Nested Oppositions


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Deconstruction has become a prominent force in legal theory in the last few years, especially through its use by feminist scholars and members of the Critical Legal Studies movement. Yet its appearance on the critical scene has not been greeted with universal acclaim; many persons are greatly concerned by the pervasive influence of deconstruction. However, no matter how great a furor deconstruction has caused in legal circles, it has caused even greater controversies in literary circles for the last decade and a half.

John Ellis describes his new book, Against Deconstruction, as an attempt to provide what has heretofore been lacking in literary theory—an intellectual case against deconstruction.1 By subjecting deconstruction to "the tools of reason and logical analysis," Ellis hopes to expose the flaws of deconstructive writing. More importantly, he hopes to generate a reasoned debate about the philosophical underpinnings of deconstruction, a debate which he sees as never having quite gotten off the ground.2 In many respects, Ellis is superbly qualified for this task. In addition to be-

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1. J. ELLIS, AGAINST DECONSTRUCTION (1989) [hereinafter cited by page number only].
2. Pp. vii-x.
ing a noted scholar of German literature, he has written a book applying
methods of analytic philosophy to traditional problems of literary criti-
cism, and has also attempted to bring the insights of Ludwig Wittgen-
stein's philosophy to literary theory.

Nevertheless, Ellis does not quite succeed in his endeavor, for his book
quickly degenerates into a polemic against deconstruction and its foremost
exponent, the French philosopher Jacques Derrida. Rather than begin-
ning a dialogue based upon the strongest and most plausible versions of
deconstructive arguments, Ellis is rather too eager to show the reader that
what he is writing about is absurd. Derrida can justly be blamed for not
being the clearest of writers, but he is hardly different from many other
philosophers in the Continental tradition who write in a metaphoric and
hyperbolic style. This way of arguing necessitates paraphrase and retrans-
lation if it is to be understood and evaluated in the rather drier format of
Anglo-American analytical philosophy. Such a project requires consider-
able patience and sensitivity, and Ellis shows a marked lack of both traits.
Thus, whenever Ellis has a choice between a charitable reading of Der-
ridda and a wooden or patently foolish reading, he invariably chooses the
less plausible and more ridiculous reading. He thus ends up betraying the
very values of dispassion, precision, and avoidance of hyperbole that he
complains are lacking in the work of deconstructionists.

Nevertheless, even if Ellis cannot quite manage to avoid the sort of
polemicking that he purportedly disdains, his book has considerable
value. Even a polemic can raise important issues that deserve response.
Although it is nominally an attack on the work of deconstructive literary
theorists, Ellis' book is quite relevant to lawyers and legal theorists be-
cause it shares many of the concerns and misunderstandings of main-
stream legal academics about deconstructive arguments made by feminists
and Critical Legal Studies scholars.

In Ellis' work one quickly perceives that what has most disturbed criti-

5. See e.g., pp. 43-44 (suggesting that Derrida has deliberately failed to mention Wittgenstein's
work in order to make his own seem more original and revolutionary; his failure to discuss these
matters raises questions that are "unanswerable"); pp. 80-82, 138-41 (deconstruction always argues
for opposite of whatever it believes to be received tradition, thus producing an interpretation as sim-
plistic as its target); p. 82 (deconstruction advocates "an indiscriminate response to authority," of same
sort as "the slogan of the younger generation in the 1960s: 'Don't trust anyone over thirty'"); pp.
111-12 (deconstructive claim that "all interpretation is misinterpretation" is "an empty piece of pos-
turing," and "an illusion of intellectual tour de force, which is not backed up by any theory of
substance" (emphasis in original)); pp. 141-42, 151 (deconstructive "formulations are chosen not for
their logical or intellectual appropriateness but, instead, for their drama and shock," or their "psy-
chological appeal"); p. 144 (deconstructionists always view their opponents in "the role of the naive
believer who must be denounced"); pp. 148-50 (deconstructive critics dislike Jonathan Culler's expla-
nations of deconstruction because they can easily be understood by non-deconstructionists; however,
Culler's clarity makes it obvious he has nothing interesting or important to say); pp. 151-52 (decon-
struction gives its adherents a way of being revolutionary and shocking without doing any important
theoretical work).
ics of deconstruction is what they see as deconstruction's apparent denial of conceptual distinctions thought essential to much literary, legal, and political discourse. An example of an important distinction in literary theory might be the distinction between interpretation and misinterpretation. Important distinctions in legal and political theory include the distinctions between law and politics, public power and private power, interpreting law and making law, and coercion and consent. Critics have also worried that deconstructive theory claims that semantic distinctions between words are incoherent, thereby precluding any possibility of meaningful discourse. Most troubling of all is the claim that deconstruction rejects the laws of logic itself, thus suggesting that all intellectual discussion must come to an end.

This essay argues that these fears are ungrounded. To be sure, some deconstructionists do talk loosely and imprecisely about total incoherence and indeterminacy, and are often not completely clear about the nature of the claims that they are making. However, the form of deconstructive analysis that I advocate does not involve any of the above-mentioned claims of radical incoherence or indeterminacy. This version of deconstruction is the type most suitable for use by legal and political theorists. It is also, I contend, the interpretation that is most charitable to Derrida's often obscure texts and that makes the most sense of the type of arguments found within them.

Properly understood and properly used, deconstruction offers theorists a set of techniques and arguments involving the concepts of similarity and difference. Because the logic of law is to a large degree the logic of similarity and difference, these issues are of obvious concern to lawyers. As I shall explain in detail, deconstructive arguments concerning similarity and difference involve the reinterpretation of conceptual oppositions as what I shall call "nested oppositions"—that is, oppositions which also involve a relation of dependence, similarity, or containment between the opposed concepts. A nested opposition, however, is not a denial that a conceptual opposition is coherent, real, or useful in some contexts. It is rather a resituation of the opposition that allows us to see both difference and similarity, both conceptual distinction and conceptual dependence.

The recurring confusion of nested oppositions with claims of false opposition or nonopposition has caused immense problems for philosophical as well as legal argument. It has led to the fears about deconstruction described above, and has generated misunderstanding both among persons who use deconstruction and among those who criticize its use. I shall argue that many if not most of Ellis' misunderstandings about deconstruction arise from this confusion.

7. See, e.g., pp. 3-11.
The remainder of the book contains Ellis' attack on the reader-response school of literary criticism, his views on the declining state of literary criticism today, and deconstruction's place in hastening that decline. In keeping with the style of the book, these chapters are sharp and provocative; although they will be quite interesting to literary scholars, I omit discussion of them here. Nevertheless, I will have something to say about Ellis' defense of linguistic conventionalism, which does have some relevance to legal issues, and to the question of conceptual oppositions.

I. DECONSTRUCTION AND THE LAWS OF LOGIC

Ellis' agenda is clear from the title of the opening chapter of his book: "Analysis, Logic, and Argument in Theoretical Discussion." Ellis is concerned that some deconstructionists have claimed that their work is not susceptible to traditional forms of logical analysis because it relies upon a different form of logic. In traditional logic, the propositions $P$ and not-$P$ are mutually exclusive. Ellis believes that the adherents of deconstruction reject this in favor of a logic which asserts "[n]either/nor, that is, simultaneously either or." No doubt for someone to insist simultaneously that "neither $P$ or not-$P$" and "$P$ and not-$P$" seems contrary to ordinary principles of logic, and it is not surprising that Ellis, who prides himself on his rigorous analytical approach, is skeptical of such claims. He argues that "[t]his kind of rhetoric does not advance serious thought or inquiry but gives an impression of profundity and complexity without the effort and skill that would be required to make a substantial contribution to the understanding of the matter under discussion." Moreover, he believes it smacks of religious mysticism, of which he also disapproves.

Ellis complains that

[perhaps the most common claim of all here is simply the most general of all: that logic, reason, and analysis are insufficient to discuss Derrida. But . . . this is a claim made with great regularity throughout human history; attacks on rational thought have occurred with regularity by mystics, visionaries, and others who were similarly impatient with the constraints of reason.]

Ironically, neither Ellis nor the targets of his criticism are quite right about the logical status of "neither/nor and both/and," although both Ellis and his targets are right to some degree. Of course, once we use the

11. P. 6 (quoting J. DERRIDA, POSITIONS 43 (1981) (emphasis in original)).
13. Pp. 7-8, 8 n.2.
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phrase as I have used it in the last sentence, it should become clear that deconstructive claims of "neither/nor and both/and" do not necessarily involve any abandonment of rationality. Rather, these claims are based upon a form of rationality that is very familiar to us, and which in fact is essential to the practice of legal and ethical argument. This form of reasoning is concerned with establishing the similarity or difference between objects, concepts, or any other entity.

It is important to understand how this type of reasoning and propositional logic often talk past each other. The key idea in propositional logic (and Aristotle's syllogistic logic) is that statements like "Fetuses are Persons" can be translated into symbols that can be manipulated without regard to what they stand for. Thus, one might argue with perfect logical validity that if all \( F \) are \( P \), and if murder is defined as killing a \( P \), then killing an \( F \) is also murder. The formal character of the symbols guarantees that the result is logically valid, regardless of the substantive content of the symbols. Thus, if we translate "Fetuses are Persons" into "All \( F \)'s are \( P \)'s," or "\( (x)(F(x) \rightarrow P(x)) \)," we no longer care what \( F \) and \( P \) stand for in our logical calculations. What we prove is logically correct whether \( F \) stands for fetuses or fandango dancers.\(^{15}\)

The rationality of similarity and difference, however, is concerned with the conditions under which we can classify things as being \( F \)'s or being \( P \)'s. Are fetuses enough like the other things we call persons to count as persons? They have human DNA, they share certain bodily functions of adult humans, and they are composed of living cells. On the other hand, all these characteristics are true of one's liver or one's appendix. Are fetuses more like persons or more like your appendix? Are all fetuses equally like persons, or are some of the things within the category we call "fetus" more person-like and some more appendix-like, for example fetuses that are eight months old and fetuses that are three weeks old? These types of questions are the object of the rationality of similarity and difference. Here we must patiently compare what things are alike or unalike, to what extent or for what purpose they are alike or unalike, and (most importantly) why we want to treat them as alike or unalike. Those reasons may have little to do with the overt physical characteristics of the fetus—for example, whether it is composed of a few cells or many—but may stem from a range of social policies or theories of rights that we think important to enforce. Thus, we treat the fetus as a person or not as a person, or as a person in some respects but not in others, because of those important social policies or theories of rights.

What I have just said must sound obvious to most lawyers. The ration-

\(^{15}\) Note that the statement "all \( F \) are \( P \)" is true if we replace "fetuses" with "fandango dancers." If \( F \) stands for "forest fires," the statement is not true, but logical inferences based upon the formal statement "all \( F \) are \( P \)" continue to be logically valid even if their ultimate conclusion is false.
ality of similarity and difference is what we mean by legal reasoning in many respects. It is quite close to what Edward H. Levi meant when he spoke of legal reasoning as reasoning by analogy.\textsuperscript{16} And such reasoning is always a matter of degree—things are always alike to some extent, and always unalike to some extent. Thus, when Derrida and his followers tell us that things are neither/nor and both/and, we know that they are not talking nonsense—they are talking like lawyers. (I am, of course, acutely aware of the question that I have just begged).

Deconstruction offers a general view about the rationality of similarity and difference, a view that provides a useful set of analytical techniques for law as well as for the other human sciences. However, to understand this view, we must first clarify a number of concepts and relate them to the problem of similarity and difference. They are logical contradiction, conceptual opposition, and nested opposition.

Logical contradiction is a property of propositions. A logical contradiction involves two terms, a proposition and its logical denial. For example, if $P$ is a proposition, then a logical contradiction is involved in asserting simultaneously that $P$ and not-$P$ are both true. A conceptual opposition, on the other hand, is a property of a relation between concepts in a particular context—it therefore need not involve a logical contradiction between propositions. A conceptual opposition consists of three elements—the first term, the second term, and the context or relationship by which they are opposed.\textsuperscript{17}

If we say that red and green are opposite colors in a traffic light, we are not saying that they logically contradict each other. Rather, they are opposed with respect to the meanings these colors are given in traffic signals. The context of conventions concerning traffic signals makes them opposites. In another context, they may be seen as similar to each other. For example, red and green are both colors of the natural spectrum, or colors associated with Christmas, while lavender and brown are not. Thus red and green are seen as different in some contexts, and are seen as having similar properties in others.

Conceptual oppositions are thus intimately related to questions of similarity and difference. A conceptual opposition between $A$ and $B$ is an implicit statement of similarity and difference—an implicit claim of similarity among the things associated with $A$ (or among those associated with $B$) and an implicit claim of difference between these two groups. These implicit claims of similarity and difference are made in the context of the relation that opposes the two poles of the opposition.

A recurring problem in theoretical argument is the confusion of concep-

\textsuperscript{16} E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

\textsuperscript{17} For an excellent discussion of this point, see T. SEUNG, STRUCTURALISM AND HERMENEUTICS 10–14 (1982).
tual opposition with logical contradiction. The problem arises because we often forget that what produces a conceptual opposition is context and relation and not logical contradiction. This mistake is easy to make because many conceptual oppositions look and act like logical contradictions in particular contexts. Our cultural practices make red and green conceptual opposites in the context of a traffic light. It is also true that the same object cannot be at the same time wholly green and wholly red. Thus it appears as if statements of the form "This object is red" and "This object is green" might be logically contradictory, and that to predicate both properties (red and green) of the same object might involve logical contradiction.

Nevertheless, statements of logical contradiction are statements that are inconsistent and also admit of no third alternative. It is not true that everything must be either green or red, nor is it true that nothing can be both green and red. Green and red are mutually exclusive in some contexts, but they do not use up the entire spectrum of color—a sweater can be purple or grey. And in still other contexts green and red are not even mutually exclusive, for a green and red striped sweater can be both green and red.\footnote{So can a traffic signal which is not working correctly.}

Thus, conceptual oppositions like red and green only give rise to statements of logical contradiction in specific contexts.\footnote{For examples of the recurrent confusion of logical contradiction and conceptual opposition in philosophy, see T. Seung, supra note 17, at 12-17.}

The confusion between logical contradiction and conceptual opposition is related to another problem—the mischaracterization of properties that depend upon context or relation as being acontextual properties of things. A good example is the property of number. Suppose we have two married couples. How many are there? There are two couples, but there are four persons. The property "two" is not a property of them, but of the way in which they are considered—that is, of the context in which the question is asked or the property ascribed.

The idea of contextual and relational properties is quite important when we discuss questions of similarity and difference. For similarity and difference are the quintessential relational or contextual properties. To say that two things are the same is always to beg the question, "in what respect?" or "in what context?"\footnote{This may seem at odds with at least one type of identity—self-identity. It might appear that self-identity is an acontextual property. Yet in fact this is not the case. For example, consider the self-identity of persons. A person is a child and then she becomes an adult. In one respect she is the same, but in another she may be quite different, both psychologically and physically. Even inanimate objects change over time, yet we still say that they are identical. The famous statement of Heraclitus—that one can never step into the same river twice—is simply another version of this point. Heraclitus argued that the same is always in the process of becoming different from itself. This metaphorical language makes sense only when similarity and difference are understood as contextual or relational properties.}

The contextuality of similarity and difference means that conceptual oppositions are only opposed in certain con-
texts. In other contexts, the terms of the opposition have similarities and are not opposed.

This brings us to the third and most important concept necessary to understanding the connection between deconstruction and logic: that of nested opposition. A nested opposition is a conceptual opposition each of whose terms contains the other, or each of whose terms shares something with the other. The metaphor of “containing” one’s opposite actually stands as a proxy for a number of related concepts—similarity to the opposite, overlap with the opposite, being a special case of the opposite, conceptual or historical dependence upon the opposite, and reproduction of the opposite or transformation into the opposite over time. These possible versions of what I call containment share what Wittgenstein called a “family resemblance”—they all bear similarities to each other, although we cannot point to one single property that they all have in common.\(^2\)

Deconstruction makes a basic claim about the logic of similarity and difference: All conceptual oppositions can be reinterpreted as some form of nested opposition. This follows from the contextual and relational nature of conceptual oppositions. Because opposition depends upon context and relation, recontextualization of a conceptual opposition may reveal similarities where before we saw only differences, or historical or conceptual dependence where before we saw only differentiation. Thus, to deconstruct a conceptual opposition is to reinterpret it as a nested opposition. It is to observe simultaneously the similarity and difference, the dependence and differentiation, involved in a relation between concepts. Deconstructive argument is simply the means by which this reinterpretation is achieved. Moreover, because claims of similarity and difference can be reinterpreted as conceptual oppositions, it follows that claims of similarity and difference can also be reinterpreted as forms of nested opposition.

The deconstructive concepts of differance and “trace” implicitly rely upon notions of nested opposition. Differance is used by Derrida to describe the mutual dependence and differentiation of concepts.\(^2\) Mutual dependence and differentiation, however, is simply one form of nested opposition. Trace is the retention of absent concepts in our understanding of other concepts;\(^3\) the trace involves a form of conceptual or historical dependence between the present and absent concepts, and thus a nested opposition between what is nominally present and what is absent. Finally, deconstructive readings implicitly make use of nested oppositions. For example, a standard form of deconstructive reading attempts to invert hierarchies of concepts found in a text. The deconstructive analysis proceeds by demonstrating that the opposition between the favored and the disfa-

\(^{23}\) Id.
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vored term in the opposition is really a nested one. In other words, the
goal is to show that the favored or dominant term bears some form of
conceptual dependence to the disfavored or subordinated term.

One might well wonder whether deconstructive theory really claims
that all conceptual oppositions can be reinterpreted as nested oppositions.
Such a translation would not be possible if there were a conceptual oppo-
sition where neither pole bore any element of similarity or conceptual or
historical dependence with respect to its opposite. However, it is always
possible to create a context, no matter how artificial, in which two things
are said to be alike in some respect. Indeed, we might note that the very
fact that we see the two concepts as opposed, rather than as completely
irrelevant to each other, indicates some basis of similarity or some concep-
tual relation between them.

It is important to understand that the deconstructive claim that all con-
ceptual oppositions can be reinterpreted as nested oppositions is not a
claim that all conceptual oppositions are incoherent or false oppositions.
For this involves a confusion of similarity with identity. To say that A
and B form a nested opposition is not to say that A is identical with B,
or that it is impossible to tell A and B apart in a particular context. Indeed,
the concept of a nested opposition only makes sense if we assume that there
are points of difference between A and B; otherwise we could not see these
concepts as opposed. Therefore it is a misuse of deconstructive argument
to claim that one can abolish all distinctions and demonstrate that all
forms of intellectual endeavor lack coherence. For deconstructive argument
itself rests upon the very possibility of those distinctions and those
coherences.

I believe that the richness and utility of the concept of nested opposition
clarifies many of the debates surrounding deconstruction and the accusa-
tions of indeterminacy regularly levelled at it. But this idea, which de-
pends so heavily upon contextualization, is itself best encountered in con-
text. Moreover, the concept of nested opposition is rich because it is
actually a cluster of interrelated concepts. For these reasons, a few exam-

24. For example, even logical contradictions, such as that between P and not-P, can be interpreted
as nested oppositions, if we shift our focus from the opposed meanings of the two propositions to the
opposition between the propositions themselves. We might note that both propositions have in com-
mon the property of being propositions, both involve a statement about a state of affairs P, and each is
dependent for its truth value upon the truth value assigned to the opposite proposition.

25. Nevertheless, this answer suggests that at least some reinterpretations of conceptual opposi-
tions as nested oppositions will be trivial or uninteresting. We might then ask if there is any way of
demarcating in advance those conceptual oppositions that will produce interesting forms of nested
opposition from those that will produce only trivial or uninteresting ones. But we cannot compile such
a list in advance, for triviality and interest, like similarity and difference, are highly contextual
properties. In other words, although deconstructive techniques can be explained formulaically, the
actual practice of deconstruction is not formulaic—it requires sensitivity and creativity on the part of
the deconstructor in discovering interesting or relevant points of similarity or conceptual dependence
between conceptual opposites.
examples are necessary in order to show how the different forms of nested opposition work in practice.

A. Nested Oppositions in History and Culture

First, consider a nested opposition of intellectual themes. Suppose a historian asserts that Thomas Jefferson and Alexander Hamilton had opposed political philosophies. She might point out that Jefferson stood for the preservation of the yeoman farmer, for individual equality and opportunity, for local power as opposed to national power, and that Jefferson’s thought emphasized revolutionary flexibility in order to preserve individual liberty. In contrast, she might argue that Hamilton stood for the growth of American industry, was complacent about natural and social inequalities, sought increased centralization of governmental power, and emphasized the preservation of social order in order to enhance economic growth.26

The example of Jefferson’s and Hamilton’s philosophies is paradigmatic of a nested opposition because it is an opposition of cultural or value-oriented themes. The most common forms of nested opposition arise in oppositions between historical movements or events, interpretive statements, claims of value, or other products of culture. This is not to say that nested oppositions cannot occur elsewhere, but merely that these are the most interesting and important examples.

We might understand this opposition as nested in several different ways. First, we might recognize that there is considerable overlap between the philosophies of the two men, as the consensus historians of the 1940’s and 50’s argued.27 Both thinkers stated their views against a background of assumptions involving a capitalist economic system and a liberal democratic political system. More particularly, both men believed in natural aristocracies of talent and the institution of private property, and both objected to government interference with individual initiative.28 We might say metaphorically that there is a little of Jefferson’s philosophy in Hamilton and a little of Hamilton’s philosophy in Jefferson. This would not justify the claim that their philosophies were identical, but it would be a useful corrective to the notion that they were in all respects opposed.

Second, we might note the degree to which Jefferson’s thought came to resemble Hamilton’s after Hamilton’s death and Jefferson’s ascension to the presidency. The similarities between Jefferson and Hamilton might tend to explain why, during his presidency, Jefferson took many steps that would have been consistent with Hamilton’s views on government and

with the early Federalist position in general. Of course, these policies can be explained on the grounds that Jefferson changed his mind about these things as he got older, or that he was simply unprincipled. But these policies are also partially explained by the fact that, as the historical context changed, the similarities between Jefferson’s views and Hamilton’s emerged more clearly—that alteration of political and historical context allowed us to see similarities where before we saw only differences.

We can see another form of nested opposition between Jefferson’s and Hamilton’s philosophies emerge when we attempt to create cultural themes, or ideal types of Jeffersonianism and Hamiltonianism. For example, in his famous work, Main Currents in American Thought, Vernon Parrington argued that American intellectual history can be seen as a dialectic between Jeffersonian and Hamiltonian philosophies. Jeffersonianism might be seen as a belief in egalitarianism, equality of opportunity, fluid social and political institutions, and decentralized decision-making, while Hamiltonianism might stand for promotion of wealth at the expense of equality, stable social and political institutions, and centralization of power in national as opposed to local government. Indeed, once we create these abstractions, it might even make sense to say that a particular person was more Jeffersonian than Jefferson himself with respect to some issues—imagine a member of Congress who thought that some of the proposals and acts of the Jefferson Administration were beyond Jefferson’s authority as President because that person had a narrow conception of Federal national power or Federal executive power.

The nestedness of a nested opposition often becomes apparent when we attempt to understand what each of the terms in the opposition means. Debates over the meaning or content of each side of a nested opposition replicate the debate over the terms of the original opposition. The struggle over the meaning or the content of the concept as it is introduced into new contexts is a struggle that recapitulates the original struggle of differentiation.

Thus, if we imagine a political debate in 1815 between “radical” Jeffersonians and “moderate” Jeffersonians over the constitutionality of an internal improvements bill, it would not be at all surprising to hear the moderate Jeffersonians calling for somewhat looser construction of Federal constitutional powers, or paying somewhat greater attention to the

29. Id. at 43-45, 46, 51; M. Peterson, supra note 26, at 689, 700-01, 775-76; L. White, The Jeffersonians: A Study in Administrative History 6, 35, 111, 131, 146-47, 547-48, 550-51 (1951).
30. In this light, Jefferson’s famous remark in his first inaugural address that “[w]e are all republicans, we are all federalists,” takes on a new meaning. R. Hofstadter, supra note 27, at 43.
32. V. Parrington, Main Currents in American Thought (1930) (three volumes).
33. See 3 id. at xxiii-xxiv.
need for a national policy of stimulating business.\textsuperscript{34} The moderate Jeffersonians' more radical siblings might accuse them of sounding like members of the Federalist party of the late Alexander Hamilton, and in a limited sense they would be quite right. In this example the contestants are not debating the meaning of the term "Jeffersonianism." Rather, this is a debate among persons who claim all to be Jeffersonians as to what the principles they believe in truly are.\textsuperscript{35} It is less a struggle over the meaning of a word than the content of a principle associated with a word.\textsuperscript{36}

This imaginary debate\textsuperscript{37} might end in any number of ways, in each case manifesting a different version of the nested opposition. First, the radical Jeffersonians might win and, arguing that they were the true disciples of Jefferson's thought, kick the moderate Jeffersonians out of their party. The radicals would then interpret this event as the preservation of the true meaning of Jeffersonian principles, and the exclusion of Hamiltonian influences, while the excluded moderates would argue that true Jeffersonian principles had been betrayed and perverted in the service of an unhealthy radicalism. Second, the moderate Jeffersonians might prevail, label their beliefs as Jeffersonianism, and the disgruntled radicals would be forced to call themselves something else. In that case, from the perspective of the moderates the true essence of Jeffersonianism would have been preserved from dangerous contamination, while from the perspective of the radicals Jeffersonianism would have become just the latest form of Hamiltonianism.\textsuperscript{38} Third, the two sides might reach some compromise and refer to this compromise as the essence of Jeffersonianism, while disgruntled losers on the left and on the right now accuse the resulting compromise of being too Hamiltonian on the one hand and too radical

\begin{itemize}
\item[] \textsuperscript{34} Note that Jefferson himself supported an internal improvements bill, despite his concerns about its constitutionality, 5 D. \textsc{Malone}, \underline{supra} note 26, at 553–60, and many of his staunchest Republican followers would later oppose it on the same grounds.
\item[] \textsuperscript{35} In this light, consider the election of 1824, in which such different political personalities as Henry Clay, John Quincy Adams, William Crawford, and Andrew Jackson all claimed to be Jeffersonian Republicans. See A. \textsc{Schlesinger}, \textsc{The Age of Jackson} 19 (1945).
\item[] \textsuperscript{36} See 3 V. \textsc{Parrington}, \underline{supra} note 32, at xxvii (rival visions of politics, originally instantiated as Jeffersonianism and Hamiltonianism, both underwent subtle changes due to demands of practical politics).
\item[] \textsuperscript{37} I have referred to this as an "imaginary" debate, although something like this did in fact happen to Jefferson's party in the 1820's, a split that led to the eventual replacement of the Federalist and Republican Parties with two branches of the Republican Party—the National Republicans and the Democratic Republicans. S. \textsc{Morison}, H. \textsc{Commager} & W. \textsc{Leuchtenberg}, \textsc{A Concise History of the American Republic} 183–85 (2d ed. 1983). However, the political situation in the years from 1805 to 1824 is very complicated, and cannot be reduced to a debate over Jeffersonian and Hamiltonian principles—for example, this perspective does not take into account the alliances formed and broken because of the issue of slavery. In order to make my point about nested oppositions more clear, I have framed my discussion in terms of a hypothetical debate over a limited number of issues, which is nevertheless confirmed by historical examples.
\item[] \textsuperscript{38} Cf. 3 V. \textsc{Parrington}, \underline{supra} note 32, at xxviii (Jeffersonian principles of democracy have been made to serve many different masters, and through this process their true meaning has been "lost out of the reckoning," except in fringe radical and third party movements).
\end{itemize}
on the other. In each case, no matter which side prevails in calling its principles the “true” version of Jeffersonianism, the original struggle between Jeffersonianism and Hamiltonianism has been recapitulated at a different level. The opposition is nested no matter in which direction history moves, because a version of the thematic opposite is involved in the struggle over the meaning of the cultural theme.

An analogous phenomenon arises when historians or other theorists attempt to give concrete meaning to theoretical terms like “Jeffersonianism” or “individualism.” This is not like a debate among Lutherans as to what Lutheranism consists in, but rather a definitional debate about a theoretical term or ideal type that will be used in theoretical discussion. Yet because the concept of Jeffersonianism depends upon a conceptual opposition that arises in a particular context, its contours are not fully defined in all other contexts. The moment that we start to fix the contours of the concept in new contexts, we will note that its opposite has made an appearance “within” the concept. The nested nature of the opposition between Jeffersonianism and Hamiltonianism will reassert itself as we attempt to flesh out the meaning of either cultural theme.

Imagine a dispute about what the Jeffersonian position on a national progressive income tax might be. Someone might argue that Jeffersonianism is inconsistent with a progressive income tax, because Jefferson himself believed in the sanctity of private property,39 while someone else might argue that as an egalitarian measure, such a tax is clearly in the spirit of Jeffersonianism.40 We cannot solve this controversy by saying that Jeffersonianism is always the more egalitarian position,41 unless we wish to say that Jeffersonianism is simply a synonym for egalitarianism. (At that point we would begin a further debate over the theoretical term “egalitarianism,” and the difficulties would begin anew.) Suppose that we decide that the progressive income tax, although more egalitarian than its opposite, is nevertheless inconsistent with Jeffersonianism. If we focus on the reasons why we think that the line separating Jeffersonianism from other forms of egalitarianism has to be drawn at the progressive income

39. For example, in a 1816 letter Jefferson wrote that redistribution should not be pursued too aggressively, because “the first principle of association [is] 'the guarantee to everyone [of] a free exercise of his industry and the fruits acquired by it.’” R. Hofstadter, supra note 27, at 47-48 (emphasis in original).

40. Cf. Cincone, Land Reform and Corporate Redistribution: The Republican Legacy, 39 STAN. L. REV. 1229, 1232-35 (1987) (arguing that Republicanism and Jeffersonianism viewed government as existing not so much to protect property as to promote equal access to property); M. Peterson, supra note 31, at 355-76 (arguing that New Deal appropriated Jefferson as symbol of egalitarianism).

41. Cf. A. Schlesinger, supra note 35, at 57-58 (noting increasing divergence between western Jeffersonians, who saw democracy as best served by emphasizing decentralization and states’ rights, and eastern Jeffersonians, who emphasized economic equality); id. at 510-18 (anti-statist element of Jeffersonian philosophy came into conflict with egalitarian element as it became clear that stronger state was necessary to reign in increasing concentrations of private power, and to check ambitions of business interests).
tax, we may discover that these reasons recapitulate some of the themes of Hamiltonianism—for example, that respect for individual autonomy can only be achieved by recognizing and rewarding individual differences in talent and ambition.\textsuperscript{42} We now see that our concretized conception of Jeffersonianism has a little Hamiltonianism in it, even though we originally defined the two cultural themes by their opposition. Of course, we may decide the other way in this case. We may decide that the progressive income tax is consistent with Jeffersonianism. But even in that case, the debate over the contours of what Jeffersonianism means will call up in an uncanny way the original debate between Jeffersonianism and its opposite.\textsuperscript{43} And at some point—when we begin to consider the issue of national health insurance or a theory of comparable worth—we will begin to see the Hamiltonian aspects emergent in our concept of Jeffersonianism.\textsuperscript{44}

The opposition between Jefferson's and Hamilton's political philosophies might be nested in still another way. Perhaps similarities between the two philosophies will emerge as history progresses—we witness Jefferson and his followers taking positions more like those of Hamilton and his followers as time goes on. Or imagine that as a result of a generation of Jeffersonian political reforms, a reaction is produced which results in a strongly Hamiltonian politics. In this version of the nested opposition, one term produces its opposite or comes to resemble its opposite.\textsuperscript{45} This last version of nested opposition sounds vaguely like Hegel's theory of history, and the resemblance is not accidental—it is one of the debts that deconstructive argument owes to Hegelianism.\textsuperscript{46}

\textsuperscript{42} This view is the converse of the Jeffersonian principle that every person should have an equal opportunity to become an independent proprietor who could provide for his or her wants or needs through the exercise of his or her own labor. The Hamiltonian element emerges as the Jeffersonian principle is applied to defend the interests of the profit-maximizing captain of industry.

\textsuperscript{43} This recapitulation will occur in two senses. On the one hand, the arguments for the tax being Jeffersonian will recapitulate the egalitarian strain of Jeffersonian thought in opposition to the Hamiltonian. On the other hand, the argument that the Federal government has the power to levy such a tax rests upon a conception of stronger national powers that is unmistakably Hamiltonian. Indeed, one of the "Hamiltonian" elements of Jefferson's own thought was his increasing recognition—during the years of his presidency and afterward—that increased national power was necessary to achieve his other political goals. Thus, the conflict about the meaning of Jeffersonianism is a conflict between two different notions of Jeffersonianism—the decentralization aspect versus the egalitarian aspect—each of which in turn has its own "Jeffersonian" and "Hamiltonian" elements.

\textsuperscript{44} We will see this both with respect to debates about the meaning of equality of opportunity and with respect to debates about the appropriate degree of government intervention.

\textsuperscript{45} In the case of Jeffersonianism, changing historical circumstances split the egalitarian component of Jeffersonianism from its anti-statist and pro-decentralization component as the need to check private power, and especially the power of business interests, increasingly called for a stronger national regulatory apparatus. Opposition to slavery on egalitarian grounds (or on the less altruistic grounds that the spread of slavery would drive down the wages of the ordinary white working man) also conflicted with a states' rights position. The confrontation between the two strains of thought came to a head both during the Civil War and the New Deal. Thus both the states' rights advocates who abandoned economic and social egalitarianism, and the economic and social egalitarians who abandoned states' rights, could claim that they were the true heirs of Jefferson, even though each group's philosophy actually became a little more like Hamilton's as history progressed.

\textsuperscript{46} T.K. Seung has offered an interpretation of Hegel along these lines. See T. SEUNG, SEMIOTICS AND THEMATICS IN HERMENEUTICS 199–203 (1982) (interpreting Hegelian dialectic as clash of
B. **Nested Oppositions in Legal Doctrine**

The dialectic of Jeffersonianism and Hamiltonianism is a good example of the nested opposition of cultural themes, but one might nevertheless object that this example relies too much on the paradoxical nature of individual human personalities. Consider now an example taken from tort law—the choice between negligence and strict liability. We are all familiar with the opposition between the two principles of liability represented by these rules—the fault principle and the compensation principle—and the constant struggle between these principles in the law of accidents. Indeed, Harry Kalven once said that negligence and strict liability “cannot be made to sleep together except by fiat. The history of tort law has been made up out of the tension between the two principles.”

In one sense, Kalven was surely right. Negligence does appear to be the opposite of strict liability. On the other hand, if we look closely at the law of negligence, we will see subdoctrines that can only be justified by the same sorts of arguments that one uses to justify strict liability. Such examples include the use of objective standards for determining fault, the adult activity rule for children, res ipsa loquitur, negligence per se, and the rule that in measuring damages the defendant takes the plaintiff as she finds her. If we look at the doctrines of strict liability, we will similarly find pockets of negligence—that is to say, we will find doctrines that make demonstrations of the defendant’s fault or culpability essential to liability. For example, in strict products liability one must still show a defect in design or construction (and in some jurisdictions there is a state of the art defense); causation in strict liability torts still requires that the defendant could have foreseen the plaintiff’s injury; extrasensitive plaintiffs cannot recover for injuries caused by ultrahazardous activities if an ordinary plaintiff would not have been injured by the activity, and so on. From a still broader perspective, we might note that existing doctrines of negligence and strict liability are both inconsistent with a position that no duty is opposing cultural themes which nevertheless depend upon and are transformed into different versions of each other).

48. For example, an objective standard of negligence holds some persons liable even if they did not understand their conduct was unreasonable and even if they could not have met the standard of reasonableness. See, e.g., Jolley v. Powell, 299 So. 2d 647 (Fla. 1974) (defending general rule that permanently insane persons are held to standard of reasonable person on grounds that it compensates injured victims, creates additional deterrence, and is easier to apply than an individuated inquiry into insanity). Similarly, the adult activity rule holds children engaging in adult activities to the standard of adults even if the child could not reasonably be expected to achieve that standard of care; the rule that the defendant takes the plaintiff as she finds her allows recovery of damages that were not foreseeable from defendant’s standpoint even if a risk of some harm was foreseeable. For a fuller discussion of the pockets of strict liability in negligence doctrine, see Balkin, *The Crystalline Structure of Legal Thought*, 39 Rutgers L. Rev. 1 (1986) [hereinafter Balkin, *Crystalline Structure*]; Balkin, *Taking Ideology Seriously: Ronald Dworkin and the CLS Critique*, 55 U. Mo. Kansas City L. Rev. 392, 409-15 (1987) [hereinafter Balkin, *Taking Ideology Seriously*].
owed at all to injured parties, or a position of absolute liability regardless of causal responsibility.

It is very important to understand that this is not a claim that negligence is strict liability, anymore than our earlier discussion claimed that a moderate form of Jeffersonianism is Hamiltonianism. In a nested opposition, the opposed terms bear a relation of similarity but not identity to each other. The similarity in this case is a similarity of the principles which justify one rule (strict liability) and the subdoctrines which form part of the opposite rule (negligence). To see this recapitulation is not to defy logic, but rather to identify recurrent thematic elements of one within what is nominally its opposite, elements which emerge as the context in which the opposition is considered changes.

One might object that the nested opposition between negligence and strict liability is contingent in the sense that it happens to be the case that most jurisdictions have an objective standard of negligence. Some jurisdictions have a state of the art defense in products liability, while others do not. Perhaps in a different jurisdiction the forms of nestedness I have identified would not appear at all. However, this opposition is nested in a more important way. The arguments used to justify the choice between negligence and strict liability reappear whenever we consider subrule choices that flesh out the meaning of the concepts of negligence and strict liability. For example, one principle which supports strict liability is that one should be compensated for injuries caused by another; the corresponding principle supporting negligence is that one should not be held liable without fault. The debate between these principles is replicated within each debate over the content of negligence and strict liability doctrine. Thus, the argument for a state of the art defense to strict products liability is that the manufacturer should not be held responsible for defects that could not have been prevented even by the use of state of the art technology; the argument against the defense is that one should be compensated for injuries caused by a product even if the manufacturer could not prevent them by exercising due care. The argument against the adult activity rule in negligence law is that children who perform adult activities should still be held to the lesser standard of children because they still cannot conform their actions to those of a reasonable adult; the argument for the adult activity rule is that children should be held to the adult standard because the plaintiff has been no less injured even though the child could not conform to that standard. No matter which way a particular jurisdiction holds on these issues, the original debate over negligence and strict liability is recapitulated in each decision. I call this phenomenon of recurring forms of argument in the development of legal doctrine a “crystalline
structure," because certain forms of crystals manifest identical internal structures when viewed at macro and micro levels.49

Where the meaning or content of the terms of a conceptual opposition is in flux, or not fully determined, it is possible to discover within each term possible versions or interpretations of that term that bear similarities to the principles associated with the opposite term. Since legal, ethical, and political concepts have this contestable and incomplete character, it is often possible to discover traces of their opposites in disputes over their meaning and interpretation.50

This phenomenon is partly explained by the differences between logical contradiction and conceptual opposition. When we accept the truth of the proposition $P$, we thereby also accept the falsity of the proposition not-$P$. We therefore think it ridiculous that not-$P$ could be used as a justification in our subsequent arguments. This exclusivity, however, does not necessarily hold true of conceptual oppositions, especially when the oppositions involve questions of value. When we accept a negligence standard over strict liability on the grounds that people should not be held liable without fault, we have not foreclosed for all time the argument that a person who causes harm to another should be held liable, even though these two propositions seem to be opposed in the context of the choice between negligence and strict liability. This is because the principle that persons should not be held liable without fault does not have a completely definite scope of application. Whereas the logical value (true or false) given to the proposition $P$ always simultaneously determines the logical value to be given to the proposition not-$P$, the acceptance of the ethical proposition "No Liability Without Fault" does not determine the moral status in all cases.

49. Balkin, Crystalline Structure, supra note 48, at 36–40. My study of recurring forms of legal argument builds on earlier work by Duncan Kennedy. See Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Md. L. Rev. 563 (1981); Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976). Very appropriately, Kennedy calls this phenomenon "nesting." Kennedy, A Semiotics of Legal Argument, in 3 Law & Semiotics (B. Keelson ed. forthcoming 1990). We can view this phenomenon in two different ways. First, we can look at it semantically, as we did in the case of the philosophies of Jeffersonianism and Hamiltonianism. We are trying to work out what the concept of negligence means as a concept. In choosing between different possible interpretations we find ourselves recapitulating the original debate between negligence and strict liability. Second, we can look at the phenomenon pragmatically. We are not trying to define the word negligence, because we realize that there are many possible regimes of rules that might collectively be termed negligence doctrine. We are simply trying to choose subdoctrinal rules that best serve society's needs or otherwise seem most just. In creating a system of negligence rules and subrules we will find ourselves recapitulating our original policy arguments about the choice between negligence and strict liability at a more discrete level. Legal debate about rules and the application of rules to facts is often both semantic and pragmatic at the same time. For example, we may see the adult activity rule as merely a subdoctrine of negligence, and not analytically required by the word "negligence." Yet we may be interested in whether operating a snowmobile is an adult activity. Similarly, we may think that the question whether the reasonable person standard takes into account certain mental or physical attributes is a matter of the best rule under the circumstances, or we may view it as an inquiry into what reasonableness means in that context.

50. Again, since what is "the opposite" concept depends upon context, one can find the traces of more radical alternatives as well as more moderate ones.
of the opposite proposition that “One Who Causes Harm Should Pay” (a proposition whose scope is equally indefinite). The proposition rejected in one context may yet live to fight another day. Indeed, because it is never fully eliminated, it remains relevant to the struggle over the meaning of the concept of “fault” within its opposite number. Of course, this is not true of logical contradictions. One cannot argue that terms in the true proposition $P$ mean such and such because not-$P$ is true. However, one can argue that the standard of negligence should be that of a reasonable person because a person injured by the defendant is no less harmed and no less deserving of compensation because the defendant who caused her harm sincerely though unreasonably believed that she was acting prudently.\textsuperscript{51}

The impossibility of fully eliminating certain ethical or political principles from legal discourse leads to a well-known phenomenon in legal argument. When we present the same case to judges of different political and ethical persuasions, they are often able to see very different principles emanating from existing bodies of doctrine. As a result both judges can sincerely believe that the best interpretation of existing legal materials produces opposite results in the case before them. For example, in a jurisdiction in which a state of the art defense is proposed by one of the litigants, one judge might note correctly that cases have held that the defendant is not an insurer of the plaintiff’s safety under all circumstances, that products liability requires a showing of defect, and that one cannot justly be blamed for placing a defective product on the market if it was constructed according to the state of the art. Another judge might note, equally correctly, that the jurisdiction’s acceptance of the doctrine of strict products liability is acceptance of the principle that compensation will be awarded regardless of defendant’s moral blameworthiness, that a product is no less dangerous because it was constructed according to the state of the art, and that the plaintiff harmed by such a product is no less deserving of compensation. Even though the case must be decided one way or the other, both judges could sincerely believe that their interpretation of the principles behind existing legal materials was the best one. Moreover, even if the court holds that there is a state of the art defense in the relevant jurisdiction, new disputes will arise concerning the interpretation of the defense, and different judges may again find within the same materials reasons for opposing interpretations. Again, the reason why this occurs is not because one of the judges or the other is unwittingly involved in logi-

\textsuperscript{51} For a philosophical argument along the same lines, see T. Seung & D. Bonevac, Constrained Indeterminacy (1989) (unpublished manuscript on file with author). For the classic legal argument for objective standards in tort law, see O.W. Holmes, The Common Law 85–89 (M. Howe ed. 1963).
cal contradiction. It is because legal doctrines and distinctions invariably involve conceptual oppositions that are also nested oppositions.  

C. Nested Oppositions in Critical Scholarship

Many of the arguments made by feminists and by members of the Critical Legal Studies movement rely upon demonstrating a nested opposition between legal concepts traditionally thought separate and distinct. For example, one of the most famous and well known of these arguments deconstructs the distinction between public power and private power. Such arguments are often misunderstood, both by those persons criticizing them and also by those making them. The problem arises from a confusion of similarity with identity, or a confusion of a claim of nested opposition with a claim that there is no opposition at all.

The deconstruction of the conceptual opposition between public and private power, for example, is easily confused with the claim that there is no difference between public and private power, or that private power is public power, or vice versa. Such uncompromising statements might have limited value as a useful shorthand, or as a corrective to a tendency to overemphasize the differences between the two terms, but they are not accurate, because one can further deconstruct them to make the distinction between public and private reappear. Public and private form a nested opposition, which means that they are similar in some respects while different in others, and that they have a mutual conceptual dependence even though they are nominally differentiated.

To cast out the public/private distinction therefore involves its own form of nested opposition, which subordinates analyses that recognize the distinction to those that do not. Yet it should be obvious that as soon as one tries to articulate any policy judgment based upon the abolition of the public/private distinction, one will reinscribe it in another form. For example, suppose that we argue that the state has a duty to prohibit private acts of racial and religious discrimination. Because the government protects its citizens from other economic and social harms produced by individual choice (for example, through minimum wage legislation), the government's failure to protect individuals from racial and religious discrimination is a value-laden regulatory choice for which the state is ultimately responsible. Suppose we then consider whether the state has a duty to create a civil action for persons who were spurned by a prospective spouse or lover because of racial or religious differences. We might well decide that the government is not responsible for such acts of discrimination, because the selection of one's spouse or lover is a matter of individual choice with which the government should not interfere. Yet at this

52. For further discussion of this point, see Balkin, Taking Ideology Seriously, supra note 48.
point our justification has simply restated the public/private distinction in a new form.  

The lesson to draw from this example is that arguments based upon the reinterpretation of a conceptual opposition as a nested opposition must be made sensitively and carefully lest they create misunderstanding. They must not be confused with claims of false opposition or identity.

A second point concerning CLS and feminist arguments which rely upon nested oppositions is that such arguments are occasionally claimed to exemplify or emanate from a countervision which is opposed to the dominant vision enforced by the law. Yet at the same time the critical or feminist scholar may claim that the countervision is exemplified by particular doctrines or policy considerations already found in the law itself, or found in modified form. No doubt this way of talking leads to considerable confusion. How can something be at one and the same time representative of a revolutionary countervision and a generalization of the status quo? The answer is supplied by understanding the critique in terms of a nested opposition. The new vision of legal practice is opposed to the traditional vision. Yet, in fact, each vision contains a little of the other. The critical or feminist scholar locates this point of similarity in marginal or exceptional doctrines within the status quo, and attempts to expand their influence until they become the paradigmatic examples of how problems of regulation should be approached. For example, constitutional law recognizes a relatively strict division between public and private action. Nevertheless, a few cases like Shelley v. Kraemer deal with exceptional situations or

53. We could continue by deconstructing this argument. The claim that the government should not interfere with one's choice of spouse or lover is problematic because the government is always doing this by the content of its legal regulations and non-regulations. The failure of the government to proscribe racial and religious discrimination in the choice of spouses and lovers when it does proscribe such discrimination in the area of employment can be said to be a governmental choice that does affect the conditions under which people choose their spouses and lovers. The same can be said for the government's failure or choice to pursue educational programs in the public schools to break down traditional barriers and prejudices against interracial or interfaith marriages. One can see that the collapse, reseparation, and recollapse of the public/private distinction could go on indefinitely. Indeed, this is one of the characteristic features of a nested opposition.

54. Similarly, radical feminist critiques of rape law, see, e.g., C. MacKinnon, Towards a Feminist Theory of the State 171-83 (1989), which point out that both rape and normal heterosexual relations may involve coercion of females by males, and the legal realist critique of laissez-faire contract doctrine, which argues that both duress and "normal" contractual relations involve forms of coercion between the parties, see Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 POL. SCI. Q. 470 (1923), are best expressed as claims of nested opposition, and not as claims of false opposition or identity.


56. 334 U.S. 1, 14-18 (1948) (holding that enforcement of private racially discriminatory covenant constituted state action).
specially demarcated areas in which the general rules do not seem to work well. The critic’s goal, then, is to expand the principles underlying the unusual or special cases until they begin to swallow up some of the paradigmatic situations in which the usual rules are thought to apply. One can then speak of the expanded doctrine as symbolizing a countervision, which is immanent in existing doctrine, yet suppressed or marginalized.\textsuperscript{57}

This sort of analysis leads to an obvious question: What value is there in postulating a countervision of politics or law, when the results one is arguing for could be achieved through manipulation of marginal areas of existing doctrine? The answer is that once the logic of a nested opposition is grasped, one can see that these are really two different ways of describing the same phenomena. It is really a matter of how one wishes to talk about it. Often it makes more sense to emphasize that the countervision one proposes is always immanent in the vision one is critiquing. On the other hand, one might wish to downplay similarity to the extent that one wants to emphasize the distance between politics and legal doctrine as one currently sees them, and politics and doctrine as they would become if the marginalized or suppressed principles were expanded or recognized. But whichever way a critical or feminist scholar expresses such insights, both she and her audience should understand that the logical basis of the argument is not logical contradiction or denial but the elaboration of a nested opposition within politics and legal doctrine.

\section{II. The Nested Opposition of Speech and Writing}

Our previous discussion of nested oppositions has shown how conceptual oppositions—of cultural themes like Jeffersonianism and Hamiltonianism, of legal doctrines like negligence and strict liability, and of political concepts like public and private—behave according to a deconstructive logic. The poles of each conceptual opposition have a simultaneous relationship of differentiation and dependence. Ellis’ major mistake throughout \textit{Against Deconstruction} is failing to recognize this relationship between conceptual opposition and nested opposition, and thus the important differences between nested opposition and false opposition. Because, as explained above, almost all deconstructive arguments can be understood to depend upon some form of nested opposition, it is clear that much of what Ellis has to say about deconstruction is affected by this flaw in his analysis.

A good example is Ellis’s critique of Derrida’s claim in \textit{Of Grammatology} that Western thought has privileged speech over writing.\textsuperscript{58} To begin with, Ellis misunderstands the claim that Derrida is making. Be-

\textsuperscript{57} In rough form, this is the method of deviationist doctrine espoused by Roberto Unger in Unger, \textit{supra} note 55, at 577-83.

\textsuperscript{58} J. DERRIDA, \textit{Of Grammatology} 3 (1976).
cause Derrida uses the term "ethnocentrism" to describe the Western preference for speech, Ellis assumes that Derrida is making a political claim—that Western cultures improperly look down on or ignore primitive societies. Ellis argues that an ethnocentric approach would tend to valorize or emphasize things Westerners have (such as writing) that more primitive cultures lack. Thus, the ethnocentrism of Western linguists, for example, involved focusing exclusively on "cultures and languages with long written traditions." Ellis points out that this is very hard to square with Derrida's claim that Western thought debases writing.

Derrida's claim of ethnocentrism, however, is much more subtle than Ellis's version. Derrida argues that Western civilization's attitude towards writing reflects a more general approach towards issues of truth and representation that has not been universally shared in all cultures. The Western tradition, Derrida argues, sees writing as a representation of a representation, and speech as something closer to or more directly representational of reality. Thus, in Of Grammatology, Derrida is not concerned with whether linguists examined written languages more than spoken ones, or whether Western cultures looked down on illiterate societies. Rather, he is interested in the rhetoric that Western thinkers have used when describing the relationship of speech and writing to reality. Derrida gives dozens of examples of rhetoric by Western figures from Plato to Saussure which indicate that for them speech is much closer to truth, or to what the speaker means, or to reality itself, than is writing. Thus, Derrida notes "the Aristotelian definition . . . [that] '[spoken words are the symbols of mental experience and written words are the symbols of spoken words.'"

The Western "ethnocentrism" of which Derrida speaks is the recurrent theme in Western thought that the very writing which distinguishes Western civilization from more "primitive" cultures is nevertheless viewed by Westerners as an abstraction from, and an imperfect representation of, speech. Speech, on the other hand, is seen as the true reflection of reality, or the speaker's actual present meaning. Thus, even though Western thinkers might have seen writing as evidence of their superiority, the semiotic

59. P. 19.

60. The difference among cultures on this issue may stem from the fact that many cultures used written hieroglyphics or picture symbols, which might arguably have a more direct resemblance to reality than spoken words. For example, a picture symbol of a bird might seem to represent a bird more closely than the phonetic sounds of the word for "bird" in a particular spoken language. But since Western thought no longer has a tradition of hieroglyphic writing, and now views such hieroglyphics as odd or impractical, see J. DERRIDA, supra note 58, at 3, 24–26 (discussing Hegel's ambivalence toward Chinese hieroglyphics and his preference for Western alphabets), it cannot imagine writing as being more direct a representation of reality than speech. A careful reading of Derrida reveals this to be his point, and it is confirmed by the cover of Of Grammatology itself, which is a picture of hieroglyphic writing—that is, the kind of writing that is thought to be more directly representational than speech.

61. Id. at 30.
properties of writing always disturbed them. Writing is debased as mere representation of truth, reality, or present meaning, as if something other than representation were available, or could be sought after. That thing, Derrida argues, is a form of “presence”—of direct, unmediated experience with what really is.62

Because Ellis misunderstands the claim Derrida is making, he also fails to give a correct account of Derrida’s key argument in Of Grammatology that writing is prior to speech. Ellis claims that there are obvious “logical” problems with Derrida’s position.63 Yet the “logical” problems Ellis identifies are really assertions that Derrida is empirically wrong about the priority of writing over speech. Ellis points out that speech existed long before the invention of writing, that there still exist languages in the world that are spoken but not written, that many people can speak but not write a language, and so on.64

At this point Ellis feigns bewilderment—“given the fact that most of this is obvious,” he asks, “what is Derrida’s argument trying to do, and why does he not explain the fact that (presumably, in his view) none of these points are relevant to it?”65 But since these facts are obvious, it does not take very much effort to see that Derrida cannot mean “prior” in the sense of historical or numerical priority. He means that writing is conceptually or ontologically prior to speech—that speech is already a kind of writing. Just as one might say of a political figure that she is a closet conservative or a closet liberal, Derrida is arguing that speech is a type of “closet” writing—that it already shares all of the characteristics of writing for which Western thinkers have debased writing and elevated speech.

Derrida’s argument is that speech and writing form a nested opposition. When Western thinkers oppose speech to writing they imagine properties in which the two are thought to differ. Speech is viewed as being more direct a presentation of meaning or truth, more present to consciousness. Writing is seen as more indirect and representational, more mediated, more of an interposition between reality and the observer—in short, writ-

62. This interpretation of Derrida also explains Derrida’s statement that the Swiss linguist, Ferdinand de Saussure, continued the ethnocentrism of the West. Ellis is mystified by this claim because “Saussure’s importance was to turn linguistics away from this prevailing ethnocentric concern with the written and toward the spoken languages of that part of the world outside the Western tradition.” P. 20 (emphasis in original). However, Derrida is concerned with the ethnocentric assumption that writing is only an imperfect representation of a truer meaning that is given by speech. Saussure’s very concern with spoken language (which Ellis thinks makes him less ethnocentric) is based upon Saussure’s view that

Writing, though unrelated to [the] inner system [of language], is used continually to represent language. . . . We must be acquainted with its usefulness, shortcomings, and dangers.

Language and writing are two distinct systems of signs; the second exists for the sole purpose of representing the first. . . . [T]he spoken forms alone constitute the [linguistic] object.

F. de Saussure, Course in General Linguistics 23–24 (1959) (emphasis added).

63. P. 21.

64. P. 21.

65. P. 21.
ing appears more “sign-like” than speech. But the nested opposition between writing and speech means that from another context we can see that speech already has these “written” characteristics. Speech is also only a set of signifiers; speech can be just as misleading or just as indirect a representation of the world as writing. Indeed, if we focus on the properties in the speech/writing opposition that we assigned to “written-ness”—being sign-like, mediating, indirect, representational—we will see that speech has all of these properties. Indeed, these are all properties of semiosis—of being a signifier standing for or representing a signified. Thus, speech and writing are both special cases of a more generalized form of “writing,” that is, semiosis.

Ellis is dissatisfied with this argument because, at the end of it, the word “writing” means something different from the “writing” that was opposed to speech.\textsuperscript{66} At the beginning of the argument “[w]e begin with three terms: language, speech, and writing. The first contains the second and third.”\textsuperscript{67} At the end of the argument we have a second triad—writing-in-general, phonic writing (speech), and graphic writing (“writing” proper).\textsuperscript{68} But, claims Ellis, the nature of writing has not changed. We have simply redefined our terms—we have not proven that speech is a form of writing. He calls this “a very well known logical mistake,” and a “misuse of English.”\textsuperscript{69}

Of course, Derrida is not trying to do anything illegitimate by his redefinition. He is simply making use of the properties and logic of a nested opposition. Starting with the opposition of speech and writing, he notes what their difference is thought to consist in. Derrida calls the purportedly differential properties of writing-as- opposed-to-speech “writing”—they are the “written” features of writing in its traditional opposition to speech. Yet it turns out (and this is Derrida’s point) that these features are features of all semiotic representation—of being a sign that stands for something else. This is because Western thought has suppressed the semiotic (sign-like) characteristics of speech and projected them onto, or identified them with, written language. Thus, when Derrida says writing is prior to speech, he means that those properties of writing that have traditionally been thought to distinguish it from speech—the semiotic characteristics of writing—are those properties that also allow speech to function, because speech is nothing more than a different form of representation, and therefore must function as all other signs do in order to signify. When Derrida talks about the general form of “writing” at the end of the argument, therefore, he means “semiotic representation” (not just “language” as Ellis thinks). “Writing” (or as Derrida sometimes calls

\textsuperscript{66} Pp. 23–25.
\textsuperscript{67} P. 24.
\textsuperscript{68} P. 24.
\textsuperscript{69} P. 24.
it, "arche-writing") is now being used to stand for the (purportedly) differential properties of writing as opposed to speech.

This way of talking is admittedly metaphorical, and, as Ellis notes, Derrida often reverts to the previous meaning of "writing" in later passages in Of Grammatology. However, because Ellis reads Derrida's texts in a relentlessly literal manner, he does not see the importance of "writing-as-opposed-to-speech" as a general metaphor for the distance between signs and what they stand for, or as a metaphor for a general distinction between what is merely representational and what is directly comprehended or experienced. This distinction is central to Western thought, which seeks to go past mere representation, and approach (to the degree humanly possible) things-as-they-really-are. Thus, Ellis does not understand Derrida's claim that the continuing acceptance of the superiority of speech over writing is a special case of a more general approach to philosophical problems. He states bluntly that "this entire fallacious argument about the priority of speech and language is found to be unnecessary for the main course of his thought: It could be dropped without loss." Yet it is precisely Derrida's point to show that the way that Western thinkers have conceptualized the virtues and vices of writing replicates the characteristic moves of Western metaphysics, moves that he collectively refers to by the term "logocentrism."

III. LOGOCENTRISM AND ESSENTIALISM

Ellis has done us a great service by noting the connection between Derrida's "logocentrism" and previous theories of language. Ellis identifies logocentrism with the philosophical position known as essentialism, which he describes as "the belief that words simply label real categories of meaning existing independently of a language." Ellis has criticized essentialism in his own writing, basing his attacks upon the earlier work of Ludwig Wittgenstein. Yet Ellis is mistaken that Derrida's target,
logocentrism, is nothing more than essentialism. This mistake colors the entire analysis that follows, leading him to make a number of misleading accusations against Derrida.

Ellis points out that if logocentrism is essentialism, many philosophers have attacked it previously, and Derrida would simply be the last in a long line.\(^7\) Indeed, Ellis remarks, essentialism is a "view of meaning that by now would have to be considered a very naive and uninformed one."\(^7\) As a result, Ellis concludes that Derrida's unclear descriptions of logocentrism must be part of a deliberate ruse or a form of intellectual dishonesty, for "if the logocentric error were stated in any clearer way it would be far too obviously an unoriginal discovery."\(^7\)

Ellis' interpretation of Derrida is a particularly good example of the sort of unfortunate misunderstandings produced by the historical separation of the Anglo-American and Continental traditions of philosophy. Ellis, who is very much influenced by Wittgenstein and ordinary language philosophy, naturally assumes that what Derrida must be concerned with is a familiar problem on the agenda of American and British philosophy. In fact, Derrida's attack on "logocentrism" speaks to a different set of concerns within the Continental tradition.

Although I am somewhat disturbed by the recurrently patronizing attitude of Ellis towards Continental philosophy in general and Derrida in particular,\(^8\) I believe that this particular misunderstanding of the term "logocentrism" is not wholly Ellis' fault. Derrida's prose is often simply quite unclear. Ellis is not the first person to assume that logocentrism is identical to essentialism,\(^9\) although I believe that a careful reading of

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75. P. 37.  
76. P. 38. I should note in passing that not all persons agree with Ellis' assessment of the naivete of essentialism. See, e.g., Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 Stan. L. Rev. 871, 879 (1989) (defending essentialism and related position of "full-blooded" metaphysical realism). Thus, it is important to understand that when Ellis criticizes Derrida, he is speaking from the perspective of a devoted Wittgensteinian, and thus may not speak for the present scholarly consensus as to the status of essentialism, either in literary theory, philosophy, or law.  
77. P. 37. Ellis points out that the essentialist view of language "has been dismembered in various ways, with varying emphases, by analytic philosophers such as Wittgenstein . . . by linguists such as J.R. Firth, by anthropological linguists working in the tradition of Edward Sapir and Benjamin Lee Whorf, and by countless others." P. 38. Ellis blames Derrida's isolation from these thinkers on his fixation with texts of thinkers in the Continental tradition of philosophy, "if for Heidegger, Freud, Nietzsche, and Levi-Strauss . . . are nowhere near being central figures in the debate on this particular issue . . . To mention such figures in this context only makes the absence of the many really central figures who deal directly and in a major way with essentialist thinking all the more obvious." P. 40.  
78. See, e.g., p. 39 ("it [is] impossible for Derrida and his followers to see themselves as other than, first and foremost, iconoclasts and liberators"); p. 40 (complaining that "Heidegger, Freud, and Levi-Strauss all had a most unskeptical attitude to the sanctity of their own terminological innovations and the concepts they embodied"); pp. 43–44 (criticizing Derrida for not acknowledging Wittgenstein's work, implying that Derrida falls to do so because he wishes to be thought philosophically and politically revolutionary, criticizing essentially "rhetorical and emotional stance" of deconstruction, and arguing that Derrida's failure to cite Wittgenstein raises "unanswerable questions" which "cast a considerable shadow on the value of Derrida's contribution").  
79. See, e.g., pp. 35–36 (quoting Lentricchia, Jameson, and others).
Derrida's work establishes that essentialism is merely a special case of logocentrism.

"Logocentrism," as its name implies, is the centering of *logos*, a richly evocative Greek word that means, among other things, "word," "reason," and "true account."80 The connections between all of these different concepts resonate deeply in Western thought. For example, from *logos* we get words such as "logic" (the laws of reason). *Logos* also connotes the Word of God, divine unmediated truth and the truth of revelation, as in the famous Biblical passage: "In the beginning was the Word, and the Word was with God . . . ."81

Derrida sees all of Western philosophy as a search for *logos*—by which he means the directly comprehensible and unmediated experience of truth, of which Divine revelation is the most powerful example. Unmediatedness and instantaneity are very important to this conception, because if one receives the Truth mediated by something, say, through the explanations of a prophet, the prophet might have gotten it partly wrong, and if one hears about it later on, one might get less than the whole experience. The goal of philosophy (and of many other intellectual endeavors) is to cut through illusion and disguise, mediation and deferral of What-Really-Is, and come to know and experience The Real Thing. The characteristic move of philosophy is to fasten upon some thing or concept X, and assert that it is closer to The Real Thing than its opposite Y. Simultaneously one asserts that Y is farther away, that Y somehow blocks or obscures direct unmediated experience or understanding, while X does not, or does so to a lesser degree. Thus, the act of philosophical distinction is the primordial act of logocentrism.82 Moreover, the act of philosophical distinction is also, it turns out, the creation of a conceptual opposition.

It should now be quite obvious what Derrida’s next move is going to be. He will argue that each conceptual opposition between X and Y is actually a nested opposition. Thus each philosophical conception of The Real Thing—whether it be Truth, Justice, or some other value—will ultimately bear a relation of similarity to or dependence upon that which it subordinates or suppresses. It will turn out that X’s claim to be closer to the Real Thing than Y will be undercut by this reinterpretation of the opposition of X and Y as a nested opposition. In sum, logocentrism as a strategy will always fail because logocentrism always involves the creation of a conceptual opposition that is already also a nested opposition.83

82. Here one can trace the influence of Heidegger on Derrida’s thought. Heidegger argues that the original meaning of *logos* is "to put one thing with another, to bring together, in short, to gather; but at the same time the one is marked off against the other." M. Heidegger, An Introduction To Metaphysics 124 (1959). Thus, intellectual conception means simultaneously gathering certain things together and distinguishing them from others.
83. I have always thought it helpful to think of Derrida as announcing a sort of “Murphy’s Law”
However, from this perspective, it should be clear that since there are many different attitudes among philosophers about what The Real Thing is, there are many different forms of logocentrism. Indeed, there are as many different forms of logocentrism as there are versions of Western philosophy. Plato’s theory of Forms is obviously logocentric, for Plato tells us that knowledge of the Forms is knowledge of what most truly is, whereas sensory experience provides only a pale copy of the Truth. Yet the empiricist who informs us that all knowledge comes from experience and the logical positivist who insists that unverifiable statements are meaningless also indulge in their own particular versions of logocentrism. One might conclude from these examples that all Western philosophy is therefore logocentric, and this is precisely the conclusion that Derrida reaches.

It follows that both essentialism and its opposite, nominalism or conventionalism, involve forms of logocentrism. The essentialist argues that language points to or refers to real entities which are the source of truth. The nominalist, however, argues that established social conventions fix meaning; the search for essences that words refer to obfuscates the real source of meaning, which is linguistic convention. Because Ellis misinterprets Derrida to mean by “logocentrism” something much more specific—namely, essentialism—he cannot understand what motivates Derrida’s attacks on Saussure, who as Ellis correctly points out is surely one of the most anti-essentialist thinkers of modern times.84

IV. THE CRITIQUE OF NOMINALISM AND LINGUISTIC CONVENTIONALISM

Ellis’ discussion of Saussure and Derrida is, although ultimately misleading at key points, one of the best parts of the book, and one which is most relevant to legal philosophy. Ellis wages his attack on Derrida largely through a defense of Saussure’s theories of language and meaning. This is because, as Ellis himself points out, Derrida’s own views of language arise as an extension and partial critique of Saussure’s theory.85 Ellis therefore takes it upon himself to expound and defend Saussure’s position, which, like Ellis’ own, is nominalist or conventionalist. Ellis wishes to refute Derrida’s claim that Saussure’s linguistic conventionalism engages in the same logocentric error that Derrida attributes to other Western thinkers. More importantly, however, Ellis seeks to show that when Saussure’s theories of language are correctly understood and applied, they offer no support for the claim that meaning is arbitrary in the sense of being indeterminate.86 Thus, Ellis’ defense of Saussure is his way

84. See p. 45.
85. See pp. 45, 52.
86. P. 51.
of establishing that a nominalist or conventionalist theory of meaning is fully consistent with (and indeed, even requires) semantic determinacy, and therefore that deconstructionist claims about the fluidity of language are misguided.

In order to understand the debate between Ellis and Derrida, one must therefore understand Saussure's theory. Here Ellis does a good job of expounding Saussure's views. Saussure's key argument is that the relationship between signifiers and signifieds is "arbitrary." Ellis correctly notes that by this Saussure meant two different things about the relationship between language and reality. The first is the arbitrary relation between the sound-image of words and the concept or thing that they signify. Thus, when Shakespeare tells us "[t]hat which we call a rose/ By any other name would smell as sweet," he is making Saussure's first point about the "arbitrary" relation between signifiers (here spoken words) and signifieds (here concepts like rose). However, Ellis notes, Saussure made a much more radical claim about the "arbitrary" relation between signifier and signified. The concept rose itself "is an arbitrary creation of a language and does not necessarily exist outside that language." Language divides up the world into various concepts, and "[d]ifferent languages group, organize, and even interpret them in different ways." Thus, Ellis argues in perfectly Saussurian fashion that concepts [in a language] are not simple, positive terms that achieve their meaning by corresponding to reality or to nonlinguistic facts; instead, they achieve their meaning by the place they take within the system of concepts of the language and, in particular, by their function in differentiating one category of things from another. It is the system of differentiation, therefore, that is the source of meaning.

Ellis emphasizes, however, that Saussure does not mean by the "arbitrary" relationship of language to reality that language has no relationship to reality. Words like warm and hot divide up the world into catego-

87. F. de Saussure, supra note 62, at 67.
88. W. Shakespeare, Romeo and Juliet, Act II, Scene 2, lines 43-44.
89. P. 45.
90. P. 45.
92. P. 46. Ellis gives as an example of Saussure's point the English words "warm" and "hot" and the German words "warm" and "heiss":

[T]he transition from the German word warm to heiss occurs very much further up the scale than . . . the transition from warm to hot. . . . [H]otjes Wasser is almost too hot. . . . while . . . hot water is hot enough. . . . An English speaker who learns the similar German words without realizing that the two systems are different is likely to get hurt. . . . What, then, is the concept warmness of water? It is a creation of the English language, a decision on its speakers' part to group together and regard as equivalent for a certain purpose everything from roughly 90 degrees to 115 degrees Fahrenheit. Water itself does not dictate such a choice, but only the arbitrary system of [differences within] a given language.
ries, but that is because Saussure thinks that there is already something there to be divided up.\textsuperscript{93}

Moreover, Ellis argues that Saussure's theory of linguistic conventions does not entail that individual speakers can mean anything they want by their words. Thus, Ellis claims, Saussure's concept of linguistic arbitrariness did not imply that meaning was indeterminate.

To the contrary: it is precisely the fact that the conceptual system of English is the common property of its speakers (i.e., that all in a sense agree to make the same arbitrary decision) that gives its words any meaning at all. As Saussure himself puts it, "The word \textit{arbitrary} . . . should not imply that the choice of the signifier is left entirely to the speaker (we shall see below that the individual does not have the power to change a sign in any way once it has become established in the linguistic community)," . . . Arbitrariness in this sense, then, refers not to randomness but to the reverse, to the fact that there is a \textit{definite agreement} on the particular system of terms to be used and on how they are to be used.\textsuperscript{94}

From Ellis' discussion and defense of Saussure, it is easy to see how Derrida concluded that Saussure had reinstated a form of logocentrism in his anti-essentialist theories of language. For Saussure, the boundaries of linguistic concepts are not given by the world itself—the world will not tell us where \textit{warm} ends and \textit{hot} begins. Rather, these boundaries must be located in fixed linguistic conventions that we agree to use, or more correctly, that we are born into and use unconsciously and naturally. This feeling of naturalness is precisely what leads to the delusion of essentialism—we mistakenly believe that language re-presents boundaries that are already there in the world when we have collectively created them and assimilated that knowledge as members of a linguistic community. Meaning is located in linguistic conventions that are logically prior to, and control, the meaning of individual acts of meaning by individual speakers and writers. This is the basis of Ellis' argument that an individual speaker cannot simply decide to make a word mean whatever she wants it to mean.

Nevertheless, because Saussure places so much emphasis on the fixity of the linguistic sign, he has two problems: First, he must explain where the source of this collective knowledge resides, how everyone happens to share

\textsuperscript{93} To be sure, highly culturally dependent concepts like \textit{politeness} do not have the same relationship to the "natural" world of things and the sensory stimuli they produce as do concepts like \textit{warmth}. Yet Saussure would probably say that the division between politeness and rudeness is only possible because there is already a culture which classifies particular acts as being polite and rude, and this previously existing set of shared cultural understandings is simultaneously demarcated and described by language.

\textsuperscript{94} Pp. 49–50 (quoting \textsc{F. de Saussure}, supra note 62, at 68–69).
Nested Oppositions

it, and how they all appear to share it equally well. Second, if individual speakers have no control over the meaning of language, Saussure must explain how linguistic change is ever possible. As we shall see, this difficulty causes problems for Ellis’ position.

Linguistic conventionalism is thus premised upon a conceptual opposition between societal conventions and individual acts of meaning, which are parasitic upon those conventions. In Saussure’s terminology, the opposition is between the systematic structural relationships of language, which he calls langue, and the contingent speech acts within the community of speakers, which he calls parole. But this conceptual opposition leads naturally to reinterpretation as a nested opposition between conventions and specific acts within those conventions, or put another way, between structures and events.

To be a member of a language community is to be part of a form of life which circumscribes the meanings that words can have. As Wittgenstein suggests, one cannot say “bububu” and mean “[i]f it doesn’t rain I shall go for a walk.” On the other hand, one might have thought in 1900 that one could not say “bad” and mean by it “good,” yet Michael Jackson’s hit album Bad demonstrated the contrary. Although no particular speaker can make “bad” mean “good,” nevertheless languages do change, and they can only change by collections of individual acts of speech. Someone has to start using the word “bad” to mean “good” for the practice to catch on—for this element of discourse to become a part of langue, to use Saussure’s terminology, or part of the language game, to use Wittgenstein’s. If linguistic meanings are fully fixed, then one must explain how it is possible to change them. If meaning requires fixity of conventions, then one must explain how lapses in that fixity can occur while people still continue to understand each other.

There are two possible solutions to this problem, and each undermines Ellis’ claims about the requirements of fixity in language. The first solution is that linguistic conventions are fixed, but that individuals in society, deliberately or otherwise, misuse and pervert them. They break the rules of the language game, and by breaking those rules, they create a new language game. We can put to one side for the moment the problem of

95. Modern commentators on Saussure have pointed out that Saussure did not explain the mechanism by which shared understandings are shared. See, e.g., R. Harris, Reading Saussure 196–203, 219–37 (1987).
97. L. Wittgenstein, supra note 21, at 18.
98. F. de Saussure, supra note 62, at 19, 98, 168.
99. This problem can be generalized to all systems of social convention. In many cases people who have abandoned essentialism argue that meaning, or appropriate behavior, or justice, or legitimacy are constituted by socially accepted conventions. The claim is also made that these conventions are more or less fixed, and that fixity is necessary for the conventions to operate effectively. But in each case one can raise the same question as to how change in conventions is possible while the conventions still continue to operate.
how this is possible given Ellis' assumption that meaning is fully dependent upon fixed conventions. Yet if such disobediences can and do occur, Wittgenstein's aphorism is incorrect—one can say "bububu" and mean by it, "If it doesn't rain I shall go for a walk," or rather, one can make it mean that if enough persons pick up the usage. Indeed, one can easily imagine a group of philosophical wags saying "bububu" to each other every day just to prove Wittgenstein wrong.\textsuperscript{100} If language changes by manipulation or abuse of its conventions—by breaking the rules of the language game—and yet meaning goes on all the same, it cannot be the case that full fixity of meaning is necessary for meaning to occur. Only relative fixity is required for language to operate, a point which Wittgenstein would clearly\textsuperscript{1} embrace, but which apparently confounds Ellis, his self-appointed disciple.

Moreover, the possibility of misuse and abuse of the language must be inscribed within the conventions of language, for otherwise languages would never grow or develop. Although language seems to rely upon fixity of meaning in order for people to mean, the growth and development of language depends upon the possibility of an abuse of the very same system, upon the possibility of disobedience of the rules of the language game. Put in Saussure's terms, langue is privileged over parole, but langue ultimately depends upon parole, because langue is constituted and shaped by acts of parole.\textsuperscript{102} Therefore a means of altering langue through parole must exist—conventions must be subject to change through acts of abuse or alteration. The inherent ability of signs to be used for unintended or nonconventional purposes—the structural possibility of altering or manipulating existing conventions—is one aspect of what deconstructive theory calls the "play" of signs.

In the alternative, one could argue, as Wittgenstein appears to do,\textsuperscript{103} that people do not necessarily violate the rules of the language game as language changes. Rather, language is never fully fixed, and the rules of the language game are always incomplete. To use Derrida's terminology,
one can argue that there is always a degree of play in the meanings of words and concepts. This is a second aspect of the deconstructive concept of “play”—the open possibilities of convention which are neither clearly proscribed nor permitted in advance. Ellis is very much opposed to this way of talking, especially to Derrida's substitution of the concept of “play” for Saussure's concept of “difference.” This substitution, he points out, “says a great deal more...[it] suggest[s] that the mechanism of differentiation is much less controlled and specific” than Saussure's theories of language allow. Once again interpreting Saussure to attack Derrida, Ellis argues that language has meaning because the system of differences is fixed—language may be just a system of differences, but words have determinate meaning because their differences are balanced against each other, like a house of cards. On the other hand, Ellis points out, if there is “play” in the system of differences, our words have nothing solid to push up against—the house of cards falls apart, and we have meaninglessness instead of meaning. Black has meaning because it is contrasted to white and to other color terms. But if this contrast were uncertain and indefinite, we could not know what the word black meant. Thus, concludes Ellis, Derrida's concept of a “play” of differences is incoherent—it cannot produce any meaning at all.

Of course, deconstructive theory's point is that language means, and continues to mean, despite the fact that there is considerable play in the joints of language, or that linguistic conventions are subject to manipulation and alteration. Similarly, any system of social conventions operates, and continues to operate, despite the fact that it is potentially open or potentially changeable.

Ironically, Ellis' theory of language is most inconsistent with that of his chosen philosophical role model, Ludwig Wittgenstein. For Wittgenstein's theory of language games assumes that linguistic conventions are never fully complete—that we do, to some degree, make the rules up as we go along. Indeed, no one was more insistent that the rules of a game need not be all defined in advance than Wittgenstein, just as no one was more concerned to show that we can get along quite nicely with concepts whose

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104. Obviously, the line between what is an abuse of a convention and what is simply an extension that is neither required nor proscribed can be a matter of considerable debate among adherents to the convention. The conceptual opposition between extending a convention and abusing or altering it is a nested opposition. This means that there is both similarity and difference between the two activities. The deconstructive concept of “play” encompasses both phenomena. Nevertheless, it would be a serious mistake to conclude from this that there is no difference between them.

105. P. 53.

106. P. 53.


108. This is consistent with Saussure's point that change and continuity in language are intrinsically related. F. de SAUSSURE, supra note 62, at 74. Thus, Saussure offers a somewhat more flexible theory of language than Ellis ascribes to him.
edges are blurred, or words whose meaning is not completely circumscribed in advance:

I can give the concept “number” rigid limits . . . but I can also use it so that the extension of the concept is not closed by a frontier. And this is how we do use the word “game.” For how is the concept of a game bounded? What still counts as a game and what no longer does? Can you give the boundary? No. You can draw one; for none has so far been drawn. (But that never troubled you before when you used the word “game.”)

But then the use of the word is unregulated, the “game” we play with it is unregulated. [This is Ellis’ objection to Derrida. Wittgenstein responds]—It is not everywhere circumscribed by rules; but no more are there any rules for how high one throws the ball in tennis, or how hard; yet tennis is a game for all that and has rules too.

In his eagerness to differentiate Derrida from Wittgenstein, Ellis has missed a key point of similarity between the two thinkers. If Wittgenstein merely believed that meaning was the result of a fixed set of conventions, he would hardly have advanced much beyond the earlier theory of nominalism, and he would be guilty of the same lack of originality with which Ellis charges Derrida. However, Wittgenstein’s insight was that social conventions and language games are always potentially open—they can be made more exact when necessary, but such exactness is not necessary to speak meaningfully. The system of differences of which Saussure speaks does not have to be fully articulable in advance in order for language—or indeed for any system of meanings arbitrated by social convention—to function. The possibilities of further play are perfectly consistent with the possibility of a meaningful discourse. Thus, Wittgenstein, like Derrida, points out that the meaning of our words is never fully complete when we use words; rather, their meaning is always yet to be determined, as new contexts and new problems arise.

Deconstructive arguments concerning language and play are important because they apply by analogy to all other discourses that rely upon social convention to establish meaning or value. Acts of meaning are dependent upon social conventions, but social conventions grow and change because of acts of meaning. Thus, the langue of manners and social expectations is both differentiated from and dependent upon the parole of particular acts of individuals in society. Structures and events are opposed, but their op-

109. L. WITTGENSTEIN, supra note 21, § 68.
110. We might even say that there is a nested opposition between their respective philosophies.
111. Note that when the linguistic conventions of langue are open in a particular situation, speakers will determine how the convention is to be extended by individual speech acts of parole, which will then be incorporated into langue. This is another instance of the conceptual dependence of langue upon parole. This mutual conceptual dependence is what is meant by the claim that the opposition of langue and parole is a nested opposition.
position is always a nested opposition. That is why social practices and customs are at once both fixed and subject to manipulation and metamorphosis. We now see that the deconstructive concept of “play” is just another way of describing the mutual conceptual support and flux generated by the *langue* and *parole* of any system of social conventions.\(^{112}\)

In particular, the deconstructive critique of linguistic conventionalism applies to conventionalism in legal theory. Legal theorists who accept some degree of cultural relativism may doubt whether ethical and political concepts like democracy, neutrality, or justice have a fully objective basis outside of particular cultures. They may nevertheless insist that these concepts have determinate meaning and application because they are the product of social conventions. Although the ethical and political concepts involved in legal discourse may vary from culture to culture, actors within the legal culture are nevertheless constrained and bound by that culture’s conventions. Legal discourse is therefore always a debate within the constraints of these conventions.

For those legal theorists who do not believe in unchanging essences of legal and political concepts, conventionalism is a valuable and appropriate alternative. Yet we must remember that the deconstructive concept of play applies equally well to the legal conventionalist as it does to the linguistic conventionalist. Like linguistic conventions, legal conventions need not be fully fixed in order to operate, and the possibility of play is always inscribed within them. The very conventions which constrain legal actors are always open conventions, and are always susceptible to manipulation and alteration. Thus any form of legal conventionalism also places us within a particular dialectic of change and continuity, whose ground rules are preserved by convention even as they are constantly undergoing alteration.

The deconstructive concept of play can be easily misunderstood as a claim of linguistic nihilism. It is therefore important to remember that the argument is based upon a nested opposition between conventions of meaning and individual acts of meaning, and not a false opposition. It is incorrect to conclude that conventions of meaning are wholly fluid—that they offer no resistance to individual acts of meaning. A nested opposition involves mutual dependence and differentiation. Our previous deconstruction has endeavored to show how conventionalism involves the possibility of disobeying conventions and the fluidity of conventions, or in Saussure’s terms, how the development of *langue* depends upon the variations produced by parole. However, we should not by this argument forget the strength of Ellis’ earlier arguments. *Parole* depends upon *langue* as much

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112. This ambivalent relation is particularly obvious in debates between advocates for and skeptics of social change. Social practices resist alteration, but nevertheless mutate historically. Social history is the history of social change. Thus although change is invariably resisted, change is nevertheless possible, although not always on the terms desired by its advocates.
as *langue* depends upon *parole*. In fact, it would be impossible for "bad" to come to mean "good" if "bad" did not already have a relatively fixed meaning to play off of. "Bububu" could not come to mean "If it doesn't rain I shall go out for a walk" unless the latter phrase had a relatively determinate meaning. We can generalize this point to any system of social conventions, including legal conventions. Derrida's notion of "play" is thus dependent upon a baseline of conventions by which we can tell that "play" or variation has occurred. The notion of indeterminacy requires a concept of determinate meanings to play against. To say that we don't know whether "bububu" means "take a walk" or "take a hike" presupposes a determinacy of meaning of the latter two phrases. Indeterminacy is ultimately parasitic upon a form of determinacy.

Ellis sees this point clearly. However, because Ellis does not appreciate the logic of a nested opposition, he mistakenly believes that he has refuted deconstructive arguments about language and meaning—when he has in fact confirmed them. A nested opposition between conventions and individual acts of meaning, between structures and events, or between fixity and free play, is a relation of mutual differentiation and dependence. As a result, the more we focus on one side of the opposition, the more we see that it depends upon the other, and vice versa. Once again it cannot be stressed too much that the reinterpretation of a conceptual opposition as a nested opposition does not abolish all boundaries or distinctions, but merely resituates them so that we can see their similarity or mutual conceptual dependence as well as their contrast and mutual differentiation.

V. Conclusion

The concept of nested opposition is important to legal theory if only because it helps to clear up recurrent confusions about theoretical discussion. Yet once we understand deconstructive arguments, we can see their obvious connection to the legal forms of reasoning, which also depend upon ascriptions of similarity and difference. For some persons deconstruction no doubt is seen as the intrusion of a foreign element into law, in more than one sense of the word. Deconstruction has arrived on the American scene as one of the many European philosophical movements that have accompanied the rise of interdisciplinary legal studies in general and the Law and Literature and Critical Legal Studies movements in particular. Yet I believe that deconstruction has found a home in American legal thought because one tradition of American legal theory has always been in some sense deconstructive. When Critical Legal Studies scholars began rediscovering the legal realists (who were not totally forgotten in any case), they found that their arguments were as deconstructive as any-

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113. P. 54; cf. p. 127 (ambiguity is parasitic upon specificity).
thing in Derrida. Thus, deconstructive argument already was present in America's legal heritage by the time that more modern movements began to champion it.

To be sure, deconstructive techniques are more general in application and broader in scope than the forms of reasoning lawyers are used to. Deconstructive techniques are equally at home in non-doctrinal argument—they can be used in the study of legal ideology or intellectual history, or in all of the various types of jurisprudential debates that now rage in the legal academy. But deconstruction is different from other interdisciplinary developments in that it makes its presence felt within legal discourse itself as well as outside of it. One can make a deconstructive argument within doctrine without ever once mentioning any of deconstruction's special terminology or jargon. Because the logic of law is the logic of similarity and difference, deconstruction can dissolve into legal discourse in a way that contributions from other disciplines often cannot. At the same time, it can lurk outside of legal discourse when it is employed for philosophical, historical, or ideological analysis. For those who worry about the invasion of law by interdisciplinary studies, deconstruction thus presents the strangest of cases. Deconstructive analysis and legal analysis are at once both alien to each other and a part of each other. They form, in other words, a nested opposition.

114. Indeed, one of the first and most important deconstructive articles, Gary Peller's *The Metaphysics of American Law*, 73 CALIF. L. REV. 1132 (1985), made this connection quite explicitly. I also believe that Morris Cohen's "principle of polarity . . . that opposites . . . involve each other when applied to any significant entity," is akin to a general statement that every conceptual opposition can be reinterpreted as a nested opposition. M. COHEN, REASON AND NATURE 165 (1931).

115. See, e.g., Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927) (legal realist critique of public/private distinction); Hale, *supra* note 54 (deconstruction of distinction between coerced and non-coerced contracts through exploration of background coercion created by state's positive law).
Applying Political Theory to International Law


Stanley Hoffmann†

Professor Brilmayer’s book examines the justification of a government’s activities beyond the borders of the state. She notes, correctly, that classical “horizontal” theories of international law that focus on the relations among states cannot cope adequately with what she calls “diagonal relationships,” by which she means “state-individual relations with international overtones,” such as the relation of a state to a nonresident guest worker, or to human beings whose rights are violated in their home country and whom the foreign state tries to protect. She shows that neither “state-moralists”—for whom international law ethics are a matter of states’ rights—nor realists—who doubt the relevance of ethical considerations in foreign policy and the effectiveness of international law—have much to say about such links. Further, she argues that cosmopolitans—for whom borders have no moral significance—practice their own brand of horizontalism, as they see the world as a net of inter-personal relations across borders. She also deplores the failure of political theory to explore issues of transnational relations, and its tendency to focus almost exclusively on “the question of domestic political legitimacy,” that is, a citizen’s obligation to obey his or her own government, rather than on non-citizens’ rights and duties.

Her attempt to remedy these failings is “vertical analysis.” Her thesis is simple (and repeated many times): “a state’s actions outside its territory . . . must be evaluated in terms of the political justification that grants that state the right to operate domestically.” Thus, “all transjurisdictional relations . . . should be analyzed in terms of domestic political theory.”

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1. L. BRILMAYER, JUSTIFYING INTERNATIONAL ACTS 84 (1989) [hereinafter cited by page number only].
2. Pp. 29-34.
3. P. 52.
5. P. 3.
She explains that she is engaged, not in a “first-order enterprise” that adopts the premises of a given political theory and draws “from them conclusions about the legitimate scope of state coercion in international relations,” but in a “second-order inquiry” which merely draws out the implications of the “vertical thesis’s consistency requirement” (the requirement that the same “constituting political theory” grant a state authority to act at home and abroad).6

Unfortunately, despite the clear and elegant writing and subtle analytic intelligence displayed throughout the volume, it is not at all clear that the vertical thesis gets us any farther than the domestic and international theories whose shortcomings Brilmayer so accurately picked out. Indeed, the volume struck this reviewer as a bundle of contradictions. Why, in the first place, can’t the state’s “constituting political theory” itself sharply distinguish between the principles of legitimacy at home and the principles to be applied in the thoroughly different international milieu? (The United States Supreme Court has granted the President far greater powers abroad than at home). Is not the absence of a sovereign above the states relevant to the distinction between “diagonal” relationships and the other set of vertical ones, state-citizen relations? Moreover, Brilmayer devotes a whole chapter7 (in my opinion, her best) to what she calls the boundary assumptions of domestic political theory. She asserts that every theory of domestic legitimacy, such as explicit or tacit consent or acceptance of benefits, turns “on implicit assumptions about the boundaries of sovereignty,”8 that is, assumptions about territoriality: “all theories of political obligation depend on the existing distribution” of territory.9 If this is the case, as she convincingly argues, then why should the same justification be required for acts within the boundaries and for acts without? Is there not a strange coincidence or convergence in oversimplification between this requirement of consistency and the “horizontal” world view of cosmopolitan theorists?

Brilmayer would deny it, since she insists that her “metatheoretical” endeavor allows each state to have its own theory of legitimacy, and merely demands “theoretical consistency between domestic justification and international coercion.”10 But this is an untenable position. Indeed, Brilmayer dismisses one objection to vertical analysis, “that it grants too much power to a state that was founded on an unprincipled domestic political theory”11 (for instance a theory that justifies aggression, or interference in external affairs), by arguing that the objection fails to “distinguish

7. Pp. 52-78.
9. P. 75.
11. P. 47.
between a valid political theory and one that is merely held sincerely.\textsuperscript{12} But in order to decide which is valid and which is not, or to "resolve conflicts between states with fundamentally different political systems,"\textsuperscript{13} one needs a metatheory that will supply "the criteria for evaluating political actions,"\textsuperscript{14} and thereby determine which "constituting political theories"\textsuperscript{15} are philosophically and existentially acceptable and which are not. If, as Brilmayer does in this volume, one refuses to do so, then it is not surprising that the analysis of such vital issues as non-intervention, affirmative duties, and humanitarian intervention provides the reader with so little guidance and leaves her with very little that is fresh. "At each step in this inquiry there are difficult issues of domestic political theory. The vertical thesis only serves to formulate them, not to answer them."\textsuperscript{16} Certainly! But then, why claim so much for it?

If the only point of this thesis is that "arguments from political theory are relevant to international relations because they both deal with the same issue: the legitimacy of state power,"\textsuperscript{17} few will quarrel with Brilmayer. If the point, however, is that because "extremely difficult issues" of diagonal relations are "the analogs for issues that domestic political philosophers do, or should, address," then "as a matter of international law, the problem disappears,"\textsuperscript{18} one can only dissent: This is a non sequitur. Indeed, it is less arduous to find a rationale for, say, humanitarian intervention, or for limits to the duties of distributive justice across borders, in an international political philosophy that takes into account both the rights of human beings and the special bonds of citizenship in a world of territorial states, than in the tortuous and inconclusive vertical thesis. Domestic political theory is all too able, even when it is not blithely inconsistent, either to justify every kind of coercive act across borders, or to exclude all coercive or all beneficial acts abroad, or to argue for a radical discontinuity between state-citizen and state-noncitizen relations. Thus, it risks providing even less guidance than traditional "horizontal" international theories.

Finally, Brilmayer argues that the vertical limitations of state acts "arise out of political theory, not out of an analogy to personal ethics," whereas "even when contemporary theory does move away from the horizontal paradigm, it does not evaluate state actions in terms of political theory but in terms of personal morality or ethics."\textsuperscript{19} Ethics, in her view, "deals primarily with an individual's relationship with other individuals,
a horizontal relationship." This is highly questionable: first, because it erects an excessively high barrier between normative political theory and ethics (politics, to be sure, is the realm of coercion, but coercion is quite properly subject to ethical judgment), and second because it distinguishes far too rigidly “states” from “people.” States are (certain) people committing certain acts, and ethics deals not only with “horizontal” and personal relations but with hierarchical relations and collective acts as well. Furthermore, if Brilmayer is right, why does she say that her book claims that “international ethics and domestic political justification . . . are not separate areas”?21

Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights


Douglas Laycock†

Constitutional Cultures contains many shrewd insights, and at least one spectacular insight. Every lawyer interested in the Constitution should read it. But read it only for specific insights, taken one at a time. The theory by which Nagel tries to unify these insights is part of the problem, not a step towards a solution.

Thus, the book’s whole is very much less than the sum of its parts. The insights are interspersed with polemic against judicial review in general and liberal judges in particular, blaming judges for all our constitutional ills and most constitutional change. The polemic is supported by a remarkably selective marshalling of history and examples.

The book is difficult to summarize, in part because of its inductive style, and in part because it finds so many different things wrong with judicial review. The power of Nagel’s argument is in his cumulation of examples of judicial review being done in ways he does not like. But not all of the examples seem consistent. Thus, he generally attacks the Court for trying to do too much, but he sometimes attacks the Court for doing too little.¹ He offers only the most conclusory statement of what he thinks the Court should do instead,² and gives no hint of how the Court should explain the results he would prefer. It is not clear whether he thinks that

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2. P. 3.
almost nothing is unconstitutional, or that almost nothing is justiciable. He seems to think both.

The book consists mostly of material published earlier in article form, with very little apparent revision; only chapter 1 is new. The unifying theme is that each chapter is about some problem that Nagel attributes to the judicial “mentality.” This is a broad umbrella, and it shelters what seem to me to be two distinct parts. Nagel argues that courts reach bad results in constitutional cases (chapters 1-4) and that they write bad opinions (chapters 5-7), and that each of these defects is inherent in the judicial process.

With respect to results, Nagel argues that the adversarial process and the training of lawyers are inherent sources of doctrinal instability. Lawyers are trained to invent new arguments and to distinguish old precedents. They are committed to rational argument, and thus are hostile to traditional values rooted more in human experience than in logic. For both of these reasons, judges are the last people who should be entrusted with preservation of fundamental values: “[T]he special function of the judiciary is to change constitutional meaning.” Nagel concludes that the Constitution fares much better when judges do not enforce it.

Consequently, judges should assume a much smaller constitutional role. They should hold governmental actions unconstitutional only when those actions are “emphatically inconsistent with constitutional theory, text, and public understanding as expressed in prolonged practice.” Nagel especially hates “the routinization of judicial power” and the “judiciary’s frequent intervention in ordinary political affairs.” He apparently would have the Court issue an occasional pronouncement, in an especially egregious case, reminding the states and the other two branches that they should respect constitutional rights. Then the judiciary should withdraw, leaving implementation of the Constitution to other units of government. Nagel would reduce all of judicial review to what Philip Bobbitt calls the “expressive function.”

Nagel is more effective when he criticizes judicial opinions. He shows, with detailed illustrations, that Supreme Court opinions tend to be detached from the facts of cases. The opinions focus on what is rational and on connections between means and ends, but they tend to avoid ex-
plicit discussion of the real competing interests at stake. Their analysis of rationality and of means and ends is often artificial and distorted, sometimes even dishonest. Every constitutional inquiry is soon reduced to a multi-part test, which largely substitutes for the constitutional text. This observation leads to the title of chapter 7, The Formulaic Constitution, and forms the basis of the insight I consider spectacular. The Justices of the Supreme Court, and their law clerks, should be required to read and meditate on this chapter at frequent intervals—say the first Monday of every month.

This review will range as widely as Nagel’s book, exploring fundamental issues of constitutional method as well as the details of Nagel’s argument. The review has three independent parts. First, I respond to Nagel’s substantive attack on judicial review. I concede many of his examples and criticisms, but dispute others, and highlight examples that he ignores. I argue that Nagel misunderstands the role of judges, misunderstands the justifications for judicial review, and misunderstands the Constitution.

Second, I argue that the vast expansion of Federal power since the founding is firmly rooted in constitutional text, and that it is not the product of usurpation or judicial manipulation. This is a special case of my response to Nagel’s substantive attack on judicial review.

Finally, I endorse much of Nagel’s criticism of judicial opinions, but I argue that the style of argument in Supreme Court opinions is largely a response to Nagel’s own brand of criticism of the Court. For decades, people like Nagel have been telling judges that they are not supposed to decide questions of substance, that they are not supposed to balance competing interests and that they are not supposed to do anything important. Many judges have internalized these views. In so doing, they ignore the structure of constitutional rights, which requires them to do exactly what Nagel would forbid.

The Justices are charged with enforcing a Constitution that expressly creates sweeping substantive rights. The government constantly demands implied exceptions to these rights. Thus, the analytic structure of constitutional rights forces the Court to decide important questions of substance, balancing the need for implied exceptions against the literal demands of the Constitution. The Court should have explicitly acknowledged the necessity of tackling substantive issues, and challenged its critics head on, but it has not. Instead, it takes refuge in the artificial analyses that Nagel decries, concealing substantive issues in clouds of technical rhetoric and multi-tiered tests. Nagel is hardly entitled to complain.

I. THE ROLE OF JUDICIAL REVIEW

In the first four chapters, Nagel develops the substantive argument that judicial review cannot work. Most of the general argument appears in chapter 2; chapters 3 and 4 attempt to illustrate it in the areas of free speech and federalism. Chapter 1 is a short apologia, conceding that Brown v. Board of Education\(^{13}\) was a good thing even though Nagel cannot justify it. He claims only that Brown was more nearly justifiable than most of what the Court does,\(^{14}\) but that one spectacular success cannot justify an institution that generally does more harm than good. Even the whims of a tyrant will occasionally produce a good result.\(^{15}\) That does not justify tyranny, any more than Brown alone justifies judicial review.

A. The General Argument

Nagel’s attack on judicial review combines familiar arguments with real insights. The Supreme Court’s actual track record is mixed. Successes like Brown are balanced by disasters like Dred Scott;\(^{16}\) even the success of Brown was dissipated in the miasma of busing.\(^{17}\) For long periods the Court has been hostile to civil liberties instead of protective.\(^{18}\) Major doctrines are adopted, abandoned, and even reversed; the courts have not provided doctrinal stability.\(^{19}\) Ultimately, Nagel concludes that the legal system cannot provide stability, because the adversary system encourages the continuous search for novel arguments.\(^{20}\)

Judicial decisions sometimes focus issues and sharpen controversies that might otherwise be left vague and neglected. Politicians and elected officials can finesse controversies with fuzzy language, by avoiding statements of principle, by agreeing on the result without agreeing on reasons, or by not offering reasons at all. Politicians can also engage in occasional emergency suppression without publishing records, without stating formal justifications, and without treating their actions as precedent.\(^{21}\) Judges have much more difficulty using these techniques. Courts must give reasons, articulate general principles, and live with their precedents.\(^{22}\) A series of cases will pressure courts to draw precise lines—to say that this plaintiff wins and that a similar but not quite identical plaintiff loses. Judicial

\(^{13}\) 347 U.S. 483 (1954).
\(^{14}\) P. 5.
\(^{15}\) P. 4.
\(^{16}\) Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
\(^{17}\) Pp. 4, 24.
\(^{18}\) Pp. 27, 54–56.
\(^{19}\) Pp. 9–11.
\(^{20}\) Pp. 7–9.
\(^{21}\) P. 40; cf. Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (“A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution.”).
\(^{22}\) Pp. 17–22.
emphasis on principle tends to push arguments to their limit instead of toward acceptable compromise.\textsuperscript{23}

Nagel also scores a point when he notes that most constitutional theorists tend to de-emphasize the actual record of judicial review and instead defend it in principle. Theorists focus on the intellectual issues, and they are “captured by the lure of the possible.”\textsuperscript{24} To elaborate on Nagel’s point, each theorist believes the Court would do much better if it would just adopt the right constitutional theory and consistently apply it. Each theorist believes that if he had five votes on the Court, he would decide cases consistently and coherently. He would be right in principle and would focus on the right issues, though of course there would be close cases, and he would make mistakes at the margin. Many theorists are even right in these high opinions of their own theory. If coherence and stability are the criteria, almost any consistently applied theory could do better than the Court has done.

The essential fact is that no one person does have five votes on the Court, and no one person has even a single vote permanently. This reduces the risks of tyranny and of idiosyncratic decisions, but it substitutes other insoluble problems. The Justices come to the Court with very different views of the Constitution; they must combine these views into group decisions. Inconsistency and instability are inherent in group decision-making. The reasons have been formally explained by Kenneth Arrow and others,\textsuperscript{25} and Judge Easterbrook has applied this analysis to the work of the Supreme Court.\textsuperscript{26} The reasons are captured informally in the folk saying that a camel is a horse designed by a committee. Constitutional doctrine is the Supreme Court’s camel, and from every point on the political spectrum, critics find it lumpy and ungainly. On this point, all the critics are right, and the situation will not improve.

But Nagel does not mention the problems inherent in group decision-making. These problems are equally applicable to the political branches, so they do not serve his end of showing that courts are uniquely ill-suited to decide anything important.

Nagel turns instead to selective constitutional history to support his claim that the Court’s work has been generally harmful. He claims that the constitutional provisions that have worked well are those the Court has not interpreted. He offers such examples as the republican form clause, the advice and consent clause, the provisions for elections and terms of office, and the qualifications for office. He claims that constitu-

\textsuperscript{23} Pp. 20, 38-40.

\textsuperscript{24} P. 4; see also pp. 31-34 (reviewing two generations of scholars who severely criticized judge-mad law of free speech while at same time looking to judges for solution).


\textsuperscript{26} Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802 (1982).

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tional meaning that emerges from practice is stable and widely accepted; constitutional meaning that is announced by courts is unstable and controversial. He carefully anticipates and refutes several arguments that the uninterpreted clauses are different in kind from the interpreted clauses.

Unfortunately, he ignores other obvious objections. In part, he inverts cause and effect. It is not that some clauses have had stable and uncontroversial meanings because they were never litigated. Rather, some clauses had stable and uncontroversial meanings, and, because they had such meanings, those clauses were never litigated. The engine of constitutional change is not judges, but controversy. Judges sometimes aggravate controversy, but they hardly ever start it.

Other rarely litigated clauses produced controversies that the Court refused to decide, with disparate results. Sometimes the Court’s refusal to enforce a clause kills the clause, in the sense that participants in public disputes quit appealing to it. Most obviously, this is what happened to the privileges or immunities clause of the Fourteenth Amendment.

But sometimes, the Court’s refusal to enforce a clause simply moves the dispute to other forums, with no reduction in controversy and no increase in stability. Thus, disputes over constitutional amendments are nonjusticiable, but bitter controversy continues over many aspects of the amendment process: repeated ratification votes, rescission of ratifications, time limits for ratification, extension of time limits, when Congress must call a convention, whether a convention can be limited to a single subject, and so on. The Court’s refusal to adjudicate anything about the amendment process has even facilitated arguments that the Article V amendment process is not exclusive.

The republican form clause has experienced both phenomena: dormant and ignored in normal times, but a wholly unpredictable source of controversial power in extraordinary times. The republican form clause supplied much of the constitutional theory for congressional reconstruction of state government in the defeated South.

Three distinct claims are embedded in Nagel’s comparison of constitutional law made by courts and constitutional law made without courts. He claims that when courts stay out of an issue, the resulting constitutional law is i) stable and ii) satisfactory. He also claims iii) that when courts do undertake to enforce a clause, and doctrine changes, the courts are the cause of the change. He ignores powerful counter-examples on all three points, and, his third point overlooks the whole political process.

With respect to the claim of stability, consider relations between the President and the Congress. The Court has largely left that relationship to the political process, intervening only sporadically. Yet, as Nagel frankly acknowledges, there have been large fluctuations in the relative constitutional power of the other two branches, resulting in both congressional government and imperial presidencies. For example, Woodrow Wilson wrote his famous book describing how checks and balances had given way to congressional supremacy, but in a new preface only fifteen years later, he wrote that power had shifted dramatically to the executive. Likewise, Supreme Court decisions did not cause the difference between Andrew Johnson’s power in 1866 and Lyndon Johnson’s in 1966.

Practice on important matters has developed, changed, and changed back again. The long-term struggle for control of foreign affairs has barely been influenced, and certainly not abated, by judicial deference. Power shifts of constitutional significance have been accomplished by statutes, such as the Budget Act and the War Powers Resolution, as well as by accumulating practice, such as executive agreements and administrative agencies.

The history of the constitutional rights of blacks is even more telling: Judicial deference produced results that were neither stable nor satisfactory. Except for a handful of narrow Supreme Court decisions, the rights of blacks were largely left to the political process from about 1860 to about 1950. By Nagel’s theory, the constitutional provisions guarantee-

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34. P. 22.
37. Id. at xi–xiii (15th ed. 1900).
42. See, e.g., Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) (requiring state to provide
ing the rights of blacks should have been a great success in that period. We should have had stable constitutional meaning with little controversy, and basic constitutional rights should have been broadly respected.

In fact, the results were neither stable nor satisfactory. There was dramatic growth in constitutional doctrine during the Civil War and Reconstruction—all coming from the political branches and eventually written into the Constitution by coerced ratification of the Reconstruction Amendments.\(^3\) The war was followed by eleven years of vigorous but gradually declining congressional commitment to the constitutional rights of blacks.\(^4\) Then, in 1876, the Federal Government abandoned blacks to their fate: the political branches dramatically reversed their constitutional policy. There ensued seventy-five years of relative stability, massive oppression, and wholesale constitutional violations. The Supreme Court kept its hands off, narrowly interpreting the privileges or immunities clause,\(^5\) the equal protection clause,\(^6\) and the Civil Rights Act,\(^7\) so that it had nothing left to enforce. But judicial abdication did not produce the satisfactory results that Nagel’s theory predicts.

Similarly, the courts stayed out of legislative apportionment until the 1960’s.\(^8\) Despite unambiguous mandates in many state constitutions for periodic apportionment on the basis of population, most state legislatures were grossly malapportioned.\(^9\) Small minorities of the population controlled a majority of legislative seats in perpetuity, with no prospect that they would ever relinquish that control voluntarily. The situation had persisted for decades, and had gotten steadily worse. Doctrine was stable, but one can hardly claim that results were satisfactory.

Nagel’s most serious error is the claim I have numbered (iii), attributing constitutional change to the judiciary. In fact, such changes often—and major changes always—originate off the Court. Great long-term changes in constitutional doctrine result from great long-term shifts in political balance.

Consider constitutional history since the New Deal. The New Deal
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brought massive shifts in constitutional doctrine, shifts that expanded Federal power, largely ended judicial review of economic regulation, and began a new era of protection for civil liberties. Nagel offers the expansion of Federal power as one of the most fundamental constitutional changes.\textsuperscript{50} Bruce Ackerman describes the New Deal changes as a constitutional transformation, a massive but implicit constitutional amendment, ratified in the election of 1936.\textsuperscript{51} No one denies that these changes were large and important. But for Nagel to attribute them to judges is nonsense. These changes were initiated by the political branches and pushed through despite vigorous resistance by the Supreme Court.

Eventually the Court acquiesced in the new constitutional theory, and after the newly dominant political coalition appointed a majority of the justices, the Supreme Court began to take its own initiatives in line with the new theory. There followed half a century of right-wing criticism of the Supreme Court. Appointments to the Court have been a significant issue in most recent presidential elections, beginning with Richard Nixon's promise to make judicial appointments that would "strengthen the peace forces." (He meant the police, not the war protesters.) This long conservative campaign may at last have created, beginning with October Term 1988, a reliable new Supreme Court majority on a wide range of issues. Given the age distribution of the current Justices, the Republican ascendancy in presidential elections, and the Court's significance to an important part of the Republican coalition, this new majority may persist for the foreseeable future. If so, we may see major changes in constitutional doctrine.

Nagel's claim that judicial abdication yields doctrinal stability implies that without judicial review, such changes would not occur at all. But this is utter nonsense. Such a claim ignores the fifty-year political campaign to change the Court's membership, just as Nagel's account of doctrinal change in the New Deal ignores the long campaigns of the Progressives and Realists to alter the Court's membership. Nagel ignores how Justices get to be Justices. The political process sketches the broad outlines of major doctrinal changes; newly appointed Justices merely work out the details.

In fact, the Justices are a force for stability in such changes. Lifetenured holdovers from earlier administrations resist change and slow it down. Without judicial review, Roosevelt's view of the Constitution, or Nixon's, or Reagan's, would have been implemented much more quickly. Newly appointed Justices sometimes turn on those who appointed them. Even Justices who implement the changes they were appointed to implement may moderate the pace or magnitude of change. It took twenty years

\textsuperscript{50} P. 11.
\textsuperscript{51} Ackerman, supra note 32, at 510-15.
of Republican appointments to the Court to produce the apparent new majority. We can argue whether this drag on the political branches is good or bad. But it refutes Nagel’s claim that judges are the engine of change and not a source of doctrinal stability.

B. Judicial Review and a General System of Free Speech

Nagel’s chapter on free speech applies and extends his general argument. He considers free speech not as an individual right, but only as a structural guarantee of democratic rule. He argues that judicial protection of free speech in individual cases is not necessary to maintain a general system of free speech, and may even be harmful. Judicial protection is not necessary because the political branches have always ended our worst periods of suppression—the Alien and Sedition Acts, the Red Scare after World War I, McCarthyism, wartime censorship—without much help from the judiciary. Judicial protection may be harmful, because frequent judicial protection of the least attractive forms of speech may discredit the idea of free speech in the public mind.

Again, he disregards counterexamples. He says that the Supreme Court did not protect those who protested the War in Vietnam until 1968, when the war was already unpopular. He is just wrong about the dates; the first decision protecting protest against the war came in 1966, and the decisions protecting draft resisters began in 1965. More important, the Vietnam protesters operated under shelter of the Court’s decisions protecting civil rights protesters, and under earlier decisions protecting political extremists, religious proselytizers, and labor organizers. These decisions made it unnecessary to decide a Vietnam protest case as such.

53. P. 39.
54. P. 57 & n.164.
55. See Bond v. Floyd, 385 U.S. 116 (1966) (holding that Georgia legislature could not refuse to seat member who opposed war and draft).
56. See Oestereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233 (1968) (authorizing pre-induction judicial review where local draft board denied exemption as punishment for protesting draft); United States v. Seeger, 380 U.S. 163 (1965) (effectively reading theism requirement out of exemption for conscientious objectors). My colleague Michael Tigar, who litigated many Vietnam-era draft cases and was Editor-in-Chief of the Selective Service Law Reporter, agrees that 1969 was a turning point in the Supreme Court’s willingness to scrutinize selective service decisions. But he attributes this change to judicial loss of confidence in local draft boards, and he believes it began somewhat earlier in the lower courts. Judges lost confidence when they began to encounter cases in sufficient numbers to become familiar with the actual administration of the selective service law. Cases did not begin to arise in large numbers until the war became unpopular. Thus, his explanation coincides chronologically with Nagel’s. To distinguish the two explanations, Tigar relies on trial court decisions that were unpopular in their local communities, such as the acquittal of Cesar Chavez’ son by a conservative district judge in Fresno, California. Conversation with Professor Michael Tigar (Nov. 15, 1989). For further evidence supporting his loss of confidence thesis, see Oestereich: “We deal with conduct of a local Board that is basically lawless.” 393 U.S. at 237.
58. See Terminiello v. City of Chicago, 337 U.S. 1 (1949); Schneider v. New Jersey, 308 U.S.
The right of political protest—the marches, rallies, vigils, sit-ins, Freedom Rides, and all the rest—was as critical to the civil rights movement as the desegregation decisions were.† Perhaps Nagel would say that civil rights protests would have succeeded even without judicial protection. Perhaps so; there were heroes and heroines in those days, willing to brave jail, chain gangs, police dogs, fire hoses, and even death for their cause. Maybe they would have persisted to victory even if the courts had denied them all constitutional protection and sided with the police dogs. Maybe they did not need all the lawyers they struggled to pay, or the Justice Department lawyers who supported them, or the Federal judges who defied ostracism and death threats. More likely, the protestors would have been worn down and defeated without judicial support. Certainly their organizations would have been bankrupted.

There is no way to know whether the civil rights movement would have succeeded without judicial support. What is clear is that the movement thought it needed judicial support. The movement appears to have depended in substantial part on the kind of judicial activity Nagel most despises: on the repeated daily enforcement of constitutional principles in case after case, getting people out of jail, saving assets from seizure, protecting the right to raise funds and thus to keep the struggle going. I do not know what Nagel might have said about these cases. He ignores the civil rights protests and the decisions that protected them.

A partial exception is his casual treatment of *New York Times v. Sullivan.* He twice offers the case as a bad example. His sarcastic initial description of the case implies that it is a usurpation: "For most of our history, reasonably vigorous public debate somehow coexisted with traditional defamation rules, but in 1964 it was discovered that the First Amendment required significant alterations in these rules in order to foster vigorous public debate."
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The Court discovered this in 1964 because Alabama officials discovered in 1960 that traditional defamation rules could be used to destroy a political movement. When Sullivan was decided, there were $5.6 million worth of defamation claims pending in Alabama against the New York Times, and $1.7 million against CBS. Recall that these claims were in 1964 dollars. In the first two cases to go to trial, juries had awarded the full amount claimed. Many of these suits also named as defendants individual leaders of the civil rights movement. Seizure of the property of individual defendants so discouraged or intimidated some leaders of the Southern Christian Leadership Conference that they left Alabama and accepted jobs in the North. The devastating threat of the defamation judgments is a running theme in the history of the SCLC, but Nagel sees no First Amendment problem.

He is similarly insensitive about the patronage cases, which he also seems to see as usurpations with no real relationship to free speech and democratic rule. Nagel did not live in Chicago under the Daley machine. I am confident that he has never worked a precinct by himself while half a dozen employees of the city and of city contractors were paid with public funds to work it for the other side. He has not experienced the hopelessness of contesting elections in such a regime.

Judicial restrictions on patronage brought democracy to Chicago, replacing a one-party system in which all conflicts were resolved by secret deliberations among the ward committeepersons who ran the party. (In Chicago they were called committeemen, and in my time there, they were always men.) Plaintiffs and defendants agree that the patronage case broke up the machine and made it possible to hold competitive elections in Chicago. Once again, this impact depended on the kind of continued judicial activity that Nagel most despises. Patronage litigation in Chicago was

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67. 376 U.S. at 295 (Black, J., concurring).
68. Id. at 294.
69. See T. Branch, supra note 61, at 580.
72. Pp. 10, 37. For the contrary view that the patronage cases should be understood as concerned only with democratic rule, see Comment, Patronage and the First Amendment: A Structural Approach, 56 U. CHI. L. REV. 1569 (1989).
74. See Keane, Tom Keane on Life After Daley, CHICAGO LAWYER, Apr. 1982, at 3. Keane, perhaps the second most powerful figure in the machine under the first Mayor Daley, wrote that the machine “is dying,” and “the thing that is killing it is the Shakman decree.” Id. at 4. “As long as it is enforced by federal courts, no one is ever again going to put together a powerful political organization in Chicago.” Id. He notes that the organization began to lose down ballot races after the decree and before the death of Mayor Daley. Id. at 3.
not a one-time pronouncement of constitutional values, nor a series of individual suits by discharged workers. With *Shakman v. Democratic Organization*, voters and candidates obtained a highly publicized structural injunction regulating public employment in Chicago. A public employee penalized for neglecting his precinct work did not have to know that he might have a claim, find a lawyer who would take his case on a contingent fee, and file an independent lawsuit that would take months or years to come to trial. Rather, such an employee could go to the *Shakman* lawyers and file a contempt citation that would be set for hearing in days or weeks. The same point is illustrated by the later opinion holding patronage hiring unconstitutional. This opinion had little impact until it was enforced with a detailed implementation decree.

The first decade of democracy in Chicago has been messy. One-party states may be more efficient than democracies, especially for those on the inside of the party organization. The change from patronage to civil service may create a bureaucracy that is unresponsive to elected officials. We could debate whether that is worse than elected officials unresponsive to the voters, or whether courts should choose between these evils. But Nagel ignores reality when he asserts that patronage had nothing to do with a system of free speech and democratic government.

Nagel’s failure to understand the patronage cases relates to his argument about the relative propensities of judges and politicians to protect free speech. He says that judges in their highly controlled courtrooms have no experience that would enable them to understand the value of free speech, while politicians engage in free speech every day. He follows up by noting the disgraceful frequency with which judges try to suppress speakers whose public criticism hinders judicial functions.

Once again he misses the central point. In all of his examples, a judge is suppressing speech that interferes with that judge’s goals. Politicians have a similar tendency to suppress speech that interferes with their goals. Their most important goal is their own re-election. Thus, the great political temptation to censorship is protection of incumbents and their policies. Regulation of campaign finance always tends in that direction, and many of the Supreme Court’s famous free speech cases—most obviously the protest cases and the national security cases—involved speech that was thought to hinder government policy. Perhaps the classic example of systemic incumbent protection is Huey Long’s discriminatory tax on opposi-

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77. *See id.* at 856–57.
79. P. 55.
tion newspapers, struck down by a unanimous Court\textsuperscript{80}—one more example that Nagel neglects to mention. Judicial enforcement of free speech rights can be a check on incumbent protection, even if we need a different check on judges' own tendency to self-protection.

C. Individual Rights

One other striking aspect of Nagel's argument is his indifference to individual rights. He appears to assume, without saying so explicitly, that the majority is entitled to get its way, and that the resulting costs to individuals are no concern of constitutional law.

He complains in Chapter 4 that courts and commentators are too concerned about individual rights and not concerned enough about constitutional structure. But the principal point of this chapter is that federalism and separation of powers are underprotected. This alone does not necessarily imply that individual rights deserve little or no protection.

The clearest example of his attitude toward individual rights is in Chapter 3, on free speech. He considers free speech law exclusively in terms of preserving a general system of free speech. He ignores the harm to individual victims of censorship and retaliation, except to note in passing—at the very end of the chapter—that protecting individual victims might be a different rationale for free speech law.\textsuperscript{81} It is not a rationale he investigates. He thinks he has written an evaluation of judicial review in free speech cases without considering the interests of individual speakers.

Nagel also makes an original intent argument against the importance of individual rights. He is surely right that our generation relies more than the founders did on express individual rights and judicial review, and less on separation of powers and federalism. But the difference lies in emphasis and degree. Nagel claims a much sharper difference, and to prove his point, he relies on mischaracterization and misquotation.

He argues that the framers saw federalism and separation of powers as "the great protection of the individual, not the 'parchment barriers' that were later (and with modest expectations) added to the document."\textsuperscript{82} The accompanying footnote claims that "[w]hen Madison proposed the Bill of Rights to Congress, its importance for preserving freedom was not emphasized."\textsuperscript{83} These claims are simply false.

The phrase "parchment barriers" appears in The Federalist No. 48, but it does not refer to the Bill of Rights. Instead, it refers to separation


\textsuperscript{81} P. 59.

\textsuperscript{82} P. 65.

\textsuperscript{83} P. 188 n.34.
of powers provisions of the form then found in many state constitutions. 84 These were merely "parchment barriers" 85 because they lacked independent enforcement mechanisms. These provisions announced limits to legislative power, but they did not give the other branches power to enforce these limits. Consequently, the legislatures regularly exceeded their limits. 86 The solution was to provide for perpetual enforcement—to give "to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." 87 The defect of "parchment barriers" was precisely the defect of Nagel’s proposal for constitutional rights without judicial enforcement.

A similar phrase, "paper barriers," appears in Madison’s great speech of June 8, 1789, introducing the Bill of Rights to the First Congress. 88 Once again, Madison was setting up the argument to refute it. He conceded that some state bills of rights had been violated, 89 but he said that a Federal Bill of Rights would be enforced by an independent judiciary. 90 It

84. "Will it be sufficient to mark, with precision, the boundaries of these departments in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power?" The Federalist No. 48, at 308 (J. Madison) (C. Rossiter ed. 1961).
85. Id.
86. This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble against the more powerful members of the government. The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.
Id. at 308-09.
87. The Federalist No. 51, at 321-22 (J. Madison) (C. Rossiter ed. 1961). The Federalist No. 48 analyzes the problem to which the more famous No. 51 proposes the solution. The intervening papers, Nos. 49 and 50, consider and reject two other proposed solutions.
88. It may be thought that all paper barriers against the power of the community are too weak to be worthy of attention. I am sensible they are not so strong as to satisfy gentlemen of every description who have seen and examined thoroughly the texture of such a defence; yet, as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one means to control the majority from those acts to which they might be otherwise inclined.
1 Annals of Cong. 456 (J. Gales ed. 1834) (remarks of James Madison) (June 8, 1789). Pagination is different in other printings of the Annals.
89. It has been said, that it is unnecessary to load the constitution with this provision, because it was not found effectual in the constitution of the particular States. It is true, there are a (sic) few particular States in which some of the most valuable articles have not, at one time or other, been violated; but it does not follow but they may have, to a certain degree, a salutary effect against the abuse of power.
Id. at 456-57.
90. If they [the rights in the Bill of Rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.
Id. at 457.
was judicial review that would turn "paper barriers" into "an impenetrable bulwark." 91

I have already said enough to show that Nagel flatly mischaracterizes Madison. But the mischaracterization goes much further. Indeed, the whole modern theory of judicial review in individual liberty cases is encapsulated in Madison's June 8 speech. The need for a Bill of Rights even in a government of limited powers, 92 the risk that a majority of the community would oppress a minority, 93 the importance of judicial review, 94 and the need to protect unenumerated rights 95—it's all there in ten pages of the Annals of Congress. 96 Like many other judicial conservatives, Nagel appeals simultaneously to the virtues of original intent and popular democracy. But he cannot have it both ways, because the original intent

91. Id.
92. "[I]f all power is subject to abuse, ... then it is possible the abuse of the powers of the General Government may be guarded against in a more secure manner than is now done . . . ." Id. at 449-50.

It is true, the powers of the General Government are circumscribed, they are directed to particular objects; but even if Government keeps within those limits, it has certain discretionary powers with respect to the means . . . [For example,] the General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government.

Id. at 455-56.

93. [State bills of rights are directed] sometimes against the abuse of the executive power, sometimes against the legislative, and, in some cases, against the community itself; or, in other words, against the majority in favor of the minority.

In our Government it is, perhaps, less necessary to guard against the abuse in the executive department than any other; because it is not the stronger branch of the system, but the weaker: It therefore must be levelled against the legislative, for it is the most powerful, and most likely to be abused, because it is under the least control. Hence, so far as a declaration of rights can tend to prevent the exercise of undue power, it cannot be doubted but such declaration is proper. But I confess that I do conceive, that in a Government modified like this of the United States, the great danger lies rather in the abuse of the community than in the legislative body. The prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the executive or legislative departments of Government, but in the body of the people, operating by the majority against the minority.

Id. at 454-55.

94. Id. at 457 (quoted supra note 90).

95. It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.

Id. at 456. The last clause of the fourth resolution, id. at 452, was an early draft of the Ninth Amendment.

96. Madison also argued that the states would enforce the Bill of Rights. Id. at 457. This expectation is not obsolete, but it is of limited utility in the wake of the Civil War and the Reconstruction Amendments.
embraced only limited democracy. The founders viewed legislatures as a serious threat to liberty, and at least one, Madison, saw further and realized that the ultimate threat came from the majority of the people.

Nagel’s account of original intent also distorts the larger political fight over ratification. I know of no one who claims that the Constitution could have been ratified without the promise of a Bill of Rights. Whatever the delegates at Philadelphia might have thought, a large part of the American people demanded and got a Bill of Rights. The Bill of Rights was an essential part of the original bargain; the argument that it was unnecessary did not prevail.

Attention to the rights of individuals strikes at the heart of Nagel’s position. If one is indifferent to the rights of individual victims, then one will be puzzled by judicial enforcement of individual rights. But if one believes that the Constitution guarantees individual rights—which seems clear from the text—and if one believes that each individual is important, then vigorous judicial enforcement of those rights will not be puzzling.97

Attention to individual rights also has more specific implications for Nagel’s argument. The number of individuals whose rights can be suppressed without threatening the general system of free speech may be quite large, especially if the victims are an identifiable category so that the citizenry at large does not fear that suppression will spread to it. It may even be that the political system responds best to the most severe outbreaks of suppression, like McCarthyism. Once it began to appear that few public figures and few government employees were safe, a powerful constituency was mobilized to fight McCarthy. In sharp contrast, the political branches did not respond to defend the Jehovah’s Witnesses, who were systematically restricted, prosecuted, and harassed. Only a long series of Supreme Court decisions ended American persecution of Jehovah’s Witnesses.98 Thus, Nagel’s comfortable reliance on the political branches may be a function of his disregard for the rights of individuals.

D. The Merits of Judicial Review and the Meaning of the Constitution

1. Nagel’s Criteria for Evaluating Judicial Review

Much of Nagel’s argument against active judicial review consists of examples of cases where judicial review worked badly or where the other branches did better. Much of my response consists of examples where judicial review worked well or where the other branches did even worse.


Nagel's examples alone are misleading; my examples alone would be equally misleading. The reality includes both sets of examples. Nagel does well to remind the more naive proponents of judicial review that judges are not always the friends of liberty, and that the other two branches are not always the enemy. What conclusions follow when both sets of examples are considered together?

The justification for active judicial review does not depend on any claim that judges are always right, or even that on average they are right more often than the political branches. The justification is that judicial review gives claims of constitutional right one more chance to be heard. Constitutional claims can be presented to the legislature and the executive like any other legal or political claim. But in addition, constitutional claims can be presented to the courts, and the courts are obliged to listen. The courts are reasonably insulated from short-term political pressures, although hardly insulated at all from long-term political changes.

The courts may or may not be any more sympathetic than the other branches, but they ensure that constitutional claims will at least get a hearing, and they give the constitutional claim one more chance to prevail. And in this last chance, the sources of political rigidity in judicial review also yield important advantages. For minorities and isolated individuals, it is a decided advantage to have one branch that is obliged to hear their claims, to render public judgment, to state principled reasons for decision, and to treat like cases alike.99

This extra chance will not always be needed, and it will not always be efficacious. Sometimes Congress will be the best protector of liberty, as during Reconstruction, or in the Equal Access Act,100 which protects student free speech from judicial content discrimination, or in the statute allowing military officers to wear yarmulkes.101

Sometimes the executive will be a powerful protector of liberty, as in the Civil Rights Division's litigation in the sixties,102 or in Truman's desegregation of the military,103 or—if you think he was right—in Jackson's veto of the Second Bank.104 I would add the Emancipation Proclamation

102. See T. Branch, supra note 61, passim. A detailed index identifies descriptions of the Justice Department's role under the following entries: "Dear, John," "Justice Department, U.S.," "Kennedy, Robert F.," "Marshall, Burke," and "White, Byron."
104. For a review of the Bank controversy, see P. Brest & S. Levinson, Processes of Constitutional Decisionmaking 9-59 (2d ed. 1983). Jackson's veto message is excerpted in id. at 51-56; the entire message appears in 2 Messages and Papers of the Presidents 576-91 (J. Richardson ed. 1897). Jackson thought he was protecting the people from the dangers of concentrated wealth and concentrated Federal power.
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and Lincoln’s prosecution of the Civil War, even though Lincoln repeatedly violated the Constitution in pursuit of larger goals. Lincoln and the Reconstruction Congresses accomplished a true revolution—a fundamental change in favor of liberty, achieved by force of arms because it could not be achieved within the voting rules created by the original Constitution.\textsuperscript{105} Revolutions by definition violate positive law; they must be legitimated by their moral rightness and by subsequent acceptance of their results. Like Washington’s before him, Lincoln’s revolution has been legitimated.\textsuperscript{106}

Sometimes the Court will be the best protector of liberty, as in the Jehovah’s Witness cases, the desegregation cases, the school prayer cases, the reapportionment cases, and the criminal procedure cases. Sometimes all three branches will collaborate in a constitutional violation, as in the nineteenth century persecution of the Mormons,\textsuperscript{107} or the oppression of blacks for three-quarters of a century after the end of Reconstruction.

Nagel’s argument against judicial review relies heavily on the history of judicial errors. In considering such an argument, it is essential to distinguish two kinds of errors. Judges may err by not enforcing liberties that the Constitution guarantees, or they may err by enforcing supposed liberties that the Constitution does not guarantee. Both types of error are inevitable, but only the second type supports an argument against judicial review.

In the first type of error, where the judges fail to protect a constitutional right, they have failed to perform their function. That is bad for the constitutional system, and bad for liberty. But this kind of judicial error does not make us worse off than we would have been without judicial review. Judicial failures to protect liberty, judicial enforcement of oppression by the other branches, even doctrinal fluctuations between protecting constitutional rights and not protecting them—none of these is an argument against active judicial review. As long as the judges enforce constitutional rights some of the time, they are doing some good, and that good is not offset by other instances in which the judges fail to do other good.

A serious argument against judicial review arises only from the second

\textsuperscript{105} For a demonstration that the Reconstruction Amendments cannot be legitimated by the voting rules in Article V of the Constitution, see Ackerman, \textit{supra} note 32, at 500–07. Ackerman does not characterize the amendments as revolutionary.

\textsuperscript{106} For the difficulties of deciding whether Lincoln was loyal to the pre-1865 Constitution, see S. Levinson, \textit{Constitutional Faith} 139–42 (1988). For the argument that Lincoln was one of the “principal architects of our constitutive tradition,” see Nichol, \textit{Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty}, 1985 Wis. L. Rev. 1305, 1323–24, 1328–33.

\textsuperscript{107} See Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (upholding confiscation of church property); Davis v. Beason, 133 U.S. 333 (1890) (upholding religious test oath for voting); Reynolds v. United States, 98 U.S. 145 (1878) (affirming criminal conviction for polygamy). For a full history, see E. Firmage & R. Mangrum, \textit{Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints, 1830–1900} (1988).
type of error, where judges begin to enforce things that are not in the Constitution at all. The *Lochner*-era liberty of contract cases are an example, and the busing cases are an example from the other end of the political spectrum.\footnote{108} In these cases, the courts inflicted high social costs on the basis of constitutional misinterpretations. In cases where that happens, we would be better off without judicial review. If we were debating a constitutional amendment to eliminate judicial review, these costs of judicial review would be weighed against the benefits.

If it were perfectly clear what the Constitution guarantees, we would not have judicial errors of either type. Indeed, we would not need an elaborate judicial procedure to apply the Constitution to individual cases. Because the Constitution is not perfectly clear, Americans will not be able to agree on a single list of cases in which the courts did harm by enforcing rights not to be found in the Constitution.

2. *Nagel’s Rules of Constitutional Interpretation*

We come therefore to the heart of the problem: What does the Constitution mean? Nagel thinks it self-evident that the individual liberty provisions of the Constitution mean almost nothing. He finds most constitutional interpretation “exceedingly implausible,” “downright implausible,” and “magical or superstitious.”\footnote{109} He believes “that the Constitution either does not bear at all, or bears only in complex and indeterminate ways, on most specific public issues.”\footnote{110} He implies that it is unsophisticated—naive or just foolish—to find the Court’s interpretations plausible.\footnote{111} He offers no argument to support these claims.

This is not the place to carefully explore the meaning of the Constitution. I will say here that I find Nagel’s assertions not merely implausible, but almost incomprehensible. I understand disagreement about constitutional interpretation at the margins, even on important issues. But I do not understand the claim that almost nothing is unconstitutional.

The Constitution states principles in sweeping terms. Each of these principles seems on its face to apply to a broad range of cases. Whatever else one says about the Supreme Court’s free speech and press cases, they are nearly always cases in which some unit of government has restricted or penalized someone’s speech, or someone’s use of a printing press, or someone’s use of a modern analogue of the printing press. These cases fall

\footnote{108. Any contemporary example of excess will inevitably be more controversial than an old example. I believe that the busing cases are not constitutionally required, because they seek to achieve a new status quo that would never have existed even if the Constitution had not been violated. For this view of remedies as designed to restore victims to their rightful position, and the contrasting view that equity courts have a general commission to do good in the wake of a violation of law, see D. Laycock, *Modern American Remedies: Cases and Materials* 234-81 (1985).}

\footnote{109. Pp. 3-4.}

\footnote{110. P. 4.}

\footnote{111. P. 4.}
naturally within the broad principles stated in the speech and press clauses. Similarly, whatever else one says about the Supreme Court's equal protection cases, they are nearly always cases in which some unit of government has applied one law to one group of persons, and a different, unequal law to another group of persons who are in some sense similarly situated. These cases fall naturally within the broad principle stated in the equal protection clause. And so on. To claim that nothing in the Constitution informs the great bulk of constitutional cases requires an invincible hostility to the constitutional text. Even very conservative judges recognize that the Constitution contains principles that potentially apply to modern legislation.112 Only Lino Graglia exceeds the extremism of Nagel's claim that almost nothing is unconstitutional.118

The claim that the Constitution says nothing about most constitutional controversies necessarily entails one or both of the following claims:

1) The text of the Constitution does not count. Constitutional meaning is to be found only in extra-constitutional sources, such as the unratified writings, speeches, and thoughts of the founders.

2) Broad statements of principle do not count. The Constitution would apply to specific disputes only if the founders had anticipated each dispute.

Nagel does not say that the text does not count. But he does appear to say that the text alone does not count. He would permit the judiciary to invalidate the acts of other government institutions only when those acts are "emphatically inconsistent with constitutional theory, text, and public understanding as expressed in prolonged practice."114 In another formulation of this point, he requires inconsistency with "the clear sense and history of the Constitution and . . . apparent public understandings."115 So the constitutional text does not count unless it is confirmed by public understanding, and either constitutional theory or history, or perhaps both.

His demand for "public understanding" makes the constitutional rights

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113. See, e.g., Graglia, Constitutional Mysticism: The Aspirational Defense of Judicial Review (Book Review), 98 HARV. L. REV. 1331, 1344 & n.26 (1985) ("If judicial review were in fact limited to merely enforcing the restrictions of the Constitution, there would be so few occasions for its exercise that it would be a subject of little controversy or even interest. . . . An example of a plainly unconstitutional statute would be difficult to find in a standard constitutional law casebook, except for the debtor relief law involved in Home Bldg. & Loan Ass'n v. Blaisdell.") (citation omitted).

114. P. 3.

of minorities and isolated individuals hostage to the constitutional understanding of a hypothetical majority. He would make judicial protection available only when it is not needed. He wholly rejects the Madisonian effort to protect the minority from the majority by constitutional law.  

His apparent treatment of history, theory, and public understanding as equal in authority to the text ignores what was ratified. Representatives of the American people once voted on the constitutional text. They did not vote on anyone’s theory, or on anyone’s account of history, or on future public understanding. Of course we must read the text in historical context, and we must try to identify the theory or theories that unify the text. But only the text was ratified, and it is the ultimate source of constitutional law.

At another point, Nagel suggests that broad statements of principle in the Constitution do not count, because they are “so general and cryptic.” This too is part of the mindset that enables one to claim that the Constitution forbids almost nothing. It assumes that the founders were either naive or disingenuous—either fool enough to think that broad statements of principle would matter, or knavish enough to include such statements knowing they would not matter. I will leave it to original intent theorists to work out the competing implications of a fool theory and a knave theory.

If instead we take seriously the sweeping principles stated in the constitutional text, they seem to both protect and forbid a great number of things. But few of those things are specifically mentioned. The Constitution does not expressly mention seditious libel, political debate, religious proselytizing, great literature, pulp novels, newspaper editorials, sports reporting, gossip columns, small talk, political cartoons, drive-in movie theaters, or television. Instead, it refers generically to “freedom of speech or of the press.” It does not expressly mention the death penalty for speech, or punitive damages, or presumed damages, or damages for emotional distress, or firing government employees, or suspending students from school, or excluding preachers from parks, or knocking down protesters with fire hoses and police dogs. Instead, it refers generically to “abridging” the freedom of speech.

To insist that every application of the Constitution be stated in the constitutional text—and presumably also in the legislative history and in the public understanding—is to make constitutionalism impossible. Constitutional protections of liberty are possible only if they are stated as broad

116. See supra note 93.
118. P. 126.
To say that such sweeping principles have no application is to deny the possibility of constitutional meaning.

II. THE SPECIAL CASE OF FEDERALISM

Chapter 4 of Nagel's book is about federalism. It fits oddly with the rest of the book, because its principal claim is that the Court has not been active enough in protecting federalism. But there is no reason to think that federalism decisions are exempt from Nagel's general critique of judicial review. If judicial enforcement can only make a mess of individual liberties, then surely it can only make a mess of federalism. What Nagel would apparently like is an occasional symbolic reaffirmation of federalism, with no follow up litigation demanding case-by-case enforcement. But as he recognizes, that is an impossible dream.\footnote{120}

Much of the chapter is devoted to an elaborate defense of \textit{National League of Cities v. Usery}.\footnote{121} This is well worth reading, especially for those scholars who claim to find the Court's opinion comprehensible only as an implicit declaration of a constitutional right to welfare.\footnote{122} It is not difficult to understand the state's interest in controlling the relationship between itself and its employees, and Nagel elaborates the point with more clarity and force than the Court did. He exposes the methodological inconsistencies of scholars who insist on expansive interpretations of individual rights provisions and crabbed readings of federalism provisions.\footnote{123}

It is less clear to me that this state interest is constitutionally protected. Nothing in the constitutional text immunizes states from Federal regulation of interstate commerce.\footnote{124} Rather, the Constitution protects the states by limiting the powers of the Federal Government. The question is whether state and local government employment is a transaction in interstate commerce. State and local government employees are now 12.7\% of civilian employment,\footnote{125} down from 13.9\% when \textit{National League of Cities} was decided.\footnote{126} Even if there can still be small pockets of isolated

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\begin{itemize}
\item 119. I mean to assert only that the Constitution itself must be stated in terms of broad principles. This is a corollary of its brevity, its permanence, and its functions. I do not speak to the distinct issue of how broadly or narrowly courts should formulate legal doctrine explicating the Constitution. On the latter issue, see Schauer, \textit{Harry Kalven and the Perils of Particularism} (Book Review), 56 U. CHI. L. REV. 397 (1989).
\item 120. P. 81.
\item 121. 426 U.S. 833 (1976).
\item 123. P. 64.
\item 124. See Laycock, \textit{supra} note 97, at 366–67.
\item 125. See \textit{Statistical Abstract of the United States}, Table 479, at 293 (109th ed. 1989) (13,913,000 state and local government workers); \textit{id.}, Table 626, at 380 (109,597,000 persons employed in civilian non-institutional population age 16 and over).
\item 126. The Tables cited \textit{supra} note 125 show 12,054,000 state and local government employees in 1975 out of 85,846,000 employed persons in the civilian non-institutional population age 16 and over.
\end{itemize}
workers whose conditions do not affect interstate commerce, *National League of Cities* was not such a case.

Nagel also seems to think that *National League of Cities* was consistent with public understanding of the role of state and local governments. On this point, I am quite sure he is wrong. To the extent that the public knew about this controversy at all, the public was simply puzzled and angry that some American workers were denied the protections accorded to all other American workers. I am confident of that point from personal experience on an analogous issue. I have argued that the free exercise clause exempts churches from a wide range of labor regulation. The dominant response to that position—from committees of church representatives, from my students, and from other scholars—is that church workers are entitled to the same rights as other workers. I can sometimes persuade people to see the churches' interest in controlling the workforce that performs its religious mission, but the first reaction is always sympathy for the workers. I doubt that public understanding would be any different with respect to government workers.

Apart from overruling *National League of Cities*, one can hardly charge the present Supreme Court with inattention to federalism. It has created an elaborate set of substantive, jurisdictional, and procedural obstacles to lawsuits challenging illegal behavior of state and local officials. Most of this law has been created in the name of federalism. Nagel waves it aside on the ground that it is not expressly constitutional law. He does not even mention the Court's expansive interpretation of the Eleventh Amendment, which is done in the name of the Constitution and goes far beyond anything arguably found in the constitutional text.

Still, Nagel is right that the late twentieth century understanding of federalism is very different from the late eighteenth century understanding of federalism. He seems to blame this change on the judges. Whether the judges caused it, or helped it, or merely acquiesced in it, it is common for commentators to imply that somehow a usurpation has occurred—that the shift to Federal power cannot be justified by any positivist theory of constitutional interpretation.

130. P. 62.
132. P. 11.
133. See, e.g., Ackerman, *supra* note 32, at 457–58, 510–15 (rejecting as "myth" claim that New Deal policies were valid under Constitution as it existed prior to 1930's, and insisting that New Deal required implicit constitutional amendment).
The claim that the Constitution does not authorize the current balance of state and Federal power has always seemed to me fundamentally wrong, in part for familiar reasons and in part for reasons that are often neglected. Before the Civil War, eleven of twelve constitutional amendments limited Federal power. Since the Civil War, nine of fourteen amendments expanded Federal power, and some of the expansions have been enormous.

The most familiar expansion of Federal power resulted from the Civil War and the Reconstruction Amendments. Nagel manages to write a chapter on federalism without mentioning either in his text! He does say in a footnote that the Fourteenth Amendment does not justify “losing sight of the framers’ original scheme.” Jefferson Davis could not have said it better. But the Reconstruction Amendments, enacted to the end that “these honored dead shall not have died in vain,” are not plausibly viewed as narrow technical changes that left intact “the framers’ original scheme.”

The second reason, familiar but less so, is the transportation and communication revolutions that forever changed the nature of interstate commerce. One could apply the Supreme Court’s modern law of interstate commerce to the economy of 1787, and most commerce would be intrastate. Land transportation was prohibitively expensive; the cost of shipping goods thirty miles inland equaled the cost of shipping them to Europe. Consequently, the nation was divided into a large number of small local markets. Most commerce was contained within one of these markets, and prices in one market had little or no effect on prices in another. With the coming of the railroads, the local market was linked to national markets and lost control of its destiny. Local prosperity now depended on far away and uncontrollable developments. The change was sudden and dramatic; it required no legal fiction to see the effects. When railroads or paved highways ran everywhere, the change was universal. No state or locality could manage its own economy and no commerce was beyond the reach of the commerce clause.

Voters increasingly chose to regulate this integrated national economy at the Federal level, especially after the Great Depression overwhelmed

134. I am counting amendments 13–19, 24, and 26. Some of these were single issue amendments not part of any larger package—women’s suffrage (Nineteenth Amendment), abolition of the poll tax (Twenty-Fourth Amendment), the eighteen year old vote (Twenty-Sixth Amendment), and prohibition (Eighteenth Amendment).

135. Pp. 188–89 n.34.

136. A. LINCOLN, GETTYSBURG ADDRESS (1863).


The resources of state and local government. This choice of Federal regulation was authorized by the original constitutional text, and contrary Supreme Court decisions were properly viewed as obstructionist. The concept of intrastate commerce became obsolete, not because of judicial interpretation, but because of technological change.

The third reason for the growth of Federal power, almost wholly neglected by constitutional lawyers who hated the basic tax course, is the Sixteenth Amendment. The Sixteenth Amendment made available to the Federal Government a vast source of revenue previously denied to it. It authorized the federal government to take as large a share of the national income as it could persuade the voters to allow. This share turned out to be very large, especially after a little-known corporate financial officer invented the withholding tax.

The Sixteenth Amendment was duly ratified by three-quarters of the states precisely because the people wanted a bigger Federal Government — because without a new revenue base, the Federal Government could not do what voters now expected it to do. The need for more revenue presupposes a need for more spending, which in turn implies a Hamiltonian understanding of the spending clause.

As much as any other issue, and more than most, the federal tax power separated the founding Federalists and Anti-Federalists. One historian describes the Virginia Anti-Federalists as fearing Federal power, and especially the tax power, "almost to the point of paranoia." In part to accommodate such fears, Federal powers of direct taxation were subjected to apportionment conditions so burdensome that the powers were rarely exercised. The Sixteenth Amendment changed all that. It has made possi-


141. Hamilton argued that the power to spend for the general welfare was not limited to the scope of the other grants of power in Article I. See A. Hamilton, Report on the Subject of Manufactures (1791), in 10 The Papers of Alexander Hamilton 302–04 (H. Syrett & J. Cooke eds. 1966); see also United States v. Butler, 297 U.S. 1, 64–67 (1936) (adopting Hamilton's interpretation).

142. T. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 209 (1986). For predictions that the Federal tax power would oppress the people, monopolize the sources of revenue, and thus destroy the state governments, see 3 J. Elliot, Debates on the Adoption of the Federal Constitution 55–57 (reprint ed. 1987) (remarks of Patrick Henry); 2 id. at 337–39 (remarks of John Williams and Melancton Smith).

143. See F. McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 264 (1985) (due to variations in wealth between states, requirement that direct taxes be apportioned by population "was so inequitable that, for practical purposes, it virtually denied Congress the power to levy direct taxes altogether."). Congress levied apportioned taxes on real estate and slaves once in 1798, for several years to finance the War of 1812, and once (on real estate only) at the outbreak of the Civil War. The statutes are collected in Springer v. United States, 102 U.S. 586,
able all the vast growth of Federal Government in this century. The American Taxpayer's Association understood this best; it responded to the New Deal by urging the repeal of the Sixteenth Amendment.\footnote{598-99 (1880). Short-lived nineteenth-century income taxes were not apportioned. Compare Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895) (invalidating unapportioned tax on income from property) with Springer v. United States, 102 U.S. 586 (1880) (upholding Civil War income tax as indirect excise tax).}

The Sixteenth Amendment worked as profound a change in American federalism as the Fourteenth. Yet it is not even mentioned in the leading constitutional law casebooks,\footnote{144. R. CAPLAN, supra note 31, at 68-69.} and it gets only a passing mention in the leading treatise.\footnote{145. I examined: P. BREST & S. LEVINSON, supra note 104; G. GUNTHER, CONSTITUTIONAL LAW (11th ed. 1985); W. LOCKHART, Y. KAMISAR, J. CHOPER & S. SHIFFRIN, CONSTITUTIONAL LAW (6th ed. 1986); and G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW (1986).} Bruce Ackerman asks rhetorically, "What possible relevance does the enactment of the Income Tax Amendment . . . have on the continuing vitality of Plessy's interpretation of the Fourteenth Amendment?"\footnote{146. L. TRIBE, supra note 29, § 5.2 at 300, § 5.9 at 318-19.} His implicit answer is "none whatever." That answer seems reasonable until you learn that for Ackerman, what undermined Plessy was "the New Deal's affirmation of activist government."\footnote{147. Ackerman, supra note 32, at 530.} The Sixteenth Amendment had everything do with the rise of an activist federal government, and the demand for activist Federal Government was part and parcel of the demand for activist government at all levels.

Direct election of Senators caused a fourth accretion to Federal power. When state legislatures elected United States Senators, and more to the point, when state legislatures re-elected or refused to re-elect United States Senators, one house of Congress was directly beholden to state legislatures. It is hard to imagine that a senator so elected could defy his legislature on a matter important to it. Direct election made it possible for the people to appeal directly to their Federal representatives without interference by their state legislatures, and for Federal representatives to appeal directly to the people without worrying as much about what state legislators might think. To the extent that expansion of Federal power might be limited by the institutional jealousy of state governments, the power of state governments was reduced.

It is hard to know the size of this effect, and I do not claim that it was large. The Amendment was debated on grounds of direct versus indirect democracy; legislative deadlocks and corruption in the choice of senators had become a scandal.\footnote{148. Id. at 530-36.} The progressive demand for direct election was related to the progressive demand for more responsive and activist government, but federalism implications as such appear to have played no role.\footnote{149. The historical facts in this paragraph are taken from R. CAPLAN, supra note 31, at 61-65.}
State legislatures, responding to popular pressure, called for a constitutional convention to consider the Amendment, and many state legislatures achieved de facto direct election through campaign pledges to support the candidate who got the most votes in a legally non-binding popular election. Resistance was concentrated in the United States Senate, where incumbents were threatened by a change in their electoral base. But the directly-elected successors of these senators had a different electoral base, and they owed little to their state legislatures. Whatever the original motivation, the Seventeenth Amendment is one more duly ratified shift of power from the state to the Federal level.

Thus, Nagel is right when he says that our understanding of federalism has shifted since 1787. He is wrong to give the judges much credit or blame for that. He is certainly wrong to suggest that there is something illegitimate about it. Technological revolution, Civil War, and constitutional amendments shifted vast powers from the states to the Federal Government. The American people fought and died and repeatedly voted to change the founders' understanding of federalism.

III. THE CRITIQUE OF SUPREME COURT OPINION WRITING

A. The Formulaic Constitution

Chapters 5–7 criticize the analytic techniques of Supreme Court opinions. Chapter 5 examines the rational basis test in equal protection doctrine, and chapter 6 examines standards of constitutional justification more generally. Chapter 7 generalizes further, examining the costs of the Court's compulsion to explain all of constitutional law in terms of multipart formulas.

Nagel's critique of form is powerful. Common to each of these chapters is a showing that the opinions often conceal or subordinate what is really at stake in a case. A statute may be condemned because it does not fit some rationale invented by lawyers for the state, even though it is perfectly rational for some other reason, not considered by the Court and sometimes not even argued by the state. A special case of this is a rational statutory compromise between conflicting purposes, condemned as irrational because it does not fit any of the purposes considered one at a time.

There is a similar propensity to focus on collateral issues at more demanding levels of review. The Court scrutinizes details of the fit between legislative means and legislative ends, often including wholly hypothetical ends, but it devotes much less attention to the importance and constitutional legitimacy of those legislative ends. The Court seems to think that

150. P. 105.
151. P. 112.
152. Pp. 88–90.
legislatures almost never have a bad idea, but that they have a terrible propensity to be overinclusive and underinclusive.

Of course the Court is not as stupid as Nagel's description of these opinions implies. When the Court ignores the real reason for a statute, it must be because the Court has decided that the real reason is of dubious constitutional weight or legitimacy. One of Nagel's better examples is \textit{Eisenstadt v. Baird},\textsuperscript{153} which invalidated a ban on the sale of most contraceptives to unmarried persons. That case is comprehensible only as a holding about the state's interest in deterring premarital sex. The Court had to find that interest either constitutionally illegitimate, or insufficient to justify imposing the risk of unwanted parenthood. Another of Nagel's examples is \textit{Erznoznik v. City of Jacksonville},\textsuperscript{154} which struck down a statute forbidding visible nudity in outdoor theaters. That decision is comprehensible only as a holding that the offense to neighbors and passersby is insufficient reason to justify burdensome regulation that might make some movies less available to customers desiring to see them.

Yet my account of these cases bears little resemblance to either opinion. In \textit{Eisenstadt}, the Court's opinion declared that less-than-absolute restrictions on the sale of contraceptives were not rationally related to any of the state's supposed goals. Nagel's analysis of this explanation is devastating.\textsuperscript{155}

In \textit{Erznoznik}, the Court said that nudity had been improperly singled out from other offensive speech on the basis of content,\textsuperscript{156} and that banning visible nudity was overinclusive as a means of protecting minors\textsuperscript{157} and underinclusive as a means of preventing traffic accidents.\textsuperscript{158} The Court did note that citizens in a pluralistic society must put up with offensive speech, that persons offended by movies could avert their eyes, and that the ordinance would deter the showing of movies with nudity.\textsuperscript{159} But these fundamental points were not presented as fundamental; they were presented as explication of the supposed main point about content discrimination.

Content discrimination cannot really be the main point in \textit{Erznoznik}; if it is, the opinion collapses in contradiction. The Court assumed that the state could restrict all offensive speech on the basis of its content, for offensiveness is a content-based category. Having assumed that, the Court forbade further content discrimination within the category. Thus, the holding that the state could not discriminate against nudity is inconsistent with the assumption that the state could discriminate against offensive

\textsuperscript{153} 405 U.S. 438 (1972).
\textsuperscript{154} 422 U.S. 205 (1975).
\textsuperscript{155} Pp. 88-90.
\textsuperscript{156} 422 U.S. at 211.
\textsuperscript{157} \textit{Id.} at 212-14.
\textsuperscript{158} \textit{Id.} at 214-15.
\textsuperscript{159} \textit{Id.} at 209-12.
speech. Moreover, the Court is surely not committed to either of these positions. The Court would never uphold a general ban on offensive speech.\(^6\) But it would uphold content discrimination against nudity in some contexts, including contexts with greater First Amendment significance. Consider the Court's likely reaction to nude guerilla theater on the Mall.\(^6\)

Nagel's demolition of these opinions merely highlights the real question. If the Court emphasizes reasons that are hard to take seriously, we must ask why the Court will not emphasize its real reasons.

Nagel is most effective in chapter 7, where he condemns "the formulaic Constitution." The modern Supreme Court tends to convert every constitutional right into a formula, usually a three- or four-part test. Most of the Court's effort is devoted to the essentially legislative task of devising these formulas, each to govern a large category of cases. Much less effort is devoted to deciding individual cases. The first step in any case not clearly subject to an existing formula is to choose the standard of review. The choice of a standard of review is generally divorced from the facts of the case, and often consumes the bulk of the opinion;\(^6\) applying the resulting standard to the facts is a tag end or a problem to be dealt with on remand.

This approach to opinion writing has many pernicious consequences. It substitutes dull and lifeless prose for the powerful language of the Constitution.\(^6\) It substitutes a regulatory perspective for a judicial one, a focus on a whole set of cases for a focus on this case.\(^6\) It produces abstract opinions—opinions that are abstracted both from the facts of the case and from the moral values at stake.\(^6\) It makes the issues before the Court seem technical, beyond the understanding of ordinary citizens.\(^6\) It compartmentalizes cases into a series of tests, or hurdles, to be considered one at a time. "The compartmentalization so characteristic of the formulaic style impoverishes the Court's moral discourse . . . ."\(^167\)

I would add some additional characteristics of the formulaic style, im-


\(^161\) See Erznoznik, 422 U.S. at 211 n.7 ("'No one would suggest that the First Amendment permits nudity in public places,'" (quoting Roth v. United States, 354 U.S. 476, 512 (1957) (Douglas, J., dissenting))); id. at 223 (Burger, C.J., dissenting) (nude actors in park or street could be prosecuted). For further analysis, see Levinson, Freedom of Expression in Contemporary American Constitutional Law, in LIBERTY OF EXPRESSION 45, 49-56 (P. Cook ed. 1990).

\(^162\) P. 148.

\(^163\) Pp. 126-27.


\(^165\) Pp. 150-53.

\(^166\) Pp. 139-42, 155.

licit in Nagel’s account but not emphasized. If the opinions are taken seriously, the effect of the formulas is to forfeit the advantages of the case method. The case method’s strength is that rules are built up inductively from the facts of individual cases. But these opinions develop the rule in the abstract, without being informed by the facts of the case, and then apply the rule to the facts. I do not believe the Justices really think in that order; I am sure their reaction to the facts still plays a major role. But that means only that the opinion is still further removed from their real reasoning.

Part of the appeal of the formulas is that they imitate careful and detailed legal analysis. To analyze a constitutional requirement—in the formal sense of “analyze,” meaning to break the requirement down into its non-overlapping component parts—is a useful step. Law teachers constantly struggle to get their students to do this. Such analysis can focus attention on issues that might be confused or overlooked, and clarify what various arguments and items of evidence are intended to prove. Even when a formula merely identifies the important separable elements in a balancing test, it can usefully structure the inquiry.

But few of the Supreme Court’s formulas do either of these things. The formulas are often constructed from snippets of old opinions, with each snippet erected into an independent test. Nagel illustrates this process when he traces snippets from *National League of Cities* into the short-lived four-part test for Federal regulation of state and local employees. I have illustrated the process elsewhere by tracing the origins of the Court’s establishment clause formula. Such snippets did not originate as a coordinated test and are unlikely to be either cumulatively complete or mutually exclusive. They were not designed as a formula, and their character is wholly changed when they are converted into one. In the establishment clause example, creation of the formula changed the substantive meaning of the snippets. Phrases that originated as explanations of neutrality were converted into separate elements of a test that seemed to forbid any significant benefit to religion, even where the effect of withholding a benefit was to inflict disproportionate harms.

Creating formulas out of snippets of old opinions has the advantage that there is a pre-formula period when the Court visibly grapples with the facts of cases. The formula is derived from the snippets that emerge from that grappling. But increasingly, the Court bypasses this process and artificially constructs a multi-part test out of its head, as in Nagel’s examples of opinions devoted to choosing the standard of review. Neither

method has resulted in formulas that can plausibly claim to capture the essence of the constitutional clause allegedly being interpreted. That is the ultimate problem with the formulas. They lack "persuasiveness as an interpretation of constitutional text."\(^{172}\)

Again there are counter-examples—opinions that address the issue and the competing interests more openly.\(^{173}\) It is even possible to describe the dominant pattern differently; Alex Aleinikoff describes modern Supreme Court opinions as establishing an age of balancing.\(^{174}\) Nagel and Aleinikoff legitimately cite many of the same opinions, because a frequent element of the Court's multi-part test is some threshold requirement for the weight or substantiality of the government's interest. Aleinikoff emphasizes the requirement of a substantial interest and sees balancing; Nagel looks at all three or four requirements and sees a formula. They are both right.

But Nagel has captured something important about why Supreme Court opinions are so often unsatisfying. The effect of breaking balancing tests into separate assessments of the weight of the state's interest, the fit between ends and means, the burden on the constitutional right, the possibility of less restrictive means, and so on, is to subordinate and obfuscate the striking of the balance. The Court prefers to rest its decision on one of the other elements of the formula; it rarely strikes down a law on the stated ground that the government's interest is not sufficient.

There are several reasons why Supreme Court opinion writing has taken its modern turn. The legislative tone of the opinions is partly an inevitable response to the difficulty of supervising all of Federal law, administered by thousands of state and Federal judges, through a mere one hundred fifty opinions each year.\(^{175}\) The Court may have decided that working out the law slowly through the case method is a luxury it can no longer afford.

Another reason is that the Justices work under difficult conditions. Opinions with odd explanations and opinions avoiding the real issue must partly reflect the difficulties of group decision-making\(^{176}\) and the intense time pressures at the end of each Term. The Justices may be confident of a result, and able to agree on a result, without being able to think through or agree on every step of the explanation.

Another cause is that most constitutional law casebooks are forced by coverage pressure to print only a small part of most opinions. The Court's formulas always survive the editing process. Supreme Court clerks mas-

\(^{172}\) P. 143.

\(^{173}\) Pp. 98-102.


\(^{176}\) See supra text accompanying notes 25-26.
tered those formulas and were rewarded with high grades; the formulas may be the only way they know of doing constitutional law. In chambers where the clerks write the opinions, the formulaic Constitution may be self-perpetuating.

Each of these reasons contributes to the problem of the formulaic Constitution. But I am not convinced that they explain the persistence with which the Court de-emphasizes what is really at stake in cases. What does explain it is the widespread failure to recognize the analytic structure of constitutional rights.

B. The Structure of Constitutional Rights

The persistent theme in Nagel's three chapters on the Court's opinions is that the Court tends to avoid talking about the central issue in its cases. It almost never says that a legislative goal is constitutionally illegitimate; only occasionally does it say that a legislative goal is not important enough to override an apparent constitutional right. It rarely says such things because to do so invites attack from a host of scholars who believe that the Court is not supposed to decide questions of substantive value. Nagel's book is merely one manifestation of that belief.

If the Court cannot admit to deciding anything important, it can shield itself by talking about whether means fit ends, whether the issue is one that requires a compelling fit, or a tailored fit, or merely a rational fit, and so on through all the dreary prose of the formulaic Constitution. But however it writes the opinion, the Court cannot avoid deciding whether the legislative goal is constitutionally legitimate and important. Those are the questions ultimately committed to judicial review. There is no reason to second-guess legislators on whether legislative means achieve legislative ends. But there is every reason to second-guess legislators on whether they have interfered with constitutional ends. As another reviewer noted, the rational and effective pursuit of evil is still evil, so that rationality and means-ends scrutiny offer "specious protection" of constitutional rights.

Nagel's account is not that different from mine, except that he thinks the disabling attacks on the Court are legitimate. He sees the formulaic Constitution as an attempt to conceal judicial discretion and to fit the opinions somewhere between formalism and realism, both of which he considers discredited. He thinks that "mechanical" appeals to the constitutional text "have long been discredited as aridly conceptualistic and

178. Lupu, supra note 41, at 956.
179. P. 147.
180. P. 129.
hopelessly literalistic," while "bald 'balancing' tests . . . too obviously separate the Court from its sources of legitimacy.\textsuperscript{181} He appears to assume that all appeals to text are mechanical, and that all balancing tests are bald. But the claim that balancing tests separate the Court from its sources of legitimacy is an unexplained ipse dixit.

A hint at the explanation appears in another passage, on the structure of constitutional rights. Nagel is perplexed that a wide array of constitutional doctrines fit into the same analytic pattern: "[T]he government must justify its rules by articulating a sufficiently important purpose and by demonstrating that the rule in some degree will actually achieve that purpose."\textsuperscript{182} He finds it implausible that all the different clauses of the Constitution "could be anchored in some single generic value."\textsuperscript{183} Thus, the Court's recurring approach to constitutional interpretation cannot be so broadly applicable, and must not be derived from the Constitution.

Of course it is implausible that all constitutional rights serve the same generic value. But it is not implausible that all or most constitutional rights present an analytically similar question of justification. Each guarantee of a constitutional right forbids government to do something. Usually the prohibition is stated in sweeping terms, and often in absolute terms. The Court might have enforced these prohibitions literally, disabling government from ever abridging speech or impairing a contract, no matter how great the need. But that would have been unworkable, discrediting judicial review and forcing defiance or constitutional amendment. Instead, the Court has implied exceptions.

It is only with respect to these implied exceptions that the common analytic pattern emerges. The first step in constitutional adjudication is to decide whether the challenged government action falls within the scope of one of the Constitution's prohibitions. The pattern that so puzzles Nagel does not apply to this step of constitutional analysis. The Court asks very different questions in deciding whether a challenged statute abridges speech, or prohibits free exercise, or impairs the obligation of a contract, or discriminates between two persons similarly situated. These questions do reflect the variety of values that underlie different constitutional rights.

But once one of these questions is answered in the affirmative—once the Court finds an apparent violation of one of the Constitution's sweeping prohibitions—then we get to the recurring pattern of analysis that so puzzles Nagel. Then the question is: Is there a governmental need so important that it justifies an implied exception to an expressly absolute constitutional right? That is the question in speech cases, in religion cases, in contract clause cases, and in equal protection cases. Sometimes the stan-
standard is modified because the prohibition is not absolute. Judicial process need be only that which is "due;" searches must be not "unreasonable"; takings must be with compensation that is "just." In these clauses, the standard of justification is reduced, but the form of the question is the same—is there justification for the government's action sufficient under the standard stated in the relevant clause? Sometimes the constitutional prohibition is implied from more general provisions, as in the family and sexual autonomy cases. But once such a prohibition has been implied, and a case falls within its scope, the question of justification takes the same form.

Thus, sweeping prohibitions subject to implied exceptions for reasons of necessity form the structure of constitutional rights. One of the Court's essential tasks is to decide governmental claims that it is necessary to make an exception to some apparent constitutional right. It is not at all surprising that the Court approaches all these claims by asking whether the benefits to the government justify the exception.

What is surprising is that the standards vary as much as they do. Elsewhere Nagel wonders why some implied exceptions require compelling reasons, some substantial reasons, and some merely rational reasons. He is right to wonder about these varying standards of justification; they are textually inexplicable. When the standard for justifying implied exceptions to textually absolute rights varies from toothless rational basis to strict-in-theory but fatal-in-fact, the Court is simply picking and choosing the constitutional rights it wants to enforce.

The proper standard for implied exceptions to absolute rights should be something like the compelling interest test. An implied exception to a textually absolute right should be an extraordinary thing. We have learned from experience that "no law" cannot literally mean no law. But "no law" should mean hardly any law—as few laws as possible. Courts should adhere as closely as possible to the text they are enforcing.

Whatever the standard of justification, the structure of constitutional provisions leads directly to a certain kind of balancing. Obviously I do not mean balancing in which the commands of the Constitution are reduced to good advice, in which the Constitution is just one interest among many. This is the sort of balancing that Alex Aleinikoff so effectively condemns. Rather, I mean that the justification for implied exceptions to constitutional rights inevitably depends on the urgency of the need for the exception and on the importance of the exception to the constitutional right. Courts should ask whether the cost of enforcing the apparent constitutional right in each case is so grossly disproportionate to the constitu-

184. P. 153.
tional benefit that it would be essentially intolerable to enforce the text absolutely.

Aleinikoff argues that such implied exceptions to constitutional rights do not require balancing at all. But in this I think he errs. Courts will inevitably create exceptions in such compelling cases, and the exceptions will be narrowest if they are explained in precisely the terms that motivate the Court. If we require the Court to invent "principled" reasons broad enough to include all the exceptions it feels compelled to make, the result will be ill-fitting proxies that sweep in less compelling exceptions as well. Aleinikoff's insistence that the Court avoid balancing even in such extreme cases mirrors Nagel's attack on balancing from the other side of the political and jurisprudential spectra, and it produces similar pressures to avoid discussing the real reasons for decision.

Far from separating the Court from its sources of legitimacy, balancing is inevitable. Balancing is the restrained judicial response to the sweeping and often absolute constitutional text. Explicit balancing tends to force the Court to deal with the facts of each case before it, and thus tends to reinforce the virtues of the case method, although the Court can balance in broad categories when it chooses.

Honest balancing would not eliminate multi-part tests, although I think it would make them fewer and simpler, and it would certainly make them more candid. There would be much less talk of fit between means and ends, and much more talk about the value choices that drive decisions. Honest balancing would force the Court to talk about the value of the constitutional right and the way in which and the extent to which the challenged government action impairs the right. Government goals that depended on a rejection of the constitutional right would be illegitimate, and the Court would sometimes have to say so. More often, government goals would be legitimate, but not important enough to justify overriding an express constitutional right, and the Court would have to say that. Sometimes, the goal would be legitimate and important, but the challenged statute would not benefit the goal enough to justify overriding the constitutional right. Only this last set of cases bears any resemblance to means-ends scrutiny. And even here the resemblance is superficial. The ultimate issue in such cases is whether the statute does enough good to justify implying an exception to the express constitutional right. The fact of an express constitutional right should weigh very heavily in the balance; it should take a powerful showing of necessity to imply an exception.

When the Court condemns a statute as irrational, or ill-suited to its ends, it denigrates the statute and avoids the need to consider competing

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186. Id. at 999-1000.
interests. If instead the Court conceded that even unconstitutional statutes usually serve plausible ends in a plausible manner, holdings of unconstitutionality would require renewed explanation of the importance of the right at issue and why it is that only the most compelling interests can override it.

The Court rarely writes its opinions this way. Too many critics have said the Court is not supposed to decide which goals are legitimate and which are important. Certainly the political branches have a much more general mandate to decide what is important. But in the context of constitutional rights, legitimacy and importance are at the core of what courts must decide, and we would all be better off if they did it explicitly.

IV. CONCLUSION

Nagel powerfully describes the results of the Supreme Court’s efforts to hide the ball, and he sometimes even sees that hiding the ball is part of the problem. But his solution would be to abandon the ball game. He does not see that the ball should be out in the open. He cannot see the legitimacy of balancing, because he does not see the structure of constitutional rights. He does not see how constitutional law repeatedly requires the Court to demand justification for the need to invade sweeping constitutional prohibitions. He does not see the structure because he does not see the sweeping prohibitions in the first place. He does not see sweeping prohibitions because he refuses to take them seriously—because he considers sweeping prohibitions too “general and cryptic” to be credited.

Nagel cannot understand vigorous judicial review because he sees so little meaning in the constitutional text, and he places so little value on the rights of individuals. Not surprisingly, it is hard to explain an institution without considering its principal source of authority and its principal reason for existence.

188. P. 126.