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THE SHADOW OF NATURAL RIGHTS, OR A GUIDE FROM THE PERPLEXED

*Hadley Arkes**

AMERICAN CONSTITUTIONAL INTERPRETATION. By *Walter Murphy, James Fleming and William Harris, II*. Mineola: Foundation Press. 1986. Pp. 1212. \$34.95.

G.K. Chesterton once remarked that the problem with the world was not that it was unreasonable or even reasonable, but that "it is nearly reasonable, but not quite." He imagined a "mathematical creature from the moon" assaying the human body and being struck by its symmetry: a hand on the left side, matched by another on the right, with the same number of fingers; twin eyes, twin nostrils, twin lobes of the brain. "At last he would take it as a law; and then, where he found a heart on one side, would deduce that there was another heart on the other. And just then, where he most felt he was right, he would be wrong." But this is precisely where Chesterton also found the charm of life. This "silent swerving from accuracy by an inch" was the "uncanny element in everything . . . a sort of secret treason in the universe."¹

That same sense of the matter may finally enfold the book of cases that has been assembled, shaped, layered — and written — by Walter Murphy, James Fleming, and William Harris, II. Any casebook offers, boldly, its scheme of organization, with a grosser, and then a finer, table of contents, with the headings, and then the parts, outlined in strenuous detail. But beyond that front, we know that there is another design at work: Some animating purpose will account for why the cases have been grouped, or "regrouped," in the way they have. And yet, we know that the design will show itself most tellingly in what it does not contain — in the cases that have been omitted, the themes that have been repressed or deleted, the comparisons that have not been invited.

There is, in casebooks, this sudden "swerving from accuracy by an inch." The authors, or compilers, evidently have a purpose, but they cannot convey it directly; they cannot offer here their own treatise, or their own extended response to the puzzles they are unearthing. They will be compelled to teach through indirection. They will try to guide

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1. G.K. CHESTERON, *ORTHODOXY* 146-47 (1926 ed.).

the reader through the thicket of jurisprudence; they will choose the path of his movement, and they will determine what he sees. But if one wishes to write or teach about the law, the casebook offers an awkward, cumbersome instrument. When the compilers of this book have the occasion to write, they seek to write well, to write vividly and differently, in a tome that curiously makes that effort seem implausible or even out of place.

And so, for example, before the writers even enter their first question of "What is the Constitution?" they show the best reflexes of a teacher: They begin with a set of cases that can impress the students, instantly, with the gravity and the grandeur of the subject. They begin with *Korematsu v. United States*,² *Hirabayashi v. United States*,³ and the cases arising from the evacuation of the Japanese from the West Coast at the beginning of the Second World War. They defer, to a later point in the book, the more intricate questions of jurisprudence. But they take the occasion to record the private exchanges among the judges, and the agonies of the judges reveal the reach of the public issues. The tension among the judges may be deepened by their personal abrasions, but those personal aversions cannot obscure the strains suffered by the judges over the ends of the law. There was an evident sympathy for the Japanese, who were made the objects of sweeping restrictions, administered with a racial animus and a war-time sense of vengeance. On the other side, of course, were the exigencies of war. And even if these measures could not survive a more stringent test of justice, were the judges really in a position to vindicate these wrongs? Were the judges in a position to supersede the orders of the military, or the Commander-in-Chief? Were the courts really the institution that could properly take responsibility for the security of the country and the deployment of the armed forces? In this prelude, set forth before they begin the real "business" of this book, the writers are able to impart a sense of the restraints emanating from the character of the Court as an institution. They convey something of the character of the justices, but the descent into gossip is overborne by the dominant theme: Whatever personal aversions may feed the tensions of the Court, the main agony of the Court is the strain of working through the "justification" for a solemn judgment of the law.

Some of the most fetching writing in the book occurs, as I say, in these opening pages, and there is never an occasion when good writing is out of place. And yet, when the reader encounters these rich, absorbing passages, he finds himself holding the remaining 1,100 pages of the book in his right hand, and he knows that the remainder is not going to be *War and Peace*. And when he learns, even before the book begins its teaching, that Justice Jackson "detested" Justice Black, he

2. 323 U.S. 214 (1944).

3. 320 U.S. 81 (1943).

may properly wonder what difference that could make to the "justification" that the Court had to produce in any case. What difference could it really make to the project of jurisprudence that it must be the mission of this book to explain? Henry James described, in one of his stories, a procession on a Sunday in Rome, at St. Peter's. "The bright immensity of the place," he wrote, "protected conversation and even gossip. It struck one not as a particular temple, but as formed by the very walls of the faith that has no small pruderies to enforce."⁴ The "walls" of this book, I take it, are nothing less than the walls of jurisprudence itself. To take the trouble to remark on the personal animosities among the justices — to raise the matter to a subject, not merely worth remarking upon, but a subject that is somehow central to the understanding of the Court — seems to incorporate "small pruderies" in the foundations of this work. For that reason, it may introduce a grave confusion, at the beginning, about the way in which the writers understand their own project. Or, it may serve to throw the reader, again, off the path of surety. That is what I mean when I say that this casebook may be "swerving from accuracy by an inch": Just when we think we understand the design of the work, just when we think we know what the writers are up to, they throw us off course. That may be the charm of the work. That may also be a reflection of the enduring, serious questions that the authors have preferred to avoid. Still, when we collect all these strands — when we take account of the places where the writers seem at odds with themselves, when they lead us to expect one thing and deliver another — when we account, in short, for the flaws that would show up in any work of this kind, it is still apt to consider just what charms, and what lessons, the book manages to deliver. To see what comes, emphatically, through these pages is to recognize at the same time the lessons that are being held back, and the issues that the writers seem reluctant to address in a searching way.

* * *

Any professor who receives a new casebook knows that the principal cases will remain the same. For a new book to justify itself, or commend itself for adoption, it must indeed promise something different: there will be a different frame placed around the cases, and there will likely be a rearrangement of the cases. The intellectual enterprise moves, in part, by recognizing connections among things that have previously been unconnected. By grouping cases in a novel way, the assemblers may bring out connections that have previously gone unperceived. At the same time, they may mute other themes. They may choose to leave certain themes unsounded because they are already so prominent that they need no further notice. On the other hand, certain themes may be muted or concealed because the writers do not

4. James, *The Solution*, in *THE COMPLETE TALES OF HENRY JAMES* 365 (L. Edel ed. 1963).

wish to make them any part of their teaching. Like the governess in *The Importance of Being Earnest*, they may prefer to omit the chapter on "The Fall of the Rupee" as somewhat too sensational for a young girl⁵ or too unsettling, politically, for an impressionable young man. But the authors may also be content to leave the reader with the impression that what has been omitted is far less important than what has been picked out for mention in the text.

With these decisions on inclusion or omission, there are of course endless quibbles. Nevertheless, any new casebook finds its justification in the claim to this kind of novelty. It must be legitimate then to raise questions about the groupings of cases that were made or foregone, and the omissions that must seem curious. But apart from the arrangement of cases, there is, as I have said, the "frame" that the writers put around the cases. Writers will often present short, interpretive essays at the head of different sections in an effort to guide the reader. Murphy, Fleming, and Harris show a willingness to exert themselves even more fully in this enterprise, and they take it, as part of their assignment, to introduce the student to that maze of concepts that have made an impression recently on the juridical mind in America. Not all of these concepts have been especially plausible, and it may be a task of supererogation for the writers to flex their talents in this way — to foster the illusion, among new readers, that these terms are, by and large, intelligible. The reader new to the law will suddenly be introduced to a world filled with partisans of "interpretivism" and "non-interpretivism"; of "positivism," "structuralism," and "departmentalism"; of "strict scrutiny" and "intermediate scrutiny"; of "rational relation" and "compelling interest." There is also something called "natural law," which always seems to be hovering about the cases, almost always ridiculed, and yet somehow never evaded, never quite expelled — and never explained as carefully as the other doctrines that claim a hold on the minds of the judges.

The student is not likely to become wise to the distinction between "induction" and "deduction" on the basis of the account offered here (pp. 302-03), but that may be only a gentle preparation for the things to come: He is likely to find far more inscrutable the distinction between laws that restrict "fundamental" interests and require the most "compelling" justifications, and the kinds of laws for which the judges are quite affably willing to accept justifications that are lame, but good enough ("minimally rational").

But this willingness to begin with the most elementary points offers one of the distinctive — and appealing — marks of this book. Early in the work the writers are willing to raise questions about the sources of law outside the text of the Constitution, and they are willing to alert their students to the possibility that the Supreme Court may not be the

5. O. WILDE, *THE IMPORTANCE OF BEING EARNEST* (1959).

sole, authoritative interpreter of the Constitution. They are willing to consider, that is, that the President and the Congress may have standing to act as interpreters of the Constitution. And in filling out these questions, the authors are willing to draw on a range of writings that run beyond the decisions of the Court. As one might expect, they draw on the notable statements of Lincoln, Jefferson, and Jackson on the responsibility of the President to judge the measures that come under his hand. Suppose, for example, that the President were faced with an act of Congress that provided military conscription only for people of a minority race in this country. Would the President be obliged to consider only the "utility" of this measure as he weighed the possibility of a veto? Would he be obliged to consider only the question of whether the policy would "work," or would he be bound also to consider the question of whether the legislation was compatible with the principles of the American Constitution?

The writers draw on the arguments made by the Presidents, but they also draw on the debates over the Judiciary Act of 1802,⁶ and the rival testimony that was offered in 1981 by Laurence Tribe and John Noonan over the Human Life Bill.⁷ With that measure, the President and the Congress sought to revise, through an ordinary act of legislation, the decision of the Supreme Court in *Roe v. Wade*.⁸ In that decision, of course, the Court articulated a "constitutional right" to an abortion. The Court managed to achieve that end by treating, as an inscrutable religious issue, the question of when human life began.⁹ In 1981 the Congress sought to relieve the puzzlement of the Court; Congress began to assemble the evidence that seemed to go unnoticed by the Court, and to make a principled argument on this question that ran beyond the imagination of the majority in *Roe v. Wade*. In any event, the Congress proposed to flex its authority under the fourteenth amendment and revise this ruling made by the Court in *Roe v. Wade*: that the human fetus, the offspring of homo sapiens, was not a "person" who came within the protections of the Constitution.

The writers showed the right reflexes in connecting this enduring problem of constitutional authority to the current question of abortion. They might have made the point even more tellingly if they had been willing to go a bit further afield and annex, to this collection of writings, the recent controversies over the War Powers Act. We have had the example, in recent years, of senators such as Gary Hart and Arlen Specter, who have scoffed at the Reagan administration for

6. 7 ANNALS OF CONG. 614 (1802).

7. *The Human Life Bill: Hearings on S. 158 Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981).

8. 410 U.S. 113 (1973).

9. For an extended treatment of this question as it was handled by the Court, see H. ARKES, *FIRST THINGS* ch. XVI (1986).

adopting the understanding held by Lincoln about the authority of the President to interpret the Constitution. They have insisted that the President may not reject the constitutionality of the War Powers Act, and they have opposed the attempt of the Administration to revise, through ordinary legislation, the decision of the Court in *Roe v. Wade*. But at the same time, these senators have claimed for themselves precisely the kind of authority they have denied to the President: They have continued to regard the War Powers Act as constitutional, even after that Act has been called into question by a landmark decision of the Supreme Court.¹⁰

In June 1862, Lincoln and his Congress claimed the same authority to act upon their own understanding of the Constitution. Congress abolished slavery in all existing territories of the United States, and in all territories that might be formed or acquired in the future. As Professor James Randall would later write of this legislation, "Congress passed and Lincoln signed an unconstitutional law, according to Supreme Court doctrine."¹¹ What the President and Congress had done, in the most explicit and direct way, was to counter the decision of the Court in the *Dred Scott* case.¹²

These moves can be regarded as comprehensible and defensible only with the understanding held by Lincoln about the authority of the political branches and the limits to the authority of the Court. When Lincoln pledged his opposition to the *Dred Scott* decision, he conceded that he would be obliged, as President, to respect the judgments of the Supreme Court. But the Court reached its judgments in cases in controversy, and so Lincoln was prepared to accept the judgment of the Court as "binding in any case, upon the parties to a suit, as to the object of that suit, . . . [and] limited to that particular case" (p. 229). What he was not obliged to accept was the *principle* or the broader rule of law articulated in the case. The power of the judges, in that respect, would have to depend, as Andrew Jackson said, solely on "the force of their reasoning" (p. 226).

That perspective on the matter left the Administration and Congress free to apply their own understanding of the Constitution in the decisions that arose in their own spheres.¹³ With the legislation on the territories, it is worth bearing in mind that the political branches did not circumvent the Court: a case could have been generated; the statute could have been tested in the Supreme Court. The Court could

10. See *INS v. Chadha*, 462 U.S. 919 (1983). I have had the occasion to explain this point more fully in a recent piece, Arkes, *On the Moral Standing of the President as an Interpreter of the Constitution: Some Reflections on Our Current "Crises"*, 20 PS 637 (1987).

11. J. RANDALL, *THE CIVIL WAR AND RECONSTRUCTION* 478 n.1 (1937).

12. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

13. I had the occasion to recall two cases in which the administration had the chance to act on this understanding in administrative decisions in reversing decisions of the Buchanan administration. See H. ARKES, *supra* note 9, at 421-22.

have held to its earlier position and struck down the new legislation. In that event, it might have been necessary for Congress to move to the level of a constitutional amendment. But on the other hand, the determined opposition of the Congress and the Administration might have induced the justices to take a sober second look at what they had done. Faced with the reasons assembled by Congress, faced with the determination of the political leadership, expressed in the solemn form of a statute, the Court could even have come to the judgment that it might have been mistaken. After all, the justices have changed their minds before, when challenged in this way by the Congress. The constitutional arrangements in America are open to this kind of exchange and challenge between the branches, and it is remarkable (to put it mildly) that some of our leading commentators on the Constitution seemed to forget about these precedents when they came to testify on the Human Life Bill.

But Professor John Noonan did recall this history when he testified on behalf of the bill, and the writers of the casebook showed an uncommon judgment when they made a place in the book for his testimony. But for some reason, they chose to delete two short paragraphs, which contained the most telling precedents in support of his position. In *Glidden Co. v. Zdanok*¹⁴ and *Prudential Insurance Co. v. Benjamin*,¹⁵ the Court backed away from earlier rulings on constitutional questions, when the Congress persisted in taking a different view of the matter.¹⁶ One would have gathered from the reaction of many professors, that there was something deeply illegitimate about the Human Life Bill, something deeply at odds with the tradition of the Constitution. In light of this reaction, it seems odd that the compilers could not find room for the two short paragraphs, which might be decisive in dissolving the kinds of objections raised against the Human Life Bill. And yet, that is not the only remarkable omission, or the only point of curiosity, in the arrangement of the cases.

The principal case on abortion appears late in the book; the reader finds it placed, well along, in a group of cases that have been collected under the title of "The Right to Bodily Integrity" (p. 1105). *Roe v. Wade* is preceded in this group by *Jacobson v. Massachusetts*,¹⁷ a venerable case from 1905 on compulsory vaccination. But the reader finds a note, referring him back in the book for the text of the *Jacobson* case. The reader may recall that he had seen *Jacobson* at page 91 (over 1,000 pages earlier). If not, or if he is not inclined just then to track the case down and read it again, he will not have the text before him as

14. 370 U.S. 530 (1962).

15. 328 U.S. 408 (1946).

16. Noonan's testimony is reprinted in Noonan, In re the "Human Life Bill," 7 HUMAN LIFE REV. 65 (1981).

17. 197 U.S. 11 (1905).

he approaches *Roe v. Wade*. He may not then recall the words of Justice Harlan in strongly rejecting the claim to "the inherent right of every freeman to care for his own body,"¹⁸ a claim that may be used to evade a public policy on vaccination, or perhaps even a policy that requires a citizen to make his body available in response to a subpoena or a draft notice.

But then, in the spirit of Sherlock Holmes, the mind is instantly drawn to the most notable "dog that wasn't barking": the most obvious omission in this section is *Schmerber v. California*.¹⁹ In that case, Justice Brennan justified the penetration of the body, and the extraction of blood, from a man who was suspected of drunken driving. In *Schmerber* and its progeny,²⁰ the Court has virtually made a nullity of *Rochin v. California*,²¹ the famous "stomach pump" case. The interest of the law in obtaining evidence, in rendering an accurate verdict on guilt and innocence, may override the claim of any person to have his body touched, pierced, penetrated, only with his consent. Is there any wonder why this case was omitted from the section containing *Roe v. Wade*? Its inclusion might have exposed the title of the section (*The Right to Bodily Integrity*) as a convenient cliché, and it would have made this point plain: If there is anything "wrong" about an abortion; if an abortion may represent, in certain cases, the assault on another body, the taking of a life, without justification; then the claim of a woman to her "bodily integrity" could not function as a shield to block off the child from the protection of the law.

Even more directly to the point, the reader will not find any reference in this section to *Connecticut v. Menillo*.²² The Court made it clear in that case that the right to an abortion had never been based on any claim to "the control of one's own body." If that premise had been critical to *Roe v. Wade*, then a woman should indeed have been free to take her own risks with her own body and have her abortion in an unlicensed clinic. But the Court has insisted, from the beginning, that the state may require the operations to take place in a hospital or a licensed clinic, at the hands of a licensed physician; and that position was affirmed by the Court in *Menillo*.²³ These provisions for safety are the only regulations that the Court has been willing to sustain in restricting the freedom of a woman to choose an abortion. And yet, that point has been quite enough to remind us that the decision in *Roe* was never based on a sovereign right to dispose of one's own body.

18. 197 U.S. at 26.

19. 384 U.S. 757 (1966).

20. See, e.g., *South Dakota v. Neville*, 459 U.S. 553 (1983).

21. 342 U.S. 165 (1952).

22. 423 U.S. 9 (1975).

23. More recently, this position has been refined, but nevertheless sustained, by the Court in *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 431-39 (1983).

It is not at all implausible, of course, to place *Roe v. Wade* under a rubric of "bodily integrity." But it is curious, and it invites one to ponder other plausible rubrics. What about: "defining persons" — the problem of considering just who is an agent bearing rights? Dead people, with wills? Animals? Members of endangered species, like sandhill cranes? Nonhumans, then, as well as humans? *Roe v. Wade* might have been placed next to *Dred Scott*: Before the reader perused the reasoning of Justice Blackmun, he might have been exposed to a far more strenuous and detailed exercise on the part of Chief Justice Taney, in his effort to show that the black man had never been regarded as a person bearing rights under the Constitution. In comparison to Taney's effort, Blackmun's scraps of evidence would have been seen as rather scanty, as he set out to argue that the "persons" mentioned in the Constitution were not, apparently, *prenatal*. But of course, a comparison would have been embarrassing, and perhaps even provocative, and it would have suggested a rather emphatic argument, even without the tendering of a word. I do not mean to suggest that in failing to take a position of this kind the writers have taken, by implication, a benign, supportive view of abortion. My own hunch is that the writers sought to take a posture of judicious detachment on this issue to raise a number of critical questions, without appearing to lead the reader in either way on this vexing matter.

And yet, certain curious points remain. I was mildly surprised, for example, to see the writers remark that *Roe v. Wade* had created a right to an abortion "at least during the first trimester" (p. 125). For over a decade the *New York Times* and the *Washington Post* continued to misinstruct their readers in this way. It is only recently that these newspapers have begun to put out the correct account as a matter of standard practice: *viz.*, that the right to an abortion, created by the Court, extends throughout the entire length of the pregnancy. The Court in *Roe* did divide the pregnancy into trimesters, and it suggested that the state may have an interest, in the later stages, in protecting "potential life." But the Court also explained that this interest of the state could be overridden by the interest of the pregnant woman in her own health, and the Court made clear, in the companion case of *Doe v. Bolton*,²⁴ that "health" included the "mental health" of the mother. As Justice Blackmun put it, the health of the mother would have to be estimated in a medical judgment that took into account "all factors — physical, emotional, psychological, familial, and the woman's age — relevant to [her] well-being."²⁵

In other words, if a woman suffered any "distress" in being denied an abortion, that distress would be sufficient in itself to justify the abortion. And in point of fact, the Court has not yet sustained any

24. 410 U.S. 179 (1973).

25. 410 U.S. 179, 192; *Accord*, *Roe v. Wade*, 410 U.S. at 164-65.

efforts on the part of the states to forbid, or even restrict, the performance of abortion in the late stages of pregnancy, for the sake of protecting the child. I took the remark of the writers then as a casual slip, but I was surprised to see the same point repeated further along in the book (pp. 194, 898). At the same time, the authors failed to include any excerpt from *Doe v. Bolton* that might have shown how radical, in fact, was this new right to an abortion created by the Court. How to account for all of this? Why would the writers state *persistently* a point they must know is not true? What they happen to conceal, in this way, are the features that have made the laws on abortion in the United States the most radical in the West. Would they make that concealment, or that decorous muting, a part of their own project?

I think not. I detect, as I say, no zeal on the part of the writers to promote this cause. And a note in the book may offer a clue to their intention. The writers direct the reader to a chapter in *The Vicar of Christ*, the highly successful novel published by Walter Murphy in 1979. The central figure in the novel is a Catholic who becomes Chief Justice of the United States. The experience of the Court induces the protagonist — as it might induce anyone with serious, philosophic interests — to retire into a monastery. From there he is launched on a new ascent that carries him — brace yourself — to the papacy. Before he leaves the Court, Declan Walsh (the central character) presides, as Chief Justice, over the famous abortion cases. Murphy uses the occasion to reconstruct the conversations, or the arguments, among the justices, and he reveals, of course, the reach of his own imagination on this question. The most serious concession that Walsh seems to make to the defenders of abortion is to credit their puzzlement over the question of when a fetus becomes a “human being.” For Walsh, it is hard to imagine that the offspring of a human may turn out to be a sunflower or a sandhill crane, but he is willing to accept, for the sake of argument, that the fetus may be only a “potential” human. Still, he notes that the Court, in the past, considered corporations as “persons,” and some of his liberal colleagues were willing to regard trees and animals as having a certain standing to receive the protection of the law in policies on the “environment.” In a memorandum for his brethren on the Court, Walsh writes:

I feel compelled by the laws of evidence, sensory perception, and plain common sense to conclude that one cannot, with any degree of rationality whatsoever, simultaneously hold that a ship, a corporation, or even a bear is a person, and a fetus formed by the union of two human cells and growing within the womb of a human mother is not a person.²⁶

This memorandum is offered in a losing cause. In a narrow decision of 5-4, Walsh's colleagues reject his argument, and favor “the

26. W. MURPHY, *THE VICAR OF CHRIST* 198 (1979). For the fuller “conversation” on this question see *id.* at chapter 9.

rights of the person we *know* to be a human being," or, as the cause is described elsewhere, the "right," on the part of a woman, "to control her own body and thus to expel the fetus."²⁷ Perhaps Murphy has been clever in disguising his position; for all we know, his own position may be closer to the adversaries of Walsh. But the writer who composed this chapter had to understand that the "right of control over one's body" simply could not supply the ground of justification for the rulings in the abortion cases. For the same reason, he would have to know that the question of abortion could not be plausibly framed, in the casebook, under a "Right to Bodily Integrity." Murphy chooses to present the question of abortion, in the casebook, under the same "principle" that Declan Walsh recognizes, in the novel, as an empty slogan. With this move, Murphy may register a melancholy judgment: It may be hard to enlist a discussion of this contentious question on terms that depart too radically from the terms that have now settled in our public discourse. Or, this decision on the part of Murphy may mark a troubled move in prudence: For Murphy to unfold more of his own understanding is to take the risk of having the casebook branded as an "anti-abortion" book. That would be quite enough to insure that the book will be decorously passed by for use in the "better" schools. If this conjecture is right, then Murphy and his colleagues might have sought to avoid the problem by straining to preserve a parity in the arguments over abortion. In order to preserve that balance, they have had to screen from the book some of the most imaginative and compelling writing. But more than that, they have had to block out critical precedents, and even basic facts about the current arrangements of the law, lest they be "altogether too exciting," or, possibly, too embarrassing for the defenders of abortion.

Yet there is no gainsaying that the writers of this casebook are very much committed to that project in jurisprudence in which the "right to an abortion" has found its place. Any label we place on this movement is bound to be misleading. Let us say that this project has been marked by a willingness on the part of judges to cast off their beamish tolerance for the legislation of states, so long as the rationale for the legislation is even faintly plausible. This refusal to accept reasons that are simply good enough, this insistence on asking demanding questions, marks the temper that the writers seem to have in mind when they urge their readers to "reaffirm our commitment to the Constitution." But this constitutional temper splits the Court into factions, with almost every justice first on one side, and next on the other. The writers of this casebook seem to mirror that division within themselves, and the division in their own minds marks the tension that pervades this book.

If only there had not been the 1930s and the reaction of the courts

27. *Id.* at 191, 195.

to the New Deal: if the courts had not been so swollen with conviction, so willing to strike down legislation on minimum wages or child labor, the liberal jurists could have avoided the reactions that would make them into caricatures of themselves for the next fifty years. They might have been less inclined then to regard moral conviction as a sign of arrogance. They might not have rejected "natural law" as the ideology of political reaction, the cover for "laissez-faire" economics. And they would not have been driven to their madcap deference to legislatures, their willingness to have the Court recede from any faintly rigorous testing of any law, so long as it touched on "economic regulations." When the liberals would be driven to protect civil rights and civil liberties, they would be driven, of course, to restore moral conviction to the judges. They did not wish to utter the dread words "natural rights," but they wished the judges to believe again in certain standards of right and wrong that did not depend on the sufferance of local majorities.

Precisely where they would find the ground of these rights, they could not say. After all, they were spending their careers in affirming the grounds of "positivism," in philosophy and law, and denying the existence of moral truths in the strictest sense. That issue continues to afflict our modern jurists, both liberal and conservative, and it afflicts the authors of this casebook. And it may explain why the liberal jurists in the 1930s were driven to cope with the problem, not by seeking to establish again the ground of rights and moral truths, but by creating "tiers" of rights: They would continue to encourage judges to suspend their critical judgment and defer to the legislatures, but they would try to confine that official witlessness to matters of "economic regulation" and property rights. On the other hand, they would encourage the courts to begin marking off certain "preferred" freedoms — e.g., freedom of speech and association — which deserved, in their judgment, a more strenuous protection. Laws restricting these freedoms would engage judges who were equipped, once again, with critical faculties, and a willingness to apply a "strict scrutiny." In this spirit, the Court would later try to mark off "fundamental rights." From the pattern of these cases the justices would later discern a right of "marriage," "procreation," "privacy." And, of course, the claims to privacy would later encompass the right to an abortion.

But these are merely the elaborations, and the writers of the casebook see clearly on this point: The whole enterprise begins with Harlan Stone's famous footnote, buried in the *Carolene Products* case.²⁸ In that note, Stone expressed a willingness to withdraw "the presumption of constitutionality" from legislation when it "appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." Stone also spoke of a willingness

28. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

to engage in a "more exacting judicial scrutiny" when legislation "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." That scrutiny would become engaged, also, when legislation threatened certain "discrete and insular minorities," who were the victims of local prejudice, and who could not command the leverage to protect themselves, politically, in their towns or states (pp. 489-90, *passim*).

From these modest points, tucked away in a footnote, the cast of our recent jurisprudence was formed, with its tiers of "preferred" (and, by implication, "unpreferred") freedoms, with "rights" that were "fundamental" (and, apparently, "rights" that were not so fundamental or important). The writers were correct, I think, in taking Stone's footnote as the pivot in their casebook: For the remaining 700 pages, the cases are arranged according to the cast that the justices came to accept for themselves as they accepted the language, and all of the awkwardnesses, that flowed from this jurisprudence. As the authors observe, "[Stone's] footnote 4 continues to be the hinge on which much of modern constitutional argument turns" (p. 493).

At the same time, the justices launched themselves on a course of philosophic incoherence from which they still have not been able to recover. For example, the "fundamental rights" to marry or to procreate were never meant to suggest that marriage and procreation could not be restricted by the law. The law could fix the age of consent, it could bar the marriage of blood relatives, it could confine marriage to "couples," it could insist that both partners be human, and of different sexes. In the famous *Skinner* case on sterilization,²⁹ both Justices Douglas and Stone sought to avoid any collision with Justice Holmes's odious opinion on sterilization in *Buck v. Bell*³⁰ ("The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough").³¹ Apparently, there was nothing categorical about "fundamental rights." Whenever they could be restricted in any case with justification, the law could restrict them. It was hard to see, then, just why they were more fundamental than the "right" to walk down the street, or the right not to be confined to one's own home. In fact, a serious case could be made that many of these cases were misdescribed — that the signal cases on "marriage" or "privacy" did not require any appeal at all to those concepts for the sake of settling the case at hand.³² These strains of coherence could be felt early on, as the Court began to work within the lines marked off by Stone's footnote. In 1943, Felix Frankfurter began to question, for the first time, the very

29. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

30. 274 U.S. 200 (1927).

31. 274 U.S. at 207.

32. For an extended explanation on these points, see H. ARKES, *supra* note 9, at ch. XV.

coherence of suggesting a hierarchy or ranking in constitutional principles:³³

The Constitution does not give us greater veto power when dealing with one phase of "liberty" than with another. . . . [The authority of the Court] does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom.³⁴

The writers perform the service of pointing up this passage in their commentary, as well as reprinting the fuller opinion. And yet, it becomes evident in the course of the book that this passage does not enlist them. It does not engage their sentiments, it does not summon their powers of argument in defense of Frankfurter, and it does not even inspire their willingness, finally, to understand the argument. To take Frankfurter seriously here, one would have to return to the understanding of the Founders, and the Founders made no discrimination between "economic" liberties and other kinds of freedoms. The Founders understood simply a "regime of liberty," in which people had a presumptive claim to their freedom, in all of its dimensions, unless there was a compelling reason that justified the restrictions of the law. When the law barred the access of aliens, or a racial minority, to certain occupations, was that an "economic" regulation? Or was it simply, as the jurists of the eighteenth and nineteenth centuries were wont to regard it: an arbitrary restriction of personal freedom?

The writers take note of that argument, but they are held back, and what seems to hold them back is an unwillingness to break with the liberal faith of the 1930s and 1940s. To put it another way, they are reluctant to admit the emptiness of the legal arguments that were produced in defense of the New Deal. That reluctance produces an ambivalence, which may be read in cases of this kind.

In *Moore v. City of East Cleveland*,³⁵ a local ordinance limited the occupancy in each dwelling unit to members of a single family, and the definition of "family" was confined to the nuclear family, with parents and their children. In this case the ordinance was applied against a woman who shared her home with her son and two grandsons; but the grandsons happened to be cousins and not brothers. In a plurality opinion, the Court overturned the conviction and raised some searching questions about the coherence of the regulation. Still, four justices dissented from this interference with the authority of a local govern-

33. For a more demanding argument on this point, going back to Aquinas, see *id.* at 161-65.

34. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 648 (1943) (Frankfurter, J. dissenting). This passage is quoted in the casebook at pp. 492, 1031.

35. 431 U.S. 494 (1977).

ment to make regulations on housing. Justice White expressed a certain unease over the prospect of launching the Court, again, on a course of "substantive due process": Were the justices really prepared to test the content, and the essential "reasonableness," of any local ordinance? White invoked the spirit of Justice Black and his "constant reminder to his colleagues that the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable."³⁶

My hunch is that the writers of this book are drawn to the side of those judges who would not settle, in these cases, with reasons that had merely a surface plausibility. Their hearts, I think, are on the side of the judges who are willing to look through the record, look through the layers of invention and official rationales, and demand a more exacting justification for a statute. And yet not entirely: I think the writers share the kind of ambivalence expressed by Justice White. They want judges who are prepared to defend "rights" in a tough-minded way; but they are reluctant to license the authority of the judges to begin testing again, with a demanding standard, the host of regulations passed by local governments on matters like zoning and rent control and the redistribution of land. The one conviction the writers are unwilling to give up is the conviction that the judges who opposed the economic "reforms" of the New Deal were deeply, enduringly, irretrievably wrong. The deepest contempt of the writers is expressed for the jurisprudence of Sutherland, McReynolds, and Peckham. But the deepest source of embarrassment for them is that the jurisprudence they want in their own day — the jurisprudence of active judges protecting "fundamental rights" — was opposed, most fiercely, by the jurists of the New Deal. No one expended more passion in attacking "substantive due process" and the Conservative Court than Hugo Black, Franklin Roosevelt's first appointee to the Court. And yet, no one was more vocal in opposing the creation of a "right to privacy" in *Griswold v. Connecticut*³⁷ or, for that matter, the invention of new "rights" against local governments.³⁸

The memorable justices of the New Deal — Black, Stone, Frankfurter — cannot supply the moral ground for the new jurisprudence sought by the writers. That ground can be supplied only by judges who understand that they are governed by a discipline of moral reasoning even when they exercise discretion. Judges gifted with that understanding know that they can call upon far more than their "subjective opinions," or their "political ideologies," when they presume to challenge the legislation of a state. In short, the project requires judges with authentic moral conviction — not judges who think

36. 431 U.S. at 544.

37. 381 U.S. 479 (1965).

38. For example, see Black's dissenting opinion in *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969), and the recollections of Justice White in *Moore*, 431 U.S. at 544.

that what is right or wrong really depends on the notions that are "posited" or stipulated by the majority in any place. It may not matter whether we call this body of conviction by the name of "natural law," or the "principles of law," or the "canons of moral reasoning." But the judges who find, in these notions, a discipline of judgment, will be readily distinguishable from the judges who regard the exercise (as Bentham regarded "natural law") as a species of "nonsense on stilts."

If the writers of the casebook sought the justices who took these matters seriously, they would find them, most conspicuously, in the Conservative Court at the end of the nineteenth century and the beginning of the twentieth. They would find their true ancestors in George Sutherland, John Harlan, and Stephen Field. When the Court in our own day brought forth a "right to an abortion," it drew that right from a chain of cases that seemed to disclose an emerging "right to privacy." Four or five cases were critical in this chain; two of them were *Meyer v. Nebraska*³⁹ and *Pierce v. Society of Sisters*.⁴⁰ The opinions in both cases were written by the hateful William McReynolds. As the writers note, McReynolds was a bitter anti-Semite. He was appointed by a liberal President (Wilson), but he became marked as a political "reactionary," a reliable member of the "Four Horsemen" of the Court (Sutherland, McReynolds, Van Devanter, and Butler), the justices who preserved a steady opposition to the measures of the New Deal. And yet, the record of the modern Court offers a silent homage to the Court of Sutherland, Field, and Peckham. When the justices seek, in our own day, the most compelling statements for the defense of personal rights against the arbitrary restrictions of the law, the strongest antecedents are still to be found in the jurisprudence produced by Sutherland and his forebears.

* * *

The writers remark that "[t]o *Lochner*' or 'to *Lochnerize*' has become a term of opprobrium referring to judges' reading their personal preferences about fundamental rights into the Constitution" (p. 980). The writers refer, of course, to the case of *Lochner v. New York*,⁴¹ and to the opinion written by the cantankerous Rufus Peckham. In that case, the Court struck down a New York state law that limited the working time of bakers to sixty hours per week. That case has been ridiculed by conservatives as well as liberals, and it has often been joined to *Adkins v. Children's Hospital*⁴² to form a model of the Conservative Court at its reactionary worst. In *Adkins*, the Court struck down a District of Columbia law that established a schedule of minimum wages for women in different occupations. The opinion of

39. 262 U.S. 390 (1923).

40. 268 U.S. 510 (1925).

41. 198 U.S. 45 (1905).

42. 261 U.S. 525 (1923).

the Court was written by the scholarly, thoughtful George Sutherland, whom the writers of the casebook regard as the very caricature of a political neanderthal. There are disparaging allusions to his motives, and he is described, most politely, as an "ardent defender of economic laissez-faire" (p. 1092). For the writers, Sutherland and Peckham reflected the tendency of the courts to invoke the "freedom of contract" as a nearly cynical device to favor the interests of business over workers. The bakers would be "protected" in their freedom to "contract," and their employers would compel them to contract for more than sixty hours per week.

And yet, in recent years, scholars have encouraged us to take another look at these decisions, and the work of the so-called Conservative Court. Bernard Siegan has taken a searching view of the record of that Court, and he has shown that the classic "liberalism" of the Court was not in fact confined to the protection of "economic liberties."⁴³ The justices protected liberties from arbitrary restriction, quite apart from whether the liberties were manifested in business or in other domains, and at times it was hard to tell the difference. In *Truax v. Raich*,⁴⁴ the Court struck down a statute that required employers of more than five persons to employ native-born citizens or qualified electors for at least eighty percent of the jobs. It takes a mind of special calibration to regard this judgment as a defense of "economic liberties." The Court removed an arbitrary restriction on the liberty of persons who were resident aliens; and that restriction happened to bear on the freedom to earn a living. In the case of *Allgeyer v. Louisiana*,⁴⁵ the Court considered restrictions on the freedom to purchase insurance from firms outside the state. In framing its judgment, this supposedly Conservative Court articulated one of the most expansive understandings of the range of personal freedom protected under the fourteenth amendment:

The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace *the right of the citizen to be free in the enjoyment of all his faculties*; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.⁴⁶

The author of this passage was the vilified Rufus Peckham. But it became critical, in fixing the political understanding of liberalism, to

43. See B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980) (especially chapters 5-7).

44. 239 U.S. 33 (1915).

45. 165 U.S. 578 (1897).

46. 165 U.S. at 589 (emphasis added).

stamp justices like Peckham and Sutherland with caricatures. Even with the estimable men who have assembled this casebook, it appears that the caricatures have taken such a secure hold that the authors are no longer able to see that the actual words of the justices — the words they have reprinted in their book — do not quite support the labels they have been content to stamp on these men. If the *Adkins* case were read again, read without preconception, Sutherland's opinion could be seen as an urbane and devastating commentary. The case for minimum wages was tested against a tutored jural sense, and the result was to expose the silliness and pretension of the local regulations. In this case, one of the suits was brought by a woman, Ms. Willie Lyons, who was more than content to work as the operator of an elevator in the Congress Hall Hotel at the wage she was offered (\$35 per week). Her employers would have been pleased to retain her, but they were compelled to let her go, because they could not afford to keep her on at the wage stipulated by the ordinance in the District of Columbia. Ms. Lyons testified that she had not been able to find a better job with better pay in surroundings as congenial to her. The law worked, then, to deprive her of a job that her employers were willing to offer, and which she was quite pleased to accept.

In the course of his opinion, Sutherland exposed the want of standards by which any official board could possibly judge the precise wage that was necessary, in any case, to preserve women "in good health and to protect [their] morals."⁴⁷ He remarked on the awkward pretension of claiming to know that it required a wage of \$16.50 per week to preserve the health and morals of a woman employed in the serving of food, while a wage of \$9 per week might be sufficient to preserve the moral character of beginners in a laundry.⁴⁸ In his career in the Senate, Sutherland had led the movement to enfranchise women. In 1915, he introduced the amendment to the Constitution on women's suffrage, and the amendment became known by his name. In the *Adkins* case, he defended the competence of mature women to understand their own interests and enter into contracts for employment with their own consent. As Bernard Siegan has suggested, Sutherland's language in this case would actually be far more in keeping with the modern temper of feminism than the patronizing view of women that was reflected in the regulations of the District of Columbia.⁴⁹ Sutherland observed that

the ancient inequality of the sexes, otherwise than physical, . . . has continued "with diminishing intensity." In view of the great — not to say revolutionary — changes which have taken place . . . in the contractual, political and civil status of women, culminating in the Nineteenth

47. 261 U.S. at 555.

48. 261 U.S. at 556.

49. See B. SIEGAN, *supra* note 43, at 148.

Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. In this aspect of the matter, while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances.⁵⁰

Of Rufus Peckham, the memoirs and letters of the times are chillingly void of any fond, or benign remembrance. Yet, Peckham's opinion in *Lochner* draws on some of the same, urbane skepticism that one may find in Sutherland: "Not only the hours of employés, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise. . . ."⁵¹ I know several young people, with newly minted degrees in law, putting in sixty hours a week as first-year associates in major firms. I also know of professors who routinely work more than sixty hours a week at their vocations. Could we imagine any "principle" that would tell us that these people had endangered their own well-being when they decided, for their own reasons, to commit these hours to their work? The usual retort is that these professionals have far more choice about their work than the bakers in New York at the turn of the century. But that reaction underlines the assumption that has always been engaged here: namely, that the workers involved in these cases had no practicable freedom to move from bakeries into other kinds of work, or to shift from one bakery to another if they found the terms of employment uncongenial.

And yet, as Bernard Siegan has discovered, there was a high degree of competition among the bakeries in New York at the time of the *Lochner* case. In fact, some further research into the origins of the law turns up this piece of intelligence: The movement to impose a limit on hours was supported mainly by the larger, "corporate" bakeries in New York. The imposition of a law on maximum hours became a highly useful device for raising the labor costs for their small competitors among the new immigrants, who were able to operate in modest, "subterranean" quarters, with lower costs in "overhead."⁵²

50. 261 U.S. at 553.

51. 198 U.S. at 60 (reprinted at p. 977).

52. See B. SIEGAN, *supra* note 43, at 116-18. The effect of the law might have been reflected in these figures reported by Siegan:

In 1899, only 2 percent of the baking establishments were owned by corporations, as compared with 7 percent in 1919. During this period the corporate portion of the industry's output rose from 28.7 to 51.8 percent. Between 1909 and 1919, the average number of wage-earners in corporate-controlled bakeries was about forty-four, as contrasted with an average work force of fewer than three people in the bakeries under other forms of ownership.

Id. at 116.

"Liberty of contract": This was the term used by Peckham and Sutherland, and which has been treated by the writers of the casebook as a code word for "laissez-faire economics." But Sutherland wrote in *Adkins* that "[t]here is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. . . . The liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It must frequently yield to the common good. . . ." ⁵³ Sutherland went on to discuss the variety of laws that may properly restrict the "freedom of contract": laws that protect workers against fraud in measuring their work and their compensation, laws that restrict the hours of work in mines and smelters under conditions that are likely to be hazardous. ⁵⁴ Sutherland sought to explain just what separated the regulations on minimum wages from the kinds of regulations that he regarded as legitimate. But this section is omitted from the casebook, along with the distinctions that he sought to explain. Still, the casebook does record Justice Peckham, in *Lochner*, making the same allowances. Peckham reminded his readers that "[t]he State . . . has the power to prevent the individual from making certain kinds of contracts . . . [e.g.,] a contract to let one's property for immoral purposes, or to do any other unlawful act" (p. 975).

Is this "laissez-faire?" Not if one understands "laissez-faire" in the simple slogans of the political marketplace, where it has been identified with the rejection of all legal restraints on commerce. But the classic doctrines of "laissez-faire" were never understood in this way, because the classic notions of economics were never disconnected from moral philosophy. Adam Smith, we may recall, was a professor of moral philosophy. The classic defenders of the "regime of liberty" in economics never assumed that the marketplace of exchange would be free from all legal and moral restraints. Writers such as Smith, Burke, and Turgot assumed that the law would be in place to do what it was ever the mission of the law to do: to mark off the difference between the legitimate and the illegitimate, and therefore, to mark off the kinds of activities that could never become the legitimate objects of contracts and exchange. It was never assumed, for example, that people would be free to make contracts over prostitution so long as there were people in the marketplace who were willing to demand and supply these services.

At the same time, the defenders of the "regime of personal liberty" understood the moral significance that attached to the "liberty of contract." Only a certain kind of creature had the competence to make contracts. Dogs and horses could not make promises and bear obligations. The notion of a "contract" implied "moral agents," who could enter, knowingly, into a commitment and bear an obligation. It was

53. 261 U.S. at 546, 561.

54. 261 U.S. at 547-48.

also understood that a moral obligation could not arise from an act of brute coercion. As Rousseau remarked, a highwayman may force us, at the point of a gun, to hand over our money, but we would not have a "duty" to hand it over.⁵⁵ A promise may be binding only when it is accepted, freely, without coercion — when it is accepted, that is, with the "consent" of the contracting party. In other words, this "freedom to contract" was understood, at the beginning, as grounded in the premises of "natural rights." It began with an understanding of the things that separated human beings, in nature, from beings that did not have the competence of moral agents. And it was drawn then from the same premises that established "government by consent" as the only legitimate form of government over human beings: No obligations could arise from contracts that were not entered freely, with the "consent" of the parties; and no arrangements of government could be binding without establishing the same "consent" on the part of the governed.

These connections were understood by jurists in the eighteenth and nineteenth centuries, but the passages that reflect this understanding are typically edited out of our casebooks. Perhaps they are regarded now as passages that bear little interest for contemporary readers. One essay that usually receives a heavy hand of splicing is that magisterial, dissenting opinion by Stephen Field in the *Slaughter-House Cases*.⁵⁶ Toward the end of the opinion Field added a footnote, in which he recalled an edict issued by Louis XVI in 1776, but written by his minister, Turgot. That edict began the dismantling of state monopolies and guilds, which restricted the access of workmen even to common occupations. The statement merits our rediscovery, after so many years, because it expresses the connection that was once taken for granted between freedom in the economy and "natural rights." The king began by praising the guilds and trading companies, but his statement then took this turn:

It was the allurements of these fiscal advantages undoubtedly that prolonged the illusion and concealed the immense injury [that the guilds] did to industry and their infraction of *natural right*. This illusion had extended so far that some persons asserted that the right to work was a royal privilege which the king might sell, and that his subjects were bound to purchase from him. We hasten to correct this error and repel the conclusion. God in giving to man wants and desires rendering labor necessary for their satisfaction, conferred the right to labor upon all men, and this property is the first, most sacred, and imprescriptible of all. . . . [T]herefore [the King] regards it as the first duty of his justice, and the worthiest act of benevolence, to free his subjects from any restrictions

55. J. ROUSSEAU, *THE SOCIAL CONTRACT*, bk. I, ch. 3 (R. Harrington trans. 1893).

56. 83 U.S. (16 Wall.) 36, 83-111 (1873) (Field, J., dissenting) (emphasis added).

upon this inalienable right of humanity.⁵⁷

In one of the famous Cherokee cases, *Worcester v. Georgia*,⁵⁸ John Marshall offered an engaging essay into the history of the first encounters between the Indians and the British on this continent. For the modern reader, the account has a nearly precious quality in reflecting an age marked by a different sensibility. As Marshall retells the story, the British established, decisively, their superiority at arms, which meant that they were in a position virtually to dictate the terms of any settlement; and yet, the British government felt obliged to hold back on a point of propriety. The British were reluctant to invoke the "rule of the strong" and claim the right of the victor to treat the vanquished as slaves or underlings. The British won at war, but they would settle their relations with the Indians now through the device of "treaties" (or contracts), and they would acquire the lands of the Indians through contracts of purchase. As the Chief Justice remarked:

[It was understood among the European powers that their dominant position] could not affect the rights of those already in possession [of the land], either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. [The Europeans could claim a right to purchase] but did not found that right on a denial of the right of the possessor to sell.

....

The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim.⁵⁹

But why was this the case? The fact that the British might be dominant at arms was not taken to extinguish the right of the Indians to "contract" over what was theirs. In a speech in Mobile in 1763, the British superintendent of Indian Affairs declared to the Indians assembled that "whenever you shall be pleased to surrender any of your territories to his majesty, it must be done, for the future, at a public meeting of your nation, when the governors of the provinces, or the superintendent shall be present, and *obtain the consent of all your people*."⁶⁰ That is, even aborigines deserved to be bound only with their consent. They merited, also, the kinds of *public* procedures that might

57. 83 U.S. (16 Wall) at 110-11 n* (quoting edict of Louis XVI) (emphasis added and in original).

58. 31 U.S. (6 Pet.) 515 (1832).

59. 31 U.S. (6 Pet.) at 544-45.

60. 31 U.S. (6 Pet.) at 547 (emphasis added).

insure that the consent was offered knowingly (or, as we might say today, that the consent was “informed”). I would suggest that these fastidious arrangements could be explained only if we take seriously the understanding of the time: that the right to enter into contracts, and to be bound only by consent, was not merely a “conventional” right, but a “natural” right. It could be accorded then, with propriety, to any moral agent, including an aborigine.

Anyone who has studied the history of our law would know that this was hardly a trivial point. For Marshall it mattered profoundly, in *Gibbons v. Ogden*,⁶¹ and in *Ogden v. Saunders*,⁶² that “individuals do not derive from government their right to contract, but bring that right with them into society; that obligation is *not conferred on contracts by positive law, but is intrinsic*, and is conferred by the act of the parties”:⁶³

If, on tracing the right to contract, and the obligations created by contract, to their source, we find them to exist anterior to, and independent of society, we may reasonably conclude that those original and pre-existing principles are, like many other natural rights, brought with man into society; and, although they may be controlled, are not given by human legislation.⁶⁴

Even in the state of nature, human beings could make promises to one another, and the obligation to keep the promise would remain, regardless of whether the parties remained in a primitive state, without government, or suddenly found themselves in civil society. If the right to contract does not arise from positive law, then neither may the obligations of contract be extinguished by positive law. The law may restrain contracts that are in principle illegitimate, but the government may not claim, so casually, the authority to extinguish, through positive law, the obligation to repay a debt, or to honor any other promise, solemnly recorded in a contract. Marshall drew this further implication in *Gibbons v. Ogden*: Since the right to engage in contracts or commerce cannot arise from the government, it cannot be within the just authority of the government to “annihilate” this commerce. Hence the language of the Constitution — that the Congress may “regulate” commerce; it may affect commerce with all rightful restraints; but it may not claim the right to ban innocent commerce, directed to legitimate ends.⁶⁵

I merely pick out here a few threads from the rich weave of our early cases; they could be supplemented, handsomely, by passages

61. 22 U.S. (9 Wheat.) 1 (1824).

62. 25 U.S. (12 Wheat.) 213 (1827).

63. 25 U.S. (12 Wheat.) at 346; (emphasis added).

64. 25 U.S. (12 Wheat.) at 345.

65. See *Gibbons*, 22 U.S. at 193, 211.

drawn from the briefs of Daniel Webster⁶⁶ or the opinions of Joseph Story and other jurists. But do we not find reflections of these ancient understandings in the cases of our own time? Over the last twenty years, the courts have revived the thirteenth amendment and section 1981 of the Civil Rights Act of 1866.⁶⁷ In cases like *Jones v. Alfred H. Mayer Co.*⁶⁸ and *Runyon v. McCrary*,⁶⁹ the federal statute was used successfully to reach discrimination against blacks in private housing and private schools. The decisive part of the statute, for these cases, was the provision that all persons shall have "the same right . . . to make and enforce contracts."⁷⁰ As the argument has run in these cases, the refusal of private establishments to deal with blacks as customers or patrons marked a refusal to regard blacks as parties with the dignity — with the competence or the moral standing — to act as "contracting" parties. The men who framed the Civil War amendments understood that the right to enter into contracts drew on the same moral premises that established the standing of black people as "free agents," with a claim to their natural and civil freedom. We have made use of these statutes in our own day, and they may yet help to remind us of the moral standing we recognize in beings who may properly claim the "freedom to contract."

The writers of the casebook turn away from "freedom to contract," as politically tainted; but they write, with a benign hopefulness, about a domain of personal rights that flow from the recognition of human "autonomy." But of course, we do not recognize claims of autonomy on the part of horses and cows, and no one would think of eliciting the "informed consent" of monkeys before they are subjected to surgery in a laboratory. The notion of "autonomy" arises only for moral agents; it finds its root in the same premises that underlay the "freedom to contract." Why is it "reactionary," then, to speak seriously of the "freedom of contract," but somehow "progressive" or liberal to extend the principle of "autonomy" and "informed consent"? To express reservations about "rent controls" may be taken as the mark of a mind notably indifferent to the advance of mankind. But when a court permits the relatives of a comatose patient to pull the plug on Uncle Julius — when it permits the relatives to act as agents for the "autonomy" or "privacy" of Uncle Julius in denying his own medical treatment — the judges are applauded for another advance in human liberation.⁷¹

66. One could hardly find a statement more learned in the law, or more philosophically compelling, than the brief written by Webster in *Ogden v. Saunders*. For the text, see 25 U.S. (12 Wheat.) at 237-54.

67. 42 U.S.C. § 1981 (1982).

68. 392 U.S. 409 (1968).

69. 427 U.S. 160 (1976).

70. 42 U.S.C. § 1981 (1982).

71. See, as an illustrative case here, in connecting "privacy," "autonomy," and the removal

This much may be said of the difference between the old apostles of "freedom of contract" and the new partisans of "autonomy": The judges who spoke seriously about the "freedom of contract" were alert to the moral ground from which that freedom arose. For that reason, they were alert to the fact that the freedom of contract could never encompass "the right to do a wrong" or to contract for immoral things. The same premises that established the rightful freedom of contract established an understanding, also, of the things that one could not claim in the name of one's "freedom to contract."

But that same understanding does not seem to be present in the claims of "autonomy." The writers of the casebook evidently find the notion progressive and liberal. And yet, they do not even attempt to suggest the ground in which it is rooted: From what does it derive? What proposition, what axiom or truth, makes the claim to autonomy valid? What makes it "good" or "desirable"? Is it "good" merely because we stipulate it to be good, as a matter of our own, arbitrary insistence? Or do we stipulate it as good because there is something that makes it in principle good? These questions all had compelling answers when the claim to freedom was rooted in the nature of beings who had access, through their reason, to the standards of moral judgment. The answers could be made irresistible when it was shown that these same beings would fall into a hopeless contradiction when they resorted, as Kant said, to that perverse maneuver of "[proving] by reason that there is no reason."⁷²

But the writers of the casebook treat this ground of their jurisprudence as one of the enduring mysteries of the text. The closest they come to intimating a response to the problem comes in a discussion of Justice Douglas and the new jurisprudence of "privacy" and "fundamental rights." They recall a book in which Douglas set forth the "theological underpinnings" of this jurisprudence. Douglas had written that, "[i]n our scheme of things, the rights of men are unalienable. They come from the Creator, not from a president, a legislator, or a court" (pp. 1, 82). This, the writers are willing to regard as a "theological underpinning." But the writers also seem to share the conviction, widely diffused in this country, that views on theology are matters of private belief, which may not rightly be imposed on anyone else with the force of law. If the new jurisprudence of privacy and fundamental rights really finds its ground in "theological" beliefs, could those rights be available even to people who do not share these beliefs? Would Justice Douglas be warranted in shaping the law of the

of medical treatment, *In re Guardianship of Barry*, 445 So. 2d 365 (Fla. 1984). New Jersey courts have led this movement, and one could hardly cite a decision that is more "advanced" on this scale than *In re Jobes*, 108 N.J. 394, 529 A.2d 434 (1987).

72. I. KANT, *CRITIQUE OF PRACTICAL REASON* 97 (1788) (6th ed. 1927). See also H. ARKES, *supra* note 9, at ch. IV.

Constitution according to the maxims of his "religious beliefs"? Some of Justice Douglas's liberal allies have been strenuous in their efforts to remove, from our political life, any trace of religiosity. The American Civil Liberties Union (ACLU) has even suggested that laws restricting the funding of abortion are founded on religious belief, and on that basis it has sought to have these laws struck down as unconstitutional. But Justice Douglas was one of the chief supporters of the kind of argument made by the ACLU in support of the right to an abortion.⁷³ Are we to understand now that his jurisprudence of privacy and fundamental rights was in turn traceable to nothing other than his own religious beliefs? Would the ACLU be inclined, then, to regard Douglas's jurisprudence as unconstitutional?

Or might the claims to privacy and fundamental rights rest on other grounds, accessible to people of all religious beliefs? The writers of the casebook do not say. They suggest that these notions of "privacy and personal liberty" are "based in visions of the polity's transcendent structure and underlying political theories as in the text of the constitutional document" (p. 935). But they do not take the occasion, in these 1,200 pages, to explain the theories they have in mind — or to indicate just which one of those theories offers the most satisfying ground for the support of these rights. In the meantime, their use of the plural is suggestive: The reference to "theories" may imply that, in the judgment of the writers, no single theory so far has been persuasive. In that event, they suggest that we are faced here with a host of theories with varying degrees of implausibility: We have a jurisprudence that commands the *reverence* of the writers but not their *reason*.

It becomes decorous, then, to ask: Might the case for "autonomy" and personal rights have been illuminated if the compilers had brought into the casebook a larger sampling of the classic writings, by the lawyers and judges who wrote with elegance and precision in explaining the ground of our constitutional freedoms in "natural rights?" Why not include the text of Marshall's opinion, or Webster's brief, in *Ogden v. Saunders*? Why not *Gibbons v. Ogden*, or *Worcester v. Georgia*? None of these classic cases finds a place in the casebook, even in abbreviated form. Again, this is not to quibble over favorite cases, but to raise this question: By omitting these cases, have the writers made way for more illuminating, recent cases, which help to explain far more clearly the rights of "autonomy" and "privacy?" My own estimate should be evident. It surely could not hurt a casebook on our current law to incorporate the best writing that this country has produced on jurisprudence; and it may offer the only possibility for supplying the coherence that is missing in our current jurisprudence.

But to pick up the thread from my beginning, here is where this casebook may "swerve" from our expectations. I confess that I nes-

73. See *United States v. Vuitch*, 402 U.S. 62, 78-79 (1971) (Douglas, J., dissenting in part).

tled in with this casebook during the Christmas holidays, and found the charm of meeting again so many old acquaintances — so many judges and venerable cases — to be savored yet again. The charm of a casebook is that it puts before us again the parade of our law — the cases and the characters, and the sensibilities of our writers — and gives them to us in smaller, manageable chunks. That is the seduction of a casebook. We sample the mind of Justice Story, without wading through his dissenting opinion of sixty pages in the *Charles River Bridge* case.⁷⁴ But that is also where we finally feel the jolt: Story's careful argument, with its reaffirmation of natural rights, is reduced to one page (p. 964). Story had no special gift for compression, but that reduction to a single page does not even begin to offer a caricature of his argument.

The jolt comes in realizing just how much reduction has taken place, along with the elegant pieces that have been omitted altogether. And that recognition prompts us to look more closely to see what has been omitted in the other cases. I have already referred to excisions in other cases, as they raised questions about the intentions of the editors. I offer these instances, in closing, for a different purpose: to bring out some final, melancholy points about the problems that may affect even the best casebooks (and I count the book I have in hand as one of the best). I will settle for two examples.

* * *

The editors reprint Justice Harlan's celebrated, and highly quotable, dissent in the legendary case of *Plessy v. Ferguson*.⁷⁵ "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."⁷⁶ But the editors neglect to reproduce another, telling section in Harlan's opinion — the section in which he remarks that "[t]here is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese."⁷⁷ Harlan was willing to play, then, on the irony that, under the statute in Louisiana, "a Chinaman can ride in the same passenger coach with white citizens,"⁷⁸ while black citizens could be declared criminals if they sought to ride in a public coach occupied by whites.

Harlan's comments on the Chinese cannot be dismissed as a quirk confined to this case. He was willing, in other cases, to join the major-

74. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

75. 163 U.S. 537, 539 (1896) (Harlan, J., dissenting).

76. 163 U.S. at 559.

77. 163 U.S. at 561.

78. 163 U.S. at 561.

ity of the Court in cases that dealt illiberally with Chinese aliens.⁷⁹ But this strand of his understanding bears a critical relevance to the ground of his dissenting opinion. Apparently, for Harlan, it was legitimate to preserve superior and inferior ranks of persons in the country by denying certain classes of people access to citizenship. And in Harlan's understanding, these discriminations could be made tenably on the basis of race. But if it were legitimate to make discriminations based on race in assigning or withholding the rights of citizenship, why would it not be equally defensible to use race as a basis for other discriminations, among citizens as well?

The inclusion of this passage on the Chinese would bring us to a recognition that has mainly been obscured over the years: For all of the celebration we have accorded Harlan, he never came to an understanding of the *principle* that made racial segregation wrong. That is why his opinion never offered a teaching that could be used, in later years, to replace the doctrine in *Plessy v. Ferguson*. When the Court overruled *Plessy* in *Brown v. Board of Education*,⁸⁰ the question was often raised as to why the Court did not simply take Harlan's dissent in *Plessy* and paste it in as the opinion of the majority. But when we include the passage on the Chinese, we become alert to what was wanting, at the root, in Harlan's opinion. It becomes plainer then as to why that opinion could not explain a new doctrine for the Court on race and the law.⁸¹

* * *

In the *Pentagon Papers* case,⁸² almost none of the justices thought that there was a categorical right on the part of the press to be free from "prior restraint." With the exception of Justice Black (and possibly Justice Douglas), they were all willing to concede that a newspaper might be restrained in advance, under certain circumstances, if that was a plausible way of averting a substantial harm. They agreed with the opinion, once expressed by Chief Justice Hughes, that a newspaper might be restrained from printing news about the movement of ships and troops in wartime.⁸³ But of course, there *was* a war on in 1971, and American forces could be endangered by the publication of material contained in the Pentagon Papers. The judgment had to hinge then on a gauging of the facts: Just what material, contained in what sections of the Papers, was likely to expose particular agents in the field or reveal something of practical importance to our adversaries?

The case turned, then, on a reading of the facts. And where were

79. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

80. 347 U.S. 483 (1954).

81. This question is taken up more fully in H. ARKES, *THE PHILOSOPHER IN THE CITY* 43-55, 227-46 (1981). See also H. ARKES, *supra* note 9, at 85-99.

82. *New York Times v. United States*, 403 U.S. 713 (1971).

83. 403 U.S. at 713 (citing *Near v. Minnesota*, 283 U.S. 697 (1931)).

the facts? Where were the Papers that would have to be examined? As Justice White noted, "the material remains sealed in court records and it is properly not discussed in today's opinions."⁸⁴ Why was it properly not discussed? Because, as White said, "the material poses substantial dangers to national interests," and for that reason, he suggested, "a responsible press may choose never to publish the more sensitive materials."⁸⁵ The material was so freighted with danger that it was prudent to avoid the revelations that could arise in Court — and yet White was willing to permit the New York Times, a private corporation, to balance the danger to the national interest against its own, private interests in publishing.

But the matter ran even deeper, to the very rationale of the Court in the case. As Chief Justice Burger pointed out, with a fusion of disbelief and outrage, "We do not know the facts of the cases. No District Judge knew all the facts. No Court of Appeals judge knew all the facts. No member of the Court knows all the facts. . . . [W]e literally do not know what we are acting on."⁸⁶ And yet the Court decided.

The editors chose to omit these observations, made by White and Burger, even though they report *facts* that were critical to the handling of the case (pp. 576-84). These remarks of the justices may seem to be niggling complaints, offered in passing, but they become critical — even decisive — if one is trying to clarify the *structure* of the Court's argument. Consider it again: The Court holds that there is no categorical right to be protected from restraints applied in advance. Whether a restraint is legitimate depends on whether it can be justified in the particular case. Whether the restraint can be justified in this particular case would depend, then, on a careful reading of the facts. As it turns out, no court that passed on the case ever had access to those facts. And yet, the Court presumes to decide anyway; without seeing the Papers, it comes to the judgment that their publication poses no substantial danger, which would warrant a delay in publication.

To reprint the remarks of White and Burger is not merely to publicize a point of etiquette, but to reveal the descent of the Court into an incoherence touched with arrogance. By the admission of the justices, they did not have in hand the record that a *court* would need in rendering a judgment. And even if they had that record, the justices could not have estimated the dangers lurking in the Papers without the guidance of people in the executive branch, in the agencies on intelligence. If the Court understood that it was not in a position to render a competent judgment in the case, why could it not have followed the advice of Justice Harlan and done the constitutionally deco-

84. 403 U.S. at 732-33.

85. 403 U.S. at 733.

86. 403 U.S. at 748, 751 (Burger, C.J., dissenting).

rous thing? Why could it not have deferred to another branch of the government, which could claim the constitutional standing, and the competence, to reach a judgment?⁸⁷ Why was the Court moved, instead, to grasp the decision for itself, deny the constitutional claims of the executive branch — and then abandon the responsibility of judgment to a private corporation?

* * *

My point here is that these questions are more likely to spring from the case when the remarks offered by White and Burger have not been filtered from the text. As we know, this filtering is the cost we come to accept for the convenience of a casebook. But we ought to be clear that the most fetching appeal of a casebook runs well beyond these claims of convenience. Teaching, at its best, can be a form of seduction, and an appealing casebook may help to seduce. For the student who is encountering the subject of law for the first time, the casebook may offer samples of the most elegant writing, directed to questions of consequence. It may offer a series of snapshots of the most arresting characters, and the most attractive sensibilities, that have filled the stage of jurisprudence. But the interest of the student may be suffocated if he is immersed, too soon, in the full intricacies of a long, learned opinion. A sensitive teacher will not wish to saddle his beginning student with all sixty-six pages of Story's dissent in the *Charles River Bridge* case. He will wish to give the student just enough to suggest the reach of the opinion, but without inducing a boredom that might become terminal.

That is what must be said, earnestly, on behalf of a casebook. On the other hand, some of the most engaging moments in the classroom arise when a student has discovered a passage in the text that runs counter to the argument offered by the professor, or to the common wisdom that has settled over a case. The student is more likely to discover that passage if it has not been edited out by a professor who no longer regards it as apt or momentous. Our first reflex, in judging a book, is to consider the omissions, as I have here. But how can we judge a book in this way unless our own understanding has been formed by the reading — and rereading — of these cases in the original documents and the complete texts? That is how even the slowest among us come to discover the passages that may be neglected by other commentators. Our abiding concern, then, about casebooks may not be for the nourishment they supply to the students, but for the way they guide the professors who use them. What shall we say of

87. As Justice Harlan observed,

I can see no indication in the opinions of either the District Court or the Court of Appeals in the *Post* litigation that the conclusions of the Executive were given even the deference owing to an administrative agency, much less that owing to a co-equal branch of the Government operating within the field of its constitutional prerogative.

403 U.S. at 758 (Harlan, J., dissenting).

the teacher of law who becomes habituated to a regimen of casebooks, and what he knows of the cases, he knows mainly through the excerpts that he has had, for years, near at hand?

And yet, certain vices may beget their own correctives. Casebooks, at their best, help to seduce, and that seduction may produce a benign reaction. It may produce a state of affairs in which distinction is drawn instantly to the character who is moved to read, with uncommon awareness, the original texts. I sense that the writers of this casebook are alert to this hidden incitement contained in their project, and that awareness may provide one of their secret satisfactions. They understand that the casebooks may do what professors, with their mere passion for the cases, may be incapable of doing: The regimen of casebooks may make the reading of the original texts into an illicit experience.