The Problem of Integrity, Tradition, and Text in Constitutional Interpretation

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The study of constitutional law clearly presupposes a theory of interpretation. This simple observation accounts for the explosion of scholarly work in recent years that advances contrasting theories of constitutional interpretation. All too often, however, these theories of constitutional interpretation are unidimensional, in that they view constitutional law as a unitary thing. To be sure, there seemingly is a justification for this unidimensional approach. As Alexander Hamilton argued in the Federalist Papers, the Constitution as a whole should be interpreted according to its "manifest tenor."¹ Nonetheless, there is virtually no recognition of the fact that constitutional law comprises a diverse and varied world of constitutional doctrines or teachings. What is seldom acknowledged is that what may be a valid interpretation of one constitutional doctrine may be entirely inappropriate for interpreting another doctrine. In fact, by failing to confront the diversity of plausible constitutional interpretations we risk obscuring the "manifest tenor" of the Constitution.

This essay focuses on an approach to constitutional interpretation

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that treats the Constitution as a manifold document. Such a reading is substantially different from a constitutional understanding which claims the Constitution is either radically indeterminate or can be reduced to a single expression. The theory of constitutional interpretation I examine is one that views constitutional law in terms of integrity, tradition, and text. It is an understanding of the constitutional text that invites and acknowledges competing frames of interpretation. Furthermore, this notion of constitutional interpretation posits that different constitutional doctrines at different points in time can best be understood with reference to the problems of integrity, tradition, and text.

In this essay, I examine some of the Supreme Court's constitutional law decisions during the 1991-1992 Term for the purpose of exploring this idea of constitutional interpretation. Part I presents in more detail the understanding of constitutional law as integrity, tradition, and text. Part II focuses on those constitutional decisions dealing with the structure of government and the operation of the political economy. The argument in Part II is that the problems raised in this area of constitutional doctrine are best explained by interpreting the Constitution as text. Part III examines the Court's decisions on criminal procedure and the rights of criminal defendants. The argument in Part II is that the problems the Court addresses in the criminal area of constitutional doctrine are largely those raised by an understanding of the Constitution as integrity. However, integrity does not account for all of the decisions, for the reason that the Court is now engaged in a struggle as to whether integrity or tradition will be adopted as the predominant interpretive mode in the constitutional domain of criminal procedure and the rights of criminal defendants. Finally, Part IV looks at the Court's decisions on individual rights. The argument in Part IV is that the problems faced by the Court in this doctrinal domain are increasingly those found in the Constitution as it is embodies an historical tradition.

I. MODELS OF CONSTITUTIONAL LAW

The interpretation of the Constitution is no easy matter. At one extreme, it can be argued that the Constitution is an open-textured and indeterminate document, whose meaning is imposed by the author, critic, or scholar who takes the Constitution to task.² In this in-

² It is no longer possible to inventory all of the law review articles that adopt this critical and/or interpretive stance to the Constitution as these approaches have come to dominate constitutional theory scholarship. The most able works in this genre obviously would include Mark Tushnet, Red, White, and Blue (1988), and Sanford Levinson, Constitutional Faith (1988). See also Steven L. Winter, Indeterminacy and Incommensurability in Constitutional Law, 78 CAL. L. REV. 1441 (1990).
terpretation, the Constitution becomes a means for the presentation of social theory. At the other extreme, the Constitution can be viewed as a determinate and sober expression of the intentions of the Founders with respect to the shape and design of the American government. In this interpretation, the Constitution becomes a manual of instruction for right government. The former view asserts the uncertainty, ambiguity, or plasticity of the constitutional text, while the latter champions the clarity and vision of constitutional intention. Each of these different perspectives is not so much wrong as incomplete. To be sure, the Constitution is silent and indeterminate about a great many things. As Justice John Marshall understood well, the Constitution is no prolix legal code. But the Constitution is also very specific about a great many things: the Constitution no longer condones slavery, no longer allows for the denial of the franchise to women, and no longer permits the imposition of poll taxes. What makes these divergent accounts of the Constitution incomplete is that each attempts to reduce the Constitution to a unitary phenomenon. Lost in this quest to capture and align the Constitution only along one dimension is any understanding of the Constitution as a multidimensional expression of the rule of law in the United States. Indeed, it is only by recognizing this multidimensional expression of constitutional rule that it is possible to capture the "manifest tenor" of the whole Constitution. In other words, what needs to be considered in constitutional interpretation is the different ways in which the Constitution manifests or presents itself.

I suggest that there are three major ways in which the Constitution presents itself for the purposes of interpretation. The first is to view the Constitution as a text. In this regard, as a text the Constitution sets out (1) a tripartite design for the national government, (2) the outlines of a political economy characterized by the institution of private property, a national economy, and the inviolability of contract, (3) a political structure embodying both national and state governments, and (4) limitations on the power of political authority as expressed in the governmental design, the Bill of Rights, and the various Amendments to the Constitution. Thus, a reading of the Constitution as text understands the Constitution primarily as a purposive document, that seeks to shape or transform society and economy in clearly defined ways, as well as defines the structure of political authority that will direct this transformation of society and economy. In short, the Con-

stition as text equates the Constitution with pure will, or purpose.

A different way of interpreting the Constitution is to focus on the position of the Constitution as it is embedded in a tradition. In this interpretation, the Constitution is not simply to be understood as a document for transformation and rule, but is also a political writing that captures and expresses an ongoing historical tradition. This tradition contains, among other things, notions about the proper role of government, the rights of individuals, the content of human nature, and the relation of the individual to the state. The hallmark of this approach is the acknowledgement that the Constitution does not create an historical tradition, but is rather an expression and representation of that tradition. For that reason, the Constitution can only be understood as bounded and defined by a tradition. What becomes important, then, is the way in which the Constitution represents tradition. In brief, this mode of interpretation requires that we look at the situation of the Constitution.

Lastly, the Constitution can be viewed in its most profound sense, understood in terms of its character, aspiration, and vision, as the rule of law. A way of capturing this interpretation of the Constitution is to refer to this vision of the Constitution as its integrity. This view of the Constitution looks at the document not simply in terms of its purpose to establish a structure of government or an economy, or as it reflects a tradition, but rather appraises the document in terms of what the Constitution demands of the law. This understanding of the Constitution captures the relation of law to the ends of civil society. In large part, this view is a moral vision; it understands the Constitution as something more than merely positive law, or simply arbitrary desire. The Constitution is a human construction intended to improve the lot and everyday life of men and women in society. Viewing the Constitution in terms of integrity perforce implies that the Constitution contains a normative view of human life and a teaching about the right and the good.

These three modes of constitutional interpretation—integrity, tra-


7. This is a very controversial term in contemporary jurisprudence, and usually refers to the jurisprudential work of Ronald Dworkin. See RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); RONALD DWORKIN, LAW'S EMPIRE (1986). I use the term "integrity" to refer to any notion of law that holds itself accountable to some extra-constitutional or non-positivist standard of right or good. This use of integrity consistent with Dworkin's notion of law as integrity, but it is consistent with, Michael Moore's natural law vision. See Michael S. Moore, A Natural Law Theory of Interpretation, 58 S. CAL. L. REV. 277 (1985). For recent examinations of the relationship between law and morality in the context of constitutional theory, see GRAHAM WALKER, MORAL FOUNDATIONS OF CONSTITUTIONAL THOUGHT (1990); MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW (1988).
dition, and text—are not at all mutually exclusive. Indeed, in many ways these modes of interpretation are mutually supportive. After all, understanding the integrity of the Constitution presupposes an awareness of the tradition in which the Constitution is situated. This is because it is often the case that our normative conceptions about the integrity of the Constitution are nothing more than restatements of what is contained in tradition. Similarly, understanding the text of the Constitution as a program for institutional design and transformation also requires an appreciation of the tradition in which that text is embedded. In America, philosophers do not rule the city. Instead, statesmen guided by ideas and experience direct and found political regimes. To attempt to account for the constitutional purpose with no regard to history or tradition is to disfigure the text. Finally, there exists a clear connection between the text of the Constitution and constitutional integrity. This connection can be seen in the following way. The vision of law can only be appraised and understood in terms of its place in the constitutional design. As an example, a law that is given a wide scope and ample room for expansion in the polity, but aspires to a very narrow vision of its task cannot be understood as integrity. In contrast, a rule of law that is severely constrained and limited in the polity and society but aspires to the same relatively narrow vision can be seen as embodying integrity. In short, the text of the Constitution determines in every way the relative integrity, so to speak, of the Constitution.

While these different modes of constitutional interpretation are interrelated, they differ in that each establishes different problems that call for resolution and different standards for critique. In other words, each mode captures a different interpretive situation. For example, the problems that face the interpretation of the Constitution as text are those commonly found in constitutional decisions departing from the “original design” of government or political structure established in the Constitution, or the “original understanding” of the Founders and their intentions as embodied in the Constitution. The problem with this interpretation of the Constitution is one of balancing the design of government and the economy contained in the Constitution with the underlying purpose of the Constitution in creating these institutions. With respect to an interpretation of the Constitution in terms of its situation in an historical tradition, the problem is different. The problem in this mode consists in assessing how well the Constitution represents a tradition that is not constant, but is continually

8. A fascinating account of the place and role of tradition in human affairs can be found in Jaroslav Pelikan, The Vindication of Tradition (1984).
in the process of recreation and transformation by human acts and institutions. Finally, the problem of interpreting the Constitution in terms of its integrity is one of balancing the various tensions found in any moral or principled extraconstitutional vision of law in society. Most importantly, the problem of constitutional integrity is one of determining the proper bounds between the individual and the state, the government and the economy, and the right and the good for instance.

These different modes of constitutional interpretation can be used to understand the contours or reaches of constitutional law.\(^{10}\) Court decisions can be assessed in terms of their constitutional integrity, tradition, and text. Indeed, any authentic interpretation would have to interpret constitutional law decisions in this way, since constitutional law is not unidimensional. The "manifest tenor" of the Constitution presents itself in a manifold expression. For this reason, it requires different modes of interpretation. But in this essay I also suggest that the development of constitutional doctrine in different areas of constitutional law can best be understood by observing how one mode of interpretation best captures different doctrines of constitutional law at different points in time. This is because different constitutional doctrines over time face the different problems that each interpretive mode sets out for resolution. These problems may be endemic to one area of constitutional doctrine because of conceptual reasons, or these problems may arise because historical or situational circumstances present them for resolution. It is important to note, however, that there is no one reason why one set of problems (presented by one interpretive mode) characterizes an area of constitutional doctrine at a certain point in time, and why a separate set of problems (presented by a different interpretive mode) defines another area of constitutional doctrine at a different point in time. Instead, the struggle over which mode of constitutional interpretation will be dominant reflects ongoing jurisprudential and political struggles. Thus, by interpreting constitutional law in terms of integrity, tradition, and text, we are better able to account for the development of the Constitution as a whole.

II. THE CONSTITUTIONAL FOUNDATIONS OF GOVERNMENT AND ECONOMY

The Constitution is a governing text. It establishes a political structure, provides boundaries for institutions within that structure, and allocates political power. However, the Constitution does more

\(^{10}\) Other interpretive approaches that identify discrete modes or frames of constitutional interpretation can be found in Philip Bobbitt, Constitutional Fate: Theory of the Constitution (1982), and Michael J. Perry, The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation," 58 S. Cal. L. Rev. 551 (1985).
than this; it also establishes a political economy. The Constitution erects a framework for economic and market transactions, provides for the protection of certain rights necessary for the functioning of a market, such as property and contract, and defines the powers of the government vis-a-vis the market. Finally, the Constitution places clear restraints on government action, at the national and state level, which aim for the most part, though not entirely, at the protection of liberal, individual rights.

The interpretive theory that reads the Constitution as a text stresses that the Constitution is to be understood primarily in terms of its original design and intention. While the Constitution was enacted for many reasons, the foremost reason being the survival of the nation, its main purpose is to establish a system of government. However, this system of government is not an end in itself. It was the belief of the Founders that this particular system of government would best provide for liberty, happiness, and the entire panoply of other "liberal virtues." But the most immediate effect of the text of the Constitution is the establishment of a liberal polity, characterized by a federal government of carefully limited powers. A theory of constitutional interpretation that considers the text of the ultimate importance will focus largely on the Constitution's design and purpose, and somewhat less on the Constitution's integrity or tradition. This does not mean that constitutional integrity and tradition are unimportant; rather, it means that constitutional purpose and design govern integrity and tradition if there is a conflict.

Supreme Court decisions that deal with the structure of American government and the operation of the political economy are best explained by an interpretive theory that stresses the Constitution's text. After all, these decisions deal with controversies involving the Separation of Powers doctrine, the Tenth Amendment, the Necessary and Proper Clause, the Supremacy Clause, the Commerce Clause, the Contract Clause, the Takings Clause of the Fifth Amendment, and the Incorporation Doctrine. These are the constitutional provisions that have allowed for the rapid growth of government power. While the powers of the federal government have expanded geometrically since the founding period, this expansion has been legitimated by Court interpretation of these provisions in such a manner that the expansion in government powers has been related to the design and purpose of the constitutional provisions. In other words, the Court has strived to make entirely unexceptional what has been an exceptional transfor-

mation in the constitutional shape of the American system of government.

During the 1991-1992 Term, the Supreme Court continued to appraise current government practices and the political economy in terms of how they furthered the design of the Constitution's text. Integrity or tradition were little mentioned. In the major case dealing with the issue of federalism, New York v. United States, Justice O’Connor addressed the issue of whether certain provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, especially those provisions that directed the states to take title to waste and dispose of it, were in violation of the Tenth Amendment. She began her analysis by positing an interpretive theory that stressed the design of the constitutional text: "The actual scope of the Federal Government's authority with respect to the States has changed over the years... but the constitutional structure underlying and limiting that authority has not." Justice O’Connor focused on the founding period and on the original intent of the Founders. After all, for an interpretive theory that focuses on the purpose of the text, the early constitutional or founding period is the most decisive. This is because the clarity of the constitutional intention at the Founding is never more striking. Then, from this historical and textual exigesis, O'Connor divined the authoritative rule "that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or compel those acts." For that reason, O’Connor found that those parts of the Act requiring states to take title to waste to be "inconsistent with the federal structure of our Government established by the Constitution."

It is important to note that O’Connor’s opinion contained no lofty invocation of tradition, nor did it aspire to some superlative standard of integrity located outside the Constitution. After all, tradition is almost always a narrative or unique account of what a given period or people considered necessary, while integrity is usually the repository of our best intentions and collective aspirations. Instead, O’Connor concluded in New York v. United States that the Constitution protects us both from tradition and our “best intentions.” A reading of the the Constitution as text requires that it be above tradition, and accountable only to itself.

In addition to establishing a national government with enumerated powers, constrained by the doctrine of federalism, the Constitution

14. Id. at 2419.
15. Id. at 2423.
16. Id. at 2429.
17. Id. at 2434.
also provides for the operation of a national market economy. This is done largely by allowing for the free flow of commerce among the states and by protecting the institution of private property. A theory of constitutional interpretation that upholds the intent of the text will stress these goals of unrestrained commerce and the inviolability of private property in examining the Supreme Court’s decisions on matters involving the political economy.

While the Commerce Clause of the Constitution grants Congress the power to regulate interstate and foreign commerce, it also serves as a constraint on states in the use of their economic regulatory powers in the guise of the Dormant Commerce Clause Doctrine. States cannot erect economic barriers between their borders and the national economy, cannot engage in blatant economic protectionism, and, generally in the absence of noneconomic reasons, cannot discriminate against interstate commerce because of local concerns. In Chemical Waste Management v. Hunt and Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources, the Court, in decisions written by Justice White and Justice Stevens, respectively, reaffirmed its stand that economic protectionism is incompatible with the Dormant Commerce Clause. In the former case, the Court found that a hazardous waste disposal fee imposed by the State of Alabama on out-of-state waste, but not on in-state waste, was a violation of the Commerce Clause; in the latter case, the Court held that a State of Michigan law that prevented a Michigan landfill operator from receiving waste generated outside of his county to be a violation of the Commerce Clause. In both cases, the Court engaged in a relatively straightforward analysis, reasoning that the laws discriminated against out-of-state economic interests in favor of local economic interests. The Court made no attempt to balance these laws against considerations such as whether the laws created waste disposal practices that might further the goal of more effectively providing for this nation’s disposal of hazardous waste. In the end, the Court struck these laws down because they impeded the operation of a national market economy. But these were not the only Commerce Clause cases.

18. The Dormant Commerce Clause Doctrine raises an interesting problem with respect to the content of the constitutional text. This doctrine is not found in the literal Constitution, but a proper reading of the Constitution acknowledges as "textual" those authoritative readings of the words in the Constitution. For that reason, the Dormant Commerce Clause, the Separation of Powers Doctrine, the Incorporation Doctrine, and other such expansive readings of the Constitution can be regarded as "textual."

In *Quill Corporation v. North Dakota*, Justice Stevens made clear the importance of the design of the Constitution in Commerce Clause disputes as opposed to other considerations in disputes involving, for instance, the Due Process Clause. At issue in this case was North Dakota’s imposition of a use tax on an out-of-state mail order company, which did not have a physical presence in the state. Stevens held that the Commerce Clause prohibited North Dakota from imposing the tax, but that the Due Process Clause did not. As a result, Congress, being constitutionally empowered to regulate interstate commerce, could enact legislation permitting North Dakota to impose the tax, since due process was no bar; however, without direct congressional authorization, North Dakota could not impose the use tax.

In justifying this distinction between the different requirements demanded by the Commerce Clause and the Due Process Clause, Stevens made clear his interpretive frame of reference:

Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual’s connections with a State are substantial enough to legitimate the State’s exercise of power over him. We have, therefore, often identified “notice” or “fair warning” as the analytic touchstone of due process nexus analysis. In contrast, the Commerce Clause, and its nexus requirement, are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy. Under the Articles of Confederation, State taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills.

In other words, Stevens underscored the fact that different domains or doctrinal areas of constitutional law—in this case the Commerce Clause and Due Process Clause—require different interpretive stances. The Due Process Clause is best captured and understood with reference to fairness, justice, or, in general, the language of integrity. (As will be argued in the next part of the essay, this is the judicial language that largely characterizes Supreme Court opinions in the constitutional domain of criminal procedure and defendant rights.) In contrast, the Commerce Clause requires an interpretation that affords the intent of the Founders (as interpreted by the Court) or the purpose or design of the constitutional text the primary role. Matters of textual authenticity, and not higher notions of integrity, are what should carry the day in the domain of Commerce Clause disputes.

While the Constitution provides for a national economy, it also

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23. *Id.* at 1904 (1992).
24. *Id.* at 1909-16.
25. *Id.* at 1916.
26. *Id.* at 1913.
27. I should note that the Court decided two other cases that dealt with the issue of interstate and foreign commerce. In *Wyoming v. Oklahoma*, 112 S. Ct. 789 (1992), the Court struck down as a violation of the Commerce Clause an Oklahoma law that mandated that coal-fired utility plants in Oklahoma use a fuel mixture that
protects those institutions considered necessary for the functioning of a market economy, such as private property. The Takings Clause of the Fifth Amendment is one restriction on the government's use of private property. There were two Takings Clause cases in the 1991-1992 Term. In Yee v. City of Escondido, Justice O'Connor addressed the issue of whether a local rent control ordinance effected a physical taking of a mobile home park owner's property, when considered in conjunction with a state law regulating the conditions under which a mobile home park tenancy could be terminated. She held that a physical taking had not transpired because the owner of the mobile home park could terminate all leases and put the property to some other use. Thus, there was no physical taking. While the resolution of Yee was relatively uneventful, in Lucas v. South Carolina Coastal Council the Court made clear that the textual design of the Constitution governed this doctrinal area of constitutional law.

At issue in Lucas was a state regulatory law that effectively prevented an owner of beachfront property, who had purchased the property prior to the enactment of the law, from developing the land. A state trial court had found that the owner's property had lost all of its economic value. Writing for the majority of the Court, Justice Scalia found this regulatory action to be a taking prohibited by the Fifth Amendment. He announced a categorical rule that an unconstitutional taking results when the state, acting through its regulatory powers, deprives an owner of all economic value of his land by proscribing uses of land that were permissible under the terms of the original title to the land. This categorical rule, Scalia claimed, was one "consistent with the historical compact recording in the Takings Clause that has become part of our constitutional culture." In reply to Justice Blackmun's dissent, Scalia stated that this rule may not have been part of early American tradition prior to the adoption of the constitutional text, was "entirely irrelevant"; what was relevant was that "the text of the Clause" allowed for the promulgation of such a rule. According to Scalia, tradition did not dictate the content of Takings contained at least ten percent of coal mined in Oklahoma. The economic protectionist intentions and effects of the law were all too apparent. In Kraft General Foods v. Iowa Department of Revenue and Finance, 112 S. Ct. 2365 (1992), the Court found an Iowa law that taxed the dividends to parent corporations from foreign subsidiaries, but not from domestic subsidiaries, violated the Foreign Commerce Clause.

29. Id. at 1528.
31. Id. at 2895.
32. Id. at 2899.
33. Id. at 2900.
34. Id. at 2900, n.15.
Clause jurisprudence; instead, the text of the Constitution was the sole interpretive guide.

Although the Court issued other decisions in property and contract cases, none is inconsistent with the argument that, in the area of constitutional law dealing with government structure and political economy, the Court uses an interpretive theory that stresses the purpose, design, and intention of the constitutional text over competing claims of tradition and integrity. There are many reasons for the importance of constitutional purpose in this doctrinal area of constitutional law, but two deserve special mention.

First, the Constitution establishes a structure of government not for the reason that the structure established is good in itself, but rather because that structure is considered best able to accomplish certain goods or better prevent certain evils. By preserving the governmental structure—which consists of a political regime of separation of powers, checks and balances, limited powers, and federalism—the attainment of the ends of the Constitution may best be realized. To be sure, over the last two centuries, the Court has adopted a very expansive reading of what the text of the Constitution requires in terms of permissible governing institutional arrangements. Indeed, the modern administrative state owes its origin to such liberal readings. But the intention of the constitutional text remains paramount in this area of constitutional law doctrine because the intentions of the Founders were so clearly and carefully articulated in the Constitution. A jurisprudence of integrity and tradition is less required when textual indeterminacy is less of a problem.

The second reason why the intention and design of the Constitution are so important is that such an interpretive theory is more likely to produce certainty and stability. This is especially important in the area of political economy. Market transactions require stability and certainty, while private property requires some assurance that its protection will be provided for by the State. Were market relations and property rights governed entirely by tradition, their protection might not be fully assured in changing times. Traditional practices may not

35. In General Motors Corporation v. Romein, 112 S. Ct. 1105 (1992), the Court was faced with a controversy that raised a violation of the Impairment of Contracts Clause of the Constitution. But the Court was able to avoid this issue by deciding that no contract existed in the first place. Id. at 1110. In Burlington N. R.R. Co. v. Ford, 112 S. Ct. 2184 (1992), the Court found a rational basis for Montana's venue rule whereby Montana corporations are subject to civil suit only in the county where their principle place of business is located but foreign corporations are subject to suit in any county. Id. at 2188. Thus, there was no Equal Protection Clause violation. Id. at 2185. Similarly, in Nordlinger v. Hahn, 112 S. Ct. 2326 (1992), the Court found that California was furthering a legitimate state interest through the operation of its Proposition 13 property tax law, whereby property was taxed differentially depending on its date of sale. Id. at 2333.
be sufficient to resolve contemporary problems. Similarly, were market relations and property rights governed by higher standards of integrity, the certainty that markets require and that property demands might very well be threatened by noneconomic considerations. It is for these reasons that an interpretive theory that places paramount importance on the intention the constitutional text—that is, its purpose to create and maintain a national market economy and to provide for the protection of individual property rights—is better provisioned to understand the development of a constitutional jurisprudence of political economy.

III. STATE, LAW, AND PUNISHMENT

The awesome power of law is most apparent when the state punishes those who transgress the law. When the law punishes, it inflicts pain on men and women. To the extent that the law is different from mere violence, the law must offer reasons for its use of punishment. The enactment of criminal statutes is an expression of a collective determination that certain conduct and acts will not be allowed in the state, and that their transgression will be punished. This is what the law demands for the justification of punishment. But this is not enough in a polity that limits its political authority through constitutional rule. In such a regime, punishment must be constrained by something other than pure majority will. It is the Constitution that limits and legitimizes the authoritative infliction of punishment; criminal procedure must adhere to a constitutional standard, and the constitutional rights of criminal defendants must be protected. For these reasons, criminal procedure and the rights of criminal defendants should be doctrinal domains of constitutional law that especially demand integrity.

An interpretation of constitutional law as integrity will look beyond the text of the literal Constitution to resolve the controversy at hand. Because the stakes in criminal cases are so incredibly high—the deprivation of life, liberty, and property—a literal reading of the Constitution may subvert what the Constitution, in a larger sense, seeks to provide: a good life, at least as adumbrated in the Preamble to the Constitution. What is more, it is in the domain of criminal law that the indeterminacy of the Constitution becomes determinate. After all, in the most extreme cases, when the Court acts (or fails to act) states may execute those sentenced to death. There is no indeterminacy in this ultimate punishment. A Court seeking refuge in the cold text of the Constitution, or trying to submerge its decision in the murky waters of a lost tradition risks failing to live up to what the

determinancy of the task before the Court in criminal matters demands. Thus, in the domain of criminal procedure and the accused, the Court should elevate its constitutional deliberation to ensure a fair criminal procedure, to guarantee defendant's rights, and, in the end, to provide for the justification of punishment.

The cases about criminal procedure and the rights of the accused, decided during the Supreme Court's 1991-1992 Term, largely, though not entirely, support the proposition that this area of constitutional law is best understood by a reading of the Constitution as integrity. In *Hudson v. McMillian*, for example, the issue concerned whether excessive force used against a prisoner that did not result in serious injury constituted a violation of cruel and unusual punishment prohibition of the Eighth Amendment. Prison guards beat the prisoner without cause, but the prisoner suffered no major injuries. Writing for the majority of the Court, Justice O'Connor stated that this was a violation of the Eighth Amendment, reasoning that, "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated." In reaching her decision, O'Connor found in the Eighth Amendment a diffuse embodiment of what society accepts as proper conduct among prison officials vis-a-vis prisoners; the Court made no attempt to assess this violent action in terms of what was condoned in historical practice. History was no guide here. Instead, O'Connor focused on evolving standards of decency, dignity, civility, and those things "that animate the Eighth Amendment." In *Hudson*, the Court went beyond the text of the Constitution, without recourse to tradition. Integrity carried the day.

Similarly, in *Doggett v. United States*, the Court addressed the issue of whether an eight and a half year delay between the indictment and arrest of a minor drug dealer violated his Sixth Amendment right to a speedy trial. Writing for the Court, Justice Souter concluded this period of delay was a violation of Doggett's Sixth Amendment right to a speedy trial, because the Government was negligent in causing the delay and the Government did not rebut the presumption of prejudice that the defendant incurred in mounting a defense because of the lengthy delay between indictment and arrest. Again, it is important to note that the Court did not look back to tradition to define the content of the Sixth Amendment right to a speedy trial. The Court did not discuss the history, nor was there mention of the origin or purpose of the right. Instead, the Court essentially treated

38. Id. at 1000.
39. Id. at 1001.
41. Id. at 2690-94.
the Sixth Amendment right to a speedy trial as a trans-historical cat-
gerical imperative, whose content was entirely context specific and ju-
dicially determined. Integrity, not precedent, demanded that Doggett
not have to stand trial for an indictment issued over eight years
earlier.

In a different case, Morgan v. Illinois, Justice White addressed
the issue of whether the Due Process Clause permitted a trial court in
a capital case to refuse to ask potential jurors during voir dire whether
they would impose the death penalty regardless of any mitigating cir-
cumstances. He acknowledged that “[t]he Constitution . . . does not
dictate a catechism for voir dire, but only that the defendant be af-
forded an impartial jury.” In this case, White reasoned, a juror who
would not consider any mitigating circumstances, as required in the
jury instructions, could not be impartial because he clearly “cannot
follow the dictates of law.” After all, the law’s integrity demanded
impartiality. In dissent, Justice Scalia asserted that this dispute cen-
tered not on what the text of the Constitution demanded or on what
was required in tradition, but rather on theories of punishment:
“Those who agree with the author of Exodus, or with Immanuel Kant,
must be banished from American juries—not because the People have
so decreed, but because such such jurors do not share the strong peno-
logical preferences of this Court.” Scalia rejected the notion of a ju-
risprudence of judicial preferences.

Morgan differs from Hudson and Doggett in that it concerns the
integrity of the criminal process, and not so much the inviolability of
an absolute right that one possesses before becoming a participant in
the criminal process. In other words, Morgan upheld the integrity of
the criminal process by requiring that jurors follow the jury instruc-
tions in cases involving capital offenses; Hudson and Doggett imposed
limitations on the criminal process, even when the formalities of the
process were observed. A case like Morgan, in that it required the par-
ticipants in the criminal process to adhere to what the criminal
process demanded, was Sochor v. Florida. In this case, Justice Sou-
ter vacated a judgement of a state appellate court upholding the im-
position of the death penalty, because that court had failed adequately to
cure a violation of the Eighth Amendment at the trial court, where
the judge had considered in sentencing an aggravating factor not sup-
ported by the evidence. Souter held that the state appellate court
should make clear its determination that the constitutional error was

42. 112 S. Ct. 2686 (1992).
43. Id. at 2229.
44. Id. at 2233.
45. Id. at 2242 (Scalia, J., dissenting).
47. Id. at 2119.
harmless.\textsuperscript{48} The integrity of the criminal process demanded such steps.

It is important to note that there were also cases, like \textit{Hudson} and \textit{Doggett}, that imposed limitations on the criminal process itself. In \textit{Foucha v. Louisiana},\textsuperscript{49} Justice White held a statute that required someone acquitted for a felony by reason of insanity to remain incarcerated, after he regained his sanity unless he could prove that he was not dangerous, to be a denial of due process and equal protection.\textsuperscript{50} Likewise, in \textit{Riggins v. Nevada},\textsuperscript{51} Justice O'Connor found that someone forced to take antipsychotic drugs by the court during trial, without a hearing to determine whether such therapy was necessary, suffered a deprivation of due process.\textsuperscript{52} In both cases, the Court placed constraints on the criminal process that were not demanded by tradition, as Justice Thomas’ dissents in both opinions revealed.\textsuperscript{53} Thus, unlike \textit{Morgan} and \textit{Sochor}, where the participants crucial to the integrity of the the criminal process were forced to abide by what the criminal process demanded, in \textit{Foucha} and \textit{Riggins} the criminal process itself was constrained by the rights of the accused. Put differently, the criminal process was held accountable to a higher notion of fairness and integrity.

The Court made clear a different way in which the Constitution constrains criminal process in \textit{Georgia v. McCollum}.\textsuperscript{54} Writing for a majority of the Court, Justice Blackmun held that the Constitution’s Equal Protection Clause prohibited a criminal defendant from using his peremptory challenges to strike potential jurors from a jury on account of their race.\textsuperscript{55} Justice Blackmun stated the criminal defendant, in some instances, could be considered a state actor. As Blackmun said, “In exercising a peremptory challenge, a criminal defendant is wielding the power to choose a quintessential governmental body—indeed, the institution of government on which our judicial system depends.”\textsuperscript{56} In carrying out this state task, the criminal defendant could not engage in discriminatory behavior, even if such behavior would have assisted in his defense. Justice Thomas, while concurring, conceded that this decision, “while protecting jurors, leaves defendants with less means of protecting themselves.”\textsuperscript{57} In this case, the criminal

\begin{footnotes}
\item 48. \textit{Id.}
\item 49. 112 S. Ct. 1780 (1992).
\item 50. \textit{Id.} at 1783-84, 1788-89.
\item 51. 112 S. Ct. 1810 (1992).
\item 52. \textit{Id.} at 1815.
\item 53. \textit{Id.} at 1821 (Thomas, J., dissenting); \textit{Foucha v. Louisiana}, 112 S. Ct. 1780, 1806 (1992)(Thomas, J., dissenting).
\item 54. 112 S. Ct. 2348 (1992).
\item 55. \textit{Id.} at 2351.
\item 56. \textit{Id.} at 2356.
\item 57. \textit{Id.} at 2360 (Thomas, J., concurring).
\end{footnotes}
justice process was held accountable not simply to those constitutional provisions that protect the accused, but also to those that protect other participants in the process. Blackmun intimated that the integrity of the entire criminal justice process demanded nothing less, asserting, "Selection procedures that purposefully exclude African-Americans from juries undermine ... public confidence—as well they should."58

In these different ways, therefore, we can see that an interpretive theory of the Constitution that stresses integrity can account for the Supreme Court's decisions on criminal procedure and the rights of the accused.59 Morgan and Sochor ensure the integrity of the criminal justice process by requiring of the participants in the process the fulfillment of what the established process demands. In contrast, Hudson, Doggett, Foucha, and Riggins ensure the integrity of criminal procedure by carefully balancing individual rights against the State's responsibility to enforce the criminal law.60 The criminal justice process must protect and accommodate the rights of the accused. Finally, McCollum demands integrity both from the criminal justice process and from the criminal defendant. Each is held accountable to standards on which the entire system of government is founded. In this instance, the constitutionally mandated goal of equality supercedes the traditional requirements of the adversarial process.

Any one interpretive theory cannot simply explain Constitutional doctrine in its entirety. The world of the Constitution is too rich and varied to be so unequivocally reduced, captured, and simplified. Indeed, even with a single area of constitutional law doctrine no one interpretive theory can account for the rich diversity of Supreme Court decisions. In the domain of criminal procedure and the rights of criminal defendants, I have argued that constitutional doctrine with regard to these subjects can best be understood by a theory that underscores the integrity of the Constitution. But, of course, there are always exceptions. Some cases are heavily fact-specific, and their resolution is perfunctory, breaking no new constitutional ground. For instance, in Estelle v. McGuire,61 the Court held that a disputed use of "battered child syndrome" evidence did not violate due process.62 Similarly, in

58. Id. at 2353-54.
59. The claim that integrity accounts for many of the Court's criminal procedure and defendant rights decisions in no way suggests that each of the justices shares the same understanding of integrity. Obviously, justices differ greatly in their constitutional philosophies. Instead, integrity can be understood as an interpretive category whose content reflects the individual vision of each justice.
60. See also Dawson v. Delaware, 112 S. Ct. 1093 (1992). In this case, the Court held that the State's presentation of evidence concerning the defendant's membership in a white racist gang violated his First Amendment rights, since the evidence had no relevance at all to the issues at the capital sentencing hearing. Id. at 1097.
62. Id. at 480-81.
United States v. Felix,63 the Court found that a criminal defendant was not subject to double jeopardy for his involvement in two different illegal drug operations.64

But there were other cases during the Court's 1991-1992 Term in the domain of criminal procedure and criminal defendant's rights that did not stress the integrity of the Constitution, but instead focused on the importance of constitutional tradition. In Griffin v. United States,65 Justice Scalia addressed the issue of whether a general verdict on a multiple-count conspiracy violated due process when one of the counts was not supported by adequate evidence. Invoking the decisive authority of English history, common law, American criminal justice practice, and precedent, Scalia concluded that there was no due process violation.66 Similarly, in Medina v. California,67 Justice Kennedy held that a state law which required a defendant claiming incompetence to prove incompetency by a preponderance of the evidence did not violate due process.68 His reasoning was largely grounded in history:

> Based on our review of the historical treatment of the burden of proof in competency proceedings, . . . we cannot say that the allocation of the burden of proof to a criminal defendant to prove incompetence 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'69

Finally, in White v. Illinois,70 Justice Rehnquist rejected the argument that the Confrontation Clause of the Constitution should only prohibit the introduction of evidence that originally motivated its invention in 16th and 17th century England;71 instead, Rehnquist held that the Confrontation Clause only prohibited the introduction of untrustworthy evidence and evidence not subsumed under one of the firmly rooted exceptions to the hearsay rule.72 Interestingly enough, although the Court rejected an Early Modern historical grounding for the Confrontation Clause, it nevertheless did hold that the traditional content of the hearsay rule constrained the Confrontation Clause. In short, the Court in White played one historical tradition off against another historical tradition.

While the trend is still inconclusive, I would like to suggest that Griffin, Medina, and White are not merely exceptions to the predominance of integrity as an interpretive theory in the constitutional do-

64. Id. at 1382-85.
66. Id. at 468-70.
68. Id. at 2577.
69. Id.
71. Id. at 740-41.
72. Id. at 743.
main of criminal procedure and criminal defendant's rights. Indeed, even where the majority used a jurisprudence of integrity to resolve the issue at hand, there were powerful dissents invoking the authority of tradition. For example, in *Hudson*, where a prisoner had been beaten by prison guards but not seriously injured, Justice Thomas objected to the Court’s “expansion of the Cruel and Unusual Punishment Clause beyond all bounds of history and precedent . . . .”\(^73\)

Nonetheless, all of these opinions in which integrity was not the dominant interpretive mode proclaimed and championed the normative hold of tradition on constitutional adjudication. While the criminal justice process may aim at integrity, this process should also be firmly rooted and defined in history. These other cases stand for the proposition that the bounds of what is permissible in criminal procedure is determined by tradition. In every way, in these opinions, tradition subsumes and replaces integrity as the interpretive standard. It is important to note that *Griffin, Medina, White,* and the dissenting opinions in many other cases seem to herald a struggle between tradition and integrity as discrete modes of constitutional interpretation in the area of criminal procedure and criminal defendant rights. While it is unclear whether integrity or tradition will eventually prove victorious, it is nonetheless clear that the legal struggle over the constitutional content of criminal procedure and criminal defendant rights in our day is for the most part constituted as an interpretive struggle. It is for this important reason that constitutional change cannot be separate from constitutional interpretation.

### IV. INDIVIDUAL RIGHTS AND THE PROBLEM OF TRADITION

As law, the Constitution is more than purpose and aspiration; it is also situated in tradition. Tradition is best understood as that constellation of norms, beliefs, expectations, and practices that define a people. It is important to note that tradition is not an unchangeable or bounded construct. The bounds of what constitutes a tradition are forever shifting, contested, and opaque. The Constitution, as a human construct, is embedded in tradition to the extent that it reflects a set of shared understandings among a people about what is good or what is right. In particular, the Constitution acknowledges a certain understanding of human nature, as well as the rights and duties that derive from that nature. While the Constitution may contain a normative account of nature, the primary situation of the Constitution is that it is embedded in history.

The Constitution presents a partial listing of those individual rights which government may not transgress. But the content of these

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rights is not delimited, nor obviously are those rights not mentioned in the Constitution given specific content. One of the most fundamental challenges, therefore, in a constitutional regime whose founding is motivated in large part by a desire to ensure human rights is to authoritatively define those rights. The difficulty is that there are competing sources of right, in particular nature and convention. The problem with nature is that it is absolute, but its interpretation is indeterminate. The problem with convention is that, although it is more determinate, it may very well be arbitrary or tyrannical. For that reason, in the American system of government, tradition is often identified as the touchstone for the constitution of right. After all, it is in tradition that we witness the conjunction of nature and convention.

An interpretive theory that seeks to understand the constitutional jurisprudence of individual rights must take into account the problem of tradition. But there are problems. The first problem is that a nation consists of traditions, and not a single tradition. For that reason, the identification of the authoritative tradition becomes a crucial problem in constitutional law, since the content of individual constitutional rights is linked to its expression in tradition. The second problem is that a tradition may be indeterminate with respect to the content of individual rights. For example, changes in technology may render problematic the exercise or protection of some rights in the present that were not a problem in the past. The third problem is that tradition, as an expression of convention, is a human construct. The great danger is that tradition can be nothing more than a normative interpretation imposed on the past. For that reason, one problem is that traditions are not simply discovered but are also created. Thus, the grounding of rights in tradition is most often an instrumental or strategic enterprise.

During its 1991-1992 Term, the Supreme Court issued constitutional decisions in the areas of racial equality, First Amendment rights, and the right to an abortion. To a large extent, the jurisprudential issue in these decisions involved the role of tradition in the determination of individual rights. For example, in *Freeman v. Pitts* and *United States v. Fordice*, the Court addressed the issue of racial equality in the area of school desegregation. In *Freeman*, Justice Kennedy held that a federal court may withdraw its supervision and control over a public school district under a desegregation decree in those areas of school administrative policy that are in compliance with the

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74. A brilliant account of the traditions in American political culture is presented by ANNE NORTON, ALTERNATIVE AMERICAS: A READING OF ANTEBELLUM POLITICAL CULTURE (1989).
original desegregation decree. As a result, Kennedy reasoned, "the district court may determine that it will not order further remedies in the area of student assignments where racial imbalance is not traceable, in a proximate way, to constitutional violations." In Fordice, Justice White issued a set of standards for a lower federal court to apply in determining whether the State of Mississippi had met its affirmative obligation to desegregate its university system of higher education, rejecting the claim that "the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system."

The way in which the Supreme Court used tradition to determine the outcome of Freeman and Fordice was that, for the purposes of the Equal Protection Clause, it defined racial equality in terms of the scope of racial inequality that existed in the past. Equality could only be understood in relation to tradition. It was for this reason that, in Fordice, the adoption of race-neutral higher education public policies was insufficient on its face to remedy past constitutional violations. It was the practice and tradition of de jure segregation in Mississippi that determined the constitutional adequacy of contemporary efforts to remedy racial discrimination. Similarly, in Freeman, the Court held that a federal court was not required to maintain supervisory control over school district student assignment policies, even though without such control the public schools would become racially imbalanced if the school district had implemented an assignment policy that remedied the legacy of the tradition of de jure segregation. Thus, in Fordice and Freeman, the adequacy of present constitutional remedies for equal protection purposes was bound in tradition.

The difference between a theory of constitutional jurisprudence that focuses on tradition and one that stresses the purpose of the text is fairly clear. A theory of interpretation that locates the content of rights in tradition rejects the idea that the content of rights can be derived simply from the Constitution. Instead, the Constitution is understood as embedded in history and tradition. For that reason, as a source of individual rights, tradition is seen as prior to, and may very well trump, the more literal stances of the Constitution. In contrast, it is more difficult to distinguish a theory of tradition from a theory of integrity. This is because notions of integrity are often derived from tradition. After all, to the extent that one rejects any form of ethical naturalism and, instead, derives claims about the right and good from convention, tradition will figure importantly in arguments about integrity. Nonetheless, the way in which constitutional theories about tradition and integrity can be distinguished is by looking at the role

78. Id. at 1445.
that tradition plays in each theory. A theory that stresses integrity in
the constitutional determination of individual rights will look to what
it considers best in tradition, while a theory that stresses the role of
tradition in determining individual rights will not separate out the
good and bad in tradition. Tradition as it exists in itself will be used as
a standard, and not some higher notion of the good and right that may
be present in tradition. It is important to keep this distinction in mind
when interpreting the area of First Amendment and abortion rights.

*International Society for Krishna Consciousness v. Lee*80 and *Bur-
son v. Freeman*81 were cases in which the Court relied heavily on tra-
dition to determine the content of First Amendment rights. At issue
in *Lee* was a ban on solicitation in the interior of an airport terminal
owned and operated by a public authority. Writing for a majority of the
Court, Chief Justice Rehnquist held that the airport terminal was not
a public forum, because “the tradition of airport activity does not
demonstrate that airports have historically been made available for
speech activity.”82 In other words, the designation of a public forum
was entirely a matter of tradition. For that reason, the restriction on
solicitation, which was a form of speech protected under the First
Amendment, need only be related to a reasonable purpose, not involv-
ing disagreement with the content of the speech, such as limiting the
inconvenience to passengers.83 Tradition indirectly dictated the stan-
dard of review used by the Court.

The Court used tradition in a different way in *Burson*. In this case,
the Court addressed the constitutionality of a Tennessee law that pro-
hibited the solicitation of votes or the display of campaign materials
within 100 feet of the entrance of a polling place. Clearly, these activi-
ties constituted political speech and thus were entitled to protection
under the First Amendment. Writing for a plurality of the Court, Jus-
tice Blackmun subjected this Tennessee statute to a strict scrutiny
analysis, holding that Tennessee had a compelling state interest in
preventing voter intimidation and election fraud, traditionally a prob-
lem in state elections, and that its statute was narrowly tailored to
achieve this interest.84 In other words, because of a past historical sit-
uation involving the integrity of elections, the state was able to limit
speech protected by the First Amendment. There was no showing
that the problems that existed in past historical periods were still a
realistic concern in the present. Interestingly enough, the dissenting
opinion, written by Justice Stevens, focused precisely on this point,

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82. *International Soc'y for Krishner Consciousness v. Lee*, 112 S. Ct. 2701, 2706
83. *Id.* at 2708-09.
calling the plurality opinion "deeply flawed; it confuses history with necessity, and mistakes the traditional for the indispensable."85 In short, the claim was that tradition should not determine First Amendment rights.

It is all too apparent that traditions do not exist, waiting to be found; instead, traditions require creation and articulation. Indeed, a great part of the craftmanship of constitutional decisionmaking involves making the novel and exceptional appear entirely ordinary and unexceptional. This is done by situating the decision in tradition. In *R.A.V. v. City of St. Paul,*86 Justice Scalia addressed the highly charged issue of "hate crimes." Looking at the St. Paul Bias-Motivated Crime Ordinance, which criminalized certain conduct directed at racial, religious, and gender groups, he found the law unconstitutional because it prohibited "otherwise permitted speech solely on the basis of the subjects the speech addresses."87 According to Scalia, there were some kinds of speech that traditionally were subject to regulation on the basis of their content, such as obscenity, defamation, and "fighting words."88 The problem with the St. Paul ordinance, however, argued Scalia, was that it was directed at the regulation of only some, and not all, "fighting words"—in particular, those words whose political content the city council deemed worthy of criminalization.89 For that reason, the ordinance was attempting to suppress speech on the basis of its content, and not simply because it might fall under the category of "fighting words."

At no point in *R.A.V.* did Scalia indicate that his understanding of the content of First Amendment rights was anything other than that found in tradition. But his opinion worked a radical change in the notion of protected and unprotected speech, and the standard of review applied to restrictions on protected speech. Indeed, in a concurring opinion, written by Justice White, joined by Justices Blackmun and O'Connor, and joined in part by Justice Stevens, Scalia was charged with abandoning tradition by endowing "fighting words" with a constitutional status equal to that of traditionally protected forms of speech, as well as with abandoning strict scrutiny analysis.90 In the guise of acting on tradition, building on the notion that some forms of speech were subject to regulation by the state because of their content, Scalia was actually undermining tradition by proscribing the less than total regulation of those forms of speech. In this case, the strategic use of tradition masked a jurisprudential sea change.

85. *Id.* at 1862 (Stevens, J., dissenting).
87. *Id.* at 2542.
88. *Id.* at 2543-44.
89. *Id.* at 2550.
90. *Id.* at 2553-54 (White, J., concurring).
It should be underscored that not every majority opinion in the First Amendment area during the 1991-1992 Term was grounded on the authority of tradition. For example, in *Lee v. Weisman*, the Court held that state involvement in having a clergy member deliver a prayer at a public school graduation ceremony was too pervasive in this instance to be permissible under the Constitution. Tradition did not dictate the outcome. However, Justice Scalia wrote a strong dissent in which he criticized the majority for precisely undermining a social practice deeply rooted in American historical tradition. The majority, he claimed, was masking its assault on tradition by distorting the facts of the case—in particular, by asserting that a student was required to attend her public school graduation ceremony—so that the decision would appear to be grounded on the simple application of precedent. Nonetheless, in *Weisman*, the Court directly rejected a First Amendment jurisprudence of tradition.

It should also be pointed out that during the 1991-1992 Term many of the Court's opinions in the First Amendment area actually involved applying precedent to what shifting majorities on the Court found to be non-problematic fact situations. As an example, in *Forsyth County, Georgia v. Nationalist Movement*, the Court held that a county ordinance requiring a permit and fee from those who wished to hold parades, assemblies, and demonstrations was unconstitutional because it had no procedural safeguards and essentially tied the amount of the permit fee to the content of speech. In *Burdick v. Takushi*, the Court found that Hawaii's prohibition on write-in voting was a reasonable restriction on First Amendment rights, serving legitimate state interests. For that reason, the prohibition did not violate the Constitution. While tradition was clearly a factor in these cases, especially to the extent that it always is in constitutional cases involving individual rights, tradition did not dictate the outcome, nor did the majority in these cases understand its decision as going against any firmly held practice rooted in tradition.

It is one thing for the Supreme Court to reduce most First Amendment cases to an interpretive contest over the meaning of tradition, and the situation of individual rights in that tradition. But it is entirely a different matter for the Court to do the same in cases involving the constitutional right to an abortion. *Planned Parenthood of

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92. Id. at 2655.
93. Id. at 2678-81 (Scalia, J., dissenting).
94. Id. at 2684-85.
96. Id. at 2402-03.
98. Id. at 2064-65.
Southeastern Pennsylvania v. Casey is not easily reduced to any one interpretive category, because the issue at stake, the right to an abortion, is a matter of the highest and most pressing urgency in contemporary American politics. In terms of issue salience and the stability of the political party system, the issue of abortion approaches the historic significance of explosive issues such as slavery and school segregation. Abortion is no simple constitutional issue confronting the Court, but is instead one of the most divisive moral, political, and cultural issue of our time, and whose resolution ultimately may lie in institutions other than the Court. For that reason, a proper understanding of those cases involving abortion requires a more inclusive framework for their interpretation than that for other individual rights. The significance of Casey is that its interpretation requires a constitutional theory that stresses not simply tradition, but integrity and text as well as tradition. In short, the urgency of the issue presented in Casey necessitates that the Court elevate the scope and dimension of its jurisprudence beyond one single mode of constitutional interpretation.

At issue in Casey was a Pennsylvania law regulating abortions that required, among other things, that certain information be provided to the woman 24 hours before the abortion procedure, and that the woman have notified her spouse of the intended abortion. Many believed that the Court might use Casey to overturn Roe v. Wade, but Justices O'Connor, Kennedy, and Souter, announcing the Court's decision, reaffirmed Roe, although they found that none of the regulations, save for the spousal notification requirement, constituted an "undue burden" on the exercise of a woman's right to an abortion.

Their opinion attempts to construct a jurisprudence of text, integrity, and tradition with respect to the constitutional interpretation of fundamental rights. They reject the notion that the Constitution only protects those rights clearly demarcated in the Bill or Rights or in explicitly found in tradition, arguing instead that "it is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." In other words, the design of the constitutional text, though not its literal wording, informs us that there is a sphere of relative personal autonomy that cannot be subject to unlicensed government regulation. To be sure, the bounds of this autonomy are indeterminate, at least in so far as the text of the Constitution is concerned. But this does not mean the text does not provide for this autonomy. Instead, the judge must confront the text, apply her "reasoned judgment," attempt to ground her opinion in what Justice

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100. 410 U.S. 113 (1973).
102. Id. at 2805.
Harlan called a "living" tradition,\textsuperscript{103} and especially take into account the human position of the person whose rights are at issue. Indeed, the existential position of the woman may even trump tradition. As O'Connor, Kennedy, and Souter put it, "Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."\textsuperscript{104} For that reason, their opinion stresses the intention of the text, the circumstances of the woman in the exercise of her right, and the idea that tradition informs but does not unequivocally determine the content of fundamental rights.

A significant dimension of the O'Connor-Kennedy-Souter opinion is the extent to which the integrity and legitimacy of the Court are subject to careful examination. The integrity of the Court is at issue in \textit{Casey} because in \textit{Roe} a constitutional right was proclaimed that "an entire generation" of women "have ordered their thinking and living around . . . ."\textsuperscript{105} To overturn \textit{Roe} at this juncture for no other reason than that a new majority of the Court now think it was incorrectly decided is to upset that expectations that people have about the role of the Court in society. In announcing the law the Court is a source of stability and certainty. The legitimacy of the Court is threatened, because to overturn \textit{Roe} at this juncture would make it appear that the Court is caving in to political and social pressure: "A decision to overrule \textit{Roe}'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy and to the Nation's commitment to the rule of law."\textsuperscript{106} Thus, their opinion puts forward a novel conception of constitutional integrity that focuses not on the substance of a Court's jurisprudence, but rather on the situation and role of the Court in the polity and society. It acknowledges the seemingly radical notion that Supreme Court decisions have consequences. The opinion of O'Connor, Kennedy, and Souter in \textit{Casey} is therefore an institutional example, so to speak, of jurisprudential consequentialism.

The opinions by Chief Justice Rehnquist and Justice Scalia, while quite detailed and at times highly imaginative, basically advance the argument that the right to an abortion is not provided for in the text of the Constitution, and that the criminalization of abortion is a part of the American historical tradition.\textsuperscript{107} Since neither the text of the

\textsuperscript{103} Id. at 2806. The Justices quote at some length from Justice Harlan's discussion of the role of tradition in determining the content of fundamental rights. Poe v. Ullman, 367 U.S. 497, 542 (1960)(Harlan, J., dissenting).


\textsuperscript{105} Id. at 2797, 2812.

\textsuperscript{106} Id. at 2799.

\textsuperscript{107} Id. at 2854-85 (Rehnquist, C.J., Scalia, J., concurring in part and dissenting in part).
Constitution nor historical tradition are an adequate grounding for a right to an abortion, there is no constitutional right to an abortion. According to Scalia, the majority of the Court is only imposing on the Constitution its own notions about the right and good. Indeed, Scalia describes the majority opinion in *Casey* as “a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls ‘reasoned judgment’, . . . which turns out to be nothing but philosophical predeliction and moral intuition.”108 In the end, Scalia aligns the minority with the forces of text and tradition, and (and in the terms of this essay) accuses the majority of promulgating an unwarranted jurisprudence of integrity.

In the domain of individual constitutional rights, therefore, with the important exception of *Casey*, and to a certain extent *Weisman*, it is clear that the jurisprudential divisions on the Court center entirely around the role and primacy of tradition in the determination of rights. This conclusion is not unexpected when one considers the fact that it was not the intent of the Founders to have the text of the Constitution contain an exhaustive list of those fundamental rights deemed worthy of government protection.109 While the Constitution limits the exercise of governmental power, it does not define the scope of human personality and the dimensions of that human nature which demand protection and support in civil society. The Constitution presupposes and is embedded in some notion of tradition. It is for this reason that, with respect to the constitutional adjudication of individual rights, the division and battle consists in the determination of what constitutes the governing American tradition.

V. CONCLUSION

The aim of this essay has been to defend an interpretation that stresses the role of integrity, tradition, and text in constitutional adjudication. By focusing on many of the major cases decided by the Supreme Court during its 1991-1992 Term, I have tried to join together notions of integrity to constitutional law cases in criminal procedure and rights of the accused, considerations of the design and purpose of the constitutional text to decisions involving governmental structure and political economy, and the dominance of history and tradition to the constitutional adjudication of individual rights. To be sure, there were cases that clearly did not neatly fit into this categorical scheme; but I have tried to demonstrate that the vast majority of constitutional law cases are best explained by the interpretive modes of integrity, tradition, and text.

108. *Id.* at 2884 (Scalia, J., concurring in part and dissenting in part).

This approach provides a conceptual means to identify the modes or justifications the Supreme Court justices use in their constitutional decisions. But it does so in a way that takes seriously the language and intentions of the justices themselves. The interpretation of the Constitution as integrity, tradition, and text does not aim to impose a construct on Court jurisprudence that is "foreign" to the legal frames found in that jurisprudence. To be sure, any legal interpretation makes impositions, as it were, on its subject. By relying on the concepts and legal understandings articulated by the justices themselves in their opinions, however, I have taken seriously the legal justifications they advance to support the outcomes of constitutional adjudication. It is for this reason that an understanding of constitutional interpretation in terms of integrity, tradition, and text does not seek to transform the Constitution into something that it is not, but instead aims to describe the Constitution as it is manifested in the process of judicial construction.

This theory of constitutional interpretation also allows provides us with a conceptual means to understand constitutional change. As mentioned, the transformation of the Constitution in different doctrinal areas can be understood in terms of struggles among the different interpretive modes of integrity, tradition, and text. In the area of criminal procedure and criminal defendant rights, for example, the Supreme Court currently finds itself in a struggle over whether integrity or tradition will become the dominant interpretive mode. The outcome of this interpretive struggle will determine the adequacy of the criminal justice process and the content of criminal defendant rights. Interpretation has consequences.

Finally, this interpretive theory treats the Constitution as a manifold document, so that its "manifest tenor" can be more accurately discerned. It must never be forgotten that the Constitution is a text, and it deserves to be read as a text; indeed, it is only as a text that the Constitution is truly authoritative. But constitutional interpretation must take account of the fact that the Constitution is situated in history, and is a human construction designed to achieve an end. After all, were there no past historical state to be avoided, or some future state to be achieved, there would be no reason to draft a Constitution. Thus, it is necessary to acknowledge in our constitutional interpretations the important fact that the Constitution is embedded in tradition and possesses an integrity. To do any less would be to disfigure the constitutional text.