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Abstraction and Authority

Frank H. Easterbrook[†]

Our Constitution creates a government of laws and not of men. The distinction is more than slogan. It is embedded in structure. Congress must proceed by law, using intelligible standards and principles with sufficient breadth to be more than bills of attainder. Rules are proposed, debated, voted on, and published. Process matters: failure at any step means no law. There are no common law crimes. Sudden changes in norms may transgress the Ex Post Facto Clause, the Due Process Clause, or both. Executive officials must act under standards they can defend in public (and before courts); judges too must support their decisions by reasons of general application.

Yet the law teems with devices that defeat uniformity and predictability. Laws may create plastic standards. They may, for example, charge an agency to act in the "public interest, convenience, and necessity." Judges attempt to define "unreasonable" restraints of trade. Balancing tests blossom in constitutional law—although lists of factors do not create "tests," for a combination of a lack of weights for the factors and the tension in a 200-year stock of precedent enables judges to go any which way. As society becomes more complex and public actors—Presidents, administrators, legislators, judges—have less time to spend on each subject, it becomes both tempting and essential (if business is to be finished at all) to muddle through with standards rather than rules. Even in theory it is difficult to know when a rule is preferable to a standard;¹ in practice neither information nor time permits a confident choice.² Language itself is too crude for full specifica-

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¹ Isaac Ehrlich and Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J Legal Stud 257 (1974). See also Donald Wittman, *Prior Regulation versus Post Liability: The Choice Between Input and Output Monitoring*, 6 J Legal Stud 193 (1977).

² See Frank H. Easterbrook, *What's So Special About Judges?*, 61 U Colo L Rev 773, 778-82 (1990).

tion even if there were time and data. So the objective of announcing rules in advance, and applying them mechanically to fact, cannot be achieved.

That decision by rule is an objective of law—even a supposition of our constitutional system—cannot be denied. That decision by rule is a benefit cannot be doubted.³ How far short will we fall? That depends in part on how general are our norms. Sometimes it is said that the more abstract the statement, the more discretion in each case; the more discretion, the less “law” remains in the system. Abstraction (the “reasonable person” approach of tort law) may liberate courts from rules, license *ex post* appreciations and “fair” divisions of the stakes; concrete rules establish incentives *ex ante* and restrain discretion later on. Sometimes, however, the more general norm is the more constraining—and the persons who seek to boost the level of generality at one time trumpet the virtues of the concrete at others.

How should we choose? Unless there is an answer, we should abandon hope of government by law. Anyone casting a glance over the constitutional landscape would encounter many different levels of abstraction. Judges (not to mention legislatures) read most of the power-granting provisions, such as the Commerce Clause, quite broadly. It is difficult to name anything that falls outside legislative power—neither a loaf of bread nor an x-ray.⁴ Judges read many of the power-limiting provisions at a lower level of generality. The Contracts Clause, for example, applies not to the institution of contracts but to agreements signed before a law setting up a new rule.⁵ A legislature thus may regulate contracts as it pleases, provided it is prepared to wait for those in existence to expire. And despite the functional equivalence between laws adjusting “rights” and those altering “remedies,” a legislature may suspend or even extinguish remedies for unkept promises.⁶ Treating the grants as broad and the limits as pinpricks has enlarged the power of the government dramatically; reading the limitations broadly and the grants narrowly is lexically possible and would have the opposite

³ See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175, 1179-80 (1989) (emphasizing not only certainty for those affected by law and reduction in the role of the politics of the judge but also the value of rules in helping judges stand against majoritarian pressure in difficult times).

⁴ *Wickard v Filburn*, 317 US 111 (1942); *Summit Health, Ltd. v Pinhas*, 111 S Ct 1842 (1991).

⁵ *Ogden v Saunders*, 25 US (12 Wheat) 213, 265-68 (1827).

⁶ *Home Building & Loan Ass'n v Blaisdell*, 290 US 398, 429-30, 440-42 (1934).

effect.⁷ You need a justification for doing one or the other. This is a conference about the Bill of Rights, so I pay disproportionate attention to the amendments to the Constitution but shall not neglect Bruce Ackerman's challenge⁸ to produce a theory of abstraction adequate to both the power-granting and the power-limiting clauses.

I.

Consider some examples from recent decisions under the Bill of Rights.

Michael H. v Gerald D. required the Court to decide whether the Due Process Clause entitles a father to visit his child over the protest of the mother and her husband.⁹ The Justices debated whether a biological father has a "fundamental right" to visitation, a question all believed depended in substantial measure on "tradition." Traditions are constructs and may be described in many ways. *Michael H.* precipitated one of the few explicit discussions of the abstraction question. Justice Scalia, for himself and Chief Justice Rehnquist, contended that the Court should select "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."¹⁰ Finding this level might be hard, Justice Scalia conceded, but anything else would be arbitrary. Justice Scalia inquired whether there is a tradition of allowing adulterous fathers to interfere with families and found none. Justice Brennan, writing for Justices Marshall and Blackmun as well, rejoined that generality is no more arbitrary than specificity and proceeded to define the tradition as the right of biological parents to raise their children, coupled with "freedom not to conform"¹¹—presumably a fundamental right to commit adultery. With "freedom not to conform" as a "fundamental right," the Court holds the whip hand, for *all* law abridges this

⁷ See *United States v E.C. Knight Co.*, 156 US 1, 12 (1895) (reading the commerce power specifically, to mean transportation but not manufacturing); *Lochner v New York*, 198 US 45 (1905) (treating broadly implicit limits on state power over commerce, so that a general "liberty of contract" forbids what the Contract Clause itself allows under *Ogden*). Richard Epstein is the leading contemporary exponent of the view that the power-granting clauses *should* be read narrowly and the power-restraining ones broadly. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va L Rev 1387 (1987).

⁸ Bruce Ackerman, *Liberating Abstraction*, 59 U Chi L Rev 317 (1992).

⁹ 491 US 110 (1989).

¹⁰ *Id* at 127-28 n 6.

¹¹ *Id* at 141 (Brennan dissenting).

freedom, and a judge may deem insufficient the justification asserted by the state for any rule at all.¹²

Cases such as *Michael H.* show the importance of picking a level of generality. By choosing narrowly the Court may find no problem in the law. By choosing broadly the Court may find a problem with any law it pleases—invoking “tradition” to demonstrate that adultery and other things that society has long deprecated are actually *protected* by some traditional freedom, that practices traditionally scorned and punished are no different from practices traditionally praised, such as providing a home for one’s grandchild.¹³ By reserving the right to choose a level of generality to fit the circumstances, as Justices O’Connor and Kennedy did,¹⁴ the Court makes a virtue of “the understandable temptation to vary the relevant tradition’s level of abstraction to make it come out right.”¹⁵ Justices O’Connor and Kennedy worried that a rule for selecting a level of generality would change the outcome of some cases. Exactly so, but it is less than clear why that should be troubling.

Although *Michael H.* vividly demonstrates the importance of the level of abstraction, the Justices’ dispute was driven by the need to identify a “tradition,” which would be used to define a fundamental right. If you assume that the purpose of that enterprise is to increase the number of protected interests, then “it is crucial to define the liberty at a high enough level to permit unconventional variants to claim protection.”¹⁶ If you believe that tradition serves to restrict the powers of judges to pursue their vision of a good society, then you will choose a lower level of generality. In either case the selection depends on conclusions about the role of “tradition” in due process analysis rather than about the function of abstraction in understanding the Constitution itself.

¹² Justice Blackmun took a similar tack dissenting in *Bowers v Hardwick*, 478 US 186, 199 (1986), in asserting that the sodomy statute interfered with the “right to be let alone.” As all law interferes with a “right” stated at this level of abstraction, if the “right to be let alone” is deemed “fundamental” then all law is unconstitutional (at least there is a strong presumption of unconstitutionality, and only an interest deemed weighty by judges would suffice to justify the law). Even Professor Tribe finds this unacceptably general. Laurence H. Tribe and Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U Chi L Rev 1057, 1065-67 (1990).

¹³ *Moore v City of East Cleveland*, 431 US 494 (1977).

¹⁴ *Michael H.*, 491 US at 132 (O’Connor concurring).

¹⁵ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 61 (Harvard, 1980). See also John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts are no Different From Legislatures*, 77 Va L Rev 833 (1991).

¹⁶ Laurence H. Tribe, *American Constitutional Law* 1428 (Harvard, 2d ed 1988).

Let us pause for clarification. Words such as “general” and “abstract” are—general. Professor Ackerman and I use them in different ways. He treats a statement of a right as “more general” when the upshot is greater protection of the claim of liberty. (Put to one side that claims of entitlement often conflict, so that it is not possible to tell which outcome protects rights more fully.) Justice Brennan’s view in *Michael H.* is more general than Justice Scalia’s in this sense. It is more general in a second sense as well: its statement abstracts away from facts and consequences, not only applying to more cases (all familial relations) but also depending less on the specifics of the underlying dispute. I use “abstract” or “general” in this second sense. The rule “motorists must use reasonable care when driving” is highly general—much more so than the rule “motorists must obey the speed limit and must drive more slowly during rain.” The more abstract rule may call for detailed inquiries later (what, after all, is “reasonable care” in the circumstances?) or may not (the rule “do not discriminate on account of a speaker’s viewpoint” eliminates the sort of balancing after the fact that is common in tort law). Justice Brennan’s abstract statement of familial rights did not eliminate the need to inquire into the nature and justification of the state’s regulation. Sometimes the point of a highly abstract statement is to set up the occasion for weighing interests and justifications, sometimes high abstraction eliminates that possibility. This is a rich source of confusion, but one I try to minimize.

*Harmelin v Michigan*¹⁷ presents a generality question without the complication of fundamental rights. The Eighth Amendment forbids the imposition of cruel and unusual punishments. Michigan prescribes life in prison without possibility of parole for anyone caught possessing more than 650 grams of cocaine. Do the two conflict? The most specific reading of “cruel and unusual punishments” is that the Eighth Amendment, like similar language in the Declaration of Rights of 1689 after the Glorious Revolution in England, forbids *judges* to impose punishments that are not authorized by law.¹⁸ We could read the language more generally to prevent the legislature from devising cruel or freakish *modes* of punishment, such as drawing and quartering or burning at the stake, neither of which ever got a foothold in the United States. Still more generally we could understand this language to address

¹⁷ 111 S Ct 2680 (1991).

¹⁸ See Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted”: *The Original Meaning*, 57 Cal L Rev 839 (1969).

modes of punishment that, although once common, have become less so and are also widely viewed as cruel. Then the clause polices outliers among states, a function it now serves in capital cases. At a more general level still, the clause is unrelated to either history or contemporary practice and forbids kinds of punishment (say, fifty years in prison for a no-funds check) that modern penological theory does not support, even if many states prescribe it. Yet another boost would forbid any punishment "cruel" by *any* measure—case-by-case review of proportionality between offense and punishment. This last approach requires judges to devise and apply their own theory of criminal sanctions, which may or may not be accepted by legislatures, the populace, or the academy.

Justice Scalia, writing once again for himself and Chief Justice Rehnquist, discarded the British practice on the ground that the lack of common law offenses in the United States meant that the cruel and unusual punishments clause had to apply to legislatures.¹⁹ He settled on the next-more-general approach, a ban on cruel modes of punishment unknown in the United States. Justices O'Connor, Kennedy, and Souter were uncomfortable with this approach and came to Justice Scalia's result without endorsing his method.²⁰ Justice White, carrying with him Justices Blackmun and Stevens, looked through the other end of the telescope and found a principle of case-by-case proportionality. To the modern ear "cruel and unusual" sounds case-specific. Although some historical evidence supports Justice Scalia, Justice White thought that it "would hardly be strong enough to come close to proving an affirmative decision against the proportionality component."²¹ Justice Scalia rejoined:

Surely this is an extraordinary method for determining what restrictions upon democratic self-government the Constitution contains. It seems to us that our task is not merely to identify various meanings that the text "could reasonably" bear, and then impose the one that from a policy standpoint pleases us best. Rather, we are to strive as best we can to select from among the various "reasonable" possibilities *the most plausible* meaning. We do not bear the burden of "proving an af-

¹⁹ *Harmelin*, 111 S Ct at 2691. He did not consider the possibility that the Bill of Rights, including the Eighth Amendment, is the reason why there are no common law crimes. Accomplishing its task without a struggle does not liberate an amendment for some other battle. (Justice Scalia also overlooked our one common law crime: contempt of court.)

²⁰ *Id* at 2702-09 (Kennedy concurring).

²¹ *Id* at 2710 (White dissenting).

firmative decision against the proportionality component," *ibid.*; rather, Justice White bears the burden of proving an affirmative decision in its favor. For if the Constitution does not affirmatively contain such a restriction, the matter of proportionality is left to state constitutions or to the democratic process.²²

This passage makes an important point: you can't have a theory of constitutional interpretation divorced from a theory of judicial review. Section III returns to this subject.

If you conclude from *Harmelin* that boosting the level of generality is a way to increase the protection of liberties, you are wrong. Maryland allows children to testify in criminal trials by closed circuit television. That way the child doesn't need to look her accused abuser in the eye. Five Justices concluded in *Maryland v Craig*²³ that this satisfied the Confrontation Clause of the Sixth Amendment. They asked: "Why do we have confrontation?", to which they answered, roughly, "so that defendants may receive fair trials." Having boosted the level of abstraction well beyond confrontation, the majority asked: "Did this defendant get a fair trial?", to which it answered "yes." That was that.

Confrontation vanished in the shuffle. Justice Scalia made this point in dissent, pursuing his regular program of keeping abstraction under control but now with strange bedfellows: Justices Brennan, Marshall, and Stevens.²⁴ The real Constitution does not say "All trials must be fair." It contains a series of rules, which the drafters anticipated would produce fair trials. Justice Scalia emphasized the rule (confrontation) while the majority emphasized the hoped-for effects.

Boosting the level of generality—in *Craig* by emphasizing the purposes and effects of a rule—can be a method of liberating judges from rules. Sometimes the practitioners of the method use it to find "traditions" that would startle students of American society; sometimes they use it to keep the Constitution in tune with modern tastes. Views can be liberal (as the high-generality approach was in *Harmelin*) or conservative (as it was in *Craig*). Nothing in the method of abstraction prefers one over the other.

To see this consider three cases in which the Court's champion of specificity showed up on the side of generality. In the first, *Em-*

²² Id at 2692 n 6 (emphasis in original). Another footnote 6 (see *Michael H.* above). Why do the most important ideas in today's opinions appear in footnotes?

²³ 110 S Ct 3157 (1990).

²⁴ Id at 3172-73 (Scalia dissenting).

ployment *Division v Smith*, Justice Scalia wrote for the Court, adopting the principle that any rule neutral with respect to religion satisfies the Free Exercise Clause of the First Amendment.²⁵ Here is a highly abstract approach: a simple rule covers the whole field. *Smith* held that a state may ban the use of peyote, even as a sacrament—the equivalent of holding that a state may forbid the use of wine in a Catholic mass.²⁶ Chief Justice Rehnquist and Justices White, Stevens, and Kennedy joined Justice Scalia; Justices Brennan, Marshall, Blackmun, and O'Connor all promoted a more particularistic reading of the text.²⁷ In the second case, *City of Richmond v J.A. Croson Co.*,²⁸ Justice Scalia concluded that all racial classifications are forbidden by the Fourteenth Amendment. He treated the Equal Protection Clause as the source of a simple but exceedingly general rule—government may not use race as a ground of decision except to undo the effects of an earlier adverse decision based on the same criterion—although Justice Scalia's colleagues shied away from or rejected that level of abstraction. In the third, Justice Scalia joined Justice Brennan in *Texas v Johnson*, which held unconstitutional a prohibition on flag desecration.²⁹ Justice Brennan stated the scope of the Free Speech Clause at a high level of generality—the government may not take adverse action because of the viewpoint of a communication—and thereaf-

²⁵ 110 S Ct 1595, 1600-02 (1990).

²⁶ *Smith* contains a footnote (footnote 5) at least as provocative as the footnotes 6 in *Michael H. and Harmelin*. See notes 10 and 22 and accompanying text. The majority trotted out a parade of horrors in which judicial line-drawing concerning accommodation would displace legitimate democratic choices. When responding to Justice O'Connor's contention, *id* at 1612-13 (O'Connor concurring), that reasonable judges could avoid these horrors, while a neutrality rule would enforce obnoxious laws, the majority remarked:

[T]he cases we cite have struck "sensible balances" only because they have all applied the general laws, despite the claims for religious exemption. In any event, Justice O'Connor mistakes the purpose of our parade: it is not to suggest that courts would necessarily permit harmful exemptions from these laws (though they might), but to suggest that courts would constantly be in the business of determining whether the "severe impact" of various laws on religious practice (to use Justice Blackmun's terminology) or the "constitutiona[l] significan[ce]" of the "burden on the particular plaintiffs" (to use Justice O'Connor's terminology) suffices to permit us to confer an exemption. It is a parade of horrors because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of legal practice.

Id at 1606 n 5. This sounds the theme of note 6 in *Harmelin*: that there is a link between generality and the institution of judicial review.

²⁷ *Id* at 1606-15 (O'Connor concurring in the judgment), 1615-23 (Blackmun dissenting).

²⁸ 488 US 469, 520-25 (1989) (Scalia concurring in the judgment).

²⁹ 491 US 397 (1989).

ter had little trouble. Justices Marshall, Blackmun, Scalia, and Kennedy joined his opinion.³⁰

In these three cases the high level of abstraction twice leads to condemnation (*Croson* and *Johnson*), and once shelters the state law (*Smith*). If we ask instead whether boosting the level of generality protects the champions of civil liberties, the answer is unambiguously “yes” in *Johnson*, unambiguously “no” in *Smith*, and debatable in *Croson*—for there are civil liberties claims on both sides of such cases. I have nothing to say about the merits of these cases (or any others); in each there were respectable arguments for divergent positions,³¹ and in each it was possible to choose a level of abstraction to achieve almost any desired outcome. Nothing in the text of the Equal Protection Clause answers the critical question: “Equal with respect to *what*?”³² One reading of the clause is that it deals only with the use of law to protect citizens, so that if the state penalizes the murder of white citizens it must penalize the murder of black citizens and so protect their lives by deterring crime. Under this reading, it has *nothing* to say about racial preferences in doling out public contracts.³³ (Substantive entitlements, on this view, are the province of the Privileges and Immunities Clause.) Increasing levels of abstraction apply the Equal Protection Clause to any use of race that hurts black persons (the “separate but equal” approach) through any use of a poorly justified classification of any kind, with many stops in between. You can’t get the right level of abstraction from the words, and the justices have been selective in their use of history.

³⁰ Id at 398. The same majority in *United States v Eichman*, 110 S Ct 2404 (1990), rebuffed a renewed legislative effort to prohibit flag-burning.

³¹ The neutrality position in *Smith*, for example, derives from the work of Philip B. Kurland, *Religion and the Law* (Chicago, 1962), and has at least one adherent on the far left of the intellectual spectrum. Mark Tushnet, “Of Church and State and the Supreme Court”: *Kurland Revisited*, 1989 S Ct Rev 373. Other careful students of the First Amendment believe that the Free Exercise Clause requires accommodation of some religious practices and on that ground have been critical of *Smith*. See, for example, Douglas Laycock, *The Remnants of Free Exercise*, 1990 S Ct Rev 1; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U Chi L Rev 1109 (1990). See also Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv L Rev 1410, 1420 (1990). But see William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U Chi L Rev 308 (1991), to which Professor McConnell has replied in Michael W. McConnell, *A Response to Professor Marshall*, 58 U Chi L Rev 329 (1991).

³² See Peter Westen, *The Empty Idea of Equality*, 95 Harv L Rev 537 (1982).

³³ Although it would have something to say about unequal application of the death penalty, making *McCleskey v Kemp*, 481 US 279 (1987), one of the few equal protection cases in the original sense to reach the Court.

Justice Scalia, who discoursed on history at length in *Harmelin*, said nothing about constitutional history in *Smith* and little in *Croson*. Perhaps no history beyond the Civil War was necessary in *Croson*, for the Fourteenth Amendment was designed to get states out of the business of awarding or withholding benefits on the basis of race. Yet four Justices carried a similar principle over to the federal government in *Metro Broadcasting, Inc. v FCC*,³⁴ although after the Civil War the federal government made extensive use of race as a basis of benefits (the Freedmen's Bureau was a race-conscious enterprise!), and no Equal Protection Clause applies to the federal government. For textualists finding *any* warrant for applying equal protection principles to the national government is a high, perhaps insuperable, hurdle.³⁵ To apply such principles at their highest level of generality without a textual hook is quite a feat—one unremarked in *Metro Broadcasting*.

We have seen all four squares of the matrix: general and specific, rights-protecting and rights-denying. Cases fill each, and all of the Justices can be found at one time or another in each square. None chooses consistently. Levels of generality are high sometimes, low at other times; history that may constrain (or boost) abstraction is sometimes used, sometimes bypassed. I suggest in Section III that the appearance of inconsistency is misleading; at all events I do not disparage opening efforts to address a complex subject that has been overlooked for the bulk of the Court's history. Better an incomplete discussion than the pretense that there is no problem.

Movements in the level of constitutional generality may be used to justify almost any outcome. It is correspondingly important that we have a consistent theory of choice. Perhaps there is one—one that explains (at least illuminates) the different Justices' varying approaches, or one that would justify a different line altogether. Section II examines several proposals;³⁶ Section III offers my own perspective.

³⁴ 110 S Ct 2997 (1990). Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy would have applied a highly abstract version of the Equal Protection Clause to a federal program awarding a preference to minority applicants for broadcast licenses. *Id.* at 3028-47.

³⁵ See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 83-84 (Free Press, 1990).

³⁶ Careful readers will notice that I say nothing about the developing school of legal pragmatism. See, for example, Richard A. Posner, *The Problems of Jurisprudence* 71-123, 454-69 (Harvard, 1990); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 Minn L Rev 1331 (1988). My excuse is that with the exception of Frederick Schauer, *Playing by the Rules* (Oxford, 1991), the pragmatists do not tackle the abstraction question. Although

II.

Traditional. Most judges and justices, most of the time, act as if every text contains its own rule for the level of abstraction. All you have to do is read. Justice Black was a loud exponent of this view, but you did not have to be an absolute textualist to find the approach congenial. Seeing that there is even a *question* is the novelty.

Robert Bork has offered one of the best contemporary defenses of the traditional way of solving the generality problem. He treats the level of generality as part of the meaning of the text. For most constitutional provisions “the level of generality which is part of their meaning is readily apparent.”³⁷ When it is not—when the rule is stated broadly (for example, “equal protection of the laws”)—“a judge should state the principle at the level of generality that the text and historical evidence warrant.”³⁸ Bork does not recommend peering inside the minds of the drafters. Their thoughts are unknowable. Anyway, they left us their *words*, their rule of decision, and not their *thoughts*; only the words passed through the process of ratification. Thus the question becomes the level of generality the ratifiers and other sophisticated political actors at the time would have imputed to the text.³⁹ We inquire not what the drafters thought their rule would accomplish (a dead end version of private meaning we could call “expectationism”), but what their rule is. Rules may have surprising implications when applied to novel facts; often the implications of a rule elude its drafters. Thus Bork is consistent in concluding that the Fourteenth Amendment forbids segregation even though its authors might have accepted separate-but-equal, and that the First Amendment curtails libel actions even though defamation actions were common in 1791.⁴⁰ Because the meaning of a text lies in its

pragmatists believe that there are “rules” and that decision by rule sometimes is best, they deny both that rules are essential to the judicial office and that it is possible to locate the proper level of abstraction. (Schauer, who is more attracted to rules and believes the subject may be tractable, calls himself a formalist rather than a pragmatist.)

³⁷ Bork, *Tempting* at 149 (cited in note 35).

³⁸ *Id.*

³⁹ Michael J. Perry spells out the argument more fully than I can do here, giving Bork the credit that many other liberal scholars deny him by discussing only a caricature of his argument. See Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 Va L Rev 669, 675-84 (1991).

⁴⁰ See Bork, *Tempting* at 74-84 (cited in note 35); *Ollman v Evans*, 750 F2d 970, 996 (DC Cir 1984) (en banc) (Bork concurring).

interpretation by an interpretive community, an objective reader-centered approach produces an objective level of generality.⁴¹

You can go a long way with this approach. Many provisions of the Bill of Rights proclaim their level of generality. The Seventh Amendment cries out for narrow, historical reading; the Fourth (with its mention of reasonableness) for more abstraction. But other amendments resist this approach—and they resist it even if we look to the meaning the words would have had for the legal community at the time of drafting.

Take the Eighth Amendment and the problem of *Harmelin*. All would be simple if “cruel and unusual punishment” in the Eighth Amendment means exactly what it means in the Declaration of Rights of 1689. The American interpretive community of 1791 did not hear the words so, however. Members of Congress talked as if the restriction would apply to legislatures and would prevent beastly punishments (in one example, the cropping of ears).⁴² What makes a punishment beastly? That it is a barbaric *type* of punishment, no matter the provocation? That a penalty that sometimes is all right is wicked as applied to this crime (twenty lashes for walking your dog without a leash)? Is the benchmark the sensibilities of 1791 or 1971? If these questions had been put to the interpretive community of 1791, they might have been answered. But they were not put to it; perhaps they did not occur to it. So different levels of abstraction may be fully consistent with the discourse of the drafters; nothing enables us to distinguish. Bork takes exactly this view of the Equal Protection Clause when concluding that the Fourteenth Amendment forbids racial segregation of schools: the rule has meanings that may differ from the expectations of its authors.

This recognition, too, is a centerpiece of modern philosophy of language. Even the *speaker* does not exhaust the meaning of the expression until possible applications have been exhausted. Someone using the expression “plus” to refer to an operation on numbers may mean addition but could refer instead to the rule: “If both numbers are less than 10,000, add them; otherwise give up.”⁴³

⁴¹ In this Bork shares much with twentieth-century philosophers of language. See, for example, Ludwig Wittgenstein, *Philosophical Investigations* §§ 201-65 (Basil Blackwell, 1953), although for reasons I take up below, see text accompanying notes 48-54, the identification of the interpretive community is a stumbling block.

⁴² I bypass references to the history, which may be found in Granucci, 57 Cal L Rev 839 (cited in note 18), and the opinions in *Harmelin*, 111 S Ct 2680.

⁴³ See Saul A. Kripke, *Wittgenstein on Rules and Private Language: An Elementary Exposition* 8-18 (Harvard, 1982).

An external interpretive community could discover whether the speaker embraced a rule carrying addition past 10,000 by asking questions and evaluating the answers. Old texts foil that process. Because official action by states *favoring* racial minorities was unheard of in 1871, we do not know (and cannot reconstruct) how the interpretive community of that era would have understood the Fourteenth Amendment. Therefore we cannot tell for a case such as *Croson* whether the right level of generality is “no official use of race” or “no use of race to harm minorities,” or some additional possibility.⁴⁴ A problem neither appreciated nor discussed is not resolved; texts do not settle disputes their authors and their contemporary readers could not imagine.

Worse: the founding generation itself understood that their texts left many matters open and preferred practice over textual interpretation as a way of settling them.⁴⁵ James Madison, for example, believed that even in conjunction the Commerce Clause and the Necessary and Proper Clause did not authorize Congress to create a national bank. Yet he signed the legislation creating the second Bank of the United States, remarking that the accommodations of the political branches in the exercise of their powers pointed more surely to meaning than did his personal view.⁴⁶ In the 46th *Federalist* Madison defends the allocation of powers as malleable:

If . . . the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due⁴⁷

⁴⁴ Perry, 77 Va L Rev at 677-79 (cited in note 39), makes this point so well that repetition would be otiose.

⁴⁵ See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv L Rev 885 (1985). Although Powell's assessment is not free from controversy, see Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 Const Comm 77 (1988), no one doubts that constitutional debate and practice in the first fifty years gave substantial weight to the working structure of government and did not rely exclusively on texts or their interpretation.

⁴⁶ Contrast his speech on the floor of the House on February 2, 1791 opposing the first proposal with his decision in 1816 to sign the legislation. See Jefferson Powell, *Languages of Power: A Source Book of Early American Constitutional History* 37-40, 293-95 (Carolina Academic, 1991).

⁴⁷ *Federalist* 46 (Madison) in Benjamin Fletcher Wright, ed, *The Federalist* 329, 331 (Belknap, 1961).

Designed for an unknown future, the Constitution accommodates change. The power to accommodate implies grave difficulty in using the community of ratifiers to fix a single level of generality.

Modified Traditional. If we cannot consult the interpretive communities of bygone years, perhaps we can turn to the one with us today. Ronald Dworkin, Owen Fiss, and Harry Wellington, among others, propose putting the abstraction question to the contemporary legal community.⁴⁸ Although the answer may depart from the one the original community may have given, it has the virtue of objectivity—of being a consensus answer rather than one personal to the interpreter, and therefore of conforming to the ideal of law. The method tracks the recommendations of scholars such as Hans-Georg Gadamer, whose hermeneutics stress the ability (indeed, necessity) of texts to adapt as their readership changes.⁴⁹

Applying methods of literary interpretation to legal texts is, however, no cure. Styles of literary interpretation exalt creativity, indeterminacy, novelty.⁵⁰ Readers use texts to enlarge their horizons. Judges, by contrast, use texts to impose obligations—to order persons to do things, pay money, go to jail. An approach that helps people broaden their minds does not justify sending them to jail; *that* depends on the idea that there are rules. “Let a thousand flowers bloom” is the right cast of mind for literary interpretation; attractive ideas will take root and others wither; it would be silly to have only one “approved” understanding of a poem or novel. Certainty and uniformity are important in law; our theory of legal obligation does not admit the possibility that one text has many meanings. I have elsewhere thrown cold water on the proposition

⁴⁸ Ronald Dworkin, *Law's Empire* 87-90 (Belknap, 1986); Owen M. Fiss, *Objectivity and Interpretation*, 34 Stan L Rev 739 (1982); Harry H. Wellington, *Interpreting the Constitution: The Supreme Court and the Process of Adjudication* ch 8 (Yale, 1990). Compare Anthony T. Kronman, *Living in the Law*, 54 U Chi L Rev 835 (1987).

⁴⁹ Hans-Georg Gadamer, *Truth and Method* xxiv (Crossroad, 2d rev ed 1989). See also William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 Colum L Rev 609 (1990) (recommending a similar approach for statutes), and T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich L Rev 20 (1988) (suggesting a “nautical model” of statutory interpretation in which the enacting body charts a course and the current crew changes that course as necessary).

⁵⁰ Anyone who doubts this should consult the work of Stanley Fish, whose presence on the law faculty at Duke has played an important role in introducing lawyers to the hermeneutical methods of the other parts of today's universities. See, for example, Stanley Fish, *Is There a Text in this Class? The Authority of Interpretive Communities* (Harvard, 1980); Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke, 1989).

that legal and literary interpretation should use the same methods, and in this belief have good company.⁵¹

Let us assume that a legal community is more apt than a literary one to produce answers to hard questions. Why are judges the proper persons to interrogate the legal community and pronounce its answers? Judges have tenure in large measure to insulate them from swings of contemporary opinion, the better to make them faithful to decisions taken in the past. If these decisions are to be updated, better to have the revision performed by those who are sensitive to the contemporary will—administrative officials, Congress, the President. Although judges are more apt to be dispassionate than are political officials, their dispassion need not lead them to be more faithful to the median view of the contemporary legal culture; it may lead them to be more faithful to their *own* views. This is the dark side of tenure.⁵² To the extent it influences judges, achieving objectivity is impossible.

If the living legal community is indeed the right benchmark, it is tempting to ask: why a *constitution*? A written constitution—the instrument that separates us from the United Kingdom, where living majorities mold traditions and thus governmental institutions to suit tastes—is designed to be an anchor in the past. It creates rules that bind until a supermajority of the living changes them. You can imagine change by the living in ways other than those described; after all, our Constitution was ratified without the unanimity required by the Articles of Confederation.⁵³ That constitutional change requires a supermajority sustained over an extended period cannot be doubted, however—for to doubt it is to doubt the ability of the past *ever* to constrain the present, and thereby to destroy the source of the judges' claim to countermand the will of contemporary majorities. Yet putting questions about the level of abstraction to today's legal community dispenses with both the supermajority requirement and the need for some stability in that opinion (which must endure long enough to obtain a

⁵¹ Frank H. Easterbrook, *Approaches to Judicial Review*, in Jack David and Robert McKay, eds, *The Blessings of Liberty: An Enduring Constitution for a Changing World* 147, 148-50 (Random House, 1989). See also Richard A. Posner, *Law and Literature: A Misunderstood Relation* ch 5 (Harvard, 1988); Paul Brest, *Interpretation and Interest*, 34 *Stan L Rev* 765, 769-73 (1982); Thomas C. Grey, *The Constitution as Scripture*, 37 *Stan L Rev* 1, 2-3 (1984); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 *Nw U L Rev* 226, 238-40 (1988).

⁵² See generally Easterbrook, 61 *U Colo L Rev* 773 (cited in note 2).

⁵³ See Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 *U Chi L Rev* 1043, 1047 (1988).

two-thirds vote in both chambers of Congress and a majority in three-fourths of the states' legislatures, a process that takes considerable time).

At all events, if we are to query the living legal community, *which* one? You get very different answers to the cases presented in Section I from scholars, practitioners, and judges. In the United States judges are selected from such divergent parts of the profession that it is a mistake to speak even of a judicial interpretive community. A judge devoted to selecting a modern interpretive community external to his own preferences may play the field. Who receives the (hypothetical) question about the right level of generality in *Harmelin*, *Croson*, or *Johnson*? Choosing a hypothetical interlocutor determines the answer.⁵⁴ Add to this the fact that the judge not only chooses the recipient of the question but also supplies the answer (it is a hypothetical community and hypothetical question, after all!) and you have no useful guidance.

I do not mean by this that you *never* get useful answers; many questions in law have determinate answers (or a substantial range of determinacy). Rather, the point is that we deem a constitutional question interesting and difficult when our hypothetical community gives different answers. The process therefore does not usefully constrain interpretation and cannot repair the difficulties with the traditional view, which looks to the interpretive community at the time of enactment.

Consistency. One variant of modified traditionalism deserves special attention. Laurence Tribe and Michael Dorf, in the most ambitious analysis of the abstraction problem to appear in the legal literature, contend that the court should treat the Bill of Rights as a coherent whole and generalize to examples that were not contemplated at the time.⁵⁵ A statement fails when the Court must ignore the rationales of other amendments or cases describing particular instances. Thus a "right to be let alone" is too general, because it makes earlier cases sustaining particular laws inexplicable. But a "tradition of protecting the marital unit against claims of adulterous natural fathers" is too specific, because it cannot rationalize earlier cases acknowledging, say, a right to contraception by unmarried couples.

⁵⁴ A point I make with respect to statutes in Frank H. Easterbrook, *The Role of Original Intent in Statutory Interpretation*, 11 Harv J L & Pub Pol 59, 62-65 (1988).

⁵⁵ Tribe and Dorf, 57 U Chi L Rev at 1059-64 (cited in note 12). See also Laurence H. Tribe and Michael C. Dorf, *On Reading the Constitution* 73-80 (Harvard, 1991).

This is a variant rather than an independent proposal because it expressly depends on the propriety of using methods of literary interpretation⁵⁶ and attempts to construct a contemporary interpretive community—the one reflected in recent decisions of the Supreme Court. I find much to admire in this attempt to make the point of reference more specific (and more accessible), thereby cutting down on judges' ability to influence outcomes by going community-shopping. Any step in the direction of objectivity is welcome.

As a variant, however, the Tribe-Dorf proposal suffers from most of the difficulties of its lineage. Their efforts to repair the defects of this category of methods creates new problems. The authors patch over some difficulties by assuming that "the issues of interpretation that arise in construing the words of the Bill of Rights are *identical* to those that arise in the fundamental rights context,"⁵⁷ although most members of today's interpretive community (including those who sit on the Court) believe that there is a substantial difference between legal claims based on constitutional text and those that are not. Tribe and Dorf patch over other difficulties by assuming consistency and calling for a combination of interpolation and extrapolation. Yet you can demand consistency in the treatment of new cases only if the existing stock of rules (and precedents) is consistent. You cannot take out more consistency than you put in. Given two inconsistent propositions (in the text or the cases), you can show or refute any proposition at all.

Tribe and Dorf assume but do not demonstrate that the stock of reference points is consistent. Why should we expect it to be consistent? The Third, Fourth, and Seventh Amendments operate on dramatically different planes of generality. Interpolating to the Due Process Clause of the Fifth does not yield one of these rather than another. If Justice Scalia prefers the historical approach of the Seventh Amendment, while Justice Brennan uses the reasonableness standard of the Fourth for a benchmark, is either one "wrong?" Maybe so, if precedent marks a clear choice and speaks as our interpretive community. Yet where is the choice? You cannot get five pages into the Tribe-Dorf article without encountering a glaring inconsistency: the difference between constitutional protection of abortion in *Roe v Wade*⁵⁸ and the failure in *Bowers v*

⁵⁶ Id at 1072-77.

⁵⁷ Id at 1061 (emphasis added).

⁵⁸ 410 US 113 (1973).

*Hardwick*⁵⁹ to include sodomy within the same class. These are irreconcilable decisions—Tribe and Dorf think so, I think so,⁶⁰ the Justices themselves think so. At least seven of the Justices who voted in *Bowers* would have treated the abortion and sodomy questions identically: Justices Brennan, Marshall, Blackmun, and Stevens, by protecting both; Justices Burger, White, and Rehnquist (perhaps Justice O'Connor too), by protecting neither. Only Justice Powell saw a difference—adhering to *Roe* while joining the majority in *Bowers*—and he is reputed to have changed his mind about *Bowers* after he left the Court.

The contrast between abortion and sodomy illustrates a problem in making decisions by majority vote, as the Court does (and as the Constitutional Convention, Congress, and the ratifying state bodies do). Even if every member of a body behaves consistently, the collectivity will generate inconsistent results.⁶¹ How pervasive the inconsistency may be is a subject of legitimate debate;⁶² that we are doomed to have *some* is beyond all debate. Inconsistency embedded in the stock of precedents—one that now fills more than 500 volumes—disables proposals to extrapolate consistently from these opinions. The Constitution is a series of compromises, starting with the Great Compromise between the large and small states (equal suffrage in the Senate) that made political union possible, and the three-fifths compromise over questions of representation. Prudence rather than unifying principle shaped the initial document and all of its amendments.

Moreover, it is difficult to believe that Tribe and Dorf embrace one of the principal implications of their view: strict path dependence, in which the meaning of the Constitution varies with the order in which cases reach the Court. Suppose *Bowers* had been decided in 1973 and the abortion question had come up for its initial decision in 1986.⁶³ Then consistent application of the prece-

⁵⁹ 478 US 186 (1986).

⁶⁰ See Frank H. Easterbrook, *Implicit and Explicit Rights of Association*, 10 Harv J L & Pub Pol 91, 92-93 (1987).

⁶¹ Kenneth J. Arrow, *Social Choice and Individual Values* 59-60 (John Wiley, 1951). For applications to courts see Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv L Rev 802, 813-32 (1982); Lewis A. Kornhauser and Laurence G. Sager, *Unpacking the Court*, 96 Yale L J 82, 109-10 n 37 (1986); Herbert Hovenkamp, *Arrow's Theorem: Ordinalism and Republican Government*, 75 Iowa L Rev 949 (1990).

⁶² Daniel A. Farber and Philip P. Frickey, *Law and Public Choice: A Critical Introduction* ch 2 (Chicago, 1991), provides a careful assessment of the state of the literature.

⁶³ An unlikely supposition, as only the outcome of *Roe* made *Bowers* a case worth litigating. Still, it is a thought experiment worth pursuing, as no one wants a form of constitutional adjudication in which judges always must *increase* their degree of "creativity" and

dents implies the absence of any fundamental right of intimate association. The abortion case would be simple after the sodomy case: if the Constitution does not protect sexual activities that have few effects on unconsenting parties, it does not protect decisions that affect the welfare of other family members and the potential child. Would Tribe and Dorf conclude that their method compelled the Court to decide against abortion in 1986 if it had decided against sodomy in 1973? Not at all; they would not (and need not) because there are contrary strands in the contraception cases. Neither result of the abortion case could be reached by simple extrapolation.

And so it is with the other subjects. You cannot get to *Harmelin* (or its opposite), to *Croson*, or to most of the other cases discussed in Section I by assuming that the interpretive community is the body of recent precedents. *Texas v Johnson* comes closest to being a “determined” outcome, although four justices did not agree and managed to cite a goodly number of recent cases that make the abstract principle “there shall be no viewpoint discrimination” (the one to which the majority adhered in *Johnson*) look like an overstatement of the body of precedent. “No viewpoint discrimination” is a *good* principle on many grounds and one I find congenial,⁶⁴ but it cannot be produced by simple interpolation of precedent.

Adding a dollop of the Ninth Amendment to the stew of precedent, as Tribe and Dorf propose, does no better at producing consistency. The Ninth Amendment reads: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” This tells us that there *are* rights not spelled out; John Hart Ely is right to say that an originalist must take this text seriously even if it is uncomfortably vague.⁶⁵ Still, rights “retained” implies an historical inquiry, just as the Seventh Amendment (the “right of trial by jury shall be

depart still farther from the text—an approach that would be compelled if every case built on the last one and urged “a little more” departure, followed by extrapolation. We must therefore imagine a sequence in which the first case simply asks the Court to confirm the conventional wisdom (in 1973 and before, that sodomy is not a fundamental right) and the second case seeks a departure (in this example, the arrival of the abortion question for the first time in 1986).

⁶⁴ See *American Booksellers Ass’n v Hudnut*, 771 F.2d 323, 327-28 (7th Cir 1985), aff’d without opinion, 475 US 1001 (1986).

⁶⁵ Ely, *Democracy and Distrust* at 34-41 (cited in note 15). See also Randy E. Barnett, ed, *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* (George Mason, 1989).

preserved") has precipitated historical inquiry.⁶⁶ There is no right level of generality at which to read history—we are back to *Harmelin*—and no reason to suppose that historical investigation would produce clues that could promote consistent adjudication.

Countervailing Rights. Bruce Ackerman asks us to abandon this pursuit and take up a different subject. He seeks consistent treatment of the level of generality of the power-granting clauses and the power-denying clauses. The New Deal settled the question for the power-granting clauses. Once the Commerce Clause is taken to authorize Congress to control whatever has an indirect effect on commerce, the national government may do almost anything a majority in Congress thinks proper. Unless the power-constraining clauses (except the Contracts and Takings Clauses!) also expand, the original balance is undone, and perhaps the people will be undone. How ironic if the judges who, like me, are most skeptical of governmental power should accept the power-expanding half of this equation, reject the power-limiting half, and end up as statist.

The force driving this argument is the belief that Something Big happened in 1933-53: an unwritten amendment to the Constitution incorporating the New Deal and authorizing a great enlargement of federal power.⁶⁷ I confess to doubting the equivalence of written and unwritten amendments to the Constitution. Perhaps this marks me as a throwback. So be it. Shouldn't good interpreters of this document strive to exemplify the eighteenth-century mind? (Well, maybe the nineteenth-century mind; let us not forget 1871.) Too, I wonder why the discarding of the written provisions of the Constitution in favor of unwritten amendments implies anything about *judicial power*. If the document no longer binds us in some respects, why does it govern in others? Political systems can survive without textual anchors in centuries past—most of the liberal democracies do so quite nicely. If we have cast aside the limited power-granting clauses and the explicit limits in the Contracts and Takings Clauses, it does not follow that judges should make extravagant claims in the name of still other clauses.

⁶⁶ See *Richmond Newspapers, Inc. v Virginia*, 448 US 555, 579-80 n 15 (1980) (Burger) (invoking the Ninth Amendment as collateral support for the proposition that the press's traditional access to criminal trials is constitutionally protected even though the right to a "speedy and public trial" identified in the Sixth Amendment belongs exclusively to the accused).

⁶⁷ See Bruce A. Ackerman, *We the People: Foundations* (Belknap, 1991).

Ackerman seeks to attract me to his enterprise by placing one of my judicial heroes in the vault of his pantheon. He treats the second Justice Jackson as the model interpreter of the New Deal Constitution.⁶⁸ But which Robert Jackson should we emulate: the generalizer of the flag salute cases and the Japanese removal cases,⁶⁹ or the anti-generalizer of *Terminiello* and the steel seizure cases?⁷⁰ I think Jackson one of the nation's greatest Justices, not only because of his eloquence and his support for the liberties established in the text of the Bill of Rights, but also because he doubted the omniscience of judges and the warrant for expansive claims of judicial power. Jackson was an enforcer, not a creator, of rights, and Ackerman would cast him in a different role.

Even Ackerman's strong appeal to our common denominator does not lead me to embrace his approach to abstraction. For I do not locate the advance of federal power in the New Deal. It occurred in *McCulloch v Maryland*,⁷¹ more than a century earlier, when the Court invoked the Necessary and Proper Clause to hold that Congress could establish a national bank. Everything after that was a matter of details. Important details to be sure, as majorities occasionally could loose a bolt of lightning at a law or three.⁷² But these were temporary setbacks, notches in an upward-sloping graph.⁷³ Dramatic boosts to national power came from the railroads, telegraphs, and other instruments that knitted the nation together (the optimal size of government grows as transportation and communication become cheaper) and two *real* constitutional amendments that made the federal government the locus of control: the Sixteenth, creating the personal income tax, and the Seventeenth, ending state legislatures' selection of senators. It is not proper for courts to rein in the effects of changing economic conditions or express amendments augmenting national power.

Most contemporary debates about abstraction do not concern federal power. They have to do with state power. And the states

⁶⁸ Ackerman, 59 U Chi L Rev at 334-38 (cited in note 8).

⁶⁹ *West Virginia State Board of Education v Barnette*, 319 US 624 (1943); *Korematsu v United States*, 323 US 214, 242-48 (1944) (Jackson dissenting).

⁷⁰ *Terminiello v Chicago*, 337 US 1, 13-37 (1949) (Jackson dissenting); *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579, 634-55 (1952) (Jackson concurring).

⁷¹ 17 US (4 Wheat) 316 (1819).

⁷² Even in the heyday of *Lochnerian* substantive due process and the nadir of the commerce power, most laws by state and federal governments were favorably received in the Supreme Court. See David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888-1986* 47-50 (Chicago, 1990).

⁷³ *E.C. Knight*, 156 US 1, for example, was effectively undone by *Swift & Co. v United States*, 196 US 375 (1905), before a decade was out.

did not receive their powers from the Constitution. They owe their powers to the consent and acquiescence of their own people. State power *decreased* during the New Deal—not only because of the augmentation of national power, but also because the steady decline in the costs of transportation and communication made states less important. Two hundred years ago states could impose taxes or regulate commerce with few obstacles. Now the people and firms will respond to state and local regulation by taking their business (or themselves) elsewhere.

As insularity fell, so did inroads on civil liberties. In 1787 seven states had established churches; all were dis-established long before the Supreme Court applied the First Amendment to the states in 1940.⁷⁴ The Court's role in civil liberties (with the exception of its holdings about race relations) has been that of a follower, not a leader. It extirpates in the name of the Constitution practices that have already disappeared or dwindled among the states. It obliterates outliers.⁷⁵

The slow but steady erosion in the powers of the states should lead Ackerman to recommend that the Court decrease the level of generality and do less to interfere with state actions. Federalism was an important part of the original design, which would suffer at Ackerman's hands. He proposes to use the decrease in state power attributable to a changing economy as the fulcrum of a still further decrease at the hands of the judiciary. Yet it should be significant for him that most of the ways in which states affect personal liberties (for example, impose life sentences for crime, punish flag-burning, limit fathers' access to their biological children, use race as a ground of decision, regulate sexual activity) are unrelated to the issues of the New Deal. States did not acquire their power to put people in jail from the Franklin Roosevelt Administration. These are old issues, prudential and moral disputes present at the foundation. Ackerman does not persuade me that the level of abstraction appropriate to the problems in *Harmelin*, *Michael H. Croson*, *Jackson*, and *Craig* should be different in 1891 and 1991. *Smith* is a better case for Ackerman; Oregon denied Smith unemployment compensation after his discharge for smoking peyote.

⁷⁴ *Cantwell v Connecticut*, 310 US 296, 303 (1940) (applies the Free Exercise Clause to the states); *Everson v Board of Education*, 330 US 1, 15 (1947) (applies the Establishment Clause to the states).

⁷⁵ See generally Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago, 1991); Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 Cal L Rev 751, 765-69 (1991); Frank H. Easterbrook, *Bills of Rights and Regression to the Mean* (forthcoming 1992).

Unemployment compensation *is* an invention of the welfare state, and local programs are so underwritten by the Treasury that they are effectively federal. Yet in *Smith* the Court took Ackerman's advice and used a high level of abstraction—much to his dismay, I should think.

Is It All Incoherent? My survey of the terrain of approaches did not produce a reliable way to select a plane of generality on which to locate a constitutional rule. Perhaps there is no way at all to do this. Dean Brest, for example, believes that the abstraction problem defeats all efforts to construct a system of adjudication by neutral principles.⁷⁶ As Brest put it, the quest for “objectivity in legal interpretation [is] on a par with the fantasy of a single, objective reading of *Hamlet* or of Balinese culture.”⁷⁷ Many other thoughtful persons have come to the same conclusion.

Brest's claim is overstated if he means that it is impossible to select the level of generality for *any* rule on a principled basis. *Hamlet* and Balinese culture are substantially more complex than most legal rules, and simplicity promotes understanding—even if imperfect.⁷⁸ If we really can't settle on the right level of generality, we will have a difficult time explaining why people must pay the piper for failing to anticipate the judges' disposition. Brest's claim is unanswerable, however, if limited to the category of cases the legal culture deems “hard” at a particular time. They are hard precisely *because* the kit of legal tools cannot produce agreement among those competent in their use. There is no way out of this conclusion. The question is: what do we make of it?

III.

Multiple legitimate levels of abstraction imply multiple legitimate meanings of the text. The problems that concern us today were not settled in the past and encoded in authoritative rules; they must be settled by the living.

Who among the living? Anyone reading a law review “knows” that this means judges. The author starts with the assumption that

⁷⁶ Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 Yale L J 1063, 1084-85, 1091-92 (1981).

⁷⁷ Brest, 34 Stan L Rev at 771 (cited in note 51).

⁷⁸ See Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L Rev 1 (1990); Kay, 82 Nw U L Rev at 248-50, 273-84 (cited in note 51). See also Margaret Jane Radin and Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U Pa L Rev 1019, 1046-54 (1991) (defending, albeit tepidly, the proposition that there can be understandable rules).

the judge will decide—that was settled by *Marbury v Madison*⁷⁹ in 1803—and then displays a range of meanings that could be imputed to the text, imploring judges to select the best one. Judicial opinions often have the same flavor. Judges' right to the final say having been established long ago, the plasticity of old texts becomes a platform for an enlargement of discretion.

When interpreting the Constitution it is tempting to see how far old texts can be pressed—for any limitations, any at all, create at least some possibility of horrible deeds slipping into the cracks. A sophisticated lawyer worried about abuses starts with the text and identifies its purposes and consequences. Next comes a move to a level of abstraction selected so that the rule governs whatever may threaten these interests to any degree. That move eliminates loopholes, but at the expense of making the rule so universal that it occupies the field of governmental action. Then the judge announces that “reasonable” limitations on the interests so identified will be respected, and no others. What is “reasonable,” except what is wise? Interests conflict and overlap, so that to choose generality in a way that focuses attention on interests is to give judges an essentially political role.⁸⁰

If indeed the Constitution deputizes judges to settle all hard legal issues, then inability to settle on a level of abstraction greatly but properly enlarges the judicial role in governance. If it does not, then the sequence should be reversed. Instead of assuming power and then searching for a level of abstraction, the court should search for that degree of generality capable of justifying a *judicial* role. Unless it is possible to find an answer that adequately differentiates judicial from political action, the judge should allow political and private actors to proceed on their way—that is, the judge should honor the structural features of the Constitution allocating powers to states and to political actors who have followed the approved forms such as bicameral approval.

Judges, more than other political actors, must answer the question why anyone should obey. The President has the Army, Congress the purse. Judges have reason. They could assemble political coalitions for protection; the Supreme Court has a formida-

⁷⁹ 5 US (1 Cranch) 137 (1803).

⁸⁰ See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L J 943, 984-95 (1987); *Miller v Civil City of South Bend*, 904 F2d 1081, 1129-30 (7th Cir 1990) (en banc) (Easterbrook dissenting), rev'd as *Barnes v Glen Theatre, Inc.*, 111 S Ct 2456 (1991); *American Jewish Congress v City of Chicago*, 827 F2d 120, 137-40 (7th Cir 1987) (Easterbrook dissenting).

ble constituency (including the press, which relies on the Court to protect speech and repays the debt by rallying to the Court's defense). But other political actors can appeal to the same constituencies, which will not lift a finger to defend judges who march to their own drummer. Judges must persuade other political actors, and the public at large, that courts produce net benefits; only that demonstration makes it sensible for others to obey judicial decisions as a rule, enforcing even edicts that a political majority believes unsound. The rule of law attracts formidable support only so long as people believe that there is a rule *of law* and not a rule *by judges*. The need to persuade society to obey sets bounds on judicial creativity; it is most unlikely that obedience will long be forthcoming to an institution that appears to be subcommittee chairmen wearing robes.

Whether or not obedience endures, there remains the question of justification. Public power in the United States depends on law. Everyone exercising the power of the state needs a legal justification, not just a moral or prudential one—the cop making an arrest, the bureaucrat denying an application for welfare benefits or collecting a tax, the commissioner dissolving a merger, the cabinet secretary reducing the number of landing slots at an airport, everyone. When rules cannot limit the exercise of authority, we define justification as process (for example, approval by both houses of Congress and the signature of the President). You can describe a society where public acceptance of official demands is a complete justification for those demands. In nations without constitutions (the United Kingdom, for example), tradition and authority merge. Our republic was founded on contractarian premises, however, and no one holding power here asserts that public acquiescence is sufficient.

Everyone needs a justification. “Everyone” includes judges. *Especially* judges, who insist that other public officials scrupulously observe the limits on their own power even when prudence might justify additional powers.⁸¹ *Especially* judges, who alone have tenure of office, something justified if at all by the tendency of tenure to make them more faithful to decisions taken in the past at the expense of convenience today. *Especially* judges, whose charge is the maintenance of the rules of the game and the faithful implementation of decisions taken under its rules. As judges (and scholars) demand that political officials justify their acts with more

⁸¹ See, for example, *INS v Chadha*, 462 US 919 (1983); *Youngstown*, 343 US 579.

than a claim of prudence, so judges must supply no lesser justification for their own acts.

How did it come to be that judges have any role in reviewing decisions taken by other branches? That power is not conferred expressly in the Constitution. It was inferred from the constitutional structure. And the way in which it was inferred informs our understanding of the abstraction problem.⁸²

The major premise of *Marbury v Madison* is that the Constitution is law—the supreme law, binding on all organs of government, and sufficiently clear to be enforceable as law. Chief Justice Marshall gives the ex post facto clause as an example and asks rhetorically whether in case of clear conflict one applies the retrospective criminal law. Another premise is that the Constitution includes a hierarchy—that it is supreme over statutes and treaties. Finally, Marshall argues that every public official owes a duty, by virtue of his oath if not the written nature of the document, to follow the supreme law in the event of conflict. Written instruments are meant to have bite; and our Constitution not only is written but also establishes a system of limited government. If there are limits then there are boundaries to be patrolled.⁸³ Otherwise our government is not limited after all.

Problems lurk in this explanation. It begs the critical question: why must political actors pay more attention to the judges' views than the judges pay to the legislature's? Chief Justice Marshall's implicit answer is that the constitutional hierarchy binds all branches, that to demonstrate the argument for the meaning of the Constitution is to produce acquiescence. Congress and the President must follow the Court because the same syllogism that drives the Court's action drives everyone else's. That is, there are understandable rules. They were laid down in the past and govern us still. To have identified the rule is to have identified the reason why all must obey. The Supreme Court's decision about the content of the rules prevails because of the definition of a *rule*, given to all alike.

Judicial review under *Marbury* is a search for rules.⁸⁴ If the age or generality of the text frustrates the statement of a rule, then

⁸² See Easterbrook, *Approaches to Judicial Review* (cited in note 51).

⁸³ Id. at 178-80. See Sylvia Snowiss, *Judicial Review and the Law of the Constitution* ch 4 (Yale, 1990), explaining the difference between this justification of judicial review and the more limited approach some state courts had taken.

⁸⁴ See Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 Yale L J 821 (1985); Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Gov-*

it also defeats the claim of judicial power. If the living must indeed chart their own course, then the question is political, outside the domain of judicial review. You cannot have a view that denies the power of the past to rule today's affairs yet asserts that Article III still binds. Judicial review depends on the belief that decisions taken long ago are authoritative. The judges' duty is "to declare all acts contrary to the manifest tenor of the Constitution void."⁸⁵ This assumes that the document *has* a "manifest tenor." The writers and ratifiers thought it did. We broke from England by having rules—and therefore enforcement—instead of having only practices and consensus that are always in political evolution, and therefore not enforceable by judges.

Marbury teases judicial review from structure rather than language. It therefore necessarily admits the possibility of other inferential, structural claims—a possibility that quickly developed in the intergovernmental tax immunity doctrine of *McCulloch*. Structural arguments can enlarge review further. Perhaps judicial review flows from the terror of the alternative: chaos. So it seemed to Holmes, who opined that the Republic would dissolve if the federal courts did not have the power to declare state laws unconstitutional.⁸⁶ So it seemed to Learned Hand, whose argument goes:

[I]t was probable, if indeed it was not certain, that without some arbiter whose decision was final the whole system would have collapsed The courts were undoubtedly the best 'Department' in which to vest such a power, since by the independence of their tenure they were least likely to be influenced by diverting pressure. It was not a lawless act to import into the Constitution such a grant of power.⁸⁷

Such a line of argument has a corollary, which Hand acknowledged:

[I]t was absolutely essential to confine the power to the need that evoked it: that is, it was and always has been necessary to distinguish between the frontiers of another 'Department's' authority and the propriety of its choices within those fron-

ernment, 57 U Chi L Rev 357, 364-76 (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U Cin L Rev 849 (1989).

⁸⁵ Federalist 78 (Hamilton) in Wright, ed, *The Federalist* 489, 491 (cited in note 47).

⁸⁶ Oliver Wendell Holmes, *Collected Legal Papers* 295-96 (Peter Smith, 1952).

⁸⁷ Learned Hand, *The Bill of Rights: The Oliver Wendell Holmes Lectures, 1958-29* (Harvard, 1962).

tiers. The doctrine *presupposed that it was possible to make such a distinction*, though at times it is difficult to do so.⁸⁸

One thing this version of the claim for judicial power cannot do is justify novelties. Will the Republic fall apart if some states use capital punishment and others do not? If some states permit sodomy and others prohibit the practice? The argument from chaos cannot establish that diversity of practice about debatable moral questions is baleful. Quite the contrary. Many visions of utopia entail great diversity of moral views and the power of people to choose their polity. Our particular governmental structure recognizes the value of different solutions (in different cities and states) to debatable questions. This is not so that states may "experiment," which implies that we will converge on a single answer to every problem. It is, rather, because people differ in tastes and moral views, both of which evolve. Divergent practices and the power to choose (or move) are important elements of liberty.

The need to produce a theory of meaning that is also adequate to justify the judicial role constrains the level of abstraction. It implies a search for a common denominator, in which judges enforce, against the contrary views of other governmental actors, only the portion of the text or rule sufficiently complete and general to count as law.⁸⁹ Several of the cases in Section I yield quickly to this approach. *Michael H.* involved an extra-textual claim, and it was correspondingly hard to locate any legal principle requiring every state and local government to adopt the same rule. This implies a low level of abstraction, for a highly general approach along Justice Brennan's lines dispenses altogether with the need to justify judicial power and dispense by assumption with the possibility of different legitimate answers. *Johnson* and *Craig* are the flip side: here there are strong textual claims to be honored. Justice Brennan's majority opinion in *Johnson* invoked a legal norm; the dissenters sought to particularize the subject in order to evade it. Just the opposite happened in *Craig*, where the majority increased the level of abstraction in order to evade a strictly legal claim: that whatever could be said about the accuracy of the verdict, it had been reached without *confrontation*. The majority in *Craig*, as it seems to me, sought to improve on rather than enforce the Sixth Amendment. *Harmelin* also is straightforward. To observe, as the

⁸⁸ Id at 29-30 (emphasis added). See also id at 66-77.

⁸⁹ See Bork, *Tempting* at 166-67 (cited in note 35); Easterbrook, *Approaches to Judicial Review* at 161 (cited in note 51); Kay, 82 Nw U L Rev at 248-50 (cited in note 51).

dissenters did in support of a general proportionality rule, that neither text nor history proves an argument *against* such a rule is to invert the theory of review, doing nothing at all to support a judicial role. It may be that a rule limited to barbaric modes of punishment will have limited contemporary effect, but it is not possible to make greater demands in the name of *law*.

Cases such as *Smith* are tougher. Neutrality between religion and secular affairs is at once a highly general rule and one that minimizes the judicial role. It is easy to see why a majority found it attractive. Yet free “exercise” implies more than free “belief”: Michael McConnell makes a strong case that the drafters and ratifiers used this word to signify accommodation of religious practice.⁹⁰ Boosting the level of abstraction to achieve a neutrality rule produces the most modest claims of judicial power—maybe too modest, just as *Craig* denied judicial authority through this device. In *Croson* and *Metro Broadcasting*, greater abstraction (e.g., “make no use of race”) reduces judicial *discretion* but increases judicial *power* relative to the other branches. It is the claim of judicial power that must be justified; although a reduction in judicial discretion is desirable, we do not get there unless the scope of authority has first been established. Again the level of generality may be excessive in relation to either textual or historical support.⁹¹

You will notice that I have omitted two lines of argument that appear over and over. One is that to settle on *any* approach to selecting the level of abstraction is to allow some hideous outcomes—capital punishment for the common cold and like abominations. Rules have borders; if there are borders people may take advantage; thus there should be no bright lines. The other sally is that settling on any one approach makes a fossil of the Constitution. As the world is changing, it would be regrettable to have governmental institutions strangled by a skeletal hand from the past.

Arguments of both flavors are common. Both are inconsistent with the premise of *Marbury*. They assert that the Constitution is not law—indeed, shouldn’t be law. Maybe so, but what then is the justification of judicial power? Why is updating to be done by persons who cannot be removed from office and have been insulated from contemporary society? Having knocked out our legal system’s premier justification, the proponents of these arguments need to

⁹⁰ McConnell, 103 Harv L Rev at 1488-90 (cited in note 31).

⁹¹ I repeat the caveat from Section I. Determining the *right* answer in hard cases such as *Smith* and *Metro Broadcasting* would require a substantive investigation—one of the kind Professor McConnell has conducted and I have not.

provide a substitute and typically do not. It is hard to find judges willing to say in public that *Marbury* is wrong and that they have a different justification of the judicial role.

As soon as you distinguish judicial from political power, you have a short and satisfactory answer to the problem of the dead hand. As the drafting of the Constitution becomes remote judicial power is harder to justify (because it is harder to point to rules of law), but the ability of the political branches of the government to keep in touch with the times *increases*. All judges can do is intervene to *negate* a political choice. When they decline to do this, the ability of political society to keep up with the times is unimpeded. Congress gained plenary legislative powers not only from popular will (recall Madison's argument in Federalist No. 46) but also from judicial inability to identify a rule of law defining the limits of "commerce."

The terror of the slippery slope looms larger. Horsecwhipping for double parking; zoning laws eliminating churches; freedom to use your business rival's trademark (if Johnson can burn the flag, why can't Wendy's erect golden arches?). Surely judges *must* be able to prevent such abuses; the need to do this counsels against any rule of adjudication. Even Justice Scalia, our leading textualist, does not resist this siren's song.⁹² He should; the parade of horrors is nothing but an argument against rules and serves (if indulged) to undermine rather than strengthen the claim for judicial review.

Horribles have lurked in the background for a long time. Here is one from Madison's Federalist 10, perhaps the greatest document of political theory penned on this side of the Atlantic.

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it⁹³

⁹² Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W Res L Rev 581, 590-93 (1989-90); *Harmelin*, 111 S Ct at 2697 n 11.

⁹³ Federalist 10 (Madison) in Wright, ed, *The Federalist* at 129, 136 (cited in note 47).

Madison tells us that paper money is wicked—but not to worry, the national government will be immune to its lure. It didn't work out that way, although the transition was not exactly smooth.⁹⁴

Marbury does not contain an assertion along the lines of: “Why, if there were no judicial review we might end up with paper money; and as that is too horrible to contemplate . . .” It is missing because it is no argument. At any instant some laws will be unthinkable. The jurisprudence of horrors is based on that fact. Yet the political climate changes; what is too horrible to contemplate in 1787 comes to pass during the Civil War. By the time the bottom of the slippery slope is reached, society no longer views the result as horrible. The exercise—whether it involves pointing a finger at paper money, or at the regulation of a farmer's baking wheat into bread, or at some rule that outrages contemporary thought—is no more than a truism. It gets its entire emotional punch by ignoring the possibility of cultural change.⁹⁵

Hypothetical horrors start from the belief that a legislature has done what *no* reasonable person could want. Such a supposition is possible only if the political process has collapsed. If indeed the process has collapsed, only judicial review can prevent disaster. Once you introduce the possibility that the laws look horrible only because the writer has assumed away the possibility of cultural change, it is harder to justify the assumption that the law is a product of political collapse and correspondingly hard to justify tinkering with the level of abstraction *now*, for a *real* law, in order to maintain discretion to deal with a horror that may never come to pass (and, if it does, won't be viewed as horrible). It was the fear of horrors, coupled with Chief Justice Marshall's slogan that “the power to tax involves the power to destroy”⁹⁶ that led to an unjustifiably sweeping rule of tax immunities from which the Court is beating a retreat.⁹⁷ We should be able to learn from experience.

Arguments of this genus may have greater utility when the Court is addressing the anachronistic law—one that could never be passed today but that is kept in place by a dedicated interest

⁹⁴ Compare *Hepburn v Griswold*, 75 US (8 Wall) 603 (1870), with *The Legal Tender Cases*, 79 US (12 Wall) 457 (1871) (overruling *Hepburn*), and *Norman v Baltimore & Ohio RR*, 294 US 240 (1935) (the Gold Clause cases). See also David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* 320-29 (Chicago, 1985).

⁹⁵ See Paul Gewirtz, *The Jurisprudence of Hypotheticals*, 32 J Legal Educ 120 (1982).

⁹⁶ *McCulloch*, 17 US at 431.

⁹⁷ See *Washington v United States*, 460 US 536 (1983), among many similar recent cases. *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528, 540-43 (1985), implies that the entire body of cases from *McCulloch* forward was misbegotten.

group despite the injuries it inflicts on a larger (but more diffuse) populace. I do not deny a modest role for what Henry Monaghan has called constitutional common law:⁹⁸ the “remand” of obsolete laws to the legislature, with the understanding that a contemporary legislative view prevails over the judges’ assessment of the demands of modern society. The Court achieved something of the sort when *Furman v Georgia* effectively required states to start from scratch with capital punishment laws.⁹⁹ This echo of Justice Holmes’s rejoinder to Chief Justice Marshall (“Not while this Court sits.”)¹⁰⁰ is a far cry from a general power of superintendence lest laws that seem outrageous to judges commend themselves to the population.

IV.

My point in the end is simple. Meaning depends on the purpose to which we put it. The Constitution can mean one thing in a classroom and another in a courtroom. Constitutional principles may serve as moral or prudential arguments about how a community should conduct itself. Judges seek not enlightenment but right answers, the core meaning within which further debate is ruled out. That core will be smaller than the scope of all constitutional interests and proprieties. In the end, the power to countermand the decisions of other governmental actors and punish those who disagree depends on a theory of meaning that supposes the possibility of right answers.

So you can’t view abstraction in the abstract. You must search for a level of generality simultaneously suited to the Constitution and to the judicial role. One that will be neither broad nor narrow all of the time, neither pro- nor con- state power. We must demand not that it conform to the reader’s political theory, but that it be law.

⁹⁸ Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv L Rev 1 (1975).

⁹⁹ 408 US 238 (1972).

¹⁰⁰ *Panhandle Oil Co. v Mississippi*, 277 US 218, 223 (1928) (Holmes dissenting) (“The power to tax is not the power to destroy while this Court sits.”).