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On Reading the Constitution

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ON READING THE CONSTITUTION. By *Laurence H. Tribe* and *Michael C. Dorf.* Cambridge: Harvard University Press. 1991. Pp. 144. $18.95.

In *On Reading the Constitution,* Laurence H. Tribe[1] and Michael C. Dorf[2] endeavor to dissect various contemporary approaches to constitutional interpretation. The book makes a constructive contribution to understanding and critiquing competing theories of interpretation but offers no satisfactory substitute that would be less susceptible to judicial arbitrariness.

Tribe and Dorf, in an attempt to develop a coherent approach to constitutional interpretation, divagate into such diverse disciplines as literature and mathematics.[3] The authors ultimately conclude, however, that no unitary formula should confine constitutional interpretation. Thus, they remonstrate against too much reliance on history or the textually unratified views of the Founding Fathers (pp. 8-13), against reading provisions either in complete isolation or as part of a unified philosophical chorus (pp. 21-28), and against eliminating all value choices in expounding a charter replete with generalities (p. 33).

Instead, Tribe and Dorf contend that constitutional interpretation should follow common law traditions in which judges announce narrow rulings founded on the reasoning of prior cases that conform to the central moral value or values in a specific constitutional clause (pp. 65-80). Tribe and Dorf correctly point out that no school of constitutional interpretation — whether based on original intent, history, traditions, or precedent — can avoid leaving a large discretionary element to the interpreter. In other words, judges will be capable of smuggling idiosyncratic value choices into their decisions no matter what interpretive theory they embrace.

But Tribe and Dorf fail adequately to address the danger of judicial overreaching; instead, they champion an open-ended interpretive

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3. For example, to prove that some value choice is inherent in the interpretive task, Tribe and Dorf draw on the standards of mathematical proof expounded by Imre Lakatos. Pp. 87-91. According to Lakatos, one method of discrediting a claim that a triangle has been constructed with the sum of its angles greater than 180° is by simply asserting that the figure is an imposter. With the profundity of Nestor, Tribe and Dorf inform the reader: "In the law there is an analogous device called drawing a distinction without a difference." P. 91.

approach which may exacerbate the problem. In the authors' view, the interpretation of terms like *liberty* and *property* requires basic value choices, and "[c]onstitutional value choices cannot be made . . . without recourse to a system of values that is at least partially external to the constitutional text" (p. 66). Thus, in discussing the Due Process and Equal Protection Clauses, Tribe and Dorf insist on resorting to extraconstitutional sources of authority in the interpretive task (p. 116).

But is there no superior alternative to Tribe and Dorf's reliance on the personal moral convictions or other idiosyncracies of judges? This review will attempt to develop an approach to constitutional interpretation that focuses on the language and purpose of constitutional provisions instead of the personal values of judges. It will then compare this alternative approach with the interpretive theory advanced by Tribe and Dorf.

I

The Constitution was crafted with the overarching goal of checking government tendencies to tyranny or arbitrariness. Trust in the benevolence, statesmanship, or wisdom of officeholders in any branch was generally eschewed because persons who display such characteristics are *rarae aves.* As James Madison warned in *Federalist 51:*

> But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government that is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[4]

Madison exempted neither members of the federal judiciary from his critique of human nature nor the judiciary itself from his call for auxiliary institutions or customs to restrain arbitrariness. Concededly, the Founding Fathers voiced their greatest concern for legislative tyranny because they had repeatedly been first-hand witnesses to that evil. In 1787, no historical examples existed of abusive exertions of power by a genuinely independent judiciary endowed with the power of judicial review because the institution was a constitutional innovation.

But that does not gainsay the Founding Fathers' self-evident desire for an interpretive theory that enables judicial performance of its checking role, yet acts as an internal restraint on caprice. Furthermore, the history of the Supreme Court suggests that its members are typified by mediocrity and a propensity for wrongheadedness urgently

4. THE FEDERALIST No. 51, at 150 (James Madison) (Roy P. Fairfield ed., 2d ed. 1981).

in need of a lucid and restraining theory of constitutional interpretation. Illustrative, but far from exhaustive, are *Dred Scott v. Sandford,*[5] the income tax decisions,[6] the separate but equal doctrine of six decades,[7] the *Lochner* era of four decades,[8] the Japanese relocation cases,[9] the criminal justice revolution[10] and the reapportionment cases[11] of the Warren Court, and the *ex cathedra* pronouncement of *Roe v. Wade.*[12] As Justice Oliver Wendell Holmes perspicaciously observed, judges are apt to be naive and simpleminded and desperately need education in the obvious.[13]

That the Founding Fathers did not envision a Don Quixote role for the federal judiciary is manifest. At the constitutional convention, for example, delegate Oliver Ellsworth remonstrated against the superfluity of the Ex Post Facto Clause: "[T]here was no lawyer, no civilian who would not say that ex post facto laws were void of themselves. It cannot then be necessary to prohibit them."[14] Ellsworth's view lost by a seven-to-three vote;[15] it was understood that the judiciary would not be empowered to nullify ex post facto laws on general principles of justice or fairness. The majority that ratified the Bill of Rights also apparently believed that its protections required amendments to the Constitution to obtain legitimacy.

The Founding Fathers renounced the idea of a federal judiciary empowered to protect individual rights through vague principles of natural rights or fairness. The Ninth Amendment[16] is not to the contrary. It is a warning to the judiciary to desist from sustaining federal legislative or executive power simply because its assertion would not violate a provision in the Bill of Rights. For instance, congressional power to regulate the press is not automatically legitimate whenever the regulation does not violate the First Amendment. James Madison, chief architect of the Bill of Rights, subscribed to that modest purpose

5. 60 U.S. (19 How.) 393 (1857).

6. *See* Pollock v. Farmers' Loan & Trust Co., 158 U.S. 429 (1895); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 601 (1895).

7. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

8. *See, e.g.,* Morehead v. New York *ex. rel.* Tipaldo, 298 U.S. 587 (1936); Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

9. *See* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

10. *See, e.g.,* Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961).

11. *See, e.g.,* Reynolds v. Sims, 377 U.S. 533 (1964).

12. 410 U.S. 113 (1973).

13. *See* OLIVER W. HOLMES, *Law and the Court, in* COLLECTED LEGAL PAPERS 291, 295 (1920).

14. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 376 (1937).

15. *Id.*

16. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

of the Ninth Amendment, a conclusion consistent with the virtual absence of contemporary debate over its inclusion in the Bill of Rights.[17]

Thomas Jefferson presciently warned against a cavalier treatment of the constitutional text and urged that amendments were the best method of constitutional innovation:

> I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in possession of a written Constitution. Let us not make it a blank paper by construction. . . . Let us go then perfecting it, by adding, by way of amendment to the Constitution, those powers which time and trial show are still wanting.[18]

The amendment process, moreover, is not a chimera. Twenty-six amendments have surmounted the supermajority rules for constitutional ratification, and most were ratified promptly. The amendment process pertains to theories of constitutional interpretation because it discredits the idea that only Supreme Court decrees can protect individual rights from the majority. The Fifteenth, Nineteenth, and Twenty-Sixth Amendments, which prohibit voting discrimination based on race, gender, or youth, were all proposed and ratified predominantly by persons representing middle-aged or elderly white males.

An interpretive theory should not be rejected simply because its application leads to an unfetching result in some or many cases. As Justice Benjamin Cardozo observed, the Constitution tolerates many policies that a judge might think immoral or unfair. Judges empowered to adjudicate according to their individual sense of justice might produce a benevolent despotism, but such a regime would put an end to the reign of law.[19] Justice Holmes echoed those sentiments in admonishing Judge Learned Hand that the judicial duty is not to invoke a personal standard of justice but to play the game according to the rules.[20]

What are those rules for constitutional interpretation? Instead of adhering to the idiosyncratic and highly discretionary approach of Tribe and Dorf, judges should confine themselves to examining the language and evident purposes of constitutional provisions. That standard minimizes (but does not eliminate) the opportunity for arbitrary decrees, yet safeguards the vitality of rights and powers the Constitution clearly endorses.

In many instances, the purpose of a provision will be manageably

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17. *See* 1 ANNALS OF CONG. 754-55 (Joseph Gales ed., 1834) (proceedings of Aug. 17, 1789); 12 THE PAPERS OF JAMES MADISON 204, 459 (Charles F. Hobson et al. eds., 1979).

18. Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803), *in* 10 THE WORKS OF THOMAS JEFFERSON 10-11 (Paul L. Ford ed., 1905).

19. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 136 (1921).

20. LEARNED HAND, *A Personal Confession*, *in* THE SPIRIT OF LIBERTY 306-07 (Irving Dilliard ed., 1960).

clear from the text. Section One of the Fourteenth Amendment, for example, forbids a state from denying "to any person within its jurisdiction the equal protection of the laws."[21] The equal protection language, designed to prevent arbitrary legal classifications or applications of the law, provides a central check against the tyranny the constitutional Framers so abhorred.[22] Applying the language and purpose standard, we see that the decision in *Plessy v. Ferguson*[23] expounding the separate but equal doctrine was clearly wrong and that the overthrow of *Plessy* in *Brown v. Board of Education*[24] was clearly correct. Legal segregation of the races in public education was arbitrary from its inception. It served no public interest consistent with the equal protection rights of individuals. A majority's desire to discriminate is not a constitutionally legitimate aim.

It is irrelevant to the language and purpose standard that all or a majority of the Fourteenth Amendment's framers believed that segregated public schooling was consistent with its equal protection stipulation. The amendment's ratifiers approved its language, not the concealed or overt understandings of its champions, and omitted any express exemption for public schools from its equal protection shield. Legislators and laymen commonly trumpet general principles of justice while remaining utterly indifferent to the inconsistencies between these principles and prevailing customs or practices. Intellectual honesty or consistency is not a hallmark of human nature, and legislators are exceptionally prone to verbal hypocrisy because of their preoccupation with popularity and reelection.

John Milton, who elegantly denounced the licensing of the press in *Aeropagitica,*[25] became a censor himself under Cromwell's Commonwealth and Protectorate.[26] Emulating Milton, several members of Congress who supported the First Amendment soon thereafter rallied behind the 1798 Sedition Act.[27] They were apparently indifferent to their intellectual inconsistency because the Sedition Act targeted their

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21. U.S. CONST. amend. XIV, § 1.

22. Thus, Justice Robert Jackson noted in Railway Express Agency v. New York, 336 U.S. 106 (1949):

> I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. . . . The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.

336 U.S. at 112.

23. 163 U.S. 537 (1896).

24. 347 U.S. 483 (1954).

25. JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND (Richard C. Jebb ed., 1918).

26. WILL DURANT & ARIEL DURANT, THE AGE OF LOUIS XIV 243 (1963).

27. Representatives Abiel Foster, James Schureman, Thomas Sinnickson and George Thatcher voted in favor of both the Bill of Rights and the 1798 Sedition Act. *See* 5 ANNALS OF

political adversaries of the day. Similarly, a majority of Fourteenth Amendment champions probably desired an equal protection exemption for public schools because racial integration would have been politically unpopular. But why should the Supreme Court pay attention to these hypocritical desires at war with the unambiguous concept of equal protection? If the amendment's ratifiers lacked the political courage or honesty to water down its equal protection language, courts were certainly not obliged to shore up such cowardice through tortured interpretations. That would be unfaithful to the Court's overarching mission to check arbitrary rule.[28] Ultimately, the language and purpose standard of interpretation properly compels intellectual honesty from lawmakers — an enormously powerful safeguard against arbitrariness. The standard also constrains the interpretive task of judges by limiting the role that personal political convictions may play in adjudication.

II

How would the language and purpose test fare in general operation, and how does it compare to Tribe and Dorf's interpretive theory? Would it minimize the opportunity for judicial smuggling of idiosyncratic values into the Constitution? Tribe and Dorf insist that judges must and should make extraconstitutional choices in constitutional interpretation but that they should seek as much guidance from the text as possible. That standard simply enlists the Constitution in support of judges' personal aims, heedless of the resulting arbitrariness it sanctions. Tribe and Dorf fail to explain why judicial arbitrariness is any less menacing than executive or legislative caprice.

The language and purpose test, in contrast, postulates that arbitrariness in government is equally threatening irrespective of its origins, and it attempts an interpretive constitutional standard that simultaneously curbs judicial caprice and retains sufficient judicial clout to arrest tyranny in the nonjudicial branches. No Euclidian proof exists that the language and purpose test could achieve its intended goals, but a systematic application of this standard to some central constitutional questions suggests that it is superior to the approach of Tribe and Dorf.

CONGRESS 2113-14 (1798); HISTORY OF CONGRESS 169-70 (Philadelphia, Lea & Blanchard 1843).

28. Of course, the actual text of the Constitution contains several prominent examples of intellectual dishonesty and hypocrisy. It tolerated slavery, mandated legal assistance in capturing fugitive slaves, *see* U.S. CONST. art. IV, § 2, cl. 3, treated slaves as three fifths of whites for purposes of electoral apportionment, *see* U.S. CONST. art. I, § 2, cl. 3, and, until 1808, prohibited limitations on the slave trade, *see* U.S. CONST. art. I, § 9, cl. 1. All of these provisions conflicted with the general constitutional principles of electoral government and the protection of individuals from tyranny. But constitutional dignity required incorporation of these unseemly political compromises into the constitutional text; they were not effectuated by tacit or express oral understandings at the constitutional convention or state ratification conventions.

For example, the Fifth and Fourteenth Amendments prohibit both the federal government and the states from depriving persons "of life, liberty, or property without due process of law."[29] Due process is clearly violated if either a legislative enactment or its enforcement is arbitrary or tyrannical, unless the constitutional text elsewhere authorizes such oppression. The general phrase *due process* does not recognize any exemptions from its renunciation of legal arbitrariness.

In *Bolling v. Sharpe*,[30] the Supreme Court held that due process prohibited racial segregation in federally operated schools in the District of Columbia. Such racial segregation, the Court reasoned, constituted an arbitrary deprivation of the liberty of black students: it served neither an educational nor any other legitimate constitutional objective. The language and purpose standard justifies *Bolling*. That many slaveholding framers of the Fifth Amendment did not subjectively intend to proscribe segregated schooling is irrelevant. The language they ratified created no due process exception for public schools.

In contrast, the language and purpose standard would not support the Supreme Court's *Roe v. Wade*[31] decree. There the Court ruled that due process permitted meaningful abortion restrictions only during the third trimester of pregnancy, and then only if carrying the fetus to term would be emotionally and physically undisturbing to the mother. Writing for a seven-to-two majority, Justice Blackmun insisted that a mother's right to terminate a pregnancy is "fundamental," and that any restrictions on that choice could be justified only by a compelling government interest.[32] Blackmun deduced a right of privacy that includes the abortion choice from the Due Process Clause and the Ninth Amendment.

The *Roe* opinion illustrates the interpretive arbitrariness that comes from discarding a language and purpose standard. How did Justice Blackmun decide the right to an abortion was fundamental? Nothing in the constitutional text either identifies rights as fundamental or lists directions for their discovery. The Constitution creates no hierarchy of rights, crowning some with greater dignity than others, but the *Roe* opinion establishes a hierarchy by judicial fiat.

How did Justice Blackmun decide that a governmental interest must be compelling to restrict the abortion choice? The language and purpose of due process requires government rationality, not government wisdom or enlightenment. In contrast, the compelling state interest standard leaves judges at sea in their search for government goals that are sufficiently important; not a single syllable in the Constitution informs the navigational quest. Neither statutory codes nor leg-

29. U.S. CONST. amends. V, XIV.

30. 347 U.S. 497 (1954).

31. 410 U.S. 113, 164-65 (1973).

32. 410 U.S. at 155.

islative histories customarily identify which laws are passed or votes cast in the belief that the government interest to be promoted is compelling.

Tribe and Dorf applaud the *Roe* decree (pp. 60-64), but their interpretive justification seems feeble. They argue that virtually all interpretation requires resort to value choices external to the Constitution (p. 66); seen in this light, *Roe* can correctly conclude that the liberty to choose an abortion is fundamental, even though this right is devoid of any supporting constitutional text. Tribe and Dorf ask: "How should the Court go about reading the Constitution to determine if an asserted right is fundamental?" (p. 73). They never provide a satisfactory answer. First, they attempt no justification for the fundamental/nonfundamental bifurcation of constitutional rights. Second, their analysis centers on the extrapolation of fundamental rights from precedent (pp. 73-80) while eschewing inquiry into the basic correctness of the precedent in question.

Tribe and Dorf assert that "judges possess the requisite tools to make principled distinctions in the selection of a level of generality in defining fundamental rights" (p. 114). But this confidence in judicial competence and restraint seems misplaced. Tribe and Dorf's explanation of how their interpretive standard would operate betrays its susceptibility to judicial manipulation. The authors' attempt to characterize government interests as compelling *vel non* epitomizes interpretive arbitrariness and insults the language and purpose of the Due Process Clause. Ultimately, no textual or extratextual constitutional guides, no generally accepted concepts of unenumerated rights, and no interpretive rules constrain judicial whimsy.

How should *Roe v. Wade* be adjudicated under the language and purpose standard? Abortion restrictions rationally support the legitimate government interest in protecting the unborn, a conclusion fortified by various state laws making third-party destruction of a fetus murder and recognizing tort and inheritance rights of a fetus after birth. Nothing in the politics of abortion suggests that abortion restrictions are a pretext for misogyny. Men and women both are sharply divided on *Roe.* Both supporters and opponents of abortion restrictions enjoy legislative clout and financial resources; public debate is not skewed in favor of or against either position. Prior to *Roe,* legislative restrictions on abortion were falling rapidly, following the lead of California's exceptionally liberal 1967 Therapeutic Abortion Act, signed by then-Governor Ronald Reagan.[33] No claim that meaningful abortion restrictions are inherently arbitrary would be convincing. Thus, the restrictions pass the due process language and purpose standard of interpretation.

33. The Act is currently codified at CAL. HEALTH & SAFETY CODE §§ 25950-25958 (West Supp. 1992).

Review of First Amendment jurisprudence provides another opportunity to compare the language and purpose test with the interpretive approach advanced by Tribe and Dorf. The amendment prohibits, in part, any law "abridging the freedom of speech, or of the press."[34] The amendment's language protects oral and written forms of communication, and the institutionalized press, but it does not reach all attempts to convey an idea, such as music, painting, dancing, or flag burning. On the other hand, the plain purposes of the Free Speech and Press Clause justify some embellishment on its language. Justice Louis Brandeis in *Whitney v. California*[35] and Chief Justice Charles Evans Hughes in *De Jonge v. Oregon*[36] ably articulated those purposes. They include the discovery and spread of political truths, the development of mental faculties, the provision of an emotional safety valve for persons disgruntled with government policies, and the promotion of government responsiveness to the will of the people.

These purposes justify a free press interpretation that embraces the broadcast media and cable television. Their role in the discovery and spread of political truths and in fostering government responsiveness to popular opinion is indistinguishable from that of the print media. The purposes also justify an interpretation of the Free Speech and Press Clause that denounces government suppression of other forms of expression. Suppression because of ideological hostility conflicts with the truth-seeking, emotional safety valve, and government-responsiveness purposes of free speech.

Tribe and Dorf correctly point out that the Free Speech and Press Clause is insufficiently precise to escape all conscientious disputations in application (p. 37) but proffer no standards that confine or resolve such disagreements. In analyzing an ordinance proscribing all First Amendment activity in a city airport, they properly criticize a literalist interpretation that would uphold the ordinance on the grounds that free speech elsewhere was tolerated.[37] But courts need not adopt a fundamental rights theory of the First Amendment — tacitly advanced by Tribe and Dorf — in order to invalidate the ordinance. The prohibition in question would clearly undercut the purposes of the Free Speech and Press Clause by squelching open discourse in a major public thoroughfare. Furthermore, the belief that all speech in all parts of an airport must be suppressed in order to insure uncongested corridors or nonharassment of patrons does not deserve a claim to rationality.

Flag desecration laws would also probably fail to pass constitutional muster under the language and purpose standard. Such laws

34. U.S. CONST. amend. I.

35. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

36. 299 U.S. 353 (1937).

37. Pp. 68-69 (citing Board of Airport Commrs. v. Jews for Jesus, Inc., 482 U.S. 569 (1987)).

mean to suppress the idea that the U.S. flag is unworthy of respect and flies over a dishonorable or unworthy government. That statutory objective blatantly conflicts with the free-speech purposes of advancing political discourse and offering a safety valve for persons dissatisfied with government policy.[38]

General prohibitions on public nude dancing, however, should survive the language and purpose standard if the prohibitions are evenhandedly enforced. Public displays of nudity fall well outside the First Amendment's express language; thus, such activities enjoy constitutional protection only against government restrictions animated by ideological hostility. Public nudity may be a method of ridiculing infatuation with dress and clothing. But a ban on such expressive conduct does not restrict the countless other communicative vehicles for conveying that ridicule. Further, public nudity is unlikely to persuade others that a preoccupation with fashions should be abandoned. Thus, a contention that general bans on public nudity are inspired by ideological hostility seems implausible.[39] Due process and equal protection, however, would require that the prohibitions be evenhandedly enforced in order to avoid arbitrary and politically motivated targeting of violators.

The Supreme Court's libel law doctrine, which establishes formidable constitutional protection for defamatory factual error, seems clearly flawed under the language and purpose interpretive standard. In the leading case, *New York Times v. Sullivan,*[40] the Court held that the First Amendment prohibited the award of damages for a falsehood defaming a public official absent clear and convincing evidence that the culprit acted with actual malice — that is, with knowledge of the factual error or in reckless disregard of the truth. Justice Brennan insisted that the actual malice rule was essential to the discovery and spread of political truths because factual error was "inevitable in free debate."[41]

But how do factual falsehoods advance the discovery and spread of political truths? Falsehoods impede the quest for truth. It is possible that fear of factual error would cause self-censorship of many truths, and thus the actual malice rule in aggregate advanced a paramount free-speech purpose. But Brennan offered not a scintilla of empirical evidence to support such a problematic proposition. Further, in the decades since *Sullivan,* no study has indicated that the Court's holding enhanced the scope and intellectual rigor of public debate in compari-

38. *See* Texas v. Johnson, 491 U.S. 397 (1989).

39. The Supreme Court thus correctly decided Barnes v. Glenn Theatre, Inc., 111 S. Ct. 2456 (1991).

40. 376 U.S. 254 (1964).

41. 376 U.S. at 271.

son to the pre-*Sullivan* era.[42]

The religion clauses of the First Amendment prohibit laws "respecting an establishment of religion, or prohibiting the free exercise thereof."[43] The purposes of the clauses are to prohibit government practices intended to coerce or ban religious practice and to deny intended government favoritism toward one religion over another, including the establishment of an official church. Furthermore, the Free Exercise Clause tacitly acknowledges a legitimate constitutional interest in government facilitation of private religious choice by reducing its cost, through tax exemptions for religious property, conscientious objection laws, or otherwise. In other words, the Free Exercise Clause accepts that government may favor religion over nonreligion.

The Supreme Court's prevailing Free Exercise and Establishment Clause doctrines are woefully misconceived; they are preoccupied with unedifying formulas that deflect attention from the language and evident purposes of the religion clauses. Emblematic is *Lemon v. Kurtzman*.[44] There the Court announced that to survive an Establishment Clause challenge, a statute or practice must enjoy a secular purpose, must neither materially advance nor inhibit religion, and must avoid excessive government entanglement with religion.[45] If *Lemon* were celebrated in the observance rather than the breach, then religion would be virtually banned from public life.

Consistent with the *Lemon* test, Tribe and Dorf defend the Supreme Court's invalidation of a "moment of silence" statute in *Wallace v. Jaffree*.[46] The statute at issue in that case permitted public school instructors to commence each school day with a brief period of silence "for meditation or voluntary prayer."[47] The statute made no effort to coerce children into prayer; more generally, the statute favored neither one religion over another nor religion over nonreligion because atheists could employ the moment of silence to wish the ultimate doom of all religion. Yet Tribe and Dorf applaud the Court's decision to strike down the statute. This conclusion is consistent with the *Lemon* test's fundamental hostility toward religion and religious expression.

Ultimately, the Court's Establishment Clause jurisprudence — epitomized by *Lemon* and *Wallace* — is mistaken in demanding that government actions necessarily serve a secular purpose. No inherently

42. Indeed, media reporters generally deny that *Sullivan* changed investigative or reporting customs. I have personally asked more than a score of reporters whether *Sullivan* caused any changes in their reporting behavior. All answered in the negative. I am unaware of any study that suggests a contrary conclusion.

43. U.S. CONST. amend. I.

44. 403 U.S. 602 (1971).

45. 403 U.S. at 612-13.

46. 472 U.S 38 (1985). For Tribe and Dorf's discussion, see pp. 45-47.

47. 472 U.S. at 41.

secular purpose lies behind the provision of legislative chaplains, or the words "In God We Trust" on currency, or the reference to God in the pledge of allegiance. These practices are intended to favor religion over nonreligion. The same was true of the released time program sustained in *Zorach v. Clauson,*[48] conscientious objection laws upheld in *Gillette v. United States,*[49] and property tax exemptions for church property validated in *Walz v. Tax Commission.*[50] The trilogy reached the correct results because all the challenged practices facilitated private religious choice and avoided religious coercion or favoritism. Evenhanded availability of government premises for religious symbols should likewise pass constitutional muster, as should evenhanded participation of religious organizations in government programs animated by clearly secular goals, such as education, family-planning counseling, or low-income housing. Thus, the Court has erred in generally prohibiting government funding of the educational missions of sectarian and nonsectarian private schools,[51] in proscribing a moment-of-silence law,[52] and in forbidding a creche display on government property.[53]

The Fifth and Fourteenth Amendments prohibit government from depriving persons of property without due process of law. As amplified earlier, the Due Process Clauses were intended to proscribe arbitrary or oppressive action, often wielded by one economic faction with political clout against another with lesser political stature. But the prevailing economic rights jurisprudence of the Supreme Court is unfaithful to the arbitrariness standard.

Tribe and Dorf permit economic rights barely a cameo appearance in their constitutional discourse (pp. 65-66). They recite the now-familiar critique of the *Lochner* era,[54] a period from the 1890s to 1937 when the Court regularly invoked "substantive due process" to overturn laws that interfered with the tenets of laissez-faire capitalism. They do not renounce *Lochner*-era jurisprudence for making extraconstitutional substantive value choices, however; instead, they conclude that it simply made the wrong value choices — wrong because laissez-faire capitalism did not "meaningfully enhance the freedom of the vast majority of Americans in the industrialized age" (p. 66).

That statement betrays the judicial whimsy that the Tribe and Dorf approach to constitutional interpretation invites. How do judges determine whether agricultural price supports or countless other gov-

48. 343 U.S. 306 (1952).

49. 401 U.S. 437 (1971).

50. 397 U.S. 664 (1970).

51. *See* Aguilar v. Felton, 473 U.S. 402 (1985).

52. *See* Wallace v. Jaffree, 472 U.S. 38 (1985).

53. *See* County of Allegheny v. ACLU, 492 U.S. 573 (1989).

54. So named for the seminal case of Lochner v. New York, 198 U.S. 45 (1905).

ernmental manipulations of the marketplace "meaningfully enhance the freedom of the vast majority of Americans?" Do they order a national referendum? Moreover, why should majority economic appetites or envy count, since the Takings, Contract, and Due Process Clauses were drafted, in part, to resist, not to surrender to, the clamor of the majority for the wealth of the minority?

The Supreme Court, however, has long endorsed views similar to those of Tribe and Dorf. Characteristic of constitutional jurisprudence in the field of economic rights is Justice Hugo Black's pronouncement in *Ferguson v. Skrupa*:[55]

> [W]e emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." Nor are we able or willing to draw lines by calling a law "prohibitory" or "regulatory." Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.[56]

Justice Black must have fantasized in suggesting that legislators consult Adam Smith, Herbert Spencer, Lord Keynes, or any other theorist in fashioning economic statutes. The vast majority have never read a syllable of their tomes and are utterly indifferent to economic theory. Legislators are earthbound creatures who respond to the clamor of special interest groups with money or votes to offer. Their *summum bonum* is reelection, not intellectual tidiness. In *Ferguson* itself, the statute under review granted lawyers a monopoly on debt adjustment. It takes no political genius to surmise correctly which interest group fueled the legislative munificence for attorneys.

In applying its due process rationality test to economic regulation, the Supreme Court should stop shutting its eyes to what everyone else can see: namely, that the purpose of most economic regulatory statutes is to benefit one class of citizens at the expense of another because of political expediency. That political dynamic completely neglects the public interest. The monopoly on debt adjustment in *Ferguson* should have been tossed out because it aimed to harm nonlawyer adjusters; debtors were not lobbying to curtail their options. But "a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest," as acknowledged in *United States Department of Agriculture v. Moreno*.[57] In summary, if the afflatus for economic regulation is to injure or favor one segment of the community at the expense of another, then the Supreme Court should give it a flunking constitutional grade under the rationality test of the Due Process Clause.

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55. 372 U.S. 726 (1963).

56. 372 U.S. at 731-32 (citations omitted).

57. 413 U.S. 528 (1973).

CONCLUSION

As the previous examples should demonstrate, the language and purpose standard is no panacea for misjudging. The purpose component of the standard admittedly leaves a fair amount of intellectual discretion consistent with honesty. And Tribe and Dorf are no doubt correct that the personal political views of judges often enter into the construction of particular constitutional provisions. But the standard confines constitutional disagreements within reasonable bounds and better insures that judges expound the Constitution, not their subjective value choices. The best theory of constitutional interpretation is one that minimizes arbitrariness or oppression by any branch of government, including the judiciary. The language and purpose standard may not be the best, but it seems preferable to the more elusive and subjective standard that Tribe and Dorf salute.