

America's Constitutional Narrative

Laurence H. Tribe

Abstract: America has always been a wonderfully diverse place, a country where billions of stories spanning centuries and continents converge under the rubric of a Constitution that unites them in an ongoing narrative of national self-creation. Rather than rehearse familiar debates over what our Constitution means, this essay explores what the Constitution does. It treats the Constitution as a verb – a creative and contested practice that yields a trans-generational conversation about the meaning of our past, the imperatives of our present, and the values and aspirations that should point us toward our future. And it meditates on how this practice, drawing deeply on the capacious wellsprings of text and history, simultaneously reinforces the political order and provides a language for challenging its legitimacy, thereby constituting us as “We, the People,” joined in a single project framed centuries ago that nevertheless remains inevitably our own.

LAURENCE H. TRIBE, a Fellow of the American Academy since 1980, is the Carl M. Loeb University Professor and Professor of Constitutional Law at Harvard Law School. The recipient of ten honorary degrees, he was appointed by the Obama administration in 2010 to serve as the first Senior Counselor for Access to Justice, and he currently serves as a Member of the President's Commission on White House Fellowships. His many publications include *The Invisible Constitution* (2008), *American Constitutional Law* (3rd ed., 2000), and *On Reading the Constitution* (with Michael Dorf, 1991). He was elected a Member of the American Philosophical Society in 2010.

What is the Constitution? This question has puzzled many of its students and conscripted whole forests in the service of books spelling out grand theories of constitutional meaning. In their quest to resolve this enigma, scholars have powerfully illuminated both the Constitution's inescapable writtleness and its unwritten extensions, its bold enumeration of rights and its construction of structural protections lest those rights become mere “parchment barriers,” and the centuries-long dance of text, original meaning, history and tradition, judicial doctrine, social movements, and aspirational values. They have documented its grandest achievements and its most appalling failures – aspects of its story that are also, in a deep sense, *our* achievements and failures as a nation. For the Constitution is more than just a historical artifact guarded by the National Archives, or a source of legal authority invoked by the courts to adjudicate cases. True to its name, it *constitutes* us as a people – *e pluribus unum* – and draws all of our cross-generational debates into a project set in motion by, and unfolding through, its written and unwritten dimensions.

© 2012 by Laurence H. Tribe

Whatever else the Constitution may be – and I do not purport to offer a complete or final answer to that question – its unfolding interpretation and implementation through the crucible of competing stories about constitutional values thus represent elements of a *practice* essential to the creation and perpetual re-creation of “We, the People.” Efforts to pin it down or freeze its development in the historical past miss this crucial lesson: debates over constitutional meaning necessarily involve episodes in an unsettled enterprise, rather than the search for a long-lost key that unlocks the secret of some ultimate constitutional truth. Put simply, the Constitution is a *verb*, not a noun. And sometimes, as we teach our children in elementary school, distinguishing between a verb and a noun can make all the difference in the world.

On the second day of the 112th Congress, January 6, 2011, congressional leaders decided to read what they advertised as the Constitution of the United States. But they had the chutzpah to expunge provisions of that celebrated document that they believed modern developments had rendered obsolete, or even downright embarrassing – such as the infamous Three-Fifths Clause and the Fourteenth Amendment’s reference to the right of a state’s “male inhabitants” to vote.¹ Treating the Constitution as a creed to be recited in properly updated, politically correct, and perhaps theologically approved form – rather than as the inescapably flawed and invariably contested narrative of our national struggle over the fundamental commitments that define us as a people – those political leaders ignored the capacity of superseded provisions to serve as antidotes to “collective amnesia about [our] national missteps.”² They forgot the power of the deathless lines of Omar Khayyam’s *Rubaiyat*: “The moving finger writes, and having writ, moves on. Nor

all your piety nor wit shall lure it back to cancel half a line, nor all your tears wipe out a word of it.”

Laurence H. Tribe

It is not by participating in revisionist mutilation of the Constitution’s text, but by engaging in the unending debate over incorporating the document into our self-understanding at each moment in time, overlaid with still-potent and anachronistic echoes of a history that is not even past, that we truly engage in the task of collective interpretation and reinterpretation. This is the truest sense in which we experience our Constitution as a verb. We navigate the Constitution, its hazards, its shallows, its depths; we explore it still; we learn from our own adventures and misadventures. Otto Neurath, an Austrian writer of the Vienna Circle, evocatively offered the analogous image of “sailors who must reconstruct their ship on the open sea,” unable ever “to start afresh from the bottom” but fated to use “the old beams and driftwood” to reshape the ship while using whatever remains for support as old beams are taken away.

So too the perpetual project of fashioning and refashioning ourselves into “We, the People,” guided by our Constitution. Justice Robert Jackson once wrote of the “fixed star[s] in our constitutional constellation.”³ His metaphor seems singularly apt – though for a reason he might not have envisioned. The stars themselves may be fixed, but the task of navigating by them is one that inevitably calls for human insight. Thus, the points of light that punctuate the night sky, like the discrete provisions of the Constitution’s text, form patterns that speak to poets and philosophers perhaps more than they do to physicists and astronomers. The task of connecting the dots with stories – narratives, if you will – of our past and future ultimately rests on acts of imagination.⁴

As we have come to understand, the single tapestry of star-glittered sky that

we see above us represents not one simultaneous reality but a number of different realities, each from its own locus in time, yet all reaching us at the same moment. The Constitution, like the night sky, is composed of elements drawn from, and reflecting the concerns of, strikingly different eras in our history. Like the sky we see at night, our Constitution retains, as though still vital and unchanged, any number of features that – like supernovae that have collapsed into invisible black holes long before their light reaches our eyes – might have long since been erased or transformed. Readers of the Constitution must project patterns onto its provisions and make arguments in the name of invisible structures – structures that observers across the ideological spectrum can only describe as the “tacit postulates” of the constitutional plan.⁵

This essay is a meditation on how those postulates express themselves through competing historical narratives that draw on the terms of our Constitution to propel us as a people across time and space. That meditation is possible because the United States of America is itself less a place than a story – or, more precisely, a cluster of hundreds of millions of stories, some stretching back to before the 1700s, others unfolding at this moment, still others not yet begun – and because our Constitution provides a capacious home that is readily transformed as new stories join the practice of divining, contesting, and constructing its meaning.

While they are told in the name of a singular “We, the People,” the competing narratives that those stories weave together into so many unique patterns are really sites of fierce contest over constitutional meaning. As two of our most insightful constitutional theorists have put it, “There are stock stories about Americans as courageous pioneers who won the

West, stories about America as a nation of immigrants who came to these shores in search of liberty and equal opportunity, and stories about America as a distinctive country that has always existed free from those forms of feudalism and social hierarchy characteristic of the Old World or has self-consciously thrown them off.”⁶ Such narratives of aspiration and progress, as well as counternarratives of conquest and self-deception, exploitation and decay, “are as central to constitutional interpretation as the opinions of any jurist,”⁷ and indeed often play central roles in the most influential of those judicial opinions – opinions that not only set forth conflicting legal arguments about the meaning of America’s founding documents, but also promulgate competing narratives through and against which Americans debate the meaning of their past and the shape of their future.

We need not believe that many people actually read, much less pore over, the texts of those opinions, or even the texts they purport to interpret and elaborate, in order to recognize the deep and dynamic interplay between those overlaying texts, the stories they tell, and the themes in terms of which we conduct our most persistent national conversations.⁸

To be sure, the recent immigrant from Latin America, the third-generation American Italian, and the American Indian are not likely to agree on a single tale as they spin out their versions of the nation’s narrative. What nonetheless defines it as *one* American narrative out of many – *e pluribus unum* – is neither ancestry nor territory but a single trans-generational project framed by our Constitution. The U.S. Constitution is the one document, the one structure, on which all competing accounts converge and of which each account contains a vivid picture. Even for those who regard our nation’s Constitution as only partly embodied in the actual text of the

written document,⁹ it is that text that constitutes the canonical touchstone for all the narratives that define us as one People.

All those who hold public office as our representatives must take an oath to preserve and protect that one “supreme law,” or at least obey its mandates. And even those of us who need take no such oath are likely to identify the Constitution as our fundamental law. It is *fundamental* in the sense that it trumps all other sources of legal power and obligation and establishes the foundation on which those other sources must build. It is *ours* in the sense that, although we played no role in its original enactment, and though we may hold no office bearing an official responsibility for resolving disputes over constitutional construction, “We, the People” have an open, standing invitation to become involved in debating and settling its interpretation. Hence, we all have a personal stake in what it means.¹⁰

This is true *both* for those of us who believe that the Constitution always means just what it originally meant to those who wrote and ratified it – or to the entire country at the time it was enacted¹¹ – and for those of us who, like me, believe that at least its elastic phrases have an evolving meaning, one that may change with changed circumstances and understandings even though the *words* of the text itself, and the *basic principles* they enact, do not change over time.¹² It is sometimes suggested that the “originalists” among us, those who seek to interpret and apply the Constitution either in accord with the subjective intentions of its authors or, more plausibly, in accord with its original public meaning, must defend the legitimacy of being governed by the dead hand of the past and thus by a framework that gives us little or no ownership of our own constitutional destiny.¹³ The “dead hand” problem is indeed a serious one. But it need not be paralyzing if the “original

meaning” of all but the most mechanical of the Constitution’s provisions is understood at a sufficiently high level of abstraction and generality, in terms of overarching principles rather than fixed and determinate rules, so that the task of putting flesh on the Constitution’s bones of “liberty” and “equality” remains inescapably our own.

Indeed, even the responsibility for separating the “mechanical” provisions from the “abstract” ones is inevitably ours. Consider the constitutional prohibitions against federal and state “bills of attainder.” One might read these provisions as straightforward mechanical prohibitions of a particular kind of law (one whereby the legislature condemns a named person to a criminal penalty). Or one might read them as broad principles condemning practices that resemble “trial by legislature.”¹⁴ As I have written elsewhere, one cannot choose between these readings simply by “meditating about the language used” or by conducting “an exercise, however grand, in historical reconstruction.”¹⁵ Instead, one must engage in the active process of *constructing* constitutional meaning, not just in the “passive process of *discovering*” it.¹⁶

Moreover, even if we are among those who remain convinced that the Constitution’s central role is to pin matters down so as to resist the winds of disastrous or decadent change, rather than to facilitate and channel orderly transformation in pursuit of broad aspirations,¹⁷ it remains *we* who are choosing to be bound by that rigid framework. No external force, nothing beyond the Constitution’s words and principles as we come to understand them, ties us down.¹⁸ And the Constitution itself, excepting the mysterious Ninth Amendment¹⁹ and the Preamble’s announcement that the charter’s purpose is to establish a “more perfect Union,” is decisively silent on the matter of its own construction.²⁰

Laurence H. Tribe

Although we are unlikely to agree on the meaning of all its moving parts, it remains *our* Constitution that organizes our most important national conversations and furnishes the primary language and framework in terms of which we debate our rights and our nation's history.

To say that the Constitution belongs inexorably to all of us is not to deny that some visions of the Constitution capture the robust spirit inherent in America's ongoing narrative better than others. If, for example, one imagines our Constitution to be merely a thing of levers and pulleys – a clockwork universe mechanically propelling us forward in time as if we cannot trust our own initiative and forthright spirit to guide our progress and save us from moral decline lest, like the too readily tempted Ulysses, we succumb to moral rot – one is likely to resist the notion that a dynamic interplay among culture, politics, and law properly defines the evolving application and implementation of open-ended constitutional terms.²¹ This gloomy outlook, however, arbitrarily presupposes that America's governing narrative is one of decline rather than one of growth and potential improvement. It manifests a cynical (and, I believe, misguided) distrust of “We, the People.” It overlooks important features of both the original Constitution's framing and the deliberately transformative amendments adopted immediately following the Civil War, amendments whose evident purpose was to change, not to nail down, the status quo.²² And it fits uncomfortably with the Constitution's Preamble, which, far from fatalistically contemplating a future of inevitable moral regression, looks forward with fervent hope to the formation of “a more perfect Union.”²³

But if instead – as I have urged ever since the late 1970s – one understands much of the Constitution as *the framework for an*

ongoing debate over how best to approximate our national ideals, then one will naturally gravitate toward what some have described as a more “aspirational” sense of what the Constitution's design mostly seeks to accomplish and of how many of its rights-declaring and power-conferring provisions were from the outset structured to operate.²⁴ For something like four decades, I have been teaching about the Constitution in largely those terms, depicting it as the scaffolding or frame for that national dialogue. In its first printing in 1978, my treatise, *American Constitutional Law*, bore the subtitle “A Structure for Liberty” and was bound in a dust jacket depicting the Statue of Liberty not yet fully liberated from the elaborate scaffolding that surrounded her as she was delivered from France.

From 1989 to 1991, I had a particularly remarkable student and collaborator – now our nation's President – who helped me more precisely articulate the notion of the Constitution as an ongoing “conversation” among generations of Americans.²⁵ And that is how I continue to describe it.²⁶ I credited President Obama with that evocative image well before a new generation of scholars breathed vital new life into this way of reading our Constitution. He foresaw how, through an ongoing sequence of narratives, the Constitution can furnish nothing less than the principal language in which we – *not just judges, but all of us* – talk with (and, unfortunately, too often *past* or *at*) one another about which courses of action are faithful and which unfaithful to our nation's founding ideals.²⁷

The critics of this “living Constitution” approach – and there are many – need to be taken seriously, but they must not be permitted to demand of the approach something it does not even purport to provide: namely, an algorithm for providing determinate answers to contested issues of constitutional meaning. There are cir-

cumstances when such answers are called for and when recourse to the Constitution as living conversation or narrative will not suffice. Such a determinate answer may be needed, for instance, when we ask whether the Constitution's provision forbidding default on the nation's lawfully incurred public debt means that debt may be incurred by the President beyond the limit set by Congress if no compromise leading Congress to raise that statutory limit is reached in time to avoid the disasters that a default would bring.²⁸ And there are circumstances when, despite the sirens of a postmodern relativism that from time to time still rears its unwelcome head, such answers are available.

One can, of course, insist otherwise.²⁹ But I cannot take seriously the occasional suggestions that even the Constitution's most rigidly mathematical provisions, such as its requirement that the President must be at least thirty-five years of age, necessarily have "a radical indeterminacy of meaning . . . within a liberal community." Take, for instance, the notion that a sixteen-year-old guru might be permitted to run for and win the presidency because the guru's "supporters sincerely claim that their religion includes among its tenets a belief in reincarnation" that must be respected lest, in counting electoral votes, we violate the First Amendment's bar on federal establishment of "a particular religious view about the definition of age" and traduce the supporters' "rights under the free exercise clause, as well as their right grounded in democratic theory to choose who will govern them."³⁰ Clever, but surely in jest. With all respect, the fact that the Constitution is a conversation and a living narrative does not mean that it is only a game.³¹ Like it or not, for instance, there are two United States Senators per state, however large or small the state may be.³² That is not a matter of competing narratives or

of cultural context, however strongly that hardwired rule might conflict with a deep constitutional norm of equal representation as reflected in the principle of "one person, one vote."³³

There are, of course, many circumstances in which the Constitution cannot be reduced to correct and incorrect answers independent of context and unhinged from point of view. It is precisely when the idea of the Constitution as a language or an ongoing narrative is offered up by its proponents as a potentially conversation-stopping argument for this or that "liberal," or sometimes "conservative," result in the face of genuine indeterminacy that such proponents become most vulnerable to critique; they lose sight of the fact that the value of the "living Constitution" approach is precisely that it eschews this insistence on dogmatic and definitive readings of all the document's provisions. Thus, for instance, some have sought to demonstrate that the right to end one's pregnancy by having an abortion is among the "privileges or immunities" of United States citizens in the twenty-first century even though, they argue, the right may not yet have been entitled to that status when the Supreme Court proclaimed it to be protected through the Liberty Clause of the Fourteenth Amendment in 1973.³⁴ Well, even as a proponent of the right, I must confess to remaining unconvinced, in part because such demonstrations, proceeding as they invariably do in terms of the equal citizenship of women, manage to leave out of the equation the life of the unborn. *Q. -not-E.D.*

As a way of understanding what constitutional discourse embodies and how it proceeds, the idea of the Constitution as narrative is powerful and illuminating; as a way of persuading the unconvinced that one's reading of the Constitution's more

Laurence H. Tribe

nebulous provisions is “the” right one, the idea is akin to using the rules of syntax to prove a normative proposition. For anyone whose hope for philosophical explanation is that it should *enable* rather than *end* conversation, it is not a defect that the notion of constitutional narrative rarely, if ever, yields a conversation-stopper.³⁵

Nor does the inability of this perspective to provide decisive answers to normative questions mean that it is *silent* on the need for “We, the People” to confront fundamentally value-based choices. In this regard, it contrasts most strikingly with purely “common law” approaches to the Constitution, which focus nearly all their attention on the case-by-case elaboration of constitutional law and preach the legitimizing virtues of this incremental dynamic. The common law model is, of course, borrowed from the centuries-old and distinctly Anglo-American method of piling layer upon layer of judicial precedent using a mix of fact-specific analogical reasoning and rule-like formulations of judicial doctrines and legal standards. This approach, however, has a tendency to lose sight of the constitutional text while immersing itself in a vast sea of precedent. It thus speaks eloquently to the way in which the superstructure of constitutional doctrine properly unfolds in the interstices of basic choices of interpretive direction, but has little to say about the fundamental constitutional principles that this doctrine exists to implement. This shortcoming, in turn, points to a deeper flaw in the common law model: its inability to grapple with deep choices about which values ought to guide the evolving course of our national project.

Meaningful liberty demands committing ourselves to an intergenerational community of ends defined and circumscribed in a way that can connect our lives to a shared past while we grope toward an ever more inclusive vision of the good.³⁶

In this conception, the Constitution provides the primary thread of continuity that integrates us as a people engaged in this trans-historical project and offers a framework within which we converse about our commitments to the principles by which we feel bound – principles which themselves evolve with our changing selves.³⁷ In such a dialogue, there is no escaping the need to reckon with potentially transformative choices concerning our basic constitutional commitments. Common law constitutionalism looks away from this imperative, prioritizing instead a slow juricentric unfolding of doctrine in which the application of agreed-upon values evolves, but only one step at a time.³⁸

This limitation of common law approaches is starkly visible in a recent Supreme Court decision striking down a California law restricting the sale or rental of violent interactive video games to minors.³⁹ The majority’s opinion perfectly sounded the notes that dominate the last half-century of American First Amendment precedent, reciting the core commitments of our free speech canon in uncompromising terms. As a matter of constitutional common law, the case was unquestionably rightly decided, for the state had sought to restrict expression in terms of the message being expressed without fitting that restriction into any of the doctrinal pigeonholes, including “fighting words” and “obscenity,” defining the narrowly excepted categories plainly identified as exclusive by decades of settled precedent.

But at no point did the majority meaningfully grapple with a simple, important question: Are the excepted categories established in decades past sufficient to protect the values implicated *today* in *this* case, where the video games being marketed to minors included some that graphically depicted savage bludgeoning, dismembering, and sexual assaults on human beings,

often in stunningly realistic and sadistically precise detail, and typically in a manner that engaged the player of the game in a degree of active interplay with the sounds and images that made the result a vividly experienced version of virtual reality? Nor could the majority have meaningfully engaged with this question so long as it remained wedded to the common law approach. It would have required a dramatic intellectual leap to move from a rigid body of case law, defined by well-settled compartments of “protected” and “unprotected” speech, to a First Amendment vision sensitive to the unique issues raised by the marketing of violent video games to children. As an old Yiddish saying has it, you can’t leap a chasm in two jumps – let alone by the series of small steps characteristic of common law constitutionalism.

Justice Stephen Breyer vigorously disagreed with the majority, delivering a dissent that wrestled carefully with the challenges posed by technological advancements that blur the boundaries between speech and action and by the insights of modern social science that cast light on the psychological impact on children of participating in interactive violence, even if “only” in virtual form. Further, noting that judicial precedent sharply distinguishes between violent and sexual speech, giving the government little or no power to target the former but great latitude to suppress the latter, Justice Breyer posed a powerful and disturbing question: “What kind of First Amendment would permit the government to protect children by restricting sales of that extremely violent video game *only* when the woman – bound, gagged, tortured, and killed – is also topless?” Indeed, a good case can be made for the view that this divide is explicable only as a matter of historical happenstance and does not withstand critical scrutiny.

Whether we should respond by permitting minors to obtain images of topless

women without regulatory obstacles, by being more tolerant of state and local regulation of interactive video violence, or (as I am tentatively inclined to think) by doing both, here was an ideal occasion for returning to basics and treating the trans-generational Constitution itself – not simply the tower of doctrine constructed to implement it over the years⁴⁰ – as the compass with which We the People navigate our course through history. One need not agree with Justice Breyer’s conclusion to admire his willingness to confront the hard issues posed by *Brown v. Entertainment Merchants Association* rather than to hide between walls of citations that obscure the basic choices implicated by the case.⁴¹

The need for such choices is rendered apparent by even a brief tour through America’s historical traditions of free speech, which reveal sustained contest over the First Amendment’s protections and the values that give it life. This fact is best appreciated, appropriately enough, through a comparison of the best available historical accounts with the constitutional narratives regularly invoked to justify opinions like *Brown v. EMA*.

Distinguished historians tell us that when the First Amendment was ratified in 1791, it was understood by many legal thinkers to embody a view of free speech rights and the principles they protect grounded in the writings of Sir William Blackstone.⁴² The Revolution itself had triggered widespread suppression of Loyalist speech, and the Framers, notwithstanding their immersion in a social reality of biting commentary and robust debate, drew on received legal traditions to craft expressive freedoms.⁴³ On that view, freedom from prior restraint in the form of government licensing of the press constituted the main safeguard against tyranny.

However, as the Alien & Sedition Act crisis soon revealed, Americans were deeply divided over the nature of expressive lib-

Laurence H. Tribe

erties. Those divisions were caught up in questions of federalism and national power, as well as in beliefs about the boundaries of free speech rights, that persisted through the nineteenth century.⁴⁴ For example, a string of Southern laws declaring abolitionist speech a capital offense prompted dramatic sectional strife in the 1830s,⁴⁵ and the Gilded Age witnessed a proliferation of laws designed to provide an arsenal for the mainstream assault on “abuse” of speech rights by anarchists, socialists, immigrants, free-lovers, and labor agitators.⁴⁶ Libertarian counternarratives abounded, and lived experience provided a richer scope of expressive freedom than judicial opinions suggested, but the law remained a potent vehicle for agents of suppression.⁴⁷ As one scholar reports, “If the number of avenues being used and the amount of traffic on them are the gauge, America never experienced greater government restrictions on the press than during the first quarter of the twentieth century.”⁴⁸ A string of speech-restrictive cases during World War I thus rested firmly on conventional legal wisdom.⁴⁹ It was only after the 1930s – and mainly after World War II – that mainstream thinkers and the Supreme Court as their most authoritative voice made a significant choice to craft the deeply libertarian doctrine undergirding Justice Antonin Scalia’s opinion in *Brown*.

Yet this is not the narrative one encounters in contemporary discussions of the First Amendment. If anything, it sounds positively alien to the modern ear. The following story certainly rings more familiar:

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can

be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.⁵⁰

Here we see Justice Louis D. Brandeis, writing at the peak of his powers in the 1927 case of *Whitney v. California*. In the soaring rhetoric and legend-driven history that Brandeis composed for *Whitney*, modern Americans first encounter a vision of free speech that they can readily claim as their own: a laissez-faire ideal that pictures a largely unregulated marketplace of ideas as integral to the flourishing of our democracy, and that looks with deep distrust on any professed benefits of interventions that limit expression in the pursuit of other facets, whether egalitarian or paternalistic, of the American constitutional vision.⁵¹ It is around this story, and its attendant values, that the Supreme Court and the vast majority of Americans currently organize debates over the legitimacy, meaning, and purpose of laws that touch on rights of speech and press – a narrative that mixes mythological description with normative guidance.

Of course, not even the recent hegemony of this narrative in opinions like *Brown v. EMA* means that it stands unchallenged. Although courts have struck down laws prohibiting the most virulent forms of hate speech,⁵² misogynist pornography,⁵³ or the commercial possession, production, and sale of videos depicting animal cruelty⁵⁴ – and have done so in opinions that command my assent, though with considerable regret and a belief that these restrictions furthered legitimate ends permissibly achievable through other means – the laws at issue were all animated by persistent and legitimate First Amendment counternarratives sensitive to the harm that speech can inflict on minorities and other vulnerable groups. Justice Samuel Alito recently channeled a modern incarnation of these narratives in his stir-

ring dissent in *Snyder v. Phelps*,⁵⁵ a decision upholding the rights of gay-bashing (and supposedly religiously motivated) protesters to parade with hate-filled homophobic placards within painful view of the mourners at funerals of fallen American soldiers. Forcefully articulating the heart of his position, Justice Alito argued that “[i]n order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like petitioner.”⁵⁶ His moving – if ultimately unconvincing – opinion reveals the modern vibrancy of narratives that appeal to the Constitution and its underlying values as a forceful touchstone for the proper boundaries of laws regulating speech, rather than solely to a common law form of doctrine and its laissez-faire presumptions.

Two other lines of doctrine currently constitute particularly heated battlegrounds between laissez-faire and counterstories that invoke different values in our constitutional scheme to advance a more interventionist approach. As a result, these domains helpfully exemplify the value-laden choices that lie at the core of any deep engagement with the First Amendment as it has been practiced in the recent past. They also suggest the difficulties associated with adopting a purely gradualist posture toward constitutional change.

The first involves speech that we fear and hate. These cases typically arise when the Court pits liberty against security. Its struggle to strike the right balance between these basic elements of our constitutional order has produced such landmark and laudable opinions as those in the *Pentagon Papers Case*,⁵⁷ which shielded *The New York Times* and *The Washington Post* from orders to suppress publication of crucial information about the Vietnam War, and *New York Times Co. v. Sullivan*,⁵⁸ which powerfully protected our free press and permit-

ted open reporting about the civil rights campaign in the South. But the same struggle has also produced unfortunate and avoidable defeats for the cause of liberty. Indeed, in a series of less-than-admirable cases, the Court has aggressively invoked exaggerated narratives of self-preservation in times of collective peril to uphold the blatant censorship of dissident and information-enhancing speech. These sad defeats for liberty occurred most famously when the government sought to repress the U.S. Communist Party in 1951⁵⁹ and, most recently, when it prohibited civil rights lawyers from providing terrorist groups with legal advice about nonviolent activities.⁶⁰

A second counternarrative, to which I am cautiously but decidedly sympathetic, looks to our core democratic commitments and the threats posed by private power in order to support egalitarian principles in campaign finance jurisprudence.⁶¹ We see this egalitarian streak in the four justices who dissented from the Court’s opinion in *Citizens United v. FEC*,⁶² which vastly enlarged corporate financial power to influence American political campaigns in the ostensible service of “free” speech. We see it also in the four justices who dissented from the Court’s recent invalidation of modest and clearly speech-enhancing legislative efforts to offset the power of money in politics with public funding of campaigns⁶³ – a case that prompted a masterful dissent by Justice Elena Kagan.⁶⁴ In both cases, the dissenting justices were able to draw on long-standing narratives of a more interventionist stripe that build on the same constitutional impulses as more familiar narratives rejecting commitments to a laissez-faire ideology in the context of economic regulation.⁶⁵

As this whirlwind tour suggests, counternarratives that support a relatively interventionist approach to speech regulation

Laurence H. Tribe

stubbornly persist in modern First Amendment jurisprudence, sometimes speaking through Supreme Court majorities but often speaking through judicial dissents or legislative enactments supporting restrictions on speech. The availability of these competing narratives in many important cases renders unsatisfactory a purely common law account that looks only to the steady accretion of precedent, pointing us instead toward a Constitution whose practice invariably includes hard choices among values in tension, each resonant with constitutional meaning and each accordingly due a measure of respect in First Amendment discourse.

Justice Breyer drew in spirit upon this set of counter-traditions when he remarked:

This case is ultimately less about censorship than it is about education. Our Constitution cannot succeed in securing the liberties it seeks to protect unless we can raise future generations committed cooperatively to making our system of government work. Education, however, is about choices. Sometimes, children need to learn by making choices for themselves. Other times, choices are made for children – by their parents, by their teachers, and by the people acting democratically through their governments.⁶⁶

In this powerful conclusion to his dissenting opinion, Justice Breyer reminds us that First Amendment constitutional narratives steeped in the virtues of *laissez-faire* – however powerful they may have been in shaping our doctrine through common law development – do not enjoy sole authority over contemporary First Amendment discourse. Our Constitution, like our society, is aspirational in its broad compass and its embrace of more than just a single value as the guiding light of robust democracy. By appealing to the same principle of preserving our democracy that Justice Brandeis invoked in

Whitney, Justice Breyer thus extended an invitation to advocates of the *laissez-faire* narrative to (re)engage in conversation about how best to think about the freedom of speech in *today's* context. Justice Scalia's majority opinion declined that invitation. Instead, its brief analysis merely invoked answers to such questions arrived at in contexts long past.

These cases each represent moments at which the Court – or a concurring or dissenting Justice – offered a story of who we are and what we value, sometimes joining this vision to a retelling of our imagined past, but always linking it to the same constitutional text and speaking in the name of the same trans-generational community. The many versions of these narratives are thus all part of our nation's collective narrative, which in turn consists of an ongoing conversation about the evolving and competing principles that bind us in order to make us more free.

Although the Supreme Court is an important interpreter of the Constitution – and one of the only institutions with the capacity to transform its vision of the past into our governing law – the Justices do not stand alone in that enterprise, which has been entrusted from the start to every branch and level of government and to “We, the People.”⁶⁷ The common law method's decidedly juricentric focus, beyond its inability to cope with moments of fundamental choice and points of discontinuity, thus provides too narrow a lens on our Constitution, whose capacity to structure a trans-generational dialogue about the course of our shared destiny extends far beyond the courtroom door. Other official actors responsible for shaping constitutional meaning include the President, Congress, and the states. The interpretations adopted by these actors are particularly important in the many contexts – significantly including mili-

tary intervention, impeachment, and fiscal policy (as in the debt ceiling debate of mid-2011) – in which judicial review is unavailable or judicial involvement unlikely.

The task of interpreting and reinterpreting the Constitution is not, moreover, restricted to government officials. That practice, like the Constitution itself, belongs to us all. This point has been made forcefully and persuasively by scholars of what has come to be known as “popular constitutionalism” – which, in the words of one of its leading exponents, explores how “social movement conflict can motivate as well as discipline new claims about the Constitution’s meaning, and how responsive interpretation by public officials can transmute constitutional politics into new forms of constitutional law.”⁶⁸

The Supreme Court’s opinion in *District of Columbia v. Heller*,⁶⁹ the decision that struck down a local ban on the possession of handguns while announcing for the first time that the Second Amendment protects an individual right to bear arms (as opposed to solely a militia right, which would have permitted far more stringent gun control laws), exemplifies this dynamic. Although Justice Scalia spoke for the Court with all the eighteenth-century authority he could muster, deploying a full originalist analysis to support his conclusion and waging historiographical battle with the dissent over the meaning of preambles and commas in the 1780s and 1790s (fascinating stuff, no doubt), the power he wielded to strike down Washington, D.C.’s handgun ordinance was grounded emphatically in the late twentieth century’s constitutional politics of gun rights, personal freedom, and law-and-order society.⁷⁰ A full perspective on the opinion must therefore look beyond the courtroom to the wider national conversation in which the Court is just one of many participants and will remain only one of many actors in crafting the post-

Heller regime of gun control in the United States. Laurence H. Tribe

Consider, too, *Lawrence v. Texas*, the 2003 decision holding that private consensual sexuality between same-sex partners cannot be outlawed.⁷¹ The conditions making both *Heller* and *Lawrence* possible included social mobilization, evolving public opinion, and shifting political alignments.⁷² Both decisions were handed down by (different) bare majorities of the Supreme Court, although one freely invoked the capacious notion of “liberty” substantively protected from unwarranted intrusion by the Fourteenth Amendment’s Due Process Clause, while the other purported to discipline itself by combing through late-eighteenth-century manuscripts⁷³ – an exercise that triggered a no less scholarly rejoinder from Justice John Paul Stevens, who read the history, and thus the provision’s original meaning, quite differently.⁷⁴ And both decisions pointed toward a future of ongoing contest about the scope, implications, and social acceptance of the formal rights they created.⁷⁵

Some prominent students of the Constitution have interpreted the Court’s response to these episodes of “popular constitutionalism” in a different light: namely, that the document’s “soft” language, while figuring prominently in many of our debates about such issues as the meaning of equality and the outer reaches of federal and state power, is ultimately meaningless to legal outcomes truly grounded in popular support.⁷⁶ These missionaries of constitutional irrelevance, often influenced by recent trends in political science, adopt a rhetoric of hard-nosed realism and deride as outmoded a belief in the importance of the language that defines the reach of federal power or that guarantees individual rights. Although few of these skeptics doubt that our Con-

stitution's hardwired provisions – for example, those that separate the federal government into three distinct branches, organize the national legislature into two houses, and divide power between the nation and the states – matter greatly to our lives and to the life of our country, some see even these structures as little more than a threadbare armature supporting the true architecture of American government: political parties.⁷⁷

There are even those who argue that constitutional amendments as seemingly fundamental as the Thirteenth (abolishing slavery) or the Fourteenth (forbidding deprivations of life, liberty, or property without due process of law, guaranteeing equal protection of the laws, and ensuring the privileges or immunities of American citizenship) have made little or no actual difference.⁷⁸ The essence of their argument is that the practices such amendments are credited with preventing are just those that would have become unacceptable to the American public anyway. Furthermore, their argument continues, to the degree various measures have had broad public approval, the Constitution's condemnation has not mattered much in practical terms. Others emphasize that constitutional interpretations are often given legal force only through judicial proclamations, and proceed to frame the Supreme Court in turn as a fundamentally majoritarian institution unwilling to land far afield from national public opinion on matters of great moment.⁷⁹

To some degree, given the way constitutional understandings shape public attitudes, as well as the other way around, this is the familiar question of what came first, the chicken or the egg. But at rock bottom, the suggestion that the Constitution and judicial decisions construing it make relatively little difference amounts to a set of empirical claims about a series of counterfactual hypotheses – claims that I be-

lieve remain unproven and that I think are belied by, for example, the recent opinions striking down popular congressional efforts to curb corporate spending on elections for public office⁸⁰ and state efforts to restrict the sale to minors of gruesomely violent video games.⁸¹

Even legal outcomes supported by passionate social movements do not call for a crude reduction of the Constitution to politics, coupled with an insistence that the Constitution's rights-protective language matters little. To frame the point with a counterfactual: If there were no Second Amendment that gun rights social movements could begin to cohere around through the late twentieth century in order to seek legitimacy in the language of our fundamental charter, the course of the gun rights movement would almost certainly have been dramatically different. The close connection of that movement to the rhetoric of originalism – an association important to many leading gun rights advocates and part of the basis for their close identification with conservative constitutional thought⁸² – would have been severed, thus changing the constitutional and political stakes of an argument for gun rights by shifting it entirely into the domain of unenumerated rights elaborated in the name of the Fourteenth Amendment's comparatively vague protection of "liberty." Given that the rhetoric of originalism as the sole legitimate interpretive methodology played an important role in raising the popular salience of certain conservative ideas, including gun rights, the absence of this relatively specific rights-protecting textual provision would likely have proven significant to the form, nature, and success of efforts to persuade politicians, the public, and ultimately five Justices to discover in the Constitution an individual right to bear arms.⁸³ The importance of such persuasion is clear for an opinion like *Heller* (as well as a follow-up

opinion that applied it to the states⁸⁴), which produced countermajoritarian results with respect to a vast swath of local and state gun control laws. Ordinary politics, though a necessary condition for the vindication of federal gun rights, was hardly a sufficient one. Text made all the difference.

The power of the Constitution's language – both its pure text and the constitutional vocabularies loosely grounded in that text – extends further than facilitating the organization and success of political causes. It shapes our national destiny, our national conversation, and even our self-understanding. One need not fully embrace some of the gauzier claims about “expressive effects” and “rights consciousness” to recognize that the Constitution speaks to us at a deeper level than the mechanistic functioning of grand Madisonian structures. This is true even for the many of our fellow citizens who do not think consciously about the Constitution's provisions, but instead treat its guarantees as part of the air they breathe and the ground beneath their feet. Words and their persuasive pull are powerful things, creating a magnetic *internal* dimension of the Constitution's power – one sounding in the realms of narrative and national self-consciousness, of historical experience, and of what some have called “constitutional faith.”

Unless we are thoroughly enthralled by a chilling cynicism, we must recognize that we as a nation have begun, however slowly, to redeem many of the promises that Abraham Lincoln⁸⁵ identified as grounded in our Declaration of Independence and later framed by the Constitution. To be sure, our public schools have yet to become racially integrated, given the demographic changes that took place between 1954 and today, and the judicial retreat from plans designed to ensure racial integration.⁸⁶ Abortions have yet to

become fully accessible, especially to those with limited resources, given the growth of political, social, and sometimes violent resistance to the 1973 decision in *Roe v. Wade*.⁸⁷ Conversely, the rights of the unborn, for those who believe such rights are part of what our founding documents promised to protect when they spoke of “life,” remain largely without constitutional protection.⁸⁸ And many indigent defendants still do not receive a fully effective defense, despite the 1963 decision in *Gideon v. Wainwright*,⁸⁹ given the notoriously inadequate funding of public defenders' offices.

But those who would argue that the constitutional rulings of the 1950s through the 1970s, for example, and the constitutional texts and principles those rulings elaborated, therefore made no difference – or little difference worth speaking of – are surely relying on an unduly recent historical baseline as the standard against which to measure change or are instead suffering from an all-too-common form of historical amnesia. They thus fail to recognize that the Constitution commits “We, the People” to traverse an evolving path along which we recognize novel rights in text whose extraordinary potential escaped even the most daring imagination of its drafters.

In any case, those who claim that a constitutional provision, or a judicial decision construing it, mattered little in the end surely take too narrow a view of textual influence. The Fourteenth Amendment's command that states not deprive any person of the “equal protection of the laws” nor deprive any person of “liberty . . . without due process of law” was interpreted in a 1967 decision, aptly named *Loving v. Virginia*, to mean that states could no longer prohibit interracial marriage.⁹⁰ Even if social pressures continued to make life difficult for interracial couples in many parts of the country, as they surely did and

Laurence H.
Tribe

perhaps still do, can we say that the legitimating effect of that 1967 pronouncement on the dignity and self-worth of such couples was unimportant?⁹¹ And, even in the years before that case was decided, can we say that the effect of the Constitution's as yet unredeemed promises of due process and equal protection – promises that could be and were held up as sources of critique aimed at the existing order of things – made no real difference to those who could at least cling to the aspirations those promises expressed? The fact that a constitutional provision or judicial order does not immediately transform social reality in its own image does not bespeak irrelevance. Rather, it suggests a complex dialogue that shapes evolving social and political experience in ways more subtle and far-reaching than some of the more popular dismissals of the Constitution's rights-protecting provisions seem willing to recognize.

By the time *Lawrence* was decided in 2003, actual prosecution of private sexual activity between same-sex partners had become exceedingly rare. It would nevertheless be a serious mistake to suppose that the decision's primary impact was simply to eliminate the few such prosecutions that remained. As the Supreme Court clearly recognized, the decision's principal effect was to end one of the justifications most often offered for denying gay men and lesbians equal treatment in a wide range of civil contexts, from immigration to housing to employment to adoption. The decision contributed to wiping away the stigma and the insult to dignity that the Court's contrary ruling in 1986, in *Bowers v. Hardwick*, had legitimated and, indeed, endorsed. By rejecting and criticizing a dominant narrative about sexuality and the law, and by crafting a powerful counternarrative that spoke in stirring terms of dignity and destiny, the Court's altered understanding of same-sex inti-

macy and same-sex relationships contributed to a major cultural movement affecting the fabric of human relations in America. The Court's shift foreshadowed and encouraged the end of the ban on openly homosexual individuals serving in the military, as well as the ongoing discussion over whether our shared commitment to equality requires legal recognition of same-sex marriages.⁹² So robust a national debate would hardly have been conceivable at a time when governments were free to brand gay men and lesbians with the stigmatizing and debilitating label: "criminal."⁹³

Thus, the promise the Constitution holds for all Americans who interact with the text is an opportunity to bolster the causes in which they believe most deeply, commit the nation to achieving distant hopes of progress, and receive vindication in knowing that the American narrative has not left them behind or ignored their story.

My reflections in this essay on the structure and role of constitutional narrative should not be confused with an effort to construct a grand theory of constitutional meaning, an effort that has come to seem (to me, at least) beside the point. In my view, the search for a unified understanding of our Constitution and its place in our unfolding history requires not so much a unified theory of what the Constitution itself, both as a text and as an invisible edifice of principles and practices surrounding that text, *says* as a coherent understanding of what the Constitution *does*. Even if competing understandings of what the Constitution *says* and *means* yield too little common ground on which to build a coherent edifice of theory and doctrine,⁹⁴ the same is not true of what the Constitution *does*: it enables government officials in every branch and at every level and, even more impor-

tant, ordinary citizens throughout the country to ground both their defense of the existing legal and political order and their critique of that order in narratives cast in terms of a text and a structure that connects us all, like it or not, with a certain set of origins, and that links our future and that of our children to a shared fate.⁹⁵ As I wrote in *American Constitutional Law*, “The Constitution provides the basic language through which [our] institutions direct and challenge one another and the society at large and through which the people in turn contest the actions of those institutions.”⁹⁶

This vision is difficult to reconcile with recent scholarship insisting that there are moments at which the Constitution fails us, times at which it does not let us move quickly enough or efficiently enough in response to national peril. On such occasions, we are told, the Constitution can and must be set aside in the name of an “unbound executive,” an “emergency constitution,” a “constitution of necessity,” or some other dramatic term invoking the familiar metaphor that our Constitution is not a suicide pact.⁹⁷ This position has echoed across crises in American history, from Lincoln’s suspension of habeas corpus during the Civil War⁹⁸ to FDR’s repudiation of gold clauses⁹⁹ and the famous debate between Justices Robert Jackson and Felix Frankfurter in *Korematsu v. United States* (the Japanese American internment case)¹⁰⁰ over a principle of necessity that “lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”¹⁰¹ Post-9/11 legal thought has once again gravitated (albeit haltingly) in this direction, as scholars on both the political Left and Right urge us to “grit our teeth and do what must be done in times of grave peril.”¹⁰²

Perhaps unsurprisingly, few of those who write in this vein of emergency con-

stitutionalism take the view that the Constitution does not matter. To the contrary, many of them think it matters all too much – that the rights it confers and the structures it puts in place are potent obstacles to necessity and expediency, and that it is riddled with dangerous inefficiencies that might unwisely handicap a robust executive.¹⁰³ In this domain, it turns out that the Constitution’s importance – indeed, its extraordinary inconvenience – can hardly be overstated.¹⁰⁴

Inconvenient, perhaps; crippling, not demonstrated. Moreover, I am skeptical that we could successfully cabin the black holes these theorists would create and unleash in our constitutional order, and I have elsewhere expressed at length my belief in our Constitution’s capacity to persist through times of crisis without being dangerously distorted in the process. After all, “[i]t is within this framework that we have articulated and argued for a succession of tentative resolutions of competing values, ideals, and interests ... [and] that we have found the terms to recognize and sometimes repudiate our mistakes.”¹⁰⁵

There is no shortage of resources within our constitutional vocabulary to facilitate a rich and productive dialogue about the balance between terror and security, freedom and efficiency. To the contrary, narratives of military, economic, and social imperative have long held pride of place alongside counternarratives of civil liberty, restraint, and privacy. Thus, Justice Jackson could argue in *Korematsu* that the Supreme Court should step aside in the face of military emergency rather than warp the Constitution to legitimize the internment of Japanese Americans, and could then speak in stunningly eloquent terms of the Constitution’s separation of powers while finding that President Truman had acted illegally by seizing control of steel mills to stave off a

Laurence H.
Tribe

military and economic crisis.¹⁰⁶ Nor is it any major shock that the same Justice Jackson could leap to the defense of Jehovah's Witnesses who refused to salute the flag in the midst of World War II, timelessly evoking the First Amendment as a "fixed star in our constitutional constellation," while Justice Frankfurter's "Fall of France" dissent ominously invoked the growing threat posed by Nazi Germany and the imperative of national unity.¹⁰⁷

It is hard for me to imagine what America would look like in any of the brave new worlds born of a so-called emergency constitution. The Constitution is more than just a set of sometimes inconvenient rules limiting the President's ability to detain citizens. Nor can it simply be replaced by a temporary upgrade or substitute when fire bells sound in the darkest night. Its text and invisible structure are part of the nation's beating heart – the solar plexus at which the vast diversity of American narratives inevitably converge, and the conversation through which we remain tied to past and future generations. "We, the People" cannot simply bracket our Constitution, even if we improvidently depart from particular commands, for that very notion presupposes a "we" that exists outside the Constitution's frame. Were we to lose faith altogether in the Constitution's possibilities, to set it aside as a will-o'-the-wisp guide to modernity or place it on pause while we transact short-term imperatives, "we" could never again exist in quite the same way. This lacuna in our national project would become a chasm of discontinuity from which the "we" that might emerge would be a new "we" altogether, and across which the narratives that bind us together – *e pluribus unum* – might fray, come undone, and then reconstitute into something altogether different. That something might not necessarily be worse, but who among us is

prepared to risk that existential transformation?

In my view, therefore, there are no intermissions at which we may securely decide that the Constitution is temporarily incapable of accommodating our national project. Forevermore, its footing would be precarious, its centrality unstable, the practice of which it is an integral part vulnerable. In that sense, the Constitution is either an aspirational project worthy of our commitment entirely and always, or not at all.¹⁰⁸

Some scholars have spoken of a similar notion in terms of constitutional faith, whose absence led men like William Lloyd Garrison to damn the nation as a covenant with hell and whose presence leads others to gamble with a trans-historical enterprise whose success is necessarily uncertain.¹⁰⁹ The heralds of necessity and exception partake of the Garrisonian impulse. I respectfully dissent.

In so doing, I associate myself with the wondrously diverse groups of men and women throughout our nation's history who have linked their narratives to that of the Constitution, joining the national conversation that constitutes us as a people and stretches backward and forward in time. They understood, as do I, that the Constitution truly *is* a verb – an ongoing act of creation and re-creation that we perform in courts, in the halls of Congress and in the White House, on the streets, in scholarly works, and in a dazzling array of other venues. These elements of practice are all essential to our charter's remarkable capacity to constitute us as "We, the People." In this way, the story of the Constitution truly becomes America's constitutional narrative.

ENDNOTES

Laurence H.
Tribe

Acknowledgments: I am grateful for the superb research assistance of Joshua Matz, Harvard Law School (J.D. anticipated 2012), as well as that of Vivek Suri, Harvard Law School (J.D. anticipated 2013), and for Elizabeth Westling's and Harvard Law School Dean Martha Minow's remarkably insightful comments on earlier drafts.

- ¹ See Dahlia Lithwick, "Constitutional Whitewash," *Slate.com*, January 6, 2011, <http://www.slate.com/id/2280249/>.
- ² Laurence H. Tribe, *The Invisible Constitution* (Oxford: Oxford University Press, 2008), 64.
- ³ *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).
- ⁴ Tribe, *The Invisible Constitution*, 72.
- ⁵ *Ibid.*, 73.
- ⁶ Jack M. Balkin and Sanford Levinson, "The Canons of Constitutional Law," *Harvard Law Review* 111 (1998): 963, 987.
- ⁷ *Ibid.*
- ⁸ On that interplay, see Lewis H. LaRue, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* (University Park: Pennsylvania State University Press, 1995).
- ⁹ Tribe, *The Invisible Constitution*; Akhil Reed Amar, *America's Unwritten Constitution* (New Haven, Conn.: Yale University Press, forthcoming 2012).
- ¹⁰ For a powerful argument about the distinct roles of the Constitution as *fundamental* law, *higher* law, and *our* law – and about how an approach to constitutional interpretation that the argument's author describes as "framework originalism" enhances the Constitution's ability to serve those three roles – see Jack M. Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Cambridge, Mass.: Harvard University Press, 2011); and Jack M. Balkin, *Living Originalism* (Cambridge, Mass.: Harvard University Press, 2011).
- ¹¹ For a canonical statement of this position, see Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57 (1989): 849.
- ¹² To take one example, although the Fourth Amendment's prohibition on "unreasonable searches and seizures" remains fixed as a matter of constitutional text, the doctrines through which courts have applied that prohibition have changed dramatically across time. Thus, even though the notion of a "search" had been historically tied to physical trespass, the Supreme Court recognized the implications of rapidly changing technology when it held in *Katz v. United States* that the government had breached the Fourth Amendment's protections by electronically eavesdropping on a public pay phone. See 389 U.S. 347 (1967). It thus overturned prior holdings limiting "searches" to physical intrusions and instead explained that a "search" occurs whenever there exists a "reasonable expectation of privacy." This test, which still constitutes the threshold for determining whether a "search" has occurred, permits doctrine to evolve with changing social circumstances. So, too, in *Kyllo v. United States*, the Court held that the use of a thermal imaging device to detect the amount of heat emerging from a home constituted a "search" even if the law enforcement officer using the device never entered the property being searched. See 533 U.S. 27 (2001).
- ¹³ David A. Strauss, *The Living Constitution* (Oxford: Oxford University Press, 2010), 24–25; Adam M. Samaha, "Dead Hand Arguments and Constitutional Interpretation," *Columbia Law Review* 108 (2008): 606, 613–627; Michael Klarman, "Anti-Fidelity," *Southern California Law Review* 70 (1997): 381.
- ¹⁴ *United States v. Brown*, 381 U.S. 437 (1965). See Laurence H. Tribe, *American Constitutional Law*, 2nd ed. (Mineola, N.Y.: Foundation Press, 1988), 656–658. The first edition of this treatise was published in 1978, the third edition in 2000. Subsequent citations will note the relevant edition. See John Hart Ely, Note, "Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause," *Yale Law Journal* 72 (1962): 330.

- ¹⁵ Laurence H. Tribe, "Comment," in *A Matter of Interpretation: Federal Courts and the Law*, ed. Antonin Scalia (Princeton, N.J.: Princeton University Press, 1998), 68–71.
- ¹⁶ *Ibid.*
- ¹⁷ For an excellent discussion, see Michael C. Dorf, "The Aspirational Constitution," *George Washington Law Review* 77 (2009): 1631.
- ¹⁸ Tribe, *American Constitutional Law*, 3rd ed., 24.
- ¹⁹ But not entirely mysterious: see Tribe, *The Invisible Constitution*, 145–148.
- ²⁰ See *ibid.*, 149–154. See also U.S. Const., amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State"). I should concede that at least one scholar disagrees. See Michael Stokes Paulsen, "Does the Constitution Contain Rules for its Own Interpretation?" *Northwestern University Law Review* 103 (2009): 857.
- ²¹ I made a similar point in the first edition of my treatise. See Tribe, *American Constitutional Law*, 1st ed., xv.
- ²² Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, Conn.: Yale University Press, 1998); Dorf, "The Aspirational Constitution," 1647–1649.
- ²³ This point was vigorously disputed in a debate between Justice Scalia and me in the mid-1990s. See Scalia, ed., *A Matter of Interpretation*, 37–47, 65–94, 133–143.
- ²⁴ Justice Stephen Breyer has championed a form of such "living constitutionalism" from his seat on the Supreme Court, arguing that the Constitution operates as a living instrument designed to secure American democracy through a judicial process that applies unchanging constitutional values to evolving circumstances. See Stephen Breyer, *Making Our Democracy Work: A Judge's View* (New York: Knopf, 2010).
- ²⁵ In 1991, Michael Dorf and I published a book in which we credited Barack Obama and his classmate Robert Fisher with the metaphor of "constitutional interpretation as conversation"; see Laurence H. Tribe and Michael Dorf, *On Reading the Constitution* (Cambridge, Mass.: Harvard University Press, 1991), 31 n.1. Obama continued to develop the image in his book *The Audacity of Hope: Thoughts on Reclaiming the American Dream* (New York: Crown, 2006), 92.
- ²⁶ Tribe, *American Constitutional Law*, 3rd ed., 23–24. I argue that the "Constitution provides the basic *language* through which [our] institutions direct and challenge one another and the society at large and through which the people in turn contest the actions of those institutions."
- ²⁷ Michael Dorf and I explored this notion in our book *On Reading the Constitution*, entitling the second chapter of that book "Structuring Constitutional Conversations." This represented a refinement of my prior work. In the years since, others have elaborated on the conversation metaphor in powerfully illuminating works of their own. See Balkin, *Constitutional Redemption*; Lawrence Lessig, "Fidelity in Translation," *Texas Law Review* 71 (1993): 1165; Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005); Jed Rubenfeld, *Revolution by Judiciary: The Structure of American Constitutional Law* (Cambridge, Mass.: Harvard University Press, 2005); Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (New Haven, Conn.: Yale University Press, 2001).
- ²⁸ For my negative answer to that question – an answer some certainly dispute – see Laurence H. Tribe, "A Ceiling We Can't Wish Away," *The New York Times*, July 7, 2011, <http://www.nytimes.com/2011/07/08/opinion/08tribe.html>; Laurence H. Tribe, "The Constitutionality of the Debt Ceiling and the President's Duty to Prioritize Expenditures," *Balkanization* blog, July 16, 2011, <http://balkin.blogspot.com/2011/07/constitutionality-of-debt-ceiling-and.html>.
- ²⁹ For example, in the midst of the recent debate over the constitutional legitimacy of unilateral executive action to borrow money in defiance of a statutory debt limit – legitimacy that its proponents attribute (I believe mistakenly) to the Public Debt Clause of the Fourteenth

Amendment – legal scholar Mark Tushnet went so far as to insist that “THERE IS NO ‘FACT OF THE MATTER’ on whether a constitutional argument is good or bad, as there is about the shape of the world. Constitutional arguments are good if there’s enough political wind behind them to make them plausible/credible/winning among relevant audiences, bad if they don’t pass the plausibility threshold among those audiences”; Mark Tushnet, “Opinions on the Shape of the World Differ,” *Balkanization* blog, July 1, 2011, <http://balkin.blogspot.com/2011/07/opinions-on-shape-of-world-differ.html>.

Laurence H. Tribe

- ³⁰ Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Cambridge, Mass.: Harvard University Press, 1988), 61–62.
- ³¹ Justice Kagan recently reminded us of this fact in her elegant dissenting opinion in *Arizona Free Enterprise Club v. Bennett*, 131 S. Ct. 2806, 2829 (2011) (Kagan, J., dissenting). Responding to the Chief Justice’s observation that “campaigning for office is not a game” (*ibid.*, 2826 [Roberts, C.J.]), she states, “truly, *democracy* is not a game”; *ibid.*, 2846 (Kagan, J., dissenting), emphasis added.
- ³² U.S. Const., art. I, sec. 3. Indeed, our inability to construe away or work around this provision and others like it, and its alleged consequence of sabotaging American democracy, has led legal scholar Sanford Levinson to call for a new convention at which the Constitution could be entirely rewritten. See Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (New York: Oxford University Press, 2006).
- ³³ Tribe, *The Invisible Constitution*, 120–121.
- ³⁴ See, for example, Jack M. Balkin, “Abortion and Original Meaning,” *Constitutional Commentary* 24 (2007): 291.
- ³⁵ See Robert Nozick, *Invariances: The Structure of the Objective World* (Cambridge, Mass.: Harvard University Press, 2001), 3; Robert Nozick, *Philosophical Explanations* (Cambridge, Mass.: Harvard University Press, 1981), 5, 13–15, 19–21, 23–24. See also Hannah Arendt, *Men in Dark Times* (New York: Harcourt, Brace, 1968), 8.
- ³⁶ See Laurence H. Tribe, “Ways Not to Think About Plastic Trees: New Foundations for Environmental Law,” *Yale Law Journal* 83 (1974): 1315, 1326–1327; Laurence H. Tribe, “Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality,” *Southern California Law Review* 46 (1973): 617; Laurence H. Tribe, “Policy Science: Analysis or Ideology?” *Philosophy & Public Affairs* 2 (1972): 66.
- ³⁷ This conception of the Constitution has been elegantly developed in new and fascinating directions by several recent commentators. See generally, sources discussed in notes 25–27.
- ³⁸ See, for example, Strauss, *The Living Constitution*.
- ³⁹ *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011).
- ⁴⁰ Tribe, *The Invisible Constitution*, 172–180 (discussing geodesic construction of the Constitution); Richard H. Fallon, *Implementing the Constitution* (Cambridge, Mass.: Harvard University Press, 2001).
- ⁴¹ Indeed, Justice Breyer has recently published a theory of constitutional and statutory interpretation that boldly tasks the Court with an ongoing mandate to “make our democracy work” by grappling pragmatically with the challenges posed by an ever-changing world; see Breyer, *Making Our Democracy Work*.
- ⁴² See generally, Leonard Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985).
- ⁴³ Constitutional historian Leonard Levy notes that the “conduct of the American revolutionists usually conformed with the maxim *inter arma silent leges* [in times of war the laws are silent]. . . . [S]peech and press, therefore, were not free during the Revolution”; *ibid.*, 173. Historian Forrest McDonald describes the Framers as “divorced from substantive reality” and notes that “no public figure in America during the 1780s expressed a view of freedom of the

- press that differed in any substantial way from the views of Blackstone and Holt"; Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University Press of Kansas, 1985), 49–50.
- 44 Keith Jenkins, "The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence," *The American Journal of Legal History* 45 (2001): 154; Levy, *Emergence of a Free Press*, 307–338; James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (Ithaca, N.Y.: Cornell University Press, 1956); John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* (Boston: Little, Brown, 1951).
- 45 See generally, Michael Kent Curtis, *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History* (Durham, N.C.: Duke University Press, 2000); Clement Eaton, "Censorship of the Southern Mails," *American Historical Review* 48 (1943): 266. See also William Lee Miller, *Arguing About Slavery: John Quincy Adams and the Great Battle in the United States Congress* (New York: Random House, 1995).
- 46 See Helen Horowitz, *Rereading Sex: Battles over Sexual Knowledge and Suppression in Nineteenth-Century America* (New York: Random House, 2002); David Rabban, *Free Speech in its Forgotten Years* (Cambridge: Cambridge University Press, 1997); Margaret A. Blanchard, *Revolutionary Sparks: Freedom of Expression in Modern America* (New York: Oxford University Press, 1992); Paul Murphy, *World War I and the Origin of Civil Liberties in the United States* (New York: Norton, 1979).
- 47 Mark Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (Berkeley: University of California Press, 1991).
- 48 Harold Nelson, ed., *Freedom of the Press from Hamilton to the Warren Court* (Indianapolis: Bobbs-Merrill, 1967), xxxi.
- 49 See, for example, *Schenck v. United States*, 249 U.S. 47 (1919); and *Debs v. United States*, 249 U.S. 211 (1919).
- 50 *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).
- 51 See also *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas. . . . [T]he best test of truth is the power of thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (recognizing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").
- 52 *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). See also Anthony Lewis, *Freedom for the Thought We Hate: A Biography of the First Amendment* (New York: Basic Books, 2007).
- 53 *American Booksellers v. Hudnut*, 771 F. 2nd 323 (7th Cir., 1985).
- 54 *United States v. Stevens*, 130 S. Ct. 1577 (2010).
- 55 *Snyder v. Phelps*, 131 S. Ct. 1207 (2010).
- 56 *Snyder*, 131 S. Ct. 1229 (Alito, J., dissenting).
- 57 *New York Times Co. v. United States*, 403 U.S. 713 (1971).
- 58 *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
- 59 *Dennis v. United States*, 341 U.S. 494 (1951).
- 60 *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).
- 61 See generally, Kathleen Sullivan, "Two Concepts of Freedom of Speech," *Harvard Law Review* 124 (2010): 143.
- 62 *Citizens United v. FEC*, 558 U.S. 08-205 (2010). In *Citizens United*, the Court reversed several precedents – and more than a century of legislative enactments reflecting a concern with the influence of corporate power in elections – to strike down provisions of the Bipartisan Cam-

paigned Reform Act that prohibited unions and corporations from spending funds from their general treasuries, as opposed to more heavily regulated political action committees, on electioneering communications. The effect of this decision was to allow unions and corporations to spend substantially more on elections, which prompted widespread and high-profile concern about the resulting potential for capture and corruption and for the erosion of meaningfully democratic self-government. Laurence H. Tribe

⁶³ *Arizona Free Enterprise Club v. Bennett*, 131 S. Ct. 2806, 2829 (2011). In *Bennett*, the Court held that Arizona's matching-funds scheme, which provides additional funds to a publicly funded candidate when expenditures by a privately financed candidate and independent groups exceed the funding initially allotted to the publicly financed candidate, substantially burdens political speech and is not sufficiently justified by a compelling interest to survive First Amendment scrutiny.

⁶⁴ See *Bennett*, 131 S. Ct. 2830 (Kagan, J., dissenting) ("The First Amendment's core purpose is to foster a healthy, vibrant political system full of robust discussion and debate. Nothing in Arizona's anti-corruption statute, the Arizona Citizens Clean Elections Act, violates this constitutional protection. To the contrary, the Act promotes the values underlying both the First Amendment and our entire Constitution by enhancing the 'opportunity for free political discussion to the end that government may be responsive to the will of the people.' I therefore respectfully dissent" [internal quotation omitted]).

⁶⁵ Legal scholar Cass Sunstein accordingly argues that many of the Court's decisions protecting spending on speech, especially by corporations but not exclusively so, make the same mistake as did the infamous decision in *Lochner v. New York* – which struck down a New York law regulating workplace and employment conditions in bakeries, and which has since become a canonical example of the Court wielding its power of judicial review to impose libertarian economic assumptions – in treating the "free market" as though it were the product of nature rather than of law. See Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press, 1995). Although he sometimes takes these arguments further than I would, I am sympathetic to the general point and sketched a similar argument in my 1985 book *Constitutional Choices*. See Laurence H. Tribe, *Constitutional Choices* (Cambridge, Mass.: Harvard University Press, 1985), 192 – 220.

⁶⁶ *Brown*, 131 S. Ct. 2771 (Breyer, J., dissenting).

⁶⁷ See Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004).

⁶⁸ Reva B. Siegel, "Dead or Alive: Originalism as Popular Constitutionalism in *Heller*," *Harvard Law Review* 122 (2008): 191, 201. In a sympathetic but trenchant critique, legal scholar Martha Minow has called attention to the tendency of popular constitutionalism to overemphasize social movements and to marginalize the other enormously significant constitutional interpreters within officialdom, including state governments and the executive and legislative branches of the federal government; Martha L. Minow, "Constituting our Constitution, Constituting Ourselves: Comments on Reva Siegel's Constitutional Culture, Social Movement, Conflict and Constitutional Change," *California Law Review* 94 (2006).

⁶⁹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁷⁰ Reva Siegel made this point in her compelling article "Dead or Alive," published almost immediately after *Heller* was decided.

⁷¹ 539 U.S. 558 (2003).

⁷² Indeed, the heightened salience of gun rights issues and emergence of debates over the nature of the Second Amendment right ultimately led me to deeper research that in turn prompted a change of view from the second to the third edition of my treatise on American constitutional law. See Tribe, *American Constitutional Law*, 3rd ed., 893 – 903. Here, I argue that the Second Amendment protects an individual right to bear arms, as opposed to a collective right – as I argue in the second edition – albeit a right subject to considerable regulation. This switch, and the resultant defense of an individual right to bear arms in the 2000

- edition of my treatise, was discussed by Judge Laurence H. Silberman in his opinion for the District of Columbia Circuit in the decision affirmed by the Supreme Court in *Heller*. See *Parker v. District of Columbia*, 478 F. 3rd 370, 380 n.7 (D.C.C., 2007).
- 73 On the methodology in *Lawrence*, see Robert Post, "Foreword: Fashioning the Legal Constitution: Culture, Courts and Law," *Harvard Law Review* 117 (2004): 1–11, 77–112; Laurence H. Tribe, "*Lawrence v. Texas*: The 'Fundamental Right' That Dare Not Speak Its Name," *Harvard Law Review* 117 (2004): 1893–1945; Pamela Karlan, "Foreword: Loving *Lawrence*," *Michigan Law Review* 102 (2004): 1447. Justice Scalia's controversial originalist methodology in *Heller* has drawn several defenders. See, for example, Randy Barnett, "News Flash: The Constitution Means What it Says," *The Wall Street Journal*, June 27, 2008; Lawrence Solum, "*District of Columbia v. Heller* and Originalism," *Northwestern University Law Review* 103 (2009): 923. However, it has also drawn numerous critics, including some prominent conservative jurists. See, for example, J. Harvie Wilkinson III, "Of Guns, Abortion, and the Unraveling Rule of Law," *Virginia Law Review* 95 (2009): 253; Nelson Lund, Lucas Powe, Jr., and Adam Winkler, "Civil Rights: The *Heller* Case – Minutes From A Convention of the Federalist Society," *New York University Journal of Law & Liberty* 4 (2009): 293, 294–305; Richard Posner, "In Defense of Looseness: The Supreme Court and Gun Control," *The New Republic*, August 27, 2008.
- 74 *Heller*, 128 S. Ct. 2783, 2822 (Stevens, J., dissenting). Justice Breyer authored an independent dissenting opinion criticizing the majority for misapplying its own standard to the gun law at issue. See *Heller*, 128 S. Ct. 2847 (Breyer, J., dissenting) ("I shall show that the District's law is consistent with the Second Amendment even if that Amendment is interpreted as protecting a wholly separate interest in individual self-defense. That is so because the District's regulation, which focuses upon the presence of handguns in high-crime urban areas, represents a permissible legislative response to a serious, indeed life-threatening, problem").
- 75 Cass Sunstein, "Second Amendment Minimalism, *Heller* as *Griswold*," *Harvard Law Review* 122 (2008): 246.
- 76 Mark Tushnet, *Why the Constitution Matters* (New Haven, Conn.: Yale University Press, 2010); Daryl J. Levinson, "Parchment and Politics: The Positive Puzzle of Constitutional Commitment," *Harvard Law Review* 124 (2011): 657; David Strauss, "The Irrelevance of Constitutional Amendments," *Harvard Law Review* 114 (2001): 1457.
- 77 See generally, Tushnet, *Why the Constitution Matters*.
- 78 Strauss, *The Living Constitution*, 115–139.
- 79 Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus & Giroux, 2010).
- 80 *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).
- 81 *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011). For an excellent rebuttal to recent scholarship emphasizing the limited degree to which Supreme Court jurisprudence is likely to depart, on the whole, from majoritarian sentiment, see Richard H. Pildes, "Is the Supreme Court a 'Majoritarian' Institution?" *Supreme Court Review* 2010 (forthcoming).
- 82 See, for example, Jamal Greene, "Selling Originalism," *Georgetown Law Journal* 97 (2009): 657, 682–690.
- 83 *Ibid.*
- 84 *McDonald v. Chicago*, 130 S. Ct. 3020 (2010).
- 85 Abraham Lincoln, "Fragmentary Writing, c. 1858," in *The Collected Works of Abraham Lincoln*, vol. 4, ed. Roy P. Basler (New Brunswick, N.J.: Rutgers University Press, 1953), cited in Tribe, *American Constitutional Law*, 3rd ed., 73–74, and in Balkin, *Constitutional Redemption*, 19.
- 86 Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1993); Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford: Oxford University Press, 2004).

- ⁸⁷ 410 U.S. 113 (1973). For a fascinating revisionist discussion of struggles over abortion rights and access to abortion in the period surrounding *Roe*, see Linda Greenhouse and Reva Siegel, “Before (and After) *Roe v. Wade*, New Questions About Backlash,” *Yale Law Journal* (forthcoming). Laurence H. Tribe
- ⁸⁸ To be sure, the Supreme Court permits considerably more restrictive government regulation of abortion today than it did in the years immediately following *Roe v. Wade*. At least at a doctrinal level, however, this shift has been one toward *greater state power*, not one toward *greater federal protection for fetal life*. States remain entirely free, if they choose to do so, to treat even late-term abortions as nothing more than medical procedures fully within the discretion of women and their doctors and do not yet appear to be under any obligation to protect frozen embryos or fetuses awaiting possible implantation. In this sense, the pro-life position, like any number of others, can count itself among the constitutional visions that aspire toward full realization in the American constitutional narrative but have yet to achieve their goal.
- ⁸⁹ 372 U.S. 335 (1963).
- ⁹⁰ 388 U.S. 1 (1967).
- ⁹¹ Before *Loving*, the parents of the current President of the United States, Barack Obama, would have been legally barred from marrying in many states. We have come a long way since those dismal days of lawful racial discrimination. Among the many issues of the 2008 presidential election, including the ludicrous questioning of the place of Obama’s birth, the fact that his parents were of different races played no discernible role.
- ⁹² See Laurence H. Tribe, “The Constitutional Inevitability of Same-Sex Marriage,” SCOTUSblog, August 26, 2011, <http://www.scotusblog.com/2011/08/the-constitutional-inevitability-of-same-sex-marriage/>. This implication of *Lawrence* was prophesied most clearly by Justice Scalia, who recognized in his dissenting opinion, “This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples”; 539 U.S. 601 (Scalia, J., dissenting).
- ⁹³ For example, the end of the military’s homophobic “Don’t Ask, Don’t Tell” policy on September 20, 2011, which followed aggressive action in each branch of government to end the policy, could hardly have occurred without the pro-gay rights developments in law, society, and politics turbocharged by *Lawrence*.
- ⁹⁴ On my own abandonment of the search for a unified theory of what the Constitution says, see Laurence H. Tribe, “The Treatise Power,” *The Green Bag* 8 (3) (Spring 2005): 292. On the Constitution as not just a text but also an invisible edifice of principles and practices, see Tribe, *The Invisible Constitution*.
- ⁹⁵ Scholar of constitutional law Louis Michael Seidman makes a similar point when he argues that the purpose of the Constitution is not so much to *settle* difficult political disputes as to *unsettle* them by “provid[ing] citizens with a forum and a vocabulary that they can use [to argue that] the political settlement they oppose is unjust”; Louis Michael Seidman, *Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review* (New Haven, Conn.: Yale University Press, 2001), 8. Seidman’s analysis arguably pays insufficient attention to the many potential disputes that never erupt to the point of political salience because the Constitution all but invisibly takes them off the table of serious discourse, but his basic point is nonetheless an important one.
- ⁹⁶ Tribe, *American Constitutional Law*, 3rd ed., 26.
- ⁹⁷ See, for example, Eric Posner and Adrian Vermuele, *The Executive Unbound: After the Madisonian Republic* (Oxford: Oxford University Press, 2010); Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford: Oxford University Press, 2006); Oren Gross, “Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?” *Yale Law Journal* 112 (2003): 1011; Mark Tushnet, “Defending *Korematsu*?: Reflections on Civil Liberties in Wartime,” *Wisconsin Law Review* 2003 (2003): 273; Michael Stokes Paulsen, “The Constitution of Necessity,” *Notre Dame Law Review* 79 (2004): 1257; Bruce Ackerman, “The Emergency Constitution,” *Yale Law Journal* 113 (2004): 1029.
- ⁹⁸ Some proponents of the position that a constitutional provision may be ignored during emergencies have latched on to a rhetorical question in Lincoln’s message to Congress re-

- porting his suspension of habeas corpus: "Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?"; Abraham Lincoln, "Message to Congress in Special Session, July 4, 1861," in *The Collected Works of Abraham Lincoln*, vol. 4, ed. Basler, 430–431. See, for example, Eric Posner and Adrian Vermeule, "Obama Should Raise the Debt Ceiling on His Own," *The New York Times*, July 22, 2011, http://www.nytimes.com/2011/07/22/opinion/22posner.html?_r=1&hp. They forget what Lincoln went on to say: "it was not believed that this question was presented," as it was "not believed that any law was violated"; Lincoln, "Message to Congress in Special Session." According to Lincoln, the Suspension Clause – whose text is silent about who has the power to suspend habeas corpus – authorized him to do so, especially because Congress was not in session at the time. "[A]s the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course until Congress could be called together, the very assembling of which might be prevented, as was intended in this case, by the rebellion"; *ibid.* Therefore, contrary to Posner and Vermeule's suggestion, not even Lincoln's wartime suspension of habeas corpus is a precedent for the proposition that the president may defy the law "in situations of extreme crisis." See Posner and Vermeule, *The Executive Unbound*, 69. See generally, Daniel Farber, *Lincoln's Constitution* (Chicago: University of Chicago Press, 2003), 157–163.
- ⁹⁹ See *Perry v. United States*, 294 U.S. 330 (1935); Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. The Supreme Court* (New York: W.W. Norton, 2010), 87–106.
- ¹⁰⁰ 323 U.S. 214 (1944). However, we must not forget that *Korematsu* upheld only (although tragically) the exclusion of Japanese Americans from certain areas of the country. In a different and often overlooked case decided the same day as *Korematsu* – *Ex Parte Endo*, 323 U.S. 283 (1944) – the Court actually found the internment of Japanese Americans illegal, though without reaching the ultimate constitutional question. See Patrick O. Gudridge, "Remember Endo," *Harvard Law Review* 116 (2003): 1933.
- ¹⁰¹ 323 U.S. 246 (1944) (Jackson, J., dissenting). This concern led Justice Jackson to take the extraordinary position that the Court should step aside and let the wartime president do what he must – but should at all costs avoid blessing this action in the Constitution's name.
- ¹⁰² Laurence H. Tribe and Patrick Gudridge, "The Anti-Emergency Constitution," *Yale Law Journal* 113 (2004): 1801.
- ¹⁰³ See, for example, John Yoo, *Crisis and Command: The History of Executive Power From George Washington to George W. Bush* (New York: Kaplan, 2010); Jack Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (New York: W.W. Norton, 2007).
- ¹⁰⁴ One important exception being Posner and Vermeule's *The Executive Unbound*, which argues that political, social, and cultural forces – not the Constitution itself – have historically constituted the main restraint on executive power.
- ¹⁰⁵ Tribe and Gudridge, "The Anti-Emergency Constitution," 1868.
- ¹⁰⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).
- ¹⁰⁷ *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).
- ¹⁰⁸ This is not to deny that the Constitution's hardwired design – including those of its features, such as the equal representation of the states in the Senate, that create what Sanford Levinson has aptly called a "democratic deficit" that cannot be corrected by evolving interpretation – is so profoundly problematic as to test the constitutional faith of even its strongest proponents. See Levinson, *Our Undemocratic Constitution*. But for those of us who hesitate to permit the perfect to become the enemy of the good and who worry about what returning to the constitutional drawing board might yield, the answer, thus far at least, is to live with imperfection rather than to begin anew.
- ¹⁰⁹ See generally, Sanford Levinson, *Constitutional Faith* (Princeton, N.J.: Princeton University Press, 1988); Balkin, *Constitutional Redemption*, 46–49.