Texas Wesleyan Law Review

Volume 1 | Issue 1 Article 7

3-1-1994

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Laurence H. Tribe & Michael C. Dorf, ON READING THE CONSTITUTION, Harvard University Press, 1991 (144 pages).

I. INTRODUCTION

The essential contradiction of the Constitution in the representative democracy which it created lies in its threefold anti-democratic nature: the document itself contains intentionally anti-democratic elements,[1] it was adopted in ways that today are not accepted as democratic (although contemporaneously they presumably were),[2] and it is ultimately interpreted by a Court that is itself wildly undemocratic.[3]

Even if one accepts that a document adopted in an undemocratic way by a generation long dead can bind contemporaneous society, an additional difficulty arises because the language of the Constitution is, to put it mildly, not crystal clear. For example, what are the "privileges or immunities of citizens of the United States"[4] which no state may abridge? What constitutes the "liberty" protected by the Due Process Clause of the Fourteenth Amendment?[5] The lack of clear referents for the "majestic generalities of the Bill of Rights"[6] and other constitutional text has led different commentators and judges to claim to find within the Constitution all manner of protection, and all

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1. For example, a bill desired by a unanimous House of Representatives, the President, and, for that matter, a unanimous American people cannot become law unless a majority of the Senate concurs. *See* U.S. CONST. art. I, § 7, cl. 2.

2. The Framers' charter was merely to propose modifications to the Articles of Confederation (which required unanimous consent by the thirteen states for modification); in addition, proposal and ratification were confined to privileged, white men. *See, e.g.,* DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 14, 37-40 (1990).

3. Justices serve for life during "good Behavior", their salaries cannot be reduced, and they are appointed by the President (with the advice and consent of the Senate) without popular election. *See* U.S. Const. art. III, § 1; U.S. CONST. art. II, § 2, cl. 2. Although there have occasionally been proposals to force the Court to act only by supermajority in certain cases, none has been successful. In its internal procedures, the Court is democratic (that is, the majority controls the result in a particular case), except for the granting of *certiorari* which requires only four votes.

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

5. U.S. CONST. amend XIV, § 1.

6. West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

DOI: https://doi.org/10.37419/TWLR.V1.I1.5

sorts of structures which it is claimed to have created.[7] In *On Reading the Constitution*,[8] Laurence Tribe and Michael Dorf argue that the Constitution cannot fairly be said to support innumerable, unlimited readings, and they present a method which, they claim, can meaningfully constrain judicial choice of what values are protected by it. While their work is useful in arguing that the Constitution, indeed, cannot fairly be read to mean all things to all people, their method of constraining judicial choice does not work.[9] In addition, they fail to recognize that their method could conceivably be used in connection with a proposal to constrain judicial creativity made by Justice Scalia,[10] to ameliorate some of the deficiencies which they find in his method.

A final antidemocratic complexity arises when the Court uses the Constitution to invalidate majoritarian choices which intrude on "unenumerated" rights — that is, rights which are not textually in the Constitution and which cannot fairly be said to follow from rights which are.[11] Despite the obvious difficulties in giving meaning to the

7. For example, it has been argued that the Constitution (at least as interpreted in such cases as Shelley v. Kraemer, 334 U.S. 1 (1948) and Griffin v. Illinois, 351 U.S. 12 (1956)) would allow a socialist judge to refuse to order the return of private property seized by a "People's Collective" displeased with the policies implemented by the property's owner, Mark V. Tushnet, *Dia-Tribe,* 78 MICH. L. REV. 694, 697 (1980) (reviewing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978)); that it requires redistribution of property until every citizen has a certain minimum amount, Akhil R. Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements,* 13 HARV. J.L. & PUB. POL'Y 37 (1990); or, less flamboyantly, that the role of judicial review is confined to policing the process by which laws are enacted. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

8. LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION (1991) [hereinafter TRIBE & DORF, ON READING THE CONSTITUTION]. As the authors acknowledge, their work draws heavily on two previous articles. *See* Laurence H. Tribe, *On Reading the Constitution,* 1988 UTAH L. REV. 747; Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights,* 57 U. CHI. L. REV. 1057 (1990).

9. Tribe & Dorf acknowledge the tentative and incomplete nature of their proposal: "The reader who expects to find in these pages a decoding device that will solve all constitutional puzzles will be disappointed. . . . [O]ur goal is to . . . suggest[ ] what we hope will be fruitful questions." TRIBE & DORF, ON READING THE CONSTITUTION, *supra* note 8, at 5. They admit that their proposal will "constrain[ ], though not eliminat[e], judicial value choice in the elaboration of constitutional liberties." *Id.* at 4.

10. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989).

11. Constitutional rights are of three basic types: enumerated, penumbral, and unenumerated. While the three categories are not analytically airtight, they can usefully be distinguished. For example, free speech is given enumerated protection by the First Amendment ("Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.), although the precise contours of what constitutes abridgment of speech require judicial elucidation. Penumbral rights are those which follow by reasonable implication from enumerated rights (or from the governmental structure created by the Constitution). For example, the right to possess word processors is penumbrally protected by the protection given to speech since they are necessary (and/or useful) to enable people to communicate. For that matter, extending the protection of the First Amendment beyond "speech" to communication in general is

open-textured and at least somewhat indeterminate language contained in the Constitution, difficulties which are present whether the rights being protected are enumerated or not, enforcing unenumerated rights adds an additional difficulty — the Court's starting point for analysis is even more problematical than when it has the admittedly enigmatic text to work with.

Nevertheless, unenumerated rights are now widely recognized as being worthy of judicial protection.[12] The problems this causes for the political theory of democracy are also widely recognized. Ultimately, the question reduces to whether a judge enforcing unenumerated rights is doing anything more than imposing on the polity his personal predilections of sound public policy. Since the problems of constraining judicial creativity are most exacerbated when dealing with unenumerated rights, I shall primarily focus my discussion on them.

II. CONSTRAINTS ON JUDICIAL CHOICE

Tribe & Dorf acknowledge that the Constitution is not an infinitely malleable document wherein can be found all things that constitute the reader's vision of a good or just society.[13] In their view, the document stands neither as an unrelated series of clauses[14] nor as a seamless, unified whole.[15] Fair enough. But how can this view be reconciled with one that imports into the Constitution things which are not textually, or at least by fair textual implication, there and which cannot provide a principled method to limit such importations?[16]

Justices have struggled with the last question as well. (Curiously, perhaps, they have often done so in opinions creating — or interpret-

itself a form of penumbral protection. *See* TRIBE & DORF, ON READING THE CONSTITUTION, *supra* note 8, at 97. Unenumerated rights are those without any explicit or reasonably related textual support. For example, there is no *direct textual* justification for striking down laws regulating abortion. *See, e.g.,* Roe v. Wade, 410 U.S. 113 (1973). *Compare* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992). The bizarre category created by the Court in Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (rights found in "penumbras [ ] formed by emanations" of specific constitutional guarantees) is a strange amalgam of the latter two categories.

12. *See, e.g.,* cases cited *infra* note 38. An interesting variation was involved in Turner v. Safley, 482 U.S. 78 (1987), which struck down regulations which, as applied, infringed on what the Court found to be an unenumerated right of prisoners to marry, while upholding restrictions on their ability to correspond by letter, an activity protected by the First Amendment.

13. "The authority of the Constitution . . . would lose all legitimacy if it really only were a mirror for the readers' ideas and ideals. . . . We must find principles of interpretation that can anchor the Constitution in some more secure, determinate, and external reality. But that is no small task." TRIBE & DORF, ON READING THE CONSTITUTION, *supra* note 8, at 14-15.

14. *Id.* at 21-23.

15. *Id.* at 24-30.

16. Tribe & Dorf do attempt to find principled limitations. However, as I discuss in this Section, their attempt fails.

ing, if you will — rights which are textually unsupported.) Justice Harlan, for example, in his dissent from dismissal of the appeal in *Poe v. Ullman*[17] wrote that "Judges have [not] felt free to roam where unguided speculation might take them"[18] when defining the scope of liberty protected from governmental intrusion by the Due Process Clause of the Fourteenth Amendment.[19] Also fair enough. How does it work in practice?

Both Justice Harlan (whose *Ullman* dissent Tribe & Dorf praise[20]) and Justice Goldberg relied on tradition to limit judicial creativity.[21] It might seem curious to the naive eye that an antimajoritarian Court should be called upon to help preserve the traditions of the people which the people themselves, acting through their elected representatives, have chosen to abandon. Further, one wonders whether tradition is an appropriate device for limiting majoritarian choice. As Justice Brennan has noted, "[Tradition] can be as malleable and elusive as 'liberty' itself."[22]

But perhaps tradition is more capable of principled application than Justice Brennan and, for that matter, Tribe & Dorf,[23] think it is. Let us start with Justice Harlan's views in *Ullman* bearing in mind that Tribe & Dorf explicitly praised them.[24] How did Justice Harlan understand his views of tradition/liberty to apply to sexual conduct outside of marriage and homosexual sex? "[The] laws forbidding adultery, fornication and homosexual practices . . . form a pattern so

17. 367 U.S. 497 (1961). The case involved a challenge to the same Connecticut anti-contraceptive statute later struck down in Griswold v. Connecticut, 381 U.S. 479 (1965).

18. *Ullman*, 367 U.S. at 542 (Harlan, J., dissenting).

19. *See also Griswold*, 381 U.S. at 493 (Goldberg, J., concurring). "In determining which rights are fundamental, judges are not left to decide cases in light of their personal and private notions." *Id.*

20. TRIBE & DORF, ON READING THE CONSTITUTION, *supra* note 8, at 77.

21. In *Ullman*, Justice Harlan noted that:

> Due process . . . represent[s] the balance which our Nation . . . has struck between . . . liberty and the demands of organized society. . . . The balance . . . is the balance struck by this country, having regard to what history teaches are the *traditions* from which it developed as well as the *traditions* from which it broke. That *tradition* is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.

Ullman, 367 U.S. at 542 (Harlan, J., dissenting) (emphasis added).

In Griswold, Justice Goldberg argued that:

> In determining what rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the '*traditions* and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.'

Griswold, 381 U.S. at 493 (Goldberg, J., concurring) (inserts and ellipses in original) (emphasis added).

22. Michael H. v. Gerald D., 491 U.S. 110, 137 (1989) (Brennan, J., dissenting).

23. TRIBE & DORF, ON READING THE CONSTITUTION, *supra* note 8, at 98-101.

24. *Id.* at 77.

deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis."[25] How can Tribe & Dorf in good conscience praise his opinion, given that they find *Bowers v. Hardwick*,[26] a case which held that there is no constitutional barrier to a state's criminalizing homosexual sodomy,[27] "egregiously wrong."[28]

The principle danger in allowing uncontrollable (and/or unprincipled) constitutional value importation is that it interferes with democratic rule. If one is willing to acknowledge that finding fundamental rights is an exercise in value choice rather than compelled discovery from first principles, democratic theory argues that the choice should be made by a politically accountable body rather than a politically unaccountable Court.[29] Surprisingly, perhaps, Professor Tribe himself arguably has conceded this point. "[T]he list of fundamental constitutional norms [is] open to debate, [and] the very identity of 'the Constitution' — the body of textual and historical materials from which the norms are to be extracted and by which their application is to be guided — is itself a matter that *cannot be objectively deduced or passively discerned in a viewpoint free way.*"[30]

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25. *Ullman*, 367 U.S. at 546 (Harlan, J., dissenting).

26. 478 U.S. 186 (1986).

27. The statute at issue criminalized all sodomy, but the challenge was brought by a man who had been arrested for engaging in homosexual sodomy.

28. TRIBE & DORF, ON READING THE CONSTITUTION, *supra* note 8, at 117.

29. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971) ("[N]o argument that is both coherent and respectable can be made supporting a Supreme Court that 'chooses fundamental values' because a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society.")

See also Duncan v. Louisiana, 391 U.S. 145, 168 (1968) (Black, J., concurring).

> [To treat] the Due Process Clause . . . as prescribing no specific and clearly ascertainable constitutional command that judges must obey in interpreting the Constitution, but rather as leaving judges free to decide at any particular time whether a particular rule or judicial formulation embodies an 'immutable principl[e] of free government' or is 'implicit in the concept of ordered liberty,' or whether certain conduct 'shocks the judge's conscience' or runs counter to some other similar, undefined and undefinable standard [causes] . . . due process . . . to be a phrase with no permanent meaning, but one which is found to shift from time to time in accordance with judges' predilections and understandings of what is best for the country. If due process means this, the Fourteenth Amendment, in my opinion, might as well have been written that 'no person shall be deprived of life, liberty or property except by laws that the judges of the United States Supreme Court shall find to be consistent with the immutable principles of free government.' It is impossible for me to believe that such unconfined power is given to judges in our Constitution that is a written one in order to limit governmental power.

Id. (second alteration in original).

30. Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 440 (1983) (emphasis added) [hereinafter Tribe, *Amending the Constitution*]. More recently, Professor Tribe expressed a similar position:

It bears emphasizing what Professor Tribe has conceded: there is no objective way to determine what fundamental rights are. Yet, he (and Michael Dorf) would allow an unelected, life-tenured judiciary to declare and impose them on the populace. This is not democracy, this is rule by Platonic Guardian. A good form of government, perhaps; even a better form than ours, perhaps; but not ours.[31] And, while the rule of law is possible in systems other than ours, a system that allows decisions to be made by politically unaccountable actors with no rationale that "can[ ] be objectively deduced or passively discerned in a viewpoint free way"[32] is not a rule of law. It is rather subjugation to arbitrary decisions to be made by a hopefully benevolent despot. As Justice Scalia has characterized it, "a rule of law that binds neither by text nor by any particular, identifiable tradition, is no rule of law at all."[33]

A line of cases that causes difficulties for all who believe that the Constitution protects unenumerated rights is the so-called *Lochner*[34] line. Broadly, these cases held that a concept of freedom that underlay much of the Constitution was freedom of contract — that is, that a willing worker should be free to sell his labor to a willing employer on terms and conditions acceptable to both. Thus, federal or state attempts to regulate wage and hour or many other conditions of employment were struck down as impinging on this fundamental liberty.[35] Is it possible to say in a principled way that, on the one hand, it was wrong for the Court to find economic freedom to be part

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> References to history, evolving community standards, and civilized consensus, can provide suggestive parallels and occasional insights, but it is illusion to suppose that they can yield answers, much less absolve judges of responsibility for developing and defending a theory of what rights are 'preferred' or 'fundamental' under our Constitution and why.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 777-78 (2d ed. 1988). It might be contended that such decisions are more appropriately reserved to We the People rather than to They the Unelected, Life-Tenured Judiciary.

31. *See* LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

> For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs.

Id. See also Plyler v. Doe, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting) ("[T]he Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.' ").

32. Tribe, *Amending the Constitution, supra* note 30, at 440.

33. Michael H. v. Gerald D., 491 U.S. 110, 128 n.6 (1989).

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

35. *Lockner* involved a New York labor law which limited the number of days and hours bakers could work. The Court struck down the law, holding that there was "no reasonable foundation" to support the law as necessary to protect either public health or the health of the bakers and that without such a foundation, the bakers' putative freedom to contract was being interfered with — a deprivation of liberty prohibited by the Fourteenth Amendment. *Id.* at 46 n.1, 57-58.

of the liberty protected from governmental interference by the Due Process Clause, while, on the other hand, finding that reproductive autonomy is properly protected? Tribe & Dorf attempt to justify this distinction, arguing that it is legitimate to protect "consensual intimacies in the home" because "the First, Third, and Fourth Amendments . . . suggest a tacit postulate with a textual root."[36] But, if it is a "textual root" one is searching for, the Contracts Clause[37] seems far more clearly to address the sort of governmental restrictions at issue in *Lochner* than the provisions Tribe & Dorf rely on to justify protecting "consensual intimacies". Why, then, should *Lochner* be seen as wrongly decided while the "privacy"[38] cases are praised?[39] In addition, the first two cases that led to the development of privacy juris-

36. TRIBE & DORF, ON READING THE CONSTITUTION, *supra* note 8, at 60.

37. U.S. CONST. art. I, § 10, cl. 1. "No State shall . . . pass any . . . law impairing the Obligation of Contracts . . . ." *Id.* Although the Contracts Clause has not been used to strike down laws of the type at issue in *Lochner*, that does not make it any less a "textual root" which the Court *could* have chosen to use. While *Lochner* involved state law, other cases similarly denied the federal government the power to regulate such matters. *See, e.g.*, Adair v. United States, 208 U.S. 161 (1908), which struck down a federal law banning common carriers engaged in interstate commerce from discharging employees for belonging to labor unions. The Court noted that such a law "is an arbitrary interference with the liberty of contract which no government can legally justify in a free land" and thus violated the Due Process Clause of the Fifth Amendment, U.S. CONST. amend. V. *Adair*, 208 U.S. at 175-76. Interestingly, Justice Harlan, who wrote for the Court in *Adair*, had dissented in *Lochner*. The textual support for limiting the federal government using the Contracts Clause is obviously weaker than for using it to limit the states.

The Court used freedom of contract as a basis for invalidation of federal law far less than it used it to invalidate state law. More usually, the Court invalidated federal law on the ground that it attempted to regulate areas outside the scope of interstate commerce. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941). The Court used a similar analysis as a second reason to strike down the federal law at issue in *Adair*, finding that there was no "connection between interstate commerce and membership in a labor organization" sufficient to allow Congress to regulate the latter. *Adair*, 208 U.S. at 179.

38. Such rights as the right to use contraceptives, to marry interracially, and to have abortion available as a choice were described as flowing from an unenumerated right of privacy. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); and Roe v. Wade, 410 U.S. 113 (1973).

39. Tribe & Dorf argue that:

> What was wrong with *Lochner* — if indeed it was wrong . . . must have been that the Court chose the wrong values to enforce, wrong in the sense that complete laissez-faire capitalism was neither required by the historical understanding of 'liberty,' nor did it meaningfully enhance the freedom of the vast majority of Americans in the industrialized age . . . .

TRIBE & DORF, ON READING THE CONSTITUTION, *supra* note 8, at 66. Tribe & Dorf make two errors here: first, if they were willing to rely on historical understanding they would be unable to argue (as they do) that the Constitution protects the rights of homosexuals to practice sodomy; and second, they appear to be imposing a supra-organizing principle onto the Constitution — that it is to be interpreted in ways that "meaningfully enhance the freedom of the vast majority of Americans." *Id.* Previously, they had argued that any attempt to impose supra-organizational principles onto the Constitution (which they called "hyper-integrated readings" of the Constitution) would distort the document. *Id.* at 24-30.

prudence were based in substantial part on *Lochner*-like concern for the freedom of the parties involved to contract as they would[40] thus suggesting that if *Lochner* was wrongly decided they were wrongly decided as well.

The failure of Tribe & Dorf satisfactorily to explain why *Lochner* should be regarded as wrong while the privacy cases should be regarded as right is even more significant than it might seem because their explanation of what should constrain judges in interpreting the Constitution and elucidating unenumerated rights appropriate for judicial protection is that the method of the common law should be used — that is, that judges should look to the holdings of prior cases as well as their rationales and attempt to extrapolate from those cases to the new situation before them.[41] There are several difficulties with this approach. First, it ignores an essential distinction between common law adjudication and constitutional adjudication: results of the latter can only be corrected by judicial revision or constitutional amendment, while results of the former can easily be changed by legislative action. This difference is of overwhelming significance to democratic theory. In one case, the people, speaking through their elected representatives, may change the result of an unpopular decision. In the other case, the people are probably bound[42] until such time as the

40. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

> Without doubt, [liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to *contract*, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. (emphasis added). *Lochner* was among the cases cited for support of this proposition. The Court later again emphasized the contract-based underpinning of its decision: "Plaintiff['s] . . . right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment." *Id.* at 400. The Court also appeared to be applying a relatively lenient standard of review when it concluded that, "[w]e are constrained to conclude that the statute as applied is arbitrary, and without reasonable relation to any end within the competency of the state." *Id.* at 403.

See also Pierce v. Society of Sisters, 268 U.S. 510, 531 (1925) ("[W]ithout doubt[,] enforcement of the statute [barring private school education and mandating public school education for children between the ages of eight and sixteen] would seriously impair, perhaps destroy, the profitable features of appellees' business, and greatly diminish the value of their property.").

41. TRIBE & DORF, ON READING THE CONSTITUTION, *supra* note 8, at 71-72. They argue that "even the boldest innovations in constitutional law have generally been based on precedent." *Id.* at 72.

42. I say "probably" to advert to the debate over whether Supreme Court decisions are "law" in the same sense that the Constitution and statutes are. *See, e.g.*, Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *reprinted in* WILLIAM B. LOCKHART, ET. AL., CONSTITUTIONAL LAW 13-14 (7th ed. 1991).

> [T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation

Court changes its position (constitutional amendments are notoriously, and intentionally, difficult to enact). Another difficulty with Tribe & Dorf's method is that it only provides a one-way ratchet. That is, the Court would be institutionally constrained to proceed in only one direction — in the general direction of previous cases. One can only speculate whether Tribe & Dorf would be advocating this approach had the Court ruled in *Roe v. Wade*[43] that fetuses are people and therefore entitled to full protection of the Bill of Rights, and that allowing abortion constituted a denial of equal protection of the laws. Finally, Tribe & Dorf cannot easily use their method to justify any innovation in constitutional law. By definition, innovation becomes suspect.[44] Whether this would be a good or bad thing is, at least, fairly debatable. Tribe & Dorf's proposed method would strongly suggest, however, that all innovation plus any substantial overruling of prior cases would be of dubious legitimacy.[45]

III. LEVELS OF GENERALITY

Inherent in all constitutional decisionmaking lies a difficult levels-of-generality problem. Simply stated the problem is this: if constitutional decisions are to be principled, a case that is not fairly distinguishable from a previously decided one should be decided in the same way as the first was.[46] The desire for principled decisions re-

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between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

Id. *See also* Edwin Meese III, *The Law of the Constitution,* 61 TUL. L. REV. 979 (1987); Edwin Meese III, *The Tulane Speech: What I Meant,* 61 TUL. L. REV. 1003 (1987).

43. 410 U.S. 113 (1973).

44. Since by definition an innovative case does not follow the rationale of previously decided cases, the method Tribe & Dorf propose cannot be used to justify it. Innovation substantially at odds with previously decided doctrine is also suspect in ordinary common law adjudication as well.

45. Obviously a case overruling an earlier one is rejecting rather than building on its rationale. *Compare, e.g.,* Plessy v. Ferguson, 163 U.S. 537 (1896) *with* Brown v. Board of Educ., 347 U.S. 483 (1954).

46. A legion of distinguished scholars has noted the need for principled adjudication.

> If a decision is to be rational it must be based upon some rule, principle, or standard. If this rule, principle, or standard is to make any appeal to the parties it must be something that pre-existed the decision. An explanation in terms of a principle created *ad hoc* to explain the decision it purports to govern lacks the persuasive power necessary to make adjudication effective.
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> . . . .
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> To preserve this faith [in the efficacy of adjudication], it is important that the uses of adjudication be confined as closely as possible to those areas where that faith is justified — where, in other words, the process of adjudication is in fact a rational one. Where adjudication is used to settle disputes not subject to rational decision, the moral force of the institution suffers, even if it succeeds in disposing of the particular case.

flects more than a desire for logical consistency — rather it resonates with the very basis of democratic theory: if decisions may institutionally be made by politically unaccountable actors in an unprincipled way, this constitutes a rule of caprice, not a rule of law. However, if one describes a result at a high enough level of generality, all cases concerning even remotely similar subjects can be made to fit within the logic of the earlier case. For example, if the earlier privacy cases[47] are described as being about freedom to control reproductive decisions, they would not be broad enough to cover a supposed "right" to practice homosexual sodomy;[48] if they are conceived of as being about freedom to control intimate association they would cover such a postulated right;[49] however, if they are conceived of as being about "the right to be let alone" they are broad enough to cover almost any and all behavior done in private.[50]

In 1989, Justice Scalia proposed a method to define the proper level of generality to use in describing rights.[51] Justice Scalia would have

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Lon Fuller, The Forms and Limits of Adjudication, (November 19, 1957) (unpublished manuscript, excerpts printed in HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 421, 425 (tent. ed. 1958)). Professor Fuller's observations apply even more strongly in the context of constitutional decisionmaking, where the court is likely to be perceived as striking at the very heart of democratic self-rule by removing an area from control by the people.

See also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 15 (1959).

> [T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. . . . [Courts must decide cases] on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply . . . .

Id. Professor Tribe also has argued that judges should engage in principled decision making: "Typically, courts are thought to be assigned responsibility for relatively 'principled' decisionmaking, including constitutional interpretation; questions requiring more *ad hoc,* instrumental approaches are normally deemed to be charged to the political branches." Tribe, *Amending the Constitution, supra* note 30, at 443, n.46.

47. *See, e.g.,* cases cited *supra* note 38.

48. *See* Bowers v. Hardwick, 478 U.S. 186, 191 (1986) ("[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.").

49. *See id.* at 199 (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). "This case [Bowers v. Hardwick] is [not] . . . about 'a fundamental right to engage in homosexual sodomy,' as the Court purports to declare . . . . Rather, this case is about . . . 'the right to be let alone.' " *Id. See also* TRIBE & DORF, ON READING THE CONSTITUTION, *supra* note 8, at 74-76.

50. *Cf.* Stanley v. Georgia, 394 U.S. 557 (1969) (there is a constitutional right to possess obscene material in the home, even though the Constitution does not protect such material and a state may proscribe its creation, sale, or possession outside the home).

51. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989). In that case, a man who was with 96% certainty the father of a child born to a woman married during conception, gestation, and birth to another man and who remained married to that man demanded certain parental rights but was refused them. The Supreme Court

the Court look for the most specific tradition which controls the outcome of a case, and would then apply that tradition to decide it. Tribe & Dorf challenge Justice Scalia's method,[52] but overlook that their own proposed method for constraining judicial discretion could be used to solve the weakness they find in Justice Scalia's method.

Tribe & Dorf begin by assuming that Justice Scalia intended to create a method which could be applied in a mechanical, value-neutral way.[53] They then demonstrate that Justice Scalia had already applied a non-neutral method to reach the description where he began his search for relevant tradition. That is, Justice Scalia characterized the starting point in his inquiry as being whether there were traditions dealing with the rights of a natural father of a child born to a woman married to another man (and found that there were no traditions protecting those rights).[54] Tribe & Dorf argue, however, that Justice Scalia had already abstracted away a considerable number of both relevant and irrelevant facts.[55] Most importantly, Tribe & Dorf argue that the case could have been understood at a *more* specific level by asking whether there are relevant traditions concerning natural fathers who adulterously conceive children and then have a long-lasting, parental-like relationship with them. If no such tradition is found, they argue, there is no value-neutral way to decide whether to abstract away, as Justice Scalia did, that the father had a long-standing relationship with the child or that the child was adulterously conceived.[56]

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affirmed. This part of Justice Scalia's opinion announcing the judgment of the Court was subscribed to only by himself and Chief Justice Rehnquist. Justices O'Connor and Kennedy joined all of Justice Scalia's opinion except for footnote 6. *Id.* at 132 (O'Connor, J., concurring in part). Tribe & Dorf argue that Justices O'Connor and Kennedy "pointedly declined to join" in note 6, TRIBE & DORF, ON READING THE CONSTITUTION, *supra* note 8, at 97, but this seems an overstatement. Justice O'Connor noted only that previous cases might have been decided in a way inconsistent with Justice Scalia's approach and that she "would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis." *Micheal H.*, 491 U.S. at 132 (O'Connor, J., concurring in part).

52. They argue that:

> Justice Scalia's claim is false on several grounds: first, that the extraction of fundamental rights from societal traditions is no more value-neutral than is the extraction of fundamental rights from legal precedent; second, that there is no universal metric of specificity against which to measure an asserted right; and third, that even if Justice Scalia's program were workable, it would achieve a semblance of judicial neutrality only at the unacceptably high cost of near-complete abdication of the judicial responsibility to protect individual rights.

TRIBE & DORF, ON READING THE CONSTITUTION, *supra* note 8, at 98.

53. *Id.* at 73.

54. *Michael H.*, 491 U.S. 110, 127 n.6.

55. "[Certain facts] would [be] deem[ed] 'obviously' irrelevant — such as hair color, or race, or age. . . . [But] what counts as arbitrary is usually a matter of societal consensus rather than pure logic." TRIBE & DORF, ON READING THE CONSTITUTION, *supra* note 8, at 103.

56. *Id.* at 103-04. If the adulterous conception were abstracted away, the relevant tradition would be one concerning the rights of natural fathers who are unmarried to

To the extent that Justice Scalia may be seen as having tried to create a mechanical test which could be applied by a well-programmed computer, Tribe & Dorf's criticism is well-taken. To the extent that Justice Scalia was proposing a method to limit, rather than eliminate, judicial discretion, however, Tribe & Dorf fail to explain why it is better to have no reasonable constraint than to have a flawed one.[57] Most significantly, Tribe & Dorf do not explain why their proposed method — using the approach of common law development — could not also be used to determine which dimension is the proper one to abstract away in the search for a relevant tradition. If a consensus, common law-like approach cannot be used for such a relatively simple task, how could it ever be sufficient to use to limit judicial discretion in important areas of democratic choice?

What if, however, Tribe & Dorf are correct that there is no way to properly choose the correct dimension to abstract away? The implications for the rule of law are enormous. That is, if there is no principled way for a judge to determine the appropriate level of generality to use in describing rights (even enumerated rights), a judge cannot be faulted for reaching any particular result he wishes to reach since he can always defend his decision by arguing that he simply chose to protect a previously recognized right defined at a high level of generality.[58] Finally, if there is no principled way in which to describe the appropriate level of generality to limit the reach of prior cases, how can the method of the common law work? And would it not be distressing, to say the least, to have self-governance limited by who can make the best common law arguments? And the point made earlier concerning the use of tradition bears repeating here: if Tribe & Dorf can simultaneously praise Justice Harlan's *Ullman* dissent, in which he argued that constitutional doctrine concerning homosexual conduct "must build upon th[e] basis" that laws proscribing it "form a pattern . . . deeply pressed into the substance of our social life"[59] and argue that *Hardwick*[60] was "egregiously wrong",[61] the burden is on them to

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the mothers of their children but who take a significant role in raising them. This tradition would probably suggest granting parental rights to Michael H. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972).

57. They do argue that Justice Scalia's approach allows surreptitious value importation, TRIBE & DORF, ON READING THE CONSTITUTION, *supra* note 8, at 106, but it is not clear why overt importation is any less an affront to democratic choice than surreptitious importation. In fact, to the extent that it is the experience rather than the reality of political autonomy that is most important in a free society, overt importation would be worse.

58. As a *reductio ad absurdum* there would be no principled way to disparage a judge who held that the freedom of speech protected by the First Amendment requires that people be fed and housed by the state since the First Amendment recognizes a very general value of political participation, and people are unable adequately and fully to participate in the political process if they must spend much of their energy seeking food and shelter. *See* Amar, *supra* note 7.

59. Poe v. Ullman, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting).

60. Bowers v. Hardwick, 478 U.S. 186 (1986).

show that their method is indeed a principled one. In my view, they have not met that burden.

61. TRIBE & DORF, ON READING THE CONSTITUTION, *supra* note 8, at 117.