The Uses of an Unwritten Constitution

Thomas C. Grey

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation

Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol64/iss1/11
We in the United States certainly have a written constitution, one that is enforced by judges, among others. I want to defend a view I have stated before, that we have a judicially enforceable unwritten constitution as well, made up of certain constitutional customs and practices, and their associated values and ideals.¹

The question whether we have such an unwritten or "common law" constitution became a matter of public concern last year during the Bork confirmation hearings. The debate centered around the legitimacy of the independent constitutional right of privacy, and at a more general level around the interpretation to be given to the ninth amendment and to the protection of liberty in the due process clauses of the fifth and fourteenth amendments. Judge Bork's nomination was rejected by the Senate after his vigorous and articulate statement of the official Reagan administration position on constitutional adjudication, a position for which he had been the most important theoretical spokesman. I interpret this position as consisting of two separate premises: first, that for purposes of judicial review, American practice should recognize only a written, not an unwritten, constitution; and second, that this written constitution must be construed according to the meaning intended for it by its framers.

In what follows, I want to stress the separate character of these two premises, which I call respectively "textualist" and "originalist." I will mainly be considering the first and more defensible of them—the textualist premise. To it I oppose the view I hold, which I call "supplemental," that much American constitutional adjudication, including but not limited to decisions under due process liberty and the right of privacy, involves the interpretation of an unwritten and essentially common law constitution, which supplements the primarily authoritative and essentially statutory written one. Supplemental adjudication is authorized but

* Professor of Law, Stanford Law School. I would like to thank Barbara Babcock, Dan Farber, Barbara Fried, Lawrence Friedman, and my research assistant Henry Bemporad for their helpful editorial suggestions. A version of this paper, delivered at a conference on "The Evolving U.S. Constitution, 1787-1987" held in Taipei in June of 1988 under the auspices of the Institute of American Culture of the Academia Sinica, will appear in the proceedings of that conference.

not significantly guided by the written constitution. In the course of discussing the choice between textualist and supplemental approaches, I will have a few things to say in passing about originalism, including some reasons why it should be treated as a doctrine distinct from (though not incompatible with) textualism.²

Two quite separate kinds of constitutional theorists oppose the supplemental position. First, there are textualists like Judge Bork, constitutional conservatives who argue that activist decisions whose normative major premises are not firmly grounded in relatively determinate text are illegitimate. Second, there are those like Professor Rapaczynski, who is joined on this point by many other distinguished constitutional theorists; these writers generally accept the liberal activist decisions of recent years, but regard them as genuinely derived from the constitutional text itself, when the text is read with an appropriately generous context. For these theorists, we do not have an unwritten constitution because we do not need one; the written constitution we do have gives judges all the room for activism that is required.³ It is mainly this latter view that I propose to criticize here, though it is a friendly quarrel, and mainly about method or rhetoric rather than results in the usual sense.

Professor Rapaczynski makes a number of practical points against my proposal that we should admit (or readmit) talk of an unwritten constitution into our standard constitutional discourse.⁴ These points are interspersed with considerable valuable theoretical discussion of legal interpretation, but in my view the differences between us lie along the practical dimension, and indeed are mainly political in character. Philosophically, Professor Rapaczynski and I share a pragmatist approach to the theory of interpretation. In politics, on the other hand, while we are both liberals and democrats, there is this difference between us: liberals who worry more about the excesses of democracy are likely

². In my view, Robert Bork’s own writings show him to be a serious textualist; he works hard to link constitutional doctrines to text in a fairly formal or deductive manner. By contrast, and unlike, say, Raoul Berger, Bork is an indifferent originalist, not much interested in historical investigation into the actual original understanding of constitutional provisions. In my own earlier essay Do We Have an Unwritten Constitution?, supra note 1, I blurred together textualism and originalism under the rubric of “interpretivism.”

³. These are the theorists I have elsewhere called “rejectionists,” because they reject the distinction between written and unwritten sources of constitutional law. Grey, The Constitution as Scripture, supra note 1, at 2. (A better name would be welcome.) The group includes, along with Professor Rapaczynski himself, such other distinguished theorists and commentators as Michael Perry, Harry Wellington, David Richards, Owen Fiss, and Ronald Dworkin; see id. at 2 n.2; as well as Laurence Tribe; see L. Tribe, AMERICAN CONSTITUTIONAL LAW 771 (2d ed. 1988).

to prefer Professor Rapaczynski's way of looking at judicial review, while democrats who worry more about the shortfalls of liberalism may prefer mine.

I. THEORETICAL PRELIMINARIES

Before getting to my main points, let me note a few things that Professor Rapaczynski and I seem to agree on. First, we both treat the question whether the United States has an unwritten constitution as itself a question of constitutional interpretation. But neither of us think it is one that can be answered by looking hard at the text—even at the part of it that reads "[t]he enumeration in this Constitution of certain rights shall not be held to deny or disparage others retained by the people." The ninth amendment sounds like a straightforward affirmation of the supplemental position, but it need not be understood that way. It might only be a statement of constitutional aspiration, like the preamble; in which case the unenumerated rights would be only moral or political rights not meant to be judicially enforced.

A second area of agreement has to do with the bearing of the "original understanding" on the question of the unwritten constitution. For more than one good reason, legislative history cannot decide the question any more than can unaided text. First, as is so often the case on interesting questions, the historical evidence is equivocal whether judges were originally meant to give constitutional force to unenumerated rights. The question was not a very salient one during the founding period; the first joinder of issue on it was the exchange between Justices Chase and Iredell in Calder v. Bull\(^5\) in 1798, at which point both positions were certainly legitimate competitors for acceptance.\(^6\) Second, the founding period does not supply the whole original understanding on the question of the unwritten constitution; one must take account of the view embodied in the Reconstruction amendments, a view whose ambiguities are suggested, for example, by the majority and dissenting opinions in the Slaughterhouse Cases\(^7\) and Loan Association v. Topeka.\(^8\)

In any event, quite apart from history's complexities and ambiguities, neither Professor Rapaczynski nor I are originalists. We agree that

5. 3 U.S. (3 Dall.) 386 (1798).
7. 83 U.S. (16 Wall.) 36 (1873).
8. 87 U.S. (20 Wall.) 655 (1874).
even when ascertainable, original understandings have no final authority in constitutional law today. Post-enactment practice makes its own contribution to the present meaning of the Constitution, as does the cultural and political situation that forms the current interpretive context.

I have already mentioned my agreement with Professor Rapaczynski on our shared pragmatic approach to constitutional theory, but on the matter of the relation between theory and practice I must say a few more words. In general, I think that theory must collaborate with practice rather than rule over it. In particular, my proposal that we admit to having an unwritten constitution does not descend deductively from any philosophical theory I hold about the nature of textual interpretation, in law or more generally. On the subject of the general theory of interpretation, especially because I agree with almost everything Professor Rapaczynski says, I can sketch my own position in a few banal slogans: interpretation always involves ascertaining the meaning of a focal text (or text-analogue) against the background of a context; no text can by itself so constrain interpretation as to make reference to context unnecessary; on the other hand, context (which generates inferences of communicative intent) never establishes meaning by itself, so as to make focus on the text itself irrelevant. In short, unless both text and context have some constraining force, the process is not one of interpretation at all.

Within this loose and boringly uncontroversial framework, I offer my distinction between written and unwritten sources of constitutional law as nothing more than a working interpretation of “this constitution”—of American constitutional practice, that is, in the light of its central texts, and the context provided by their origins, their development, and the demands of the present legal, political and intellectual situation. I believe my proposal reasonably connects up and helpfully clarifies our official and popular practices and ideals as they are and have been, while tending to nudge current practice in the right direction. In a certain sense, then, what I have to say is not “theoretical” at all.

In another sense, though, this is an exercise in what is commonly called “constitutional theory” as that genre has proliferated in recent years. What makes this kind of work theoretical is only that it proceeds at a higher level of generality than is usual with the doctrinal commentary lawyers and judges cite and consult. Such theory should be judged, like more down-to-earth commentary, by whether it is useful, as heuristic device and political guide, in the teaching of constitutional law and the

practice of constitutional government. We always have to remember that very general remarks about a complex body of practice are more likely to be vacuous than profound.

On the heuristic side, the constitutional theorist can be understood as both teacher and debate moderator. The teacher’s job is to supply a framework of concepts through which a newcomer can usefully survey the field of constitutional law. Frameworks absorbed in this way can be influential because they tend to remain in place, unconsciously structuring (and slanting) the way the experienced practitioner conceives and categorizes problems that arise within his field. The moderator’s job is to supply terminology and conceptual structures that perspicuously frame embattled subjects for debate. This means, first, identifying those “essentially contested concepts” around which controversy can most usefully be organized; and, second, supplying rival conceptions of those contested concepts, conceptions that express persistently conflicting ideals, passions and interests in a way that is intelligibly structured and that both sides can accept as reasonably fair.\(^1\)

Of course constitutional disputes, unlike debate contests, are not just for fun and mental exercise. They can substitute for immediate violence only because violence lurks behind them; they are part of a game in which clubs sometimes indeed are trumps, as Hobbes said they always were.\(^11\) In these circumstances, the metaphor of the moderator presents too neutral and technical a picture of the constitutional theorist’s role. After all, the way a question is stated will affect, sometimes predictably, how it is answered, and knowing this the theorist will frame the debate not only to clarify matters but also to promote the better values, and make more likely the victory of the better side. This is why constitutional commentary is unavoidably political and “result-oriented” as well as heuristic.

As I read Professor Rapaczynski, he has three main practical objections to framing current constitutional debates in terms of the question “Do we have an unwritten constitution?” In the first place, he points out that judges and lawyers do not talk this way now\(^12\)—the implication being “if it ain’t broke, don’t fix it.” Second, he argues that any division

---

11. The late Robert Cover put the point dramatically by saying that constitutional interpretation took place upon “a field of pain and death,” as it certainly does in many cases, most pointedly those involving the death penalty. Cover, Violence and the Word, 95 YALE L.J. 1601 (1986). Alongside Hobbesian observations like these, true as they are in limited contexts, I would always want to place Hume’s point that the world is ruled more by opinion than by force; Hume keeps us clear on the most important link between interpretation and power.
between written and unwritten sources of constitutional law leads to a narrow or rigid, even a strictly originalist, approach to textual interpretation. Finally, talk of an "unwritten constitution" tends to undermine the legitimacy of useful forms of judicial activism by portraying them as subjective and unguided. Behind these objections lies a single theoretical point: we can press very far with the importance in interpretation of context, the point that social and professional practices and ideals inevitably color constitutional interpretation even when it tries to stick to the text. The further one takes this point, Professor Rapaczynski argues, the less use there is for a revisionist (and potentially misleading or scary) proclamation that these practices and ideals make up an "unwritten constitution."

In what follows, I make the case for my proposal with these sensible practical objections in mind. I argue that the distinction between written and unwritten sources of constitutional law serves both as a helpful heuristic device and as a politically sound guide to judicial practice. Heuristically, it connects current controversies both to a debate about constitutional interpretation that has persisted throughout American history, and to similar debates about the interpretation of authoritative texts in other contexts, both legal and extralegal. Politically, when properly understood, recognition of an unwritten constitution also connects professional usage more closely to the popular understanding of the constitution as written law, and thus makes constitutional adjudication more subject to critical public scrutiny. If that makes adventurous judicial activism more problematic, such a result is not an unmixed evil; the positive side is the promotion of a republican vision of citizenship and government—and it is here that Professor Rapaczynski and I perhaps have our main differences.

II. MAKING CONNECTIONS: CONSTITUTIONAL TRADITION

It remains true that for judges and practitioners today, talk of an "unwritten constitution" has an unfamiliar and somewhat jarring sound. The British have an unwritten constitution; we have a written one—so most people familiar with our practices would say. I want to say that we have both. I do put my proposal forward as a reform; it is meant to sound a bit unfamiliar, and hence draw attention to phenomena that I think should be noticed more than they are.

13. Id. at 193.
14. Id. at 190-91.
15. Many would add that the British Constitution is not enforceable by way of judicial review because it is unwritten.
But it is also meant to fit reasonably well with our familiar practices, and one of its strong points is its roots in American constitutional tradition. The tracing of these roots could support a long book, but here must be compressed into a short story.

To begin with, the American Revolution was made by a generation of lawyers and pamphleteers who believed in and were used to arguing on the basis of a legally supreme and yet unwritten English or British constitution. This generation accepted a binding body of higher law, conceived as an amalgam of the rights of man and the birthrights of Englishmen. This conception then appeared in the earliest exercises of judicial review, immediately after independence.\textsuperscript{16} Five years before \textit{Marbury v. Madison},\textsuperscript{17} Supreme Court Justice Chase issued an opinion in \textit{Calder v. Bull} that claimed the power of judicial review even over legislation that was not “expressly restrained by the constitution,” and yet violated “certain vital principles in our free Republican governments.”\textsuperscript{18} The unwritten constitution made up of these principles was likewise invoked as an alternate ground of decision by John Marshall in \textit{Fletcher v. Peck},\textsuperscript{19} and it was widely affirmed by orthodox judges and commentators, prominently including James Kent and Joseph Story, during the early and middle years of the nineteenth century.\textsuperscript{20}

On the other hand, the conception of a supplemental unwritten constitution has been, at least since Justice James Iredell’s answer to the Chase opinion in \textit{Calder}, subject to criticism by those who thought that judges should only enforce positively enacted constitutional limitations.\textsuperscript{21} As time passed these criticisms were heard more frequently, so that by the beginning of this century invocation of constitutional principles that claimed no anchor in the text had become rare. This history gives pause to proponents of a living and partially unwritten constitution. Even if we originally had judicially enforceable unenumerated constitutional rights, might we not have gradually lost them through a process of interpretive development driven by the movement toward a more democratic ideal of legislation and a more positivistic conception of law?

But other historical developments make any simple conclusion along these lines untenable. As Edward Corwin accurately summarized

\begin{itemize}
  \item \textsuperscript{16} For the early history, see Grey, \textit{Origins of the Unwritten Constitution}, 30 Stan. L. Rev. 843 (1978); see also, Grey, \textit{supra} note 6, and Sherry, \textit{supra} note 6.
  \item \textsuperscript{17} 5 U.S. (1 Cranch) 137 (1803).
  \item \textsuperscript{18} 3 U.S. (3 Dall.) at 388 (emphasis omitted).
  \item \textsuperscript{19} 10 U.S. (6 Cranch) 87, 136 (1810).
  \item \textsuperscript{20} Terrett v. Taylor, 13 U.S. (6 Cranch) 43, 50-52 (1815) (Story, J.); Gardner v. Newburgh, 2 Johns. 162 (N.Y. 1816) (Kent, J.).
  \item \textsuperscript{21} 3 U.S. (3 Dall.) at 398-400.
\end{itemize}
the upshot of the Chase-Iredell debate, while Iredell won the victory in
form, Chase won in substance.22 Accompanying the decline in direct ap-
peal to unwritten sources during the nineteenth century was an ever-exp-
anding conception of the range of limitations that took shelter within
the general clauses of the text. The principles protecting private property
and vested rights, earlier claimed as intrinsic and unenumerated, came
increasingly to be referred to the federal Constitution's contract clause,
and to state constitutional provisions that affirmed inalienable rights,
prohibited retrospective laws, or required the separation of powers.23

The law of the land and due process clauses of state constitutions
(always treated as equivalents) also served, ever since the founding pe-
riod, as yet another constitutional general clause. Substantive due pro-
cess long predates the "Lochner era."24 In fact it was around 1840 that
the due process provisions gradually began to outstrip the other general
clauses in popularity as a vehicle for invalidating laws that violated
vested rights, or "took from A to give to B."25

The adoption of the due process clause of the fourteenth amendment
advanced this development, under the tutelage of lawyers, judges and
commentators who sought a central role for the federal courts in protect-
ing property and the market against the "democratic excesses" of the
state legislatures.26 The "property" and "liberty" protected by the due
process clauses supplied the textual basis for constitutionally protected
unenumerated rights, and there was no further need for any explicit doc-
trine of an unwritten constitution.27

(1914).
(contract clause); Lessee of Good v. Zercher, 12 Ohio 364, 368 (1843) (inalienable rights); State v.
Fry, 4 Mo. 120 (1835) (retrospective law); Gaines v. Buford, 31 Ky. (1 Dana) 481, 497-501 (1833)
(separation of powers).
24. See Lindsay v. Commissioners, 2 S.C.L. (1 Bay) 38 (1796); University of North Carolina v.
Foy, 5 N.C. (1 Mur.) 53 (1805); Little v. Frost, 3 Mass. 106 (1807). Corwin, The Doctrine of Due
Process of Law Before the Civil War (pts. 1-2), 24 Harv. L. Rev. 366, 460 (1911), which remains the
best known historical treatment of this question, understates the degree to which what we would call
"substantive due process" was common during this period, though lawyers of the time did not typi-
cally make our distinction between substantive law and procedure.
25. The decision in Taylor v. Porter, 4 Hill 140 (N.Y. 1840) became the leading precedent in
the spread of substantive due process.
26. For the most influential commentary, see T. Cooley, Constitutional Limitations
351-413 (1st ed. 1868); and see also T. Sedgwick, Statutory and Constitutional Law 138-
44, note a (2d ed. 1874). Comparison of the cited footnote, written in 1874 by John Norton Pome-
roy, the editor of the second edition of Sedgwick treatise, with Sedgwick's text written in 1857,
illustrates how far the consolidation of the doctrines of the unwritten constitution under the due
process clauses had gone forward during the intervening period.
27. The early Supreme Court cases did reject the broad reading of the fourteenth amendment
due process clause. See The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872); Davidson v. New
Orleans, 96 U.S. 97 (1877). That Justice Miller's opinions were based on considerations of federal-
For much of the period before 1937, the interpretation of the due process clauses as incorporating an unwritten constitution including "certain immutable principles of justice which inhere in the very idea of free government" was not itself controversial. What was controversial was the content of that constitution and the degree of deference courts should show to legislatures in formulating and implementing it. Even Justice Holmes' dissent in *Lochner* affirmed the common understanding of the period; he conceded that a piece of legislation consistent with all of the explicit restrictions of the written constitution would still violate due process if it offended "fundamental principles as they have been understood by the traditions of our people and our law." Frontal assaults during this period on the very idea of a judicially enforceable unwritten constitution were rare, and when they occurred, were thought to require such drastic action as that proposed by Felix Frankfurter: "The due process clauses must go."

After 1937 many commentators began to assert that the due process clauses properly governed only matters of procedure. But few followed out the implications of this claim, which was qualified by the doctrine that the fourteenth amendment due process clause imposed at least some of the substantive requirements of the Bill of Rights on the states, while the fifth amendment clause similarly transferred to the federal government at least some of the restraints imposed on the states under the equal protection and contract clauses. Though logically these doctrines certainly meant the continuation of "substantive due process," many commentators and judges convinced themselves that they merely involved the enforcement of "specific" provisions of the Constitution, and hence did not entail the kind of judicial invention-concealed-as-enforcement of wholly extra-textual rights that had come to be seen as an anomalous

---

30. Frankfurter, *The Red Terror of Judicial Reform*, *The New Republic*, Oct. 1, 1924, reprinted in F. Frankfurter, *Felix Frankfurter on the Supreme Court* 158, 167 (P. Kurland ed. 1970). In the same essay, Frankfurter wrote that "it cannot be too often made clear that the meaning of phrases like 'due process of law,' and of simple terms like 'liberty' and 'property,' is not revealed within the Constitution; their meaning is derived from without." *Id.* at 163.
departure of the "Lochner era." 32

Even between 1937 and 1965 there was some continued explicit defense of judicial development of unenumerated rights, for example, by such "old believers" in the traditional conception of due process as Justice Harlan. 33 Further, this period saw the rise of what has sometimes been called "substantive equal protection," the openly revisionist invocation of changing conceptions of equality in support of doctrines that were well removed from the issues of racial discrimination and its near relatives. 34 But it was not until 1965 in Griswold v. Connecticut 35 that a revived version of the old Chase-Iredell debate came into prominence, and only in 1973 with Roe v. Wade, 36 the most controversial judicial decision of the last generation, was the debate guaranteed to stay in the forefront of attention for many a day to come.

There was a right of privacy, the Court said in Roe, broad enough to protect a woman's decision to terminate her pregnancy, "whether [that right] be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, on the Ninth Amendment's reservation of rights to the people." 37 The tone was appropriate to the Court addressing an issue of merely terminological import: whether to call privacy a due process liberty or an entirely unenumerated right. The constitutional text was quite avowedly supplying not the normative content but only the taxonomical nomenclature. It is a story familiar to constitutional lawyers how we came from that point to the Bork hearings, which made "interpretivism vs. noninterpretivism" part of the public discourse.

Though I used to pose the division in those terms myself, I now think that "noninterpretivism," besides being stylistically barbarous, is a misleading term for the view that accepts the legitimacy of judicial enforcement of an unwritten constitution. It is better to treat all approaches to constitutional adjudication as constrained to the interpretation of the sources of constitutional law, and then to argue about what those sources are and how much relative weight they should have.

32. For a good statement of the orthodox post-1937 view of the relevant history, see Easterbrook, Substance and Due Process, 1982 Sup. Ct. Rev. 85.
35. 381 U.S. 479 (1965).
37. Id. at 153.
As I would frame the debate now, some interpreters, textualists (Judge Bork and his allies for example), treat the constitutional text as the sole legitimate source of operative norms of constitutional law. Other interpreters, supplementers (my crowd, the good guys), treat the text as the overriding source where it speaks clearly, but supplemented by an unwritten constitution made up of principles that underlie precedent and practice as seen from the perspective of the present. The text itself authorizes resort to these unwritten sources through provisions like the ninth amendment and the due process clauses.

Much more could be said to show the approximate congruence of this account with our traditions as well as our present practices and understandings, but this must suffice for now. The story reveals two themes. On the one hand, for reasons derived from the spread of democracy and the rise of legal secularism and positivism, judges prefer to rely on a written constitution when they invalidate legislation; this explains the long-run tendency to bring what were once avowedly unwritten general principles within the shelter of the general clauses of the text, most notably the due process clauses. On the other hand, there is the vigorous survival of the American tradition that if a law is seriously unjust it must somehow be unconstitutional; this explains the expansion of the general clauses, as well as the judges' intermittent frankness about the lack of guidance those clauses give in establishing the content of the doctrine developed under them.

III. More Connections: Legal Writings

My proposal would add some further structure to the standard conceptual framework of debate about constitutional interpretation. I suggest seeing two kinds of disputes where others see only one, drawing a line where others see only a continuum. Everyone recognizes the continuum: it gives rise to the familiar disputes about how much account should be taken of context in interpreting the text, disputes that we put in terms of strict against free construction, verbal meaning against framers' intent, fixed against changing meaning. But when all is said and done on these issues, I think there is a further question: whether at some point judges rightly shift their interpretive focus outside the text altogether, as in my view they do when they decide cases like *Bolling v. Sharpe* or *Roe v. Wade*. In these cases, the text—even the text freely interpreted—seems to me to be no longer supplying the norms that guide

38. 347 U.S. 497 (1954). This case, which imposes the "anti-discrimination principle" of equal protection doctrine upon the federal government under the due process clause of the fifth amend-
decision. It is rather authorizing the courts to seek operative norms in extra-textual sources of law—perhaps the book of nature ("immutable principles of justice"), today more likely the social text ("evolving standards of decency," basic traditions, and the like).

Before coming to the political case for this view, I want to point out some of its additional heuristic advantages; these go beyond the historical connections it draws between current debates and the tradition of constitutional dispute going back to the Chase-Iredell exchange in *Calder*. The written-unwritten distinction also connects constitutional interpretation to other kinds of interpretation of authoritative texts, both in the law and beyond. When we apply this distinction to our constitutional disputes, we can see a pervasive structural feature that they share with other such controversies. This can give us a fresh perspective and some new argumentative resources.

The textualist-supplementer division appears, for example, in the discourse of scriptural interpretation. "Religions of the book" seem invariably to give rise to an opposition between textualists, who regard the sacred writings as the exclusive source of divine revelation, and supplementers, who treat unwritten traditions as an additional source. In Christian history, this phenomenon appears in the conflict between the Protestant doctrine of *sola scriptura*, "scripture alone," and the Catholic *scriptura et traditio*, "scripture plus tradition." Similar oppositions have arisen in connection with the Jewish and Islamic sacred writings. The tradition of constitution-worship makes Americans in a sense a "people of the book," like Christians, Jews and Moslems, and we gain a revealing perspective when we look at our constitutional debates against the framework provided by the long tradition of controversy over sources of revelation in scriptural interpretation. The point is not to apply the scriptural framework mechanically to constitutional disputes; rather we can learn practical lessons from both the similarities and the differences between scripture and constitution. Priests, prophets and believers are structurally parallel to but—given a secular conception of law and politics—importantly different from judges, politicians and citizens.39

The comparison of constitutional interpretation to scriptural exegetis illuminates certain important aspects of our practices, but it does so by stressing the aspects of the constitutional enterprise that set it at some remove from lawyers' ordinary activity with legal documents. And yet a

---

crucial argument for judicial review is the Constitution's claim to be a formal legal instrument, a writing of the kind lawyers and judges construe in the regular course of their work.⁴⁰ True, the Constitution is supposed to be our national sacred Book, the scripture of our civil religion; but at the same time it is a legal document like others. And it is the Constitution's status as a legal writing that is often said to make it subject to authoritative construction by judges, government officials whose primary training and experience is not in statesmanship, prophecy or political philosophy, but in the application of legal language to the resolution of disputes.

When we look at the conceptual framework used for ordinary legal interpretation, we find that the contrast between textualist and supplemental approaches is as pervasive as in the scriptural realm. For example, the so-called "parol evidence rule" generates opposing approaches, textualist and supplemental, that are structurally identical to those found in constitutional theory.

Stated in its most general terms, the parol evidence rule governs when and how a legal transaction expressed in writing may be supplemented by terms drawn from outside the document. Typically it applies to private law instruments such as wills, leases, deeds, and written contracts and trusts.⁴¹ Regarded as an evidentiary doctrine bearing on interpretation, the rule purports to exclude extrinsic evidence (particularly "parol" or oral evidence) of context that, if believed, would contradict or vary the terms of a transaction embodied in a written instrument. So read, the rule favors interpretation of writings strictly, for their plain meaning.

But modern commentators almost uniformly reject reading the parol evidence doctrine as an exclusionary rule governing the evidence to be used in interpreting a writing. They treat it rather as involving the substantive question whether a document embodying a legal transaction may properly be supplemented by unwritten terms. On this view, the doctrine does not directly speak to questions of evidence or interpretation at all. It comes into play only when the writing has been properly interpreted by the use of all relevant and otherwise proper evidence, "parol" or written. At that point, the rule protects the transaction as embodied in the (properly interpreted) writing against being "varied or contra-

⁴⁰ See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-78 (1803).
⁴¹ As my discussion aims to show, the general conceptual framework developed to deal with these subjects can in principle be extended to issues involving "public law writings," issues such as whether there may be common law crimes, a common law of anti-trust—or constitutional rights beyond those enumerated in the written constitution.
dicted” by extraneous or inconsistent terms. This may indeed involve
the exclusion of parol evidence—for example, testimony proffered to
show agreement on an oral term inconsistent with the provisions of an
integrated written contract. However, the evidence is excluded not
under any special exclusionary rule, but rather as irrelevant in light of
the already established exclusivity of the integrated writing.42

We see the substantive operation of the (misnamed) “parol evidence
rule” in modern contract law, which freely admits contextual evidence of
negotiations, prior dealings and the like, as an aid to interpretation. Only
when a writing has been interpreted to include an agreement to make
itself the exclusive expression of the entire contract, does the rule exclude
evidence introduced to establish independent unwritten terms.43

When we turn to parol evidence doctrine as applied to wills, we see
quite a different picture. Whereas unwritten contracts and contractual
terms are generally accepted, an undisputed governing axiom of the law
of succession is the textualist requirement that every valid term of a will
must be in writing.44 There is a fundamental similarity, though. With
wills as with contracts, a distinction is recognized between the two ques-
tions I have been insisting on keeping separate: first, are unwritten terms
allowed? and second, how freely are written terms to be interpreted?
From the undisputed requirement that every term of a will must be in
writing, it does not follow that the writing must be construed without
reference to (often unwritten) context. Textualism does not practically
or logically require a “plain meaning” rule governing interpretation, any
more than it requires an “originalist” approach that focuses on authorial
intention. The traditional approach to the interpretation of wills is quite
literalist, proclaiming that the interpreter is not to go outside the four
corners of the will unless an ambiguity appears on the face of the writing.
But more modern approaches receive evidence of context to challenge
apparent “plain meaning” as well as to resolve ambiguity. On the other
hand, the requirement that every term of the will must be in writing

42. A good summary version of the contemporary views on the problem of interpretation and
the parol evidence rule, with citation to the main authorities, is J. CALAMARI & J. PERILLO, CON-

43. A written contract may be also be a “partial integration,” which excludes inconsistent but
not additional terms. (Supplementers treat the Constitution as a “partial integration” in this sense.)

44. A very narrow exception is recognized in some jurisdictions for “nuncupative wills,” oral
testamentary declarations by dying persons. See generally T. ATKINSON, HANDBOOK OF THE LAW
OF WILLS 363-67 (1953). In contract law, the Statute of Frauds requires a writing as a precondition
to the validity of certain kinds of contracts, but the writing need only be a memorandum of the
contract, not its complete expression, so that once the evidentiary requirement of the writing has
been met, courts will recognize additional or inconsistent terms on the basis of the oral agreement of
the parties. J. CALAMARI & J. PERILLO, supra note 42, at 480-81.
continues to be universally recognized and quite strictly enforced.\footnote{On this point as on others, I have found illuminating the discussion in Langbein & Waggoner, \textit{Reformation of Wills on the Ground of Mistake}, 130 U. PA. L. REV. 521 (1982). Langbein and Waggoner argue that this aspect of the law of wills should be changed, so that as long as there is some written will, courts should be empowered to "reform" them, adding terms meant to be included but omitted by mistake. \textit{Id.} at 566-77.}

While the question whether unwritten terms should be allowed and the question how to interpret the written ones are distinct, they are not completely unrelated. The point behind the prohibition of unwritten wills would be undermined if certain very free notions of textual interpretation were allowed to prevail. The textualist prohibition of unwritten wills (or constitutions) needs to be reinforced by a requirement that the written terms must give some definite guidance.

Imagine a will whose words by themselves give no such guidance, for example, by providing only "Do what is right with my property." There might be extensive evidence about the testator's values and preferences, particularly concerning his property and the potential objects of his bounty, which would support a finding of what the testator would have wanted done. If a court were allowed to interpret the will in the light of all this evidence, characterized as interpretive "context" to the words, this would not be very different in substance from giving judicial effect to the inferred wishes of a decedent who had never executed a written will at all. Who doesn't want "what is right" done with his or her property at death? (What nation doesn't want its laws to be consistent with justice, fairness, the right?) In fact, any court would treat the will as void for indefiniteness, and the estate would pass by intestate succession—much as certain indefinite constitutional provisions, including the guarantee of republican government, are treated as nonjusticiable in constitutional law because they do not supply "judicially manageable standards."\footnote{An important difference, which suggests that our constitutional law is not really textualist in character, is that judicial enforcement of verbally vague provisions such as the equal protection clause is uncontroversial at least with respect to applications that contextual evidence shows their framers would have approved.}

The point is not that the process of ascertaining a testator's intentions from biographical evidence cannot be considered interpretation. A life or course of action has or can have meaning, and so it is a text-analogue, something interpretable. But inquiry into that meaning is not interpretation of a text in a sense that responds to the reasons the law requires certain arrangements to be reduced to writing. When we consider what these reasons might be, we can move toward a rough practical
sense of the limits that bound the process of genuinely textual interpretation in law.

The strict textualism of the law of wills is based on a strong preference for what might be called errors of formality over errors of informality. An error of formality occurs when someone wants to dispose of her estate in some substantively unobjectionable way, but this desire is not realized because she failed to reduce her wishes to a testamentary writing. An error of informality would occur, if oral wills were allowed, in those cases in which a genuine testamentary intention was wrongly determined to exist, by virtue of fraud or mistake, on the basis of informal evidence; or in which effect was given to an ill-considered intention that would have been changed had it been subjected to the "sober second thought" induced by the solemnity of writing.

Presumably the reason we do not allow informal wills is that, with respect to transmission at death, we picture errors of informality as likely to be frequent and costly, and errors of formality as rare and of tolerable cost. It is easy for someone to make an informal statement of testamentary intention without taking it seriously, one that she would regret if she had to think it over. Further, a potential beneficiary can easily manufacture such a statement; there is often a lot at stake, and the alleged declarant is not around to refute the testimony. On the other side, in the absence of a will, the law provides an alternative regime of intestate succession, an off-the-rack will substitute based on legal stereotypes of the social relations that most often shape testamentary plans. Where some claimed intended disposition is frustrated in favor of the intestate regime by the writing requirement, the losing beneficiary is likely to fall in the categories where suspicions of frivolity, spite and undue influence arise, while the winners will be "natural (i.e. customary) objects of bounty," surviving children and spouses. Any person whose considered intentions really do depart from the standard regime can easily formalize them; indeed most people with significant property would make a will whether or not the law required it. For reasons like these, the law requires wills to be in writing.47

The contract regime is quite different. By contrast to the textualist law of wills, its basic framework is supplemental; it stresses the legally binding quality of the "unwritten contract," the agreement rather than the writing. Thus a leading commentator describes as one of the "unas-

47. I have drawn on the excellent discussion of the policies behind the formality of the law of wills in Langbein, Substantial Compliance with the Wills Act, 88 Harv. L. Rev. 489, 490-503 (1975). Langbein argues for relaxing the degree of formality required, believing that the policy of effectuating the testator's actual intent should be given greater weight.
sailable rudiments" of contract doctrine the principle that a contractual writing is "not the contract but merely . . . evidence thereof."\textsuperscript{48} Some textualist elements, for example, the requirement of a written memorandum for certain contracts under the Statute of Frauds, survive in the face of this overall supplemental thrust. But the very fact that the law recognizes unwritten contracts puts these textualist elements under strain. Conceptually, at the root of every "written contract" is an (unwritten) agreement of the parties about what effect to give any writing; the more seriously this point is taken, the more difficult it becomes to enforce formalities in the face of demonstrated agreement, or to give exclusive force to the document in the process of determining the legally effective terms of the contract.

The main practical dispute about documentary exclusivity within contract law arises over the issue of how readily courts should infer from the existence of a "written contract" the legal conclusion that it excludes additional unwritten terms. Judges and commentators of the classical "Williston school" treat a contractual writing that looks complete on its face as creating a strong presumption that the writing is a complete integration, embodying the whole agreement. In the absence of specific evidence negating integrative intent, they then will exclude testimony tending to establish additional or inconsistent terms. By contrast, those of the modern "Corbin school" treat the question whether an apparent written contract is a complete integration as a question of fact about the intent of the parties, to be determined case by case. This approach would admit all evidence relevant to that question, which may include oral evidence of agreement on additional or inconsistent terms insofar as such evidence tends to negate integrative intent. Corbinians will also sometimes admit parol evidence of additional or inconsistent terms in the face of a "merger clause," which explicitly provides that the writing shall express the whole contract; in such cases, there still remains the issue whether the party who did not draft the writing knew of the clause and actually assented to it.\textsuperscript{49}

From this brief summary, we can assign a textualist tendency to Willistonians, and supplemental leanings to Corbinians. The difference

\textsuperscript{48} Murray, \textit{The Parol Evidence Process and Standardized Agreements under the Restatement (Second) of Contracts}, 123 U. Pa. L. Rev. 1342 (1975). If the writing departs from the intent of the parties, it is the intent that controls, and courts will grant the equitable remedy of "reforming" (that is, rewriting) the text of a written contract shown to misstate the terms of the underlying agreement, as a result, for instance, of a typing error. \textit{See Corbin on Contracts} 568-69 (one volume ed. 1952).

\textsuperscript{49} See the summary of the Williston-Corbin debate, with citations, in J. Calamari & J. Perillo, \textit{supra} note 42, at 79-85.
between them is over the same kind of issue involved in the debate over the unwritten constitution: How readily should one infer that a written document is the exclusive expression of the terms of a legal transaction or agreement? Here again, as with the law of wills, there is broad agreement that the question whether there are unwritten terms (the parol evidence problem) is separate from the question how to discern the meaning of the writing (the problem of interpretation). And yet here again, the two kinds of question intersect. The law of contracts treats the exclusivity of the writing as a matter subject to agreement by the parties. But any such agreement can only be established by external manifestations that require interpretation, and here traditional divisions between strict (relatively acontextual) and free (relatively contextual) approaches produce predictable disagreements. More often than not, free interpreters are likely to be Corbinians on the parol evidence question, while strict constructionists will typically be Willistonians.

The centrality of the unwritten agreement in contract law is based upon the notion that a contract is not typically an isolated transaction between strangers who share only what they make explicit. Rather most contracts are embedded in a web of social relations and shared tacit understandings; the contract takes its main content from these underlying relations as they are modified or sharpened for a particular transaction by negotiation and explicit agreement. This is the Corbinian view, and it bears clear analogy to the organic and social view of constitutional government held by those of us who subscribe to the slogan of the living constitution. The Willistonian approach, with its greater willingness to let the plain terms of a contractual writing override evidence that it does not express the actual understanding of the parties, places more stress on the separateness and mutual distrust of contracting persons, and hence emphasizes the explicit and the transactional as against the tacit and the relational aspects of contract. It bears natural kinship to the more Hobbesian views of the social order typically held by constitutional textualists.  

While the Willistonian approach to contract doctrine contrasts with the supplemental informality of the Corbinian approach, it falls short of the full textualist formality of the law of wills. An important difference between the testamentary and contractual situation is that the will modifies an underlying default regime of intestate succession, a regime that

already approximates widely shared views of how property should be distributed at death. The regime of wills is then conceived as an additional allowance for individual variation from the social construction. As such, it is readily conceived as “a privilege not a right,” legitimately to be given effect only when the testator turns the prescribed square corners. By contrast, the default regime upon a finding of no contract is not a socially designed scheme of allocation, but rather a reign of chance that lets losses lie where they fall.

The relation between the intestate regime and the terms of a will bears some analogy to the relation between the body of ordinary (statute and common) law on the one hand and the constitution on the other. Constitutional textualists always stress the strong presumptive legitimacy of “ordinary law,” which is conceived as made through, or readily alterable by, republican processes, and with “counter-majoritarian” constitutional restrictions bearing a heavy burden of justification. By contrast, supplementers resist the equation of democracy with “ordinary” law-making; we tend to think that while majoritarian legislative institutions are fundamental to democracy, they also create anti-democratic tendencies that courts are equipped to counter.

The analogies between private law and constitutional interpretation could be developed further, and much more could be said about the (very great) dissimilarities that have to be taken into account between wills and contracts on the one hand and written constitutions on the other. For now I will leave the topic, having made a point that I would summarize thus: In law, a written constitution might be treated either on the analogy of a will or a contractual writing, as in political theory a constitution can be seen either as the expressed Will of the Sovereign People or as the embodiment of the Social Contract; further, within the contractual frame of reference, competing “relational” and “transactional” conceptions of contract to some degree mirror the larger differences between will and contract.

The analogy of the will portrays the written constitution, the instrument submitted for ratification, as the sole limitation on the default re-

51. For example, consider the implications of the three-way comparison that might be made among (a) “living” or nonoriginalist approaches to constitutional interpretation, (b) the modification of charitable trusts under the judicial doctrine of cy pres, and (c) the doctrines governing modification of written contracts by the parties’ subsequent course of dealing.

52. One difference is that most contracts and wills are conceived as affecting only a few readily identifiable individuals or businesses, whereas the Constitution affects the whole society; another is that private law instruments like contracts and wills are conceived as having their legal force determined by a controlling body of law, while the Constitution is conceived as itself the primary source of fundamental law.
gime of ordinary law. It further presses forward a strong requirement that only the document's more definite terms are to be judicially enforced, supplying the requisite "judicially . . . manageable standards" for decision. By contrast, the analogy of the contract stresses that the Constitution's status as judicially enforceable higher law persists only by virtue of a continuing and necessarily unwritten social agreement to give it that authority. If the judges supply so crucial a term as this by interpretation of the social text, it is hard to condemn them as usurpers when they read the Constitution's warning not to "deny or disparage other rights retained by the people" as addressed to them. The ninth amendment tells us that the Constitution is not a complete integration; not only does it contain no merger clause, but it explicitly disavows its own exclusivity.

IV. STAYING CONNECTED: ORDINARY INTERPRETATION

Now finally let me turn to the political matters at the center of the debate over the unwritten constitution. The heuristic issue is how best to argue about the legitimacy of decisions like Roe v. Wade and Bolling v. Sharpe, decisions that do not follow from the text in any obvious or straightforward way. The related political issue is how easy we should make it for courts to justify decisions like these. We can assume that, other things being equal, the easier they are to justify the more of them we will have.

The question is not whether judges' basic values and ideas of justice should play any part in constitutional adjudication. Sensible supplementers and textualists should agree that judicial values can and inevitably do enter in, at least as part of the context of decision, part of the lens through which, or the background against which, a constitutional interpreter scrutinizes the text. How explicit the acceptance of such contextual factors should be is what is at stake in the debates between strict and free construction, debates that can take place between textualists.

The further question of the unwritten constitution arises when, as it seems to me happens in many cases, these extra-textual considerations stop being matters of context and become the focal object of interpretive scrutiny, the figure rather than the ground. This most obviously happens when the Court treats the words of the Constitution as essentially irrelevant to its decision, as, for example, in Roe and Bolling.

Many constitutional theorists, Professor Rapaczynski among them,

think that there is no good reason to go beyond the familiar questions of strict versus loose construction to deal with the issue whether we have an unwritten constitution. In their view, the Court makes a mistake whenever it signals that the text gives no real normative guidance toward the decision reached. Their point is that the range of possibilities within the notion of textual interpretation is broad enough to cover any defensible exercise of judicial review. They see decisions like Roe and Bolling as properly derived from the text of certain broad clauses, those guaranteeing liberty and due process—not, of course, just through the words' plain meaning, or the concrete intentions of their authors, but when they are read with an appropriately broad sense of context.\textsuperscript{54}

My main objection to this view is a simple minded one. The public idea of adjudication according to written law derives from the common experience of giving and following instructions in the form of shopping lists, notes for babysitters, memos from the boss, and the like. Instructions or agreements are typically fixed in writing to communicate definite content. This conception of “getting it in writing” underlies the special connection between the written character of American constitutions and their judicial enforceability; James Iredell long ago justified judicial review on the ground that a constitution is “not . . . a mere imaginary thing, about which ten thousand different opinions may be formed, but a written document to which all may have recourse.”\textsuperscript{55} Activist judicial review that proceeds without taking account of the popular view of the importance of writings lacks the consent of the governed.

This does not mean that textual interpretation must be narrow, crabbed, and wooden, some grim mixture of originalism and literalism, if it is to avoid deceiving the public. Even though the hermeneutics of everyday life begins with plain linguistic meaning on the one hand and speaker's or author's intent on the other, there is still room for a workable public understanding of the role of context in textual interpretation. In most contexts, a writer or speaker (henceforth “utterer”) is assumed to “mean what he says.” This is a defeasible presumption; everyone also understands that additional context may reveal an actual meaning that differs from the initially evident sense of an expression. Failure to look to the elements, verbal and non-verbal, surrounding the focal utterance is what gives rise to the familiar complaint against isolated utterances being “taken out of context.” The first role of context in interpretation is thus to correct or amplify plain meaning by reference to an utterer's intention.

\textsuperscript{54} See supra note 3.

\textsuperscript{55} 2 G. McRee, The Life and Correspondence of James Iredell 169 (1857).
Originalists hold that the context of utterance, by which we establish the original understanding, is the only context that should count in the process of constitutional interpretation. In my view this position becomes defensible only when it is qualified in such a way as to take away the constraining force that originalists mean it to have. The point is that part of the original understanding of some writings, those meant to be canonical texts, is a set of indefinite expectations about the future process of interpretation itself. The great advance made possible by the invention of writing was that verbal formulations could be consulted and used in a context remote from their original utterance. In a limited sense, this happens whenever a babysitter reads a parent's note or a shopper reads a spouse's list. But the kind of interpretation involved in limited situations like these can be reasonably well understood in terms of verbal meaning and utterer intent alone. It is only when a culture develops canonical texts, writings that are read, interpreted and applied across a wide range of spatial and temporal contexts, that additional factors enter the interpretive process in a really conspicuous way.

The immodest poet writes "Not marble, nor the gilded monuments / Of princes, shall outlive this powerful rhyme." Similarly, the politicians who frame a constitution intend it "to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." Writers projecting words into an indefinite future in this way foresee and expect that they will be read, and reasonably read, in ways that fit neither the words' plain meaning at the moment of utterance, nor the writers' own immediate concrete intentions.

We might fold projective expectations such as these into the idea of authorial intention. But once this is done, originalism no longer strongly constrains future interpreters. For purposes of clarity, I think it is better to confine the concept of "context of utterance" to the factors consulted by strict originalists, and treat the factors affecting textual meaning that come to bear after the moment of original utterance as collectively constituting the "context of application." The distinction between utterance and application stresses the point that textual interpretation is a joint activity, to which author, reader and text all contribute. (This of course is true, though less conspicuously so, with interpretation of more ordinary writings, and indeed with conversations.)

What are the factors that make up a text's context of application? In the first place, words change even their "plain meaning" over time with

56. W. Shakespeare, Sonnet No. 55.
changes in patterns of general usage. But as a practical matter this factor is more often a source of correctable interpretive mistakes than of genuine changes in the meaning of texts. Much more important are changing political situations and audience expectations for texts intended to be used to govern, such as laws, and to enlighten or entertain, such as literary and theatrical works; the readings that best serve these purposes will themselves change with these circumstances, as any author must expect. Finally, a legal or literary text that achieves significance gathers a history of application and interpretation which inevitably affects its meaning for later interpreters. It was James Madison who said, speaking of the Constitution, that "all new laws" are "more or less obscure until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." 58

These points resonate with the experience of those who, like actors, preachers and lawyers, work regularly with much-interpreted and long-lived writings. But most people deal mainly with writings that are not canonical texts, but rather are like the note for the babysitter, the shopping list, or the boss' memo. In interpreting everyday writings like these, the elements constituting the context of application play relatively little role. This fact helps to explain the perennial popular appeal of simple originalist doctrines of legal interpretation—the populace to which these doctrines appeal makes the natural though false assumption that laws are not canonical texts, but ordinary written communications. (This imposes some responsibility on legal writers who know better; they should not exploit the misunderstanding of the process of textual interpretation that arises, inevitably, out of everyday experience.)

But the more complex idea of interpretation as a collaboration between author and reader, involving context of application as well as plain meaning and context of utterance, is by no means completely remote from ordinary life. Everyone, not just the lawyer or the literary scholar, recognizes that an interpretation has something about it of the subjective, something contributed by the interpreter, not simply read off from the page or inferred from evidence of the author's state of mind. "That's your interpretation," we say; or "I want facts, not interpretation." Locutions like these reveal our working sense of interpretation as an activity mediating between invention and discovery.

So I believe that even interpretation in the narrow sense, the treatment of the written constitution as a legal rule-book, can take into account context beyond the original understanding, including the past

interpretation of the text and the present and imagined future exigencies conditioning its use. One can be a textualist without being an originalist. Nevertheless, for interpretation to be genuinely textual in nature, primary focus must remain on the words; extrinsic factors must remain contextual. When the interpretive focus shifts from the text to the practice generated by it, as in my view it clearly does in substantive due process cases, and no doubt with other constitutional provisions under which an essentially autonomous body of case law has developed, lawyers and commentators should not try to convince the public that judges are getting the basic normative content of their decisions from the text. Supplementing the written constitution is something more than reading it in context.

We should portray the process of decision in these cases as the continued judicial development of an unwritten, common law constitution. This links constitutional adjudication to the past in a way that offers legitimate comfort rather than false nostalgia, for ours is indeed a common law legal and constitutional tradition. This way of portraying the constitutional case law connects the professional practice of judges and commentators more closely to the common understanding. At least it can connect to the understanding of the kind of citizenry—open, informed, concerned, willing to listen—that tradition insists is necessary for republican government.

When we connect governmental processes to common understandings in this way, we take a step in the direction of making government less opaque, and hence toward pulling elites and masses together into a genuine public. The concept of the unwritten constitution can supply a modest nudge toward achieving or restoring this connection; this is a virtue additional to the pedagogic connections it makes when it links both the constitutional present to the past, and constitutional interpretive disputes to the more general hermeneutics of authoritative texts.

Against the heuristic and long-run political advantages of framing debate in terms of an unwritten constitution, we must consider certain short-run political disadvantages suggested by Professor Rapaczynski. Perhaps talk of an unwritten constitution too much burdens the efforts of judges to continue the good judicial work of the last two generations, work that has on the whole improved the quality of American public life. No doubt there is some such burdening. For example, the theme of the

59. I have been influenced in my formulation here by J. DEWEY, THE PUBLIC AND ITS PROBLEMS (1927), especially chapter five, "Search for the Great Community," and by the discussion of the requirement of "publicity" in J. RAWLS, A THEORY OF JUSTICE 175-83 (1971).
unwritten constitution connects *Lochner v. New York*, the most famously unpopular case involving unenumerated rights, both to *Roe v. Wade* and to hopes for overruling *Bowers v. Hardwick*; this connection cannot in the short run contribute to *Roe*’s survival or *Hardwick*’s demise. If constitutional theory must be result-oriented, in the sense that part of its justification is its contribution to good government, then why should someone who thinks *Roe* a good and *Hardwick* a bad decision, promote a theory that aids opponents to drape unhappy Lochnerian connotations over desired results?

Let me conclude by offering three answers to that question, answers flowing out of the pragmatic conception of constitutional theory that I articulated at the beginning. The first deals with the “result-oriented” difficulty just posed in its own short-run terms. Pragmatism gets what bad name it has for overvaluing considerations of expediency and short run advantage. Real pragmatists try to give the short run its due, but no more; we know that in the long run we all are dead, but also that our descendants will then be alive, and our interest in them is a genuinely practical one. So let me first give the political short run its due, retiring into the caucus room to address myself to my fellow supporters of “liberal judicial activism,” post-1937 variety.

I accept that talk of an unwritten constitution does make judicial activism somewhat harder to justify to a doubting public that is subject to literalist and originalist appeals; people would object less to our favorite activist decisions if we could convince them that those decisions emerged from a straightforward reading of the constitutional text. My question is how confident we can be that judicial activism over the next generation will have the same political direction it has over the last two: the interpretation of the Constitution in the light of a democratic, egalitarian, citizenship-broadening conception of liberalism.

There is now available a contrasting vision of constitutionalism, promoting an alternative brand of activism, which treats democratic politics as a Prisoner’s Dilemma, and proposes to cure its defects by prohibiting wasteful redistributive “rent-seeking” legislation in the name of rights of property and contract. A few more right-wing victories in important elections and we will have a judiciary ready for the vigorous pursuit of that vision.

Post-New Deal liberals can argue against this right-wing constitu-

---

tional vision on the ground that it gives a bad version of our *unwritten* constitution, one grossly inconsistent with our present best aspirations for the American future. Or we can confine ourselves to an interpretive debate within the terms of the *written* constitution, a constitution that was written by men who did regard private property rights as sacred, and redistributive democratic excesses as a primary threat to republican forms of government. Of course we are not bound to any narrowly originalist approach to interpretation in debate about the text, but any approach that confines itself to the text as the exclusive source of constitutional rights is handicapped in debating against libertarian activist constitutionalism.

Now let me pass to a second "result-oriented" defense of the unwritten constitution; this is one that I can make outside the liberal caucus room. The job of the constitutional theorist is not just to promote a cause in the short run, but to try to frame debate in such a way that all can take part on reasonably fair terms. The theorist's or commentator's objectivity, by contrast to the position of an advocate, consists in a willingness to temper the pursuit of immediate results by concern for the health of the continuing debate, not in some impossible aperspectivity or point-of-view-lessness. This commitment is itself "result-oriented," in the sense that it takes the flourishing of the process of debate itself as a "good result."

Thinking in these terms, I believe that the proposal to debate the current constitutional agenda in terms of whether there should be an unwritten constitution, and if so what its content should be, offers a fair deal to constitutional conservatives. It invites them to move away from the sterile and demagogic formulations of strict originalism, formulations we may hope will go back on the shelf after their failure with the public in the Bork confirmation debate. In return, it gives them a reasonable chance to get their real arguments to the public audience for constitutional controversy. Those on the right who favor judicial restraint can identify themselves as textualists, and attack the legitimacy of the unwritten constitution; they have a lot on their side, including the bogey of *Lochner* and the public's natural and healthy suspicions of lawyers' fancy tricks. (Liberals who fear that they cannot win this argument should remember the Bork nomination debate itself, and the politically effective use opponents made of the ninth amendment in the debates over privacy.)

Those others on the right who favor an activist libertarian constitution can join the liberal establishment for the part of the debate that engages the conservative textualist proponents of restraint. They must then
turn to argue with the liberals over the relative attractiveness of the libertarian and the democratic-egalitarian visions of the American future, which is where the real conflict lies between them. Tradition has its important place in constitutional debate, but ultimately it is upon hopes and fears about the future that any serious choice between constitutional visions must turn.

My third and last pragmatic defense of the unwritten constitution accepts the partial handicap it places on liberal judicial activism as appropriate, not just because liberal oxen can be gored by right-wing activist judges, or because we need a reasonable framework within which to debate our disagreements with our opponents, but in the name of republican ideals. In my own picture of the ideal republic, very little of the basic public business would be in the hands of elderly men in black robes who work in marble palaces and hand down decrees from high benches. Much more of that business would be conducted by ordinary citizens discussing and arguing with each other, relying on experts and specialists only where expertise is genuine and specialization necessary. Basic decisions about public morality and justice would not be a specialized or expert matter.

Movement toward this ideal depends on the infusion of a greater degree of public spirit into ordinary politics. Libertarian or “public choice” constitutionalism is founded on the theory that government must be designed as if no one ever acted from public spirit. I doubt that republican government can work at all without some element of disinterested cooperation, and as a pragmatist I would like to hedge my bets on how far this can be achieved, and what is likely to promote it further.

Right now, one of the institutional forces that tends to raise the level of public spirit is still the liberal activist judiciary, or what is left of it. The judges advance this cause when they promote achievement of a working ideal of full and effective citizenship for those who have not realistically had that status, including among others persons of color, women, the poor, and unpopular sexual and religious minorities. Only citizens all of whom are genuinely independent and self-respecting can trust each other enough to cooperate effectively in republican self-government. The goal of effective equal citizenship for those left out of the Constitution’s full protection at the beginning, and not yet brought in by formal amendment, has led judges to construct from the evolving democratic ethos of this country our present unwritten constitution.

I am all in favor of the judges continuing to play that role—at least for the middle-run future. On the other hand, I would like them to do so
on the basis of an account of their job that sustains the long-run republican vision, and reminds us that an activist judiciary is a second-best solution, something we would like to be able to do without. If we think of ourselves as having an unwritten constitution whose success depends on the good judgment of judges in discerning and articulating our basic principles, that may help us to keep both points in mind.