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## "Terminator 2 1/2": The Constitution in an Alternate World.

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# “TERMINATOR 2½”: THE CONSTITUTION IN AN ALTERNATE WORLD

*Daniel A. Farber\**

*[The computer] was so certain that time displacement could save it from defeat that it had sent two terminators through: one in 1984, and one now. . . . Remove two human beings like pieces out of a puzzle, hoping the new historical pattern that emerged after will be more in its favor. Editing the past to change its present.*

Randall Frakes, *Terminator 2:  
Judgment Day* 156<sup>1</sup>

LETTER FROM THOMAS JEFFERSON TO JOHN ADAMS,  
JULY 2, 1826

. . . As the End approaches, old friend, I cannot help but reflect on the mysterious Death of mister Madison. In the years that have gone by since that day, I have collected and assayed the testimony of many of the Witnesses. There was much Confusion. Several speake of a Man all dressed in leather and with Dark eye glasses of a forbidding aspect. Others claim to have seen feats of amazing Strengthe, and say that he did lift a horse to clear a path to our Friend. Yet Men are prone to imagine Horrors and among those who live in Cities the tendency to alarms and panic is great indeed. All that we can know for fact is that a man jumped from the crowd and fired many bullets into the helpless figure of our Friend.

Thus was his corporeal existence Terminated. How or why will never be knowne. Little wonder that Congress soon removed itself from the dangers and Crimes of New York to a safer seat of Government.

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\* Henry J. Fletcher Professor of Law, University of Minnesota. Thanks are due to Dianne Farber, Phil Frickey, Mike Paulsen, and Suzanna Sherry for helpful comments.

Non-historians should note that certain bill of attainder cases—*Garland, Missouri v. Cummings*, and *United States v. Brown*—are described or quoted in the text without any modification of the “real” versions. The same is true of *Chisholm v. Georgia* and of the description of ante-bellum views of the Privileges and Immunities Clause.

This article is dedicated to the post-contemporary philosopher Jean-Luc Picard.

1. Bantam Books, 1991.

Poor Jemmy! If only he had lived. How History would have been different we cannot know in Detail but we cannot doubt.

\* \* \* \* \*

ANNALS OF CONGRESS, JUNE 8, 1789

THE SPEAKER addressed the House concerning the death of the Honorable Representative from Virginia, Mr. James Madison.

MR. SHERMAN We must all mourn the passing of one of the first Architects of our Nation. His role in the construction of our constitution is known to all present. We must carry on in the spirit in which he set forth.

If Mr. Madison had lived, he planned today to request that the House go into a Committee of the Whole to consider amendments to that document, or that a select Committee be appointed to consider the Matter. As he was wont to say, such amendments may on the whole have a salutary effect, and he was of the view that it would be highly political and proper in itself for the tranquility of the public mind that we should offer some such protections to be incorporated into the system of government. He had written a brief draft of these amendments, which I have brought with me today for the purpose of moving that the House refer them to the Committee of the Whole.

ELBRIDGE GERRY With the greatest of respect to the late Member, urgent business faces this House regarding the revenues and government of the United States. In the original drafting of the Constitution Mr. Madison built better than perhaps even he knew, and to amend the building in haste is no fit tribute to the original architect who designed the plans. I move that the main motion be laid upon the table.

Upon a taking of the ayes and nays, the ayes had it, and the motion was laid upon the table.

\* \* \* \* \*

DANIEL FARBER & SUZANNA SHERRY, *A META-HISTORY OF THE AMERICAN CONSTITUTION* (1990), pp. 230-231.

Madison's death was a turning point. His bereft widow, lacking other resources, opened a bakery with the assistance of friends, and became famous as the creator of the confections for children that are known by her name even today. Spurred on by popular revulsion at his death, the Jeffersonians were successful in organiz-

ing a new party, and seized power from the Federalists in the Presidential election of 1801.

With the fateful death of Madison, the one real opportunity for a national bill of rights passed. The Federalists remained unconvinced of its necessity, insisting as they always had that the limited powers of the new government would not extend to the violation of individual rights. For the Anti-Federalists, the demand for a bill of rights had never been much more than a makeweight. Perhaps, if Madison had lived, he would have felt bound by his own promises to promote the passage of a bill of rights. Ironically, his death made a bill of rights less likely than ever. Many assumed that his unknown assailant was an embittered opponent of the Constitution. In the aftermath of his mysterious death, Madison became known as the "Martyr of the Constitution." Any change in the original document—which was often referred to as "our Perfect Constitution"—was subject to popular attack as an affront to the memory of the Martyr.

As the years went by, and the Constitution remained unamended, the very idea of amending the Constitution became more and more unthinkable. When the Supreme Court shocked the nation in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), by holding that an individual could sue a state in federal court, there was much muttering about a constitutional amendment, but there was even greater support for impeachment of the Justices. The Court hastily granted rehearing and overruled its prior decision. The one aspect of *Chisholm* to have permanent effect was its reliance on the Preamble (2 Dall. at 464, 474-76), which might otherwise have been dismissed as "window dressing."

Even in the aftermath of the Civil War, the few amendments proposed by Radical Republicans were unsuccessful. A proposed amendment to abolish slavery foundered, as Congress preferred to rely on the War Power and Guarantee clauses of the Constitution as the basis for reconstructing the South. The majority of Republicans believed amendments to be unnecessary. They agreed with Senator Trumbull that the Privileges and Immunities clause of Article IV already established that "the rights of a citizen of the United States were certain great fundamental rights, such as the right to life, to liberty, and to avail one's self of all the laws passed for the benefit of the citizen to enable him to enforce his rights." *Cong. Globe*, 39th Cong., 1st Sess. 600 (1866).

If Madison had lived, things might have been very different. As it is, to this day, the document stands just as it did at the end of the summer of 1787.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE  
UNITED STATES (1820)

Article III of the Constitution, section 2, paragraph 3, states that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." To the uneducated sense of the lay person, this might seem only a matter of procedure at Trial. But those who were responsible for its adoption understood it differently, as would all who know the sorry history of English state trials. What avails it to have a jury at the trial, if the whole matter be settled by a confession twisted from the unwilling defendant by torture or threat? The true trial would then take place, not before the jury, but in the dark interrogation room of the gaol. Even in the case of treason, the Framers in their wisdom required in Article III, section 3, clause 1, that any conviction not grounded on the evidence of two witnesses be based on "Confession in Open Court," so as to guard against the destruction of the right to jury trial through secret interrogation of the prisoner. In cases less grave, an out-of-court confession may be admitted, but only if made without coercion; otherwise, the right to jury trial would be negated. And so also, if the matter be settled by papers seized from the defendant without any proper cause, or if the defendant be denied the use of counsel with whom to address the jury, or the right to bring witnesses before the jury and to question those appearing against him, so that the jury is denied knowledge of his cause. True trial by jury means trial according to the accustomed course of common law, with the rights of procedure that have been the due process of our law. So it has been understood since Magna Carta, and so it was understood by the founders of our Nation. For their solemn pledge was that the Constitution contained within it the rights of free citizens, so that the power of the government was limited by those inherent and inalienable rights.

\* \* \* \* \*

*STRAUDER V. WEST VIRGINIA*  
100 U.S. 303 (1880)

[Strauder, a black defendant, was convicted of murder by a jury from which blacks were excluded under state law. The issue before the Court was the constitutionality of the state statute.]

JUSTICE STRONG delivered the opinion of the Court.

\* \* \*

The defendant argues that the statute removing members of the negro race from jurors is a bill of attainder. We are constrained

to agree. In *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866), we held unconstitutional a state law that required priests to take an oath that they had never aided the late rebellion. The Court explained the scope of the clause:

The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of convictions upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment. 71 U.S. at 320.

In *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866), we held that even Congress could not require a similar loyalty oath by attorneys practicing in the federal courts. We have no doubt that such an oath could never be required of jurors. If, then, it is clearly unconstitutional to deprive a person by statute of fundamental rights on the basis of their past misconduct, how much more unconstitutional it must be where the basis of denial is not any conduct of their own, but only the circumstances of birth.

The appellee argues that disabilities based on race cannot be bills of attainder since slavery was itself contemplated in the Constitution. But slavery, when it existed, was based on the lack of citizenship of the slaves. Lacking legal personhood, they could not enjoy the protection of the rights granted by the Constitution to others. Congress, in the exercise of its power in Article I, sec. 8, clause 4, to establish uniform laws of naturalization, has made citizens of all those unfortunates who were formerly held as slaves. Having become citizens, they are now entitled to the full protection of the Constitution, and can no more be subjected to bills of attainder, ex post facto laws, or impairments of contract, than any other citizens. And those who were not slaves themselves but only children of slaves must in the future have the full rights of citizens, of which not even Congress could deprive them, for under Article III, section 3, even conviction for Treason, let alone anything else, can not "work Corruption of Blood." All distinctions based on ancestry are wholly repugnant to the Constitution, which bans not only punishment of the son for the sins of the father, but also elevation through any title of nobility.

The legislature in this case has imposed a grave disability and stigma, not on those who have been adjudicated to have violated some previously enacted statute, but on a class singled out by the

legislature for disapproval. For the legislature to attain an entire race is as much if not more a violation of the clause as for the legislature to attain a named individual or a group such as the supporters of the rebellion. This Court, which has defended even the rights of those who sought to overthrow the Constitution in the name of slavery, must stand steadfast against violations of the rights of those whom the late rebels sought to hold in chains.

\* \* \* \* \*

THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL  
LIMITATIONS (1868), pp. 167-68.

The protection of property being, as the Framers well understood from their study of Locke, one of the foundations of legitimate government, it cannot be thought that the right of property would be left unguarded by the Constitution. As the Dartmouth College case established, the Constitutional protection against impairment of the obligation of contract is not limited to private debts, though that may have been the concern that originally prompted the drafting of the clause. Rather, the clause extends to all agreements made by the states, whether in the form of agreements for the repayment of money, corporate charters, or grants of property.

Common sense concurs that the clause cannot be limited to any particular legal form of undertaking by the state. It would be of little use to have a constitution that protected against a modification of the charter of Dartmouth College, if the state could have achieved the same goal by seizing all of the property of the college without compensation, and then remitting the property to a newly chartered corporation more agreeable to the legislature. Implicit in every grant of property by or under state law is the undertaking of the state to respect the ownership of that property. That undertaking is, of course, subject to the police power where the use of property would be contrary to the public health, welfare, or morals, and it leaves the state with the power to purchase the property over the owner's objections at fair market price. But whether or not the state has explicitly so stated, it can never be presumed to have reserved the power to arbitrarily destroy property or eliminate its value. It is the office of the Contract Clause to protect that implicit understanding.

As the great Chancellor Kent understood, legislation in civil society must be based on the twin principles deriving from the limits on the temporal jurisdiction of the legislature: First, that which was neither a crime nor a basis for culpability when the act was done

cannot be made so afterward; and second, property once lawfully gained cannot afterwards be arbitrarily denied. These fundamental principles need not be explicitly stated to remain valid, but the Contract Clause is an implicit ratification of them.

\* \* \* \* \*

*LOCHNER V. NEW YORK*  
198 U.S. 45 (1905)

[A New York statute prohibited the employment of bakery employees for more than 10 hours a day or 60 hours a week. The statute was attacked as a violation of the Contract Clause and the Privileges and Immunities Clause of Article IV.]

JUSTICE PECKHAM delivered the opinion of the Court.

\* \* \*

The statute necessarily interferes with the right of contract between the employer and employees. As to all employment relationships already in existence it relieves the employees of their obligation to perform the hours of service required by their contract; we need not consider in the present case whether it also impairs an implicit undertaking of the state to uphold the liberty of its citizens. As to even future employment relationships, it deprives the individual of one of the great "privileges and immunities of citizens of the Several states." For that clause has long been understood to encompass the fundamental rights of free citizens. In *Corfield v. Coryell*, 6 Fed. Cas. 546, 551-52 (C.C.E.D. Pa. 1823), Justice Washington said that this clause included "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states." Among those rights were "Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole." The right to pursue a lawful occupation as one sees fit, and to enter into a contract with one's employer, is thus such a fundamental right. The question then, is whether the power of police described in that last clause provides a justification for the statute before us.

[The Court held that the purported health justification for the statute was specious.]



*GITLOW V. NEW YORK*  
268 U.S. 652 (1925)

[The defendant was convicted of criminal anarchy. The majority held that he was properly convicted, inasmuch as he had gone beyond abstract academic discussion of revolution and had advocated the overthrow of the government.]

JUSTICE HOLMES, dissenting. Mr. Justice Brandeis and I are of the opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the privileges and immunities clause of Article IV, in view of the scope that has been given to the word "immunities" as used there. [Holmes here cited *Lochner* and *Corfield*.] Even as to the federal government, the Framers took care to cabin the national power to punish sedition. The Constitution allows Congress to punish treason only if there are two witnesses to an overt act. That prohibition would be a nullity if anything less than a criminal attempt to overthrow the government could be punished, for Congress could then call Treason by another name and define the offense as it chose.

To rise beyond mere preparation to the level of a punishable attempt, an act must give rise to a clear and present danger of harm. \*\*\* If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, it was an incitement. Every idea is an incitement. It offers itself for belief, and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration.

\* \* \* \* \*

*EVERSON V. BOARD OF EDUCATION*  
330 U.S. 1 (1947)

[This case involved a state law providing free bus transportation for children at parochial schools.]

JUSTICE BLACK delivered the opinion of the Court.

\* \* \*

A large proportion of the early settlers of this country came

here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. \* \* \*

These practices of the old world were transplanted to and began to thrive in the soil of the new America. \* \* \* They became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. [Justice Black then discussed the controversy in Virginia in 1785-86, in which Jefferson and Madison led the fight for religious freedom, and Madison wrote his famous Remonstrance against the law.]

This Court has previously recognized that the provisions of the Constitution, in the drafting and adoption of which Madison played such a leading role, were intended to provide the same protection against governmental intrusion as the Virginia statute. That is undoubtedly what the “martyr of the Constitution” meant by the “blessings of liberty” in the Preamble, and why all religious tests for office were forever banned in Article VI, section 3. The separation of church and state was also clearly a part of the “republican” form of government guaranteed the states, by Article IV, section 4. In previous cases, this Court has recognized that a republican government is necessarily a non-theocratic government, and that such a government could neither establish a religion nor impair the free exercise of religion.

The “republican form of government” clause means at least this: No state can set up a church. Nor can it pass laws which aid one religion, aid all religions, or prefer one religion over another. And what the states cannot do under that Clause, the federal government is also without power to do under Article I, for as the supporters of the Constitution made clear, the enumerated powers of the government did not extend to regulation of the press or to the subject of religion.

\* \* \* \* \*

*BROWN V. BOARD OF EDUCATION*  
347 U.S. 483 (1954)

[This opinion concerns four cases from Kansas, South Carolina, Virginia, and Delaware, in which school segregation laws had been challenged.]

CHIEF JUSTICE WARREN delivered the opinion of the Court.

\* \* \*

In the first cases in this Court after the civil war construing the Bill of Attainder Clause, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. [The Court here cited *Strauder*.] The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in *Plessy v. Ferguson*, involving not education but transportation.\* \* \*

In approaching this problem, we cannot turn the clock back to 1789, when the Constitution was adopted, or even to 1896 when *Plessy* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools imposes a bill of attainder on these plaintiffs.\* \* \*

We come then to the question presented: Does segregation of children in public schools solely on the basis of race . . . deprive the children of the minority group of equal educational opportunities? We believe that it does.\* \* \* To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. Whatever may have been true when *Plessy* was decided, today it is clear that segregation imposes a disability and a stigma on the affected class, and therefore violates the constitutional prohibition on state bills of attainder.

[In a companion case, *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Court held that segregation within the District of Columbia violated the bill of attainder clause of Article I, section 9, which applies to the federal government rather than the states.]

\* \* \* \* \*

DANIEL FARBER & SUZANNA SHERRY, A META-HISTORY OF  
THE AMERICAN CONSTITUTION (1990), pp. 256-57.

The climax of economic libertarianism occurred in the early 1930s, when the Court struck down important New Deal legislation. President Roosevelt then proposed to "pack" the Court with additional appointees. Although his proposal was rejected by Congress, his view of the Constitution triumphed, first because of a switch in the views of a key justice and then because of new appointments. As a result, for many years the Court almost entirely withdrew from judicial review of economic regulations. It also left Congress free to regulate areas previously left to the States. In the

famous footnote 4 of *Carolene Products*, the Court drew a distinction between ordinary legislation and that contravening the rights of "discrete and insular" minorities, violating specific constitutional guarantees, or impairing the democratic process. That distinction was to prove fruitful in the years ahead.

Gradually, the Court began to assume a new role as the guardian of other individual rights, especially as against state governments. As early as the case of *Palko v. Connecticut*, the Court had held that the privileges and immunities clause incorporated those rights inherent in ordered liberty, relying in part on the intent of the Framers to "establish Justice," in the words of the Preamble. However, the Court rejected Justice Black's argument that specific protections—such as the Article III right to jury trial—were "incorporated" or "transplanted" into the Privileges and Immunities Clause of Article IV.

Justice Black was never successful in selling his view of total transplantation, but the Warren Court held that the jury trial right was itself fundamental. This set the stage for the "transplantation" doctrine, under which various decisions construing the federal right to a jury trial were transplanted as interpretations of the Privileges and Immunities Clause of Article IV. Those rights included all of the various non-adversarial, inquisitorial methods of proof such as coerced confessions (construed broadly in *Miranda v. Arizona* to include any confession unaccompanied by specified warnings), unreasonable searches (a violation of the jury trial right under *Mapp v. Ohio*), and the assistance of counsel, at government expense if necessary (*Gideon v. Wainwright*).

*Carolene Products*, with its emphasis on freeing the channels of majority rule, naturally called to mind the mandate of the Guarantee Clause. Early decisions by the Stone Court made it clear that the obligation of "the United States" to "guarantee to every State in this Union a Republican Form of Government" was binding on the Courts as well as on the political branches. Only as to the question of identifying the legitimate state government, which had early on been held to be a political question, were the courts powerless.

In a series of cases involving the State of Texas, the Court made it clear that disenfranchisement of racial groups was incompatible with "our society's evolving view of the nature of republican government." In the capstone of these cases, the so-called Jaybirds Case, the Court held that a de facto delegation of electoral power to a private group did not constitute a republican form of government.

The Warren Court made even more expansive use of the clause. In the famous one-person, one-vote decisions, it held that

malapportionment was unrepugnant and therefore unconstitutional. It upheld the Voting Rights Act of 1965 and subsequent amendments as Congressional implementations of the clause.

Building on the Holmes and Brandeis dissents of an earlier era, the Warren Court also aggressively protected freedom of expression. As Justice Cardozo once said, this freedom is as much “instinct within the entire document” as found in any particular provision. *Carolene Products* made clear that free expression on political matters is inherent in the scheme of democratic majority rule established by the Constitution, which could hardly function if the public were unable to discuss political matters.

Other provisions of the Constitution have also been invoked in support of free speech. For example, as early as *Near v. Minnesota*, the Court held that a prior restraint on speech violated the right to jury trial found in Article III and transplanted by the Privileges and Immunities Clause of Article IV. Historically, one key function of jury trials was to protect dissenters, and that function would be critically undermined if courts were allowed to use their equitable powers to suppress speech.

The Privileges and Immunities Clause—once characterized by Justice Holmes as “the last resort of constitutional argument”—has also been utilized to protect freedom of speech. In *United States v. Brown*, 381 U.S. 437 (1965), the Court struck down a statute making it a crime for a member of the Communist Party to be a labor union officer. Chief Justice Warren’s opinion remains today as a leading discussion of the Bill of Attainder Clause. Rejecting the argument that the statute was not a bill of attainder because it affected so large a group, the Court said “the decisions of this Court, as well as the historical background of the Bill of Attainder Clause, make it crystal clear that these are distinctions without a difference.” Quoting Alexander Hamilton, the Court said:

Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. . . . If the legislature can disenfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense. [381 U.S. at 444].

Thus, the Court said, "the Bill of Attainder Clause reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling on the blameworthiness of . . . specific persons."

Recently, conservatives have attacked many of these decisions as unwarrantedly "creative" readings of the Constitutional text. In response, some liberals have invoked the idea of a "living Constitution," arguing that since amending the Constitution has proved completely impossible, only judicial creativity can keep the Constitution in tune with changing times. Other liberals rely on the original intent of the Framers. The Federalists made it clear, they argue, that no bill of rights was required because the federal power lacked the power to invade fundamental individual rights. Thus, even what seem to be broad grants of power—such as the power of general legislation in the District of Columbia—must be seen as carrying inherent limitations. After all, the individuals ratifying the Constitution could hardly have believed that they were giving the new government power to reenact such ancient practices as burning religious dissenters at the stake, even within the seat of government. Conservatives, on the other hand, point to what they see as the lack of textual support for modern judicial decisions. They also argue that whatever limits the Framers may have meant to impose on the federal government implicitly, they imposed only a few very specific limitations on the states.

In response, some scholars have suggested that constitutional law has resulted from a creative interplay of history, text, and evolving social norms. Ultimately, practical reason mediates between the anchoring tendencies of text and history, and the dynamic pull of the legal system's aspiration toward justice.

In the meantime, some critical legal scholars argue that the language and history of the Constitution have little to do with the outcomes of cases. As one critical legal scholar has argued:

Perhaps more than any area of the law, constitutional law reveals the indeterminacy of liberal legal thought. While purporting merely to rely on the rules laid down in the Constitution, the open texture of Constitutional language has given the Court free rein to create doctrinal results inspired more by ideology than by history or text. The plasticity of the legal materials allows them to be molded toward any politically desired goal.

On the other hand, Morris Zapp, a prominent literary theorist, argues that the critical scholars are right about the indeterminacy of texts but wrong about the implications:

A text means nothing without a reader. It means different things

to different readers. So far, the Crits are right. But no reader simply *decides* what the text means. Consider the broad protection of individual rights, which generations of judges have found in the Privileges and Immunities Clause and the Bill of Attainder Clause. Other readers, in other contexts, might have read these as no more than technicalities. Our judges, from almost the beginning, read them as foundations of individual liberty. But this does not mean that they *decided* how to read these clauses, as if they had a menu of interpretations to choose from. They had to read those clauses from their own standpoint, from the standpoint of American lawyers, trained in a certain commonlaw tradition in which the line between technicalities and fundamentals has never been clear to begin with. They read the Constitution to embody a concept of limited government and individual freedom. How else could they have read it, being who they were? What choice did they have? What other interpretation *could* they have found? There was never any moment when they were free to choose.

\* \* \* \* \*

*ROE V. WADE*  
410 U.S. 113 (1973)

[The issue before the Court was the constitutionality of the Texas abortion law, which prohibited all abortions except those performed to save the life of the mother.]

JUSTICE BLACKMUN delivered the opinion of the Court.

\* \* \*

The Constitution does not explicitly mention any right of privacy. But the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the jury trial clause and its implied prohibition of unreasonable searches, *Stanley v. Georgia*; in the Preamble's language concerning the Blessings of Liberty; in the concept of liberty guaranteed by the privileges and immunities clause of article IV, *Meyer v. Nebraska*, 262 U.S. 390 (1923); in the special protection granted by the contract clause to consensual relationships such as marriage, *Loving v. Virginia*; in the bill of attainder clause, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); and in the penumbras of all these clauses, *Griswold v. Connecticut*, 381 U.S. 479 (1965). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" [*Palko*] are included in the guarantee of personal privacy. They also make it clear that the

right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.

This right of privacy, whether it be found in the Privilege and Immunity Clause’s concept of personal liberty, as we feel it is, or as the District Court determined, in the Preamble, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. \* \* \*

\* \* \* \* \*

“The Past is Prologue.”