Thirteenth Amendment. Doubts about the sufficiency of this basis for congressional power eventually helped lead to congressional adoption of the Fourteenth Amendment, which was (among other things) designed to provide a rock-solid foundation for the Act. In this passage, Wilson defended the pending civil rights bill by quoting verbatim Section 2 of the Thirteenth Amendment and then explicitly linking its wording to the key words from *McCulloch* (which Wilson also quoted verbatim).

of the Necessary and Proper Clause were "equivalent" to the word "appropriate."³⁰⁰ And here is what the Court said in the 1880s, in language prominently relied on in *Jones*, about the Enforcement Clause of the Thirteenth Amendment: "[It] clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States"³⁰¹

The *Boerne* Court's self-confident and self-aggrandizing attitude about interpretive power under the Fourteenth Amendment is easy to explain but hard to justify. Perhaps the Court sees itself as the font of all constitutional wisdom and is offended by the audacity of lawmakers who "criticized the Court's reasoning"³⁰² in *Smith* and who attacked it by name in a statute.³⁰³ At one point the Court tellingly proclaims that "Congress' power to enforce the Free Exercise Clause follows from *our* [the Court's] holding in *Cantwell v. Connecticut*."³⁰⁴ I might have thought that Congress's power followed from the Fourteenth Amendment itself, which was merely interpreted (correctly, I might add) in *Cantwell*. Overly exuberant statements of judicial supremacy are in vogue these days, but it is ironic to read all this back into the Fourteenth Amendment, in which Congress (the good guys) drafted emphatic constitutional language to repudiate the arrogant *Dred Scott* Court (the bad guys). Congress did not insist on being the only interpreter of fundamental rights. It was aware that it might one day fall into the wrong hands, and so it created a self-executing Section 1 that courts could enforce on their own. But courts can also at times fall into the wrong hands, as the Thirty-Ninth Congress well knew. Thus the most sensible reading of the Fourteenth Amendment would involve both courts and Congress in the task of protecting truly fundamental rights against states, with states generally held to whichever standard was stricter — more protective of fundamental freedoms — in any given instance.

Boerne is yet one more illustration — my last today — of the capacity of intratextualism to highlight a certain kind of interpretive inconsistency or self-promotion. But the value of the tool goes far beyond that. Its largest value lies, quite simply, in enabling us to squeeze

³⁰⁰ *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 614–15 (1870).

³⁰¹ The Civil Rights Cases, 109 U.S. 3, 20 (1883), cited in *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 439 (1968).

³⁰² *City of Boerne v. Flores*, 117 S. Ct. 2157, 2161 (1997).

³⁰³ See *supra* p. 819.

³⁰⁴ *Boerne*, 117 S. Ct. at 2163 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)) (emphasis added).

more meaning from the document that inscribes our highest and most popular law. Good interpreters need to know when and how to read between the lines.³⁰⁵

³⁰⁵ Those readers looking for a general concluding section in this Article will not find one. Intratextualism is one among many interpretive tools, and like all tools it must ultimately be judged instrumentally. Does the tool work? Can the tool generate important, incisive, and illuminating readings of the Constitution? With this tool, can we see more clearly deep truths about the meaning of our Constitution? These questions are best answered by example rather than by a priori reasoning. If my examples have failed to persuade readers of the power and elegance of intratextualism, little more can be said. If, however, my examples have persuaded readers that a small and simple tool can in fact generate large and rich insights across a broad range of questions, little more need be said.