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Constitutional Fate

Philip Chase Bobbitt
Columbia Law School, pbobbi@law.columbia.edu

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Editor's Introduction

The Mary Ireland Graves Dougherty Lectures in Constitutional Law were established in 1979 at the University of Texas School of Law in the memory of Mrs. Dougherty by her family. Professor Bobbitt delivered the inaugural series of these lectures on three evenings in April 1979.[a] Of those in attendance, only Professor Bobbitt's students, who had witnessed the evolution of his ideas during that year, and a few colleagues with whom he must have shared his thoughts, could have expected what followed on those spring evenings in Austin. His subject was "the question of judicial review." So stated, the subject hardly appeared to be fresh. For those students in attendance, however, whose pursuit of constitutional mysteries had been limited to little more than dubious meanderings along the doctrinal trails of the *United States Reports*, Professor Bobbitt brought a new perspective on the Constitution and on constitutional law.

He began on the first evening by explaining that he would approach his subject in a roundabout way, by first identifying six recurring forms of argument in constitutional interpretation, and then, by describing them and analyzing their respective appeals to our "constitutional sense," working backward to discover what those insights could tell us of the legitimacy of judicial review. This rather unconventional approach was necessary, we were told, to avoid the mistake of previous discussions of the question: analyzing the legitimacy of judicial review by means of arguments which themselves betray a commit-

* Professor of Law, The University of Texas. A.B. 1971, Princeton University; J.D. 1975, Yale University.

a The lectures, as delivered and as they appear here, were greatly condensed from a book-length manuscript, to be published separately.

ment to a particular basis for judicial review and thus which cannot serve to establish a foundation for legitimacy.

Interwoven with this typology of constitutional arguments were vignettes about men who acted in response to similar theoretical crises in the development of twentieth century constitutional law, and who, in responding, came to be associated with particular types of constitutional argument. Thus, for example, Professor Bobbitt examined the asymmetrical, falsifying feature of historical argument and its relation to the work of William Winslow Crosskey. He discussed the contributions of Justice Hugo Black and identified the genesis of incorporation doctrine in the requirements, both practical and theoretical, of textual argument. And, in similar fashion, Professor Bobbitt in turn addressed the features of structural, doctrinal, and prudential argument and the prominent advocates with which each has come to be associated.

Throughout that first evening, however, Professor Bobbitt cautioned that the forms of argument he had identified were merely conventions of our profession, with their own peculiar strengths and weaknesses as interpretive tools. The preference of a particular scholar or judge constituted the writer's legal style. But this list of conventions was not intended to be exhaustive, nor could it be. And at the close of that first lecture Professor Bobbitt identified one other form of argument, certainly unconventional and undoubtedly powerful, if unnamed and unacknowledged by its practitioners. He termed this argument "ethical" and devoted the second lecture to describing it and making the case for its legitimate use as a method of legal discourse. He offered a method for distinguishing constitutional ethical arguments—those with a basis in a particularly constitutional ethos—from moral arguments generally, and explored the application of that distinction to the review of state statutes. Of perhaps greatest interest to his audience, Professor Bobbitt then explained the principle by which the ethic of limited government could be used to generate rights not specifically named in the constitutional text: that a state may not use, in the pursuit of its quite different, unenumerated ends, any means that would be denied the federal government—that is, one that is not necessary and proper to the achievement of the enumerated federal powers. He went on to apply this principle as a way of explaining many constitutional decisions and as a way of justifying, in particular, the controversial decision in *Roe v. Wade*.[b] Finally, Professor Bobbitt used the conception of ethical argument to account for the historical development of sub-

b 410 U.S. 113 (1973).

stantive due process and the misguided attempts of the federal courts to impose limits on the ends sought by the states.

He closed the second lecture by suggesting that the constitutional arguments he had described were related to the particular functions exercised by the Supreme Court in each case. On the following night Professor Bobbitt devoted his final lecture to a discussion of those functions. Thus, he turned to the modern functions identified by Charles Black and Alexander Bickel and demonstrated that each reflected a particular argumentative perspective. To these Professor Bobbitt added the "cueing" function and analyzed one recent controversial decision, *National League of Cities v. Usery*,[c] which he argued could not properly be understood without an appreciation of its function. He devoted the remainder of the final lecture to another purpose of constitutional decision, which he termed the "expressive" function: judicial opinions were not solely wellsprings of doctrine; they could serve as well to express something of what we are as a people and of what, in our more reflective moments, we would wish to become.

He concluded the third lecture with a theory of the interplay of the types of argument—each shown to be derived from prominent features of the written Constitution—and choices about the function to be exercised, choices that, with the chance and highlighted facts of a case, make one approach more appropriate than another. With this description came a picture of how change comes to the Constitution and the "answer" to a question with which the first lecture began and to which all the lectures proceeded—how the legitimacy of judicial review is established. The conception that emerged left many of us, who had too soon grown cynical about the task of judges, with an educated hopefulness, with a renewed faith in the processes of constitutional decision, and with a new appreciation for the links between ourselves, our past, our Constitution, and our many fates, as yet unclear, that it holds within it.

As a law student and editor on the *Yale Law Journal*, Professor Bobbitt once wrote an introduction to a similar series of lectures delivered by Professor Grant Gilmore at Yale. It is appropriate to quote here from what Professor Bobbitt wrote about the last of Gilmore's lectures:

> Twenty-five years ago, Professor Gilmore wrote of Karl Llewellyn in these pages that he "and his co-conspirators were right in everything they said about the law. They skillfully led us into the swamp. Their mistake was in being sure that they knew

c 426 U.S. 833 (1976).

> the way out of the swamp; they did not, at least we are still there." And, Gilmore told us that afternoon, for tomorrow and tomorrow.[d]

One wonders to what extent Professor Bobbitt recalled Gilmore's message as he prepared his own lectures (which, as you will see, are in part lectures about lectures). For they stand as signposts on the way out of the swamp to those who might have consigned their tomorrows to an existence there.[e] They point the way to firm ground, not by promising yet another "escape from [the] inconclusiveness" of constitutional law[f]—whose promise has sent so many, not out of the swamp, but merely into another part of it—but by showing us that the study of constitutional law is the study of ourselves. We must live with the reality of a Constitution whose contours are as immutable, and as changeable, as we are. But that *modus vivendi* is cause for despair or disparagement only to those who have forgotten, or never knew, that the framers could have given us nothing more. They gave us their ideas, a link with a rich past, and a special way of governing ourselves. And, of course, they gave us the document itself, which over the years has changed us just as surely as we have changed it.

What follows here is the text, without substantial revision, of those first Mary Ireland Graves Dougherty Lectures in Constitutional Law. We cannot duplicate the sights and sounds of the lecture hall on those spring evenings, but we hope that the words will prove to the reader as thought-provoking and as full of hopeful promise as they did to those who heard them delivered a year ago in April.

P.C.F.

I. Constitutional Argument

The central position in the constitutional debate of the last quarter

d *Editors' Introduction* to Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 YALE L.J. 1022, 1027 (1975) (quoting Gilmore, Book Review, 60 YALE L.J. 1251, 1252 (1951)).

e There appeared recently in these pages two articles on judicial review that are as disturbing as these lectures are hopeful. Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEXAS L. REV. 1307 (1979); Leedes, *The Supreme Court Mess*, 57 TEXAS L. REV. 1361 (1979). To extend the metaphor introduced in the text, perhaps inadvisedly, these works describe the swamp to us, but deny the existence of a path out of it, or at least the existence of one the Justices are likely to find. Those articles and the lectures printed here may profitably be read together. As the industrious reader will discover, the perspective of these lectures is fundamentally different from the one shared by Tushnet and Leedes and other incompatible pairs, who though often at polar extremes, seem to share an expectation of what law should be.

f Text following note 22 *infra*.

century has been occupied by the idea of the legitimacy of judicial review of constitutional questions by the United States Supreme Court. This debate, ongoing in one form or another since the founding of the Republic, is thought to have achieved this centrality with the Court's decision in the historic *Brown* desegregation case[1] and to have become the question of the hour in the academy with Judge Learned Hand's Holmes Lectures[2] in 1958, lectures that severely criticized the basis for such review.

Throughout the 1960s the activism of the Warren Court kept the issue of legitimacy alive, and interest in the issue was heightened in the 1970s by the controversial decision of *Roe v. Wade*.[3] I think it fair to say that the question of judicial review has claimed more discussion and more analysis than any other issue in constitutional law. These lectures are an examination of this question. But they may strike some as going about an answer in a rather odd and roundabout way, for it is customary among essayists in constitutional law to address this question directly, that is, by offering arguments which support or cast doubt upon the exercise of this judicial power in various contexts. And yet such legal arguments cannot, I think, establish an independent legitimacy for judicial review because they are themselves the products of particular views of legitimacy. The debates and analyses are conducted by means of arguments which themselves reflect a particular commitment to one view of the basis for judicial review. It is because we are already committed to the force of an appeal to text, for example, that such an argument can be used in support of a court's role. When one argues that a court's experience with parsing documents, its time for reflection, or its relative insulation from political pressure fit it as an institution for the task of assessing the constitutionality of legislation, one is already committed to the view that enforcing rules derived from the constitutional text is itself the legitimate task at hand. If you doubt this, think of the kinds of arguments one does not hear—arguments from religious texts, from determinism, or sheer power, as well as more exotic appeals.

Therefore, in the ensuing hours, I will not take the conventional tack of raising arguments that appear to define the scope of legitimate review. Instead, I will present a taxonomy of those kinds of arguments one encounters in judicial opinions, in hearings, and in briefs that consider constitutional questions. Any of the classic forms of argument in

1. Brown v. Board of Educ., 347 U.S. 483 (1954).
2. L. HAND, THE BILL OF RIGHTS (1958).
3. 410 U.S. 113 (1973).

my list must be one with which you could agree, though you may, of course, differ in your view of its force in a particular context. It is not relevant, for the time being, whether constitutional arguments decide cases, or are the decision itself, forming the structure of meaning the case ultimately achieves as precedent. What is important at present is that the Court hears arguments, reads arguments, and ultimately must write arguments, all of which, as we shall see, occur within certain conventions.

A. Historical Argument

The first of these approaches that I shall discuss is historical argument. Historical arguments depend on a determination of the original understanding of the constitutional provision to be construed. At first, notice how odd this is, that the original understanding of anything should govern our present behavior. Certainly no one proposes an historical argument in physics, that we should try, for example, to discover what Democritus had in mind when he used the word "atom" so that we may properly use that term when confronted with, say, the problem of electron spin. Nor is anyone in the arts likely to argue that a particular artist must conceive his problem in terms dictated by his precursors. Indeed, we reserve the epithet "derivative" for artists who do precisely that. Of course, there is no text in the arts and sciences of the mid-twentieth century, but to notice this is scarcely to explain the phenomenon. It may be that there is no text simply because we doubt that exegesis will work in the sciences or in the arts. Why do we think it will work in constitutional law?

The American decision to produce a constitution in writing, a novelty at the time, suggests an answer, one that finds expression in John Adams' view that a "frequent recurrence to the fundamental principles of the constitution . . . [is] absolutely necessary to preserve the advantages of liberty and to maintain a free government. . . . The people . . . have a right to require of their law givers and magistrates an exact and constant observance of [these rules]."[4] This was the basis for the very idea of an original understanding having force: that the Constitution *bound* government and that the People, therefore, had a right to see that its limits and rules were observed. But what was the original understanding of the use to be put of this original understanding? That

4. *Quoted in* R. BERGER, GOVERNMENT BY JUDICIARY 287 (1977). *See also* MASS. CONST. OF 1780; Murphy, Book Review, 87 YALE L.J. 1752, 1763 n.60 (1978) (explaining that Adams' words were "paraphrased in several other early state constitutions").

is, what did the framers and ratifiers intend as to how their intentions were to be determined?

We do not have an original commitment to a particular form of historical argument. And thus we do not know to which source we are to refer for the authoritative understanding. Whether we look to the state ratifying conventions[5]—whose votes were not taken on specific provisions—or to the Constitutional Convention,[6] which we must remember was not authorized to propose a new constitution,[7] we encounter substantial obstacles. This may be in part because the records of the debates are so scanty that full discussion of any point has been lost. But it is also because the Convention met in secret without official minutes,[8] in an atmosphere that concealed dissent and put a premium on achieving agreement to a document unglossed or unexplained in any way that might disclose or provoke fissures in the coalitions which proposed it.

Moreover, the debates in either state or national conventions cannot operate affirmatively to establish the correctness of a particular construction because they cannot establish why a coalition of states adopted a particular measure. At best, they can only falsify a particular reading. For example, many of us have been called upon recently, in our proper role as citizen-lawyers discussing the Constitution in our communities, to consider the question whether a President may be impeached for acts that are politically repugnant to Congress though not

5. *See, e.g.*, Twining v. New Jersey, 211 U.S. 78, 107-10 (1908).

6. *See, e.g.*, Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838). In another case, having examined the "intention of the convention," the Court determined that framers intended to confer a comprehensive taxing power to Congress, and therefore upheld a federal tax on state-issued banknotes even though the effect was to drive those notes out of circulation, a context not explicitly considered by the Convention. Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 540-41 (1869). The Court has since resorted to the debates at the Convention to determine what uniformity is required by the indirect tax provision, U.S. CONST. art. I, § 8, cl. 1, Knowlton v. Moore, 178 U.S. 41, 100 (1900), to allow a President to remove executive officers without congressional consent, Myers v. United States, 272 U.S. 52, 116-18 (1926), and to decide whether the treason clause, U.S. CONST. art. III, § 3, cl. 1, prohibits the imputation of incriminating acts when uncorroborated by two witnesses, Cramer v. United States, 325 U.S. 1, 22-26 (1945). The Court has relied on this sort of historical argument to support its view that congressional districts must have a roughly equal population, Wesberry v. Sanders, 376 U.S. 1, 8-14 (1964), and its ruling that Congress could not augment the constitutionally required qualifications for membership, Powell v. McCormack, 395 U.S. 486, 532-41 (1969). *See also* Gannett Co. v. DePasquale, 443 U.S. 368, 385-91 (1979); *id.* at 418-27 (Blackmun, J., dissenting). The list might be expanded considerably, in part because garnishing an opinion with historical arguments is usually considered a matter of good taste. The interesting feature of such arguments in all these cases is, however, that not one instance actually establishes the intent of the Convention, and usually when this is attempted it has been refuted. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 98-110 (1962).

7. *See* H. HOCKETT, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 1776-1826, at 199 (1939).

8. 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at xi (rev. ed. 1966).

of constitutional impact. The historical approach to this question might frame the matter as "Did the framers intend by the phrase 'high crimes and misdemeanors'[9] matters of political dispute between the branches?" My answer is "no," and I may say this because this very proposal was put forward by George Mason at the Convention, was the subject of controversy in an exchange between Madison and Mason, and was voted down.[10] But suppose it had been adopted. We would not then have an equivalent assurance of determining intent, for while a debate and vote can make it clear that a particular provision has been severed from a rejected meaning, regardless of the delegates' reasons, when a passage is adopted we are thrown back on the puzzle of varying, incompatible intentions that are unexpressed or, as in the case of trade-offs for votes on other matters, indecisive. This asymmetricality, this negativing role, has seldom been enough for the full-blown historicist in constitutional law. He wants what none of the historical arguments I have mentioned can give, and that is the authoritative reading in a particular context.

It is worth spending a moment then on a particular variant of historical argument that promises such certitude: This says, with Holmes, that "we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used."[11] This method, which contracts scholars call, quite misleadingly, an "objective" method, frees us from all the difficulties and paradoxes of intent. At a stroke, all of these problems are brushed aside, and with them, of course, the negative, asymmetrical feature of historical argument. There is a true meaning, on this view, and it is objective, an object the contours of which we may discern by consulting the maps and photographs of the day. It is an idea with roots in Luther Martin[12] and Spencer Roane,[13] but which in our own day has been principally associated with William Winslow Crosskey.

9. "The President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST. art. II, § 4.

10. 2 M. FARRAND, *supra* note 8, at 550.

11. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-18 (1899). *See, e.g.*, Abrams v. United States, 250 U.S. 616, 627-28 (1919) (Holmes, J., dissenting); United States v. Johnson, 221 U.S. 488, 496 (1911); Aikens v. Wisconsin, 195 U.S. 194, 206 (1904); 1 HOLMES-POLLOCK LETTERS 90 (M. Howe ed. 1941).

12. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 372-74 (1819) (Martin avers that Congress had no implied power to charter a bank because "the scheme of the framers intended to leave nothing to implication.").

13. *See* 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 808-09 (1953) (criticism by Judge Roane of Justice Marshall's historical arguments in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816)).

Crosskey was, by all accounts, an unusual, even eccentric man. He was, according to Harry Kalven, "the stuff from which legends are made,"[14] and he seems to have been quite aware of this aspect. I remember his portrait on the walls of the *Yale Law Journal*—heavy set, a balding head over a truculent scowl, his large frame crammed into a small officer's chair; he obviously dominated that editorial board as he dominated that photograph. After Yale, Crosskey clerked for Chief Justice Taft and then went on to a Wall Street practice with Davis and Polk. He was, as you might expect, personal assistant to John W. Davis, the senior partner and one of the country's leading lawyers of the period, and Davis is reported later to have said that Crosskey's brain "was the best piece of legal equipment he had ever encountered."[15] In 1935 Crosskey accepted an offer from the University of Chicago Law School where, it was thought, he might add a note of "professionalism," of the practitioner, to a faculty strongly theoretical. The faculty, however, was shortly disabused of any such notions when his first course, Federal Income and Estate Taxation, resolved into a study of exclusively constitutional issues.[16] For Crosskey was one of those brilliant men who is obsessed by the conviction that life is far simpler than the nitwits running the world can perceive. With such iconoclasm it was idle to suppose that he would attempt anything less than a revolution in constitutional scholarship. This effort resulted, sixteen years later, in the two volumes we know as *Politics and the Constitution*.[17]

This book is, I think all agree, a remarkable work. Its central thesis is that the Constitution established a government fully empowered to accomplish the broad charter of the Preamble and not a government, as has been generally thought, of limited, enumerated powers. The Supreme Court, on this view, has a sharply circumscribed role of review of congressional acts. The President is endowed with plenary authority to ensure domestic tranquility. Congress is empowered to pass all laws necessary and proper for the general welfare. It was, in short, the constitution Franklin Roosevelt would have written in 1935.

How did Crosskey reach these surprising conclusions? Let me give one example. In determining the scope of the commerce power, the Supreme Court has construed the word "States" in the phrase from article I, section 8, empowering Congress to regulate commerce among

14. Kalven, *Our Man from Wall Street*, 35 U. CHI. L. REV. 229, 229 (1968).
15. Gregory, *William Winslow Crosskey—As I Remember Him*, 35 U. CHI. L. REV. 243, 244 (1968).
16. Kalven, *supra* note 14, at 230.
17. W. CROSSKEY, *supra* note 13.

the several states to mean "territorial divisions of the country" and has thus contrived the doctrine of interstate commerce.[18] Crosskey argued, with hundreds of accompanying citations, that the word "States" in the commerce clause was understood in 1787 to refer to the "people of the states."[19] Therefore, Crosskey concluded, the Constitution granted Congress plenary power to regulate all gainful activity. Using similar methods on the basis of examples of word usage drawn from eighteenth century newspapers, pamphlets, dictionaries, letters, diaries, and articles, Crosskey tried to recreate the legal and linguistic context within which the Constitution was drafted. He expressed scorn for the idea that the Constitution should change through time. "Did you ever see a living document?"[20] he would growl to his classes.

How could these meanings have been so utterly lost during the first decades of constitutional construction by the Supreme Court? Crosskey proposed this startling answer: James Madison had tampered with the notes he kept of the constitutional debates—Madison had the only set—and had released them when all other members of the Convention had died.[21] This deception was advanced by the complicity of Jeffersonian Justices on the Supreme Court who, from a date early in Marshall's tenure, began systematically painting glosses on the true meaning of the constitutional text. So it was that the true Constitution became, in Crosskey's phrase, the "unknown" Constitution.[22]

What was the reaction to these charges and this remarkable attack on constitutional argument as practiced? Initially, it was very favorable indeed. "This remarkable work sweeps away acres of nonsense that have been written about the Constitution," wrote the prominent historian Arthur Schlesinger, Sr.[23] "It is perhaps," he continued, "the most fertile commentary on that document since the Federalist Papers . . . ."[24] And even Arthur Corbin, who had taught us all that the intention of the parties was but a single element in the complex decision whether to enforce a contract, approved the great length devoted "to the language of the time in which the Constitution was written and was first interpreted."[25]

18. *Id.* at 50.
19. *Id.* at 77.
20. Krash, *William Winslow Crosskey*, 35 U. CHI. L. REV. 232, 234 (1968).
21. *See* 1 W. CROSSKEY, *supra* note 13, at 7.
22. *Id.* at 11.
23. Rheinstein, Book Review, 2 U. CHI. L. SCH. REC. No. 2, at 6 (1953) (quoting Schlesinger).
24. *Id.*
25. Corbin, Book Review, 2 U. CHI. L. SCH. REC. No. 3, at 14 (1954). *See also* Corbin, Book Review, 62 YALE L.J. 1137 (1953).

For a year the first two volumes of *Politics and the Constitution*—two more were projected—were the major event in constitutional scholarship. The books were reviewed thirty-six times in law reviews and journals; the Chicago Press went into a second printing. But then the pendulum began to swing.

A favorable review by Malcolm Sharp in the *Columbia Law Review*[26] was followed by a bewildered notice in the same *Review* by Irving Brant,[27] Madison's biographer: "In spite of appalling misrepresentations," Brant wrote, with the tone of the mouse who has encountered the badger, "there is a vast amount of sound reasoning in Mr. Crosskey's work."[28] This was in March of 1954. Then in June of that year two further reviews appeared, both in the *Harvard Law Review*, which had hitherto been silent. The first, by Ernest Brown,[29] proceeds on several fronts. Contemporary letters by Washington and Jefferson are quoted to establish the *Federalist Papers* as true reflections of the Convention's understanding. More damning is Brown's use of Crosskey's own method. The words "among" and "several," as well as others, are examined for their eighteenth century usage and shown, predictably, to have had several meanings, some of which are compatible with the conventional Constitution and none of which compels the Crosskey revision.[30] Even more damaging, however, was the review that followed, a lengthy analysis of Crosskey's thesis about judicial review, written by Henry Hart.[31] Professor Crosskey, Hart wrote in an unforgettable passage, is "a devotee of that technique of interpretation which reaches its apogee of persuasiveness in the triumphant question, 'If that's what they meant, why didn't they say so?' "[32] With this remark Hart served notice that he had no intention of adopting the variant of historical argument that Crosskey had used. The remainder of the review is revealing of the way in which Hart used a different approach—one I have called doctrinal argument[33]—to attack Crosskey's thesis.

After the Hart review much of the furor around Crosskey subsided. He had promised two more volumes that would vindicate his analyses and further substantiate Madison's perfidy, but advancing

26. Sharp, Book Review, 54 COLUM. L. REV. 439 (1954).
27. Brant, Book Review, 54 COLUM. L. REV. 443 (1954).
28. *Id.* at 450.
29. Brown, Book Review, 67 HARV. L. REV. 1439 (1954).
30. *See, e.g., id.* at 1449-51.
31. Hart, Book Review, 67 HARV. L. REV. 1456, 1457 (1954).
32. *Id.* at 1462.
33. *See* text accompanying notes 55-78 *infra.*

years and illness prevented this. Of Max Rheinstein's claim only a year before that "[l]awyers will use [Crosskey's book] in argument, judges will have to discuss it, historians will have to test it, politicians will draw upon or inveigh against it"[34]—of all this came nothing. It has been cited only once in the text of an opinion for the Court and this for a trivial point.[35] It has, with its brilliant and eccentric author, sunk beneath the waves of our constitutional consciousness. Why did this happen? In part because the problem with which Crosskey began in 1937, the constitutional crisis resulting from the frustration of the New Deal Congress by the Supreme Court, was largely solved by the very methods that Crosskey despised, and by the institution whose role he wished to limit. And new problems engaged the legal culture, not the least of which were those stemming from a case handed down at about the same time as Henry Hart's review, *Brown v. Board of Education*.[36] In that case, you will recall, the Court, after having requested briefs from both sides on the question of the original understanding of the fourteenth amendment, offered only a single paragraph on this subject in the opinion. The historical arguments were, Chief Justice Warren wrote, "[a]t best . . . inconclusive."[37]

Crosskey's enterprise, the escape from inconclusiveness, was doomed. He died in 1968, in Connecticut, not far from the place of his early triumphs. But the argument—the variant I have typed of the historical approach—lives on, promising a sloughing off of generations of wrong living and a return to simple rules straightforwardly applied. And thus, it was with recognition that I read the jacket blurb to the historicist Raoul Berger's book, *Impeachment*:[38] "An admirable and powerful book, [it is] valuable and illuminating." It was signed, of course, by the prominent historian, Arthur Schlesinger, Jr.

34. Rheinstein, *supra* note 23, at 16.

35. Michelin Tire Corp. v. Wages, Tax Comm'r, 423 U.S. 276, 290-91 (1976). The citation appears within a discussion of the meaning of the Import-Export Clause, U.S. CONST. art. I, § 10, cl. 2. The Court later questioned even the inconsequential proposition for which Crosskey was earlier cited. Department of Revenue v. Association of Wash. Stevedoring Cos., 435 U.S. 734, 760 n.26 (1978). In addition to its appearance in these two cases, Crosskey's work is cited in only three other opinions, all in dissent. Flast v. Cohen, 392 U.S. 83, 129 n.18 (1968) (Harlan, J., dissenting); Commissioner v. Estate of Bosch, 387 U.S. 456, 476 n.6 (1967) (Harlan, J., dissenting); Marcello v. Bonds, 349 U.S. 302, 319 (1955) (Douglas, J., dissenting).

36. 347 U.S. 483 (1954).

37. *Id.* at 489.

38. R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973).

B. Textual Argument

In contrast to, but often confused with, historical arguments, are textual arguments. Justice Story shows the distinction ably.

> Mr. Jefferson has laid down [what he deems a perfect canon] for the interpretation of the constitution. . . . "On every question of construction [we should] carry ourselves back to the time, when the constitution was adopted; recollect the spirit manifested in the debates; and . . . conform to the probable one, in which it was passed." Now, who does not see the utter . . . incoherence of this canon. . . . Is the sense of the constitution to be ascertained . . . by conjectures from scattered documents, from private papers, from the table talk of some statesmen . . . ? . . . It is obvious, that there can be no security to the people in any constitution of government, if they are not to judge of it by the fair meaning of the words of the text . . . .[39]

Why is this? Why should we be limited to a recourse to text when collateral sources may identify the intention of the framers or ratifiers? Because, as Story put it, "Constitutions . . . are instruments of a practical nature, . . . fitted for common understandings. The people make them; the people adopt them; the people must be supposed to read them . . .; and cannot be presumed to admit in them any recondite meaning . . . ."[40]

If historical arguments draw legitimacy from an assumed original position and the social contract then negotiated, textual arguments are not simply this source with the parol evidence rule strictly applied. Instead, they rest on a sort of ongoing social contract, in which the terms are given contemporary meanings. Story believed that this constrained judges,[41] and I am inclined to think he was right. One cannot appeal to superior learning to establish the meaning of a common phrase. To the textualist, the eighteenth century dictionary is as illegitimate as the twentieth century Brookings pamphlet.

In our lifetimes the principal exponent of this view was the long Senior Associate Justice of the Supreme Court, Hugo Black. Justice Black was of a type not infrequently seen in American law. Hostile to intellectuals and big businessmen alike, he regarded himself as a self-made man. He read the classics—by which he meant the Greek historians and Shakespeare—and, again true to type, doted on Jefferson and Madison. Largely self-educated, he relished telling the story of how on

39. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 407, at 390 n.1 (Boston 1833).

40. *Id.* § 451, at 436-37.

41. *See id.* §§ 450-452.

the Senate floor he had pinned an opposing member with a passage quoted from the "Fallacies of the Anti-Reformers," volume 27 of the *Harvard Classics*.[42] How many men the South has produced who have intensely held a Hobbesian view of the conflicts in life and, at the same time, passionately idealized the common man.

Yet Hugo Black was not merely of a type. For in addition to his manic self-improvement and invincible provincialism, he was one thing none of his colleagues were: Black was a genius, with a grasp of the effect of simplicity in the law, of the need for it, and an understanding of how to make his contemporaries feel that need. It was this understanding that animated and gave a power to textualism that it had not had since the Marshall Court. It was Hugo Black who led constitutional argument out of the wilderness of legal realism. The means for doing this was the textual argument.

The principal crisis of legitimacy for judicial review in this century is thought to have occurred in the years from 1932 to 1937 when the Supreme Court, in a number of reactionary, five-four decisions, struck down New Deal measures as unconstitutional. In response to this frustration of national purpose, President Roosevelt proposed the Court-Packing Plan, which would have added members to the Supreme Court and, presumably, changed outcomes in future cases. The events of that spring and summer of 1937 are familiar, culminating in the dramatic shift by Justice Owen Roberts in *NLRB v. Jones & Laughlin Steel Corp.*,[43] which began the series of validations of New Deal legislation. The death of the Court bill followed quickly, it having, many observed, served its purpose. At the time, T.R. Powell quoted Fielding: " '[H]e . . . would have ravished her, if she had not, by a timely compliance, prevented him.' "[44]

Actually, I think the crisis had a somewhat different form than all that; or perhaps I have in mind a different crisis. The real constitutional crisis of the 1930s was begun by Holmes, not by Sutherland, and it consisted principally in the tension between legal realism—which asserts that there are no discernible, nonformal legal rules of any significance—and the democratic faith in law, which depends on the transmutation of political conflict into legal problems when issues of constitutional importance are involved.

42. H. BLACK, JR., MY FATHER: A REMEMBRANCE 160 (1975).
43. 301 U.S. 1 (1937).
44. T.R. POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 19-20 (1956) (quoting H. FIELDING, THE HISTORY OF THE LIFE OF MR. JONATHAN WILD THE GREAT bk. III, ch. vii (London 1743)).

The real crisis, then, was in the disillusionment which followed the realization that law was made by the Court. "[N]ow with the shift by Roberts," then-Professor Frankfurter had written President Roosevelt, "even a blind man ought to see that the Court is in politics, and understands how the Constitution is 'judicially' construed."[45] It was this crisis that Senator Black had done his share to bring about and to whose resolution he devoted his judicial life.

Black developed the textual argument, and a set of supporting doctrines, with a simplicity and power they had never had. His essential idea was that the Constitution has a number of significant prohibitions which, when phrased without qualification, bar any extension of governmental power to those areas. A judge need not decide whether such an extension is wise or prudent; and in so refraining, he is, therefore, a mere conduit for the prohibitions of the Constitution. He is not, as the realists charged, enforcing his own views—indeed, he may sometimes be in the exquisite position of affirming legislation hostile to his own views—and, moreover, he is acting on a basis readily apprehensible by the people at large, namely, giving the common-language meanings to provisions in the Constitution. This allowed Black to restore to judicial review the popular perception of legitimacy that the New Deal crisis had threatened.

But here, let me give you a scene of Black in action. In the following passage you will hear Black espousing the approach of textual argument, as well as expressing some corollaries that follow from it and aid its implementation in constitutional law. CBS News is the interlocutor. The last time, ironically, a sitting Justice had appeared in his study for a prime-time broadcast had been the radio greeting by Holmes on the occasion of his ninetieth birthday in 1931.

The CBS reporter asks what reason Black has for arguing that there are absolute prohibitions on government. Black replies:

> Well, I'll read you the part of the first amendment that caused me to say there are absolutes in our Bill of Rights. . . . Now, if a man were to say this to me out on the street, "Congress shall make no law respecting an establishment of religion"—that's the first amendment—I would think: Amen, Congress should pass no law. Unless they just didn't know the meaning of words. That's what they mean to me. Certainly they mean that literally.[46]

It was Black who developed the doctrine of the incorporation of the

45. ROOSEVELT AND FRANKFURTER 392 (Freedman ann. ed. 1967).

46. *Justice Black and the Bill of Rights*, 9 Sw. U.L. Rev. 937, 938 (1977) (transcript of CBS News Special, broadcast Dec. 3, 1968).

Bill of Rights into the fourteenth amendment.[47] This device was crucial to the textual approach, since the language of the fourteenth amendment by itself is too sparse to provide the common phrases on which the textualist relies. Here is Black defending this incorporation; I think you will see his larger motives:

> [I apply, by incorporation in the fourteenth amendment, the fifth amendment, which says that no person shall be compelled to be a witness against himself.] And the theory—opposite to mine—has been the fact that's bad and it's unlawful, the Constitution prevents it, is not because it's in the fifth amendment. Well, if it's not because it's in the fifth amendment, where does it come from? Is it the mind of the judge? In other words, is he going to fix limits to the Constitution? I don't see that. I don't think I have that power. And I wouldn't do it. . . . I've sustained laws as constitutional that I was bitterly against—didn't agree with them.[48]

One corollary to the textual approach is a disregard of precedent. Thus, Black says to a somewhat alarmed Eric Sevareid: "I think it's my obligation to take this Constitution—I don't care what anybody else has decided—that's immaterial."[49] After all, not only can I, today, give as valid a reading to a text as someone twenty years ago, I can perhaps give a better one in the sense of one that better comports with the words as commonly understood today. It was at this point, as if to dramatize the textual perspective, that Justice Black produced from his coat pocket a small copy of the Constitution, which he said he always carried with him in order to use the text precisely and not in paraphrase.[50]

Black made no mention in these remarks of collateral sources as aids in interpreting the text—no discussions of the controversies that swirled around particular passages at the time of their adoption, or of the inconvenient fact that segregation, school prayer, and capital punishment were ongoing and unchallenged at the time the amendments were adopted. Thus, one power of the textual argument is that it provides a valve by which contemporary values can be intermingled with the Constitution. The contemporary understanding of the word "commerce," for example, is far more comprehensive, and hence more promising as a source of national power, than it was a century ago, reflecting perhaps our more interconnected economy as well as our awareness of that interconnectedness. But at the same time, we have only to recall Justice Black's consistent dissents from the Court's efforts

47. *See* Adamson v. California, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting).
48. *Justice Black and the Bill of Rights*, *supra* note 46, at 938.
49. *Id.* at 939.
50. *Id.*

to include wiretaps within the fourth amendment[51] to observe the stultifying rigidity of textual arguments.

It is thrilling to see Justice Black taking a swing at the Gordian knot of economic due process by suggesting that corporations are not "persons" within the fourteenth amendment.[52] And certainly the man on the street would be inclined to agree. But would a lawyer, accustomed to the distinction between natural and non-natural persons? And if a lawyer would not, why not? Is it not because the uses to which lawyers have put the word "person" include purposes for which they wish to treat corporations as responsible entities with all the liability and proprietary characteristics of natural persons—and if this is so, it represents a choice about how to use the law, a choice from which the meaning of the word follows, not one that it anticipates. It was no idle sneer that T.R. Powell offered in the mid-40s, that Justice Black "sets before himself the ideal of writing judicial opinions so that they can be understood by intelligent laymen."[53] This was the fundamental criticism leveled by the Realist: that words, like rules, cannot lead to a decision by those who are themselves required to give content to the words.[54]

But I am ahead of my story. Let us return to the incident of crisis in 1937, out of which Hugo Black emerged as Associate Justice of the Supreme Court, taking the seat promised by the President to the Senator who led the Court-Packing Plan. That crisis will illuminate for us other constitutional approaches tried by the Court.

C. Doctrinal Argument

Did the imminent threat of the Court-Packing Plan and Franklin Roosevelt's overwhelming victory in the 1936 election cause Owen Roberts to abandon the Court's conservative bloc and vote to uphold New Deal statutes and social welfare legislation in the states? Was it in fact, in the cruel phrase often attributed to Powell, "the switch in time that saved nine"? Roberts was greatly stung by this accusation. The substance of the charge is this: In June 1936, Roberts joined the five-man majority in the *Tipaldo*[55] case, which reaffirmed the holding in

51. *See, e.g.,* Katz v. United States, 389 U.S. 347, 364 (1967) (Black, J., dissenting); Berger v. New York, 388 U.S. 41, 70 (1966) (Black, J., dissenting).

52. Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 85-90 (1938) (Black, J., dissenting).

53. Powell, *Insurance as Commerce*, 57 HARV. L. REV. 937, 982 (1944).

54. *See, e.g.,* T.R. POWELL, *supra* note 44, at 26-28.

55. Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936).

Adkins,[56] one of the old Court's most retrograde decisions, and thereby struck down New York's minimum wage law. But then, in March 1937, Justice Roberts changed sides in *West Coast Hotel Co. v. Parrish*.[57] His vote gave the four *Tipaldo* dissenters a new majority that flatly overruled *Adkins* and sustained minimum wage legislation for the first time.

Roberts was deeply hurt by the accepted gossip that he had switched sides in response to Roosevelt's threats and successes. He prepared a memorandum for Felix Frankfurter, doubtless intending that it be published posthumously—as it was[58]—in which he endeavored to exculpate himself. In it Roberts said that he had been willing to overrule *Adkins* at the time of *Tipaldo*, but because counsel had tried merely to distinguish *Adkins*, he decided simply to concur with the majority. When the *Parrish* case arose, he voted to hear the case because *Adkins* was there "definitely assailed and the Court was [being] asked to . . . overrule it."[59] This vote, plus the fact that it was Stone's illness which actually delayed an opinion until after the election, made evident, in Roberts' words, "that no action taken by the President in the interim had any causal relation to my action in the *Parrish* case."[60]

But since the Washington Supreme Court had sustained the statute, the meaning of Roberts' vote to note probable jurisdiction is at best ambiguous. And while it is true that the conference vote on the merits in December did antedate Roosevelt's submission to Congress of the Court Plan, it followed by a month and a half the election and the President's public indication that *Tipaldo* was "the final irritant."[61] Even to a sympathetic reader, Roberts' memorandum is unconvincing.

But the important question here is why did Roberts care one way or the other? The answer is that Roberts was deeply committed to doctrinal argument and to the aesthetic of the doctrinal position. In the Anglo-American tradition, this aesthetic is loosely called "the rule of law." It is addressed principally to judges and depends on at least two clear distinctions. First, legislative policymaking must be distinguished from judicial rule-applying. Second, judicial rule-applying must be a reasoned process of deriving the appropriate rules and of following them in deciding a practical controversy between adverse parties, with-

56. Adkins v. Children's Hosp., 261 U.S. 525 (1923).
57. 300 U.S. 379 (1937).
58. Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 310, 314-15 (1955).
59. *Id.* at 315.
60. *Id.*
61. J. ALSOP & T. CATLEDGE, THE 168 DAYS 18 (1938).

out regard to any fact not relevant to the rules, as, for example, the status or ultimate purposes of the parties.

Roberts' switch for political reasons would have violated both canons of doctrinal argument. It would have been legislative rather than judicial; it would not have been based on neutral principles of general rather than ad hoc application. But where do the doctrinalist's general principles come from? In the answer to this question lies the unique character of doctrinal argument in our day. The legal realists had erased the background assumed to yield such principles by showing that general principles could not be derived satisfactorily simply by *stare decisis* and that substantive law was, if it was to be rational, necessarily purposive and selected, rather than derived. Thus, doctrinal argument, as we know it today, is a response to realism that seeks to preserve the aesthetic of the rule of law. The late Professor Henry Hart was its chief theoretician, and his great works, about which I shall say more, have dominated the discussion of constitutional law for the last quarter-century.

Hart's answer to the realist question, and his reformulation of doctrinal argument, changed the matrix from the application of precedential, substantive rules to the rules of precedential process. It's not *what* judges do, Hart told us, its's *how* they do it.

The ideology of doctrinal argument finds its fullest expression in the most influential casebook in constitutional law, Hart and Wechsler's *The Federal Courts and the Federal System*,[62] which, naturally enough, focuses on the methods by which state and federal courts decide who will decide, how decision is to be reached, what authority it will have, and so forth. This extraordinary work is perhaps the most influential casebook ever written. It is the one most frequently cited by the Supreme Court both generally and in constitutional opinions.[63]

During the same time that the work has enjoyed its astonishing success, however, the Supreme Court has moved further and further away from the principal premise of doctrinal argument and of the Hart and Wechsler casebook: the notion that the judicial function with respect to the Constitution is essentially a common law function, arising from the Court's common law process governing private litigants. The various process doctrines that flow from this conception of the Court's role—justiciability, mootness, meticulous attention to *stare decisis*, and the formulation of neutral principles—have been considerably on the

62. H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1st ed. 1953).

63. As of April 30, 1979, fifty-seven opinions of the Supreme Court had cited this casebook.

decline. This drift away from doctrine has been the occasion for a number of violent attacks on the Court. Hart's own *Foreword* to the *Harvard Law Review*'s 1959 issue on the Supreme Court[64] is the paradigm for these assaults.

This essay, entitled *The Time Chart of the Justices*, is divided into two sections. In the first, a sort of armchair arithmetizing of the hours for discussion and opinion-writing available to the Justices, Hart counts up the numbers of cert. petitions, dissents, holidays, and so on, arriving at a hypothetical allocation of the 1532 hours in each Justice's working year. Hart decides, for example, that 372 hours are devoted to "collective deliberation."[65] He concludes that the Justices are much overworked.[66] What is the point of this bizarre exercise? It is to excuse the Justices from the second portion of the essay, which is a savage attack on the intellectual and moral quality of their opinions. These opinions, Hart writes, "lack the underpinning of principle which is necessary to . . . exemplify . . . the rule of law . . . . Only opinions which are grounded in reason" can be applied by lower courts.[67] And only such opinions will be legitimate. It is a powerful exposition of the doctrinal position. But the essay also reveals something of the flaws of the doctrinal approach.

Doctrinal argument assumes the Court has but one function when, in fact, the Supreme Court properly exercises a family of functions.[68] And doctrinal argument treats the Supreme Court as though it were merely the last, best appellate tribunal. For example, Hart bitterly complains that the Supreme Court of that period insisted on reversing lower court findings[69] in workmen's compensation cases.[70] He criticized this as an unprincipled deviation from the rule that appellate courts reexamine only legal and not factual findings. It looked as though the only principle the Court was applying was "employees win." It looked this way because the commentators and the appellate courts examined the FELA statute through the doctrinal glasses of classical negligence law,[71] while the statute, as the Supreme Court read it, really could not be fitted within conventional negligence doctrine. This does not mean, as doctrinalists would suggest, that there is no

64. Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).
65. *Id.* at 86.
66. *Id.* at 99-101.
67. *Id.* at 99.
68. *See* part III *infra*.
69. *See, e.g.*, Rogers v. Missouri Pac. R.R., 352 U.S. 500, 506 (1957).
70. Hart, *supra* note 64, at 96-97.
71. *See id.* at 97 n.29.

principle. It means that radical departure from doctrine necessarily appears unprincipled from the perspective of the doctrine it replaces. The presumption that employees win *is* a principle; indeed, it is a key principle in the doctrine of strict liability.

Hart's *Foreword* reflects other biases of doctrinal argument. For one thing, it depends on descriptions of both the world and the constitutional world that are far from evident. Doctrinal argument assumes dispassionate, disinterested judges who arrive at decision by the process of reason applied to doctrine. But Justices of the Supreme Court, as Thurman Arnold pointed out,[72] are far *more* likely to have deep convictions on the political issues of the day than are the rest of us. And although, as one would expect, the doctrinal ideology seeks to keep cases of political significance out of the courts, no one can doubt, whether approving or disapproving, that the Court is one of our principal political actors. If the FELA cases reflect a shift in favor of the workingman, this was in turn a reflection of Roosevelt's legislative programs and his appointments to the Court.

Ignoring this accounts, in part, for the absolute confidence with which Hart writes. As was true of lawyers of the late nineteenth century, conclusions inescapably emerge for him. This assurance is accomplished only if focus is greatly narrowed and the kinds of legitimate argument reduced to one. Thus, Hart's process of collective decision-making does not sound like the description we have of the Court's Friday conferences. It sounds instead more like the world of the *Harvard Law Review*: with industrious but largely convictionless students *arriving* at results.

Doctrinal argument faces its true crisis when the old purposes for the development of the doctrine have been obscured or mooted, or have simply withered away, and when there is no consensus as to the discernible purpose. For it is the reasoning from purpose that gives doctrinalism its power. It cannot provide purpose, and the debate over purposes is generally the issue in constitutional law.

A poignant example of this dilemma occurred, not in a judicial opinion, but in one series of the Holmes Lectures at Harvard. I do not mean Wechsler's famous *Neutral Principles* lectures,[73] though they are an influential exposition of doctrinal argument,[74] nor Judge Friendly's

72. Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1313-14 (1960).

73. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), *reprinted in* H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3 (1961).

74. *See generally* Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968); Pollak, *Racial Discrimination and*

Holmes Lectures, appropriately entitled *The Federal Administrative Agencies: The Need for Better Definition of Standards*,[75] but Hart's own lectures delivered in 1963. Hart began by examining the premise of much of social science that estimations of value and fact should be separated.[76] This he rejected, since that separation would deny us the ability to decide whether legal decisions were sound, who ought to make them, what values they should reflect. This was Hart's *crie de coeur* against legal realism. The second lecture was devoted to a sort of meta-anthropological essay.[77] Reasoning from the assumption that human wants can be satisfied only in the association of human beings, Hart concluded that a legal system is necessary to secure the benefits of social living. Thus, we may deduce that a going society, with the purpose of securing to itself the benefits of social living, requires mutual forbearance of aggression, some faith in the promises of others, some minimal recognition of the security of property—in short, the basic doctrines of the common law.

Hart began his third lecture by saying: "Suppose we were to decide that the commitments in the Constitution mean that every American is entitled . . . to an equal opportunity to develop and to exercise his capacities as a responsible human being . . . and that the overriding purpose of all actions taken by the authority of society . . . is to make that opportunity as meaningful as possible."[78] If we accept this value, it then becomes possible to choose the means of reaching this end through reason. Then Hart paused, and when he continued he said he had realized, on the very eve of the lecture, that he could not offer a general resolution, that he could give no principle by which such values could be arrived at. His answers were, he now saw, less conclusive than he had hoped. And then, in a hushed and crowded Ames courtroom, halfway through the period allotted to his lecture, he sat down. In this moving anecdote we confront the integrity and the impotence of doctrinal argument.

D. Prudential Argument

A bit before Hart delivered his Holmes Lectures, Justice Black spoke at New York University, giving the first James Madison Lec-

Judicial Integrity: A Reply to Professor Wechsler, 108 U. PA. L. REV. 1 (1959); *see also* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 81 (1st ed. 1970).

75. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* (pts. 1-3), 75 HARV. L. REV. 863, 1055, 1263 (1962).

76. *Henry Hart Converses on Law and Justice*, HARV. L. REC., Feb. 28, 1963, at 7.

77. *Id.* at 7-8.

78. *Id.* at 8.

ture.[79] There he offered, in contrast to his own textual approach, another approach that he derided as dangerous to the Constitution. This I will call the prudential approach. Referring to the text of the last clause of the fifth amendment—the prohibition against taking private property without just compensation—Justice Black constructed an imaginary opinion that he attributed to Judge *X*. This opinion, in pompous and convoluted tones—for Black was a master of ridicule—came to the conclusion that the Defense Department might seize a family farm without paying compensation since the takings clause in the fifth amendment must be balanced against the provision for the war power in article I, and, there being competing texts, the balance had to be struck as a matter of prudence, a calculation of the necessity of the act and its great benefits against the small harm incidentally worked.[80]

The kind of argument that Justice Black is ridiculing is prudential argument, and Judge *X* is, if anyone does not know, Justice Frankfurter.[81] The contrast with textual argument is sharp—as Black's acid pen makes clear—because, in constitutional questions, competing texts can almost always be found, and if a prudential approach is used to decide between them, then they really count for nothing in the decision. Prudential argument is constitutional argument actuated by the political and economic circumstances surrounding the decision. Thus, prudentialists generally hold that, in times of national emergency, even the plainest of constitutional limitations can be ignored. Perhaps others share that belief; but the prudentialist makes it a legitimate legal argument, fits it into opinions, and uses it as the purpose for doctrines, and it is this that makes him interesting to us.

In our time the most eloquent and creative exponent of prudential argument was Alexander Bickel. I knew him very slightly just before and during his tragic dying. Like his mentor, Felix Frankfurter, Bickel was short and slight and dressed in a dapper, elegant way. Like him also, he had been brought to the United States as a child, had excelled at City College, and had gone on to excel at Harvard Law School. It is fair, I think, to characterize Justice Frankfurter, for whom Bickel clerked, as Bickel's jurisprudential progenitor. But the line begins—as does the modern era of prudential argument—with Louis Brandeis. Therefore, it is pleasing that we may observe the first significant ex-

79. Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960).

80. *Id.* at 877-78.

81. Black disclaimed any perfect correspondence between life and art by saying, at the end of the imaginary opinion: "Of course, I would not decide this case this way nor do I think any other judge would so decide it today." *Id.* at 878.

pression of modern prudentialism in constitutional law in a memorandum by Brandeis, collected in a volume by Bickel,[82] to whom Brandeis' papers had been entrusted by their executor, Frankfurter.

This memorandum was written about *Atherton Mills v. Johnston*,[83] a little known case decided the same day as the *Child Labor Tax Case*.[84] It presented the same statute for challenge,[85] but was handled in conventional terms of mootness in a brief opinion by Taft. *Atherton Mills* arose in this way. The father of a child employed by a mill had complained that the mill was about to discharge the boy to avoid triggering the ten percent tax on profits derived from child labor. The father argued that the statute which imposed the tax damaged him by threatening to deprive him of his son's earnings.[86]

In a draft opinion labeled a memorandum to the Court, Brandeis urged dismissal of the case for lack of jurisdiction on the ground that since the mill could always fire the boy for any reason, the Court could not remedy the alleged loss even if it struck down the statute.[87] The Court should not interfere with the political process when it could reasonably avoid doing so. Brandeis believed the Court should avoid constitutional decision when grounds such as these were available in order to safeguard the Court's own position and to activate the political processes of the legislature. These are not textual, historical, or even doctrinal reasons, though they are sometimes embodied in doctrine. They are prudential reasons. The memorandum was convincing enough at least to persuade his colleagues to hold the decision in *Atherton Mills* over for a Term. By focusing discussion on the issue of jurisdiction, Brandeis avoided a collision with his colleagues on the merits. Moreover, he isolated an area in which the Court could speak with utter finality, not dependent on other branches of government or other courts to give its decision effect. For the Court, declining jurisdiction is thus uniquely suited as a weapon of self-defense.

With the *Atherton Mills* memorandum, Brandeis had gained a toehold for a position of considerable importance on a Court in which he was doomed to sit in the minority. Even on reargument, when the Solicitor General intervened to urge the constitutionality of the Act but

82. A. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 13-14 (1st Phoenix ed. 1967).
83. 259 U.S. 13 (1922).
84. 259 U.S. 20 (1922).
85. Revenue Act of 1918 (Child Labor Tax Act), Pub. L. No. 65-254, 40 Stat. 1138 (1919).
86. 259 U.S. at 14.
87. A. BICKEL, *supra* note 82, at 8-9.

refused to press the jurisdictional issue,[88] despite, it is said, helpful and finally exasperated prodding from Brandeis, even then the Court still did not decide. Finally young Johnston reached age sixteen, and the statute no longer applied. The case was mooted.[89] But the groundwork had been laid for Brandeis' development of the jurisdictional doctrines by which prudence was brought to bear in determining when the Court should act. Indeed, afterward, Brandeis would cite the Taft opinion in *Atherton Mills* for this very point,[90] inexplicably to an observer limited to the pages of the *United States Reports*.

Brandeis' campaign for prudentialism culminated in his majestic concurrence in *Ashwander*[91] fourteen years later, in which he gave an authoritative list of the occasions when the Court should refuse jurisdiction.[92] "The most important thing we do," said Brandeis, "is not doing."[93] The means of avoiding decisions are so important, wrote Bickel of this famous phrase, because they "are the techniques that allow leeway to expediency."[94]

This discussion should establish the important position the *Atherton Mills* memorandum and the later *Ashwander* opinion occupy in constitutional law. The former is a prudential argument—such are common in all conferences, at all times—cast in the form of a draft opinion. And the latter is an opinion seized as an opportunity, as all concurrences are. By this route, prudential argument became legitimate constitutional argument. It moved from the cloakroom and the private conversations of worldly men into opinions, as reasons that might support a judicial decision.

Bickel gave the fullest expression of the prudential approach to constitutional law in his celebrated essay, *The Passive Virtues*.[95] This subtle and ingenious work details the use of various jurisdictional doctrines as mediating devices by which the Court can introduce political realities into its decisional process. Prudential approaches are efforts to bring to constitutional decision, in Frankfurter's words, "[t]he impact

88. *Id.* at 18-19.

89. 259 U.S. at 15.

90. Chastelton Corp. v. Sinclair, 264 U.S. 543, 549 n.1 (1923) (Brandeis, J., dissenting); Pennsylvania v. West Virginia, 262 U.S. 553, 611 (1923) (Brandeis, J., dissenting). Chief Justice Stone shared Brandeis' view of *Atherton Mills*. *See* CIO v. McAdory, 325 U.S. 472, 475 (1945); Coffman v. Breeze Corps., 323 U.S. 316, 324 (1945).

91. Ashwander v. TVA, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

92. *Id.* at 346-48.

93. Brandeis-Frankfurter Conversations (unpublished manuscript in Harvard Law School Library), *quoted in* A. BICKEL, *supra* note 82, at 17.

94. A. BICKEL, *supra* note 6, at 71.

95. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); A. BICKEL, *supra* note 6, at 111.

of actuality."[96] It is instructive to compare this feature with doctrinal argument, which is typically used in an effort to escape the impress of particular facts to get to the common high ground of principle. For Bickel, by contrast:

> The accomplished fact, affairs and interests that have formed around it, and perhaps popular acceptance of it—these are elements . . . that may properly enter into a decision to abstain from rendering constitutional judgment or to allow room and time for accomodation to such a judgment; and they may also enter into the shaping of the judgment, the applicable principle itself.[97]

Of course, this scarcely squares with the aloof detachment of doctrinal argument, and so, following the publication of an expanded version of *The Passive Virtues* in *The Least Dangerous Branch*,[98] Bickel was sharply rebuked in the *Columbia Law Review*[99] by Gerald Gunther, who is, today, the principle proponent of doctrinalism in constitutional law. Bickel, Gunther wrote in a telling and brilliant phrase, demanded "100% insistence on principle, 20% of the time."[100] Gunther correctly saw that Bickel's approach "would endorse conjecture about the complexities of political reactions as a primary ingredient of Court deliberations."[101]

Bickel responded to this attack in his Holmes Lectures of 1969.[102] There Bickel reviewed the work of the Warren Court and stood back a moment from the fork in the road to which constitutional prudential argument had brought him. The most important decisions of the era, Bickel argued—on school segregation, discrimination in housing, the poll tax, racially-limited juries, and others—could not be justified by resort to doctrine or to any truly neutral principles.[103] The Warren Court found its justification in a particular political vision of progress. If they were right, as Jan Deutsch has pointed out,[104] then history will ratify their decisions and these will come to be seen as resting on "neutral" principles.[105]

96. Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1006 (1924).
97. A. BICKEL, *supra* note 6, at 116.
98. *Id.*
99. Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).
100. *Id.* at 3.
101. *Id.* at 7.
102. A. BICKEL, *supra* note 74.
103. *See, e.g., id.* at 99.
104. *See* Deutsch, *Harvard's View of The Supreme Court: A Response*, 57 TEXAS L. REV. 401 (1979); Deutsch, *supra* note 55.
105. *See* A. BICKEL, *supra* note 74, at 99-100.

But Bickel would not take this course, though he was scarcely insensitive to its appeal. Of prudential argument Bickel could say only that his use of it allowed the Court to avoid going in the direction it did not want to go and allowed an accommodation with other branches, also deciding prudentially.[106] Bickel would not go further. He wished to be principled, even if, as he wrote of Edmund Burke, "one of his principles was the principle that on most occasions in politics principle must not be allowed to be controlling."[107] He would not support affirmative, rather than passive, programmatic, rather than institutional, prudentialism. This next step was left to his successors, of whom Guido Calabresi, who dedicated his Holmes Lectures in 1977[108] to Bickel, and Bruce Ackerman, whose *Private Property and the Constitution*[109] is an extended treatment of a constitutional issue from a prudential perspective and which is itself also dedicated to Bickel, are perhaps the most prominent.

What Bickel recognized—and what Gunther was at pains to dispute—was that the Court has an enormous influence on events when it declines to strike down a law and that this influence is by no means the same as that produced when the Court declines to discuss the issue at all. This insight, as Bickel frankly acknowledged,[110] came from his remarkable colleague, Professor Charles L. Black, Jr. It is to his contribution to constitutional argument that I shall next turn.

E. Structural Argument

Structural arguments are inferences from the existence of constitutional structures and the relationships that the Constitution ordains among the structures of government. They are, therefore, different in kind from historical and textual arguments, which construe a particular constitutional passage and then insert that construction into the reasoning of an opinion. And they are also quite different in kind from prudential arguments, which alter the flow and character of information going to the judge. Structural arguments are largely factless and de-

106. The true secret of the Court's survival is not, certainly, that in the universe of change it has been possessed of more permanent truth than other institutions, but rather that its authority . . . is in practice limited and ambivalent, and with respect to any given enterprise or field of policy, temporary. In this accommodation, the Court endures. But only in this accommodation. For, by right, the idea of progress is common property.

Id. at 181.

107. Bickel, *Reconsideration: Edmund Burke*, THE NEW REPUBLIC, Mar. 17, 1973, at 31.

108. G. CALABRESI, THE COMMON LAW FUNCTION IN AN AGE OF STATUTES (to be published by Harv. Univ. Press). For a glimpse of the book's subject, see Calabresi, *The Nonprimacy of Statutes Act: A Comment*, 4 VT. L. REV. 247 (1979).

109. B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977).

110. A. BICKEL, *supra* note 6, at 29.

pend on deceptively simple logical moves from the entire constitutional text, rather than from one of its parts. At the same time, they embody a macroscopic prudentialism, that is, not one drawing on the peculiar facts of the case, but rather one arising from those general assertions about power and human nature we call common sense. Let me give you a current example of structural argument.

In *National League of Cities v. Usery*[111] the Supreme Court struck down a congressional amendment to the Fair Labor Standards Act[112] that would have brought state employees within certain wage and hour guidelines. The court's reasoning runs roughly as follows: (1) The Constitution sets up a federal structure, which necessarily includes states;[113] (2) unless states perform those functions integral to being a state without regulation by the national government, the relationship established by the Constitution between these two structures would be changed into the assimilation of one structure into the other;[114] (3) it is plausible to conclude that, from among various state activities, determining the wages and hours of its employees is one of those fundamental state activities.[115]

It may be that choosing whether to elect or appoint certain state officials or where to locate the state capital are other such activities; or it may not be so. But it necessarily follows from the very structure of federalism that there must be at least some such activities. I think a reasonably close reading of *National League of Cities* will support the view that it rests on just such a structural argument[116] and not, as is sometimes suggested,[117] on arguments drawn from the text of the tenth amendment.

T.S. Eliot, in the introduction to an edition of Seneca, wrote that "[f]ew things that can happen to a nation are more important than the invention of a new form of verse."[118] This is, as Bronowski characterized it, "a startling remark,"[119] but one I think with some justification. Far less justification, at any rate, is required for the assertion that few

111. 426 U.S. 833 (1976).

112. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a)(1), (5), (6), 88 Stat. 55, 58-60 (amending 29 U.S.C. § 203 (1970)).

113. 426 U.S. at 844.

114. *Id.* at 845.

115. *Id.* at 851.

116. *See, e.g.,* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 423 (1978) (Burger, C.J., concurring).

117. *See, e.g.,* J. NOWACK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 53 (1978); Barber, National League of Cities v. Usery: *New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161.

118. Eliot, *Introduction* to SENECA: HIS TENNE TRAGEDIES at xlix-l (T. Newton ed. 1927).

119. J. BRONOWSKI, MAGIC, SCIENCE AND CIVILIZATION 5 (1978).

things can happen in the life of *this* Nation that are more important than the introduction of a new form of constitutional argument. For such an introduction we are all indebted to Charles Black. This introduction came in Black's Edward Douglass White Lectures in 1968, entitled *Structure and Relationship in Constitutional Law.*[120]

It was Black's distinction to create anew the structural form at the very time when doctrinal argument was showing the considerable strain I have argued it must bear when new law is being written. This came, of course, at the time of the Warren Court, and it is well to realize that Black was one of the few insistent defenders of that Court's opinions at the very time when he was, evidently, in search of more satisfying rationales. For example, it was given to the Warren Court to devise doctrines by which to protect free speech against state restriction. That Court determined that a solution lay in the first amendment. This meant that, preliminarily, the Court had to decide—whether historically or textually guided—what content to give to the words "freedom of speech" in the first amendment. Then, somehow, it had to surmount the fact that that amendment refers only to Congress and that the fourteenth amendment, which does apply to the states, seems to forbid only those intrusions into our liberty—and restricting our speech is concededly one—that come about without due process. To tackle that assignment, the Court alternated between discredited historical theories about the circumstances of the framing of the amendment and fantastic doctrines that, although undoubtedly useful, seem to have no connection whatever to the purposes of the text. Black, by contrast, offers the following. He argues that because the structure of our federal government is that of representative democracy, "discussion of all questions which are in the broadest sense relevant to Congress's work is, quite strictly, a part of the working of the national government. If it is not," Black asks, "what is our mechanism for accommodating national political action to the needs and desires of the people? And if it is, does it not reasonably follow that a state may not interfere with it?"[121]

The principal objection to structural approaches is that they can offer no firm basis for personal rights. Since structuralists hold that such rights derive from the relationship between state and citizen, then, it is argued, the rights of citizens—to say nothing of aliens—are essentially statist and, therefore, vulnerable to the state's desire for power and its ability to manipulate the relation between citizen and state. It

120. C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).
121. *Id.* at 43.

was Bickel's last book, *The Morality of Consent*,[122] published posthumously, that advanced this objection.

In the notorious *Dred Scott*[123] case, which held that a Negro could not invoke the diversity jurisdiction of the federal courts since he had not been and could not be a citizen, diverse or otherwise, Bickel saw the fundamental flaw in a system of rights based on citizenship: what government may grant, it may take away.[124]

Thus, for Bickel, the statement in a then-recent case that "[c]itizenship *is* man's basic right for it is nothing less than the right to have rights"[125] yields the intolerable inferences of Chief Justice Taney, the author of *Dred Scott*, that noncitizens "[have] no rights . . . but such as those who [hold] the power . . . might choose to grant them."[126] I am not persuaded by this argument, since I do not believe government has the power unilaterally to dissolve the bonds of citizenship. Indeed, I think that any structural theory that raises citizenship to such prominence must hold this axiomatically. But I agree that while structural approaches are very powerful for some kinds of questions—particularly intergovernmental issues—they are not, as Bickel sensed, adequate to the task of protecting human rights. This is why: Though citizenship may be the proper structure from whose relation to representative government we may infer the right to vote on equal terms,[127] to speak on political matters,[128] to hold office when duly chosen,[129] and to associate for political purposes,[130] these examples do not capture the values of personhood that animated both the American Revolution and constitution-making, and that principally account for the phenomenon of limited government. Oh, I suppose you have to be your own man to be truly capable of freely voting your choices in an election, but is that the reason neither government, nor a collection of individuals acting while government stands by, ought to be able to deprive you of the various rights that are the exercise of independent choice? Just what, after all, does the choice of whom to marry,[131] of whether to have children,[132] or of whether to send your children to private school[133] have to

122. A. BICKEL, THE MORALITY OF CONSENT (1975).
123. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).
124. A. BICKEL, *supra* note 122, at 53.
125. Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., Black & Douglas, JJ., dissenting) (emphasis in original), *overruled*, Afroyim v. Rusk, 387 U.S. 253 (1967).
126. A. BICKEL, *supra* note 122, at 53.
127. *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).
128. *E.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964).
129. *E.g.*, Powell v. McCormack, 395 U.S. 486 (1969).
130. *E.g.*, Shelton v. Tucker, 364 U.S. 479 (1960).
131. *See* Loving v. Virginia, 388 U.S. 1 (1967).
132. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
133. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

do with the "good *political* life"?

Furthermore, isn't there a positive danger in relying on structural arguments in this area? Since the personal rights to which I have referred have no affirmative structure in the constitution, won't they always be sacrificed to those unchecked inferences that plausibly do flow from the citizen-state relation? For example, might Congress legislate that each of us be required to listen to political debates or attend political discussions, assuming, of course, that these were "unbiased"? Or might Congress, pursuant to its section five[134] powers to enforce the rights of citizens, plausibly decide that part of the good political life is the right to decent housing[135] and require that some number of us with sufficient space begin lodging those who presently live in slums?

Man is a political animal, it is often said, and we are a political people. But even a sensitive rendering of what this means in our society—that our politics depend on notions of individual autonomy, the security of one's home and possessions, the primacy of familial and intimate relations, and the contribution of all these matters to political attitudes—even this portrait does not capture the fact that constitutional life in America is not just political life. Structural argument then has, as we have observed of other constitutional approaches, its powers and its shortcomings. As governments *qua* producers become more important in our lives, structural arguments will be more prominent in our law.

* * * * *

I now think you have some overview of constitutional argument. You will not be surprised to learn that Crosskey based his views on the legitimacy of judicial review on a pamphlet, published and distributed in Philadelphia at the time of the Convention, which outlined a kind of supreme tribunal somewhat like the current Court,[136] or that Henry Hart thought that judicial review was to be justified as incident to the judicial process,[137] or that Charles Black thinks that it is the Court's structural insulation from elections that permits it to confer legitimacy upon legislative action.[138] And you may also have a clearer view of why some opinions, majority and dissent, seem to pass each other without quite engaging, or why a court can continue a particular line of

134. U.S. CONST. amend. XIV, § 5.

135. *See* Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 9 (1970).

136. 2 W. CROSSKEY, *supra* note 13, at 976-1007.

137. *See* Hart, *supra* note 31, at 1457. *See also* H. HART & H. WECHSLER, *supra* note 62, at 312.

138. *See* C. BLACK, THE PEOPLE AND THE COURT 64-66, 86 (1960).

development despite what appears to be crushing criticism in the law reviews. Different constitutional arguments reflect different conceptualizations of the Constitution. In the third of these lectures, I will provide my own view of what foundation does exist for judicial review *outside* these various conventions. But before that, there is one more convention we must consider. That is ethical argument.

II. Constitutional Ethics

The principles of constitutional law are patterns of choice among kinds of constitutional argument. From each of these patterns one may derive a particular justification for judicial review. It is, however, an error virtually endemic to most constitutional commentary to do this in reverse, choosing first what appears to be a convincing basis for judicial review and thereafter being persuaded by arguments appropriate to that particular judicial role. This is a profound error, because it assumes that the commentator comes to the question of judicial review from a fresh perspective, one outside, as it were, the legal process of argument.[139]

In choosing which justification of judicial review to adopt, we are following a rule. Indeed, insofar as we are persuaded by the arguments for a particular justification, we are not really "choosing" anything, since we cannot choose to be persuaded. By the same token, when, within the context of a particular constitutional case, we apply a particular rule, we are also in fact following a rule. In the first lecture, I asked, "What is *that* rule, the deeper, predeterminate, rule?" I have portrayed these rules as various approaches to the construction of the Constitution. I would emphasize that no sane judge or law professor can be committed solely to one approach. Because there are many facets to a single constitutional problem and, as I shall discuss in the third lecture, many functions performed by a single opinion, the jurist or commentator uses different approaches as a carpenter uses different tools, and often many tools, in a single project. What makes the *style* of a particular person is the preference for one particular mode over others. If you were to take a set of colored pencils, assign a separate color to each of the kinds of arguments I have identified, and mark through passages in an opinion of the Supreme Court deciding a constitutional matter, you would probably have a multicolored picture when you finished. Judges are the artists of our field, just as law

139. *See also* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (3d ed. 1958) (a similar criticism of sense data theories).

professors are its critics, and we expect the creative judge to employ all the tools that are appropriate, often in combination, to achieve a satisfying result. Furthermore, in a multimembered panel whose members may prefer different constitutional approaches, the negotiated document that wins a majority may, naturally, reflect many hues, rather than the single bright splash one observes in dissents.

If you ever take up my challenge and try this sport, you will sometimes find that there is nevertheless a patch of uncolored text. And you may find that this patch contains expressions of considerable passion and conviction—not simply the idling of the judicial machinery that one finds in dictum. It is with those patches that I am now concerned. There is a class of arguments that I will call *ethical* arguments, which reflect, like other constitutional arguments, a certain approach to constitutional adjudication, a particular conceptualization of the Constitution. I will suggest that this class of arguments, like the others I have discussed, is especially suited to some of the Supreme Court's functions (and those of other important constitutional deciders) and reflects a particular commitment to one view of the legitimacy of judicial review. By "ethical" argument, I mean constitutional argument that relies for its force on a characterization of American institutions and the role within them of the American people. It is the character, or *ethos*, of the American polity that is advanced in ethical argument as the source from which a particular decision derives.

There is an almost utter absence of rigorous discussion of these arguments in the teaching of constitutional law. They are, instead, either regarded as disreputable reflections of the moral and political predispositions of the judge who, owing to a lack of sufficient willpower, is unable to keep them properly cabined, or, on the other hand, they are indulged by both the cynical and the sentimental alike as being what "real" judging is all about. I hope that this lecture will provide a systematic basis from which to criticize these positions, but for now I am concerned with their general effect, which has been to justify ignoring the treatment of ethical approaches as legal, constitutional arguments. The result of this, with respect to students, I think, has been unfortunate. They know that those constitutional cases that engage them the most are not decided, for example, on the basis of whether the framers thought that contraception should be banned,[140] or whether the word "speech" in the first amendment means, among other things, wearing a

140. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 717 (Rehnquist, J., dissenting). *See also* Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693 (1976).

jacket with a four-letter word on it.[141] They know this, and so for them constitutional law may take on an unreal aspect, or at the hands of some professors, simply dissolve into political science, a sphere from which civilized law, I believe, has long fled. And so I think that the mere recognition of ethical arguments, as arguments, may have some salutary effect. To that task of observation—though, of course, no observation of this kind is not theory-laden—I now turn.

First let us begin with some recent examples of ethical argument. In *Moore v. City of East Cleveland*[142] the Supreme Court confronted an Ohio zoning ordinance that limited occupancy of a dwelling unit to members of a single family. Inez Moore, who was 63 years of age, lived in her own home with her son and two grandsons, one of whom was her son's son and the other his nephew. For this crime she was convicted, having failed to remove the nephew as an "illegal occupant" as defined by the Ohio zoning ordinance.

Precedent, in the form of previous cases sympathetic to the integrity of the family, had focused on the childbearing and childrearing functions of the nuclear family.[143] At the same time, the recent case of *Village of Belle Terre v. Boraas*[144] had upheld a zoning ordinance limiting land use by excluding groups of students or friends living together, and also by excluding groups of married persons who, like the Moores, were not couples. Nevertheless, a plurality struck down the Ohio statute. Justice Powell read the earlier decisions, as you will see, not in terms of their doctrinal consistency—that is, the arguments and rationales they shared, the intersection of their constitutional arguments—but in terms of the *ethical* approach to constitutional questions that they embodied. Thus, he wrote: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[145] Justice Powell squarely placed the decision on an ethical ground, that is, one based on the American ethos—by no means shared by all cultures—that values and uses the extended family for a variety of reasons: "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and

141. Cohen v. California, 403 U.S. 15 (1971).
142. 431 U.S. 494 (1977).
143. *Id.* at 536-37 (Stewart, J., dissenting).
144. 416 U.S. 1 (1974).
145. 431 U.S. at 503 (footnote omitted).

equally deserving of constitutional recognition."[146]

This is a clear exposition of an ethical argument. My characterization not only enables us to deal with precedent in a way quite distinct from that taken by the dissenters, but it also establishes itself as a different precedent when understood in this light. Indeed, one value of a classificatory approach may be appreciated when contrasting it with more conventional analyses. Professor Tribe, for example, in his illuminating and important treatise, is forced to resort to doctrinal pyrotechnics to rationalize *Moore* with *Belle Terre*. The latter case, he argues, involved students who did not claim "an enduring relationship" with one another.[147] Therefore, *Moore* should stand for the proposition, Professor Tribe tells us, that "governmental interference with *any* [enduring] relationship should be invalidated unless compellingly justified";[148] *Belle Terre* cannot be said, we are told, to foreclose this position.[149]

I fear that counsel who rely on this view are apt to be disillusioned. There is nothing I can clearly discern in the American ethos that relies on the value of enduring relationships generally, except possibly magazine subscriptions and appeals from one's old college. It is because Professor Tribe has elected a different constitutional approach than that taken by the Court that so able a reader as he is led to so profound a misconstruction.

Some of you may be tempted to assume that ethical arguments are simply substantive due process in another form. This is not so. But it is almost so in an interesting way. At least as applied to the states, ethical constitutional arguments often seem to involve substantive due process because the due process clause is the textual vehicle by which the ethos of limited government has been applied to the states. But the same thing may be said of the Bill of Rights. No matter how explicit its provisions may be, the Bill of Rights applies by its terms only to national government. You should not then dismiss the class of ethical arguments against the states unless you are also willing to dismiss the doctrinal arguments that, to take one instance, constitute the entire main body of first and fifth amendment constitutional law. Furthermore, there is no absolute relation between ethical argument and substantive due process. Ethical arguments are derived from the constitutional ethos of limited government. What government is not

146. *Id.* at 504 (footnote omitted).
147. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-21, at 990 n.30 (1978).
148. *Id.* at 990 (emphasis in original).
149. *Id.* at 990 n.30.

granted the power to do, it may not do. This notion long antedates the fourteenth amendment.

And so we may see one very famous example of ethical argument at work in the *Pentagon Papers*[150] case, scarcely a candidate for substantive due process. In that case, no underlying congressional legislation had authorized the President to prevent publication by the *New York Times* of various secret reports on the Vietnam War. Indeed, as Justice Marshall pointed out, "[o]n at least two occasions Congress [had] refused to enact legislation that would have . . . given the President the power that he [sought] in [that] case."[151] And yet the Court applied conventional prior restraint analysis drawn from applications of the first amendment, despite the clear terms of that amendment that it limits *Congress'* power. The Court simply assumed that what the President was not empowered to do, he was forbidden to do.

We can observe, if we look carefully, the evidence of ethical approaches at work in the oral arguments before the Supreme Court, which the Justices do not have to rephrase in doctrinal terms before they are published. For example, in *Kennedy v. Mendoza-Martinez*[152] the Supreme Court was asked to strike down a statute that stripped American citizens of their citizenship for various reasons, including, as was the case with Mendoza-Martinez, fleeing the country to avoid the draft. The relevant ethical constitutional approach is an expression of our constitutional ethos of a government limited in its powers to those granted by the People. And so, early in oral argument, we hear Justice Stewart asking for the basis of the government's power over citizenship[153] and Justice Brennan answering the government's reply by observing that "[n]othing in the Constitution says Congress can take citizenship away."[154] A few minutes later, Justice Black makes the same observation, adding that the federal government possesses only those powers expressly granted by the Constitution or necessary to the exercise of those powers.[155] The attorney for the government parried these remarks, as he did in his brief, by asserting that a "government which cannot exert force to compel a citizen to perform his lawful duty is, to that extent, not sovereign as to him."[156] But that is precisely the ethical point. That approach is bottomed on the notion that, to some

150. New York Times v. United States, 403 U.S. 713 (1971) (per curiam).
151. *Id.* at 746 (Marshall, J., concurring).
152. 372 U.S. 144 (1963).
153. 31 U.S.L.W. 3191 (1962).
154. *Id.*
155. *Id.* at 3193.
156. 372 U.S. at 197 (Brennan, J., concurring).

extent in every matter, and wholly in some matters, government is just not "sovereign" as to its people.

The same point is evident in the transcript of the oral argument in *Reid v. Covert*,[157] a case involving the jurisdiction of a military tribunal over civilian dependents overseas. The Solicitor General, Mr. Rankin, had argued[158] that this jurisdiction derived from the extension of constitutional power by the necessary and proper clause.[159] After a sharp exchange with Justice Black, Rankin finally conceded that it was one purpose of the Constitution to limit the influence and authority of the Army, "but," he said, "[the framers] did not want to leave the country without any defenses."[160] Save for the ethical argument this lame reply might have passed unnoticed. Instead, it was the occasion for Justice Black's tart rejoinder as to the framers' plans: "They did not want to leave civilians without any defense against the Army."[161]

It is not the mere existence of ethical argument, however, that I am asserting. It is its rightness in some situations. And so I would like you to consider three famous cases, none of whose opinions purports to reach decision via an ethical approach. See which approach you think best.

In *Trop v. Dulles*[162] a former private during the Second World War challenged the forfeiture of citizenship that had accompanied his conviction and dishonorable discharge for wartime desertion. This forfeiture was overturned by the Supreme Court on the ground that it constituted cruel and unusual punishment in violation of the eighth amendment.[163] It was a splintered decision, five to four on the result, with no opinion claiming a majority. Yet there are few people, I suspect, who think that military tribunals ought to be able to denationalize someone. The difficulty is with the eighth amendment rationale. It is simply hard to swallow the argument that a collateral penalty for what is, after all, a constitutionally validated *capital* offense,[164] is unconstitutionally harsh. As Mr. Justice Frankfurter put it: "Can [it] be seriously urged that loss of citizenship is a fate worse than death?"[165] Certainly the collateral penalty was not unusual in the sense of being novel or bizarre; the statute struck down was the lineal descendent of one first

157. 354 U.S. 1 (1957).
158. 25 U.S.L.W. 3252 (1957).
159. U.S. CONST. art. I, § 8, cl. 18.
160. 25 U.S.L.W. at 3253.
161. *Id.*
162. 356 U.S. 86 (1958).
163. *Id.* at 101-03.
164. 10 U.S.C. § 885 (1976).
165. 356 U.S. at 125 (Frankfurter, J., dissenting).

adopted in 1865.[166] The justification for our intuitive sense of the rightness of the holding in *Trop v. Dulles* must lie elsewhere.

I would have thought that a governmental agency could not unilaterally dissolve the bonds of citizenship of a natural-born citizen because the government was not responsible for joining them in the first place. Since this relationship between citizen and state has constitutional status,[167] and since so much of our political life is predicated upon it, I would assume that it is a principle of the American constitutional ethic that representative government, created by the People acting as a whole, may not begin slicing off groups of those People without the consent of the People once more. Now this ethical argument leads to some close questions. I think these questions are also best approached not by asking whether they may be analogized to drawing and quartering, but from the perspective of the constitutional ethic.

In *Rochin v. California*,[168] for another example, a narcotics conviction was challenged by a defendant who, upon the arrival of police officers in his home, swallowed two capsules that the police sought to extract from him, first by physical force and later, at a hospital, by forcing him to take an emetic. He vomited the capsules which, found to contain morphine, were admitted in evidence against him at trial. Urging an approach that has since been adopted by the Court, Justice Black wrote in concurrence that the government's part in these events contravened the fifth amendment because the vomiting of the capsules amounted to self-incrimination without consent.[169] Applying this standard twelve years later, the Court held that blood tests may be taken without consent from a conscious person after an auto accident.[170] The results of a blood test, you see, were not evidence of a "testimonial" nature, the Court said, and hence not within the fifth amendment.[171]

All of us must feel that there is something strange in these analyses. Could Rochin have been forced to vomit if he had been granted prior immunity? Or if the evidence were sought for use against his wife (who in fact was present in the room at the time of the search and

166. *See* Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25, 60-61 (1950).

167. U.S. CONST. amend. XIV, § 1. *See* Vance v. Terrazas, 444 U.S. 252, 258-63 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967).

168. 342 U.S. 165 (1952).

169. 342 U.S. at 174-75 (Black, J., concurring).

170. Schmerber v. California, 384 U.S. 757 (1966).

171. *Id.* at 765.

therefore potentially a defendant) and not against him? Perhaps we may disagree as to whether the forcible administration of blood or breath tests is permissible, but is the real issue whether the evidence produced is "testimonial" in nature? Is it not, instead, whether a constitutional ethic applies here, one that finds partial expression in some of the passages of the Bill of Rights and that restrains the police from physically degrading an individual in custody in an effort to enforce law?

Or consider the notorious *Skinner*[172] case. An Oklahoma statute that provided for the sterilization of habitual criminals was applied against a man three times convicted of theft and robbery, the first time for stealing chickens. Purporting—and I say this with all humility and respect—to rest its decision on the ground that similar offenses—embezzlement, for example—were exempted from triggering the punishment, the Supreme Court held that the Oklahoma statute violated the equal protection clause.[173] The statute, Justice Douglas wrote for the Court, created an invidious discrimination against a certain class of offenders.[174] Despite this doctrinal rationale by one of the Court's most gifted jurists, I simply cannot believe that if the measure had been extended to defendants convicted of larceny by trick, and so forth, that the statute would have, or should have, survived constitutional scrutiny. That is because I do not think American government may impose a system of eugenics, no matter how egalitarian and, to reject Chief Justice Stone's approach,[175] no matter how formal the hearing that precedes its implementation. I do not think American government can do this because among the *means* fairly inferred from the affirmative powers accorded the federal government—the limits of which means apply to state means—eugenic improvement is simply not present. Of course it is not forbidden, but then the framers may have thought better of us than to anticipate that it need be.

I do not disagree with the results arrived at in any of these decisions. My complaint, therefore, is not that the Court in a few odd and famous cases is wrongly deciding, but rather that it is wrongly explaining. Since in law, as in science, explanation is prediction, my complaint is hardly an idle one. If you should come to believe that ethical arguments in these cases would have produced more candid opinions,[176] or

172. Skinner v. Oklahoma, 316 U.S. 535 (1942).
173. *Id.* at 538.
174. *Id.* at 541.
175. *Id.* at 543-45 (Stone, C.J., concurring).
176. *See generally* G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 26, 74-75 (1978).

if you find ethical approaches in these cases more satisfying than the attenuated textual and doctrinal methods that the Court actually chose, then a case has been made for the use of ethical argument. But it is more than this. If you find this approach more satisfying, then I suggest that such arguments may be what actually motivates the decision process. If I am right in this, and it can be shown, then perhaps it can be established that ethical arguments in constitutional law operate in the same way that other types of constitutional argument operate.

Ignoring ethical approaches has yielded the cynical conclusion that mere political bias rather than argument governs much constitutional decision. Even the most gullible student is reluctant to accept the doctrinal justification in, say, *Shapiro v. Thompson*[177] that welfare residency requirements are unconstitutional because they interfere with the equal protection to be afforded *travel*.[178] Ignoring the existence of ethical arguments *qua* arguments has had other costs as well. Not only candor, but simplicity is sacrificed. Most importantly, the exile of ethical argument from the domain of legitimate constitutional discussion has denied an important resource to the creative judge who exploits all the various approaches from time to time and case to case.

Ethical argument has been neglected because it is feared. We are unwilling to use constitutional institutions as a moral arbiter, and therefore many would like to remove moral argument from constitutional law altogether. Why are we unwilling to view ethical argument as appropriate to constitutional decisionmaking? Obviously, there have been many societies—indeed, we have seen the emergence of one such in Iran—that wholly integrate ethical and constitutional functions. There are two reasons that support this attitiude; one is widely accepted in various forms, and the other is correct.

The first view is roughly analogous to the empiricist's hostility to moral observations generally. One reason we are disinclined to admit moral statements into a calculus of truths about the world, as opposed to our willingness to admit scientific hypotheses, is that the latter are verifiable by observation evidence. If I observe a vapor trail in an electron chamber, I am inclined to count this as evidence of an electron. If, on the other hand, I feel moral indignation at the government's decision to suspend food stamps, this scarcely establishes the wrongness of the government's act; it only counts as evidence of my feelings.[179]

Conventional constitutional arguments appear to have the same

177. 394 U.S. 618 (1969).
178. *See id.* at 638.
179. *See generally* G. HARMAN, THE NATURE OF MORALITY (1977).

epistemological basis as statements of scientific observation. That is, there are independent phenomena—the text, historical events, political structure, the calculus of costs and benefits, or previous case law—that stand for a state of affairs independent of our feelings. True, you and I may put different interpretations on a piece of historical evidence, but this is no different than trying on different scientific hypotheses for fit. There is an objective fact. But when I say that a statute is unconstitutional because it violates an ethic to which our government ought to cleave, am I not simply saying something about my perception, a conclusion perhaps, but not anything about the Constitution per se?

This view of things is, I think, quite probably wrong about science and the role of observation evidence,[180] but I am certain it is wrong about the process of constitutional law. In both cases it treats an object—the constitutional rule or the electron—as severable from our apprehension of it and use of it with other concepts. This is an error with respect to the Constitution since the choice of a particular mode of approach and argument is itself not the product of an objective fact. Nothing in the Constitution dictates, for example, the use of historical argument, but even if this were not so, our application of such a provision would be made in light of how we apply textual provisions generally.

The second objection to ethical argument is more telling. It admits that we see our Constitution through various legal conventions—that the Constitution is inseparable from the organizing framework of these conventions. These are the arguments I discussed in the first lecture, and the Constitution we are to apply will appear differently depending on which convention is chosen. But competing moral conventions generally do not, among themselves, provide the methods for resolution that are available within the various competing legal approaches. Since ours is a society of considerable moral pluralism, to admit ethical arguments in the constitutional arena is to sacrifice the ameliorative, assimilating power of constitutional law.[181] The result would be, one fears, the kind of intractable ideological conflict so notable on the European scene. The conventions of a legal language are then exchanged for ideologies, in the face of which no event, much less an argument grounded in a different approach, can but confirm to each side the

180. *See* Kuhn, *Logic of Discovery of Psychology or Research?*, in CRITICISM AND THE GROWTH OF KNOWLEDGE 1 (I. Lakatos & A. Musgrave eds. 1970).

181. To take advantage of this power, as de Tocqueville observed, political questions in America are often transmuted into legal questions. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 248 (J. Mayer & M. Lerner eds. 1966).

rightness of its principles. It is difficult, for example, to argue with a Marxist about the shortcomings of the labor theory of value, since he is likely to insist that one's objections are merely part of the prevailing bourgeois ideology.[182] It is like arguing with a Freudian about psychoanalytic theory when the Freudian contends that your objections are really "resistances."[183]

This is a substantial and highly important shortcoming of ethical argument in constitutional law. When the authoritative decider is the Supreme Court, this shortcoming is greatly worsened, since the finality of a constitutional decision by that Court often freezes the situation, preventing action by other constitutional institutions. Indeed, given the federal structure of law in our society, a good argument might be made that moral arguments generally should be ruthlessly excluded from the constitutional discourse altogether.

I believe that this argument, for example, accounts for the phenomenon of federal habeas corpus, which is otherwise difficult to justify. This process severs the constitutional decision from the moral question of guilt or innocence so that the former can be weighed dispassionately, as one suspects it seldom can in the context of trial. At the same time, federal habeas corpus gives the matter to a group of deciders whose customary business is, by comparison with state courts, largely amoral. It is the state courts that must confront questions of moral blame, broken promises, negligent or intentional harm, marital collapse, and almost all crime, while federal courts, save for their diversity jurisdiction, are largely given over to matters of government regulation, intergovernmental conflict, and national commerce. Federal habeas corpus enables the constitutional questions to be given the priority they can never achieve when held in the balance with a moral conviction widely enough shared to have found its way into a state's criminal code.

But doesn't such a distinction between moral argument and moral deciders on the one hand, and constitutional argument and federal judges on the other, actually reflect an accommodation with the source of the principal shortcoming of ethical argument, that is, its independent, nonlegal ground? Aren't the values of the fourth and fifth amendments, which habeas corpus has protected to the extent of turning so many guilty men free, aren't these values also "ethical"? If so, then it may be that we can identify a class of ethical arguments that originate

182. *See* Robinson, *The Chomsky Problem*, N.Y. Times, Feb. 25, 1979, § 7 (Book Review), at 3.

183. *See id.*

in a specifically constitutional ethos, and hence avoid the difficulties of ethical and moral arguments generally.

Arguments are most clearly and easily derived from the constitutional ethos when that ethos may be identified from some specific text in back of which, so to speak, it may be said to stand. Thus, it has been argued that it would be unconstitutional for government to require a landlord to rent to a specific party—as by a statutory extension of open housing laws—since to do so would be to exercise a power analogous to that proscribed by the third amendment's provision against the quartering of soldiers in private dwellings.[184] First of all, notice that this is an ethical, not a textual argument, despite the fact that it depends for its force on an analogy to the text. The argument is ethical because it assumes a constitutional ethos, textually manifested in one instance by the words of the third amendment. The classic *textual* argument applied to the open housing case, on the other hand, would be that since the language of the amendment is specifically limited to military occupation, any constitutional application to civilian occupiers is insupportable.

If we could neatly limit constitutional ethical arguments to those that have textual cousins, so to speak, relatives whose characteristics identify for us the common ancestor,[185] then we would be able to clearly distinguish such arguments from moral arguments generally. For example: Assume we confront the practice of a state mental hospital to drug some of its patients into a perpetual senility. One way to resolve the constitutional problem posed by this practice would be to characterize such treatment as "punishment" and find that it offends the eighth amendment.[186] This is strained, since we do not think of committing people for therapy as punishment for crimes. Indeed, just the opposite is true.[187] Yet the eighth amendment might nevertheless be of help here. Suppose we think that the textual provision of the amendment that forbids cruel and unusual punishment is evidence of a more general constitutional ethos, one principle of which is that government must not degrade the persons for whose benefit it is constituted. If we have this, or something like it, we may then make the ethical argument against this treatment, if such it is, per se. We would be able to take advantage of the resolving power of legal conventions—

184. *See* Black, *supra* note 135, at 38-39.
185. *See id.* at 37-40 (additional examples of analogical reasoning).
186. *See* Comment, *Eugenic Sterilization Statutes: A Constitutional Re-evaluation*, 14 J. FAM. L. 280, 289-90 (1975).
187. *See id.* at 290.

the teaching of which I have come to believe is the principal duty of law schools—while shunning the pretense that only nonethical arguments are truly constitutional, are truly "legal."

But this nice position is not really available to us. In the first place, there is one specific text—the words of the ninth amendment[188]—that makes it quite clear that the Bill of Rights and the body of the Constitution do not exhaustively enumerate the rights of persons. And there is simply nothing to suggest that only the enumerated rights can lead us to the unenumerated ones. Moreover, and more important, given the limited nature of the government that the body of the Constitution describes, the retained rights of persons—even if there were no ninth amendment—would necessarily constitute an infinite list. Both the unspecified rights and the enumerated prohibitions derive from the general constitutional ground of enumerated and implied powers and not from each other. Our rights are defined by the shoreline of the enumerated powers. Where delegated government authority stops, our rights begin.

You will recall the initial opposition of James Madison and others to the adoption of a bill of rights.[189] It was said then that such specific protections were unnecessary since the power to achieve the objects that the various amendments would prohibit had not been delegated to the federal government in the first place.[190] As Hamilton wrote prior to the adoption of the Constitution: "Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"[191] The Bill of Rights, therefore, is in this view an incomplete list of those objects that are denied the government because government is not given the power to accomplish them. The body of the original, unamended Constitution, in the words of *Federalist Number 84*, "is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."[192]

188. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

189. 2 M. FARRAND, *supra* note 8, at 587-88. *See* 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 435-623 (1971).

190. *See* 2 M. FARRAND, *supra* note 8, at 617-18.

191. THE FEDERALIST No. 84 (A. Hamilton) 156 (Tudor ed. 1937).

192. *Id.* at 157. The Court recently relied precisely on this argument to reach a result that is an instructive example of the power of the ethical approach. To understand this requires a brief digression.

In Gannett Co. v. DePasquale, 443 U.S. 368 (1979), a divided Court held that the sixth amendment's guarantee of a public trial in criminal cases does not afford the press or the public an enforceable right of access to pretrial suppression hearings. The Court purported to reserve the question of whether the first and fourteenth amendments guarantee a right of the public to attend pretrial hearings or trial itself. *Id.* at 392 (plurality opinion). The decision provoked a vigorous dissent by Justice Blackmun, who argued that the sixth amendment does not permit a private trial

So one way we may understand the Bill of Rights is as a collection of those examples of power denied the federal government that simply happened to occur to Madison and others as requiring reinforcement, on account, perhaps, of past treatment at the hands of unlimited government. To understand this is to understand, by way of our constitutional grammar, the notion of substantive due process. However much these doctrines may be despised,[193] they are a *necessary* occurrence, given the necessarily partial list of rights that is the Bill of Rights. Regardless of how many politicians or professors rail against these doctrines, they cannot be avoided without doing violence to the constitutional ethos that every lawyer and judge has internalized. Substantive due process is not a function of politically aggressive judges who have lost their heads, acting as would-be legislators, abandoning any sense of self-restraint. Rather the doctrine is the necessary product of the superimposition onto a state system of plenary authority of a federal court system dedicated to preserving those individual liberties that animated the Constitution. As such, substantive due process is the

even if the accused waives his right to a public trial with the consent of the prosecutor and the court. Note the similarity of this position to the ethical approach examined here: the Bill of Rights is a partial list of those powers denied the government. The sixth amendment merely emphasizes that the government is granted no power to close trials to the public, and the defendant's waiver of his sixth amendment right cannot confer power on the government that the Constitution did not expressly or impliedly establish.

Not surprisingly, the *Gannett* decision was the source of much confusion and apprehension. The immediate question left unanswered was whether the Constitution provided any barrier to the closing of a trial with the defendant's consent. The Court recently answered that question in Richmond Newspapers, Inc. v. Virginia, 100 S. Ct. 2814 (1980). Chief Justice Burger, writing for the Court, concluded that the first and fourteenth amendments provided a qualified right in the public and the press of access to trials, despite the concurring decision of the defendant, the prosecutor, and the trial court to close the trial.

Of course, as Chief Justice Burger recognized, "the Constitution nowhere spells out a guarantee for the right of the public to attend trials." *Id.* at 2828. However, relying on the Constitutional Convention's response to Madison's fears that the enumeration of certain rights might be read to exclude others, *id.* at 2829 & n.15, the Chief concluded that "[t]he concerns expressed by Madison and others have . . . been resolved; fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined," *id.* at 2829. "The Constitution guarantees more than simply freedom from those abuses which led the Framers to single out particular rights." *Id.* at 2828 n.14.

This remarkable decision surely reveals the workings of an ethical approach. Although the Constitution does not in express terms limit the power of government to close trials when the defendant does not object, the Justices obviously believed that the assertion of that power was inconsistent with the scheme of limited powers established by the Constitution. Although, as Justice Blackmun reminded his brethren, *id.* at 2842, the Court had previously rejected the sixth amendment as the textual recognition of this limit and thus deprived itself of a more plausible textual support for its decision, something like an ethical approach led the Court to announce that such limits did exist, notwithstanding the absence of express language. If the decision is remarkable, it is because the ethical approach appeared so near the surface of the written opinions.

193. *See, e.g.*, L. LUSKY, BY WHAT RIGHT? 336-41 (1975); Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 937-49 (1973); Vieira, Roe *and* Doe*: Substantive Due Process and the Right of Abortion*, 25 HASTINGS L.J. 867, 870-79 (1974).

inevitable by-product of the constitutional events of the 1860s and 1870s, events that are reflected in, but not captured by, the customary meaning of the few phrases in the first sentence of the first part of the fourteenth amendment.[194]

Therefore, it is perfectly natural that we should see the greatest use of ethical argument in cases nowadays thought of as involving substantive due process. The greatest use, and the greatest difficulty—since treating such an approach with an irrelevant textual talisman such as "due process" and all the redundant doctrine of "fundamental rights" is hardly a promising beginning—is developing the distinction between constitutional ethical arguments and moral arguments generally. This distinction must be maintained if we are not to slip into competing moral conventions, all the more dangerous when they are widely shared.

Ethical argument can be made into constitutional argument by requiring that a specifically constitutional ethos—and not a moral one—be its source. Such an ethos may be indicated by a specific provision in the Bill of Rights—as the fifth amendment points to a larger principle that government may not force defendants to assist in their own destruction in a criminal trial, or as the fourth amendment points to a larger principle that some sorts of privacy may be infringed by government only on a showing of necessity—or it may be the more general American constitutional ethos of limited government. If it is the latter, we may say that, against the federal government, those means not fairly implied from the enumerated powers are denied it. And those means denied the federal government are also limitations on the states, by virtue of the integration of federal constitutional norms into the contours of state authority produced by the Civil War. That is to say that states, in the pursuit of their quite different ends, are denied those means that are not necessary and proper to the achievement of federal ends. We can *say* this was accomplished by the Civil War amendments, but this is deeply misleading since they are, like the Bill of Rights, mere reflections of the change that generated them. Like most Southerners, I am acutely aware that the Civil War, or the War Between the States as we were taught to call it, was a constitutional war. The questions of constitutional authority and human rights then, as now, were really one ques-

194. The Civil War amendments, U.S. CONST. amends. XIII, XIV, XV, effectuated a revolution in the constitutional arrangement by deploying the federal courts to enforce limitations on state power with respect to state citizens and persons in the states. Substantive due process was the result of applying the federal notion in a state context that a limited grant of power, by its very limitation, implied a personal right. That is to say, the federal courts chose to overlay on the realm of state power the federal model of limitations defined by affirmative grants.

tion. I do not believe, for example, that black disenfranchisement could constitutionally continue after the War, regardless of the adoption of the fifteenth amendment.[195]

Furthermore, there is a provision appended to the Civil War amendments, as the ninth amendment is appended to the Bill of Rights, to remind us that the list of prohibitions against involuntary servitude, the denial of equal protection, and so forth, is not exhaustive. I am referring to the privileges and immunities clause of the fourteenth amendment.[196] When that clause is construed in light of the ethical approaches I have sketched in these preceding pages, its role in this way will be clear. It has been thought that there were two principal difficulties with using the privileges and immunities clause as the vehicle by which human rights could be enforced against the states. I leave aside the doctrinal roadblocks that derive from precedent, since these are merely reflections of the Supreme Court's appreciation of these difficulties. First, it is said that we are unsure of just what the "privileges and immunities" referred to actually comprise.[197] What catalogues of these rights we have been offered sound like lists of rights the speaker considers important, and nothing more. In this they resemble the "fundamental rights" of contemporary due process analysis, and therefore to rely on them is scarcely to improve the situation. Second, it has been thought that the protection the clause offers would shield citizens only.[198] In this respect, the due process clause,[199] which speaks of "persons," would seem more favorable.

Thus it is that we have been tempted to ignore the plain meaning of the due process clause—that life, liberty, and property *can* be taken so long as it is done with procedural correctness—and, responding to the theoretical demands arising from the Civil War's rearrangement of constitutional limits on state authority, to contrive the doctrines of substantive due process. The following alternative will better serve these demands.

One view, an ethical view, of federal constitutional human rights describes them as being beyond the boundary limned by enumerated

195. At oral argument in Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1963), counsel for the State of Virginia argued to the contrary, 34 U.S.L.W. 3261, 3262 (1966).

196. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.

197. Benoit, *The Privileges or Immunities Clause of the Fourteenth Amendment: Can There Be Life After Death?*, 11 SUFFOLK U.L. REV. 61, 100 (1976).

198. *See id.* at 109; Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U.L.Q. 405, 415, 419; 42 COLUM. L. REV. 139, 141 (1942).

199. "[No State shall] deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

powers and implied means. The federal government may not employ any means not necessary and proper, not fairly inferable, from its enumerated powers. One might say that this is a sort of immunity vis-á-vis the federal government: one is immune from such means, or, to put it another way, one is privileged, with respect to national government, to be treated only in those ways that are constitutionally mandated. This fundamental relationship, as the ninth amendment emphasizes, is the privilege and immunity of citizens of the United States because it is the very foundation of national authority. (It thus has nothing to do with the privileges and immunities of state citizens, mentioned in article IV.[200])

A few moments ago I said that the application of the ethic of limited constitutional government to the states yields the rule that states may not, in pursuit of their unenumerated and plenary ends, employ those means denied the federal government. Now we can see the textual basis for this assertion. Furthermore, we now have a generative rule for determining what are the privileges and immunities of citizens of the United States. We need only ask: Is this legislative means (whether federal or state) one that is fairly inferable from one of the federal enumerated powers? Moreover, this formulation also enables us to deal with the citizen/person problem. It shows us that the problem was a false one. Because we were mesmerized by the model of rights as trumps, we treated the "privileges and immunities" as rights that belonged *to* someone, that is, citizens. But the text does not say that no state shall deprive "any citizen" of privileges and immunities, a construction that would be parallel to that of the due process and equal protection provisions that forbid states to deny to "any person" their protections. Instead, the text reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[201] If we give the meaning I have suggested to the entire clause—privileges and immunities of citizens of the United States—we have a general limit on state government, not a specific right held by any specified group. States may not abridge the right to be the subject of only that governmental action that is within the constitutional means of the United States government, regardless of who is affected by the abridgement.

I am partial to this account of the privileges and immunities

200. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

201. U.S. CONST. amend. XIV, § 1.

clause. It makes useful what has been, up to now, a barren provision[202] and does so within a relatively spare theoretical construction that simultaneously explains the historical development of the police power and substantive due process doctrines as post-Civil War constitutional limits on state authority. But suppose there were no privileges and immunities clause. If it were a mere text we required—and not the morphogenesis the text records—we could make use of the tenth amendment's equivocal suggestion that some powers not prohibited the states are nevertheless reserved to the people. That amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[203] Unless the last phrase is surplusage, there must be some unspecified, unenumerated rights that belong to the people against the states. That is, there are some powers which, while not delegated to the United States nor explicitly prohibited to the states, are nevertheless in the hands of the people and not the states.

But if you are really persuaded by this discussion of ethical arguments, you will want to say that an explicit text is superfluous. The real test of ethical arguments—whether they have force and derive from our constitutional ethos— is, as with all legal arguments, in the application to concrete cases. Therefore, I should like to devote the rest of this lecture to a discussion of a significant case that could have, or perhaps I really mean should have, been resolved by an ethical approach.

Roe v. Wade[204] is perhaps the most important, and certainly the most controversial, constitutional decision of this decade. The decision in that case, which struck down the Texas abortion law,[205] has done almost as much to shape current attitudes about ourselves and our society as have the social and technological changes that did so much to bring about the decision. And yet one rarely encounters a law professor or judge willing to defend the decision. The first semester I taught constitutional law at the University of Texas Law School, my distinguished colleague Professor Wright began his discussion of *Roe* by saying that only my appointment forced him to amend his customary introduction: that he knew of no one teaching constitutional law on this faculty who thought the case rightly decided.

202. *See* Benoit, *supra* note 197, at 61-98; Kurland, *supra* note 198, at 406-14.
203. U.S. CONST. amend. X.
204. 410 U.S. 113 (1973).
205. 1907 Tex. Gen. Laws, ch. 33, § 1, at 55 (held unconstitutional); 1858 Tex. Gen. Laws, ch. 121, at 17, 4 H. GAMMEL, LAWS OF TEXAS 1044 (1898) (held unconstitutional). The companion case, Doe v. Bolton, 410 U.S. 179 (1973), struck down the Georgia abortion law.

I think the universal disillusionment with *Roe v. Wade*[206] may be traced to the inadequacies of the opinion, and I will endeavor to propose a rationale that is more satisfying than the doctrinal approaches taken by Justice Blackmun. Let us begin by simply recounting those approaches.

The opinion of the Court may be parsed in the following way. First, the Court asserts that the constitutional right of privacy has been established by case law.[207] Second, without explication of the development of that right in precedent, the opinion asserts that the fundamental right "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[208] Third, largely nonprivacy cases are cited for the proposition that only a compelling state interest will permit the state's regulation of this fundamental right.[209] Fourth, with respect to the state's compelling interest in protecting the fetus, the Court concludes that the compelling point is at viability because "the fetus then presumably has the capability of meaningful life outside the mother's womb."[210] Thus, the Court determined that, in the first trimester of pregnancy, the state, having no viable fetal life in which to take a compelling interest, may not regulate abortion at all; in the second trimester, it may not forbid abortion; only in the *third* trimester, after quickening, can the state outlaw abortion of the fetus.[211]

Several features of this rationale catch the eye. No reason is given why the right-to-privacy cases establish a right to that least of all private experiences, an abortion. Certainly a technology that allowed a fully-clothed woman to pass through an X-ray gate and abort would not mean that the woman's right was less fundamental than that of a woman using an operating room procedure. The Court does not tell us what features of the situation in *Roe* are forcefully analogous to those in the cases that developed the right to privacy.[212] But even assuming that the right to procure an abortion is "fundamental" in the way that other privacy-derived rights have been held constitutionally significant, there is no reason to suppose, and none is offered by the opinion, that

206. *See, e.g.*, Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250 (1975); Ely, *supra* note 193; Epstein, *Substantive Due Proeess by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159; O'Meara, *Abortion: The Court Decides a Non-Case*, 1974 SUP. CT. REV. 337; Vieira, *supra* note 193.

207. 410 U.S. at 152-53.

208. *Id.* at 153.

209. *Id.* at 155-56.

210. *Id.* at 163.

211. *Id.* at 164-65.

212. Certainly, the privacy of the bedroom and sexual practice, so important in Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965), has been left far behind by the time a woman checks into an abortion clinic.

the protection of an embryo or fetus is an insufficiently "compelling interest" to permit the state to infringe such a fundamental right. For the case law that establishes privacy as a fundamental right also relies on a compelling state interest analysis to determine the scope of that right. The latter is a part of the doctrine of fundamental rights. The decision in *Roe*, however, turns on a metaphysical assessment that only when the fetus is viable does the state's interest become compelling. This assessment of relative worth does not seem inferable from the Constitution or the record in the case. Indeed, it appears to rest on the unacknowledged and plainly incorrect premise that only living, self-sufficient entities may serve as the object of the state's compelling interests.[213]

Thus, the two principal propositions on which the opinion rests are neither derived from precedent nor elaborated from larger policies that may be thought to underlie such precedent. As such, the opinion is as close to a total failure as a doctrinal opinion can be. But I doubt that the members of the Court, any more than you, were actually persuaded by these arguments. The Court was, as were its critics, mesmerized, I believe, by one or two conventions of constitutional arguments.

But suppose we try a different approach. Let's begin by asserting a rule that would decide *Roe v. Wade* and then testing it in the way I suggested a few moments ago. I propose this rule: Government may not coerce intimate acts. Now there may be no cases establishing this rule, but that scarcely counts against its constitutional status, since legislators may so take it for granted that they simply do not pass laws that are offensive to that rule. And the text need not confirm this rule either, saying, as it does, merely that there are unspecified prohibitions. So the next step is to try our constitutional sense of the matter by testing the rule in various situations that might implicate it.

For example, it would seem clear enough that a teacher in the public schools may not order students to perform sex acts as part of a sex education class. Does anyone think that a state might be able to order marriages as a remedy in paternity suits? Or, from another angle, order conception between individuals thought to have desirable characteristics, or among groups—say state workers—thought to be reproducing too little? Does anyone even entertain the possibility that the state might be able to order errant husbands or wives to rejoin the families they have abandoned? Certainly the state may order parents to pay

213. *See* United States v. O'Brien, 391 U.S. 367 (1968) (finding a compelling state interest in the prevention of the wanton destruction of draft cards); Ely, *supra* note 193, at 924-26.

support; why not order them back into the home, there to provide a fuller kind of support?

If no one thinks for a moment that states could order any of these practices, why does no one think so? It seems to me that the barriers are constitutional, and while I confidently expect them to be enforced by legislatures, I cannot imagine that this empirical fact implies that a federal court may *not* enforce such barriers.

I restate then my principle: Government may not coerce intimate acts. And I argue that whatever else may be an intimate act, the act of carrying a child within one's body and giving birth must be a profoundly intimate act. I can think of no other relation as intimate as that which exists between woman and developing embryo, a relation so intermingling that all other acts that seem intimate to us are, by contrast, momentary and detached. If the state could not coerce its females into conceiving in its behalf, how can it be claimed that it can coerce them into carrying an embryonic form until the woman is forced to give it birth?

Yet perhaps government is not, in every case, delimited from coercing a woman to carry a child to term, because in many cases the woman has waived her right to object to coercion. To take polar examples, I assume that few would argue that a woman, nine months after a voluntary and knowing conception, can at that point assert a claim to be free from carrying a child; on the other hand, one could hardly demand that the victim of a forcible rape be denied an abortion requested the following day on the ground that she has consented to a waiver of her rights. We may disagree as to what time period is, in what circumstances, appropriate to a conclusion that waiver has occurred, but in resolving this question we have familiar legal concepts to serve as guides. It is not unreasonable to suggest that a woman who voluntarily consents not merely to sexual intercourse—since it is relatively unlikely that this will lead to pregnancy and that the woman can therefore be said to have knowingly consented to giving birth—but also to carrying a child for a period long enough so that she can be presumed both to be aware of her condition and to have had the time to reflect on it, has by her acquiescence waived any claim against the state's coercion. Moreover, this perspective justifies the intuitive notion given expression by state legislatures that a woman who is raped or is the object of incest is different from one who consents to sexual relations, despite the fact that the fetus in both situations is in the same condition.

This basis for determining under what circumstances government may intervene might be given effect in statutes that reflected a conclu-

sive presumption of waiver after some period and in particular circumstances. Or such a statute might provide instead for some initial showing by the state, as part of the enforcement of the statute, that the woman had, by her acts, waived her right. Unlike the doctrinal rationale in *Roe*, which permits no state regulation during the first trimester, this rationale would allow states to prescribe sterile surroundings and competent physicians and therapists as long as these rules did not coerce the woman into carrying to term.

It will be observed that the rationale I have offered yields the same outcome—the trimester rule—as that achieved by the Court (with the wholesome modification that not all regulation need be forbidden in the first trimester). I am inclined to believe that this similarity reflects the actual pull of unacknowledged ethical argument on the members of the *Roe* majority. Or it may be that I am simply writing in the tradition of law professors who employ a certain facility to rationalize what the Court in fact does. If the same result is achieved, does it really matter by what route?

To ask this, as to ask whether there are overriding government interests that will justify striking a balance, in extreme cases, in favor of coercion, is to ignore the entire approach of the preceding pages. In actuality, government is wholly limited from coercing a woman to carry a child and give birth. Because the mode of the *Roe* argument I have given is ethical, as I have used the term, it cannot yield the Court's result. Ethical arguments arise from the ethos of limited government and the seam where powers end and rights begin. As such, no "waiver" on the part of the woman can augment the government's authority. Indeed, she has the right because government has no power to begin with.

The ethical argument I have proposed in *Roe v. Wade* differs from a similar one that you may recognize in my scheme of things as a moral argument *simpliciter*, and, therefore, one whose study may illuminate the present approach. That argument is that a state may not require a person to risk her life for the purpose of benefiting another. The common law rule has long been that one has no duty to intervene in behalf of one stricken or in peril.[214] Although some courts have recognized a duty to render aid under special circumstances, such a duty scarcely goes so far as to require significant risk.[215] A variant of this argument has been put forth by Judith Jarvis Thomson, with her customary elo-

214. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 56, at 338-43 (4th ed. 1971).
215. *See id.* at 341-53.

quence, in *Philosophy and Public Affairs*.[216] But this argument is in fact not part of our constitutional ethos, as reflected in the common law. For this approach seems to treat the embryonic child as a stranger who merely happens to be inconveniently placed proximate to the mother. There is much law, however, for the proposition that one owes a duty of care to one's child. And to avoid this puts us back in the position of deciding when child life begins, a position that the *Roe* Court was doctrinally forced to take in its argument, despite its disclaimers, and one that sound constitutional decision ought to avoid completely.

As far as my own rationale for *Roe v. Wade* is concerned, it must be painfully apparent that constitutional, ethical decision—decision proceeding from a constitutional ethos—can not only be distinguished from moral argument but that it can lead, as many will feel it does here, to a clearly immoral end. It may be that a similar consequence occurs when the constitutional ethos of unrestrained communication prohibits the eradication of pornography.

The complementary feature of ethical argument, applied in the way I have advocated, is that while it may confine government in few respects, it is an absolute bar as to the rights it does protect. This view may be derided for its impracticality. But I ask the reader, is it less practical to say government may not force a woman to carry to term, under any circumstances, or to say that fact determinations about the viability of the fetus (which will vary with technology and circumstances), legal holdings as to the scope or intensity of government's interests, and philosophical speculations about what constitutes life, and so forth, shall settle the question?

Is my proposed argument in *Roe* in fact more satisfying than the Court's opinion? If you find it so, I claim this is because some such rationale was the true basis on which the judgment was reached and that the resulting opinion—which avoids ethical argument—strains credulity precisely because no one would be convinced by *its* arguments. I do not mean that the process of constitutional decision consists in judges first making up their minds and then casting about for a suitable doctrinal argument. That is often the accusation, indeed most often when, as in *Roe v. Wade*, the doctrinal opinion is unconvincing. This is wrong, and it is defamatory. It is rather that judges in such circumstances find a particular doctrinal argument persuasive precisely because they are being pulled by the unacknowledged force of constitutional ethical argument. Indeed, only this can explain the

216. Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

choice of the poor rationale actually offered by the Court and a distinguished judge. One way to test this is to look at a recent case also involving an abortion statute to see if the majority in that case relies on the doctrinal arguments put forth in *Roe*, which is, after all, the governing precedent.

The Supreme Court handed down *Colautti v. Franklin*[217] in January of 1979. There the Court struck down a Pennsylvania abortion law that required physicians to try to preserve the life of a fetus if there were "sufficient reason to believe that the fetus" might be viable.[218] In contrast to *Roe*, which concerned, I have claimed, the coercion of the mother, the opinion in *Colautti* reaches its decision on grounds of the statute's vagueness and its chilling effect on the rights of physicians.[219] These grounds were studiously ignored in *Roe*, though they were as relevant there as in *Colautti*, if the Court's approach—the right to an abortion—were what truly led it to decision. Indeed, the grounds used in *Colautti* had in fact been relied on by the lower court in *Roe*,[220] which makes their absence from the Supreme Court opinion in that case, and their reemergence in *Colautti*, all the more telling. There is virtually no argument—of any kind—in the Court's opinion in *Roe v. Wade*. When direction is so sure, and argument so absent, it is because we have made the arguments that gave us direction somehow unnameable. But they continue to exert their force on us.

We shall have need to improve the structure of such arguments as we approach the third century of our constitutional life. Whether a state may offer chromosome "corrections," which are said to enhance the "intelligence" of offspring, or whether a state may forbid the marketing of such products; whether a state may, as Singapore continues to do, read someone out of the welfare state because of that person's refusal to voluntarily make certain life choices such as a particular family size, or whether a state may someday be required to guarantee a certain amount of government product based on family size; whether the federal government may, as has the CIA, secretly engage in drug experimentation or openly attempt various strategies of "mind-control," as for example in prisons, or whether government has a right of free speech and may spend money on political propaganda; whether parents will have a right to be allowed to choose the gender of their child, when this is technologically feasible, or whether the state may regulate such

217. 439 U.S. 379 (1979).
218. PA. STAT. ANN. tit. 35, § 6605(a) (Purdon 1977) (held unconstitutional).
219. 439 U.S. at 390-401.
220. Roe v. Wade, 314 F. Supp. 1217, 1223 (N.D. Tex. 1970).

choices; these are, or soon will be, live *constitutional* questions. Even the answer that the Constitution has nothing to do with these situations is a constitutional answer. We will need ethical arguments in these contexts in part because the other forms of constitutional argument are not well adapted to them.

* * * * *

If I am correct in my assertion that the constitutional ethos of limiting the means available to government can serve as the basis for asserting personal rights, and that the specific prohibitions of various means in the Bill of Rights are necessarily and acknowledgedly only a partial list, why do we need a Bill of Rights at all? It can scarcely be that this formalization of rights in specific texts has made them inviolable. Congress, after all, *has* made laws that abridge the freedom of speech, and these are customarily upheld by the United States Supreme Court.[221] Moreover, when Congress made no law, as in the *Pentagon Papers Case*,[222] this was so trivial a bar to Court action that it was not even discussed.

Moreover, to some extent the fears of Madison and others that the enumeration of specific rights would lead inevitably to the disparagement of others have been fulfilled.[223] Insofar as we treat the Bill of Rights as the sole source, by enumeration or analogy, of constitutional rights, we are contributing to the realization of these fears. Indeed, if the function of the Bill of Rights were to generate a grammar of constitutional arguments, as it does on a very small scale, for example, with each new precedent, then it might be that we should not have had a Bill of Rights. But making constitutional doctrine, like the decisions made possible by those doctrines that adjudicate rights between parties, is not the only function of a court, or of a constitution. One other function of

221. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968); Dennis v. United States, 341 U.S. 494 (1951); Abrams v. United States, 250 U.S. 616 (1919). The Supreme Court never ruled on the constitutionality of either the Alien Act, ch. 58, 1 Stat. 570 (1798) (expired 1800) (giving the President the power to deport aliens dangerous to the peace and safety of the United States) or the Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired 1801) (outlawing numerous, supposedly seditious activities including writing, printing, uttering, or publishing anything false, scandalous, and malicious with the intent to bring the government, the Congress, or the President into contempt or disrepute). The constitutional validity of the Sedition Act, however, was sustained by the lower federal courts and by three Supreme Court Justices sitting on circuit. *See* 1 T. EMERSON, D. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 38 (3d ed. 1967).

222. New York Times v. United States, 403 U.S. 713 (1971). *See* text accompanying notes 150-51 *supra*. Of course, it may be retorted that the jurisdictional statute by which the federal courts could entertain such a suit is the needed "law" that Congress shall not make. This reply is, I suggest, just the sort of strained explanation one gives for actions one really had not thought about at the time.

223. For a collection of the views of those who opposed the inclusion of a bill of rights in the Constitution, see 1 B. SCHWARTZ, *supra* note 189, at 527-53, 578-91.

constitutional decision is an expressive one. To a discussion of this function my third lecture is devoted. The Bill of Rights certainly performs an expressive function: "The freedom of speech"; the "right of the people to be secure in their persons"; the right of an accused to be informed of the nature and cause of an accusation; the absolute bar against compelling him to be a witness against himself. These phrases were plucked out of many by the first Congress. Their wording is more economical and more poetic than that first proposed by Madison.[224] They read quite unlike the other amendments of the Constitution, save the fourteenth amendment with its graceful litany of immunities, and equality and liberty, of process, protection, and privileges. The rest of the amendments are largely mechanical, usually longer in text.

The particular Bill of Rights we have serves, and seems chosen to serve, as more than a text for exegesis. It acts to give us a constitutional motif, a cadence of our rights, so that, once heard, we can supply the rest on our own.

III. Constitutional Expression

If tort law may be said to be a system of allocating the costs of accidents,[225] and contract law a system of allocating the transaction costs of market decisions,[226] then constitutional law may be thought of as the allocation of roles—who is to have the authority to make what sort of decision. One test, then, for failure of a constitutional system would be how well its allocation of power worked. To take an extreme example, I should think civil war an indictment of a particular constitutional arrangement, just as the worst architecture, I have heard it said, is that of a building that collapses. The most successful constitutional order is one that encourages collaboration and harmony among the various constitutional institutions and actors.

With this notion we may have some basis from which to evaluate constitutional rules. Do they encourage collaboration among citizens for a common good? Do they maximize the availability of information so that the possibilities of collaboration are recognized? Do they permit shifting coalitions so that the opportunity costs for cooperation are minimized? Indeed, one very ingenious defense of *Roe v. Wade* is that it represents a particular allocation of the role of decisionmaker to the pregnant woman, thereby putting the right of decision in the hands of

224. 1 ANNALS OF CONG. 257-468 (Gales & Seaton eds. 1789), *portions reprinted in* 2 B. SCHWARTZ, *supra* note 189, at 1012, 1016, 1023.

225. G. CALABRESI, THE COSTS OF ACCIDENTS (1970).

226. *See, e.g.*, A. KRONMAN & R. POSNER, THE ECONOMICS OF CONTRACT LAW (1979).

the one constitutional actor who has the most control as well as the most information and the highest payoffs and costs.[227]

The important thing to recognize about this view is that it is only that—a *view*. It is an overlay—a simple descriptive mode that cannot fully capture all the significant features of constitutional decision. It captures one function of constitutional decision. It has particular shortcomings. These are principally two. It has too narrow a concept of constitutional decisionmaking, and it assumes some general external good that a third party observer may discern. The features of constitutional law that account for these shortcomings are the richness of functions served by constitutional decision and the actual ways in which direction and change in constitutional development take place. These two topics are the subjects of my final lecture.

In 1974 Grant Gilmore delivered the Storrs Lectures at the Yale Law School. At the end of the final lecture, he spoke the lines that have since become so famous:

> Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.[228]

This unforgettable passage, written in the elegant and polished irony of Gilmore's prose, states a general thesis, which is, I think, quite wrong. For what process we use does itself determine what sort of people we are, and therefore there is a reflexiveness, a kinesthetic, mutually affecting reaction between a society and its law.

Besides constitutional law, I also teach civil procedure. In that class, there is, as you might expect, a good deal of talk about due process. I have sometimes reminded my students of the importance due process accords to the values of accuracy, efficiency, federalism, and fair play. And yet, what is "fair play"? As an expression it is relatively new to our language, arriving in common usage not much before the time Shakespeare wrote.[229] And its early uses[230] leave no doubt that it was a conjunction of ideas parallel to expressions like "fair maid" in

227. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 33-41 (1973).
228. G. GILMORE, THE AGES OF AMERICAN LAW 110-11 (1977).
229. 4 THE OXFORD ENGLISH DICTIONARY 27 (reissue supp. 1933).
230. *See id.*

the phrase "Fair maid, send forth thine eye,"[231] or "fair day," as in "a fair day in summer; wondrous fair."[232] What then is fair play? It is play—a serious game, if you will—that is fair, that is beautiful to us. And foul play is that which revolts us. Because I do not believe we are born with a taste for jury trials or the Australian ballot, I must assume that our institutions play some role in establishing our aesthetic principles in these matters. The Constitution is first among such institutions. And yet we must apply to it, in its construction, the very standards it teaches us, knowing that even as we do so, we are creating a changed institution that will, in turn, change us.

Constitutional decisionmaking has, therefore, an expressive function. Perhaps this is true for all societies. But it is truer still for ours. The Constitution is our Mona Lisa, our Eiffel Tower, our Marseillaise. This dynamic role is fulfilled by all constitutional actors. For example, Lincoln's First Inaugural Address[233] may be taken as nothing more or less than a constitutional decision—announced through a different medium than a court opinion—that secession was not permitted by the Constitution.[234] The address, so moving in its efforts to persuade, and so heartbreaking when set against subsequent events, is a series of constitutional arguments, largely from text and structure, but also from history and ethic, doctrine and prudence. For our purposes, it is most important to note that since the address was not meant to guide future deciders, that is, to serve as precedent, its arguments can exercise, as a court's never quite can, a *wholly* expressive function. Lincoln calls on the South to think of itself in the terms of its constitutional identity. His decision that the Constitution does not permit secession and that various national activities will continue to be maintained is not, of course, insignificant. But no one can read those pages and miss the point of the arguments. It is not simply to persuade but, by persuading, to recast the conflict.

It is important, I think, to be reminded of the absolute requirement of our system that each significant constitutional decider exercise his or her judgment and not simply assume that all constitutional questions are matters for the judiciary. Nevertheless, I have drawn my focus in these lectures on judicial matters, and it is to a consideration of the

231. W. SHAKESPEARE, ALL'S WELL THAT ENDS WELL, act II, sc. iii, l. 58.
232. W. SHAKESPEARE, PERICLES, PRINCE OF TYRE, act II, sc. v, l. 36.
233. A. LINCOLN, *First Inaugural Address*, in 7 MESSAGES AND PAPERS OF THE PRESIDENT 3206 (1897).
234. *Id.* at 3208.

Court—rather than the President or Congress—and its role in performing the expressive constitutional function to which I now turn.

First I want to point out how well suited our Supreme Court is to fulfill an expressive role. For most of the life of the Court, there has been a tradition of unanimity. This is crucial if the court is to be perceived with clarity and with an undivided force. The strenuous efforts of the Court to achieve unanimity in the *Brown* desegregation opinion[235] are evidence that the Court itself is not unmindful of this fact, although the recent proliferation of opinions suggests that such virtues are, at least for a time, not wholly controlling. Yet for a very long period of our history, the Court either spoke through one opinion for the entire Court, or through a single opinion not joined in by dissenters.[236] Obviously, the splintering of the Court, and particularly of a majority, renders an expressive role less credible. A second distinctive feature of the Court is the provision for lifetime tenure.[237] It can be shown that the average length of years on the Supreme Court is less than that of the average senior congressman's years in Congress, who, far from having a lifetime appointment, must begin a new race only a little after the old one is over.[238] It is not, then, the length of service that is significant. Two Republican Presidential terms after all were enough to obtain a majority on the current Supreme Court. Rather, it is the security the Justices are seen to have while they are on the bench that is important. Lifetime tenure does not remove them from the political process so much as change how they are perceived within that process. They are made secure so that they need not be expedient, so that what they say can be believed to reflect their motives. In a political system like ours, which requires a healthy and pervading skepticism about political motives, this effect is indispensable.

Most interesting, and most illuminating, are those features in which we differ from the English practice, because our departures were deliberately chosen. It is largely to John Marshall that, as with so much else, we owe a debt for halting the English practice of seriatim opinions delivered orally and summarily reported and for replacing

235. *See* R. KLUGER, SIMPLE JUSTICE 596-616, 655-99 (1976).

236. *See* Seddig, *John Marshall and the Origins of Supreme Court Leadership*, 36 U. PITT. L. REV. 785, 800 (1975).

237. U.S. CONST. art. III, § 1.

238. The average length of service for Supreme Court Justices, not including those serving at present, is approximately 16 years. *See* A. BLAUSTEIN & R. MERSKY, THE FIRST ONE HUNDRED JUSTICES app. at 104-09 (1978) (table one). The average length of service for the 25 most senior Senators and the 75 most senior Representatives of the 96th Congress, as of January 1979, was approximately 21 years. *See* 37 CONG. Q. WEEKLY REP. 52, 52-55 (1979).

them with a written opinion for the whole Court.[239] Only once in Jay's tenure was this done, and this, in the important jurisdictional case arising from the Neutrality Proclamation,[240] seems to have been done in part to evade giving reasons for the decision.[241] Jay's successor, Ellsworth, tried to eliminate the seriatim practice, but his absence on a mission to France in 1800 provided an opportunity for backsliding, so that when Marshall was sworn in the following year, the practice of delivering seriatim opinions was still in some use.[242]

Marshall at once began urging their abandonment and replacement by a single, written opinion.[243] This, for two reasons, was a crucial step in permitting the Court to exercise an expressive function. First, it allowed the Court to speak with a single voice so that its message would be unqualified and the prestige of that message correspondingly enhanced. Second, the "quest for a single opinion inevitably increased the importance of bargaining and persuasion among the justices."[244] This meant that whatever statement finally gained consensus would reflect more than the attitudes of a single person, and this increased considerably the proximity an opinion was likely to have to the views shared by the great mass of the people.

The expressive function—which is in part to recreate national ideals—was also enhanced by a second departure from English practice. This was the assumption, from the beginning of our constitutional life, that the Court could overrule precedent.[245] This allows the Court to shift from supporting one view to another, contrary one when the latter appears more compelling; this prevents the Court from being locked into a single view. Without this flexibility, no Court could wisely undertake an expressive function, since conflicting truths will, from time to time, require reinforcement at each other's expense.[246] This feature of the Court's operation is perhaps most important, since it permits the

239. *See* J. SHIRLEY, THE DARTMOUTH COLLEGE CASES AND THE SUPREME COURT OF THE UNITED STATES 309-10 (1895).

240. Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6 (1794).

241. 1 J. GOEBEL, THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 765 (1971).

242. *Id.* at 778.

243. *See* J. SHIRLEY, *supra* note 239, at 310.

244. Seddig, *supra* note 236, at 796.

245. Indeed, there is no discussion of this point in Mason v. Eldred, 73 U.S. (6 Wall) 231 (1867), the first express overruling, which unanimously overruled Sheehy v. Mandeville, 10 U.S. (6 Cranch) 235 (1810), nor in the controversial Legal Tender Cases, 78 U.S. (11 Wall.) 682 (1870); 79 U.S. (12 Wall.) 457 (1870), overruling Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869), decided only the previous year. The Court merely states that "it is no unprecedented thing in courts of last resort, both in this country and in England, to overrule decisions previously made." 79 U.S. (12 Wall.) at 554.

246. *See* G. CALABRESI & P. BOBBITT, *supra* note 176, at 195-99.

Court to be a conduit of change. At the same time, the existence of various constitutional arguments—the conventions discussed in the first lecture—allows differing parties each to claim the Constitution as its own. And so, over time, it is the ability to *overrule* precedent that enables the Court to achieve this expression of values. To quote Lawrence's remark about the novel: "It can inform and lead into new places the flow of our sympathetic consciousness, and can lead our sympathy away in recoil from things that are dead."[247]

But one's view of the function of a court's decision often depends upon one's preference for particular constitutional arguments. So, for example, Charles Black wrote: "Judicial review has *two* prime functions—that of imprinting governmental action with the stamp of legitimacy, and that of checking the political branches of government when these encroach on ground forbidden to them by the Constitution as interpreted by the Court."[248] This account reflects Black's structural perspective;[249] you will recall that in the first lecture I said that each of the different kinds of argument implied a particular justification for judicial review.[250] For example, historical argument suggests a sort of social contract between government and the people, with the original intention of both parties determining the construction of that instrument—the written Constitution—which is the memorialization of the contract. Courts then, reflecting this view, examine legislation to see if it comports with the original understanding of the parties. They exercise solely a checking function, reviewing legislative action to check it against the original charter. Structural argument also implies a justification for judicial review. A court exercises a legitimating force with respect to legislation it necessarily, if inadvertently, validates in the process of applying it; and, of course, there could be no real legitimation without the power to *invalidate*.

One's view of the functions of the Supreme Court is as much a product of the approach one adopts to the Constitution, then, as are one's convictions about the proper foundation of judicial review. Professor Kurland has written that he doubts whether any such legitimating function is really exercised.[251] Professor Bickel, on the other hand, took up the legitimating idea so thoroughly that he would have added yet another function to describe the Supreme Court's role when it

247. *Quoted in* J. UPDIKE, PICKED UP PIECES 29 (1966).
248. C. BLACK, *supra* note 138, at 223 (emphasis added).
249. *See* text accompanying notes 120-21 *supra*.
250. *See* text following notes 3, 136-38 *supra*.
251. Kurland, Book Review, 28 U. CHI. L. REV. 188 (1960).

wishes neither to check nor to legitimate.[252] I think of this as a referring or remanding function, and I need hardly add that this is using a method in a prudentialist's way. For my own part I should like to draw attention to still other functions of the Court. First, just to break the spell that there are only one or two functions of judicial review, I will discuss briefly the "cueing function" in constitutional law. I would like to do this in the context of a single, concrete case so that you may appreciate the difference it makes whether a decision is attributed to one function or another.

On June 24, 1976, the Supreme Court handed down *National League of Cities v. Usery*.[253] At issue were the 1974 amendments to the Fair Labor Standards Act, by which the Act's minimum wage and maximum hours provisions were extended to state employees. The Court determined that these amendments would displace the states' freedom to structure operations in areas of traditional authority, by vastly increasing the expense of police protection, sanitation, fire prevention, and the like, and by limiting the choices of how they are to be provided.

The opinion in *National League of Cities* was met by considerable adverse commentary.[254] Many persons—including four members of the Court[255]—felt that this decision was a step back to the pre-New Deal era in which the Court routinely found reasons to limit the exercise of Congress' commerce power. Some said that *National League of Cities* cast doubt on the landmark *Darby* case,[256] which had virtually ended the invalidation of social legislation when Congress acts pursuant to its commerce powers. The case is indeed troubling if one assumes that it represents a new point at which the checking function is to be exercised.

But assume for a moment that this decision serves a different function, that of a cue to some other constitutional actor. Begin with the view that officials in each of the three branches of the federal government have the burden under the Constitution of judging their own ac-

252. A. BICKEL, *supra* note 6, at 29-33.

253. 426 U.S. 833 (1976).

254. *See, e.g.*, Comment, *At Federalism's Crossroads:* National League of Cities v. Usery, 57 B.U.L. REV. 178 (1977); Note, *Federalism and the Commerce Clause:* National League of Cities v. Usery, 62 IOWA L. REV. 1189 (1977); Comment, *Applying the Equal Pay Act to State and Local Governments: The Effect of* National League of Cities v. Usery, 125 U. PA. L. REV. 665 (1977); 25 EMORY L.J. 937 (1976); 30 RUTGERS L. REV. 152 (1976); 8 TEX. TECH. L. REV. 403 (1976). *See also* Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977).

255. 426 U.S. at 856 (Brennan, White & Marshall, JJ., dissenting); *id.* at 880 (Stevens, J., dissenting).

256. United States v. Darby, 312 U.S. 100 (1941).

tions according to the limits and restraints placed on them by the Constitution.[257] Their oaths of office demand as much. And the presumption of constitutionality that courts extend to legislation validly passed and signed into law, as well as the judiciary's aversion to inquiry into legislative motivation, necessitates some kind of constitutional review by each of the nonjudicial branches.

In at least one constitutional role, however, Congress has special responsibilities. Herbert Wechsler has written persuasively of the important part played by the states in the selection and composition of Congress.[258] More is involved here than just the obvious facts that the Senate is drawn wholly from a state constituency and that the state legislatures decide districting for the House. The perception of common interests, the background and associations of elected officials, the influence of local business and political interests are but a few of the factors that, as Madison clearly foresaw,[259] so aptly fit Congress to exercise the restraint of the local against the centripetal force of the national.

If we assume with Wechsler and Madison that the protection of the states' sovereignty is primarily the work of Congress, we need not conclude, with the dissent that cites Wechsler,[260] that the majority in *National League of Cities* is wrong. Instead, we may come to think that the case is not a major doctrinal turn, but a cue to a fellow constitutional actor, and encouragement to Congress that it renew its traditional role as protector of the states. The case does not threaten invalidating legislation per se, so much as it argues for a different construction of the Constitution, particularly for a sturdier federalism. There are several reasons why Congress' role as protector of federalism has been neglected lately, not the least of which, as a perusal of the *Congressional Record* and various committee reports confirms, is the popular conception of the Court's decision in *Wickard v. Filburn*.[261] The frequency and looseness with which the "Wheat Case" has come to be mentioned in Congress as proof that there are no limitations on the commerce power has contributed to the stultification of Congress' role. *National League of Cities* changed all that, as Congress' apparent change of heart regarding the extension of Social Security to state

257. *See* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 352-54 (1975); Linde, *Without "Due Process,"* 49 OR. L. REV. 125, 125-31 (1970).

258. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546-52 (1954).

259. *See* THE FEDERALIST No. 45 (J. Madison) 288-89 (Lodge ed. 1888).

260. 426 U.S. at 877 (Brennan, J., dissenting) (citing Wechsler, *supra* note 258).

261. 317 U.S. 111 (1942).

workers reflects.[262] Moreover, the cue was taken by the Executive as well.[263] But how do we know it was just a cue, and what difference does it make?

My thesis is, unlike so many, testable. If the Court were exercising a cueing function in *National League of Cities*, then we would not expect to see the Court granting certiorari in cases that present a development of the doctrine announced in that case. We would expect to see little development of it in the cases taken on appeal; indeed, its citation would be virtually absent, except in dicta. Finally, if we were lucky, we might even encounter a case presenting a substantial *National League of Cities* issue that the Court chose wholly to ignore. What do we find? We find virtually no development of this potentially major doctrinal change. There have been no *National League of Cities* cases taken up by the Court since that case was decided. And in the case of *City of LaFayette v. Louisiana Power & Light Co.*,[264] which applied the federal antitrust laws to state municipalities, there is not even a reference to *National League of Cities*, despite its discussion in both briefs, at oral argument, and, clearly enough, its relevance to the decision that followed.[265] Much of the commentary on *National League of Cities*, then, if my view is correct, is wholly irrelevant, and therefore it makes a great difference which function the Court was exercising.

I have treated you to this excursion because I wanted to give an example of a different function than the ones commonly discussed. However, I shall caution that my enumeration of these various functions is not exhaustive; I do not purport to give a complete list. Each function appears to us only by contrast with the others—just as Bickel's referral function only appears once one accepts Black's legitimating

262. H.R. 13040, 94th Cong., 2d Sess., 122 CONG. REC. H9481 (1976).

263. The recent internal Executive debate about the extension of FLSA regulations to mass transit workers is squarely the result. *See* Defendant's Motion for Partial Summary Judgment at 19-23, San Antonio Metro Transit Auth. v. Marshall, Civ. Act. No. SA-79-CA-457 (W.D. Tex., filed Nov. 21, 1979).

264. 435 U.S. 389 (1978).

265. *See* discussion in PREVIEW OF UNITED STATES SUPREME COURT CASES (ALI-ABA) No. 6, at 6 (Oct. 10, 1977). In a footnote, Justice Brennan wrote: "Our emphasis today in our conclusion, that municipalities are 'exempt' from antitrust enforcement when acting as state agencies implementing state policies to the same extent as the State itself makes it difficult to see how *National League of Cities* is even tangentially implicated." 435 U.S. at 413 n.42. But it does not follow, even if this statutory construction permits the Court to avoid reaching the constitutional issue, that *National League of Cities*' underlying rationale can be so effortlessly limited to states and not their subdivisions when the latter are anything other than "state agencies implementing state policies to the same extent as the State itself." *Id.* Five members of the Court, on both sides of the antitrust issue, would appear to agree. *See id.* at 423-24 (Burger, C.J., concurring); *id.* at 430-31 (Stewart, J., dissenting, joined by White, Blackmun & Rehnquist, JJ.). For similar avoidance maneuvers, see EPA v. Brown, 431 U.S. 99 (1977).

function, just as one can only see certain colors when they are next to others. Let us then turn to an examination of the expressive function at work in several well-known, much-written-about constitutional cases.

The school prayer case—*School District of Abington Township v. Schempp*[266]—was perhaps, with the *Miranda*[267] decision, the most controversial Supreme Court case of the 1960s. Unlike *Miranda*, however, it is widely disobeyed.[268] Does this mean that it is an example of poor constitutional deciding, like collapsing architecture, and if so, can this be related to an erroneous choice of function by the Court, analogous to the erroneous choice made by commentators on the *National League of Cities* opinion?

On February 14, 1958, three students in the public schools of Abington Township, Pennsylvania, and their parents, filed a complaint alleging that the school district and its employees were violating the students' religious consciences by causing the Bible to be read in the classrooms of the Township, as required by a Pennsylvania statute. The three children were from one family, the Schempps. On September 16, 1959, a three-judge court declared the Pennsylvania statute unconstitutional.[269] Its conclusion that the statute violated both the free exercise and establishment clauses of the first amendment was predicated on a factual finding that attendance at the Bible readings by all pupils and participation by teachers were compulsory.[270] In December the legislature of Pennsylvania, in an effort to eliminate the compulsory features of the statute, amended it to provide that any child could be excused from Bible reading or attending Bible reading.[271] The legislature's action prompted the Supreme Court to vacate and remand the suit to the three-judge court.[272] In February 1962, after a very brief trial, that court declared the amended statute unconstitutional.[273] The court evidently thought that it could avoid the effect of the amendment—by which the legislature had sought to remove the common element of compulsion that tied the establishment and free exercise claims together—by limiting the grounds of the decision to the establishment clause. The first case had held that the Schempp children could not

266. 374 U.S. 203 (1963).
267. Miranda v. Arizona, 384 U.S. 436 (1966).
268. *See* Katz, *Patterns of Compliance with the* Schempp *Decision*, 14 J. PUB. L. 396, 402 (1965).
269. Schempp v. School Dist. of Abington Township, 177 F. Supp. 398 (E.D. Pa. 1959).
270. *Id.* at 406-08.
271. *See* Schempp v. School Dist. of Abington Township, 184 F. Supp. 318, 382 (E.D. Pa. 1960).
272. School Dist. of Abington Township v. Schempp, 364 U.S. 298 (1960).
273. Schempp v. School Dist. of Abington Township, 201 F. Supp. 815 (E.D. Pa. 1962).

exercise their freedom not to repeat doctrines that were distasteful to them. Now, in the second case, the court held that regardless of a lack of compulsion, the simple reading of the Bible per se constituted an establishment of religion.[274]

In the Supreme Court this holding was affirmed, Justice Clark writing for the majority.[275] His is a purely doctrinal argument, distilling a test from earlier cases, and wholly ignoring the lengthy historical arguments that had characterized earlier discussions of the first amendment clauses at issue. His opinion is straightforward; roughly, the argument goes like this: (1) the relevant case law requires a "wholesome 'neutrality' " by the state;[276] (2) the test of this neutrality can be summed up, from the cases, as a simple matter of legislative intent and statutory effect;[277] (3) the three-judge panel's finding of fact that the readings, even though not required by law, were a religious ceremony and constituted the promotion of public religiousness permits the Supreme Court to infer a compatible legislative motive.[278] Thus, the statute was struck down since the legislature was taken to have established a particular religion in Abington Township.

There are many critical things one may say about this opinion, and most have been said. But perhaps most damning to any doctrinal argument is a dissent that relies on the same principle asserted in the majority. So it is troubling that Justice Stewart announced that he too was asserting a neutrality thesis. Justice Stewart's dissent in *Schempp*[279] argues that the construction required by the majority to create an establishment issue would trigger a free exercise issue on the other side, which would save the statute. In other words, forbidding states to take any measures that make available, without compulsion, religious materials or exercises, denies parents the right to exercise freely *their* religious convictions. A bona fide neutrality, on this view, is offended by a kind of state secularism, since those children whose parents cannot afford parochial schools are prevented from receiving an important element of their religious upbringing.

Which is the correct position? I do not believe one can arrive at the answer by these arguments. The fundamental error in these competing neutrality theses is that there is no way to choose between them by relying on the principle both assert. As a principle, a neutrality the-

274. *Id.* at 818-19.
275. 374 U.S. at 217-22.
276. *Id.* at 222.
277. *Id.*
278. *Id.* at 222-23.
279. *Id.* at 308.

sis is of no help whatsoever, because we have no adequate notion of generality on which a neutrality thesis, if it is to guide decision, must depend.

Recently it came to my attention that a litigant actually challenged the motto, "In God We Trust," that is engraved on United States coinage.[280] At first it may seem simple to say that the primary purpose of the coins is to provide a medium of exchange and not to advance a particular sectarian view. But that assumes that the level of generality is fixed on the coin. One could just as well ask what the primary purpose of the motto is. Or suppose we allow a conscientious objector to absent himself from military training. If a legislature does this it is plainly open to the charge of recognizing the particular set of religions whose scruples include objection to war. But if a legislature refuses to make such provisions, the objector quite plausibly can go to court and say that induction and service will infringe his free exercise rights. It is hard to see any decision concerning religious groups or individuals that does not commit a resource to, or withdraw it from, religions. Recent news stories of men allowing themselves to be bitten by poisonous snakes remind us that even a simple game statute may have an anti-religious effect on some sects. That Clark and Stewart should have determined that the first amendment's purpose was the enforcement of neutral principles was a fatal, if ironic, step in pursuit of satisfactory doctrine. Of course, this pursuit is necessary if checking or referring functions are to be adequately performed. In either case guidance must be given to others, *viz*, the lower courts and the legislatures.

But assume for a moment that a different function is to be served—an expressive function. We want, then, in the school prayer context, a statement that characterizes the society and its rules, but that does not, by itself, set up a general rule for development in the lower courts. At the outset, let me say that the first amendment religion clauses are well suited—by their history, not by chance—to be the vehicle of the Court's expressive function. The great prohibitions against Congress making a law respecting the establishment of religion or prohibiting the free exercise thereof did not apply to the states, where established churches were a live possibility, and in some states, a reality. Their value was chiefly heuristic. It was not that Jefferson feared an American inquisition. Rather he sought that elevation of projected purity into present virtue by which nations are often forged.

It is useful to remember that the constitutional text contains only

280. *See* O'Hair v. Blumenthal, 462 F. Supp. 19 (W.D. Tex. 1978).

three references to the deity, and two of these are quite remote: (1) the clause excluding Sundays for purposes of determining the period of time within which the President must exercise his veto;[281] (2) the dating of the document above the framers' signatures as "in the Year of Our Lord one thousand seven hundred and Eighty seven"; and (3) the third clause of article VI proscribing religious tests for office.[282] As Richard Morgan wrote after noting this paucity of religious reference:

> The absence of any positive reference to God was not accidental. It was . . . much remarked on at the time and blamed, by that dour Federalist Timothy Dwight, President of Yale, on Jefferson.
>
> . . . Under Washington's chairmanship [of the Constitutional Convention] there were no invocations, and when Benjamin Franklin (himself no orthodox Christian) moved that the meeting pray for divine guidance, he was defeated.[283]

With such a background, it is hardly surprising that the debate in the First Congress about the adoption of the religion clauses did not center on their usefulness as checks on likely national abuses. And thus, from the very start, these clauses held the potential for a heuristic, expressive use.

I do not want to write an opinion for you in *Schempp*. I will simply say that if this function, rather than either of the ones chosen by majority or dissenter in that case, had been adopted, the resulting opinion would have been quite different. The holding would have been based on the uniqueness of that quintessentially American institution, the public school, and its crucial role in our culture as framer and builder of the attitudes by which we, its products, characterize ourselves and our relation to organized society. It is not the religiosity of these prayers—mostly mumbled by sleepy children or ignored by adolescents preoccupied with less pious pursuits—it is not that which should disturb us. It is their inclusion in the *school* context. Not neutrality in and of itself, but abstinence in such a context is required. The Court's decision, however, calls into question—indeed summons into litigation—everything from charitable donations to the designation of Army chaplains.

Well, perhaps you would have written a different opinion. But what I want you to recognize is that, even with the weak and uncompelling doctrines of both sides in *Schempp* and an erroneous choice of functions, the case has nevertheless *come* to exercise a powerful expressive function. It is the statement of a new, secular national society.

281. U.S. CONST. art. I, § 7, cl. 2.
282. U.S. CONST. art. VI, cl. 3.
283. R. MORGAN, THE SUPREME COURT AND RELIGION 20-21 (1972).

That its mandate has been largely ignored in the public schools and that the Court has shown little inclination to exploit its checking potential further suggests to me that its importance is now perceived even by the Court as principally an expressive one.

Many commentators have asked why the Court would grant certiorari in such sensitive, controversial cases as *Schempp* when the Justices must have known that their decision would be met with hostility by the vast majority of Americans. After posing this question, which concerns popular response, scholarly analysts answer it in a most nonpopular way: whatever the reaction, it is said, "for most Americans . . . the vitality of these . . . decisions . . . must depend upon [the] intrinsic persuasiveness" of the constitutional arguments offered.[284] This answer is just as unlikely, it seems to me, as the opposite view that the arguments of an opinion are largely irrelevant and that only popular acceptance can justify a particular exercise of judicial review.[285]

If we accept the expressive function of the Court, then it must sometimes be in advance of and even in contrast to, the largely inchoate notions of the people generally. The Court's role in the exercise of this function, after all, is to give concrete expression to the unarticulated values of a diverse nation. So we must approach decisions that have this function as their principal justification with a different eye for their arguments. We need not entertain the fiction that the opinions will be pored over in every hamlet and town meeting. Nor need we abandon the care for craft. To the contrary, once we recognize the function, we know better how to craft the argument. There are other examples of the Court acting in this expressive way in major constitutional opinions.

For example, I do not think the decision in *United States v. Nixon*,[286] the Tapes Case, can be understood, much less justified, on any basis other than as an expressive one. In contrast to other weak doctrinal opinions, the Tapes Case is notable for the diffidence with which it has been treated. But I venture to say that it is the worst set of doctrinal arguments, the least convincing, the most easily refuted, brief but repetitious, bombastic but unmoving, one is likely to encounter in the pages of the *United States Reports*. Yet the outcome in *United States v. Nixon* is right because it expresses a national goal captured by the clichés "a government of laws, not men," and "equal justice under laws." The holding in the Tapes Case is not the preposterous one

284. Pollak, *Public Prayers in Public Schools*, 77 HARV. L. REV. 62, 64 (1963).
285. Deutsch, *supra* note 74, at 235-36.
286. 418 U.S. 683 (1974).

stated by the Court—that an assertion of privilege must be balanced against a prosecutor's need for evidence in a criminal trial, this balance to be struck by a preliminary inspection of documents or tapes.[287] The real holding is that a President, as chief executive officer, may not manipulate the instrumentalities of law enforcement both to prevent the law's enforcement and to acquit himself. To have ruled in the opposite way would have forever given strength to the view that the President is the sole and ultimate arbiter of the prosecution of the law, even when it means that he sits as judge in his own case. This is not really a holding since it is at once confined to the unique facts of a President's appointment of someone to prosecute him and his claims that the very material he said was privileged would exculpate him, and yet, as a principle, it is as unconfined as any great national ideal.

There are other decisions that may, as well, be usefully analyzed in this way. The magnificent statements that "[l]egislators represent people, not trees or acres"[288] and that they "are elected by voters, not farms or cities or economic interests"[289] are scarcely accurate as descriptions. But they do fulfill an expressive role. We may disagree about whether the issue is best thought of as one involving equal protection or the guaranty of republican government.[290] But by either approach, we may at the same time call for "one man, one vote" without being reduced to mathematical formulae, if we remember that the role of the Court in such a case is principally expressive and not checking. These cases are no less "effective" if they rely on constitutional actors other than courts to give them life. Justice Hans Linde of the Oregon Supreme Court, then a law professor, wrote with characteristic insight when he derided the narrow view of the Court's effectiveness and called for a recognition of the significance of a constitutional holding for its own sake.[291] What would be the implications, Linde asked, of a decision saying that a bit of organized public prayer never hurt anyone; that a little inequality of voting rights did not matter as long as the state thought it served a useful purpose in some larger scheme of things; that it was no injustice to ransack someone's home or wire it from floor to ceiling if the evidence obtained proved him guilty of a crime; or that difficulties of effective schooling, of peaceful public recreation, or of mixed-race families might on occasion justify evenhanded segrega-

287. *Id.* at 711-13.
288. Reynolds v. Sims, 377 U.S. 533, 562 (1964).
289. *Id.*
290. *See* W. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 270-81 (1972).
291. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972).

tion?[292] The value at stake is far more than programmatic effectiveness. Linde recognized that such holdings "would shape people's vision of their Constitution and of themselves."[293] This is the function of the Court's work that I have been calling "expressive."

If you have the same negative reaction I have when I repeat Linde's imaginary holdings, you might ask yourself why that is. Of course no court, deciding the cases to which he refers, need have made the statements Linde derives by negating their actual holdings. I think that we have this reaction because the Court's expressive function has already worked its way into our constitutional sense. And thus Linde's questions are not only examples of the expressive function, but, taken as a whole, are *an* example.

* * * * *

Jorge Luis Borges has written: "Sometimes at evening there's a face that sees us from the deeps of a mirror. Art must be that sort of mirror, disclosing to each of us his face."

The Constitution functions this way. How is this related to the various sorts of argument discussed in my first lecture? For one thing, whenever an ethical argument is advanced in an appropriate situation, its very advancement—the very fact of its avowal and assertion—serves an expressive function. It says: "We are such people as would decide matters on this basis"—while at the same time it works toward a decision that may serve an expressive function.

Also, ethical argument changes through time as the constitutional ethos changes. How does this happen? In part, I would say, because of the expressive functions served by various constitutional actors. So there is a double relation here: ethical argument is a powerful approach to the exercise of the expressive function, while that function has, in large measure, determined the availability and force and focus of ethical arguments. Take, for example, the famous *Bakke*[294] case. It seems to me that the expressive function of the Court is properly discharged by a statement that race, by itself, will not do as the basis by which people are to be judged. Imagine, if you doubt this, a different statement, "Race can sometimes be used to discriminate," or "Color can be used as a sole sufficient criterion for treating people differently if the color is black." I believe I appreciate the persuasive arguments that may be advanced for affirmative action, and I certainly think that

292. *Id.* at 238.
293. *Id.*
294. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). For a different view of this case, see Calabresi, *Bakke as Pseudo-Tragedy*, 28 CATH. L. REV. 427 (1979).

black people and women and Indians may claim a unique constitutional status. But think, for a moment, not just of the arguments but of the function, and the fact that *Bakke* does not render affirmative action impermissible.

I would not, however, like to tie ethical argument and the expressive function too closely.[295] My taxonomy of conventions is neither comprehensive nor clearcut. The various arguments I described often occur in combination. This is also true of the functions. Furthermore, the conventions that allow us to make arguments of different kinds are each themselves aspects of an expressive function that is reasserted whenever the relevant argument is used. Thus, the simple assertion of an historical argument is also the expression of a continuity of tradition, a fidelity to our forefathers' legacy to us, an acknowledgement of the modesty of our perspective and the limits of our wisdom, a statement that constitutional institutions are faithful as they are constitutional.

At the same time, while the various arguments seem to depend upon the conflict of their approaches for their existence, their role in serving an expressive function changes them. In the same poem I quoted above, Borges has written: "Art is endless like a river flowing, passing, yet remaining, a mirror to the same inconstant Heraclitus, who is the same and yet another, like the river flowing."

This concludes my consideration of constitutional argument and the functions of constitutional decisions. I will now draw from that consideration conclusions to four questions about the Constitution: (1) how it changes; (2) how it determines arguments; (3) how it brings about decisions; (4) how it legitimizes them. First, how does constitutional change come about? Change comes to the Constitution through many different channels and is mediated by different agencies. The most frequent processes are the incremental corrections in course that courts make as they confront unanticipated fact situations and must apply old rules reconsidered in their light. As both the interstitial and the reviewed methods of change operate from the past, they also operate on the past. It has been remarked that every artist creates his own precursors.[296] I must read Keats differently having read Yeats and perhaps read both differently having read Auden. So I must read *Pierce*[297] and *Meyer*[298] differently having read *Griswold*[299] and must read them

295. *See* text accompanying notes 221-24 *supra*.
296. *See, e.g.*, H. BLOOM, THE ANXIETY OF INFLUENCE (1973).
297. Pierce v. Society of Sisters, 268 U.S. 510 (1925).
298. Meyer v. Nebraska, 262 U.S. 390 (1923).

all differently having read *Roe*.[300]

Yet re-cognition differs from the incremental working-out of doctrine because it acts to make available different arguments. Thus, the work of Calabresi[301] may truly be called seminal, since it brought to the academy a different analysis, which, in the pattern of ideas circulating between the three branches of our profession, will find its way into acceptable argument in accepted opinions. The opinions will be accepted first as fragments for higher courts mending their own internal conflicts, and later, again, by lower courts trying to explain the rules that are the product of those conflicts, and later still by the temporary finality that occurs when a particular case is over. That acceptance will make such arguments part of the functioning perception of problems by lawyers. As Nelson Goodman has written: "[F]or reality in a world, like realism in a picture, is largely a matter of habit."[302]

There is also the rare, utterly transforming change that shatters the existing symmetry. In constitutional law, the Civil War was such a change. Yet one of the analytical changes it brought about underscores the point that constitutional approaches often differ in response to theoretical rather than practical needs. The development of substantive due process, and the response this development called forth from constitutional conventions of argument—the mistaken superimposition on the states of the federal model of enumerated powers—that gave us the notorious *Lochner* decision,[303] is one example I have in mind. Then the transforming constitutional event becomes less important than the change by which we know it. It has been said that Thucydides' *Peloponnesian War* has replaced the war itself since the latter can't stay in print.

These constitutional transformations do not give us new conventions, new approaches. They change the context in which these conventions are applied, and therefore, the sense of fit that each will provide in a particular setting. I do not wish anyone to think that a particular approach is correct, legitimate, or true in a way the others are not. Indeed, it is one of the fortunate results of these conventions that there is no one truth outside of them. This allows our institutions to take advantage of the insight captured in a remark by Niels Bohr

299. Griswold v. Connecticut, 381 U.S. 479 (1965).

300. Roe v. Wade, 410 U.S. 113 (1973).

301. *See, e.g.*, G. CALABRESI, *supra* note 225; Calabresi, *Transaction Costs, Resource Allocation and Liability Rules: A Comment*, 11 J.L. & Econ. 67 (1968); Calabresi, *The Decision for Accidents: An Approach to Non-fault Allocation of Costs*, 78 HARV. L. REV. 713 (1965).

302. N. GOODMAN, WAYS OF WORLDMAKING 20 (1978).

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

that the opposite of a correct statement is a false statement, but the opposite of a profound truth may well be another profound truth.[304]

Second, how do the various kinds of arguments discussed earlier come about? The various constitutional approaches I have discussed are made possible by corresponding features of our Constitution. A textual argument is possible only because we have a written Constitution; it is the Constitution's "written-ness," if you will, that enables textual approaches. Historical arguments are possible because the Constitution was proposed by a deliberative body, campaigned for, and ratified by the people, instead of being imposed on the people or announced as law by fiat. Structural arguments work because the Constitution establishes three principal, fundamental structures of authority—the three-branch system of national government, the two-layer system of federalism, and the citizen-state relationship. Prudential arguments are a result of our Constitution's rationalist superstructure of means and ends, of enumerated powers and implied methods, which impose a calculation of benefits. Doctrinal arguments are possible only because of the imposition of the federal courts into the constitutional process. Ethical arguments arise from the ethos of limited government, from the "limited-ness" of our Constitution.

In each of these features the American Constitution was unique. Because these features inhere in it, and make the various approaches possible, each generation of constitutionalists will sort itself into styles corresponding to the kinds of arguments. I have mentioned Bruce Ackerman[305] in this regard as an exemplar of a prudential approach; I must also add his contemporaries, Paul Brest[306] and John Ely,[307] as representative of the doctrinal and structural traditions, respectively. Hans Linde's articles[308] reflect a textual approach.

A particular problem is more or less suited to a particular approach when the factual features of the problem bear a certain relationship to the correspondent factual feature of the Constitution that gives rise to the approach. For example, the question whether a state may enforce its own statute when to do so conflicts with a federal statute is a problem that is singularly appropriate to a textual approach, since it shares a particular factual feature with a written rule in the Constitu-

304. N. BOHR, *Discussion with Einstein on Epistemological Problems in Atomic Physics*, in ATOMIC PHYSICS AND HUMAN KNOWLEDGE 66 (1958).

305. *See, e.g.*, B. ACKERMAN, *supra* note 109.

306. *See, e.g.*, P. BREST, *supra* note 257.

307. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST (1980); Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978).

308. *See, e.g.*, Linde, *supra* note 291.

tion, namely the competition for supremacy that article VI settles in favor of the federal statute.[309]

I am not claiming here that every constitutional problem presents a single question that will have a perspicuous factual feature which, on inspection, will turn out to be neatly paired with a particular constitutional feature and hence a particular sort of constitutional argument. I am arguing, instead, that the chance concatenation of numerous events makes one sort of constitutional argument work in a particular context. When we throw dice, it has been observed, we do not suspend the law of dynamics. Moreoever, a convention's development may make certain facts appear for the first time, or at least give them relevance for decisionmaking. For example, recall the defensive maneuvers Bickel prescribed for the Supreme Court.[310] Like the small fish, the photoblepharon, who emits light from window-like openings beneath its eyes, the Court, when threatened or when unsure, was to swim in a zig-zag fashion with lights on during the zig and lights off during the zag. The Court had been exploiting these "passive virtues," Bickel said, but unconsciously and infrequently. Of course, once Bickel told the Court this is what they had been doing, they began doing it in earnest. The "fact" of arguable mootness in the *DeFunis*[311] reverse discrimination case—a fact that, as Bickel himself neglected even to anticipate or refer to in his amicus briefs for the Anti-Defamation League,[312] and one that hardly would have detained the Court for a paragraph in another case—became the basis for the Court's ruling. This is the topological feature of constitutional analysis—the correspondence between chance, factual features of constitutional problems and features of the Constitution itself.

Third, how does constitutional decision come about? Do judges and commentators decide to adopt a particular approach, or does the Constitution require one approach rather than another? To the extent that one is attracted to natural law, it will perhaps seem that the choice of a particular approach is a matter of finding which approach, latent in the Constitution, is most suitable for a particular problem. To the extent one is attracted to positivist or existentialist perspectives, it will

309. U.S. CONST. art. VI, cl. 2.

310. *See* text accompanying notes 95-101 *supra*.

311. DeFunis v. Odegaard, 416 U.S. 312 (1974) (per curiam).

312. *See* Brief of Anti-Defamation League of B'nai B'rith as Amicus Curiae in Support of Jurisdictional Statement or in the Alternative Petition for Certiorari, *reprinted in* 1 DEFUNIS v. ODEGAARD AND THE UNIVERSITY OF WASHINGTON, THE UNIVERSITY ADMISSIONS CASE (A. Ginger ed. 1974); Brief of the Anti-Defamation League of B'nai B'rith Amicus Curiae, *reprinted in* 2 *id.* at 465.

often seem that the choice of one of these approaches is a creative decision which, over time, yields an artifact that is the body of law expressing this approach. Some judicial activity appears to support both views. I have discussed how particular factual features of a problem suit it to treatment by a particular approach. However, I also discussed the relationship between a particular approach and the function served by a single decision displaying this approach. It was my conclusion that the choice of a particular function often determines which conventions are appropriate. To the layman, without these conventions, all legal opinions will appear to be creative acts, choices. The constitutional arguments appear to be just plain arguments. To a judge or commentator working within a particular convention, its application will appear to be determined for us. This accounts for the genuine sincerity of judges who claim they only "apply" the law.

Both are wrong. Of course, legal truths exist within a convention. But the conventions themselves are possible only because of the constitutional object—the document, its history, the decisions construing it—*and* because of the larger culture, with whom the various constitutional functions serve to assure a fluid, two-way effect on the ongoing process of constitutional meaning. We have, therefore, a participatory Constitution.

What are the features of this Constitution? First, the present must to some extent control the past. Otherwise one's decisions are either determined by precedent, or we are forced to reject precedent and begin fresh. Second, the various conventions must have arisen, must have come into being, with the Constitution. They cannot be "natural" or have any a priori status. Third, the chance concatenations of facts that precipitate a constitutional decision must give rise to participation by observers, so that they are changed by it and they can communicate these changes in plain language. This participation, because it is two-way, gives tangible reality to the Constitution. By participation and observation I do not mean acquiescence. It is difficult to state just where this community of observer-participants ends, as the expressive function reminds us.

Our Constitution satisfies these conditions. The present does in part control the past. For example, Justice Douglas' use in *Griswold*[313] of the *Meyer*[314] and *Pierce*[315] cases as first amendment precedents might strike a law review editor as unprincipled or at least highly crea-

313. Griswold v. Connecticut, 318 U.S. 479, 482-83 (1965).
314. Meyer v. Nebraska, 262 U.S. 390 (1923).
315. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

tive. The first amendment is not even cited in *Meyer*. But after such a use by the Court, *Meyer* becomes a first amendment precedent, and, indeed, may now be seen as the decisive first step in the development of a first amendment doctrine of freedom of ideas. The present use of precedent transforms it, and the earlier case must then be read in light of the use to which it is later put.

Finally, the Constitution is a sort of self-exciting circuit. As it is applied in the courts, among other places, it gives rise to observer-participancy. Ask any American adolescent what we would look for to see if a society is just and he or she will answer, sooner or later, with conceptions drawn from the applications of the Bill of Rights. Judges, litigants, reporters, and juries are responsible for what they often believe themselves merely to be witnessing. Out of the chance collisions of interests, billions of random acts of observer-participancy arise. Yet by these acts the Constitution is changed just as surely as we are changed by it.

The manners that occur in constitutional law must also occur and have a meaning in everyday life. We must argue in everyday life. We must arrive at decisions by way of arguments. It is the use of these manners outside law—and of course this use is influenced by the reports of legal decisions, opinions, and so forth—that makes their use within constitutional law meaningful. "If there is a mystery to constitutional law," T.R. Powell once wrote, "it is the mystery of the commonplace and the obvious, the mystery of the other mortal contrivances that have to take some chances, that have to be worked by mortal men."[316]

I come now to the question with which I began. I have been engaged in a study of the legitimacy of judicial review. I have, however, gone about it in an odd way, beginning with the rejection of the usual justifications for this review and taking up instead a consideration of the kinds of argument that are customarily used in proving one justification or the other. Now we have at last arrived at the question with which we started. I hope this approach has not reminded you, as it has sometimes reminded me, of Steinberg's first cartoon in *The New Yorker* in 1941.[317] In it a female art student defends to a stern instructor her reverse painting of a centaur—equine head, human hindquarters—by saying: "But it *is* half man and half horse."[318] This upside-

316. Powell, *The Logic and Rhetoric of Constitutional Law*, in ESSAYS IN CONSTITUTIONAL LAW 89 (R. McCloskey ed. 1957) (paraphrasing Holmes).
317. THE NEW YORKER, Oct. 25, 1941, at 15.
318. *Id.*

down, topsy-turvy investigation was necessary if we were to avoid the tacit assumption of a particular answer to the problem of judicial review.

What then is the fundamental principle that legitimizes judicial review? There is none. Indeed, it follows from what I have thus far said that constitutional law needs no "foundation." Its legitimacy does not derive from a set of axioms which, in conjunction with rules of construction, will yield correct constitutional propositions. Indeed, I would go further and say that the attempt to provide such a formulation for constitutional law will likely lead to the superimposition of one convention on the Constitution, because only within this do we achieve the appearance of axiomatic derivation that the foundation-seeker is looking for. We do not have a fundamental set of axioms that legitimize judicial review. But we do have a Constitution, a participatory Constitution, that accomplishes this legitimation.

The physicist John Wheeler has told us about a game of "20 questions":

> You recall how it goes—one of the after-dinner party [is] sent out of the living room, the others agreeing on a word, the one fated to be questioner returning and starting his questions. "Is it a living object?" "No." "Is it here on earth?" "Yes." So the questions go from respondent around the room until at length the word emerges: victory if in twenty tries or less; otherwise, defeat. Then comes the moment when I am . . . sent from the room. [I am] locked out unbelievably long. On finally being readmitted, [I] find a smile on everyone's face, sign of a joke or a plot. [I] innocently start [my] questions. At first the answers come quickly. Then each question begins to take longer in the answering—strange, when the answer itself is only a simple "yes" or "no." At length, feeling hot on the trail, [I] ask, "Is the word 'cloud'?" "Yes," comes the reply, and everyone bursts out laughing. When [I was] out of the room, they explain, they had agreed not to agree in advance on any word at all. Each one around the circle could respond "yes" or "no" as he pleased to whatever question [I] put to him. But however one replied one had to have a word in mind compatible with one's own reply—and with all the replies that went before.[319]

This story is an illuminating metaphor of the process of constitutional decision. Note that if Wheeler had chosen to ask a different question, he would have ended up with a different word. But, by the same token, whatever power he had in bringing a particular word—

319. Lecture by Professor John Archibald Wheeler, University of Texas (Feb. 9, 1979) (copy on file with the author).

"cloud"—into being was partial only. The very questions he chose arose from and were limited by the answers given previously. In constitutional law the choice of a particular function will determine the sort of analysis that results in a particular case. On the other hand, the choice of function is not determinative by itself, since the chance facts of the case will make one convention rather than another appropriate for each question in the case. Moreover, these facts are, in part, a result of earlier constitutional decisions, and, in part, the result of the conventions.

If law is predicting what a court will in fact do, then we have only statistical predictions. This is not because judges and legislators are corrupt or stupid, but because we cannot always say that one particular convention or argument is correct in a particular case. We are put to the choice as to what type of event it is, so that we may determine which function to exercise. Only then can we determine the correct argument. And so I think law is not just predicting what a court will do, but why it will do it.

The finality of such decisions is commonly misunderstood. Our view is distorted owing to the various crises that begin, develop, and are resolved within the ongoing constitutional life. The constitutional crisis, begun in the 1930s by the assault of Legal Realists on the Court, and given political urgency by the frustration of the New Deal on constitutional grounds, reached its climax in the case of *Brown v. Board of Education*.[320] The ratifying coda was sounded in the adoption of the 1964 Civil Rights Act.[321] Not "guesses about the future," but the ordinary functioning of a participatory Constitution brought this about.

It may be that *Roe v. Wade* has begun another such crisis.[322] The current calls for a constitutional convention attest to our bewilderment at our problems and our deep faith in the constitutional instrument. Such a convention would be unwise, but it would scarcely be fatal nor would it likely much change the Constitution. This is because the Constitution is, in great measure, what *we* are, and a mere convocation is unlikely to change us very much. We are, after all, in part what the Constitution is and, as such, we resist stray appeals to change ourselves.

Our culture is made of many forms of life, of which the constitutional—the ways of argument, of decision, of function—are but a few. These, interworking, have assured constitutional decisionmaking a legitimacy that could not be conferred.

320. 347 U.S. 483 (1954).
321. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified in scattered sections of 28, 42 U.S.C.).
322. *See* text accompanying notes 204-16 *supra*.

Law reflects, and at the same time, determines the fate and worth of our society. It has been our destiny to attempt what no society before us has attempted, the making of justice through a constitution. It is as we are. So it is not yet complete. I am prepared to believe it holds within it fates as yet unfolded, toward which we are working. Like the grub that builds its chamber for the winged thing it has never seen but is to be,[323] we labor within our forms of constitutional decision to bring into being a just society. Our constitutional fate is determined by the arguments by which the Constitution structures decision; yet we determine their availability by our choice of constitutional functions. The framers could do no more for us than bequeath us such decisions, within such conventions. In our theories, therefore, are our fates.

323. The figure is from Holmes' speech at a dinner of the Harvard Law School Association of New York on February 15, 1913, reprinted as LAW AND THE COURT, THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 168, 174 (M. Howe ed. 1962).