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BOOK REVIEWS

“ARROGANCE CLOAKED AS NEUTRALITY”

Frederick Mark Gedicks*


INTRODUCTION

In On Reading the Constitution, Laurence Tribe and Michael Dorf argue a bold thesis. They claim that it is possible for a judge to interpret the Constitution, and in particular to discover unenumerated constitutional rights, in a value-neutral manner. They argue further that this neutral interpretive methodology affirms the validity of the abortion choice right articulated by the Supreme Court in Roe v. Wade¹ and exposes the flaws in the Court’s refusal to extend constitutional protection to homosexual

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**** Hereinafter cited by page number only. Unless otherwise indicated, italics within quoted passages reflect the authors’ original usage.

¹ 410 U.S. 113 (1973).
conduct in *Bowers v. Hardwick*.  

Given the persistent criticism of the Court's privacy decisions over the last twenty-five years, the development of a neutral theoretical justification for them would be a stunning achievement. For those who are as troubled by *Bowers* as they are untroubled by *Roe*, an ideologically neutral theory that criticized the former and defended the latter would be welcome indeed. Alas for such people, Tribe and Dorf do not succeed in setting forth a persuasive account of such a methodology. On the contrary, with spectacular irony (no doubt unintended) their text demonstrates precisely the opposite—that value neutrality in constitutional interpretation is impossible. At every turn, the very arguments they make in defense of their methodology undermine its claims of neutrality. By the end of the book, one sees clearly that Tribe and Dorf like *Roe* and dislike *Bowers*, but no supporting neutral principles are in sight.

I. How NOT to Read the Constitution?

Tribe and Dorf begin by suggesting how the Constitution should not be interpreted. Their targets are originalism and antifoundationalism. Employing an argumentative strategy that is repeated throughout the book, they characterize originalism and antifoundationalism as methodological extremes to be avoided at all costs, thereby implying that they themselves occupy the sensible and defensible middle ground.

A. The Critique of Originalism

Tribe and Dorf's critique of originalism is largely unoriginal. Nevertheless, the various criticisms of originalism scattered throughout the book (8-13, 32, 66-70, 98-101) are one of its more
useful aspects. By insightfully and succinctly setting forth the weaknesses of originalism as an interpretive methodology, Tribe and Dorf provide a valuable perspective on the persistent band of politicians, judges, and academics who champion this methodology as the most (if not the only) determinate and neutral way of interpreting the Constitution.

Originalism is one of those protean terms that encompasses a potentially wide variety of interpretive practices. Tribe and Dorf maintain that originalists use the intent of the framers of the constitutional text and, more broadly, the understanding of others who lived at the time this text was written and ratified, to constrain the meaning of the text (9-10).

In their various references to originalism, Tribe and Dorf highlight three basic obstacles to the originalist project—indeterminacy, bias, and irrelevance. Indeterminacy suggests that the past cannot be recaptured in any definitive sense. This is not merely because historical sources and evidence are incomplete, making it impossible to know with confidence the intentions of those who acted in the past (10, 66-68). The difficulty is more fundamental. The only

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4 See, e.g., Meese, Address Before the American Bar Association (July 9, 1985), in The Great Debate: Interpreting Our Written Constitution 31 (1986); Selection and Confirmation of Federal Judges: Hearings Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 228-30 (1979) (colloquy between Senator Orrin Hatch (R-Utah) and nominee Patricia Wald).


7 This is the brand of originalism advocated by Robert Bork. See R. Bork, supra note 5, at 143-60. Ronald Dworkin has suggested that Bork's book was "so spectacular a failure that... it may mark the end of the original intention thesis as a serious position among constitutional lawyers." Dworkin, The Reagan Revolution and the Supreme Court, N.Y. Rev. of Books, July 18, 1991, at 23, col. 4. By contrast, Bork's originalism has been defended by Michael Perry, who argues that Dworkin, along with most other contemporary constitutional scholars, has attacked a weak and unpersuasive originalist straw man, rather than the "sophisticated" Borkian originalism. See Perry, The Legitimacy of Particular Conceptions of Constitutional Interpretation, 77 Va. L. Rev. 669, 674-86 (1991). Perry goes on to conclude, among other things, that "we should all be originalists" now, on the ground that virtually every interpretive methodology espoused by legal academics today depends to some extent upon recovery of how the constitutional text was understood at the time it was drafted and ratified. Id. at 686-94, 718.
way to understand the Constitution as did the framers and their contemporaries is to recreate the world in which they lived. But because this world is no longer part of our present experience, it is not accessible to us, no matter how voluminous our research.8

Bias implies that even if we could recall the lost world of those who lived in the past, "we" would still not be "them." We cannot understand the framers' world as they did, but only as we do. Arguments like Garry Wills's, that we can discern the "true" meaning of the Constitution by "forgetting" all we have learned since the late 1700's, are absurd and futile (9-10). One may just as well argue that a millionaire can genuinely understand what it is like to be poor by "forgetting" that she is independently wealthy. Bias makes it impossible for any person to determine in a value-neutral manner what the past has been (99-100). Since we cannot avoid seeing through the interpretive lens of our own cultural time and place, history is always constructed, and never discovered (9).

Finally, irrelevance suggests that even if we could overcome indeterminacy and bias so as to "discover" what the framers and their contemporaries "really" thought about a particular constitutional provision, it is not clear why this understanding should decisively define the meaning of that provision (10-11).9 As Tribe and Dorf cogently observe, "history serves to illuminate the text, but . . . only the text itself is law" (11). It is always open to the Court to ignore or to rewrite history, and it has done both on many occasions.10 Moreover, the framers themselves may have believed their private intentions to be irrelevant to the process of authoritatively interpreting the Constitution, which, if true, substantially

8 Indeed, antifoundationalists would argue that even the "presentness" of current experience is illusory, so that our understanding of even the most apparently immediate experiences is only an approximation of those experiences. See, e.g., M. Kelman, A Guide to Critical Legal Studies 112 (1988); Peller, The Metaphysics of American Law, 73 CALIF. L. REV. 1151, 1171, 1179, 1289 (1985).

9 See, e.g., Blumoff, The Third Best Choice: An Essay on Law and History, 41 HASTINGS L.J. 537, 553 (1990) ("knowledge of what caused an action, including the action of generating a new text, gets confused with understanding the expression itself").

undercuts originalist premises (11-13).\textsuperscript{11}

None of this is to suggest that historical analysis is pointless or unimportant, but only that it is not a determinate and value-neutral constraint on judicial decisionmaking. “History provides ambiguous guidance both because historical traditions can be indeterminate, and because even when we discover a clear historical tradition it is hardly obvious what the existence of that tradition tells us about the Constitution’s meaning” (100). It is not surprising, then, that there are as many controversial and regrettable Supreme Court decisions that are historically faithful as there are decisions that are not.\textsuperscript{12} Notwithstanding the claims of originalists, their formula does not eliminate judicial choice; indeterminacy, bias, and irrelevance guarantee that originalist judges no less than others exercise broad judicial discretion when interpreting the Constitution (32). Indeed, the exercise of such discretion by originalist judges seems all the more insidious because of their claims of determinacy and neutrality—hence Justice Brennan’s dismissal of originalism as “arrogance cloaked as humility” (106).\textsuperscript{13}

Nevertheless, despite having debunked claims for originalism as a determinate and neutral interpretive methodology, Tribe and Dorf frequently rely on it. In its weakest forms, this reliance is merely implicit, a suggestion that history is somehow relevant to constitutional meaning even though it is not controlling. They note that history is “helpful,” that it is “indefensible to ignore it,” and that “history alone” cannot determine constitutional meaning (11, 18). At other times, they make a somewhat stronger claim, arguing that history may foreclose certain interpretive possibilities without indicating a single correct interpretation (18-19, 33).\textsuperscript{14} Thus, judges should seek to define “unenumerated rights by drawing on other parts of the [constitutional] text, coupled with history” (59-60).

At still other times, Tribe and Dorf come very close to endorsing a strong version of originalism—that is, originalism as the only

\textsuperscript{11} E.g., Powell, supra note 3.

\textsuperscript{12} For example, \textit{Scott v. Sandford} is probably more faithful to the racial views of the framers of the 1787 constitutional text, and \textit{Plessy v. Ferguson} more faithful to those of the framers of the 14th Amendment, than \textit{Brown v. Board of Education} is to either. Compare \textit{Scott}, 60 U.S. (19 How.) 393 (1857) and \textit{Plessy}, 163 U.S. 537 (1896) with \textit{Brown}, 347 U.S. 483 (1954).


\textsuperscript{14} This is the claim most relevant to their interpretive methodology. See infra text accompanying notes 39-40, 75-76.
value-neutral determinant of constitutional meaning. For example, they argue that the evisceration of the privileges and immunities clause of the fourteenth amendment by the *Slaughter-House Cases* was incorrect because it failed to account for the apparent intent of the framers that the clause protect unenumerated rights (52-53). They suggest that a proper reading of the takings clause of the fifth amendment is necessarily bounded by the framers’ Lockean conceptions of property (70-71). In discussing the substantive content of the right to privacy, Tribe and Dorf consider it critical to ascertain what rights the framers had in mind not to “disparage” when they drafted the ninth amendment (60).

Of course, history may be relevant to constitutional interpretation without being a determinate and neutral guarantor of meaning. For example, the ubiquitous appeal to history may reflect a psychological need to reduce the dissonance that is often a by-product of judicial decisionmaking by constructing an historical narrative of the decision’s continuity with the past. Alternatively, the relevance of history may be its hermeneutic illumination of unavoidable cultural biases which obscure potentially valuable interpretations of the text under scrutiny. Ultimately, the need for historical inquiry in interpretation may stem from no more than the necessity of ascertaining the authority or occasion that demands interpretation.

Tribe and Dorf do not understand reliance on history as a consequence of the phenomenology of interpretation. The only role that they articulate for history is that of a significant interpretive constraint that operates independently of the interpreter. Indeed, they even offer history as an antidote to the indeterminacy and ideology of antifoundationalist methodology: “Surely close atten-
tion to history will prevent us from deploying the Constitution as a kind of crystal ball in which we might see whatever we wish to see” (18). This appeal to history as an objective constraint on textual meaning is centered on the presuppositions that (i) contemporary interpreters can discover the history of the text to be interpreted, (ii) they can achieve a present understanding of this history that is undistorted by their own assumptions and biases, and (iii) they are authoritatively bound by this history in interpreting the text. For rebuttal, one need only consult Tribe and Dorf’s own discussions of indeterminacy, bias, and irrelevance.

B. The Dismissal of Antifoundationalism

Having dispensed with originalism, Tribe and Dorf pivot to parry the thrust of antifoundationalist approaches to constitutional interpretation. These are branded as exercises in “wish fulfillment,” whereby those interpreting the constitutional text use that text “simply as a mirror to dress up their own political or moral preferences in the hallowed language of our most fundamental document” (14 (emphasis removed)). In contrast to the manner in which they discussed originalism, however, Tribe and Dorf make no serious attempt to summarize and analyze antifoundationalism as an interpretive strategy. Echoing the dismissive tone that has become all too common among liberal scholars confronted with antifoundationalist criticism, Tribe and Dorf simply label antifoundationalism “indefensible” and “completely unsatisfactory” (14; accord 29-30, 67-68). As support, they point out that “[t]he correspondence to ultimate reality, or “the-way-the-world-really-is-apart-from-how-we-think-about-it.” For the foundationalist, meaning is something external to and independent of human experience that is discovered rather than created. I use “antifoundationalist” to indicate the view that all meaning is humanly constructed rather than naturally immanent in the phenomenal world. For the antifoundationalist, meaning has no referent outside of human experience, and thus can always be deconstructed and reconstructed in a variety of equally plausible ways, depending on how the human interpreter is historically, culturally, and otherwise situated. I intend antifoundationalism to include those views denominated as “post-modern” and “post-structuralist.” See, e.g., S. Fish, Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies 322-23, 342-46 (1989); Benson, The Semiotic Web of the Law, in 1 Law & Semiotics 35, 37-38, 57 n.9 (R. Kevelson ed. 1987) [hereinafter Benson, The Semiotic Web]; Brooks, Bouillabaisse (Book Review), 99 Yale L.J. 1147, 1151 (1990) (reviewing S. Fish, supra).

Mark Tushnet remarks that “if people interested in law and economics spent one tenth of the time understanding critical legal studies that cls people spend understanding law and economics, we would all be better off.” Tushnet, Critical Legal Studies: A Political History, 100 Yale L.J. 1515, 1519 n.17 (1991) (criticizing R. Posner, The Problems of Ju-
authority of the Constitution, its claim to obedience and the force that we permit it to exercise in our law and over our lives, would lose all legitimacy if it really were only a mirror for the readers' ideas and ideals" (14). In other words, if Americans understood the decisions of the federal judiciary as mere value imposition by federal judges, they might not pay any attention to the judges or their decisions. As if drawing the obvious conclusion from this assertion, Tribe and Dorf emphasize that "[w]e must find principles of interpretation that can anchor the Constitution in some more secure, determinate, and external reality" (14-15).

It is probably correct that Americans are angered by judicial decisions that seem merely to reflect the personal values of the judge or judges who make them, although it is not clear that this stems from a popular presumption of judicial neutrality. More- over, even granting the presumption, it is equally unclear how it follows that constitutional interpretation is necessarily neutral and determinate. For example, one plausible response to the argument that judicial review is indeterminate and ideologically biased is to question the validity and utility of judicial review. Another is to reconceive judicial review as something other than the disinterested discovery of ideologically neutral principles.

RISPRUDENCE (1990)). One suspects that, unable to respond adequately to antifoundationalist criticism, liberal scholars wish that the troublesome radicals would simply go away. See, e.g., Carrington, Of Law and the River, 34 J. LEGAL EDUC. 222 (1984).

Tribe and Dorf do not actually use the term "antifoundationalist," but their text leaves little doubt that this is the target of their criticism.

Most Americans may accept the judiciary's interpretations of the Constitution most of the time because most constitutional decisions reflect conventional values, see, e.g., Grey, Eros, Civilization and the Burger Court, 43 LAW & CONTEMP. PROBS. 83 (1980), rather than because, as Tribe and Dorf assume, Americans perceive the interpretive enterprise to be value-neutral. Decisions that contradict or undermine conventional values are often ignored, as evidenced by the Southern response to Brown v. Board of Educ., 347 U.S. 483 (1954), and the rural response to the school prayer cases, Abington School Dist. v. Schemp, 374 U.S. 203 (1963), and Engel v. Vitale, 370 U.S. 421 (1962); see also Levinson, Escaping Liberalism: Easter Said Than Done (Book Review), 96 HARV. L. REV. 1466, 1473 n.25 (1983) ("Law professors, whether mainstream or radical, all join in overestimating the extent to which law is taken seriously by the laity."). Among powerless or otherwise marginalized classes of Americans, silence with respect to the Supreme Court's interpretations of the Constitution may be more a fatalistic concession to the realities of political power than evidence that such interpretations are properly neutral.


See, e.g., M. Perry, Morality, Politics, and Law ch. 6 (1988) (arguing that role of Supreme Court in constitutional review is to stimulate societal discussion about fundamen-
In any event, Tribe and Dorf's fear that Americans would ignore the judiciary if they perceived its decisionmaking processes to be ideologically biased is hardly an adequate response to the charge of such bias. The nakedness of the judicial emperor is not so horrible to contemplate that its potential confirmation by antifoundationalist criticism relieves foundationalists of the responsibility to examine the merits of that criticism.

From this point on, Tribe and Dorf virtually ignore antifoundationalist criticism. It surfaces occasionally in their argument as caricature, the obviously unacceptable and immediately-to-be-dismissed "writing" (as opposed to "reading") of the Constitution. Antifoundationalism thus serves as one discredited interpretive extreme that can be paired with the discredited interpretive extreme of originalism to mark the twin ideological borders beyond which constitutional interpretation becomes irresponsible and incredible.

But Tribe and Dorf have not discredited antifoundationalism. The major and fatal error of their book is that they ignore their most powerful adversary. Their attempt to set out a value-neutral theory of interpretation without discussing or even acknowledging the antifoundationalist criticisms that undermine all such systems betrays a total lack of appreciation of the power of those criticisms and, therefore, of the weaknesses of their own position. As a consequence, the interpretive methodology they advocate is an easy target.

II. A FOUNDATIONALIST METHODOLOGY

Tribe and Dorf frame the development of their methodology of constitutional interpretation with a discussion of two interpretive fallacies, "dis-integration" and "hyper-integration." Dis-integration is the mistake of reading the various provisions of the Constitution in isolation, as if they were wholly unrelated to each other (20). Tribe and Dorf give as an example of dis-integrated interpretation former Chief Justice Burger's reading of the fifth amendment as permitting capital punishment so long as "due process of law" is followed, thereby ignoring the effect of the eighth amendment's prohibition of cruel and unusual punishments (21-22). Other examples include Mark Tushnet's reading of the equal pro-
tection clause of the fourteenth amendment as having done away with the institution of private property, which fails to account for the protection of private property in the contracts clause of article I, the takings and the due process clauses of the fifth amendment, and the due process clause of the fourteenth amendment (22); and Justice Brennan's reading of the tenth amendment as doing away with reserved state rights, which fails to consider the effect of popularly electing senators after the seventeenth amendment (22-23).

The other interpretive extreme, hyper-integration, is the error of reading the Constitution as a consistent and unified theoretical system, a seamless web woven from a single political vision (20, 24). Tribe and Dorf give numerous examples of this fallacy, including John Ely's theory of representation-reinforcement, Jesse Choper's theory of federalism and the separation of powers, Richard Epstein's theory of private property, and David Richard's theory of tolerance and diversity (26-28).

Tribe and Dorf argue that interpretive theory should avoid both these fallacies. Their goal is to develop a formally neutral methodology of constitutional interpretation that is neither dis-integrated nor hyper-integrated: "To be able to chart a course between the equally hazardous shores of dis-integration and hyper-integration, we must know how the Constitution's text channels choice without eliminating it" (33).

There would seem to be little wrong in the exhortation to avoid extreme interpretive strategies, but at best there is also little use in it. Since Tribe and Dorf do not tell us how to recognize a properly integrated textual analysis from a hyper-integrated one,

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28 J. Ely, supra note 3.
31 D. Richards, Toleration and the Constitution (1986).
32 As Steven Smith has observed, sometimes the preacher's sermon serves to remind us of what we already know we ought to do. Smith, The Pursuit of Pragmatism, 100 Yale L.J. 409, 411 (1990).

Allan Hutchinson has suggested that the pretense to moderation is a standard Tribe move, A. Hutchinson, Dwelling on the Threshold 166-67 (1989), and On Reading the Constitution certainly bears that out. See infra text accompanying notes 38-39.
or an appropriately focused analysis from a dis-integrated one, the concepts are about as helpful to the interpretive venture as Justice Stewart's regrettable "definition" of pornography. Moreover, certain readings of the Constitution may be dis-integrated on some premises, and hyper-integrated on others. At worst, then, by failing to define the respective reaches of hyper-integration and dis-integration, Tribe and Dorf create the possibility that their domains overlap, which would make an interpretive theory conceptually positioned between the two incoherent. From this vantage point, the counsel to avoid both dis-integration and hyper-integration is confusing. In effect, Tribe and Dorf advise that judges be simultaneously constrained and liberated in interpreting the Constitution.

For example, consider Tribe and Dorf's assertion that the fourteenth amendment is properly understood "to render unconstitutional the subjugation of an entire race with the force of law" (13). One can argue that this is a dis-integrated reading of the amendment because it ignores other constitutional texts having an apparent equality dimension but no racial dimension, such as those protecting economic rights, fundamental personal liberties, and gender equality. On the other hand, this reading is also hyper-integrated, because it fails to recognize that the effect of the amendment was purposely undercut by its jurisdictional prerequisite of state action. The reading also ignores evidence that the

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While discussing the term "hard-core pornography," Justice Stewart declared, I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). This is the judicial equivalent of the Hollywood casting director's line, "Don't call us, we'll call you."

This reminds me of the advice my parents gave me when I went off to college at BYU: "Study hard, but have fun." Roughly translated, this meant, "Get A's and find a nice Mormon girl to marry." It didn't take me long to realize that activities in pursuit of these two goals were in some degree of tension (although in my case the tension was no doubt exaggerated by intellectual and social ineptitude). Many people develop romantic attachments while studying (which are sometimes even reciprocated), but after a certain point, attachment tends to assume priority over studying, a situation typically evidenced by poor grades notwithstanding long hours hitting the books with one's beloved. In any event, the point (yes, there is one) is that encouraging someone to pursue mutually incompatible goals is rarely helpful, however well-intentioned.

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U.S. Const. art. I, § 10 (contracts clause); id. amend. V (takings clause).
Id. art. IV, § 2 (privileges and immunities clause); id. amend. VI (right to counsel).
Id. amend. XIX (prohibition of gender discrimination in granting right to vote).
fourteenth amendment was intended to secure to blacks only a narrow set of civil rights, such as the right to own property, to make enforceable contracts, and to sue in state courts. Thus, not only does Tribe and Dorf's reading of the fourteenth amendment fail to avoid both interpretive extremes, it may actually represent both at once.

Within the hortatory frame of dis-integration and hyper-integration, Tribe and Dorf's actual interpretive methodology emerges in two parts—the identification of a textual referent and the construction of a theoretical model that accounts for the existence of the textual referent and any precedents that have construed it. The methodology is neatly captured by their statement that unenumerated constitutional rights are evidenced by "a tacit postulate with a textual root" (60).

As in their prior discussions of originalism and antifoundationalism, and dis-integration and hyper-integration, Tribe and Dorf articulate an interpretive role for the text that purports to occupy the middle ground between two apparent extremes. Having already debunked originalism as a determinate and neutral methodology of constitutional interpretation, they reject its close relative, textualism. Tribe and Dorf concede that text alone cannot resolve interpretive questions; there is an unavoidable political or ideological dimension to the interpretive process. Thus, judges often conscientiously disagree about the meaning of the text even when that text appears relatively specific (37). In interpreting legal texts, judges "cannot avoid making at least some basic choices in giving it content" (15).

Nevertheless, a neutral interpretive methodology requires that constitutional law be related to one or more textual provisions of the constitutional text. "It is difficult to imagine how an approach to constitutional interpretation that is not in any way connected with the text qualifies as reading as opposed to writing the Constitution" (43). This requirement of some textual connection delimits the boundaries of responsible interpretation. Tribe and Dorf cite the doctrine of state sovereignty, which enjoyed a brief contemporary revival after National League of Cities v. Usery, as an exam-

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ple of the unstable character of constitutional principles that are
not tied to any textual provision of the constitutional document (42-43).

Tribe and Dorf envision the text as foreclosing certain interpretive options without fixing a singular meaning (18-19, 33). “The [constitutional value] choice one makes must be justified extra-textually but may and should then be implemented in ways that draw as much guidance as possible from the text itself” (116). Thus, the text serves as an objective check on the tendency of judges to infiltrate their own values into the Constitution when they interpret it (57, 67, 110).

The second part of Tribe and Dorf’s interpretive methodology requires that arguments about constitutional meaning be supported by a theory (which may be historical40) of the textual provision whose meaning is at issue. “[O]ne way to go about identifying the central value or values implicit in a specific constitutional clause is to locate that clause within the overall structure of the rest of the Constitution—to ask whether the practices that are either mandated or proscribed by the Constitution presuppose some view without which these textual requirements are incoherent” (69-70). In other words, Tribe and Dorf’s methodology requires the construction of a conceptual model that explains how various textual referents that seem to bear on an interpretive question are coherently connected with one another. This entails the inference of general abstract principles from the specific textual referents interpreted by the Court in particular cases, which principles may include “rights instrumentally required if one is to enjoy those specified,” as well as “rights logically presupposed if those specified are to make much sense” (77).

For example, Tribe and Dorf suggest that sense can be made of the text of the takings clause of the fifth amendment only if one postulates that the Constitution protects a prepolitical conception of property rights (70-71, 77). Similarly, the constitutional right to freedom of expression would be largely empty if it did not include the right to own or to have access to some means of expression, such as a printing press or a typewriter (77).

Tribe and Dorf use this two-part methodology—identifying plausible textual referents and developing a theoretical model that credibly explains them—to defend the Court’s line of privacy cases

40 See supra text accompanying notes 13-15.
that eventually begat Roe, as well as to criticize the Court's refusal to extend the reasoning of those cases to homosexual conduct in Bowers. They identify three textual referents for the constitutional right to privacy—the due process clauses of the fifth and fourteenth amendments, which the Supreme Court has consistently (if controversially) interpreted to have a substantive as well as a procedural dimension; the privileges and immunities clause of the fourteenth amendment, which the Court has interpreted (now largely without controversy) to have little substantive breadth; and the ninth amendment, which the Court has resolutely ignored despite the best efforts of the academy (51-55).

The most important of these referents clearly is the due process clause. There is a venerable and still-vibrant line of cases decided under that clause, which is widely understood to have created a sphere of autonomy within which decisions about the quality and character of family life are granted special protection from governmental interference. This sphere includes decisions about marriage, child-bearing, child-rearing, and family living arrangements. By contrast, the ninth amendment is merely a rule of constitutional interpretation which seems to counsel that the Court is not foreclosed from recognizing a constitutional right simply because that right is not enumerated in the constitutional text (54-55). Acknowledging the legitimacy of recognizing unenumerated rights by means of the ninth amendment is not the same as actually recognizing such rights under the fourteenth amendment. Similarly, while the privileges and immunities clause buttresses the argument for constitutional protection of a certain sphere of autonomy under the due process clause, it is doubtful at

42 See Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); see also Skinner v. Oklahoma, 316 U.S. 535 (1942). Although Justice Douglas's opinion in Griswold attempted to justify the constitutional right to privacy as an unenumerated penumbral right implicit in the Bill of Rights, the privacy right is now almost universally viewed as a component of the substantive liberty protected by the due process clause. That justification was argued by Justice Harlan in Griswold, 381 U.S. at 499 (Harlan, J., concurring), by reference to his dissenting opinion in Poe v. Ullman, 367 U.S. 497 (1961), and is a premise of Justice Blackmun's majority opinion in Roe, 410 U.S. at 152-56.
45 But see infra text accompanying note 48.
this point in our constitutional history that the clause could bear by itself the weight of the argument for unenumerated rights.  

Having located the right to privacy in the constitutional text, Tribe and Dorf then move to articulate a model of the privacy decisions. They initially describe the decisions as constitutionally protecting "a fundamental right of individuals to structure their family interactions as they see fit" (52). Roe v. Wade follows fairly simply from such a right; the right to choose not to bear a child by aborting a pregnancy would seem to fall well within even the narrowest interpretation of "structuring family interactions" (61). Tribe and Dorf argue that what makes Roe difficult is not doubt about the propriety of including the decision not to bear a child within a protected zone of privacy under the due process clause, but rather the singular weight of the state interest in protecting fetal life that must be balanced against the privacy right (60-61). In most constitutional conflicts, the state is hard-pressed to articulate a regulatory interest whose importance can compete so well with the asserted individual right.

Tribe and Dorf's critique of Bowers requires more theoretical spadework. If the texts of the ninth and fourteenth amendments are rationalized as protecting decisions about the structure of "family interactions," one can only attack Bowers on privacy grounds from the premise that homosexual activity is such an interaction. Since homosexuality is unrelated to marriage, childbearing, and child-rearing—three of the four traditional touchstones for the privacy right—this premise is vulnerable to attack (75-76). Accordingly, Tribe and Dorf move to refine their theory of the privacy texts by identifying additional textual referents that might enlarge the meaning of the fourth touchstone, "family living arrangements." Three of the five textual roots of privacy identified by Douglas's opinion in Griswold v. Connecticut are focused on "association" and "the home" as constitutive of liberty: The first amendment protects the right of peaceful assembly, the third amendment protects the right to refuse to quarter soldiers in one's home, and the fourth amendment protects the right to be secure in one's home against unreasonable searches and seizures. These texts, argue Tribe and Dorf, suggest what kinds of unenumerated rights the framers might have had in mind to protect when they

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47 381 U.S. 479, 482-86 (1965).
enacted the ninth amendment—namely, rights to engage in "consensual intimacies in the home" (60) or, alternatively, rights of "intimate personal association in the privacy of the home" (117). Such rights are consistent not only with the texts of the first, third, and fourth amendments, but also with the actual privacy cases that constitutionally protect decisions about marriage, child-bearing, child-rearing, and living arrangements.

Decisions about how and with whom to express one's sexuality clearly fall within the conventional meaning of "intimate association." If acted upon in the privacy of one's home, these decisions would be entitled to a strong presumption of constitutional protection under the privacy right as formulated by Tribe and Dorf, even if they encompass unconventional sexual acts or partners (58, 78). It is still open to the state to argue a compelling regulatory interest that might justify state intrusion into these decisions. However, if the uniquely weighty interest of protecting fetal life is insufficient to override the privacy right, then it is difficult to imagine what overriding interest the state could articulate in justification of an antisodomy law. Under this analysis, Bower's refusal to protect consensual homosexual activity in one's home against criminal prosecution is deeply problematic.

Although the rearticulation of constitutional privacy from the right to "structure family interactions" to the right to "intimate personal association in the home" would seem to reflect only the smallest of conceptual changes, it is an important theoretical move. It represents the reconceptualization of the privacy right at a higher level of generality, one that brings more decisions and activities under its protective umbrella while continuing to shelter those decisions and activities that it has traditionally protected. Tribe and Dorf make this move in direct response to Justice Scalia, who has argued that fundamental rights ought to be articulated at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."

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48 Academic enthusiasm for the ninth amendment notwithstanding, not every law professor agrees that this reading of it is warranted. See, e.g., McAffee, The Original Meaning of the Ninth Amendment, 90 Colum. L. Rev. 1215 (1990).

49 Preventing the spread of AIDS may seem to be such a justification. However, the proliferation of the disease among heterosexuals through intravenous drug use, prostitution, heterosexual promiscuity, and contaminated blood donations is likely to render the AIDS justification for antisodomy laws substantially underinclusive under traditional constitutional doctrine, if it has not done so already.

 Tribe and Dorf criticize Scalia's proposal as decidedly not value-neutral constitutional interpretation. They revisit their critique of originalism, arguing that historical traditions are not likely to yield a determinate, nonideological answer to any question about the level of generality at which a constitutional right ought to be articulated (98-101). They also note that specificity is multidimensional, so that the decision to move to a more specific articulation along one axis—say, the reproductive freedom of women—will often have the effect of generating a more general articulation of the right along another axis—say, the rights of fetuses (76, 101-02). No matter which axis the interpreter determines to proceed along in articulating the right, the choice will be heavily laden with moral and ethical bias (102). They further observe that "tradition" by its nature is likely to protect primarily majoritarian interests, so that using tradition as a touchstone for constitutional review in individual rights cases turns the Bill of Rights on its head (104-06).

Tribe and Dorf's most revealing criticism is saved for last. Adoption of Scalia's methodology by the Court would bring to a halt the general expansion of individual rights that has characterized constitutional review in the twentieth century. Indeed, it is likely to lead to a rollback of the current coverage of such rights (104, 109). (Anyone who doubts that such a rollback might be part of Justice Scalia's agenda should consult his majority opinion in Employment Division v. Smith.\textsuperscript{1}) Tribe and Dorf are probably right when they describe Scalia's interpretive rule of specificity as "virtually tailor-made as a means for overruling Roe v. Wade" (107). In any event, history and tradition simply do not eliminate value considerations in the choice of a level of generality (80).

In contrast to Justice Scalia, Tribe and Dorf argue that an individual right should be articulated at the highest level of generality that plausibly can account for the textual roots of the right and the precedents interpreting those texts. This, they suggest, was the method of the common law, the effort to articulate legal principles

that “connect . . . our intuitions about specific fact situations at a higher level of abstraction” (109). Articulating an individual right at the highest level of generality possible provides “progressive pressure,” constantly pushing us to “check our practices against our principles” (109). Tribe and Dorf further argue that the ninth amendment provides affirmative support for an interpretive methodology of generalization. Since the ninth amendment by its terms invalidates the argument that lack of enumeration in the constitutional text is fatal to an asserted individual right, they conclude that affirmative recognition of unenumerated rights through generalization is precisely what the ninth amendment authorizes (110-111).

Finally, they argue that progressive generalization provides an antidote to the temptation of judges to articulate a level of generality based upon their own subjective value preferences. Admitting that generalization does not eliminate judicial value choice, they nevertheless assert that “it does channel it considerably” (111). Like the constitutional text, generalization forecloses certain interpretive options in a value-neutral manner without specifying a single correct interpretation.

The methodology of Tribe and Dorf serves to advance an agenda directly opposed to that of Justice Scalia. By insisting that any theory of the textual roots and interpretive precedents bearing on an asserted individual right be articulated at the highest level of abstraction, Tribe and Dorf ensure not only that those rights recognized to date will continue as part of the constitutional tradition, but also keep open the possibility that their application and scope will be expanded.

III. A CRITIQUE OF THE FOUNDERALIST METHODOLOGY

Tribe and Dorf contend that their interpretive methodology constrains judges in a value-neutral way. First, they contend that the requirement of tying an interpretation to the constitutional text and to the precedents interpreting that text forecloses some (but not all) interpretations of the text that otherwise would be available as interpretive options. Second, they argue that although extratextual value choices are unavoidable, these can be kept to a minimum by the requirement of progressive generalization, pursuant to which constitutional rights are articulated at the highest level of abstraction possible that can still account for all of the relevant texts and precedents. I will argue that neither text nor
generalization imposes a meaningful value-neutral constraint upon judicial interpretation of the Constitution.

A. The Locus of Interpretive Constraint

In the penultimate chapter of their book, Tribe and Dorf examine the nature of literary interpretation (81-87) and mathematical proof (87-96) for insights into legal interpretation. In a subsection entitled "How Law Is Like Literature," they conclude that literary criticism teaches that "internal structure" and "widely shared values" constrain meaning, at least in the weak sense of foreclosing certain interpretive options, if not in the strong sense of determining a single meaning (87). With respect to mathematics, however, they conclude that although it contributes certain insights into the strength of particular arguments, rationality and logic are insufficient to determine meaning, so that "[l]aw is, ultimately, unlike mathematics" (96).

Bearing in mind Mark Tushnet's criticism of the "lawyer-as-astrophysicist," I will have little to say about Tribe and Dorf's use of mathematics, with which I have never been able to come to terms despite long and desperate struggles with quantitative economics and corporate finance. I will instead concentrate on their favorable discussion of law and literature as similar interpretive enterprises, since I do know something about literary interpretation.

Tribe and Dorf build their discussion of law and literature on Ronald Dworkin's well-known "chain novel" analogy. This analogy suggests that judicial interpretation is like adding the latest chapter to an uncompleted novel comprising a series of chapters, each written by a different author. Although the judge, like the latest chain author, has a certain amount of leeway to decide how and why the case before her should be resolved ("a given . . . story can be consistent with more than one ending" (82)), she is nevertheless constrained by the precedents that relate to the case ("some endings . . . are simply beyond the pale" (85)).

Dworkin's analogy has been attacked by a number of critics.

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of whom Stanley Fish is the most persistent if not the most important. There is no need to replicate the entire critique here. For my purposes, the most important point argued by Fish and other critics relates to the general source of interpretive constraint argued by Dworkin through the chain novel analogy. Dworkin locates significant constraint in the language of the text itself, whereas the critics locate it elsewhere—for example, in the reader of the text, or in the various interpretive communities to which the reader belongs (or thinks she belongs).

For Dworkin, both literary and legal interpretation are grounded in an “aesthetic hypothesis”—a (usually controversial) postulate of value. Dworkin suggests that we should understand “interpretive claims and arguments about literature . . . as special and complex aesthetic claims about what makes a particular work of art a better work of art.” Thus, one argues for the meaning of

Empire (Book Review), 96 Yale L.J. 637, 647-50 (1987) [hereinafter Hutchinson, Indiana Dworkin] (reviewing R. Dworkin, Law’s Empire, infra note 55); see also Levinson, Law as Literature, 60 Tex. L. Rev. 373 (1982).

Fish’s rebuttal to Dworkin’s original essay is contained in S. Fish, supra note 19, ch. 4. Dworkin’s surrebuttal is contained in R. Dworkin, supra note 53, ch. 7, and is the subject of another Fish critique, S. Fish, supra note 19, ch. 5. After Dworkin refined his argument in R. Dworkin, Law’s Empire ch. 7 (1986), Fish came back with still another critique, S. Fish, supra note 19, ch. 16, and there the matter rests (at least for now). For a summary of this exchange and an attempt to synthesize the two views, see Note, Interpretation in Law: The Dworkin-Fish Debate (Or, Soccer Amongst the Gahuku-Gama), 73 Calif. L. Rev. 158 (1985).

Tribe and Dorf’s discussion does not cite any of Fish’s critiques of Dworkin’s chain novel analogy. Given that so much of their argument depends on the validity of this analogy, failure to cite even one of these critiques is baffling; after all, Fish’s many responses to Dworkin on this point constitute one-half of what has become widely known as the “Dworkin-Fish debate.”

Fish is widely criticized on a number of points, but not usually on this one. See, e.g., Ayer, Aliens Are Coming! Drain the Pool (Book Review), 88 Mich. L. Rev. 1884, 1594-96 (1990) (indefinitiveness of extratextual constraint does not foreclose either theory or self-consciousness); Brooks, supra note 19 (antifoundationalism need not entail claims that theory is without consequences or critical self-consciousness impossible); Schlag, Fish v. Zapp: The Case of the Relatively Autonomous Self, 76 Geo. L.J. 37 (1987) (accepting Fish’s critique of “already-in-place interpretive constructs” but placing locus of meaning in the self rather than in interpretive communities); White, The Text, Interpretation, and Critical Standards, 60 Tex. L. Rev. 569 (1982) (arguing that Fish’s claim that text cannot act as a repository of objective truth prevents neither its acting as reference for relative truths nor possibility of critical self-reflection); Winter, Bull Durham and the Uses of Theory, 42 Stan. L. Rev. 639 (1990) (accepting Fish’s claim that meaning is not primarily a function of linguistic structure, while going on to criticize Fish’s claims that practice is unaffected by theory, theory inconsequential, and critical self-consciousness impossible and unnecessary).

R. Dworkin, supra note 53, at 149.

Id. at 168.
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a literary text by an interpretation of it that “attempts to show which way of reading . . . the text reveals it as the best work of art.” Similarly, one argues for the meaning of a body of law by “demonstrating the best principle or policy it can be taken to serve.” Thus, for Dworkin, the text imposes meaningful constraints on the reader when read in light of the aesthetic hypothesis, leading to a distinction between “explaining” or “interpreting” the text and “changing” or “inventing” it. Critics and judges who possess integrity observe these textual constraints, limiting themselves to textual interpretation and eschewing textual invention.

Fish argues that Dworkin’s position presupposes that some textual meaning stands apart from and beyond the reader’s act of interpreting the text, that “texts constrain their own interpretations.” If textual meaning were wholly dependent upon interpretation, there would be nothing external to the reader’s interpretive act to constrain that act. Therefore, Fish argues that the theory of textual constraint includes the proposition that language contains some core of independent, self-certifying meaning that is immediately present to human understanding without any act of interpretation. In short, Dworkin’s position presupposes that meaning can precede interpretation.

Fish argues that such preinterpretive meaning cannot exist. For example, the latest author in a chain novel enterprise can be constrained by the prior authors’ development of the story only if she knows what this already developed story is. But, because it is composed of words that are arbitrary signs, “what-the-already-developed-story-is” cannot be a self-declaring fact that is immediately apparent to the latest author without an act of interpretation. Rather, it must be constructed by this author’s interpretation of what the prior authors have written, which

50 Id. at 149.
51 Id. at 160.
52 Id. at 150, 160.
53 Id. at 150-51, 160-61. Dworkin hints that the distinction between legitimate and illegitimate interpretation is related to the form-substance distinction. See id. at 169. If the substantive meaning that a legitimate interpretation gives to the text is circumscribed by the form of the text, then legitimate interpretation presumably is to refrain from violating the integrity of the textual form.
54 Id. at 95; see also Levinson, supra note 54, at 374 n.7 (“no word conveys to the mind . . . one single definite idea”) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414 (1819)).
55 S. Fish, supra note 19, at 89-90; accord Graff, “Keep Off the Grass,” “Drop Dead,”
Dworkin seems to appreciate.6 Unless and until the author understands the meaning of what has already been written, she is not constrained by it, yet that meaning cannot be understood except by an act of interpretation.67

Fish is not arguing that the latest author is without constraints in what she writes; to the contrary, he argues that she is subject to numerous constraints relating to the activity of novel-writing—"‘novel-writing choices,’ choices that depend on a prior understanding of what it means to write a novel."68 Were the author involved in a different enterprise, she would be constrained in a different way, but she would still be constrained. An author always feels pressure from the work of those who have gone before,69 but the source of this pressure is not a self-declaring text. Rather, authors are constrained by the "interpretive communities" to which they already belong or to which they wish to address themselves—i.e., by their prior understanding of the enterprise or practice in which they are engaged.70

Thus, "it is neither the case that interpretation is constrained by what is obviously and unproblematically ‘there,’ nor the case that interpreters, in the absence of such constraints, are free to read into a text whatever they like."71 To the extent that constraint exists, it originates outside of the text.72

and Other Indeterminacies: A Response to Sanford Levinson, 60 Tex. L. Rev. 405, 405-08 (1982) ("meaning" is not a substance that resides in words, but a determination dependent upon usage of words); Levinson, supra note 54, at 377 ("any given ascription of narrative line or meaning is the product of an interchange between object and viewer rather than an attribute of the object itself").  

Dworkin does not deny that meaning is partially constructed, but maintains that it must be constructed in accordance with the aesthetic hypothesis so as to make of the object of interpretation the best thing it can be. See R. Dworkin, supra note 53, at 152-54, 158; see also Hoy, supra note 17, at 327 (suggesting that constructed meaning is an important element of Dworkin’s general account of interpretation).  

S. Fish, supra note 19, at 108-09.

Id. at 89; see also Graff, supra note 65, at 408-10 (rejecting possibility of objective meaning in words does not require that meaning of words be considered indeterminate).


S. Fish, supra note 19, at 98, 367; Benson, How Judges Fool Themselves, supra note 54, at 39-40. See generally S. Fish, IS THERE A TEXT IN THIS CLASS? (1980). For an insightful account of how the various institutionalized beliefs, practices, and understandings of an interpretive community constrain the process of constructing textual meaning, see Benson, The Semiotic Web, supra note 19.

S. Fish, supra note 19, at 97.

It is of course possible to imagine a devious or eccentric author in a chain enterprise
This extratextual interpretive constraint has important consequences for Tribe and Dorf's foundationalist methodology. Tribe and Dorf acknowledge that communal conventions, practices, and beliefs are not the inevitable result of simply being in the world, but rather a contingency of cultural time and place (87, 103). If these conventions, practices, and beliefs are what determine textual meaning, rather than the text itself, then the constraint they impose is value-biased rather than value-neutral (although it is nonetheless constraint).

B. The Irrelevance of Textual Constraint

Tribe and Dorf's conception of textual constraint largely mirrors Dworkin's, and hence the antifoundationalist critique of Dworkin works against their position as well. However, they depart from Dworkin in an important respect: they reject the aesthetic hypothesis (17) in favor of "widely shared values" (85, 86, 87). They purport to do so because the aesthetic hypothesis does not sufficiently limit interpretation, but their jettisoning of the hypothesis is hardly an improvement. Whereas for Dworkin extratextual values may participate in the construction of meaning only if they help make the text "the best it can be,"7 for Tribe and Dorf extratextual values apparently may participate so long as they are conventional (82). It is difficult to see how conventionality is any more constraining than aesthetics, since it is merely an exchange of "best" for "most popular."

Tribe and Dorf, explicitly assuming that texts have self-declaratory meaning, repeatedly refer to the constitutional text ("the Constitution") as if it had an existence and meaning independent of the act of interpreting it (e.g., 16, 25, 66, 69-70, 97). For example, they assert that the equality principle of the fourteenth amendment has had a stable meaning since its ratification, although Americans have not always understood this meaning (10-11, 13). Elsewhere they argue that if a principle "is not part of the Constitution, we have no business proclaiming it in the Constitution's name" (27). They treat the texts of judicial decisions in the

who purposefully adds precisely what is not expected or allowed. Even this author is constrained, however, for before she can depart from the conventions of a particular interpretive community she must first have an understanding of what it is she is departing from. Id. at 109-10. Such an understanding can only be had by an interpretive construction of the conventions she wishes to violate. Id. at 110, 366.

7 See supra text accompanying notes 57-62.
same way, going so far as to accuse Scalia of "judicial nihilism" because his interpretive method "denies that there are essential aspects to prior cases" (112).

This problematic assumption of textual foundationalism is the basis of their Dworkin-like distinction between "reading" and "writing" the Constitution (13, 26, 43), between "what you think the Constitution says and what you wish it would say" (17). The message is clear: responsible constitutional interpretation merely uncovers meaning that already exists in the text, whereas irresponsible interpretation creates meaning that is then forced upon an unwilling text.75

Tribe and Dorf disavow that the constitutional text can constrain interpretation to the extent of producing a unique meaning. Instead, like Dworkin, they claim merely that the text forecloses certain potential meanings, thereby leaving many other viable interpretations among which the interpreter may choose (18-19, 33, 116). This is not sufficient to deflect the antifoundationalist critique. Even if they claim only that the text eliminates some but not all potential meanings, rather than eliminating all such meanings but one, Tribe and Dorf are still recognizing the existence of textual meaning that can be humanly understood without an interpretive act—that is, some immanent, transparent meaning in the text that serves to foreclose certain (though not all) potential interpretations of the text.76

The weakness of Tribe and Dorf's position is evident from the application of their methodology to the constitutional right of privacy. Consider the following language, which they identify as the root constitutional texts of the privacy right:

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .77

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.78

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

74 See supra text accompanying notes 61-62.
75 See, e.g., 17-18 (criticizing Thomas Grey and Michael Perry for advocating textually unwarranted theories of constitutional interpretation).
76 See S. Fish, supra note 19, at 112-13, 362.
77 U.S. Const. amend. V.
78 Id. amend. IX.
It is impossible to ascertain what these words signify for the constitutional right of privacy without first interpreting them. Only one of the texts even mentions "rights" (assuming that we know what those are), and none is apparently about a right to "privacy" (whatever that is), let alone a right to use condoms, abort fetuses, or engage in homosexual sodomy.

To pursue the matter further, consider the root texts of Griswold itself. In addition to the ninth amendment and the due process clause, which are quoted above, the Court in Griswold relied on the following:

Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble . . . .

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches . . . shall not be violated . . .

No person . . . shall be compelled in any criminal case to be a witness against himself . . .

Again, none of these texts speaks in terms of privacy. Even assuming the common meaning of the words (which nonetheless is an interpretive act), the texts are not obviously about a right to structure one’s family interactions or other intimate associations without government intrusion. For example, the Griswold Court’s textual concern regarding the fourth amendment was narrower, focusing more on the apparent necessity of a per se unreasonable search to enforce the challenged law than on government intrusion upon a broad right of sexual privacy. Under this analysis, Bowers...
is a bizarre case, but not because the constitutional right to privacy clearly protects homosexual activity. Rather, *Bowers* initially involved a highly unusual combination of facts that enabled a law enforcement officer to observe illegal sexual activity between consenting adults in a home from a place where the officer had a right to be. When this situation is combined with the apparent fact that the antisodomy law in *Bowers* was not applied by the state in a way that implicated the unreasonable search concern of *Griswold*, it becomes tenable to argue that *Bowers* did not depart from *Griswold* at all. (Of course, I have only gotten this far with a substantial amount of interpretation.)

Tribe and Dorf could object that the foregoing analysis isolates the root texts from one another, that it is the reading-together of the first, third, fourth, fifth, ninth, and fourteenth amendments that yields a constraining, value-neutral meaning (see 58-60, 116-17). However, both the assumption that these texts are related and the articulation of the relation are acts of interpretation that create, rather than discover, meaning.

Cases have required direct evidence of such use, which could have been obtained only by surreptitious personal or electronic surveillance by law enforcement authorities of marital sexual activities. Moreover, it was not clear that the fourth amendment's prohibition of unreasonable searches would have barred this possibility, since even searches that otherwise would be unreasonable may often be conducted pursuant to a warrant issued upon a showing of probable cause that illegal activity is taking place. Assuming the validity of a statute prohibiting the use of condoms, it is conceivable that a warrant for surveillance of sexual activity could have issued upon a showing that the objects of surveillance had purchased or were in the possession of condoms. The majority of the *Griswold* Court simply would not countenance this result, even as a possibility.

The reported opinions in *Bowers* provide virtually no facts. On the authority of various newspaper accounts and interviews, the *Education Law Reporter* recounts that a bench warrant had been issued for Michael Hardwick for failure to appear on a citation for public drunkenness. A police officer went to Hardwick's residence, which was apparently not a single family house, to serve the warrant. The officer was admitted to the house by another occupant, who invited the officer to look for Hardwick himself. While walking down a hallway, the officer saw, through an open bedroom door, Hardwick and another man committing sodomy. Hardwick was subsequently arrested on several charges, including sodomy. Hardwick was subsequently arrested on several charges, including sodomy, but the state district attorney declined to prosecute. Hardwick subsequently filed a declaratory judgment action in federal court seeking to have the antisodomy law constitutionally invalidated. Valente, *Bowers v. Hardwick and the Homosexual Teacher*, 35 Educ. L. Rep. (West) 1, 2 (1987); see also *Hardwick v. Bowers*, 760 F.2d 1202, 1204 (11th Cir. 1985), rev'd, 478 U.S. 186 (1986); *Nat'l L.J.*, June 17, 1985, at 10, col. 1.

In oral argument before the Supreme Court, the state attorney represented that the statute had not been used to prosecute sexual activity between consenting adults in a residence in nearly 50 years. See *Bowers*, 478 U.S. at 219 & n.11 (Stevens, J., dissenting).

Cf. T. Eagleton, *Literary Theory: An Introduction* 81 (1983) (criticizing Wolfgang Iser's implicit requirement that "the reader must construct the text so as to render it inter-
posit some sort of organic unity or continuity between the various
texts and then attempt to describe the nature of that unity or con-
tinuity. However, it is entirely possible to read the various provi-
sions of the Bill of Rights, not as different aspects of some unified
themes, but rather as a list of specific and largely disconnected
grievances. Under this interpretation, the root texts identified by
Tribe and Dorf as warrants for the privacy right might be linked
(if at all) only by a thinly textured interpretive theory, such as
"the texts express specific wrongs suffered by the colonists under
the English crown which the colonists did not wish to suffer again
under the central government of the newly created United States."
This view of the Bill of Rights may be wrong in the sense of being
implausible and unpersuasive to those engaged in the enterprise of
constitutional interpretation, but that is beside the point. Whether
one takes them as related or isolated, these texts cannot be under-
stood without value-laden acts of interpretation. There is no self-
declaring meaning that resides in them independent of the reader's
attempt to ascertain what they signify.

Tribe and Dorf usually make only the relatively weak claim
that whatever these texts mean in an affirmative sense, at least we
can be sure what they do not mean. They are presumably not
about, for example, interstate commerce. But even this weak claim
fails. The reason it seems obvious that the privacy texts are not
about interstate commerce is that there has been no occasion to
consider the relationship of the commerce clause to the right of
privacy, so that any attempt to do so appears odd and irrelevant.
If all of these texts were authoritatively eliminated as potential
sources of a constitutional right to privacy, however, their relation
to interstate commerce could easily become obvious. In the face of
such a constitutional rollback, Congress could conceivably attempt

nally consistent") (emphasis in original).

88 Indeed, one of the central insights of Critical Legal Studies is that the insistence on
coherence in law is dishonest and self-deceptive. Hoy, supra note 17, at 346-51.
89 See supra text accompanying notes 39-40.
90 As Fish states:
To see a present-day case as similar to a chain of earlier ones is to reconceive that
chain by finding it in an applicability that has not always been apparent. . . . All
histories are invented in the weak sense that they are not simply "discovered," but
assembled under the pressure of some present urgency; no history is invented in
the strong sense that the urgency that led to its assembly was unrelated to any
generally acknowledged legal concern.
S. Fish, supra note 19, at 94.
to re-establish the right to privacy by statute pursuant to its authority under the commerce clause, in which case potential connections between interstate commerce and the right to privacy would become a focal point of the interpretive enterprise.\footnote{ Cf. Katzenbach v. McClung, 379 U.S. 294, 317 (1964) (holding that Congress could statutorily prohibit racial discrimination by a privately owned and operated restaurant pursuant to its power under the commerce clause); Heart of Atlanta Motel v. United States, 379 U.S. 241, 261-62 (1964) (same with respect to a privately owned and operated motel); proposed Religious Freedom Restoration Act, H.R. 2797, 102d Cong., 1st Sess. (1991).}

During the heyday of substantive due process analysis, for example, the legal community would have been incredulous at the suggestion that substantive individual liberties were protected against government intrusion by the equal protection clause.\footnote{ See, e.g., Lochner v. New York, 198 U.S. 45 (1905); see also Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).} As late as 1927, Justice Holmes—no friend of substantive due process—flatly stated for a majority of the Court that the equal protection clause was “the usual last resort of constitutional arguments.”\footnote{ See, e.g., Buck v. Bell, 274 U.S. 200, 208 (1927).} After the apparent elimination of the due process clause as a source of protection for individual liberties,\footnote{ See West Coast Hotel v. Parrish, 300 U.S. 379 (1937).} however, the potential connections between equality and liberty got a closer look, and the Supreme Court’s fundamental rights/equal protection analysis debuted shortly thereafter.\footnote{ See Skinner v. Oklahoma, 316 U.S. 535 (1942).}

Tribe and Dorf might respond that even though there are numerous interpretive options for the privacy texts, we at least know that they do not mean, say, that one must be at least sixteen years of age to obtain a driver’s license in Utah. There are those who would take issue even with this; radical linguistic indeterminacy has been argued by a number of commentators.\footnote{ The standard method seems to be showing how the constitutional text specifying that the President must be at least 35 years of age, U.S. Const. art. II, § 1, cl. 4, would not foreclose an interpretation that permitted the election of a teenager to the presidency. See, e.g., S. Fish, supra note 19, at 358-59; Benson, How Judges Fool Themselves, supra note 54, at 31; D’Amato, Aspects of Deconstruction: The “Easy Case” of the Under-Aged President, 84 Nw. U.L. Rev. 250 (1989); Peller, supra note 8, at 1174; Spann, Deconstructing the Legislative Veto, 68 Minn. L. Rev. 473, 532-33 (1984); Tushnet, Principles, Politics, and Constitutional Law, 88 Mich. L. Rev. 49, 53 (1989); see also Levinson, supra note 54, at 382 n.33 (describing unreported decision holding that “.82165” was not the equivalent of “82.165%”).} The undeniable fact that certain potential interpretations of any text are absurd reflects not textual constraint, but communal assumptions about
the text that are so deep that they go unquestioned. As Fish explains, "someone who stands on a literal or explicit meaning in fact stands on an interpretation, albeit an interpretation so firmly in place that it is impossible (at least for the time being) not to take as literal and unassailable the meanings it subtends."

But one need not go this far to discredit the textual component of Tribe and Dorf's methodology. If all that this component has to offer is confirmation of the nonexistence of potential meanings that have been unanimously rejected, then it hardly constitutes a great leap forward in constitutional interpretation. For example, Tribe and Dorf ridicule the possibility that one could legitimately construct an ending to Dickens's *Great Expectations* in which "Pip and Estella are eaten by space aliens[, o]r Miss Havisham is reincarnated as a giant talking cockroach, while Pip emigrates to Bolivia to become a shepherd," on the ground that the prior text of the novel has definitively foreclosed such non sequiturs (85). But even granting this (which, as I indicated, many


S. Fish, *supra* note 19, at 359; accord id. at 358 ("[a] meaning that seems to leap off the page, propelled by its own self-sufficiency, is a meaning that flows from interpretive assumptions so deeply embedded that they have become invisible"); see also Hutchinson, *supra* note 54, at 652 ("as we all know, a way of seeing is always a way of not seeing; sight and blindness are simultaneously present"); Klare, *The Public/Private Distinction in Labor Law*, 130 U. Pa. L. Rev. 1358, 1361 (1982) (public/private distinction “repress[es] aspirations for alternative political arrangements by predisposing us to regard comprehensive alternatives to the established order as absurd”). In this view, critics like Kenney Hegland have missed the point; that an alternative interpretation is unimaginable evidences only lack of imagination—an inability to reconceive the world in a way that would make the interpretation persuasive to the culture and community in which one is situated. Compare Hegland, *Goodbye to 2525*, 85 Nw. U.L. Rev. 128 (1990) with D'Amato, *Pragmatic Indeterminacy*, 85 Nw. U.L. Rev. 149 (1990).

This point highlights certain similarities and differences in Dworkin's and Fish's positions. As a descriptive matter, Dworkin is correct that judges feel (and thus in this sense are) constrained by text and precedent, but Dworkin argues the normative point as well, that this constraint is justified. Fish refutes Dworkin's normative claim by showing that the contingent nature of linguistic meaning will always prevent judges from giving an adequate account of the justification for such constraint. See Levinson, *supra* note 54, at 384; Yablo, *Law and Metaphysics* (Book Review), 96 Yale L.J. 613, 633-34 & n.97 (1987).

Tribe and Dorf really ought to read a little fantasy literature to disabuse them of the notion that no reasonable person could accept something like this. For example, I recently read M. *Wies* & T. *Hickman*, *The Dark Sword Trilogy* (1988), which Santa Claus gave to my 13-year-old son Alex last Christmas (that's right, I only read this stuff because my kids do, just like I never read the *National Enquirer* except in the grocery store check-out line). These novels spent 855 pages developing a conspiratorial plot in a fantastical place where magicians rule the world, people fly, trolls and centaurs eat little children, alchemists practice their art, etc. The story ends with a successful invasion of this magical world by a
would not), of what use is this "insight" in interpreting the novel? After all, no one is pushing a space aliens-cockroach ending to Great Expectations (I think I'm on fairly safe ground here even though I don't have a cite). Tribe and Dorf's textual component serves only to eliminate interpretations that the community has already unanimously rejected. Their interpretive methodology merely reveals to us what we already know.

This is even more emphatically the case with constitutional interpretation, at least as it is conceived by Tribe and Dorf. Although they nod in the direction of sources of authoritative constitutional interpretation other than the Supreme Court (72), their argument is centered on the assumption that constitutional law is made exclusively by the Court.100 This court hears little more than 100 cases each term (many of which do not present constitutional issues), and these are heard only after four Justices determine that they are worth the Court's time. Virtually all of the Court's constitutional cases are controversial, and most result in splits among the Justices about the correct interpretive result. The questions are so close that non sequiturs are simply not on the Court's interpretive radar screen.101

Accordingly, in terms of constraining the Court's interpretation of the Constitution, Tribe and Dorf's textual methodological component literally adds nothing. It relies on the existence of a preinterpretive meaning in the Constitution that asserts itself to constrain the Justices only with respect to interpretive choices they would never make.

decidedly nonmagical United States Army, complete with high-tech weapons and arrogant officers. The narrative explains (sort of) that the Army sneaked in from another dimension and neutralized all the magic. (I guess this was Tribe and Dorf's space aliens-cockroach ending in reverse.) Anyway, not only did the authors manage to think up this non sequitur of an ending but, if book sales are any indication, readers have not been troubled by it. For whatever it's worth, Alex loved the ending, and I (don't laugh) spent at least half an hour trying to discern the deeper metaphysical meaning that I assumed the authors had intended to communicate. For an equally illustrative (if somewhat more elevated) example of non sequitur interpretation, see Bohanan, Shakespeare in the Bush, Nat. Hist. Mag., Aug./Sept. 1966, at 28 (Hamlet as interpreted by pre-modern tribal community).

100 Of the 93 judicial decisions that Tribe and Dorf list in the index of cases cited (137-40), only three are by a court other than the Supreme Court, and one of those was reversed by the Court. See Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127 (1985); Arcara v. Cloud Books, Inc., 65 N.Y.2d 324, 480 N.E.2d 1089, 491 N.Y.S.2d 307 (1985), rev'd, 478 U.S. 697 (1986); Post v. State, 715 P.2d 1105 (Okla.), cert. denied, 479 U.S. 890 (1986).

101 See Levinson, supra note 54, at 382 n.33.
C. Extratextual Meaning and Value-Neutral Interpretation

Tribe and Dorf's text—that is, the manner in which they felt compelled to argue for their methodology—is itself strong evidence that the locus of meaning is in a reader or community of readers rather than in the text. Reliance on conventional meaning pervades the book, signaled by words and phrases that virtually cry out for identification of a reader or interpretive community—"acceptable" (19, 31), "plausible" (45, 60), "it seems" (21, 27, 37, 57, 58). Of course, this is what one would expect of those whose hypothesis of extratextual relevance is "widely shared values." What is never made clear is to whom these various arguments and observations are so obviously acceptable, plausible, or apparent (or not).

For example, consider their criticism of the majority's reasoning in Bowers:

The Court will protect unenumerated, traditional, family-oriented rights, even outside of marriage . . . . It will protect such rights even among unmarried teenagers . . . . But anatomical combinations that do not seem as traditional to the Court will not be protected. Somewhere among the "tacit postulates" of the Constitution there is apparently an anatomical catalogue which the Court consults. This seems like the wrong way to go about developing principles of privacy (58 (emphasis added)).

To whom does the Court's reasoning seem incorrect? To lots of law students and legal academics, so much is clear.\textsuperscript{102} To the majority of Americans who disapprove of homosexual orientation on moral grounds, however, the Court may have gotten it just about right.\textsuperscript{103} Of course, Tribe and Dorf argue that majority dis-


\textsuperscript{103} One recent poll showed that 78% of Americans thought that homosexual conduct
approval should be irrelevant, since the Bill of Rights exists to supply counter-majoritarian protection to individual beliefs and actions (57-58). Tribe and Dorf thus join those academics who talk a lot about democracy but have little use for popular values. Given their critical dependence on conventional linguistic meaning, there is more than a little irony in this.

Disguised elitism aside, Tribe and Dorf cannot identify the interpretive community in which they place themselves because doing so would fatally undermine their thesis. They contend that their interpretive methodology enables one to identify and describe the bounds of unenumerated constitutional rights—in particular a privacy right that protects homosexual activity—“without imposing her own economic, social, and political theories on the document” (66). The possibility of such a value-neutral, objective approach is remote if constitutional meaning is not located in a self-declaring autonomous text, but in the contingent conventions, practices, and beliefs of judges and the interpretive communities to which they belong. Only if (at least) some portion of textual meaning is placed beyond interpretation does value-neutral, objective interpretive methodology become possible. Only then can “the Constitution’s text channel choice without eliminating it” (33).

Stripped of its pretension to textual constraint, Tribe and

was “always” or “almost always” wrong, whereas only 16% thought it was “not wrong at all.” See An American Profile—Opinions and Behavior 1972-1989, at 583 (F. Wood ed. 1990). However, when it came to criminalizing homosexual behavior, another poll showed only 36% were in favor, as opposed to 47% against and 17% with no opinion. See C. Gallup, Jr., The Gallup Poll: Public Opinion 1989, at 215 (1990). Thus, keeping criminal antisodomy laws on the books but declining to enforce them against consenting adults in the home—exactly the scenario of Bowers—may well reflect the ambivalence of Americans towards homosexuality.

See supra text accompanying notes 50-51. This is not an adequate response. The unpopularity of a belief or practice is not a sufficient condition for constitutional protection of the practice since sometimes the majority does rule, for no reason other than the fact that it is the majority.

See Hutchinson, The Three "Rs": Reading/Rorty/Radically (Book Review), 103 Harv. L. Rev. 555, 555-66 (1989) (criticizing as condescending and oppressive Richard Rorty’s presumption that liberal elites can and ought to speak for the powerless); Hutchinson, supra note 54, at 664-55 (arguing that Dworkin’s jurisprudence is “profoundly elitist and undemocratic”); Smith, Separation and the “Secular”: Reconstructing the Disestablishment Decision, 67 Tex. L. Rev. 955, 1015 (1989) (arguing that liberal theories of church and state tend to ignore “beliefs, values, and reasons that the actual citizens in a democracy do in fact understand and use,” focusing instead on “beliefs, values, and reasons that, in the theorists’ view, citizens should understand and use” but which in fact most citizens reject) (emphasis in original).

See T. Eagleton, supra note 87, at 97, 124.
Dorf's methodology reduces to a single proposition: Responsible constitutional interpretation must articulate individual rights at the highest level of generality possible. *Bowers* is wrong in their view because a principle broad enough to protect homosexual activity can be convincingly abstracted from the root texts and precedents that delineate the constitutional right of privacy. That the right of privacy can plausibly be read to protect homosexual activity is surely correct. But the question is whether the right must be so read. Their argument that *Bowers* is wrong is persuasive only if the highest level of generality at which a right can be convincingly articulated always constitutes the preferred interpretation of the scope of the right. As they themselves admit, a less abstract formulation of the privacy right probably does not protect homosexual activity (78-79). If proper constitutional interpretation may choose a less general articulation of a right, then *Bowers* is defensible on the ground that homosexual activity does not fit within a conventional understanding of "family interactions."

As I described in Part II, Tribe and Dorf defend their preference for generalization on the basis of its progressivity. "Progressive" is commonly set up in opposition to "conservative," and, in fact, Tribe and Dorf criticize both Scalia and the *Bowers* Court for their premise that there is value in the preservation of tradition *simpliciter* (116). Progressive generalization of individual rights thus becomes the means by which individuals become and remain liberated from the confinement of social convention.

In this post-Kuhnian era, there is serious doubt that progressive rights generalization can be an adequate descriptive account of constitutional interpretation. But even as a normative aspiration, Tribe and Dorf's argument for progressive generalization is highly simplistic, ignoring the ideological biases that inhere in the idea of "progress." Progressivity, dependent on a conception of linear rather than cyclical time, reflects both theological and gen-

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107 *See generally* T. Kuhn, *The Structure of Scientific Revolutions* 136-43 (2d ed. 1970) (arguing that history does not support popular view of science as gradual and continuous accretion of knowledge).

108 For example, Eastern thought tends to view time as cyclical, repetitive, and endless, and, in any event, an artificial construct of the mind. In Western thought, however, time often is considered to exist independently of human thought. Moreover, many Westerners see the unfolding of events in time as the progression towards an historical climax, an attitude typified by Protestant millennialism which views history as inexorably moving to the second coming of Jesus. *See generally* G. Witherspoon, *Language and Art in the Navajo Universe* 22-23, 201 (1977); Sacred Time, in *12 Encyclopedia of Religion* 536, 538-41 (M.
der biases. The liberation of the individual from the confines of tradition sounds laudable until one remembers that tradition perpetuates community, and that it is largely through community that one can hope to maintain meaningful personal freedom against the overwhelming power of modern government and corporate institutions. The preference for autonomy over community reflects an ideological bias about the nature of both individuality and freedom. Indeed, Tribe and Dorf’s argument for generalization typifies the arrogant liberal confidence that freeing individuals from oppressive communities is an unqualified good that always enhances individual freedom.

One of the most telling moves in the book is Tribe and Dorf’s use of the common law to buttress their argument for generalization while simultaneously rejecting the legitimacy of nineteenth century economic due process doctrine. The common law is itself deeply stamped with an ideological bias, and it has been persuasively argued that Lochner-style analysis and the capitalistic excesses it protected were both spawned by common law conceptions of individuality, privacy, and freedom.

Tribe and Dorf reject economic due process because neither history nor text required it, and when applied it did not result in increased freedom for most Americans (65-66). Yet, Tribe and Dorf’s interpretive methodology can be applied to justify economic due process protection; if there was ever a “tacit postulate with a
textual root” in constitutional law, it was laissez-faire capitalism.\footnote{Cf. J. Ely, supra note 3, at 229 n.94 (conceding that “if one were pressed to identify ‘the American ideology,’ laissez-faire capitalism would have to be a candidate”).}

If we assume (as Tribe and Dorf insist we must) that “property” includes the right of every person to control her own body (71), laissez-faire capitalism links those constitutional texts that prohibit the government from arbitrarily depriving one of her property\footnote{U.S. Const. amend. V; id. amend. XIV, § 1.} to the contracts clause\footnote{Id. art. I, § 10.} to create a “liberty of contract” that protects each person’s right to sell her labor for as much or (more likely) as little as she chooses. Whether this model protects the “right” values (66) is, of course, an open question, but this model of economic due process is at least plausible (to capitalists, anyway). Indeed, it is as plausible an application of Tribe and Dorf's methodology as their construction of the right of privacy, yet they reject it.

At no point do Tribe and Dorf make an explicit argument for the priority of linearity over cyclicity, individuality over community, or the ideology of the common law over competing conceptions of human freedom. The second element in each of these binary oppositions is never discussed. Reflecting the classic structure of liberal antinomial discourse, Tribe and Dorf present their ideological preferences as obvious and desirable—and thus neutral—by suppressing the alternative conceptions of the world that can be found in opposing ideological premises. Justice Scalia is not the only one guilty of sneaking ideological preferences into the Constitution under the guise of value-neutral methodology (106).

**CONCLUSION**

Tribe and Dorf fail to persuade that their methodology constrains constitutional interpretation in a value-neutral way. Text alone does not constrain constitutional interpretation; interpretation of the Constitution is constrained by extratextual sources (“widely held values”), but these are not ideologically neutral. The requirement of progressive generalization may also supply constraints, but again, this preference is ideologically biased.

Tribe and Dorf exhibit an obvious sympathy for *Roe*, and an equally obvious antipathy for *Bowers*. It is hard to believe that they were lead to these positions by faithfully following the path
marked out by their methodology. On the contrary, criticism of state efforts to regulate sexual activity and to protect economic activity is precisely what one would expect from one of the foremost liberal lawyers in the United States.\footnote{118} Certainly anyone familiar with Tribe's work would have been shocked had On Reading the Constitution led in any other direction.\footnote{119}

Tribe and Dorf do not make a persuasive case for defending Roe and criticizing Bowers on the basis of a value-neutral interpretive methodology. Those who agree with Tribe and Dorf's substantive positions on abortion and homosexual rights will find little comfort and even less neutrality in their methodological treatment of Roe and Bowers, while those who disagree with those positions will find nothing at all.

\footnote{118} As Jim Gordon has observed, "Liberals want to regulate business activity but not sexual conduct, while conservatives want precisely the opposite." Gordon, \textit{How Not to Succeed in Law School}, 100 \textit{Yale L.J.} 1679, 1699 n.31 (1991). Tribe and Dorf do confess that their methodology has caused them to consider Roe a closer case than they had once imagined (117), but apparently not close enough to warrant its overturning.

This reminds me of a shopping expedition I went on with my wife last fall. As the result of a convergence in our lives of residential relocation and bad luck, we had to buy four major household appliances at the same time. For reasons too incredible to recount here, it was to our advantage to buy all of these appliances from one particular retail outlet. As Nicea and I drove up to the storefront on the fateful day, we both realized from the wording on the store sign that this particular retailer was a \textit{dealer} for all major brands of household appliances, but a \textit{distributor} of General Electric appliances. "You watch," Nicea said, "they'll be pushing GE."

Prophetic words. No matter what we asked the salesman about—quality, durability, color selection, warranties, ease of repair, you name it—the GE appliances had the edge. Everything was the same price, more or less, from brand to brand; it just seemed that GE was a little bit better, and who wouldn't buy the better product if it didn't cost any more? Two hours later, we emerged from the store having bought three General Electric appliances; the fourth and least expensive appliance was not made by GE with the features we wanted. We even bought a gas range made by General Electric. (Think about that.)

Now, we like our GE appliances. They have mostly lived up to what the salesman said about them. Even so, I still wonder what we would have bought if, along with all the facts and explanations about GE superiority, the salesman had also said, "And by the way, we make twice as much money on GE sales."

\footnote{119} Since On Reading the Constitution is apparently Dorf's first published work and he (like most of us) lacks a national reputation, I have no way of ascertaining what political biases he may have brought to the project.