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## Soundings and Silences

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# SOUNDINGS AND SILENCES

Laurence H. Tribe\*

## INTRODUCTION

It was 1964. I was in my second year of law school when Simon and Garfunkel released the early version of their first and maybe greatest musical masterpiece, “The Sounds of Silence,” a commercial failure that temporarily broke the duo apart until the piece was remixed in 1965 and re-released in 1966.<sup>1</sup> As revised, it has had a lasting legacy as art. And it quickly became my favorite song from the 1960s. As the song’s own lyrics put it,

a vision softly creeping  
Left its seeds while I was sleeping  
And the vision that was planted in my brain  
Still remains  
Within the sound of silence.<sup>2</sup>

I still recall how those lyrics echoed in my mind during a class I was taking in the Fall of 1965 called *Advanced Constitutional Law* taught by the former Solicitor General and Watergate Special Prosecutor, Professor Archibald Cox. The professor came into the classroom carrying the slip opinion the Supreme Court had released that June in the now-famous case of *Griswold v. Connecticut*, which held that a married couple’s use of contraceptives to enjoy sex without risking pregnancy could not be made a crime.<sup>3</sup> The right of reproductive freedom, later extended to unmarried individuals<sup>4</sup> and eventually extended from contraception to abortion,<sup>5</sup> hadn’t been mentioned in the Constitution. But the Court’s majority had

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\* Carl M. Loeb University Professor and Professor of Constitutional Law, Harvard Law School. I am grateful to my colleague, Vicki Jackson, for her helpful comments on a previous draft of this essay. I would also like to thank Colin Doyle, Cary Glynn, Alexander Loomis, and Alice Wang for their outstanding editing and research assistance.

1. Geoffrey Himes, *How “The Sound of Silence” Became a Surprise Hit*, SMITHSONIAN, (Jan. 2016), <http://www.smithsonianmag.com/arts-culture/sound-silence-surprise-hit-180957672/?no-ist> [https://perma.cc/LEZ3-LTF7].

2. SIMON AND GARFUNKEL, *The Sounds of Silence*, on WEDNESDAY MORNING, 3 A.M. (Columbia Records 1964).

3. 381 U.S. 479 (1965).

4. *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972).

5. *Roe v. Wade*, 410 U.S. 113, 165–66 (1973).

concluded it was there just the same: the Constitution's silence on the subject wasn't to be construed as denying constitutional protection to "a right of privacy older than the Bill of Rights."<sup>6</sup>

I didn't know it at the time, but that same vision would come to structure much of what I learned and have since taught about the law. During my clerkship for Justice Potter Stewart in 1967–68, for example, I was proud to have had an opportunity to play a role in the Supreme Court's holding, in a case called *Katz v. United States*,<sup>7</sup> that electronically eavesdropping on phone conversations that someone expected would not be overheard by Big Brother constituted a "search or seizure" within the meaning of the Fourth Amendment's ban on "unreasonable searches and seizures."<sup>8</sup> The Court's justification for this landmark holding was that, although government agents had not physically trespassed on or into any property occupied by the person on whom it was spying, the Constitution "protects people, not places,"<sup>9</sup> and the government's electronic overhearing and recording of the defendant's conversations conflicted with his justifiable "expectation of privacy."<sup>10</sup>

The Fourth Amendment, as Justice Hugo Black insisted in dissent, was *silent* with respect to eavesdropping, whether by private citizens or by government agents.<sup>11</sup> And the Framers had certainly been well aware of the practice of government eavesdropping when the Bill of Rights was drafted in 1789 and ratified in 1791<sup>12</sup> (although they of course had no idea that *electronic* eavesdropping might someday be possible). Moreover, as Justice Black emphasized, the *entire Constitution* was silent with respect to a right of "privacy."<sup>13</sup> The majority's response, in the opinion I helped draft, was that *implicit* in the Constitution was a right to expect that certain conversations would indeed remain private, even if the government made it known that it might be listening in. To reach that conclusion, the majority necessarily

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6. *Griswold*, 381 U.S. at 486.

7. 389 U.S. 347 (1967).

8. *Katz*, 389 U.S. at 353, 369. Almost forty years earlier, the Court had handed down *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled in part by Katz*, 389 U.S. at 352–53, which held that the government could violate the Fourth Amendment only by trespassing on people's property. In *Katz*, the Court was going to vote 4-4 (with Justice Marshall recusing himself) to leave standing the decision below, which had relied on *Olmstead*, but the arguments I made helped persuade Justice Stewart to adopt changed the result to a 7-1 ruling in the other direction. Stephen Reinhardt, *Tribute to Professor Laurence Tribe*, 42 TULSA L. REV. 939, 940–41 (2007).

9. *Katz*, 389 U.S. at 351.

10. *Id.* at 361 (Harlan, J., concurring).

11. *See id.* at 365–66 (Black, J., dissenting).

12. *Id.* at 366 (Black, J., dissenting).

13. *Id.* at 373–74 (Black, J., dissenting).

looked outside the four corners of the Fourth Amendment's text to formulate what it deemed a tacit postulate of the freedom of expression, a freedom expressly protected by the First Amendment. As the Court saw it, the *system of free expression* could not survive the chilling effect that would result from requiring all phone users to assume that they might be broadcasting their words to the uninvited ears of the FBI just because they hadn't taken measures to block out the uninvited eyes of passersby.<sup>14</sup> The fact that the defendant in *Katz* made his call from inside a glass telephone booth was not dispositive of his right to informational privacy against the government.<sup>15</sup>

It would be a stretch to attribute that treatment of the Constitution's silence with respect to informational privacy to the song Paul Simon had written a few years earlier. But that song played in my mind's eye, and I must say that Justice Stewart was a Simon and Garfunkel fan as well.

Flash forward a dozen years or so to the first edition of the treatise I published in 1978, entitled *American Constitutional Law*.<sup>16</sup> That book's final chapter, entitled "The Problem of State Action," grappled with one of the most perplexing aspects in the law of the U.S. Constitution: its character as a body of law addressing not ordinary private conduct but only *government conduct*.<sup>17</sup> Because government is responsible not only for the discrete acts of public officials and agents acting on its authority but also for the body of laws and rules promulgated by government, it follows that the law of the Constitution is a kind of *meta-law*.<sup>18</sup> Among its rules are some that address the things that government actors have an affirmative constitutional obligation to do, so that many instances of what might be regarded as *government inaction* pose troubling constitutional questions.<sup>19</sup>

But to prevent the Constitution from becoming just another ordinary law—and to create breathing space for choices that government is either constitutionally obliged or at least free to permit or prohibit as it sees fit—the

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14. *Id.* at 352.

15. *Id.*

16. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1st ed. 1978).

17. *Id.* at 1147.

18. See Laurence H. Tribe, Essay, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, (1989).

19. See, e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 766–68 (2005) (holding that a woman did not have a property interest under the Due Process Clause in the town's enforcement of her restraining order against her estranged husband, who later killed their three children); *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 194–97 (1989) (holding that the Due Process Clause does not impose affirmative obligations on local officials to protect an infant from his abusive father, even after local officials receive reports of possible abuse).

Supreme Court has generally interpreted constitutional provisions as having nothing at all to say about *non*-governmental choices. That is so even if those constitutional provisions (like the Eighth Amendment’s ban on “cruel and unusual punishments”<sup>20</sup>) whose text does not expressly *say* they are limited to the acts of some level of government—in contrast with, for example, the First Amendment<sup>21</sup> and the Fourteenth,<sup>22</sup> which are limited by their very terms to government action. One might accordingly say that the constitutional principle limiting the Constitution’s reach to “state action” is an unwritten command derived from the Constitution as a whole—a command that the Court has essentially “heard” in the sounds of constitutional silence.

So, for example, however cruel and extraordinary a parent’s punishment of a supposedly misbehaving child might be, even a parent clearly guilty of child abuse in violation of state or local law could not be deemed to have violated the Eighth Amendment’s prohibition against inflicting “cruel and unusual punishments”—despite the fact that the Amendment is literally silent as to whether its prohibition restricts only government actors. So too a terrorist guilty of mass murder in violation of federal law would not have deprived anyone of life “without due process of law,” which the Fifth Amendment requires the Federal Government to provide before it executes someone. And that is the case even though the Fifth Amendment’s text, unlike that of the Fourteenth, contains no explicit limitation on government action.<sup>23</sup>

Of course, even though the Fourteenth Amendment by its terms prevents only *states* from depriving people of life (or liberty or property) without due process of law and bans only *state* deprivation of “the equal protection of the laws,”<sup>24</sup> it would be entirely possible and indeed proper to hold a state government that knowingly permits the beating or killing of an individual while looking the other way responsible for indirectly depriving that person of life or liberty without “due process of law,” in violation of the Fourteenth Amendment.<sup>25</sup> And if the practice of looking the other way targets members of a racial or religious minority, then that selective

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20. U.S. CONST. amend. VIII.

21. U.S. CONST. amend. I.

22. U.S. CONST. amend. XIV.

23. U.S. CONST. amend. V.

24. U.S. CONST. amend. XIV.

25. *Cf.* TRIBE, *supra* note 16, at 8–12 (discussing the dissents in *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 203–213 (1989)).

“inaction” by a state could well amount to a denial of equal protection of the laws.<sup>26</sup>

Developing and understanding the constitutional doctrines that determine when the requisite “state action” is present and when it is absent turns out to be particularly challenging. My treatise ended by summing up the final chapter—the one analyzing those doctrines—as a chapter about “what we do not want particular constitutional provisions to control.”<sup>27</sup> And I closed the book with the question: “[I]s it not fitting that a book about the Constitution should close by studying what the Constitution is not about?”<sup>28</sup>

Needless to say, there are plenty of things besides private action that the Constitution is “not about.” As Chief Justice John Marshall emphasized in *Marbury v. Madison*,<sup>29</sup> decided in 1803, the Constitution is *not* about what Marshall called purely discretionary choices left to the political branches,<sup>30</sup> like the president’s choice of whom to nominate to the Court<sup>31</sup> or Congress’s choice of how best to regulate interstate or foreign commerce, or whether to facilitate commercial and fiscal activity by chartering a national bank.<sup>32</sup>

The Constitution *is* about certain *limits* on permissible political choices. Sometimes, the Supreme Court holds that a particular constitutional limit has been exceeded—as it held in *Marbury* with respect to Congress’s attempt to expand the Court’s own jurisdiction beyond the limits set by Article III.<sup>33</sup> In doing so, the Court exercises a power of “judicial review” that *Marbury* proclaimed was part, even if a silent part, of the entire constitutional plan.<sup>34</sup>

But many of the most important Supreme Court decisions take the form of holding that a particular limit either has not been exceeded or, more fundamentally, that the asserted limit is *not* in fact part of the Constitution at all. The holding of Marshall’s 1819 opinion in *McCulloch v. Maryland*,<sup>35</sup> for instance, was that—unlike the Articles of Confederation, which had limited federal authority to the powers the Articles “expressly delegated” to the

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26. See *DeShaney*, 489 U.S. at 197 n.3 (“The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.”) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

27. TRIBE, *supra* note 16, at 1174.

28. *Id.*

29. 5 U.S. (1 Cranch) 137 (1803).

30. *Marbury*, 5 U.S. (1 Cranch) at 170.

31. See *id.* at 167.

32. *McCulloch v. Maryland*, 17 U.S. 316, 422–23 (1819).

33. *Id.* at 175–76.

34. See *id.* at 179–80.

35. 17 U.S. (4 Wheat.) 316 (1819).

national government<sup>36</sup>—the 1787 Constitution, in deliberately *omitting* the word “expressly,” entrusted to the national government certain unenumerated powers reasonably related to its delegated missions of regulating commerce and the like.<sup>37</sup> In upholding congressional power to charter a national bank in *McCulloch*, Marshall thus heard a message in the sound of silence that he detected when comparing the Constitution with the Articles that had preceded it.

As students of American constitutional history know well, there was a period from the late 19<sup>th</sup> century until 1937 during which the Supreme Court heard a very different message, one less tolerant of centralized federal power and more protective of so-called “states’ rights.”<sup>38</sup> When the Court in 1918 struck down congressional legislation banning the interstate shipment of the products of child labor, for instance, in *Hammer v. Dagenhart*,<sup>39</sup> it went so far as to reinsert the key word “expressly” into its stingier summary of national legislative power!<sup>40</sup>

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The point of this largely autobiographical introduction is to motivate the discussion that follows by setting out some concrete examples of what I mean by “constitutional silence” and how it pervades all of constitutional law.

It is a commonplace that much of what our Supreme Court does involves filling in the “great silences of the Constitution,” as Justice Robert Jackson put it when striking down the protectionist dairy regulation that New York State enacted without congressional authorization in 1949 in *H.P. Hood & Sons, Inc. v. Du Mond*.<sup>41</sup> That decision was one of many implementing what has come to be called the “dormant Commerce Clause,” a set of unwritten constitutional principles limiting state commercial regulation in the face of congressional silence coupled with the Constitution’s delegation to Congress of the power to regulate interstate commerce.<sup>42</sup> Although the silence of the Constitution’s text with respect to such state regulation has not been construed to forbid or abolish it altogether, it has been understood to limit it considerably. Alexander

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36. ARTICLES OF CONFEDERATION of 1781, art. II.

37. See *McCulloch*, 17 U.S. (4 Wheat.) at 406.

38. See generally Robert L. Stern, *The Commerce Clause and the National Economy, 1933–1946*, 59 HARV. L. REV. 645 (1946).

39. 247 U.S. 251 (1918) (*overruled by* United States v. Darby, 312 U.S. 100 (1941)).

40. *Hammer*, 247 U.S. at 275.

41. 336 U.S. 525, 535 (1949).

42. See 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1029–43 (3d ed. 2000).

Hamilton's *Federalist* 83, dedicated to the relationship between the state and federal courts in the plan of the new Constitution, spoke of such limiting silences, noting "the wide difference between *silence* and *abolition*."<sup>43</sup>

What may be more commonplace is the proposition that constitutional silences, like silences of other kinds, aren't just occasional gaps or omissions in an otherwise-seamless design. They're everywhere and come in as many flavors and varieties as sounds. Ambiguity and multiplicity of meanings are in a sense manifestations of silence. There are as many reasons to be silent as there are to speak, and as many ways to hear meaning in the sounds of silence.

But *words* are partly silent too. In his book *Gardens: An Essay on the Human Condition*, Robert Pogue Harrison recalls the portion of *Phaedrus* in which Socrates compares the obvious silence of paintings to the subtler silence of written words.<sup>44</sup> Socrates says "you might suppose that they understand what they are saying, but if you ask [written words] what they mean by anything they simply return the same answer over and over again."<sup>45</sup> Every sentence, every phrase, is in part silent with respect to how a reader or listener is to go about attributing meaning to it—how narrowly or literally it is to be taken; what significance is to be attributed to what it excludes along with what it includes; how its context, both elsewhere in the same text and in preceding and comparable texts, ought to figure in what it conveys.<sup>46</sup>

Two Supreme Court decisions, *Bush v. Gore*<sup>47</sup> in 2000 and *Arizona State Legislature v. Arizona Independent Redistricting Commission*<sup>48</sup> in 2015, both decided by the narrowest of margins, dramatically illustrate the enormous leeway Justices perceive in the answers they hear when they ask either somewhat general language, like "equal protection of the laws," or seemingly specific terms, like "the Legislature" of "each State," what those words, in Socrates's terms, "mean" to be communicating.

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43. THE FEDERALIST NO. 83, at 441 (Alexander Hamilton) (J.R. Pole ed., 2005).

44. ROBERT POGUE HARRISON, GARDENS: AN ESSAY ON THE HUMAN CONDITION 61 (2008).

45. *Id.* (quoting PLATO, PHAEDRUS AND THE SEVENTH AND EIGHTH LETTERS 97 (Walter Hamilton trans., 1973)).

46. See 2 THE COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 135 (Charles Hartshorne & Paul Weiss eds., 4th prt. 1978) ("A sign, or *representamen*, is something which stands to somebody for something in some respect or capacity").

47. 531 U.S. 98 (2000).

48. 135 S. Ct. 2652 (2015).



In *Bush*, a case in which I played the role of an advocate,<sup>49</sup> the key concurring opinion by then-Chief Justice Rehnquist understood the word “Legislature” (as applied to Florida) to convey a single federal meaning.<sup>50</sup> The Chief deemed this meaning independent of the Florida Supreme Court’s holding that the State’s Constitution must be consulted in order to decide *what the Florida Legislature must be understood to have prescribed* as the State’s method for selecting presidential electors.<sup>51</sup> The four justices dissenting on that basic point would have held, I think rightly, that it is up to each State to decide in its own constitution (subject only to federal constitutional protections for the State’s residents) not only how that State’s “Legislature” is to be composed but also what counts as a permissible method for that “Legislature” to “appoint . . . Electors” for purposes of casting that State’s votes in the Electoral College.<sup>52</sup>

In *Arizona Legislature*, the majority opinion by Justice Ginsburg understood the word “Legislature” (as applied to Arizona) to encompass the State’s entire electorate, voting in a statewide referendum.<sup>53</sup> This interpretation led to the conclusion that Arizona had complied with the Constitution’s requirement that each State’s “Legislature” make legislative apportionment decisions by adopting in that State’s constitution a referendum mechanism for delegating that lawmaking power to the people as a whole.<sup>54</sup> Appealing as I found the majority’s idea that a State’s constitution could provide that its electorate would share lawmaking authority on equal footing with the State’s Legislature—an approach that creatively addressed the problem of partisan gerrymandering by an incumbent-protecting legislative body—I found the dissenting opinions of Chief Justice Roberts,<sup>55</sup> joined by Justices Scalia, Thomas, and Alito, and of Justice Scalia,<sup>56</sup> joined by Justice Thomas, difficult to fault analytically.

Whatever conclusion one reaches in such cases, the important lesson I draw from them for purposes of an inquiry into silence is that we should beware of “hearing” silences where nearly all readers, setting aside how they would *like* a particular controversy to end, identify determinative text that fills up the relevant field. “The heart has its reasons,” as Pascal famously said,

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49. See Laurence H. Tribe, *eroG .v hsuB and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170 (2001).

50. *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring).

51. Compare *id.* at 115, with *Gore v. Harris*, 772 So. 2d 1243, 1254 (Fla.), *rev’d sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

52. *Bush*, 531 U.S. at 123 (Stevens, J., dissenting).

53. *Ariz. Legislature*, 135 S. Ct. at 2671.

54. *Id.*

55. *Id.* at 2677–94 (Roberts, C.J., dissenting).

56. *Id.* at 2694–99 (Scalia, J., dissenting).

“that reason does not know.” Good enough. And those heartfelt reasons deserve a hearing. But when they defy reason, the meaning of living by the rule of law is that reason should prevail.

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My work over the years has included both studying existing constitutions, particularly that of the United States, and assisting others with the drafting of new constitutions—from the Marshall Islands to the Czech Republic to South Africa. Among the things I noticed was that those undertakings, although distinct, were related—and related most significantly in the way that formative decisions about *what to say and what not to say* in a new constitution have bearing on later decisions about *how to interpret* what a constitution says or fails to say.

My decision to pay special attention to the various roles of silence in the distinct but related projects of constitution-making and constitution-interpreting<sup>57</sup> was underscored by an observation a law student of mine (Louis Fisher, J.D. 2016) once made about how he had been struck by the “presence of absence” in Berlin’s modern urban landscape. My student was moved by the way Berlin harnessed the “power of negative space in framing the public memory of World War II, from skeletal monuments outlining former churches to negative-space sculptures of murdered Jewish families.”

I was born in Shanghai to Russian Jewish refugees, many of whose closest relatives had perished in the pogroms of Russia or had been silenced in the ultimate sense at the hands of the Nazis. That made this image of absence particularly vivid and meaningful to me. As I look back at where I came from and what I’ve done over the course of my professional life, it strikes me that attempting to organize and give structure to the study of legal silence has been a primary purpose of much of what I have written and taught over the past half-century. In recent years, I decided to focus more systematically on that attempt in an advanced seminar I have been teaching at Harvard Law School and, to a lesser degree, in courses I have taught as a University Professor to Harvard College undergraduates. This paper is an outgrowth of that effort—an outline of how I hope to pursue it in the years that remain, and how I hope others will pursue it as well.

#### I. DOOR-CLOSING SILENCES V. DOOR-OPENING SILENCES

The introduction to this paper discussed both (1) the absence of the qualifying word “expressly” from the description of the powers “delegated”

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57. See generally Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193 (2015).

to the national government in the 1787 Constitution, and (2) the absence of any reference to nontrespassory “eavesdropping,” whether aided or unaided by technology, from the Fourth Amendment’s ban on “unreasonable searches and seizures.” Both were offered as examples of constitutional silences that have required interpretation by the Supreme Court.

The difference between those two silences is at least as important as the similarities. The Court in *McCulloch* treated the first silence as strongly suggestive of a *binding decision* in the Constitution to entrust the U.S. Government—in that case, the newly established Congress—with less tightly constrained powers vis-à-vis the States than the unsuccessful Articles of Confederation had entrusted to the Continental Congress.<sup>58</sup>

That silence, understood in light of what Chief Justice Marshall argued were the purposes of the Constitution, *closed* the door to a decentralizing approach that had been deemed inadequate at the Constitution’s founding. When the Court in *Hammer* later *reopened* that door by essentially *reinserting a constraining term that had been deliberately erased*, it did so without any persuasive argument that changed circumstances (or a better understanding of our founding history) justified the turnabout.<sup>59</sup> That step simply substituted the constitutional vision of the justices who sat in 1918 for that reflected in the 1787 Constitution as ratified in 1789. The fact that this substitution, and the dramatically narrower view of national authority it represented, lasted for less than half a century and was announced more as an ipse dixit than with a plausible explanation doesn’t in itself prove that the majority in 1918 was wrong. It does, however, reinforce a conclusion that that era’s attempted reversal of the trajectory on which the founding generation set the nation was misguided.<sup>60</sup>

The Court in *Katz* treated the Constitution’s silence with respect to electronic eavesdropping as reflective of *no decision either way* on whether a requirement of reasonableness (and a presumption that the absence of a

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58. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819).

59. *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (*overruled by United States v. Darby*, 312 U.S. 100 (1941)).

60. The period from the 1890s to 1937, when the *Hammer v. Dagenhart* era came to an abrupt end with the decision in *West Coast Hotel v. Parrish*, 300 U.S. 379, 395 (1937) (upholding a state’s minimum wage law), is often described as the “*Lochner* era,” named after the 1905 decision in *Lochner v. New York*, 198 U.S. 45, 62 (1905) (striking down a state’s maximum hours law). The complex jurisprudential currents—and the politics of judicial appointments—that led to the simultaneous turnaround in the narrow vision of both *congressional* economic power (a shift usually associated with the decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 (1937) (upholding key provisions of the National Labor Relations Act), and *state* economic power during that roughly half-century-long era is beyond the scope of this paper. For competing views on this period of doctrinal history, compare EDWARD S. CORWIN, *THE COMMERCE POWER VERSUS STATES RIGHTS* (1936), with RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004).

warrant normally triggers a conclusion of unreasonableness) should be imposed on invisible privacy intrusions—intrusions involving no tangible entrance into a physical area occupied by the target of the government’s surveillance.<sup>61</sup> Government eavesdropping of the only kind that would have been possible in 1789–91 may well have been thought at the time of the Framing, as Justice Black’s dissent insisted, to fall entirely outside the category of banned government intrusions into the “right of the people to be secure in their persons, houses, papers, and effects”—the right that the Fourth Amendment expressly protects from “unreasonable searches and seizures.”<sup>62</sup> As the dissent said, citing Blackstone’s famous 18<sup>th</sup> century *Commentaries*, “eavesdropping . . . was . . . ‘an ancient practice which at common law was condemned as a nuisance.’”<sup>63</sup> “In those days,” Justice Black observed, “the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond their walls seeking out private discourse,”<sup>64</sup> and enhancing the ear’s listening power technologically, Black insisted, made no difference as a matter of principle: because “the Framers were aware of [physical eavesdropping]” and could easily have “used the appropriate language” to subject *all* eavesdropping to the Constitution’s constraints (of having to obtain a warrant and the like), Justice Black treated the *silence* the Framers chose on the matter as decisive.<sup>65</sup> In so doing, he overlooked the far-greater threat to freedom of undeterred “private communication”<sup>66</sup> posed by potentially ubiquitous and undiscoverable electronic surveillance than by occasional government agents lurking under the “eaves of houses or their windows” where observant occupants might detect their presence.<sup>67</sup> At least with respect to such forms of surveillance, treating the silence of those who made the Constitution and its amendments the law of the land as preclusive punishes all of us for the fact that the Framers were not endowed with the gift of prophecy. It is indefensible to treat all constitutional silences as though they reflected strategic choices with respect to something different in kind from what could have been anticipated. Sometimes, as the saying goes, a cigar is just a cigar.

Justice Black was certainly smart enough to understand all that. The driving force behind his approach was not a misguided belief that his insistence on a narrow and time-bound reading of the protective words of

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61. *Katz v. United States*, 389 U.S. 347, 353 (1967).

62. *Id.* at 365 (Black, J., dissenting) (quoting U.S. CONST. amend. IV).

63. *Id.* at 366 (quoting *Berger v. New York* 388 U.S. 41, 45 (1967)).

64. *Id.* (quoting *Berger*, 388 U.S. at 45).

65. *Id.*

66. *Id.* at 352.

67. *Id.* at 366 (Black, J., dissenting).

the Bill of Rights would best capture the Constitution's underlying purposes notwithstanding changed scientific or social conditions. Rather, the driving force behind Black's approach was institutional in character. It was a long-standing hostility to *judicial* extrapolation from a constitutional provision's underlying purposes as translated to "keep the Constitution up to date" or "to bring it into harmony with the times."<sup>68</sup> That view, reflective of Black's deep belief that the "history of governments proves that it is dangerous to freedom to repose such powers in courts," was a staple of his jurisprudence.<sup>69</sup> He famously equated entrusting politically unaccountable justices with that kind of "translating" authority with making the Court "a continuously functioning constitutional convention."<sup>70</sup>

This is not the place to engage in the ongoing "originalism" debate over whether fidelity to the Constitution requires (or even permits) an approach as literal as that of Justice Black.<sup>71</sup> Despite the colorful rebirth of that approach in the jurisprudence of the late Justice Antonin Scalia and its persistence in the opinions of Justice Clarence Thomas, it has *not* been the approach followed by other justices in the Court's history, including any (other than Justice Thomas) who serve today.<sup>72</sup> My purpose in this paper is not to pursue that debate by rehearsing the arguments that I and many others have made against that approach. Suffice it to say here that only an approach paying much closer attention to the *underlying purposes of constitutional structures and rights-protecting provisions* can account for the bulk of the Supreme Court's interpretive work over the last 75 years or so.<sup>73</sup>

To account for decisions like *Katz* (and a plethora of others, including *Griswold*<sup>74</sup>), it is necessary to avoid a door-closing approach to the

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68. *Id.* at 373.

69. *Id.* at 374.

70. *Id.* at 373; *see also* HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 109–12 (1996).

71. Plenty has been written on this debate already. *Compare, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION (Geoffrey R. Stone ed., 2010); *and* LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION (2008); *and* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985), *with, e.g.*, Frank H. Easterbrook, *Alternatives to Originalism?*, 19 HARV. J.L. & PUB. POL'Y 479 (1996); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127 (1998); William H. Rehnquist, *The Notion of A Living Constitution*, 54 TEX. L. REV. 693 (1976); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

72. LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION 8–13, 141, 142 (2014).

73. *See* RICHARD H. FALLON, JR., THE DYNAMIC CONSTITUTION (2d ed. 2013).

74. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Constitution's silences in the absence of the kind of analysis that Marshall employed in *McCulloch* when evaluating the Constitution's demonstrably deliberate omission of limiting language that the Articles had contained in describing national lawmaking authority. If one is determined to preserve the underlying point of a constitutional provision, it is essential to keep in mind Marshall's admonition in *McCulloch* that "it is a *constitution* we are expounding"—one designed to "endure for ages."<sup>75</sup> An approach that would demand updating the text itself through frequent invocation of the deliberately difficult amendment process of Article V to account for changes wrought by time and technology would generate a document far more prolix and detailed than many of those to whom the Constitution is addressed could plausibly absorb or would be likely to cherish as the nation's founding document.

Among the features of the Constitution that seem to me crucial to its success over the centuries is the widespread recognition of its character not as a set of disconnected points but as a connected structure that, despite its gaps—some deliberate and others unintended—invites understanding as a coherent, if not always internally consistent, whole. So, for example, the Fourth Amendment's promises as elaborated in *Katz* are separated in space if not by time from the First Amendment's simultaneously ratified prohibition on laws "abridging the freedom of speech."<sup>76</sup> But the Court in *Katz* recognized, without having to *cite* the First Amendment, that it had to read the Fourth Amendment broadly enough to avoid unjustifiably undermining the system of open and undeterred communication that the First Amendment was dedicated to protecting.<sup>77</sup>

Two years after *Katz*, when the Court in *Stanley v. Georgia*<sup>78</sup> held that government cannot criminalize someone for the mere private possession or observation of books or films whose "obscene" content stripped them of First Amendment protection in the course of commercial distribution or display, it was clear that neither the First Amendment nor the Fourth, taken alone, could explain the Court's conclusion.<sup>79</sup> Much that occurs inside a "private" living space, from spousal or child abuse to bomb-making and even the solitary consumption of prohibited substances, may be investigated and prosecuted so long as the Fourth Amendment's procedural requirements are satisfied; and the private possession of the products of sexual exploitation of actual children, for instance, can be criminalized consistent with the First

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75. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819).

76. U.S. CONST. amend. I.

77. See *Katz v. United States*, 389 U.S. 347, 352 (1967).

78. 394 U.S. 557 (1969).

79. See *Stanley*, 394 U.S. at 564–68; *id.* at 569–72 (Stewart, J., concurring in the result).

Amendment—as a narrowly tailored means of drying up the market for such material.<sup>80</sup> Government power deployed in service of that end is wholly unlike government power exercised to prevent some unwanted impact on the psyche of the private beholder. To prosecute someone simply for finding satisfaction or excitement in widely deplored visual stimuli or ideas would, the *Stanley* Court held, impinge on the “freedom of the mind,” a concept that—although *nowhere mentioned* in the Constitution’s text—was part of the connective tissue that linked the First Amendment’s underlying purposes and postulates to those of the Fourth.<sup>81</sup>

So too with government information-gathering that could not, by any linguistic stretch, be seen as entailing conduct within the ambit of the Fourth Amendment’s restraints on “searches and seizures” even as that notion was expanded in *Katz*.

Consider, for instance, wide-ranging and deeply probing background investigations into and interrogations of individuals seeking various government benefits, like employment with NASA.<sup>82</sup> The issue presented in such cases is *not* the legitimacy of giving a broader definition to constitutional terms reaching us from centuries earlier—as with stretching the terms “search” and “seizure” to encompass high-tech variants (for example, electronic surveillance or, as in *Kyllo v. United States* in 2001, thermal imaging enabling government to “see” through the walls of a private home<sup>83</sup>) unimaginable when the words were first used in the Constitution.<sup>84</sup> The issue is rather the legitimacy of drawing lines to link disparate constitutional provisions like the First and Fourth Amendments, as the Court implicitly did in *Katz*, in order to treat forms of government intrusion into personal control over private information as potentially outlawed by the Constitution even though clearly beyond the reach of any particular prohibition.

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80. *Osborne v. Ohio*, 495 U.S. 103, 108–10 (1990).

81. *See Stanley*, 394 U.S. at 560, 565–66. And yet, as recently as August 2016, the Eleventh Circuit upheld a municipal ordinance banning the sale or rental of sex toys against a Fourteenth Amendment challenge made by a woman suffering from multiple sclerosis who sought to use sex toys to “facilitate intimacy” with her husband and by an artist who used sexual devices in his artwork. *Flanigan’s Enterprises, Inc. of Ga. v. City of Sandy Springs*, No. 14-15499, 2016 WL 4088731, at \*1–\*2 (11th Cir. Aug. 2, 2016). Although the case didn’t involve prosecuting mere private possession and use—and thus the court had no occasion to compare or contrast *Stanley*—it makes little sense to limit *Stanley*’s logic to protect one’s right to create and use a sex toy at home but not one’s right to acquire such a toy elsewhere.

82. E.g., *NASA v. Nelson*, 562 U.S. 134, 140–42 (2011).

83. *Kyllo v. United States*, 533 U.S. 27 (2001).

84. *See id.* at 31–32; *see also* Lawrence Lessig, *Fidelity in Translation*, 71 *TEX. L. REV.* 1165 (1993).

Specifically, the puzzle in cases like *NASA v. Nelson*<sup>85</sup> in 2011 is whether to treat the Constitution's verbal isolation of several distinct points (like the First and Fourth Amendments) along a broader spectrum that implicates the same general set of values (there, values of "informational privacy"<sup>86</sup>) as though the silence between those points represents a *negation* of any constitutional right that falls outside the points isolated.<sup>87</sup> Doing so would entail unjustifiably treating the absence of language expressly connecting the distinct constitutional provisions as a "door-closing" silence, in the parlance of this essay. The alternative would be to treat the absence of connecting language linking the provisions in question as a "door-opening" silence: an open invitation to bring within constitutional control *other* kinds of government action that impinge on the same set of overlapping values even though falling outside the points expressly isolated in the Constitution's text.

As we will see in the section of this essay dealing with *rules of construction or interpretation bearing on textual gaps or omissions*, the text is in fact *not* entirely silent on that choice of approaches. But even if it were, it's important to note that one option open to constitutional interpreters is *to remain silent about how to read the Constitution's silence on the existence of a general right to informational privacy beyond either the First Amendment or the Fourth*. That is exactly what the Supreme Court did in the *NASA* case, where the majority opinion written by Justice Alito held that the government's non-physical "probes" into the personal backgrounds of people seeking government employment to work on improving the Hubble Telescope's ability to conduct deep space probes were not too invasive to comply with whatever unwritten constitutional right of "informational privacy" might exist.<sup>88</sup> Concurring in the result but dissenting from the majority's approach, Justice Thomas and the late Justice Scalia all but tore their hair out over the Court's insistence on leaving that question unanswered. To them, it seemed obvious that the silence of the Constitution's text on the existence of a right of informational privacy had a door-closing character, given the fact that distinctive dimensions of what such a right might be designed to protect were indeed picked out and protected by a specific constitutional provision.<sup>89</sup>

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85. 562 U.S. 134 (2011).

86. *NASA*, 562 U.S. at 146

87. See *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (citations omitted) ("[L]iberty is not a series of isolated points . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . .").

88. *NASA*, 562 U.S. at 159; see also *id.* at 161 (Scalia, J., concurring in the judgment).

89. *Id.* at 161–62 (Scalia, J., dissenting). But right-leaning jurists are not the only ones who fall into this trap. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 336–40 (2001)



The place of silences in judicial opinions *about* the Constitution—a matter on which the majority and the concurring justices in *NASA* strongly disagreed—will be taken up in a later section of this essay, distinguishing silences about *what the Constitution commands, permits, or prohibits* from silences in what courts *say* about the Constitution. But first it is important to focus on the substantive issue that divided the Alito majority from the Scalia/Thomas concurrence. That is the issue of whether the existence of a broad right of informational privacy should be deemed precluded by the *juxtaposition* of the Constitution’s silence about such a wide-ranging right with its *textual protection of more narrowly defined rights* that are, in a sense, subspecies of that broad right. The alternative is to regard the silence as to the existence of such a right as potentially leaving the matter open.

That the specially concurring justices in *NASA* focused solely on the Fourth Amendment as the relevant narrower right and paid no attention to the First isn’t of particular significance for present purposes; what counts is their assertion that, whenever the Constitution narrowly protects a particular value from one or another species of invasion, its failure to protect that value from *other* invasions as well (and, indeed, from the broad genus of invasions of which the species isolated is but one example) should be taken to slam the door on the possibility that such other invasions might be constitutionally foreclosed.<sup>90</sup> That canon of construction, beyond being incompatible with how the Constitution itself tells readers to treat certain kinds of gaps or silences (as we will see below), makes sense only in a constitution conceived as a set of isolated and self-contained points rather than a constitution regarded as a coherent whole. And that is certainly not the way Chief Justice Marshall conceived it in the seminal *McCulloch* case.

To return briefly to Marshall’s analysis in *McCulloch*, its method—which Professor Akhil Amar has aptly termed “intertextual”—proceeded in significant part by comparing the words of the Constitution with the words of the text it replaced.<sup>91</sup> Rounding out the summary of Marshall’s method, it’s noteworthy that he also employed “intratextual” comparisons when considering constitutional silences and the significance they should be accorded.<sup>92</sup> For instance, Marshall contrasted the Constitution’s clause empowering Congress “To make all Laws which shall be *necessary and proper* for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United

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(opinion for the Court by Souter, J.) (rejecting the view that the Due Process Clause “forbade peace officers to arrest without a warrant for misdemeanors” on the ground that founders were not concerned enough about the practice to prohibit it in the most relevant specific provision, the Fourth Amendment).

90. See *NASA*, 562 U.S. at 161.

91. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 799–800 (1999).

92. See *id.* at 756–57.

States”<sup>93</sup> with the Constitution’s ban on state actions that, without congressional consent, “lay any Imposts or Duties on Imports or Exports, except what may be *absolutely necessary* for executing [the state’s] inspection Laws.”<sup>94</sup> The Constitution’s silence with respect to the *degree* of “necessity” required to comply with the Necessary and Proper Clause rightly reinforced Marshall’s conclusion that this silence underscored the degree of deference courts owed to Congress in its judgment of just *how essential* a measure was for “carrying into execution” various delegated powers.<sup>95</sup>

Nor are textual comparisons, whether “inter” or “intra,” the only relevant ways of distinguishing deliberate (and thus presumptively door-closing) silences or omissions from unintended (and thus presumptively door-opening) silences or omissions. Consider, to address a truly fundamental example, the topic of *secession from the Union*. Unlike the Articles of Confederation, which expressly said that the States ratifying the Articles in 1781 had entered into a “perpetual Union,”<sup>96</sup> the Constitution ratified in 1791 said nothing at all about the possibility of dissolving the “more perfect Union” described in the Preamble.<sup>97</sup>

We all know how tensions over *slavery* among the 13 states that entered into the new Union required referring to that “peculiar institution” only euphemistically—with code words like “*such Persons* as any of the States now existing shall think proper to admit,”<sup>98</sup> and “all *other Persons*” (as contrasted with “*free Persons*”) in the infamous three-fifths clause,<sup>99</sup> as well as in Article V’s explicit carve-out for any constitutional amendments that might end the slave trade (again identified only obliquely and without ever mentioning the dreaded word) before 1808.<sup>100</sup>

Less often foregrounded was the way tensions at the Founding over possible secession by any State that wished to exit evidently required no mention of the Union’s indissolubility, which the Court in its 1869 decision in *Texas v. White* treated as so self-evidently axiomatic as to go without saying.<sup>101</sup> In my 2008 book, *The Invisible Constitution*, I treated that anti-secession axiom as now firmly a part of our “unwritten Constitution.”<sup>102</sup> But

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93. U.S. CONST. art. I, § 8 (emphasis added).

94. *Id.* art. I, § 10 (emphasis added).

95. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 387–88 (1819).

96. ARTICLES OF CONFEDERATION of 1781, pmb1.

97. U.S. CONST. pmb1.

98. *Id.* art. I, § 9 (emphasis added).

99. *Id.* art. I, § 2 (emphasis added).

100. *Id.* art. V.

101. See *Texas v. White*, 74 U.S. (7 Wall.) 700, 700 (1868).

102. LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 28–29 (2008).

whether one agrees or disagrees, any such axiom is certainly not written in ink on parchment. Rather, it was inscribed in blood on the killing fields of the Civil War when the Union prevailed over the Confederacy—before the axiom had been given the Court’s doctrinal blessing in the *Texas* case.

The same issue arises on the international stage in the modern era. I think back to working in Prague in the early 1990s with Pierre Trudeau, who had served several years earlier (1968–1979 and 1980–1984) as Canada’s prime minister. We were part of a group assisting Vaclav Havel in drafting a new constitution for Czechoslovakia after it broke in late 1989 from the USSR (in the so-called “Velvet Revolution”) but before it eventually split into two nations in 1993, Slovakia and the Czech Republic. One especially difficult issue was whether to include a provision expressly addressing the possible secession of what later became Slovakia. Trudeau had grappled with similar questions with respect to Quebec long before Canada’s highest court, in *Reference Re Secession of Quebec*, held unilateral secession by Quebec to be unlawful.<sup>103</sup> Trudeau recognized that remaining silent in the Czech/Slovak situation about the secession issue might not hold off the centrifugal forces pulling Czechoslovakia apart, but he nonetheless advised, I think wisely, that those forces not be encouraged by providing a clear path to national dissolution in the newly independent country’s written constitution.

In other historic circumstances, such as the formation of the EU in the Maastricht Treaty of 1992<sup>104</sup> as amended by the Lisbon Treaty of 2009, which included Article 50, regularizing the secession process that Great Britain voted to initiate when “leave” prevailed over “stay” in Brexit, the formation and widely accepted legitimacy of a founding document for a nation or for a confederation of nations might preclude leaving such matters unspoken.<sup>105</sup> In such instances, the matter of unilateral exit might have to be squarely addressed in advance despite the prospect that doing so might make the entire effort fall apart prior to its launch, or might make future exit, and the early collapse of the constitutional project, more likely. The pros and cons of addressing the secession issue at the outset in any particular setting, as my Harvard colleague Vicki Jackson has carefully shown, are complex and contextually dependent.<sup>106</sup>

Deeply related both to slavery and to national unity is the Constitution’s all but complete silence on the profoundly significant topic of *race*, a subject

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103. *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 104 (Can.).

104. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 224) 1, 1 C.M.L.R. 719.

105. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, art. 50, Dec. 17, 2007, 2007 O.J. (C 306) 1.

106. Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT’L J. CONST. L. 91, 121–23 (2004); see also Vicki C. Jackson, *Secession, Transnational Precedents, and Constitutional Silences*, in NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT 314–42 (Sanford Levinson ed., 2016).

that no history of the United States purporting to explain anything of importance can afford to ignore. Only the Fifteenth Amendment so much as *mentions* race, and it does so only in the context of the right of U.S. citizens to vote in state or federal elections.<sup>107</sup> (Interestingly, the Constitution is also silent on the existence of any general “right to vote,”<sup>108</sup> confining itself to the prohibition of disenfranchisement on account of “race, color, or previous condition of servitude” (Fifteenth Amendment);<sup>109</sup> the guarantee that U.S. Senators shall be “elected by the people” of their respective States (Seventeenth Amendment);<sup>110</sup> the prohibition of disenfranchisement on account of “sex” (Nineteenth Amendment);<sup>111</sup> the prohibition of disenfranchisement for “failure to pay any poll tax or other tax” (Twenty-fourth Amendment);<sup>112</sup> and the prohibition of disenfranchisement “on account of age” for “citizens . . . eighteen years of age or older” (Twenty-Sixth Amendment)<sup>113</sup>)

Although Justice Scalia once wrote—incorrectly, as it turns out—that the Fourteenth Amendment expressly bars states from making distinctions among individuals on the basis of their race,<sup>114</sup> it does no such thing. Rather, it is *conspicuously silent* on the degree to which, and the circumstances in which, government may use racial classifications to decide whom it may reward with particular opportunities, employ for particular purposes, target for particular burdens, or otherwise single out for other than purely data-gathering purposes. In fact, *Fisher v. University of Texas*,<sup>115</sup> decided in 2016, was the first case in thirteen years<sup>116</sup> (and only the third case ever)<sup>117</sup> in

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107. U.S. CONST. amend. XV.

108. Heather K. Gerken, *The Right to Vote: Is the Amendment Game Worth the Candle?*, 23 WM. & MARY BILL RTS. J. 11, 11 (2014); see generally Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345 (2003).

109. U.S. CONST. amend. XV.

110. *Id.* amend. XVII.

111. *Id.* amend. XIX.

112. *Id.* amend. XXIV.

113. *Id.* amend. XXVI.

114. *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1639 (2014) (Scalia, J., concurring in the judgment) (“Does the Equal Protection Clause of the Fourteenth Amendment *forbid* what its *text plainly requires*? Needless to say (except that this case obliges us to say it), the question answers itself. “The Constitution *proscribes government discrimination on the basis of race*, and state-provided education is no exception.”) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part) (second emphasis added)).

115. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016).

116. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (decided 13 years earlier).

which the Court upheld a government affirmative action program expressly taking the race of individuals into account in allocating benefits or burdens—there, admission slots in a state’s universities, allocated to achieve educational diversity.

In this essay, I will not address the merits of that decision, which I have elsewhere applauded,<sup>118</sup> but I will note that, particularly in the context of characterizing the decision as (a) going out of its way to decide large constitutional questions that might better have been left open, (b) being suitably modest and admirably minimal about how much to resolve, or (c) not going far enough to button down the constitutional issues left up in the air, it turns out, unsurprisingly, that how observers characterize what the Court did or failed to do seems more a function of their preferred style of adjudication and degree of judicial intervention than on any intrinsic characteristic of the Court’s ruling.<sup>119</sup>

The same can be said of the sequence of Supreme Court decisions along the path to marriage equality and toward a strong constitutional norm of nondiscrimination with respect to sexual orientation and/or gender identity—the decisions from *Romer v. Evans*<sup>120</sup> in 1996 to *Lawrence v. Texas*<sup>121</sup> in 2003 to *United States v. Windsor*<sup>122</sup> in 2013 to *Obergefell v. Hodges*<sup>123</sup> in 2015 to whatever future case extends the principles of those holdings to discrimination between transgender and cisgender individuals. All of those decisions, of course, hung their constitutional protections on the textual hooks of due process and equal protection. But they did so by invoking and elaborating underlying principles of personal liberty, privacy, and equal dignity not to be found anywhere in the Constitution’s express

117. See *id.* (upholding race-conscious law school admissions program); *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (upholding race-conscious programs to promote minority ownership and control in the broadcasting industry), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

118. E.g., Adam Liptak, *Supreme Court Upholds Affirmative Action Program at University of Texas*, N.Y. TIMES (June 23, 2016), <http://www.nytimes.com/2016/06/24/us/politics/supreme-court-affirmative-action-university-of-texas.html> [https://perma.cc/LLW8-PFPZ].

119. Compare, e.g., Richard Primus, *Affirmative Action in College Admissions, Here to Stay*, N.Y. TIMES (June 23, 2016), <http://www.nytimes.com/2016/06/23/opinion/affirmative-action-in-college-admissions-here-to-stay.html> [https://perma.cc/TCU7-BG36] (celebrating *Fisher* as a “huge victory for supporters of affirmative action”) with, e.g., Cass R. Sunstein, *On Affirmative Action, Supreme Court Rules for Humility*, BLOOMBERG VIEW (June 23, 2016), <http://www.bloomberg.com/view/articles/2016-06-23/on-affirmative-action-supreme-court-rules-for-humility> [https://perma.cc/N33A-9KPB] (praising *Fisher* for its “judicial modesty”).

120. 517 U.S. 620 (1996).

121. 539 U.S. 558 (2003).

122. 133 S. Ct. 2675 (2013).

123. 135 S. Ct. 2584 (2015).

terms.<sup>124</sup> In that sense, all were children of *Griswold v. Connecticut*<sup>125</sup> and its abortion-related progeny, *Roe v. Wade*<sup>126</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>127</sup>

From the perspective of either constitutional silence or silence in decisions construing the Constitution, this arc of rulings is a treasure trove of insights too far-reaching to be elaborated here. Suffice it to say that the engine driving those decisions was as much external to both the Constitution's text and the legal process as internal to either. Chief Justice Roberts was surely incorrect when he wrote in his bitter *Obergefell* dissent that the post-*Obergefell* celebrations of marriage equality were not celebrations of the Constitution because, in his words, "[the Constitution] had nothing to do with it."<sup>128</sup> The Constitution, in all its moving parts both legal and cultural, had *everything* to do with it.

Especially notable, from the perspective of silence, is how the majority opinion in *Obergefell*, written by Justice Kennedy, treated the dissenting justices' insistence that the Court was illegitimately redefining the institution of "marriage" without proof that the traditional, "one man + one woman" definition had been intentionally designed to denigrate or stigmatize same-sex couples.<sup>129</sup> But the dissenters missed the point. As the majority saw the matter, the exclusion of same-sex marriage from what the dissenters described as the traditional definition, while almost certainly *not* expressive at the time of homophobia or hatred of gays or lesbians, was reflective of unexamined assumptions that evolving understandings of liberty, equality, and dignity have rightly led succeeding generations to question.<sup>130</sup> The Constitution's text says nothing about marriage, let alone about same-sex marriage. But *those silences were rightly treated by the Court as invitations to fill in the gaps, gaps not left in the document out of any deliberate design to treat that singularly important form of state-sanctioned relationship as unentitled to special constitutional solicitude or out of any deliberate design to treat same-sex couples as less worthy than their opposite-sex counterparts.* In

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124. See Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 19–23 (2015).

125. 381 U.S. 479 (1965).

126. 410 U.S. 113 (1973).

127. 505 U.S. 833 (1992). *Casey* was also notable in that it finally identified the gender equality strand underlying the Court's reproductive rights line of cases, 505 U.S. at 852–53 (plurality opinion), something that *Griswold* and *Roe* conspicuously failed to do.

128. *Obergefell*, 135 S. Ct. at 2626 (Roberts, J., dissenting).

129. See *id.*; *id.* at 2642 (Alito, J., dissenting).

130. *Id.* at 2598 (majority opinion).

the terms used in this essay, these were silences that allowed doors to open rather than force them to close.

## II. STRUCTURAL SILENCES V. SILENCES ABOUT RIGHTS

The preceding section cut one major slice through the topic of silences, distinguishing those that effectively *open* a constitutional conversation by leaving a number of options on the table from those that shut such conversation down by essentially limiting the options to one. But of course that “one” remaining option—for instance, reading the Constitution’s delegations of power to the national government more broadly than those contained in the Articles of Confederation, or recognizing rights of informational privacy beyond those protected by the Fourth Amendment from unreasonable physical invasions of private property—typically leaves numerous *sub-options* open. As with Robert Frost’s “[t]wo roads [that] diverged in a yellow wood,”<sup>131</sup> each road turns out to lead to numerous further paths at succeeding forks, just as do the capillaries that branch out from the circulatory system’s arteries.

This section cuts a different slice through the same topic, dividing silences along a distinct axis. This division separates those silences that bear on the structure created by the Constitution from those that bear on the individual rights the Constitution protects against either a particular level or branch of government, or against government as a whole.

This is not to say that these two topics are entirely distinct. Many Justices have been fond of pointing out that the *structural checks and balances and divisions of governmental authority* created by the Constitution—including both the *horizontal* divisions among the three federal branches elaborated by “separation of powers” doctrines and the *vertical* divisions between the federal government and the states elaborated by “federalism” doctrines—exist in no small part to shield individuals from overbearing, oppressive, or unaccountable government power.<sup>132</sup> It remains

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131. ROBERT FROST, *The Road Not Taken*, in MOUNTAIN INTERVAL 9, 9 (1916).

132. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010) (“[T]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.”) (quoting *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (“Liberty is always at stake when one or more of the branches seek to transgress the separation of powers. Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty.”); *New York v. United States*, 505 U.S. 144, 181 (1992) (“Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)); *Morrison v. Olson*, 487 U.S. 654, 710 (1988)

useful nonetheless to distinguish (a) gaps or silences in the Constitution's description of how the federal branches relate to one another and to the states, from (b) gaps or silences in the Constitution's description of the rights protected against each level or branch of government.

It is arguably less important that the lines the Court ends up drawing provide clear guidance to the relevant government bodies when the Court identifies new categories of "unenumerated" rights—like the right to reproductive freedom or nondiscrimination based on sex-related or gender-related characteristics—than when the Supreme Court undertakes to decide, in the face of what appears to be constitutional silence, whether:

(1) an action by the federal executive branch unconstitutionally intrudes upon congressional authority and thereby impermissibly aggrandizes unilateral presidential power, as the Court did in striking down President Truman's nationalization of the steel industry without prior authority from Congress in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>133</sup> or

(2) an action by Congress unconstitutionally intrudes upon executive authority and thereby impermissibly aggrandizes legislative power, as the Court did in *Zivotofsky v. Kerry* in 2015;<sup>134</sup> or

(3) a law enacted by Congress unconstitutionally invades state prerogatives, as the Court did in part of its ruling about the Affordable Care Act in *NFIB v. Sebelius* in 2012;<sup>135</sup> or

(4) a state statute enters an area it is forbidden to enter without congressional permission by virtue of the so-called dormant Commerce Clause, as the Court has done on countless occasions;<sup>136</sup> or

(5) the federal executive branch can require state compliance with executive action, as the Court did in *Medellin v. Texas*;<sup>137</sup> or

(6) states impermissibly intrude on exclusively federal executive or legislative authority, as the Court did in *Arizona v. United States*.<sup>138</sup>

In a paper I recently published in the online Forum of the *Yale Law Journal*, *Transcending the Youngstown Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine*, after exploring a problem closely related to that of *constitutional* silence—the problem of *congressional* silence—I argue that concern for the individual-rights consequences of

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(Scalia, J., dissenting) ("While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty.").

133. 343 U.S. 579 (1952).

134. 135 S. Ct. 2076 (2015).

135. 132 S. Ct. 2566 (2012).

136. *E.g.*, *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333 (1977).

137. 552 U.S. 491 (2008).

138. 132 S. Ct. 2492 (2012).



resolving congressional-executive disputes one way rather than another has been a long-neglected dimension of the separation-of-powers puzzle.<sup>139</sup>

I illustrate the point by taking a close look at the decision in *Zivotofsky v. Kerry*, where none of the Justices paid any attention to the consequences for the Zivotofsky family of how the Court resolved the dispute between the U.S. State Department and Congress.<sup>140</sup> Congress had enacted a law specifying that when a U.S. citizen is born in Jerusalem to an American family living there that family is entitled upon request to have its baby's U.S. passport stamped so as to identify *Israel* as the nation of the baby's birth.<sup>141</sup> The State Department, acting on the direction of a series of U.S. presidents, defied that law, denying the Zivotofsky family's religiously motivated request on the theory that for U.S. passports to proclaim a view by the Executive Branch that Jerusalem is the capital of Israel would interfere with the policy of the Executive that the U.S. should remain neutral on the ongoing dispute over whether the government of Israel is indeed sovereign over all of Jerusalem.<sup>142</sup>

A closely divided Supreme Court ruled for the Executive. Regardless of whether one agrees or disagrees with that unusual ruling—the second ever in which the Court upheld the authority of the Executive to defy a duly enacted federal statute<sup>143</sup>—I think that it was wrong for the Court to be silent on, and seemingly not even to consider, the individual rights arguments on the family's side of the scale.<sup>144</sup>

I will return in the third section of this paper to the broader question of when the Court *should* be silent on a constitutional matter and when it should instead address the matter squarely. For now, I turn to the extent to which the Constitution is or is not silent on the proper *method of construing* both structural and individual rights issues posed by constitutional cases and controversies.

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139. Laurence H. Tribe, *Transcending the Youngstown Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine*, 126 *YALE L.J. F.* 86, 100 (2016).

140. *Id.* at 103–04.

141. Foreign Relations Authorization Act Fiscal Year 2003, Pub. L. No. 107-228 § 214(d), 116 Stat. 1350, 1366 (2002).

142. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2082 (2015).

143. See *Myers v. United States*, 272 U.S. 52 (1926) (upholding the authority of the President to defy the Tenure of Office Act of 1867 and to remove an executive officer without consent of the Senate).

144. Conceptualizing the scope of the individual rights at issue in *Zivotofsky* is admittedly challenging and would affect how the Court weighs those rights. A sufficiently wider lens may have also considered the rights of classes of people beyond those in the same situation as little Menachem Zivotofsky—for example, people who wanted to visit Israel but might have been unable to do so if the Court had upheld the law and relations with Middle Eastern nations had deteriorated as a result of the Court's decision.

### III. SILENCES IN THE CONSTITUTION GENERALLY V. SILENCES IN THE CONSTITUTION'S RULES OF INTERPRETATION

I begin this part of my paper by returning to one of the decisions I described briefly in the autobiographical introduction, explaining what first led me to use the “sounds of silence” as a frame through which to view the largest constitutional questions: *Griswold v. Connecticut*, the Supreme Court’s 1965 invalidation of a state law criminalizing the use of contraceptives by married couples.<sup>145</sup> Nothing in the Constitution’s text could be invoked to explain fully why such a law could not withstand constitutional scrutiny.

In an early draft of the Court’s opinion striking the law down, Justice Douglas sought to describe the conduct of a married couple to have unprotected sexual intercourse as an exercise of the First Amendment right “peaceably to assemble,” but Justice Black deftly responded that what he regularly did with his wife of many years didn’t seem to either of them to be an instance of peaceable assembly.<sup>146</sup>

After abandoning that somewhat silly effort, Douglas settled on putting the entire Bill of Rights into a jurisprudential Cuisinart and emerged with a *mélange* that treated a “right of marital privacy” as a mix of various “penumbras” of the First, Third, Fourth, Fifth, and Ninth Amendments.<sup>147</sup> Although that Douglas effort was understandably derided by commentators as singularly undisciplined to the point of being opaque, if not altogether incoherent,<sup>148</sup> a valid and indeed profound point lurked within the famed libertarian’s slapdash opinion. The point was that those disparate amendments were not just a sequence of unconnected limits on government authority over intimate personal choices. They were instead parts of a broader shield against totalitarian government, a shield whose shape could not be specified with precision at any given time but whose existence could not be denied or even denigrated simply because it wasn’t spelled out in detail anywhere in the Constitution’s text.

Douglas included the Ninth Amendment along with the others that he poured into his verbal blender,<sup>149</sup> not pausing to recognize that he was making a category error: the other amendments Douglas included each had a substantive ambit referring to a particular kind of individual decision, or a

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145. 381 U.S. 479, 485–86 (1965).

146. BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE WARREN COURT*, 231–37 (1985).

147. *Griswold*, 381 U.S. at 482–486.

148. *E.g.*, ROBERT H. BORK, *THE TEMPTING OF AMERICA* 98 (1990).

149. 381 U.S. at 484.

procedural ambit dealing with a specific sort of governmental practice. Unlike the first eight amendments, the Ninth is a *rule of construction*, an overarching meta-principle directing the Federal Government and all its branches, including the Judiciary, never to regard the piecemeal and incomplete character of the enumerated substantive and procedural rights as preclusive of other rights, depending on the circumstances. That Amendment states: “[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”<sup>150</sup>

*Griswold* thus constituted an instance in which the Constitution’s own text did *not* in fact silently leave the Court free to choose between Douglas’s approach and that of the dissenting Justices, each of whom treated the Constitution’s silence on the existence of a right to intimate personal, sexual, or marital privacy—its failure to “enumerate” that right in the Bill of Rights or anywhere else in the Constitution—as though that silence represented a constitutional prohibition on the recognition of any such a right and on its federal judicial enforcement.<sup>151</sup> Properly understood, the Ninth Amendment is a command, directed to all federal officials (including, of course, Supreme Court Justices), about how *not* to construe the rest of the Constitution’s text.

Although Justice Goldberg, concurring separately, invoked the Ninth Amendment in just the right way (for the first time ever in any Justice’s opinion, whether for the Court or in a concurrence)<sup>152</sup>—a tribute, I think, to my friend and former Harvard colleague Stephen Breyer, the Justice who had been Goldberg’s law clerk at the time—the truth is that the Ninth Amendment’s meta-rule had never before been treated as a serious source of, or constraint on, constitutional doctrine. Indeed, although his having done so may in significant part help to explain Judge Robert Bork’s lopsided rejection by the Senate when President Reagan nominated him to the Court, Bork had casually dismissed the Ninth Amendment’s rule of construction as an incomprehensible and therefore judicially unenforceable “ink blot” during his confirmation hearings roughly two decades after *Griswold*, which he famously went out on a limb to denounce.<sup>153</sup>

Whatever the most convincing explanation for *Griswold v. Connecticut* might be, that decades-old decision, now part of the firmly settled

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150. U.S. CONST. amend. IX (emphasis added).

151. 381 U.S. at 510 (Black, J., dissenting) (“I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.”); *id.* at 530 (Stewart, J., dissenting) (“With all deference, I can find no such general right of privacy in the Bill of Rights . . .”).

152. See *id.* at 488–90 (Goldberg, J., concurring).

153. See Ramesh Ponnuru, *Judge Bork’s Ink Blot*, NATIONAL REVIEW (December 20, 2012, 4:00 AM), <http://www.nationalreview.com/article/336142/judge-borks-ink-blot-ramesh-ponnuru> [<https://perma.cc/BLY6-UCWS>]; STEVEN F. HAYWARD, THE AGE OF REAGAN 565–66 (2009).

constitutional canon, remains to this day the judicial foundation on which any number of more recent holdings rest—holdings that involve interests as disparate as the rights of women to decide, within certain limits, whether or not to continue their pregnancies to term (*Roe v. Wade*,<sup>154</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>155</sup> and *Whole Woman’s Health v. Hellerstedt*<sup>156</sup>); the rights of grandparents to choose which of their grandchildren to welcome into their homes (*Moore v. City of East Cleveland*<sup>157</sup>); the rights of consenting adults to engage in whatever forms of private sexual intimacy and coupling give them pleasure without imposing on any nonconsenting participant or observer (*Lawrence v. Texas*<sup>158</sup>); and the rights of same-sex couples to receive exactly the same official recognition as “married” as opposite-sex couples enjoy under the federal or state law (*Obergefell v. Hodges*<sup>159</sup>).

In each of the leading cases establishing these rights notwithstanding the Constitution’s silence as to their existence, the Court was met with dissents that share a common objection. Reduced to their essentials, each of these dissents insisted that the failure of the constitutional text to give verbal expression to the right in question had to be treated as binding on federal courts unless and until the resulting silence was replaced with text adopted in accord with Article V’s process for formally amending the Constitution.<sup>160</sup> That those dissents have regularly, although to be sure not always, been rejected—sometimes in highly controversial rulings but usually in rulings that eventually met with broad public approval and invariably in rulings that have withstood the test of time—speaks volumes about the importance of not giving undue weight to constitutional gaps and omissions when interpreting that document—one intended, as the great Chief Justice John Marshall put it in 1819, to “endure for ages.”<sup>161</sup>

Lamentably, the jurisprudence of the Ninth Amendment is, to say the least, underdeveloped, if only because it remained unmentioned, and perhaps all but forgotten, until 1965. Another possible explanation for the relatively recent emergence of that amendment in the Court’s body of precedent is that, until Justice Goldberg’s concurring opinion in *Griswold*,

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154. 410 U.S. 113, 129 (1973).

155. 505 U.S. 833, 849 (1992).

156. See 136 S. Ct. 2292, 2309 (2016).

157. 431 U.S. 494, 499 (1977).

158. 539 U.S. 558, 564–66 (2003).

159. 135 S. Ct. 2584, 2599–600 (2015).

160. See, e.g., *Obergefell*, 135 S. Ct. at 2627–29 (Scalia, J., dissenting); *Lawrence*, 539 U.S. at 605–06 (Thomas, J., dissenting); *Moore*, 431 U.S. at 542–44 (White, J., dissenting).

161. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

people appear to have assumed that the Ninth Amendment had to be mere window dressing lest it become a completely boundless source of newly invented and even fanciful rights. The more modest prospect of using the Ninth Amendment not as a shapeless and bottomless sea of potential new rights but solely as a rule of construction seems not to have occurred to anyone, at least not to any federal judge, before the mid-1960s.

Perhaps the most convincing use of the Ninth Amendment is a relatively modest one. I have in mind situations in which the question presented involves a value or set of values *almost but not quite* covered by a constitutional provision or even by several such provisions. *NASA v. Nelson*, discussed previously, was a case of just that sort: however intrusive a government's employment questionnaire and the accompanying background inquiries might be, the resulting invasion of what has come to be called "informational privacy" cannot quite be deemed a "search" or a "seizure" without stretching language past the breaking point.<sup>162</sup> Thus it cannot come squarely within the ambit of the Fourth Amendment, at least as most of us read the text of that provision. Nor can it come squarely within the ambit of the First Amendment, although there are some Supreme Court precedents, mostly dating to the late 1950s and early 60s, in which probes into a person's allegedly far-left (specifically, communist) political affiliations were held to violate the First Amendment.<sup>163</sup> But the inquiries challenged in the *NASA* case were not even arguably ideological in character, and the right he asked the Court to recognize was not couched in terms that would have been limited to political inquiry.

Yet the position taken by Justices Scalia and Thomas in that case was a radical one, viewed through the lens of the Ninth Amendment (which, sadly, the majority did not invoke when rejecting the Scalia/Thomas position as unreasonably constraining). Their position was that, because a right of informational privacy is *not covered by*—that is, *enumerated in*—the Fourth Amendment, it follows that it *cannot* be found within what might be called the gravitational field of that amendment,<sup>164</sup> perhaps influenced as well by the gravitational field of the First Amendment.<sup>165</sup> That cramped

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162. See 562 U.S. 134 (2011).

163. E.g., *Baird v. State Bar of Ariz.*, 401 U.S. 1, 8 (1971); *Speiser v. Randall*, 357 U.S. 513, 528–29 (1958).

164. *NASA*, 562 U.S. 134, 162 (2011) (Scalia, J., concurring in the judgment) ("But the Government's collection of private information is regulated by the Fourth Amendment, and '[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment . . . must be the guide for analyzing these claims.' . . . That should have been the end of the matter." (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998))).

165. 562 U.S. at 164.

interpretation looks like as pure an instance of violating the Ninth Amendment's rule of construction as can be imagined.<sup>166</sup>

Another such instance came before the Supreme Court in 1980, in *Richmond Newspapers, Inc. v. Virginia*.<sup>167</sup> That case, which I argued at the Court against the Commonwealth of Virginia, held that only extraordinary circumstances could ever justify excluding the press and the public from courtrooms trying a criminal case just because neither the trial court, nor the prosecution, nor the defendant (who could not invoke an accused's Sixth Amendment right to a *public* trial in order to *exclude* the public) wants the proceedings to be open for public observation.<sup>168</sup>

It was my view at the time that the First Amendment's freedoms of speech and press, which media lawyers thought sufficient to justify the result we sought in *Richmond Newspapers*, could not in themselves comfortably support a presumptive right of public observation of proceedings like those in that case. The reason was that none of the participants in the trial in question was a "willing speaker."<sup>169</sup> All relevant actors opted to keep the proceedings out of public view, much as an author who chooses not to share her diary with anyone opts to keep that diary to herself—and does so without triggering anyone's First Amendment right to be free of government interference to prevent a willing speaker from communicating with a willing listener. But the "freedom of speech" and "of the press," while plausibly encompassing freedoms to hear and observe and to report, *presuppose* that the source of what one wants to hear or observe *wishes to communicate* that information. As others have observed, the First Amendment is not a Freedom of Information Act.<sup>170</sup>

For that reason, I thought it essential to invoke not just the First Amendment but also the Ninth, identifying its purpose as that of preventing anyone from "construing" the silence of the Constitution's text as to the existence of a contested right as a decisive negation of that right.<sup>171</sup> I thought

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166. See *id.* at 160 ("One who asks us to invent a constitutional right out of whole cloth should spare himself and us the pretense of tying it to some words of the Constitution.").

167. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

168. *Id.* at 559–60, 580.

169. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976).

170. See, e.g., Amy Jordan, *The Right of Access: Is There A Better Fit than the First Amendment?*, 57 VAND. L. REV. 1349, 1377 (2004); David M. O'Brien, *The First Amendment and the Public's "Right to Know"*, 7 HASTINGS CONST. L.Q. 579, 588–89 (1980); Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know"*, 72 MD. L. REV. 1, 15 (2012).

171. See Laurence H. Tribe, *Public Rights, Private Rites: Reliving Richmond Newspapers for My Father*, 5 J. APP. PRAC. & PROCESS 163, 164–65 (2003).

that argument was particularly essential when, as in *Richmond Newspapers*, the contested right protects values close to the heart of rights that the Constitution *does* in fact enumerate. And, to my delight (and to the consternation of those on my side of the case who sought mightily to prevent me from so much as mentioning the all-but-forgotten Ninth Amendment, which they viewed as radioactive), the plurality opinion by Chief Justice Burger upheld our contention that the Constitution presumptively precluded closing the proceedings to the press and public, and centrally invoked the Ninth Amendment, focusing on the reasons for James Madison's decision to include it in the Bill of Rights.<sup>172</sup>

As our brief had detailed and the plurality opinion explained, Madison's principal reason for including that rule of construction in the Bill was to mollify those who feared that, just as a Constitution without *any* listing of specific rights might be invoked (despite the Tenth Amendment) to enable the Federal Government to run roughshod over the rights enumerated, so too a Constitution that *listed* certain rights might be taken by future generations to imply that the list was exhaustive and that no rights *other* than those enumerated were entitled to federal constitutional recognition.<sup>173</sup> To prevent the Bill of Rights from exerting that kind of "repulsive gravitational force"—to prevent it from becoming a kind of "dark energy"—the Ninth Amendment was included as one of the Bill's two final provisions.

The other such provision was the Tenth Amendment, a rule of construction that is, in a sense, the mirror image of the rule embodied in the Ninth. It directs that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."<sup>174</sup> As with the Ninth Amendment, my courses in constitutional law over the years have addressed the degree to which that rule about "powers not delegated"—again, a textually expressed rule about matters *not* expressed in the text—either has or should have played a role in the way structural principles of federal-state relations, relations sometimes described under the rubric of "vertical federalism," have evolved over time, with the arc of unenumerated federal powers largely ascendant in the early nineteenth century, turning downward from the late nineteenth until

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172. *Richmond Newspapers*, 448 U.S. at 579–80.

173. *Id.* at 579 n.15.

174. U.S. CONST. amend. IX.

roughly 1937,<sup>175</sup> then ascendant again until the 1990s,<sup>176</sup> and on a mostly downward trajectory in the years since.<sup>177</sup>

Without any change in the Constitution's text, the dominant judicial approach to the Constitution's silences with respect to both rights and powers has undergone enormous transformation through the medium of the legal culture, reflected and implemented by the federal judiciary, exercising a power of judicial review that we must recall is itself nowhere enumerated in the Constitution—a vast power extracted from a conspicuous silence.

Noteworthy is the fact that such textual rules about how gaps, absences, or silences are to be understood are *themselves* surrounded by silences: Are the Ninth and Tenth Amendment's rules about those gaps, absences, or silences to be enforced by the federal judiciary, or are they merely reminders of postulates entrusted to the political branches or to state courts, not enforceable by federal judges?

Disputes over such choices are unending in our law. And, perhaps, necessarily so because the tower of rules and meta-rules and meta-meta rules is inevitably unending. The great philosopher Bertrand Russell is said to have asked a woman who told him the Earth rested on the back of a huge turtle, "What holds up the turtle?"—trying to lead her into a logical dead-end. Quickly besting the brilliant logician, she instantly replied: "It's no use, Professor. . . . It's turtles all the way down."<sup>178</sup>

#### IV. SILENCES IN THE CONSTITUTION ITSELF V. SILENCES IN WHAT IS SAID ABOUT THE CONSTITUTION

As we saw in connection with *NASA v. Nelson*, the majority's determination *not to say* whether the Constitution contains a generalized right of "informational privacy" infuriated two of the Justices, who thought it obvious *both* that no such right could possibly exist *and* that the Court was wrong not to come right out and say so. Any such right, they insisted, would

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175. Robert L. Stern, *The Commerce Clause and the National Economy, 1933-46: Part One*, 59 HARV. L. REV. 645 (1946).

176. *Id.* at 691-93; Robert L. Stern, *The Commerce Clause and the National Economy, 1933-46: Part Two*, 59 HARV. L. REV. 883, 886-90 (1946).

177. John R. Vile, *Truism, Tautology or Vital Principle? The Tenth Amendment Since United States v. Darby*, 27 CUMB. L. REV. 445 (1997).

178. In *A Brief History of Time*, first published in 1988, Stephen Hawking said the subject was a "well-known scientist (some say it was Bertrand Russell)." STEPHEN HAWKING, *A BRIEF HISTORY OF TIME 1* (1988). In the Princeton Review in 1882, William James told the story in the third person and described it as "rocks all the way down." William James, *Rationality, Activity, and Faith*, 2 PRINCETON REV. 58, 82 (1882). Some claim that it was really James who first told the story in the much more memorable "turtles" version. Out of deference to the great physicist Stephen Hawking, I will use his attribution to Russell in this essay.



have to be “invent[ed] right out of whole cloth.”<sup>179</sup> No less vehemently, those justices accused the majority of needlessly teasing the legal profession and the American public: “Thirty-three years have passed since the Court first suggested that the right may, or may not, exist. It is past time for the Court to abandon this Alfred Hitchcock line of our jurisprudence.”<sup>180</sup>

Notwithstanding the protest by Justices Scalia and Thomas, both of them are among the jurists who have frequently said that the Court should avoid constitutional pronouncements when not necessary to the resolution of a concrete case or controversy. Indeed, as every student of the Court’s body of decisions knows well, the vast bulk of what the Court does involves deciding what *not* to decide, both about the Constitution and about other matters of federal law. Of the seven to eight thousand petitions asking the Court each year to weigh in on such matters, only six or seven dozen are selected by the Court in granting writs of certiorari to review the questions presented.<sup>181</sup> When the Court denies review, as it nearly always does, it is expressing no view either way on whether the decision it has left untouched was right or wrong, and it is only once in a blue moon that any Justice either concurs to explain his or her agreement with the denial of cert or dissents to protest that the case should have been set down for full briefing and argument on the merits.

Much could be said, and more than enough has already been written, about the factors that enter into decisions about whether to grant cert, and I won’t be adding to that voluminous literature here. Rather, I will focus—and then, only briefly—on a narrower set of issues, those presented when the Court is not just leaving a case totally unreviewed but is undertaking to review it and is then considering whether to dodge some substantive constitutional question that the case might squarely present or might at least reasonably be thought to present. That is the issue of “constitutional avoidance,” which some see as a problem<sup>182</sup> and others study as a doctrine.<sup>183</sup> The Court first articulated constitutional avoidance as a matter of doctrine in 1936, in a famous concurring opinion by Justice Brandeis in *Ashwander v.*

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179. *NASA v. Nelson*, 562 U.S. 134, 160 (2011) (Scalia, J., concurring in the judgment).

180. *Id.* at 165.

181. For example, in the 2014–15 term the Court disposed of 7,006 petitions for certiorari and granted certiorari to only seventy-one of those petitions. *October Term 2014*, J. S. CT. II (Jun. 30, 2015), <https://www.supremecourt.gov/orders/journal/jnl14.pdf> [<https://perma.cc/5DWL-KRTW>].

182. *E.g.*, Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 815–16 (1983).

183. *E.g.*, Gilbert Lee, *How Many Avoidance Canons Are There After Clark v. Martinez?*, 10 U. PA. J. CONST. L. 193 (2007).

*Tennessee Valley Authority*.<sup>184</sup> Refusing to address the claim that the entire TVA Act—a federal statute designed to promote rural electrification as part of FDR’s “first” New Deal—was unconstitutional, Justice Brandeis memorably articulated a set of considerations that he said ought to lead federal courts to avoid deciding difficult constitutional questions that might dispose of a case when it would be possible to decide the case on narrower grounds—grounds leaving those difficult questions unanswered at least for the time being.<sup>185</sup>

There are more than a few occasions when the Court has all but tortured the words of a federal statute in order to avoid resolving a particularly perplexing constitutional issue. One particularly egregious example involved *Bond v. United States*, a 2014 Supreme Court decision stemming from a U.S. Attorney’s seemingly bizarre and at the very least unwise decision to charge a woman with violating the law Congress had enacted to implement the Chemical Weapons Convention even though all the distraught woman did was conspicuously spread toxic substances on the car, mailbox, and door knob of a rival for her husband’s affection in the hope that her rival would develop an uncomfortable rash.<sup>186</sup> Although the terms of the law literally covered what the woman had done, the Court, in an opinion written by Chief Justice Roberts, managed to cobble together six Justices to hold that, because of uncertainty about whether Congress *really meant what it said* as applied to circumstances like those presented in that case, respect for “basic principles of federalism” supported holding that the accused woman’s “local criminal activity” could not be punished under the *Act to Implement the International Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*.<sup>187</sup> The Court’s majority wrote that, just as it would have had a duty to interpret an *ambiguous* federal law so as to avoid difficult constitutional questions about the reach of the treaty power and of Congress’s power to implement a duly ratified treaty, so too it had a duty to find some way to hold even an *unambiguous* federal law inapplicable if holding it applicable in accord with its manifestly applicable terms would have made such avoidance impossible.<sup>188</sup>

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184. 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (“The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.”).

185. *Ashwander*, 297 U.S. at 344–48, 355–56.

186. 134 S. Ct. 2077, 2085–86 (2014).

187. *Id.* at 2088–90.

188. *See id.* at 2090.

Unsurprisingly, the four dissenters, led by Justice Scalia, made mincemeat of that reasoning: “Somewhere in Norristown, Pennsylvania, a husband’s paramour suffered a minor thumb burn at the hands of a betrayed wife. The United States Congress—‘every where extending the sphere of its activity, and drawing all power into its impetuous vortex’—has made a federal case out of it. What are we to do?”<sup>189</sup> His answer was straightforward: “As sweeping and unsettling as the Chemical Weapons Convention Implementation Act of 1998 may be, it is clear beyond doubt that it covers what Bond did; and we have no authority to amend it. So we are forced to decide—there is no way around it—whether the Act’s application to what Bond did was constitutional.”<sup>190</sup> Scalia would have held that it was not, and he forcefully accused the Court of exceeding its authority by contriving *not* to do so.<sup>191</sup> (Oh how I miss the late Justice Scalia’s clarity—much as I often disagreed with him.)

Many, and one hopes most, instances of constitutional avoidance are far easier to justify than that presented in *Bond*. Federal laws are often written in genuinely ambiguous ways that can be construed narrowly enough to spare those laws from facial invalidation (and, at the same time, sufficiently narrowly to avoid effectively accusing Members of Congress of having violated their oath to uphold the Constitution). When laws are drafted with sufficient facial ambiguity, that kind of narrowing construction can be performed without twisting statutory words beyond recognition or, even worse, leaving those words standing but stubbornly refusing to apply them in particular circumstances where federal enforcement authorities foolishly failed to exercise their discretion not to prosecute.

The Court decides a number of clearly defensible constitutional avoidance cases on a regular basis. Those that are most controversial involve raising barriers to individuals and businesses seeking to bring federal constitutional challenges before Article III courts, barriers either very narrowly defining the class of those with “standing” to invoke federal judicial power or treating certain matters, such as the constitutionality of actions by the Commander in Chief in pursuing undeclared wars, as posing nonjusticiable political questions and thereby leaving individual victims without any possibility of obtaining judicial redress.<sup>192</sup>

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189. *Bond*, 134 S. Ct. at 2094 (2014) (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 48, at 333 (James Madison) (J. Cooke ed., 1961)).

190. *Id.*

191. *Id.* at 2102.

192. *E.g.*, Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 623 n.74 (1976) (collecting cases in which federal courts used standing and political questions doctrines to avoid ruling on the constitutionality of the Vietnam War).

There is a veritable cottage industry of books and articles about the so-called passive virtues of abstaining from decision, as well as counter-books and articles delineating the “subtle vices of the passive virtues.”<sup>193</sup> This paper isn’t a useful place to sum up that literature or to build on it, but it is worth noting at least one particular form of “constitutional avoidance” that entails the very opposite of remaining silent about what is *in* the Constitution. That form of avoidance turns out to be more frequently invoked than one might suppose.

The most consequential example in recent years was the approach taken by Chief Justice Roberts to provide a fifth vote to reject a sweeping constitutional attack on President Obama’s most significant domestic achievement, the passage of the Affordable Care Act. In *NFIB v. Sebelius*, decided in 2012, the Chief joined four Justices in concluding that Congress had exceeded its power under the Commerce Clause and the Necessary and Proper Clause in undertaking to require virtually all businesses and citizens to purchase federally approved health insurance<sup>194</sup>—but he joined another four justices in concluding that Congress acted within the taxing power in imposing federal tax penalties on those who failed to purchase such insurance in accord with the ACA.<sup>195</sup> Congress had, as far as the naked eye could see, done more than impose taxes on non-purchasers: it had in essence purported to make non-purchasers into outlaws.<sup>196</sup> But the Chief Justice, alone among the Justices in that respect, asserted the authority in essence to *rewrite* the ACA, abetted by the administration’s promise, offered obligingly during oral argument,<sup>197</sup> to refrain from criminally prosecuting any non-purchasers, so that the ACA could masquerade (at least for the duration of the Obama administration) as a mere tax, which the Chief Justice insisted—with a clear if not altogether convincing explanation—was a less drastic and invasive form of power than a free-standing regulation.<sup>198</sup>

I don’t mean to be as critical of the chief as this may sound. On the contrary, in the 2014 book I coauthored with Joshua Matz, *Uncertain Justice*, I *defend* the Chief’s unusual way of sustaining the heart of the ACA,<sup>199</sup>

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193. Compare, e.g., ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111–98 (1962), with, e.g., Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

194. 132 S. Ct. 2566, 2593 (2012).

195. *NFIB*, 132 S. Ct. at 2600.

196. *Id.* at 2651–55 (Scalia, J., dissenting).

197. See Transcript of Oral Argument at 44–50, *Dep’t of Health and Human Servs. v. Florida* 132 S. Ct. 1618 (2012) (No. 11-398).

198. See *NFIB*, 132 S. Ct. at 2596–97 (opinion of Roberts, C.J.).

199. LAURENCE TRIBE & JOSHUA MATZ, *UNCERTAIN JUSTICE* 66–68 (2014).

following a path I had publicly predicted he would take (and had argued he *should* take) months before the decision was announced.<sup>200</sup>

What I *do* mean to be saying is simply that, although presented as an instance of constitutional avoidance, the Roberts opinion didn't actually *avoid* any constitutional question but instead *resolved it against what Congress quite plainly wrote*. The Chief Justice conceded that "reading" the congressional mandate to purchase insurance as though it offered individuals and employers the *option* of *either* purchasing insurance or *paying a federal tax penalty for not doing so* required rejecting by far the most natural reading of the ACA and replacing it with a version of the law that Congress had not actually crafted. But he said that he *had* to adopt that reading in order to avoid the more drastic step of striking down the ACA altogether. Thus the Chief Justice essentially *rewrote* Congress's handiwork so as to avoid the politically unpalatable and institutionally injurious result of dooming the entire ACA. In doing so, he was taking two significant and controversial steps.

One was a step that four dissenting Justices criticized as a usurpation of Congress's exclusive *power to raise and collect taxes* under Article I<sup>201</sup>—while four concurring Justices defended it as entirely legitimate inasmuch as it did not entail subjecting anyone to a tax liability that Congress had not in fact authorized, albeit under a regulatory rubric.<sup>202</sup>

The other was a step that the four dissenters praised as a proper application of prior Commerce Clause jurisprudence<sup>203</sup>—while the four concurring Justices attacked it as unprecedented and unjustifiable.<sup>204</sup> To those four, the Chief had imposed a substantial and analytically incoherent new constraint on Congress's Article I power to regulate interstate commerce when he insisted that Congress had exceeded its power to *regulate* commercial activity when it sought to *create* such activity by compelling supposedly "inactive" individuals to *enter* the stream of commerce.<sup>205</sup> It was an instance of using faux-avoidance not as a genuinely interpretive technique but, rather, as a more modest remedy for a constitutional violation than out-and-out rejection of Congress's entire enactment would have

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200. JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 183–84 (2013); Laurence Tribe, *Chief Justice Roberts Comes into His Own and Saves the Court While Preventing a Constitutional Debacle*, SCOTUSBLOG (June 28, 2012, 3:41 PM), <http://www.scotusblog.com/2012/06/chief-justice-roberts-comes-into-his-own-and-saves-the-court-while-preventing-a-constitutional-debacle/> [https://perma.cc/52DM-A64R].

201. See *NFIB*, 132 S. Ct. at 2651 (Scalia, J., dissenting).

202. See *id.* at 2612–2613 (Ginsburg, J. concurring).

203. *Id.* at 2645–47 (Scalia, J., dissenting).

204. *Id.* at 2621–23 (Ginsburg, J. concurring).

205. *Id.*

been.<sup>206</sup> But what seemed more modest vis-à-vis the ACA was anything but modest vis-à-vis the Constitution.<sup>207</sup>

That observation leads to a final note: whenever the Supreme Court either issues a formal constitutional condemnation (even if in the course of upholding an exercise of power on other grounds, as in *NFIB*) or gives its formal constitutional blessing to a contested exercise of state or federal power, evaluating the long-term impact of what the Court has done requires a comparison with the impact of what *would have happened* had the Court simply refrained from speaking to the constitutional question at hand. The evaluation requires, to be clear, a comparison with the impact of silence.

Perhaps the best example of what I have in mind is *Korematsu v. United States*, the infamous—indeed, anticanonical—case in which the Court in 1944 deferred to government assertions that the forced relocation of Japanese Americans (all United States citizens of Japanese ancestry living along major stretches of the West Coast) was essential to America’s national security.<sup>208</sup> Among the many reasons *Korematsu* was a blot on the Court’s and the nation’s history was that the Court displayed uncritical faith in factual claims by government lawyers about the threat posed by persons described as Japanese-American spies and saboteurs even though these claims directly contradicted confidential reports by high-level military and intelligence officials that, as it turns out, the Justice Department had deliberately misrepresented to the Supreme Court—an inexcusable lapse for which the Solicitor General formally apologized decades later.<sup>209</sup>

The Court stopped short of ever actually *upholding* the *internment*—in “so-called Relocation Centers,” which dissenting Justice Owen Roberts rightly said was but “a euphemism for concentration camps”<sup>210</sup>—of loyal Americans of Japanese descent, purportedly upholding “only” the orders imposing a curfew on those Americans and requiring them to leave their

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206. See Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275 (2016) (developing a helpful distinction between avoidance as interpretation and avoidance as remedy).

207. See Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2138 (2015) (“[*NFIB*] required, as a logical matter, establishing *two* separate constitutional propositions: that a mandate cannot be constitutional as a tax and that a mandate cannot be passed under the commerce power. That’s an awful lot of constitutional law to make in a decision that turns finally on the interpretation of a statute.”).

208. 323 U.S. 214, 219–20 (1944).

209. Neal Katyal, *Confession of Error: the Solicitor General’s Mistakes During the Japanese-American Internment Cases*, DEP’T OF JUSTICE (May 20, 2011), <https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases> [<https://perma.cc/D25U-CW6Q>].

210. *Korematsu*, 323 U.S. at 230 (Roberts, J., dissenting).

homes and the areas in which they had lived for years to report to designated “Assembly Centers.”<sup>211</sup> Indeed, in a much-overlooked decision issued the same day as *Korematsu*, in a case called *Ex parte Endo*, the Court ruled in an opinion by Justice Douglas that the *forcible internment* of U.S. citizens merely by virtue of their Japanese ancestry was *not* in fact authorized by federal law.<sup>212</sup> The Court thus avoided having to decide whether, *if* federally authorized, such race-based internment would, under the circumstances existing at the time, comport with the Fifth Amendment’s Due Process Clause.<sup>213</sup>

The Court’s *Korematsu* opinion contained a slim silver lining: it voiced the first dictum in our constitutional history stating that the principles of “equal protection of the laws” applicable to racial discrimination by *state* authorities under the Fourteenth Amendment, enacted in 1868, apply as well to racial discrimination (and presumably to other forms of discrimination as well) by *federal* authorities under the Fifth Amendment, enacted in 1791—despite the Fifth Amendment’s self-conscious silence as to any equality principle and the obvious incompatibility of its history with that principle, at least with respect to the paradigm case of race. Specifically, the Court in *Korematsu* said that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect” and must be “subject[ed] to the most rigid scrutiny” to assure that they are in fact justified by “[p]ressing public necessity” and do not reflect “racial antagonism.”<sup>214</sup> But the Court then shamefully proceeded to find the requisite justification by deferring uncritically to the merely asserted judgment of the President and of military authorities in the perilous circumstances confronting our nation in the wake of Japan’s attack on our naval forces at Pearl Harbor.

One of the three dissenters, Justice Robert Jackson, issued a passionate condemnation not just of the Court’s finding but, more fundamentally, of the Court’s decision *not to remain silent*:

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset

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211. *Id.* at 221–22.

212. 323 U.S. 283, 303–05 (1944).

213. *Endo*, 323 U.S. at 299–300; *see also* Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933 (2003).

214. *Korematsu* 323 U.S. at 216 (emphasis added). Notably, the possible differences between legal restrictions curtailing “civil rights” along expressly racial lines and those affecting “only” the distribution of positive, government-created entitlements along such lines, have yet to be fully explored. Equally unresolved are arguments about what violations, if any, depend on the mental state with which government actors either curtail a group’s “civil rights” or affect its access to government benefits, entitlements, or privileges. *See* Richard H. Fallon, *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. (forthcoming 2016).

that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. . . . No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting. Perhaps he should be. But a commander, in temporarily focusing the life of a community on defense, is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.

But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. That is what the Court appears to be doing, whether consciously or not. I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient military precautions, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court holds, it does follow, then we may as well say that any military order will be constitutional, and have done with it. . . .

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather *rationalizes the Constitution to show that the Constitution sanctions such an order*, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as “the tendency of a principle to expand itself to the limit of its logic.” A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.<sup>215</sup>

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215. *Korematsu*, 323 U.S. at 244–47 (Jackson, J., dissenting) (emphasis added) (footnote omitted).



It is by no means clear what Jackson would have had the Court *do* with the conviction of Fred Korematsu, “born on our soil, of parents born in Japan,” for “merely . . . being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived,” in violation of a “series of military orders which made [his] conduct a crime” by forbidding him to remain—and at the same time forbidding him to leave.<sup>216</sup> This surreal and untenable Catch 22 required him, if he wished to avoid violation, “to give himself up to the military authority” to submit to “custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps.”<sup>217</sup>

Would Jackson have let Korematsu’s conviction stand *without any judicial review at all*? Could he have held that the conviction should have been reviewed but somehow *upheld* that same conviction while not addressing in any way the constitutionality of the orders he had been convicted of violating?

My purpose here is not to explore the intricacies of the extraordinary sort of “judicial silence” that Justice Jackson seemed to favor in the singular circumstances of Fred Korematsu’s case. My only purpose is to illustrate, in the dramatic form the subject demands, the importance of evaluating every instance of a pronouncement about what the Constitution says—or what it fails to say—against the background alternative of somehow contriving to remain silent.

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Silences, whether in the Constitution itself or in authoritative judicial pronouncements about what the Constitution requires, allows, or forbids, cannot be meaningfully evaluated without comparing them to the array of alternatives—comparing them to the background of soundings that those silences interrupt or replace. The question is always: silence . . . compared to *what*?

The reciprocal relationship between soundings and silences, the topic of this paper, is ultimately shrouded in mystery. That brings me to my final observation: few fortune cookies reveal messages worth saving. A possible exception turned up in a cookie a friend was served at a popular Chinese restaurant in Cambridge: “Everything that we see is a shadow cast by that which we do not see.”<sup>218</sup>

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216. *Id.* at 242–43.

217. *Id.* at 243.

218. For several years, I had simply assumed that the author of this haunting image would remain hidden from view, laboring away in some obscure fortune cookie factory. But my resourceful research assistant Colin Doyle, a 3L at Harvard Law School—finding that scenario as unlikely as it was romantic—pursued the matter assiduously and recently informed

I would add only: “Everything that we do *not* see is a shadow cast by that which we might have seen.”

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me that the source of the message in question was none other than an early sermon by Dr. Martin Luther King Jr., reprinted in his 1958 book, *The Measure of a Man*. MARTIN LUTHER KING, JR., *THE MEASURE OF A MAN* 32 (1959).