

Substance and Method in the Year 2000

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The 1999 Term featured an extraordinary array of interesting constitutional decisions across a broad range of substantive issues—more significant statements and restatements, perhaps, than in any Term of the last decade.² However, no single case or set of cases towers above all others in significance. To do justice to a Term of this character, it seems best to tour several legal neighborhoods to get some sense of the overall landscape. The seven cases I have selected for commentary are, I think, broadly representative of the current Court's output, though they are not a wholly random sample. Rather, I have tried to identify some of the cases where documentarian and doctrinalist approaches might diverge most clearly, so that we may best compare their respective insights and consequences.³ Given my particular assignment for this forum, I will direct my comments first to issues of sovereign immunity; and I will then proceed to consider violence against women, late-term abortions, religious liberty, and unenumerated rights.

I. SOVEREIGN IMMUNITY

In *Kimel v. Florida Board of Regents*,⁴ the Court divided five-to-four, with Justice O'Connor writing for the five over a strong dissent by Justice Stevens.⁵ The *Kimel* Court invalidated Congress' Age Discrimination in Employment Act of 1967 (ADEA) insofar as Congress authorized state employees to sue states for damages when victimized by state discrimination.⁶ Rightly read, the Constitution's text, history, and structure do not support what the Court did, nor does the Court's ruling reflect an attractive normative vision. Here, at least, the

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2. The pages that follow are excerpted from my foreword to the Harvard Law Review. See Akhil Reed Amar, *The Supreme Court, 1999 Term Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000) [hereinafter Amar, Foreword].

3. For definitions of documentarianism and doctrinalism see generally Amar, Foreword, *supra* note 2. Several other cases might also have illustrated my general conclusions. In particular, *Dickerson v. United States*, 530 U.S. 428 (2000) (declining to overrule *Miranda*), exemplifies the current Court's extraordinary confidence in itself and its own precedents: the Great and Powerful Oz Has Spoken! Even more noteworthy is *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (calling into question important aspects of judicial sentencing). The several opinions in *Apprendi* (especially Justice Thomas' ambitious concurrence) raise fascinating issues of method and of substance. Indeed, the case is so rich that I simply pass over it today in hopes of returning to it some other day. Many other cases from last term are of large substantive significance, but cast only indirect light on the methodological issues I seek to examine today.

4. 528 U.S. 62 (2000).

5. Justice O'Connor's opinion was joined by the Chief Justice, and by Justices Scalia, Kennedy, and Thomas. Justice Stevens' dissent was joined by Justices Souter, Ginsburg, and Breyer.

6. See *Kimel*, 528 U.S. at 91.

document is better than the doctrine.⁷

Citing the 1890 case of *Hans v. Louisiana*⁸ and the more recent case of *Seminole Tribe v. Florida*,⁹ among others, Justice O'Connor declared that "for over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States."¹⁰ This view, she stressed, is now supported by "firmly established precedent."¹¹

Notwithstanding doctrine to the contrary, the document unambiguously provides federal jurisdiction over all federal question cases, regardless of party: Article III, section 2 expressly says that "the judicial Power shall extend to all Cases, in Law and Equity, arising under" the Constitution, laws, and treaties of the United States.¹² Nothing in the Eleventh Amendment applies whenever a citizen sues his own state, or indeed, under a proper "diversity" reading, whenever a lawsuit arises under federal law.¹³ Undergirding these basic textual points are two structural precepts. First, whenever federal law applies, federal courts must have matching authority to adjudicate. Federal judicial power is coextensive with federal legislative power. Second, where there is a right, in general there should be a remedy. The federal government has authority to create rights against states, and when these rights are violated, federal courts should be open to offer federal remedies.

The countervailing doctrine of state "sovereign immunity" invoked by *Hans* and by the *Kimel* majority, is constitutional nonsense. It is, quite literally, the precise negation of the Founders' root idea that the People are sovereign and that governments are not. There is no constitutional right for government to violate the Constitution and get away with it. This is so even if "sovereign immunity" was a traditional concept at the Founding. In important ways, the Constitution broke with pre-existing traditions of monarchy, aristocracy, permanent standing armies, established churches, seditious libel laws, and governmental (as opposed to popular) sovereignty. *Hans* and *Kimel* echo the very error that led Justices like Samuel Chase to support the infamous Sedition Act of 1798. (That law, too, was rooted in an inapt analogy to Parliamentary sovereignty.)¹⁴ Where government is sovereign—the source of all law—logic suggests that government may not legally be sued unless it creates a law that allows the suit, and thereby "consents." But in

7. For more documentation and elaboration of my expansive claims in this section, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1466-92 (1987) [hereinafter Amar, *Sovereignty*].

8. 134 U.S. 1 (1890).

9. 517 U.S. 44 (1996).

10. *Kimel*, 528 U.S. at 73 (citing, inter alia, *Hans v. Louisiana*, 134 U.S. 1 (1890)); see also *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

11. *Kimel*, 528 U.S. at 79.

12. U.S. CONST. art. III, § 2.

13. See U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.") Under the "diversity" reading of this Amendment, these words simply repeal the earlier grant of Article III citizen-state diversity jurisdiction at issue in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), but do not in any way limit the other fonts of Article III jurisdiction—for example over federal questions and admiralty. In essence *Chisholm*'s error was the creation of a pro-creditor federal common law in a diversity case, and the People responded by restricting diversity jurisdiction. For more details, see Amar, *Sovereignty*, *supra* note 7, at 1474-75 & n. 202.

14. See Amar, Foreword, *supra* note 2, at 56-57.

America, the People, not the governments, are the source of law, and there is no such thing as governmental sovereign immunity where the government has violated the Constitution. In these situations, government is not “sovereign.”

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

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

Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent. First and foremost, the reasoning of that opinion is so profoundly mistaken and so fundamentally inconsistent with the Framers’ conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court.¹⁵

Stevens adds a few other reasons for resisting the pull of *stare decisis*, but this first one contrasts markedly with his emphasis on judicial nose-counting in *Stenberg v. Carhart*¹⁶ (which we shall consider below). After all, the “diversity” reading that he embraces in *Kimel* had many fewer judicial adherents in the twentieth century than the competing view. But this nose-counting should not end the issue. The judicial noses are wrong and the “diversity” reading is right—at least if the Constitution itself is the touchstone. (Although many documentary issues are hard, some are easy.)

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

In recent years, the Rehnquist Court has tried to revive federalism in a variety of contexts, often insisting—rightly—that the Framers envisioned federalism as a

15. *Kimel*, 528 U.S. at 97-99 (Stevens, J. dissenting).

16. 530 U.S. 914 (2000) (Stevens, J., concurring).

system for protecting liberty. “Perhaps the principal benefit of the federalist system is a check on abuses of government power ‘If [the people’s] rights are invaded by either [government,] they can make use of the other as the instrument of redress.’”¹⁷ “[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself.”¹⁸ In cases like *Kimel*, how, exactly, are abuses checked and rights redressed when states escape liability for their illegalities? A more proper documentarian approach, building on the very Founding sources the Court has invoked but failed to follow, would use federalism to protect rights, not defeat them. Each government would have reciprocity not in shielding itself when it violates the Constitution, but in empowering citizens to gain full remedies when the *other* government has violated the Constitution. In this view, the federal government should be recognized as having broad power to arm Americans with remedies against states when states have violated the Constitution and valid federal laws. The reciprocal counterpart of this federal power is not sovereign immunity for lawless states, but rather the right of states to arm citizens with remedies against the federal government when the feds have violated the Constitution. For example, state property law helps give a citizen standing to sue when the federal government has taken his property without due process or just compensation, in violation of the Fifth Amendment; and state tort law helps provide a remedy when federal officials violate a citizen’s Fourth Amendment rights in an improper search or seizure of his person or property.¹⁹

So much for the views of the Founders. Holistic documentarian analysis also ponders the meaning of later constitutional moments, like Reconstruction. And here, the *Kimel* Court’s pronouncements become odder still. Surely, if the Fourteenth Amendment was about anything, it was about ensuring that states follow federal law. When a state flouts federal law, it thereby offends due process *of law*, in violation of section 1. And when a state violates section 1, surely Congress has power under section 5 to act, even under a very narrow reading of section 5. Yet *Kimel*, following recent precedent,²⁰ holds that Congress lacks Reconstruction power to insist that, when states trample federal rights, federal courts stand open to make victims whole.²¹

Finally, *Kimel* claims that although Congress may properly forbid age discrimination by states under its Commerce Clause power, it may not do so pursuant to its powers under the Fourteenth Amendment.²² Building on the 1997 *City of Boerne*²³ case, *Kimel* seems to suggest that congressional power to recognize new civil rights exists only where there is a clear antecedent pattern of

17. *Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991) (quoting THE FEDERALIST No. 28, at 180-81 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

18. *New York v. United States*, 505 U.S. 144, 181 (1992).

19. For more analysis, see Amar, *Sovereignty*, *supra* note 7, at 1492-519; Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers about Converse-1983*, 64 U. COLO. L. REV. 159 (1993).

20. *See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

21. *See Kimel v. Fla. Bd. Of Regents*, 528 U.S. 62, 72-73 (2000).

22. *Id.* at 66-67.

23. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

state misbehavior.²⁴ Here, no such pattern of state misbehavior exists. (Indeed most states have banned age discrimination on their own.) But this new rule of doctrine contrasts sharply with the text, history, and overall architecture of the Fourteenth Amendment itself. The Reconstruction Republicans aimed to give Congress broad power to declare and define the fundamental rights—the privileges and immunities—of American citizens above and beyond the floor set by courts.²⁵ The fact that many states deem a certain right important—like the right against age discrimination—may properly support a Congressional determination that such a right is indeed fundamental today. Courts, for example, look at the actual practice of states to determine what punitive practices are "cruel and unusual" today.²⁶ Likewise, Congress may properly consult state practice in playing its assigned rights-protecting role under section 5, as envisioned by the American People who ratified the Fourteenth Amendment. And this documentary scheme—in which Congress may go above the judicially declared floor of fundamental rights—is, I submit, a more attractive one than the Court-centric regime exemplified by cases like *Kimel* and *Boerne*.

II. VIOLENCE AGAINST WOMEN

A. *A Curious Per Curiam*

Stepping back now from *Kimel* and sovereign immunity, let us take a more expansive look at the 1999 Term. It started on a haunting note. In the first month of the session and its first opinion of any significance, the Court, with little support from the document itself, set aside the conviction of a man who murdered his wife.²⁷ The way the Court did so is also troubling—with no proper briefing, no chance for amici to weigh in, no public oral argument, no signed opinion, no more than a page of analysis, no careful consideration of counterarguments, no evidence of real collective deliberation, and no recorded dissents. It is the ultimate in Rehnquist Court efficiency. But to what end?

The uncontested facts were simple. James Michael Flippo and his wife Cheryl²⁸ were vacationing in an isolated cabin in a rustic state park.²⁹ Mr. Flippo

24. 528 U.S. at 80-82.

25. See generally Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115, 139-40 (1999); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 175 (1998) [hereinafter Amar, *Bill of Rights*]; PAUL BREST, SANFORD LEVINSON, J.M. BALKIN & AKHIL REED AMAR, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 546-50 (4th ed. 2000) [hereinafter Brest, et al.].

26. See *Stanford v. Kentucky*, 492 U.S. 361 (1989).

27. *Flippo v. West Virginia*, 528 U.S. 11 (1999).

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

29. See *id.* at 12.

called 911 to report that they had been attacked by an intruder wielding a log and a knife.³⁰ When police arrived, they found Mrs. Flippo dead, her head covered with blood from an apparent bludgeoning.³¹ Police took Mr. Flippo to the hospital, and proceeded to investigate the crime scene.³² They found an unlocked briefcase in the cabin, and opened it.³³ It contained photos that seemed to incriminate Mr. Flippo, and these were ultimately introduced into evidence.³⁴ A West Virginia jury found Mr. Flippo guilty of first degree murder, and the state sentenced him to life imprisonment.³⁵

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

The case exemplifies how the Court has often taken broadly acceptable constitutional text and turned it into dubious doctrine.³⁶ The People’s Fourth Amendment condemns unreasonable searches and seizures. Were the cops here unreasonable? Most citizens, I suspect, would say no; but the Court says yes (and without a recorded dissent). The People’s Constitution contains nothing to support excluding reliable evidence. Most citizens, I think, shudder at the idea of springing a murderer and burying the evidence; but the Court blithely does just that (again, without dissent).

On this set of issues, the citizens seem wiser than the Justices. The text ratified by the People does not require warrants for all searches and seizures, nor is this a sensible global requirement. As a matter of history, no one at the Founding—no framer, no treatise writer, no judge—ever said that intrusions always require warrants. Arrests, for example, are obvious seizures of persons, yet they have never required warrants, nor have searches incident to arrest, nor searches on the high seas, nor various inspection programs, nor border searches, nor countless other intrusions. At the Founding, warrants were in fact seen as

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Over the next several pages, I shall be making sweeping claims about constitutional meaning; claims that I have elsewhere tried to document in detail. *See generally* AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997) [hereinafter, Amar, *Criminal Procedure*]. *See also* Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53 (1996) [hereinafter, Amar, *Writs*]; Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN’S L. REV. 1097 (1998). This body of work has its critics, but I continue to stand by it.

dangerous devices, in part because they immunized searchers from after-the-fact tort liability in trespass suits that might otherwise be brought by searchees.

Flippo declared that the facts before the Court were squarely controlled by the 1978 case, *Mincey v. Arizona*.³⁷ *Mincey* in turn relied on earlier cases that simply misread the Fourth Amendment's text and history as requiring warrants.³⁸ *Mincey's* words, and the words of these earlier cases, should not be treated as gospel when proved erroneous. But on an epistemic view, even if some of these cases' words should be discounted, their precise holdings on their facts may distill important insights. Thus, a precedent-sensitive documentarian might recast the cases as follows: Yes, the text of the Amendment does not say that all intrusions require warrants, nor is this a sensible global requirement. But police departments (which did not exist as such at the Founding) pose special threats in today's world, and these threats require special safeguards. Overzealous cops can overreact, with severe consequences for values of liberty, privacy, property, and equality. Where a very intrusive and highly discretionary activity is involved, like choosing to search a person's home, we should generally, though not always, require the police to get preclearance from someone more detached, like a magistrate or judge. Preclearance can help prevent police discrimination and abuse of discretion, and can also freeze the facts by giving us a record of what the police knew before the search. This fact-freezing makes it harder for cops to fabricate ex-post rationalizations for their intrusions. In "exceptional" situations where there is a diminished risk of police abuse, or where there are strong reasons for bypassing preclearance, however, even warrantless intrusions can be upheld as "reasonable."

Had the *Flippo* Court looked at precedent from this more documentarian perspective, it might have noted some important distinctions. *Mincey* on its facts was indeed a case of police overreaction. Ten cops tried to enter *Mincey's* apartment in a drug bust, and *Mincey* shot and killed one officer.³⁹ The fallen officer's comrades responded with a four-day search of the apartment, ripping up carpets and seizing hundreds of objects.⁴⁰ But there are obvious differences, as a matter of reasonableness, between *Mincey's* facts and *Flippo's*. *Flippo's* search occurred, not in his home, but in a cabin owned by the state itself, which surely had its own legitimate interests triggered by a murder on state grounds. In *Mincey*, the police had already nabbed the suspect; in *Flippo*, the police had been told that an unknown intruder had come, and for all the police knew, might soon come back. Perhaps the intruder had been looking for something—maybe in the briefcase?—and the cops had good reason for searching quickly before the trail went cold. In *Mincey*, the police themselves initiated the initial encounter (the drug bust); in *Flippo*, they were responding to a documented 911 call with a

37. 437 U.S. 385 (1978).

38. See, e.g., *id.* at 390 (citing, inter alia, *Trupiano v. United States*, 334 U.S. 699, 705 (1948)). For other cases rooting the warrant requirement in the alleged dictates of text and history, see Amar, Writs, *supra* note 36, at 73 n. 81.

39. *Mincey*, 437 U.S. at 387.

40. *Id.* at 389.

verbatim phone transcript of the facts as they knew them before they came on the scene. (Thus the facts were frozen and documented in far more detail than in a typical warrant.) Unlike the *Mincey* cops, the *Flippo* police were not overreacting to a fallen comrade or trashing an abode. They were just doing what most citizens would want them to do.⁴¹

The state judge, who upheld the search in a terse paragraph, did not quite say all this, but the foregoing analysis is based on the uncontested facts of the case. Before reversing the lower court's judgment, the Supreme Court should have explained why these uncontested facts did not suffice to uphold the decision below. Instead, the Justices brusquely reversed and remanded, seemingly offended that "the trial court made no attempt to distinguish *Mincey*."⁴² Apparently, lower courts must not simply get it right, but must also talk Supreme Court talk.

What the trial court said, in its two-sentence paragraph, could be construed as suggesting that *Mincey* was wrong. *Mincey* rejected a general "homicide crime scene" exception to the warrant requirement, and the trial judge might be read as embracing such a general exception. But a more charitable reading of the trial court's commonsense ruling is that, on the facts of *this* homicide, a warrantless search was reasonable, even if warrantless searches might well be unreasonable in some other homicides, like the one in *Mincey*. Though the overall issue of reasonableness is not always clearcut, and faithful documentarians will disagree in hard cases, there was, I think, more sense in the trial court's instincts than the Supreme Court—looking at the world only through the twisted prism of "warrant requirement" doctrine—acknowledged.

The trial court's approach aimed to bring the decedent into the Fourth Amendment frame. The Supreme Court, by contrast, failed to do this—indeed, it failed even to tell us her name.⁴³ If James Flippo's consent would have made the search reasonable, as the Court admits, what about Cheryl Flippo's consent? She too had a lawful right to the premises (unlike, perhaps, the dead officer killed in *Mincey*'s apartment).⁴⁴ Had she been able to whisper, "Avenge me," to the police before her life ended, would this have been enough? Might we infer her implied consent from her very body? These questions seem less outlandish when we recall that the key issue of "consent" here is not whether persons have waived their rights, but whether a search might be "reasonable" overall in light of the signs and signals greeting the police.

41. Midway between *Mincey*'s facts and *Flippo*'s facts are those of *Thompson v. Louisiana*, 469 U.S. 17 (1984) (per curiam), also decided without briefing or argument. To the extent *Thompson* went beyond *Mincey*, my criticism of *Flippo* applies to it too; but *Flippo* went well beyond even *Thompson*. *Flippo* cited *Thompson*, but the Justices, for good epistemic reasons, have insisted that "unargued summary dispositions" are not entitled to full precedential weight. See, e.g., *Parker v. Randolph*, 442 U.S. 62, 76 (1979) (plurality opinion, per Rehnquist, J.).

42. *Flippo*, 528 U.S. at 14.

43. See *supra* note 28. Cf. Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 70-95 (1987) (calling upon judges to listen for and be moved by the voices of actual human beings and the stories of the silenced).

44. The justification for the consent "exception" to the "warrant requirement" is not based on waiver of the defendant's rights, but on the fact that consent—even by someone other than the defendant—can make a search reasonable, a point made clear by the post-*Mincey* case of *Illinois v. Rodriguez*, 497 U.S. 177, 183-86 (1990). Of course, this is an open recognition that the ultimate Fourth Amendment touchstone is reasonableness, not warrants.

This brings us to the most troubling part of *Flippo*: namely, the Court's easy embrace of the exclusionary rule as the proper response to Fourth Amendment violations, even in cases of violent crime. Under this rule, crime victims are revictimized when those who hurt them walk free, grinning, because evidence is suppressed.⁴⁵ Nothing in the Constitution's text, history, or structure supports this as the most plausible reading of the document. (Though there are many hard questions of interpretation, there are also easy ones.) The text nowhere calls for exclusion, and a close reading in fact reveals that it presupposes civil remedies for innocent searchees rather than criminal exclusions for guilty ones: Tort law and property law make us "secure in [our] persons, houses, papers, and effects."⁴⁶ Historically, the Amendment built on prominent paradigm cases of civil damages; no court in America, state or federal, ever excluded on Fourth Amendment-like grounds for the first hundred years after Independence. When exclusion eventually came into Court doctrine, it did so under an erroneous *Lochner*-era fusion of the Fourth Amendment and the Fifth Amendment Self-Incrimination Clause, a fusion that has since been properly repudiated. Structurally, exclusion warps the general architecture of the Bill of Rights, several of whose provisions were designed to insure that truth will out at trials, even if defendants prefer otherwise. In short: Nowhere does the document embrace exclusion of this sort, and in several places the document attests to the importance of truth-seeking and reliability.

What "We the People" have said in the document makes more sense than what the Justices have said in the doctrine. To the extent that the exclusionary rule is claimed to deter violations, it is a bad fit; and no wonder—it was not originally designed by *Lochner*-era judges with this goal in mind. (For example, it works only when cops find evidence, and thus offers no protection for a person known to be innocent yet whom the cops seek to harass. It does nothing to cure police brutality and many other forms of unreasonable action that have no causal link to evidence-finding. It is not properly tailored to the actual scope of the violation and imposes direct and sometimes massive demoralization costs on faultless victims.) Other remedial systems, closely tracking the Founders' paradigm cases, can offer more and better deterrence, at less social cost.⁴⁷ Exclusion is also said merely to restore the status quo ante, to prevent government from profiting from its own wrong. Had the government not unconstitutionally intruded, the argument runs, the evidence never would have come to light, and so it should be suppressed. This argument fails, both normatively and factually. Normatively, society should not return stolen goods to a thief. Rather, government properly restores these goods

45. See CHARLESTON DAILY MAIL, Oct. 23, 1999, at 5A (letter to the editor written by the victim's mother, Mary Jewell) ("I am appalled by the Supreme Court's decision. This is very upsetting. It causes her family more pain and grief . . . This whole situation is a nightmare and now it starts all over again"); *id.* Oct. 25, 1999 (letter written by victim's sister, Anita Jewell Pratt) ("The evidence convicted him. Why should we have to go through that hell again?").

46. U.S. CONST., amend. IV.

47. For details, see Amar, *Criminal Procedure*, *supra* note 36 at 26-31, 40-45, 155-60.

to the rightful owner, even if government finds them in an unconstitutional search.⁴⁸ If the government finds a kidnap victim, it should never give her back to her captor. It may retain illegal drugs and other contraband taken from drug dealers, and likewise it need not forego the use of evidentiary fruits to which it has a legal right. (As a general matter, the “public . . . has a right to every man’s evidence.”)⁴⁹ Factually—and here we return to *Flippo*—exclusion often occurs even when the government clearly would have found the evidence anyway. Assume for argument’s sake that a warrant was required on the facts of *Flippo*. What magistrate in the world would have denied such a request? Wouldn’t a warrant have automatically been issued, and if so, wouldn’t the cops have found the photos anyway? How, then, is exclusion proper? Where is the causation? Doctrine has never answered—or even asked—this question.

To be sure, *Flippo* is a tiny case, as Supreme Court cases go. But the case vividly illustrates a domain where doctrine seems far afield of the document. More generally, in *Flippo*’s small mirror, we see a Court that appears insufficiently deliberative, enamored of its own past pronouncements (which it tends to overread and treat as holy writ), and less wise than the document itself. The Court seems more concerned about affirming its own status than understanding the document it is charged with enforcing. The Court also seems insensitive to the gender issues raised by its dubious deployment of the Constitution in this case, and in criminal procedure cases more generally. Men are more likely to be violent offenders; women more likely their victims.⁵⁰ *Flippo* was a case about the violence done to a woman by a man, and the woman’s voice was not heard. In the cabin, and in the Court, Cheryl Flippo was silenced.

B. Rights, Structure, and Fairness

“K.M.,” a teenager sexually abused by her step-father, was also silenced by the Court last Term.⁵¹ The sexual assaults occurred from 1991 to 1995, and in 1997, Texas prosecuted the step-father, Scott Carmell, based on K.M.’s uncorroborated testimony.⁵² The jury believed K.M. and found Carmell guilty beyond reasonable doubt on fifteen separate counts.⁵³ Because Texas had recently

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

49. See, e.g., *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)); 8 JOHN HENRY WIGMORE, *Evidence* § 2192, at 70 (John T. McNaughten, ed., 1961).

50. See generally Mary E. Becker, *The Politics of Women’s Wrongs and the Bill of “Rights”: A Bicentennial Perspective*, 59 U.CHI. L. REV. 453, 507-09 (1992). Many prominent cases have involved men who have killed or raped women or girls. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Brewer v. Williams*, 430 U.S. 387 (1977); *New York v. Quarles*, 467 U.S. 649 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *Vasquez v. Hillery*, 474 U.S. 254 (1986). There was, perhaps, another gender issue implicated by *Flippo*, involving the precise nature of the photos. Nothing in the Court’s analysis, however, turned on this possible wrinkle.

51. *Carmell v. Texas*, 529 U.S. 513 (2000).

52. *Id.* at 516-18.

53. *Id.* at 516.

reformed its evidence laws, Carmell claimed that K.M.'s testimony, regardless of how persuasive it might be, could never suffice to convict on four of these counts.⁵⁴ In an opinion by Justice Stevens over a dissent by Justice Ginsburg, a closely divided Court agreed, holding that the Constitution required the jury to ignore what K.M. had said under oath.⁵⁵

The Court's particular five-to-four line-up was unprecedented; never before or since have Justices Stevens, Scalia, Souter, Thomas, and Breyer joined together against the Chief Justice and Justices O'Connor, Kennedy, and Ginsburg.⁵⁶ Rarely do we find both Justices O'Connor and Kennedy in dissent.⁵⁷ And the issue before the Court, implicating matters of both rights and structure, offers a good laboratory for measuring the document against the doctrine.

The case pivoted on the fact that, when the four relevant incidents of sexual abuse occurred, Texas had in place an old law providing that certain sexual assault defendants could never be convicted merely on the testimony of the victims.⁵⁸ In these cases, there also had to be some physical evidence, or some timely statement or "outcry" by the victim—for example, to a friend, a relative, a counselor, or a doctor—to confirm that she was not later making things up.⁵⁹ Texas changed this law in 1993, and when it prosecuted Carmell in 1997, it applied the newer law.⁶⁰ Carmell claimed that this application violated the Ex Post Facto Clause, and the Court agreed.⁶¹

This result, I think, would puzzle—if not shock—most citizens. Texas did not change the basic rules of criminal conduct. It has been criminally wrong to abuse one's stepdaughter since time immemorial. Texas merely changed the way this crime could be reliably proved in court. Once upon a time, females were not deemed sufficiently believable, but today we should treat them as no less believable than males. Applying these enlightened ideas about female credibility to all proceedings is not impermissibly *ex post facto*. The crime is committing the sexual assault itself, not getting caught.⁶² Texas only changed the rules about getting caught, not about the crime itself.

54. *Id.* at 520.

55. *Id.* at 552-53.

56. The point is confirmed by examining the statistics compiled at the back of *The Harvard Law Review* Supreme Court issues for the 1994 through 1999 terms.

57. Last year, for example, these two Justices were both in dissent only twice, in *Carmell*, 529 U.S. at 553 and in *Apprendi v. New Jersey*, 530 U.S. 466, 475 (2000).

58. *Carmell*, 529 U.S. at 516-17.

59. *Id.*

60. *See id.* at 519. The new law did not completely eliminate all outcry requirements—a complexity I shall initially sidestep to simplify exposition, but that I shall squarely confront later in this section. *See infra* text accompanying notes 84-85.

61. *See id.* at 552.

62. *See generally* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984); Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 Harv. L. Rev. 1357 (1985). If the "crime" were getting caught—being proved in court to have done wrong—then all adjudication would border on *ex post facto*, making people criminals rather than finding them to be so.

Here too, the citizens are wiser than the Justices, who have taken a text that came from the populace and read it in an odd way that fails to do justice to the basic instincts of the American People in whose name this text speaks. A proper documentarian analysis would proceed as follows: We the People have embraced a document with not one, but two *Ex Post Facto* Clauses—one limiting the federal government and the other limiting the states.⁶³ Only two other sets of prohibitions in the entire original Constitution are given similar status: the bans on bills of attainder and the bans on titles of nobility.⁶⁴ From these facts alone, we may properly deduce that we deal here with what the People, from the beginning, have deemed a basic principle that should command near universal assent in a free republic. The core principle is this: The legislature may not make conduct that was wholly innocent at time T1 retroactively criminal at time T2. Otherwise, the legislature could target known political opponents (who cannot change their past actions), trespass on ground properly judicial (by acting to punish known persons for what they have already done), and deprive citizens of fair notice of the basic norms of conduct they must observe. The *Ex Post Facto* Clauses stand back to back with the Bill of Attainder Clauses, which reflect a similar cluster of concerns.⁶⁵ These facts in turn confirm that we have properly deduced the core principle, and its basic rationales. Further confirmation comes from the basic structure of the document as a whole, with its obvious emphasis on protection of political dissenters, separation of powers, due process, and fair notice. Historical evidence from Founding debates and pamphlets and Revolution-era state constitutions proves that *ex post facto* laws were widely defined as laws retroactively criminalizing conduct that was innocent when done.⁶⁶ Such laws

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

64. Today the category is much broader as a result of the incorporation of the Bill of Rights against states and the reverse incorporation of equal protection principles against the federal government.

65. For extended analysis, see Akhil Reed Amar, *Attainer and Amendment 2: Romer’s Rightness*, 95 MICH. L. REV. 203, 208-21 (1996).

66. See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 379 (Max Farrand ed., Yale Univ. Press 1966) (“[T]hey shall not cause that to be a crime which is no crime.”) (paraphrasing remarks of Gouverneur Morris, James Wilson, and William Samuel Johnson); THE FEDERALIST NO. 84, at 511-12 (Clinton Rossiter ed., 1961) (Alexander Hamilton) (“The subjecting of men to punishment for things which, when they were done, were breaches of no law.”); 1 THE DEBATES ON THE CONSTITUTION 396 (Bernard Bailyn ed., 1993) (attributed to James Iredell) (“What [a man] does innocently and safely to-day, according to the laws of his country, cannot be tortured into guilt and danger to-morrow.”); MD. CONST. OF 1776 (Declaration of Rights), art. XV (“[R]etropective laws, punishing facts committed before the existence of such laws, and by them only declared criminal.”); N.C. CONST. OF 1776 (Declaration of Rights), art. XXIV (same); cf. Del. Declaration of Rights of 1776, § 11 (condemning “retrospective laws, punishing offences committed before the existence of such laws” but not using words “ex post facto”); MASS. CONST. OF 1780, pt. I, art. XXVI (condemning “Laws made to punish actions done before the existence of such laws, and which have not been declared crimes by preceding laws” but not using words “ex post facto”). These formulations mesh well with and may have been borrowed from Blackstone, whose views on the proper meaning of *ex post facto* influenced leading Framers. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 66, at 448-49 (remarks of John Dickenson reporting to his colleagues on Blackstone’s definition). With Blackstone on their side, leading Federalists were on solid ground in denying Anti-Federalist claims that the *Ex Post Facto* Clauses would prevent certain useful retroactive civil laws. *But cf.* N. H. CONST. OF 1784, pt. I, Art. XXIII (condemning all “retrospective laws” even in “civil causes,” but not using words “ex post facto”). The words of Blackstone himself perfectly cohere with the documentary framework that I propose:

There is a still more unreasonable method [than Caligula’s], which is called the making of laws

were widely condemned as repulsive to all right-thinking folk—"contrary to the first principles of the social compact and to every principle of sound legislation."⁶⁷

What Texas did, however, was not repulsive at all, and would not be so seen by the American People at any point in our history. Why, then, did the Court condemn Texas? First, the Court defined the *Ex Post Facto* Clause very broadly, and then applied it quite rigidly. This is a classic two-step move in many areas of modern doctrine, but often it reflects poor judgment.⁶⁸ It is often proper to construe a given clause as embracing both a hard core rule, and a broader principle. But the penumbral principle cannot always be sensibly enforced with the same rigidity as the core rule itself.

The Court took its cue from Justice Chase's exposition of the *Ex Post Facto* Clause in his separate opinion in the 1798 case, *Calder v. Bull*.⁶⁹ Chase defined *ex post facto* laws to encompass, not just laws that make actions criminal that were innocent when done (our "core" rule), but also all laws that retroactively increase the offense-grade or sentence, and all laws that "alter[] the legal rules of evidence, and receive[] less or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender."⁷⁰ Many later cases, in dicta, have quoted Chase's definition, and the *Carmell* Court found this dispositive.⁷¹ What Texas did, said the Court, was a textbook case of Chase's final prong, altering the rules of evidence in order to convict the offender with less than would have been required when he did the deed.⁷²

Though this appeal to a 1798 case may look like originalism—enough so to win the votes of Justices Thomas and Scalia—it, in fact, exemplifies modern

ex post facto, when after an action, *indifferent in itself*, is committed the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who committed it. Here it is impossible that the party could foresee that an action, *innocent when it was done*, should afterwards be converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust.

1 William Blackstone, Commentaries *46 (emphasis altered). Note that the first italicized phrase did not appear until Blackstone's second edition, published in 1766.

67. THE FEDERALIST NO. 44, at 82 (Clinton Rossiter ed., 1961) (J. Madison). For similar descriptions, see *id.* No. 84, at 511-12 ("most formidable instrument[] of tyranny") (A. Hamilton); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 66, at 376 (remarks of Oliver Ellsworth and James Wilson) ("void of themselves" and contrary to "first principles of Legislation"); 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 66, at 165 (pamphlet by Oliver Ellsworth) ("tyrannical"); 1 William Blackstone, Commentaries *46 ("cruel and unjust" and "still more unreasonable" than what Caligula did); MD. CONST. of 1776, (Declaration of Rights), art. XV ("oppressive, unjust, and incompatible with liberty"); N.C. CONST. of 1776, (Declaration of Rights), art. XXIV (same); Del. Declaration of Rights of 1776, § 11 ("oppressive and unjust," though not using words "ex post facto"); MASS. CONST. of 1780, pt. I, art. XXIV ("unjust, oppressive, and inconsistent with the principles of a free government," but not using words "ex post facto").

68. For a similar move in the free-speech context, see *United States v. Playboy Ent. Group*, 529 U.S. 803, 879 (2000).

69. 3 U.S. (3 Dall.) 386 (1798).

70. See *id.* at 390 (separate opinion of Chase, J.) (emphasis altered).

71. See *Carmell v. Texas*, 529 U.S. 513, 525 (2000).

72. See *id.* at 530-34.

doctrinalism and illustrates some of its pathologies. As an epistemic matter, Chase is hardly the most surefooted guide to the document—the man, after all, was impeached for his constitutional clumsiness—and later Court dicta parroting Chase is not particularly deliberative. But the current Court simply points to Chase and later dicta, treating the issue as dictated by precedent instead of giving us a careful account of the relevant constitutional values at stake. Tellingly, Chase’s definition of *ex post facto* was not put forth by *anyone* before the Constitution’s ratification.⁷³

Rather than insisting that *every* law that modifies the rules of evidence is *exactly* the same as one that makes a wholly innocent act retroactively criminal, it makes more sense to say that *some* evidence-altering laws might indeed violate the spirit—the animating principles—of the *Ex Post Facto* Clause. Imagine a law that retroactively imposes the burden of proof on defendants for a given affirmative defense in a regulatory context where reliance issues are large and the conduct in question was not *malum in se*.⁷⁴ This could indeed be a case of political targeting, of legislative overreaching, or of improper frustration of legitimate reliance interests and the fair notice ideal. Not all evidence-altering laws, however, are like this. If lie-detector or DNA tests at time T1 are unreliable, the law might forbid these tests from being introduced against defendants. But if technology improves, and the law changes at time T2, tests done after T2 should properly be admissible even for crimes that occurred prior to T2. The lie-detector analogy perfectly describes what Texas did. At time T1, the testimony of females in certain sexual assault cases was seen as uniquely unreliable—so that it was treated much worse than most other testimony—but we now know better. At time T2 Texas finally realizes that this testimony is not different in principle from any other testimony, and should be treated the same way. For any other crime, a single uncorroborated witness can suffice; so the same rule should apply to these sexual assault cases. And this testimony should be immediately admissible, as were the new-technology lie-detector and DNA tests in our hypothetical.

Justice Stevens has no good purposive or principled answer to this line of analysis, but he does have an ace up his sleeve, and he plays it with fanfare. To illustrate an impermissible evidence-altering law, Justice Chase, following a 1792 English treatise, cited the trial of Sir John Fenwick in 1696.⁷⁵ At every tight spot in his opinion, Stevens plays the Fenwick card.⁷⁶ The trial, he implies, was a paradigm case of *ex post facto* violation, and, he insists, is on all fours with *Carmell*’s case.⁷⁷ Fenwick committed treasonous acts in 1695, and was tried in

73. Instead, the leading definition was the core rule that I have offered here. See *supra* note 66.

74. I am assuming here that the new rule, applicable only to affirmative defenses, does not violate the *Winship* line of cases; otherwise, it could not be applied even prospectively. See *In re Winship*, 397 U.S. 358, 367-68 (1970) (holding that elements of case-in-chief must be proved by prosecutor beyond reasonable doubt); *Patterson v. New York*, 432 U.S. 197, 229-30 (1977) (holding *Winship* inapplicable to certain affirmative defenses). On the importance of the distinction between *malum in se* and *malum prohibitum* offenses where issues of fair notice are concerned, see Dan M. Kahan, *Ignorance of the Law is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 129 (1997).

75. See *Calder*, 3 U.S. (3 Dall.) at 389.

76. See generally *Carmell*, 529 U.S. 513.

77. See *id.* at 526-30.

1696.⁷⁸ At the time of his crime, the general rule was that a treason conviction required two witnesses. The prosecution could muster only one, but Parliament said that one would be good enough, and Fenwick was found guilty.⁷⁹

Alas, Stevens' ace is in fact a joker. No one in 1787-89 ever invoked Fenwick's trial as an example of an impermissible *ex post facto* law. Not that Americans would have found Parliament's actions in that case acceptable. Regardless of retroactivity, the Framers believed that, in the absence of a confession, treason should *always* require two witnesses, as they made clear elsewhere in the Constitution.⁸⁰ Fenwick was tried by the legislature itself, in a manner violative of anti-attainder principles the Founders held dear. Moreover, Fenwick's case raised serious issues of legislative targeting of political opponents (issues far afield from what Texas did to Carmell). Thus, there was much to condemn in Fenwick's case that has no bearing on Carmell's.

Stevens' over-reliance on Chase's passing reference to Fenwick reflects a much larger problem of doctrinal self-absorption, in which the Court creates ever more intricate doctrinal structures but tends to miss the big ideas of the document. A more holistic documentarian approach to *Carmell* would try to look at the facts of the case in a larger context. Is there legislative targeting here, in which lawmakers are singling out known enemies for hostile treatment? This is an obvious concern of both the attainder and the *ex post facto* bans, but it is minimal when victims of assault have not spoken out, and thus even the legislature does not know the names of those whom these victims may accuse. Though not purely prospective, the evidence-reform legislation is adopted behind a suitable veil of ignorance. This alone decisively distinguishes Carmell's case from Fenwick's where Parliament adopted an ad hoc rule applicable only to Fenwick after the facts came to light. Is there legislative over-reaching of the judicial function here? This is probably a greater concern at the federal level, where the *Ex Post Facto* Clause interacts with many other separation of powers provisions. But at the state level, this particular aspect of the *ex post facto* idea may have less bite, because the Constitution generally does not require that states follow a rigid separation of powers on the federal model. If Texas courts, acting on their own, had decided to recognize a common-law offense of sexual assault, and had allowed uncorroborated testimony to suffice, wouldn't this have been permissible? Wouldn't it be permissible for Texas courts to apply this common-law modification retroactively? If so, the reason in part is that we think sexual assault is *malum in se*, and there are very few legitimate reliance interests at stake.⁸¹ If Texas courts could have chosen to do what they did in *Carmell*, why is it a federal concern that they did it in partnership with their state legislature?

78. See The Proceedings Against Sir John Fenwick Upon a Bill of Attainder for High Treason 40 (1702).

79. See *id.*

80. See U.S. CONST. art. III, § 3, cl. 1 ("No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.").

81. See Kahan, *supra* note 74, at 129.

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

This brings us to the final holistic question: Why wasn't the old Texas law unconstitutional? Documentarian analysis focuses not just on the Founding, but on later constitutional moments. Wasn't Texas' old "outcry" rule an affront to Fourteenth and Nineteenth Amendment ideals of women's equality? After all, no comparable rule existed for male victims of nonsexual assault. Unlike the two-witness rule at issue in Fenwick's case and at the heart of the Constitution's Treason Clause, Texas's old rule—dating back to an era in which women did not vote—in effect singled out some persons on basis of their birth status and said that they—uniquely in our criminal justice system—are not fully reliable witnesses.⁸² This was a kind of obvious status insult to equal citizenship of women. More than that, it denied them the genuine equal protection of laws, a concept that at its core protected the rights of victims to be equally protected by government from criminals. The Fourteenth Amendment thus barred a state from looking the other way when white Klansmen murdered and pillaged black folk.⁸³ Texas's old law was also reminiscent of the infamous Black Codes that said that whites could never be convicted on the testimony of blacks.⁸⁴ Had this old law been struck down by the state judiciary on state or federal equality grounds, surely this ruling would have full retroactive effect. Thus, the old law was itself no law at all; and the true law applicable when Carmell assaulted K.M. was one that treated her as a full and equal citizen. Therefore, there was nothing remotely impermissible or genuinely retroactive about what Texas did to Carmell. The only real constitutional violation was of the rights of K.M. and others like her—a violation Texas has yet to fully cure. (The state has retained vestiges of the outcry rule in other parts of its legal code.) However, not a single Justice identified Texas' true violation or openly discussed the obvious issue of women's equality.

C. VAWA

Which brings us to the last of our trilogy of cases about male violence against females. Christy Brzonkala brought suit in federal court against two men who, she claimed, assaulted and raped her.⁸⁵ Her suit was based on a 1994 congressional

82. See *Carmell v. Texas*, 529 U.S. at 557-58 (2000) (Ginsburg, J., dissenting) (discussing history of Texas law). Although modern versions of this statute are formally gender-neutral, the law had its origins in an explicitly gendered set of rules about "female[s] alleged to have been seduced." See *id.* at 558 (citing 1891 version of Texas statute).

83. See generally *Jacobus Ten Broek, EQUAL UNDER LAW 157-97* (1965); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 *DUKE L. J.* 507 (1991).

84. See, e.g., *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1872); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW 36-41* (1997).

85. *United States v. Morrison*, 120 S. Ct. 1756 (2000).

civil rights law, the Violence Against Women Act, which, among other things, created a federal civil cause of action for victims of gender-motivated violence.⁸⁶ By a five-to-four vote, the Court once again sided against an apparent female victim of male violence.⁸⁷ Even if everything Brzonkala said was true, it did not matter. Congress had no business enacting the civil rights provision at issue.

So says the doctrine, per Chief Justice Rehnquist.⁸⁸ The document, per the American People, says something different, and more admirable: Women are equal citizens, and Congress has broad power to affirm the rights of equal citizens against social structures and forces—even private ones—that threaten a regime of equal citizenship.

The documentary key to the case, then, is not the Commerce Clause, as the four dissenters seemed to think.⁸⁹ Yes, violence against women may be an economic issue of sorts; it is also a national problem—that is, a problem everywhere. But is it truly a *federal* problem—that is, an *inter*-state problem, a problem *among* or *between* the several states, a problem involving genuine interjurisdictional spillovers? If not, then the majority has a plausible argument that the *Interstate* Commerce Clause is an inapt basis for federal power.⁹⁰

Candid supporters of VAWA can concede that the issue of violence against women is not mainly an economic one, or chiefly an interstate one. The deepest concern is not about gross domestic product, or about things that cross or spill over state lines.⁹¹ Indeed, the main goal may not even be to ensure women's access to courtrooms. After all, state courts are open to hear garden variety assault and other tort cases. State criminal courts have been inhospitable to women victims of male violence, but so have federal criminal courts (beginning with the Supreme Court itself, as we have already begun to glimpse). The inhospitability has less to do with state courts as such and more to do with inherent features of criminal courts. Criminal courts, federal no less than state, deny full agency to women victims, who must rely on professional prosecutors to take the lead. Criminal courts, federal no less than state, also feature a variety of rules, from the outlandish exclusionary rule to the proper proof-beyond-reasonable-doubt rule, that can make it difficult for victims to prevail, especially in he-said-she-said settings. To overcome the inherent limits of criminal proceedings, it is necessary

86. 42 U.S.C. § 13981 (supp. 2000).

87. See *Morrison*, at 1756.

88. The Chief Justice was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Souter authored the lead dissent, joined by Justices Stevens, Ginsburg, and Breyer. Justice Breyer also wrote a dissent joined in part by Justices Souter and Ginsburg and entirely by Justice Stevens.

89. See *Morrison*, 120 S. Ct. at 1760-61 (Souter, J., dissenting).

90. See U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . to regulate Commerce . . . among the several States"). For more analysis of the distinction between national and federal problems, see Brest, et. al., *supra* note 25, at 470-71, 480, 532-33.

91. I mean to define spillovers broadly so as to encompass, for example, goods, services, pollution molecules, water, air, animals, and persons that cross state lines. For a case next term that may probe the limits of congressional power over inter-state affairs that are not narrowly economic, see *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675 (2001).

to ensure that the victim herself can sue in a civil proceeding, but it is less clear why this proceeding needs to be a federal one if the only goal is to give women agency and a fair chance to recover damages.⁹²

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

The Chief Justice says that Congress lacks power to do this under the Reconstruction Amendments.⁹³ In part, he appeals to the "language and purpose" of the Fourteenth Amendment, which lead him to embrace "the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action."⁹⁴ Precedents from the period "[s]hortly after the Fourteenth Amendment was adopted"⁹⁵ confirm this reading, he says. Foremost among these precedents are the 1883 *Civil Rights Cases*,⁹⁶ in which the Court invalidated those parts of Charles Sumner's 1875 Civil Rights Act that banned racial discrimination by innkeepers, common carriers, theaters, and the like. These cases are especially valuable epistemically, says the Chief Justice:

The force of the doctrine of *stare decisis* behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at the time. Every member had been appointed by President Lincoln, Grant, Garfield, or Arthur—and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.⁹⁷

There are a few basic facts about the document and the doctrine that the Chief omits. The first sentence of the Fourteenth Amendment has no explicit state-action requirement in its language: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and

92. One answer might be that state evidentiary rules, even in civil cases, continue to tilt against women alleging sexual assault. Another answer would focus on rules in place in some states preventing women from suing their husbands generally, or for some kinds of marital rapes. A third answer might be that unless a law specially names violence against women as a wrong, certain subspecies of assault will be casually dismissed by some jurors as "private" matters rather than serious torts. See *Morrison*, 120 S. Ct. at 1761, n. 7, 1772-73 (Souter, J., dissenting).

93. *Id.* at 1755-59.

94. *Id.* at 1756.

95. *Id.*

96. 109 U.S. 3 (1883).

97. 120 S. Ct. at 1756.

of the State wherein they reside.”⁹⁸ This sentence was introduced to overrule the not-so-wise Supreme Court, whose lead opinion in the *Dred Scott* case proclaimed that blacks could never be “citizens.”⁹⁹ Ordinary Americans confronting the language of the first sentence in 1866-68, and deciding whether to support or oppose the Amendment, understood Taney’s opinion as the paradigm case of what this sentence aimed to repudiate. Taney’s opinion focused not merely on the governmental aspects of citizenship—state action—but on the broader sociological and public meaning of the concept. “Blacks,” said Taney in (in)famous language, could not be citizens because they were widely regarded by the white race (and not merely by government) as “beings of an inferior order, and altogether unfit to associate with the white race,” with “no rights which the white man was bound to respect”¹⁰⁰—the white man, not just the white government. Thus when the Constitution explicitly repudiated Taney, it did so with words that seemed to suggest that the Congress, which was explicitly given sweeping, *Prigg*-ish and *McCulloch*-like enforcement power in Section 5,¹⁰¹ would have power to enact certain laws designed to affirm that blacks were equal citizens, worthy of respect and dignity. Such laws could not compel whites to invite blacks over to their dinner parties—truly private consensual relations were outside the ambit of citizenship—but could regulate larger non-governmental systems of exclusion in places such as hotels, theaters, and trains. Such laws could also try to protect blacks from racially-motivated violence, and thereby affirm that blacks did indeed have rights that white men (and not merely governments) were bound to respect.

This, at any rate, was the theory under which the Reconstruction Congress adopted sundry civil rights laws that the Court later struck down. Many of these Congressmen had been leading architects of the Amendment itself. Why doesn’t William Rehnquist accord *these* men any epistemic respect? Founders like James Madison and Thomas Jefferson, who lived and died as slaveholders, are treated with reverence by the Court (even though Jefferson was not even in America at the Founding). Why are Reconstructors like John Bingham and Charles Sumner, crusaders for racial justice, treated with so much less respect?

And what about the first Justice Harlan? After all, he dissented in the *Civil Rights Cases*, arguing that Congress had broad *Prigg*-ish power to address even certain private conduct,¹⁰² and that the Citizenship Clause of the Fourteenth

98. U.S. CONST. amend. XIV, § 1.

99. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

100. *Id.* at 407.

101. See generally Engel, *supra* note 25; The Section 5 language granting Congress “to enforce, by appropriate legislation, the provisions of this” Amendment was consciously modeled on the famous passage in *McCulloch* glossing the Necessary and Proper Clause: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate . . . are constitutional.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (emphasis added).

102. *Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

[P]rior to the amendments, Congress, with the sanction of this court, passed the most stringent laws—operating directly and primarily upon States, and their officers and agents, as well as upon individuals—in vindication of slavery and the right of the master. . . . [So now may Congress,]

Amendment had no state-action requirement.¹⁰³ This is the same Harlan who later dissented in *Plessy*. If he was right in *Plessy*, perhaps he might have been right here. To pass over him in silence, as Rehnquist does, is to disrespect a great Justice. In other opinions, Harlan insisted that the Fourteenth Amendment incorporated the Bill of Rights against the states; that the federal government was bound by the principle of equal citizenship (a kind of reverse-incorporation); that free expression meant more than the ban on prior restraints; that the Bill of Rights protected brown-skinned folk in the territories; and that the Court could not simply ignore the Fifteenth Amendment in the face of massive southern disfranchisement.¹⁰⁴ In all of these contexts, Harlan's opinions—often in dissent—have stood the test of time better than the majority opinions of his Gilded Age colleagues whom the Chief now privileges.

Here we begin to see the wages of a standard narrative presenting the Court as heroic and downplaying the document. None of the other Justices see the serious problems with Rehnquist's basic storyline. Most casebooks omit *Prigg*,¹⁰⁵ gloss over *Dred Scott*,¹⁰⁶ and fail to teach students enough about men like John Bingham and Charles Sumner. Lawyers are dimly aware of *Plessy*¹⁰⁷ in the background, but focus on *Brown*¹⁰⁸ in the foreground. The many failings of the Court in the Gilded Age are largely repressed—much of this is simply omitted from

by legislation of a like primary and direct character, guard, protect, and secure the freedom established, and the most essential right of the citizenship granted, by the constitutional amendments. . . . [T]he national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the masters of fugitive slaves.

109 U.S. at 53 (Harlan, J., dissenting).

103. The first clause of the first section . . . is of a distinctly affirmative character

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

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

Id. at 46-47, 54 (emphasis added).

104. See, e.g., *Hurtado v. California*, 110 U.S. 516, 546 (1884) (Harlan, J., dissenting) (incorporation); *Twining v. New Jersey*, 211 U.S. 78, 114-27 (1908) (Harlan, J., dissenting) (incorporation); *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896) (reverse incorporation); *Patterson v. Colorado*, 205 U.S. 454, 463-65 (1907) (Harlan, J., dissenting) (free expression); *Downes v. Bidwell*, 182 U.S. 244, 375-91 (1901) (Harlan, J., dissenting) (territories); *Hawaii v. Mankichi*, 190 U.S. 197, 226-49 (1903) (Harlan, J., dissenting) (territories); *Dorr v. United States*, 195 U.S. 138, 154-58 (1904) (Harlan, J., dissenting) (territories); *Giles v. Harris*, 189 U.S. 475, 504 (1903) (Harlan, J., dissenting) (black disfranchisement).

105. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

106. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

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

108. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

casebooks. And the irony of Rehnquist's presenting post-Redemption cases seeking to undo Reconstruction as rendered "shortly after the Fourteenth Amendment" is, I suspect, lost on most readers.

Coming from William Rehnquist, this crabbed view of the Fourteenth Amendment is not wholly unexpected, for he has never been a particularly sympathetic or generous reader of Reconstruction. What is most surprising—and disheartening—is that no one on the Court squarely challenges Rehnquist on Reconstruction (though Justice Breyer raises an eyebrow).¹⁰⁹ The debate instead focuses on the Commerce Clause.

Instead of talking about Commerce Clause issues far afield from women's equality, the dissenters would have done better to begin with the Citizenship Clause¹¹⁰ and explain how gender-motivated violence against women can pose a threat to equal citizenship in a manner analogous (though not identical) to the ways that other power structures have threatened the equal citizenship of blacks. The dissenters might have noted that race and sex are not isomorphic; and that in the case of equal citizenship based on sex, it is important to read the Fourteenth Amendment in light of the much later Nineteenth. But in the case of both race and sex, the dissenters could have argued, Congress may properly act to dismantle what it plausibly perceives to be large social structures creating and sustaining conditions of unequal citizenship, in which some citizens are systematically disrespected or mistreated on the basis of birth status. In the context of both race and sex, government has helped maintain these structures, by its actions and inactions. In the case of race, the Black Codes, Jim Crow, lynchings, and disfranchisement have loomed large. In the case of sex, government has created marriage laws that left women's property and bodies largely at the mercy of men¹¹¹ and has erected unjustified obstacles to rape prosecution, such as the "outcry" requirement. Through such laws, government has historically invested men with an improper sense of entitlement over women's bodies.

But the past involvement of government is probably not necessary to uphold

109. *United States v. Morrison*, 120 S. Ct. 1740, 1778-79 (2000) (Breyer, J., dissenting). Only Justice Stevens joined this part of Breyer's dissent. *Id.*

110. In emphasizing this clause, and its proper application to certain direct citizen-citizen relations apart from state action, I stand on the shoulders of the great Charles Black. See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 51-66 (1969).

111. For example, at common law, a man could rape his wife with impunity, and subject her to physical punishment. See Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117 (1996); Robin L. West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 *FLA. L. REV.* 45 (1990); Robin L. West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 *W. VA. L. REV.* 111, 138-50 (1991). Husbands also had general legal control over their wives' earnings and property, see Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-80*, 103 *YALE L.J.* 1073 (1994); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 *GEO. L.J.* 2127 (1994).

congressional action; it merely strengthens the case.¹¹² Though the documentarian issues are not free from all doubt, the best reading of the Constitution as a whole is probably this: To vindicate the vision of the Fourteenth Amendment (read through the prism of the Nineteenth), Congress may pass expressive laws affirming women's equal status and citizenship, making clear to all that women have rights that men are bound to respect. Congress's power is not plenary—wholly plenary power is hard to reconcile with the basic structure of enumerated power, which the Reconstruction Amendments accept rather than repudiate. But where Congress can honestly be understood as affirming equal citizenship for those who have historically been denied equality on the basis of birth-status, judicial review of enumerated power should be no less deferential than in *Prigg*¹¹³ or *McCulloch*,¹¹⁴ on which the Fourteenth Amendment's supporters justifiably relied.¹¹⁵

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

III. VIOLENCE AGAINST POSTERITY: PARTIAL BIRTH ABORTION

Abortion is perhaps America's most agonizing legal and moral issue. It has divided the country, and last term it divided the Court deeply and down the middle. In *Stenberg v. Carhart*,¹¹⁶ five Justices voted to overturn Nebraska's ban on partial birth abortions; four dissenters sharply disagreed.¹¹⁷ Eight Justices wrote—more than in any case last term, or indeed, in the last decade.¹¹⁸ Some of the opinions contain passages that are gut-wrenching in their graphic descriptions of late-term abortions.¹¹⁹ Nothing that anyone could say about abortion law—on the Court, in the *Pepperdine Law Review*, or anywhere else—could soothe all sides of

112. For a graceful and forceful argument that VAWA was a proper response to governmental violations, see Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in Brzonkala v. Morrison*, 75 N.Y.U. L. REV. 150 (2000).

113. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

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

115. The VAWA section at issue speaks of "persons" rather than citizens. 42 U.S.C. § 13981(b) (1994). To the extent it sweeps beyond citizen-citizen violence, it may properly be justified by Congress's sweeping power to regulate and protect aliens.

116. 120 S. Ct. 2597 (2000).

117. *Id.* Justice Breyer wrote for the majority, joined by Justices Stevens, O'Connor, Souter, and Ginsburg, each of whom, except Justice Souter, also wrote a short concurrence. *Id.* at 2604-20. Justices Thomas and Kennedy wrote the longest dissents—the former joined by the Chief and by Justice Scalia, the latter joined only by the Chief. *Id.* at 2623-56. The Chief Justice and Justice Scalia also wrote short separate dissents. *Id.* at 2620-23.

118. Last term, the case with the next most opinions (six) was *Troxel v. Granville*, 120 S. Ct. 2054 (2000). To my knowledge, the last time eight or more Justices wrote in a single case was in *Furman v. Georgia*, 408 U.S. 238 (1972), where all nine Justices wrote.

119. *E.g.*, *Stenberg*, 120 S. Ct. at 2622 (Kennedy, J., dissenting).

completely heal the nation's bleeding wounds. But I submit that that doctrine's discourse, as exemplified by the opinions of the Justices in the majority, is insensitive and obtuse—more partisan, more cold, less conciliatory, and less wise than the document itself.

The basic approach of the majority, whether couched in the bland language of Justice Breyer's opinion for the Court, or the more confrontational prose of some of the concurring Justices, is that the Court has spoken, and all must obey. Breyer begins, however, on a far more promising note, cautioning that "constitutional law must govern a society whose different members sincerely hold directly opposing views."¹²⁰ So far, so good. What is needed is a focal point, a common ground, something that respects the valid concerns of both those who care about women's equality and those who care about unborn human life. And that focal point, says Breyer, is doctrine: "This Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose. *Roe v. Wade*¹²¹; *Planned Parenthood v. Casey*¹²². We shall not revisit those legal principles. Rather, we apply them to the circumstances of this case."¹²³

There are several problems here. First, exactly where and how and why does "the Constitution" offer this basic protection? In other words, where is the first link in the chain of proper constitutional argument connecting *Roe*'s rules to something actually in the document? In order to apply "legal principles" to new facts, we need to know the reasons underlying the principles. In the year 2000, it is hardly a state secret that *Roe*'s exposition was not particularly persuasive, even to many who applauded its result. *Casey* built on *Roe*, without ever explaining why *Roe* was right. Now *Stenberg* builds on *Casey* and *Roe*, and critics may justly feel that this is a shell game with no pea. If all sides are sincerely being asked to come together in good faith, it is hard to ask them to cohere around *Roe* simply because "this Court" keeps incanting it without explaining or justifying it, constitutionally. "We shall not revisit those legal principles."¹²⁴ Shut up, he explained. Because I said so.

Second, even if *Roe*'s documentary weaknesses were not so obvious or important, what *Roe* said was not particularly wise or sensitive. There is very little about women's equality in the case; more about the rights of doctors, and rather a lot about privacy. But to talk about privacy is to beg the question of the moral status of the fetus.¹²⁵ How can all be asked to come together around a

120. *Id.* at 2604.

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

122. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

123. *Id.* (internal citations modified).

124. *Stenberg*, 120 S. Ct. at 2604.

125. *Roe* itself acknowledged that a "pregnant woman cannot be isolated in her privacy" and that the issue before the Court was thus "inherently different" from true privacy cases involving issues like contraception. *Roe v. Wade*, 410 U.S. 113, 159 (1973). This acknowledgment renders the opinion's exposition of abortion as a "privacy" right rooted in these earlier cases, almost self-contradictory. *Id.* at 152-53. See also Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 773-78 (1999).

discourse that simply fails to acknowledge the basic moral insight of one side—that the fetus is a moral entity? Even if the moral nothingness of the fetus were obvious to most right-thinking folk when the fetus is a near-microscopic clump of cells, the issue in *Stenberg* is very different—late second-trimester abortions of recognizable humans, with hands, organs, dimensions, senses, brains.¹²⁶ When you prick them, they bleed.

Thus, *Roe*'s privacy talk is not a promising way to find common ground. What about women's equality? Breyer's opinion contains exactly one mention of equality, in its opening paragraph: "[M]illions [of Americans] fear that a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty and leading those with least resources to undergo illegal abortions with the attendant risks of death and suffering."¹²⁷ On the facts of *Roe*, where an old law that no woman voted for banned all abortions, the claims of women's equality were indeed forceful—especially when we understand how law has often used women's biology to limit women's prospects and channel them into circumscribed lives. But the law in *Stenberg* was quite different. It had been recently adopted in Nebraska, and in 29 other states, in a process that fully involved women as political equals.¹²⁸ It did not limit early abortions in any way—any woman wanting to end an unwanted pregnancy early on had complete freedom to do so. Thus, the law did not completely conscript women's bodies or channel them into narrowly circumscribed lives.¹²⁹ As to late term abortions, where the fetus was much more developed and recognizably human, the law, if narrowly construed, outlawed only a single procedure, leaving other methods of abortion unaffected.¹³⁰ Moreover, the American Medical Association proclaimed that there were no situations in which the banned procedure was the only safe and effective one; safe alternatives were always available.¹³¹

The majority counters that, although the alternatives are safe, it is possible to imagine some situations where the banned procedure might, perhaps, be ever so slightly safer.¹³² But where exactly does the Constitution say that the government may never oblige citizens to undergo some very small risk? If the document does

126. Cf. Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599 (1991) (discussing fetal development in utero).

127. *Stenberg*, 120 S. Ct. at 2604.

128. In Nebraska itself, it passed the state legislature by an overwhelming margin among both male and female legislators. Overall, the vote for it was 45 to 1, with three abstentions. 95 NEB. LEGIS. J. 2609 (1997). Among female legislators, twelve voted for it and one abstained. *Id.* A nationwide Gallup Poll conducted in the spring of 2000 found that both men and women supported a ban on partial birth abortion by a margin of more than 2 to 1. Conversation with The Gallup Organization, Princeton, N.J. (July 26, 2000).

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

130. Despite the law's apparent narrow aim, critics claimed that its words in fact swept more broadly than advertised. The federal courts below construed the statute expansively, and the Supreme Court majority agreed, over sharp dissent. Federal courts are not the definitive interpreters of state law; and where possible, statutes should be construed so as to avoid constitutional doubts. Several other states have statutes with narrower language than Nebraska's; to simplify exposition of the key constitutional issues, I shall thus assume a clean statute that prohibits only the "D & X" procedure rather than the "D & E" method of abortion.

131. *Stenberg*, 120 S. Ct. at 2612-13.

132. *Id.* at 2611-12.

not enact Herbert Spencer's *Social Statics*,¹³³ where does it enact Stephen Breyer's *Risk Regulation Manual*?¹³⁴ Would such a rigid *Manual*—constitutionalized so that no legislature could ever properly modify it—be truly wise, given that there is more to life than maximizing safety? Other values, such as minimizing cruelty, are also important. If it could be proved that crime victims could be made marginally safer if we vivisected all murderers, would this gruesome capital punishment be mandatory? Of course, at some point, where only women are asked to bear serious risks without strong justification, equality principles should come into play; but once again, isn't it important, on an *equality* argument, that many women across the country have supported the ban on one particularly cruel form of abortion?¹³⁵

The majority tries to sidestep the cruelty question—*Casey* said nothing about cruelty, so the Court will assume it away¹³⁶—but Justice Stevens addresses it head on, in a concurrence joined by Justice Ginsburg. All forms of abortion are cruel—“equally gruesome”—and so distinguishing between them is, in Stevens' words, “simply irrational.”¹³⁷ So much, it seems, for trying to be sensitive to competing moral visions; just dismiss the millions of Americans who disagree with you as “irrational.” Granted, the document itself does sharply condemn certain things; it is hardly “neutral” on everything. But the things it condemns in blunt terms, like aristocracy and slavery, generally deserve condemnation. Those who believe in White Supremacy and Black Codes deserve scorn; those who weep at partial birth abortion do not. Deep down, Justice Stevens himself must know this. Would he dismiss as “simply irrational” those who insist that capital punishment by electric chair should be banned in favor of death by lethal injection? At some level, all forms of capital punishment are gruesome, but a society that seeks to minimize barbarism makes fine distinctions. There are laws, for example, that prohibit mistreatment of corpses. Those who support a ban on partial birth abortion seek to use the law expressively—to find some way of saying in law that the unborn child late in a pregnancy is not nothing, that we recognize it, and respect it, that we seek to minimize its insult and avoid dehumanizing ourselves even if we allow the mother to end its life.¹³⁸ In this sense, the law itself sought to protect choice while also expressing society's sense of tragedy.¹³⁹ To

133. *Lochner v. New York*, 25 S. Ct. 539, 546 (1905) (Holmes, J., dissenting).

134. STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 18 (1993).

135. This is not to suggest that a very clear equality violation would always be cured by general support from the disfavored group; but surely the views of women are relevant where the alleged violation of women's equality is not so clear.

136. See *Stenberg*, 120 S. Ct. at 2597.

137. *Id.* at 2617 (Stevens, J., concurring).

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

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

dismiss this effort to find some common ground as “simply irrational” is politically obtuse and morally insensitive.¹⁴⁰

The rest of Stevens’ short concurrence is not much better. He adopts a dismissive tone towards dissenters, and exults in the fact that *Roe*’s central holding “has been endorsed by all but 4 of the 17 Justices who have addressed the issue.”¹⁴¹ This seems quite impressive—until one remembers how many Justices supported, say, censorship for the first 150 years. Past Court opinions are epistemically valuable, but a properly humble Justice should always be open to the possibility of past error. Those who want to follow and extend a given precedent should be prepared to defend it on the merits; and here, Stevens falls short. He distills *Roe*’s central holding as follows: “the word ‘liberty’ in the Fourteenth Amendment includes a woman’s right to make this difficult and extremely personal decision.”¹⁴² But of course the document says that “liberty” may be limited by “due process of law”—as may “property,” which stands alongside liberty in this clause.¹⁴³ Properly speaking, it is thus awkward to speak of a “Liberty Clause” as such, though Stevens is fond of doing so.¹⁴⁴ Stevens impatiently ends his opinion with “See U.S. Const. Amdt. 14.”¹⁴⁵ With due respect, what is needed is a careful parsing of this, and other constitutional text, not a dismissive wave.

Speaking of “liberty,” a holistic documentarian might note that the word appears three times in the Constitution. Two of these occasions are in the Due Process Clauses—or Liberty Clauses, as Stevens would have it—limiting the federal and state governments, respectively. The third is in the Preamble: “We the people of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution”¹⁴⁶ This too, is a Liberty Clause, and it suggests that the sensitive moral balance that Nebraska tried to strike between women and posterity was not a wholly irrational or counter-constitutional one.¹⁴⁷

140. Stevens also suggests, picking up on a suggestion in Justice Ginsburg’s dissent, that Nebraska’s true motivation was simply to undercut *Roe*. *Stenberg*, 120 S. Ct. at 2617 (Stevens, J., concurring); see also *id.* at 2620 (Ginsburg, J., concurring). This, too, is a doubtful and needlessly provocative statement—and thin-skinned to boot, seeing only a possible insult to the Court rather than an avoidance of insult to an innocent life.

141. 120 S. Ct. at 2617 (Stevens, J., concurring).

142. *Id.*

143. U.S. CONST. amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property without due process of law.”).

144. See John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 20-38 (1992).

145. 120 S. Ct. at 2617 (Stevens, J., concurring).

146. U.S. CONST. pmbl. (emphasis added).

147. For a similar, if rather more forceful, suggestion, quoting both the Preamble’s liberty/posterity language and its “establish Justice” language, see *Stenberg*, 120 S. Ct. at 2621-23 (Scalia, J., dissenting). Justice Scalia’s willingness to invoke the Preamble’s justice-seeking language should hearten those critics of originalism who see this methodology as insensitive to questions of justice. See, e.g., Christopher L. Eisgruber, *Dred Again: Originalism’s Forgotten Past*, 10 CONST. COMM. 37 (1993).

IV. RELIGION

Consider next the only case of the term to openly overturn a precedent, *Mitchell v. Helms*.¹⁴⁸ *Mitchell* involved a longstanding federal program that lent computers and other educational equipment to public and private schools, including private religious schools.¹⁴⁹ By a vote of six to three, the Justices upheld the program against an Establishment Clause challenge, although no single opinion commanded a majority of the Court.¹⁵⁰

Here—at last!—the Court got one right, though it remains to be seen if there are indeed five Justices on the current Court who are truly in sync with the basic teaching of the document.¹⁵¹ Moreover, to get it right, the Court was obliged to overrule two cases from the 1970s.¹⁵² Proper realignment of doctrine and document in the future may require still more overrulings.

Led by Justice Souter, the dissenters claimed that the Constitution is offended whenever government aid goes directly to religious entities for religious purposes, even if this aid does not single out religious entities for any preferential treatment.¹⁵³ In other words, government may not, pursuant to a genuinely secular law, give computers on a completely evenhanded basis to public schools and private schools without regard to the private schools' religious affiliation or lack thereof.¹⁵⁴ To put it yet another way, the Constitution requires that if government decides to give computers to private schools, it may give them to the Secular School and the Indifferent Institute, but must withhold them from various religious schools. If a given private school eligible for the computers later decides to add prayer to its curriculum, while otherwise continuing to teach all the basics, that school must forfeit its computers. The Constitution requires this discrimination, depriving religious schools, and only religious schools, of a benefit that all other schools receive.

But the Constitution requires no such thing—at least if the test is the best reading of its words, history, and structure, as opposed to the many outlandish

148. 120 S. Ct. 2530 (2000). The Court in *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000) unsettled the law of sentencing in ways that could well have profound repercussions in the future, but the majority declined to openly overrule any of the Court's past cases.

149. *Id.* at 2537.

150. Justice Thomas authored a plurality opinion joined by the Chief Justice, and Justices Scalia and Kennedy. 120 S. Ct. at 2536. Justice O'Connor, joined by Justice Breyer, concurred in the judgment. *Id.* at 2556. Justice Souter dissented, joined by Justices Stevens and Ginsburg. *Id.* at 2572.

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

152. These cases are *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977).

153. 120 S. Ct. at 2572-73 (Souter, J., dissenting). This is not a new theme for Justice Souter, and much of my description and critique of his general approach is based on his earlier judicial statements in cases such as *Rosenberger v. Rector*, 515 U.S. 819, 863-99 (1995) (Souter, J., dissenting), and *Agostini v. Felton*, 521 U.S. 203, 240-54 (1997) (Souter, J., dissenting).

154. *See id.*

(and contradictory) things that have been said about it in *U.S. Reports*.¹⁵⁵ As a matter of text, the document renounces a national “establishment of religion.”¹⁵⁶ Let us recall the world the Founders aimed to repudiate, a world where a powerful church hierarchy was anointed as the official government religion, where clerics *ex officio* held offices in the government, and where members of other religions were often barred from holding government posts. With this paradigm case in mind, we can begin to see how the First Amendment fits well with other ideas in the document repudiating the hierarchies and inequalities of the ancient regime—the kings, dukes, cardinals, permanent standing armies, parliamentary pomposities, and sovereign immunities—in favor of a New World Order where no church would be given special treatment by the federal government. All citizens of all religions would stand equal before federal law, and equal in eligibility to hold federal office. (Thus, in important ways, the opening words of the First Amendment build on the closing words of Article VI, promising that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”)¹⁵⁷ On this view, there are not truly two Religion Clauses that coexist in tension—an Establishment Clause discriminating against religion and a Free Exercise Clause limiting the discrimination. Rather, there is one Religion Clause, proclaiming that the federal government should neither favor nor disfavor religion as such.

In fact, the subject of religion as such was, in general, simply beyond the proper enumerated powers of the federal government in the states: “Congress shall make no law”¹⁵⁸ respecting—that is, on the topic of—religion qua religion. On close inspection, this phrasing is plainly an intratextual gloss on the enumerated-power language of Article I, proclaiming that “*Congress shall have power . . . to make all Laws which shall be necessary and proper*” to the Constitution’s careful division of power.¹⁵⁹ But to see this is to see how the Religion Clause, with its absolutist grammar, addresses only laws that regulate religion as such—for example, laws requiring or banning prayer, or naming some sect or sects for special treatment. The Amendment has nothing to do with the incidental effects on a religion of a law passed without regard to religion—for example, a law about computers for all schools, regardless of religion. Here, Congress does indeed have obvious enumerated power insofar as such aid to all schools helps promote the federal economy.¹⁶⁰ For Congress to distinguish in its law between private schools that sponsor prayer and those that do not—as the dissenters insist Congress must—would be to violate this very enumerated-power idea: Whether prayer takes place or not is simply none of Congress’s business. And so the dissenters have turned the text precisely upside down.

And the history, too. In past church-state opinions, the *Mitchell* dissenters

155. For detailed documentation of my admittedly sweeping assertions in this section, see Amar, *Bill of Rights*, *supra* note 25, at 32-45, 246-57, 532-33.

156. U.S. CONST. amend. I.

157. U.S. CONST. art. VI.

158. U.S. CONST. amend. I.

159. U.S. CONST. art. I, § 8, cl. 18. (emphasis added).

160. For discussion (and explanation of the interstate externalities that render education a proper subject for federal legislation), see *generally* Brest, et. al., *supra* note 25.

have tried to wrap themselves in the mantle of James Madison.¹⁶¹ But the kinds of governmental aid to religion that James Madison and his allies opposed were aids to religion *as such*, in laws that singled out some explicitly religious sects or institutions or practices (“Protestants,” “Christians,” “churches,” or “prayer,” for example). Moreover, it is a categorical mistake to automatically equate an Amendment proposed by Congressional supermajorities and ratified by a great many states in the 1790s with what James Madison personally believed or did in Virginia years before. Indeed, given that the text of the First Amendment most closely tracks the proposals of New Hampshire rather than Virginia, the *Mitchell* dissenters’ history is way off—as is their fundamental structural vision. In both logic and effect, this vision discriminates against religious entities as such. On a proper view of the matter, government need not give any aid to private schools at all—the distinction between aid to public schools and aid to private schools is itself a wholly secular and legitimate distinction. But if government does choose to give aid to private schools, it should not be in the business of discriminating against religious schools, by imposing a prayer tax. (If you pray, you must give up the computer that everyone else gets.)

Even at the Founding, one of the big ideas of the First Amendment was Equality—government should not favor or disfavor any religion, just as it should not favor or disfavor a speaker because of his political viewpoint under the neighboring Free Speech Clause. And this idea, of course, was powerfully reinforced by the Fourteenth Amendment, which incorporates religious freedom principles against the states. The Citizenship Clause condemns governmental discrimination on the basis of birth-status, and religious discriminations are closely akin to racial discriminations. (Indeed, some religions focus on birth itself—one is born a Jew, for example.) White or black; male or female; rich or poor; Jew, Protestant, Catholic, Hindu, Agnostic, or Atheist—we are all equal citizens. Yet the dissenters’ logic requires—not just permits, but requires—the government to distinguish between the Atheist Academy and the Morning Prayer Private School, whose “3Rs” curricula are otherwise identical.

There is, I admit, a considerable amount of modern doctrine, especially from the 1970s and 80s, that lends support to the dissenters’ normatively unattractive vision. So much the worse for doctrine; so much the better for the document.

V. UNENUMERATED RIGHTS

The last case from the 1999 term that we shall consider, *Troxel v. Granville*,¹⁶² addressed the topic of unenumerated rights, an issue that might be thought particularly difficult for a documentarian. Acting under a broadly worded Washington state statute, a family court judge had ordered a mother to make her

161. See, e.g., *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 868-876, 890-91 (Souter, J., dissenting); *Agostini v. Felton*, 521 U.S. 203, 243 (Souter, J., dissenting).

162. 120 S. Ct. 2054 (2000).

two minor children available for mandatory visitation with the children's paternal grandparents.¹⁶³ As construed, the statute allowed anyone at all to petition at any time for compelled visitation, and authorized the judge to order such visitation whenever the judge decided that such visitation would be in the best interest of the child, without any need to give the slightest deference to the contrary wishes of the parent or to make any finding of parental unworthiness.¹⁶⁴ Invoking the doctrine of substantive due process, the Justices voted to strike down this breathtakingly open-ended grant of power to intrude upon parental authority in intact and functional families.¹⁶⁵ As in *Mitchell*, however, the Justices were unable to cohere around a majority opinion.¹⁶⁶ Justice O'Connor wrote the lead opinion for four Justices, and Justice Souter concurred in the judgment on the basis of similar, but not identical reasoning.¹⁶⁷

Though they disagreed on details, these five Justices found common ground in a series of Court cases, beginning in the early 1920s, affirming the strong liberty interest of parents in the care, custody, and control of their minor children. This open appeal to *Lochner*-era cases like *Meyer v. Nebraska*¹⁶⁸ and *Pierce v. Society of Sisters*¹⁶⁹ is too much for Justice Scalia, who argues that such relics of a largely discredited judicial era "[have] small claim to *stare decisis* protection."¹⁷⁰ What the trial judge did, says Scalia, may well be stupid, but the Supreme Court does not sit to correct all stupidity.¹⁷¹

If the debate here looks vaguely familiar—O'Connor against Scalia on the question of substantive due process methodology—it should. In some ways, the debate recalls the skirmishing over this issue in *Michael H. v. Gerald D.*¹⁷² and the battle royale in *Casey v. Planned Parenthood*,¹⁷³ and presages the fireworks in *Stenberg*.¹⁷⁴ It is also worth noting that the cases Scalia would thrust aside, *Meyer* and *Pierce*, also featured prominently in *Griswold v. Connecticut*,¹⁷⁵ and, later, *Roe v. Wade*.¹⁷⁶ In cases like *Roe*, *Casey*, and *Stenberg*, the majority might be

163. *Id.* at 2057-58.

164. *Id.* at 2057.

165. *Id.* at 2059-65.

166. *Id.* at 2057.

167. The plurality (Justice O'Connor, joined by the Chief Justice and Justices Ginsburg and Breyer) struck down the statute as applied. *Id.* at 2057. Justice Souter voted to invalidate it on its face. *Id.* at 2065. Justice Thomas concurred in the judgment, and Justices Stevens, Scalia, and Kennedy filed separate dissents. *Id.* at 2067.

168. 262 U.S. 390 (1923).

169. 268 U.S. 510 (1925).

170. *Troxel*, 120 S. Ct. at 2074 (Scalia, J., dissenting).

171. *Id.* at 2074.

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

173. Compare *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (embracing expansive, precedent-based view of substantive due process), with *id.* at 979-84 (Scalia, J., dissenting) (challenging this view as unconstrained).

174. In *Stenberg*, Justice O'Connor writes a Court-centric concurrence—"Nebraska's statute cannot be reconciled with our decision in [*Casey*] and is therefore unconstitutional." 120 S. Ct. at 2618 (O'Connor, J., concurring) (emphasis added). Justice Scalia likens the majority's result to the one in *Dred Scott*. *Id.* at 2621 (Scalia, J., dissenting).

175. 381 U.S. 479, 481-82 (1965).

176. 410 U.S. 113, 152-53 (1973).

accused by critics of inventing rules nowhere in the document, while the dissenters might be faulted by critics for ignoring a principle that is definitely in the document, namely women's equality. A similar point applies to *Troxel*. The majority insisted on talking about the non-mammalian whale¹⁷⁷ of substantive due process—a phantasmagorical beast conjured up by judges without clear textual warrant. Conversely, the dissent ignored the fact that there is indeed constitutional text that limits state power to restrict unspecified and substantive fundamental freedoms, namely the Privileges or Immunities Clause of the Fourteenth Amendment.¹⁷⁸

But does a documentarian gain anything by changing the label on the lid of the black box of unenumerated rights from “substantive due process” to “privileges and immunities of citizens?” Perhaps a little. Because the very phrase “*substantive due process*” teeters on self-contradiction, it does not give us a sound starting point, or a directional push to proper legal analysis. The phrase does not clarify thought. Granted, once the first set of substantive due process cases is on the books, these may launch the project (so long as we don't ask where those decisions came from). But given that the origins of the substantive due process doctrine are not particularly admirable—*Dred Scott* and *Lochner* haunt this swamp—perhaps we can do better.

There were indeed a core set of fundamental freedoms that the People aimed to affirm in the Fourteenth Amendment's Privileges or Immunities Clause—freedom of expression and of religion, protection against unreasonable searches, the safeguards of habeas corpus, and so on.¹⁷⁹ These clear instances of inclusion—with less tainted origins—give us paradigm cases from which we can properly begin the doctrinal process of generalization, interpolation, and analogic reasoning. Moreover, the Privileges and Immunities Clause suggests a method for going about finding fundamental rights that is less Court-centered, and admirably so. The Fourteenth Amendment does not exhaustively list all of Americans' privileges and immunities, but it does rest upon a notion that such fundamental rights are catalogued elsewhere in documents that the American People have

177. With thanks to the incomparable phrasemaking of Charles Black. See BLACK, *supra* note 110, at 70. Though Black, in this passage, is not describing substantive due process, he does elsewhere condemn it as “paradoxical, even oxymoronic.” CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM 3 (1997).

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

179. For more elaboration of this claim, and the other claims in this section, see Amar, *Bill of Rights*, *supra* note 25, at 137-230.

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

This law-canvassing approach is hardly a novel method. For example, the younger Justice Harlan emphasized that the Connecticut contraception law at issue in *Griswold* was utterly outlandish, as measured by the laws of all the other states.¹⁸⁰ Most important, law-canvassing has the salutary effect of focusing the Justices not on themselves and their own wisdom, but on the wisdom of the American people more generally. On this approach, the key fact in *Troxel* was not so much that the Washington statute went beyond what the Court said in the 1920s, but that the statute was utterly outlandish when measured against the historical and current practices of every other state.

180. See *Poe v. Ullman*, 367 U.S. 497, 554-55 (1961) (Harlan, J., dissenting); see also, *Stanford v. Kentucky*, 492 U.S. 361 (1989). For more discussion of the law-canvassing method, see Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 590-605 (1993). I do not claim that this method is the only proper way to fill the open texture of the Fourteenth Amendment; only that it is one technique of central significance and usefulness.

DEAN JONATHAN D. VARAT'S RESPONSE

DEAN VARAT: I agree with Akhil about many of the cases about which he spoke, particularly with respect to *Morrison*¹ and *Kimel*.² But I would like to address his back-to-basics constitutional law, which would get away from what he calls self-absorption by the Court in its own precedent. Akhil favors the Court looking to the Constitution's text, its structure, its history, its architecture, its big ideas. That seems to me to suggest a greater willingness to allow the Court to not let intervening decisions stand in the way of repudiation of those decisions, in order to go back to basics, if you will.

Whether that approach would actually produce the results that Akhil would like the Court to produce is a serious question. That happens, of course, only if they read the document the way that Akhil reads it. However, I would pose these things in particular: if one of the concerns here is about judicial imperialism, and we've heard a lot about that this morning, is the right way to solve that problem to free the Court, allowing it to ignore its earlier precedent? One view of what has happened here is that the Court is simply hiding behind these precedents, unwilling to look more fundamentally at the questions that underlie them. Another view, however, of the judicial adherence to precedent or to at least some, the limitation of precedent, is that the Court from time to time, with its changing composition of Justices, is in fact limited to some degree by what went before it. Therefore, the Justices are not free to strike out on their own and to change dramatically the course of the Court.

We've already had quite a bit of discussion this morning about whether *Lopez*³ and *Morrison* mean very much and whether they will have any significant lasting impact. Part of that, one might suppose, is a result of the fact that there are so many cases that have been decided pointing in the other direction that the Court tends to walk somewhat gingerly when it begins to take a new path. Is that a bad thing? I suppose that depends on what went before. It depends on how bad the earlier case law was. If the case was *Dred Scott v. Sandford*,⁴ that's one thing. If the case is *Wickard v. Filburn*,⁵ one might have a somewhat different point of view about that.

A second pragmatic question for the panel concerns competing big ideas of the Constitution. And if one reverts to basics, different Justices might revert in fact to very different basics. So while I actually agree with Akhil about *Morrison* and *Kimel*, the idea of federalism and the idea of separating the powers between states and federal government are big competing ideas of the Constitution—ones that compete often with the notion of using congressional power to improve the equal status of a variety of groups. And while I

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1. *United States v. Morrison*, 529 U.S. 598 (2000).
 2. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).
 3. *United States v. Lopez*, 514 U.S. 549 (1995).
 4. 60 U.S. 393 (1856).
 5. 317 U.S. 111 (1942).

would be very comfortable resolving the questions in the way that Akhil would, I nonetheless think that the current Court and other Courts might well adopt the other point of view, even if they were pursuing a distinctly documentary approach of the sort about which Akhil speaks.

He spoke very eloquently about the first sentence of the Fourteenth Amendment, to which I do agree the Court has not paid nearly enough attention. I once heard another colleague of ours, Sandy Levinson, say that the entire doctrine of the Constitution of the Supreme Court could have been derived from the ban on titles of nobility, without need for the Fourteenth Amendment. In some respects, that's actually an interesting exercise to think through. That's a very big idea of the Constitution. There are times when big ideas of liberty and big ideas of equality are in fact in some tension, although they need not always be. The fact that one reverts to the documentarian approach without reviewing intervening decisions by Justices who may have wrestled very much with some of these decisions may result in a good thing, a fresh look, or it may miss a lot of what went in between. Again that depends on the particular people.

Though I agree with Akhil about *Kimel*, I do want to say one thing about his general, very powerful notion of how much the Constitution broke with what went before and therefore, why *Kimel* is at odds with that. I would say what others have said—that there is support in English history for the notion that the king can do no wrong, meaning not that the king can never be thought to do any wrong and therefore is completely immune, but rather that the king should never be understood to have done any wrong. That idea is not so much a separation from the English tradition but actually a continuation, in our context.

More fundamentally, I guess the only reason I raise this here, what might seem a small quibble, is that while it's true that we have a system that began with many breaks from England, we also have a system that followed and received a great deal of what came before, including many notions of liberty that I'm sure Akhil greatly favors and appreciates. So, as with the competition among big ideas, there's sometimes competition among historical ideas, including competition among historical ideas about what came from England.

Finally, I note that in six of the seven cases Professor Amar discusses, he believes the Court should have kept its hands off and let government act. It is not obvious to me that judicial restraint and documentarianism are completely aligned, and that's the last issue I would like to raise. Perhaps his point is that doctrinal self-absorption has gotten in the way of judicial self-restraint, even systematically. Once decisions invalidating government action are on the books, the system of adhering to precedent, supported by the tendency of judges to regard their own work as more important than that of others, is too likely to lead to bad precedents, or even marginal ones, not only to be reaffirmed but to be expanded incrementally.

PROFESSOR KMIEC: We will have questions for Professor Amar and Dean Varat from Marcia Coyle, the Washington Bureau Chief and U.S. Supreme Court Correspondent of the National Law Journal.

MS. COYLE: I have a question for Professor Amar first. While we can sort of debate the real-world impact and long-term impact of cases like *Lopez* and *Morrison*, it would seem that the Court's work in the area of the Eleventh Amendment and section 5 recently has had a very obvious impact, the closing of the courthouse door to litigants who feel states violated their rights under federal law. I'm wondering if you would look ahead as the Court is going to be revisiting this in *University of Alabama v. Garrett*,⁶ in which the statute at issue is the American with Disabilities Act. The case looks very much like *Kimel*. Can you distinguish the two, and is there a way for the Court to uphold what Congress did with *Garrett* and still be consistent with *Kimel*?

PROFESSOR AMAR: The case that's coming before the Court, as you have noted, doesn't involve age discrimination, which is what *Kimel* involved, but discrimination against those with disabilities, under the Americans with Disabilities Act. Not the ADEA, but the ADA. In some ways it's an easier case to uphold congressional power, because you can say there's much more of a record of actual discrimination against folks with disabilities—even in courtrooms and courthouses with access, just physical access. In education. In employment. Across a very wide range of issues, you may have a better record of state lapses, real state discrimination, than were evident in *Kimel*. On the other hand, the law itself requires not mere nondiscrimination, but affirmative accommodation, of various sorts. That may make it harder to sustain. I've probably suggested my sympathies are that this should be an easy case for congressional power to be affirmed, but, you know, I have zero votes.

MS. COYLE: This question is for Dean Varat. It's nice to hear Commerce Clause definitions offered by Professor Kmiec and others, but right now we have a Congress that has to deal with a five-four majority indefinitely and that has its own view of the Commerce Clause and the Eleventh Amendment. I'm wondering, in the real world, what can this Congress do? Professor Amar suggested the Privilege and Immunities Clause as another way of looking at some of these problems, but if you're a legislator, where else can you look, and how do you think such legislation would fare before the current Court?

DEAN VARAT: Is this after January 20th?

MS. COYLE: No. This is now.

6. 121 S. Ct. 955 (2001).

DEAN VARAT: This is now. I think it is difficult for the Congress to figure out exactly what the scope of their powers is at the moment. I do suppose that the report that Dean Sullivan gave a little bit ago about adding jurisdictional elements would probably be a way of both achieving the symbolic points about which Akhil is talking and sustaining regulation. And were I a member of Congress, who wanted to further such legislation, I would simply do that—that is, add the jurisdictional elements. Let me put it another way. I don't think the *Lopez* and *Morrison* limits seem very significant. Hence, they seem relatively easy to evade.

PROFESSOR KMIEC: Akhil, I want to give you an opportunity to respond to Dean Varat as the audience questions are being digested.

PROFESSOR AMAR: Jon raised a number of spectacularly good questions. So you're asking just the right questions in fact. Here's one of the biggest: who's listening? Who's ultimately the audience? I actually, Jon, agree with you that perhaps the audience isn't the Supreme Court. I don't know whether they are going to pay much attention to what we say. And if they actually were more document focused, perhaps I wouldn't like at all what they think that document really says.

So who is the addressee? I ultimately think that we should at least, as scholars, talk amongst ourselves and talk to our students and introduce them to the Constitution and tell them in our case books about the Supreme Court adjudication which is not always a great progressive narrative of judges doing really good things. There are very few really good things where the judges are the leading edge of the wedge. I actually think that the best things that the judges have often done is simply take seriously what the Constitution said a hundred years before; I'll talk about the Warren Court in just a minute. But if ordinary citizens knew more about the Constitution, if law students knew more about the Constitution, if they went to the Constitution Center,⁷ in the long run that might actually raise counterweights against certain tendencies toward judicial imperialism, tendencies that I think are out there. We have a more powerful Court than ever before in history. In part, this is because we have a divided government at the federal level with Republicans hating Democrats and vice versa and the Congress hating the president and vice versa. And the Court steps in, as do the trial lawyers and the National Association of Attorneys General, doing all sorts of things that have never been done before. So ultimately, the addressee is us here in this room. So it's good that we're together.

On whether I believe in judicial restraint—in judges doing little or following the document—the examples of cases tended to be ones from this

7. Professors Amar and Kmiec serve as the inaugural scholars to the National Constitution Center, an interpretative museum to the American Constitution, under construction in Philadelphia on Independence Mall.

term where the judges were doing stuff that I think they shouldn't have been doing. They were invalidating perfectly sensible laws, including the law in Texas, the *ex post facto* case of *Carmell*,⁸ and civil rights laws like in *Kimel* and *Morrison*. In other parts of the Harvard paper though, I talk about how the document really should have required invalidations that the Court didn't order. The first chapter of Larry Tribe's brilliant treatise reminds us that it was not until 1965 that the Supreme Court struck down an act of Congress on First Amendment grounds, even though Congress had been doing dreadful things from the Sedition Act. And the Courts say, "Sounds good by us."

So the Warren Court, just to pick a Court, overturned a lot of precedents. I think it's one of the better Courts in history, in part because it began to take seriously what the document really said about racial equality, about Republican government, about applying the Bill of Rights to the states, about a robust protection of free expression, about protection of religious equality. I think the Burger Court went a little far in discriminating against religion; we'll hear more from Michael McConnell this afternoon.

My final point is that I think the most interesting thing about the document is what I'll call the arc of history. It's interesting that the amendments actually come at the end, in a series of post scripts in chronological order. It exposes the document's epic history to the ordinary eye. It's like going to the Grand Canyon and seeing those levels of accretion. We have been inattentive, I think, to the arc of history. We don't focus on how most of the new Amendments are about equality and democracy and ever greater inclusion. They're not about property and inequality.

So the folks who have pledged allegiance to the document tend to tell us too many stories about the founding and not enough about the abolitionists, about the women's suffrage movement, about the youth movement that gave us the eighteen-year-old vote, and so on, the Civil Rights movements of the '60s and the Progressive Era Amendments. So that's one of the bigger things--let's read the document with attention to more recent Amendments, in part because they're more inclusionary in process and substance.

PROFESSOR TRIBE: First, I love the image of the arc of history. I have a new book coming out in which I use a constellation image, and I think the Grand Canyon may be a lot better.

I wanted to say something about Dean Varat's notion that the commerce power limits that have been imposed so far aren't very significant. I think we fool ourselves if we say that. If we say, "Well, you just use a jurisdictional

8. 120 S. Ct. 1620 (2000).

hook, and you'll get the results you want." Keep in mind that, under the Commerce Clause, no matter what they do, hook, line, or sinker, they can't, under the current Court's view of sovereign immunity, authorize citizen suits seeking damages against the states in federal court even though the states are the violators. They have to go to the Fourteenth Amendment, and when they do, they bump up against *City of Boerne v. Flores*⁹ and a very narrow view in *Kimel* and *College Savings v. Florida Prepaid*¹⁰ of what Congress can do under section 5 of the Fourteenth Amendment. And we have a Court that is not terribly likely to accept the view that the Privileges or Immunities Clause, or especially the Citizenship Clause, without the accretions of historic precedents to back it up, is a source of authority, although I completely agree with Akhil's reading.

We are dead up against the same five-to-four majority over and over again. Our Court says there isn't anything citizen victims can do to win compensation in federal court against certain kinds of state wrongs. I think that's a profound limitation, and only a replacement of one of the current five majority Justices will change it. It's as simple as that.

DEAN SULLIVAN: Except you can throw money at it. Until *South Dakota v. Dole*¹¹ is overruled, Congress can use the leverage of spending to compel the states to do a lot of things. And it's surprising that the Rehnquist Court, which vowed to bring back *National League of Cities*,¹² hasn't.

PROFESSOR TRIBE: But there's a huge literature that *South Dakota v. Dole* is so obviously inconsistent with what the Court is doing in other areas that I wouldn't count on the spending power persisting as a source. And anything that depends on the House and Senate Appropriations Committees to vindicate rights against the government isn't, I think, an adequate line of defense. True, in addition to the spending power, theoretically you could have federal agencies bring suits instead of citizens. But again, relying on federal agencies, despite the occasional *Kessler*¹³ and *FDA*,¹⁴ is inadequate. So I don't think one should say the sky is falling, but I don't think one should say it's a bright sunny day in terms of what the Supreme Court is doing in these areas.

PROFESSOR KMIEC: Just one thought which I believe is explanatory, and this is a Kmiec axiom: one constitutional mutation always breeds another, though not always immediately or directly. To the Court, the over-extension of the commerce power is part of the bitter fruit of a failed Tenth Amendment jurisprudence. And the Eleventh Amendment cases, as nontextual or

9. 521 U.S. 507 (1997).

10. 527 U.S. 666 (1999).

11. 483 U.S. 203 (1987).

12. 426 U.S. 833 (1976).

13. *Kessler v. Brown & Williamson Tobacco Corp.*, 121 S. Ct. 779 (2001).

14. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

historically troubled as they may be, is basically saying that “well, if you’re not going to control yourselves, Congress, we’re not going to let citizens sue the states based on your illicit handiwork.” If citizens want to sue their states, they will need to get the states to enact a law that protects them against age discrimination or disability discrimination, and then sue in state court. By this means, the federalism that was strangled by an overextended conception of federal power or a withered view of the Tenth Amendment is restored: mutation breeds mutation. Part of the message, I think, of the Eleventh Amendment jurisprudence is that it is a result of mistakes made elsewhere in the arc of history or in the constellation.

PROFESSOR CHERMERINSKY: I have some thoughts. One thing that I’m a bit uncomfortable with in the conversation is that we’re trying to assess the overall impact of decisions that are all five years old or less. *Lopez* was 1995. *City of Boerne* was 1997. *Printz*¹⁵ was 1997. *Florida Prepaid* and *Alden v. Maine*¹⁶ were 1999. *Morrison* is the year 2000. And to look at all these cases and say, “Wow, they don’t make that much of a difference yet,” is taking a very short-term perspective. I think if these cases are looked at cumulatively and if they’re extended along a projection into the future, they’re a radical change in American government. And I don’t know if that projection is going to happen because we are sitting here in the year 2000. But I’d be very cautious about minimizing impact of decisions that are so recent.

DEAN VARAT: May I be clear that when I was responding to the question, I was not responding on the overall notion of all of those cases taken together, which I do think is a somewhat different story.

PROFESSOR AMAR: As Larry said, the really interesting thing is the pincers created by the combination of the Eleventh Amendment and the Fourteenth, because you can’t do certain things in the Eleventh unless you invoke the Fourteenth. I love Justice Kennedy, but *Boerne* is my candidate for the most imperialistic decision of the decade. And in part, I’m so emphatic about this because it really destroys one of the very big outcomes of the Civil War, that Congress should have broad power, and we don’t really hear any judicial dissents at all about this. And that’s maybe then the job of the academic to tell the students: here’s what isn’t being said on the Court that should be said.

15. *Printz v. United States*, 527 U.S. 706 (1999).

16. 521 U.S. 898 (1997).

