Rhetoric about the Supreme Court's making law, and ignoring the intentions of the framers of the Constitution, is no doubt motivated by such Court decisions as *Roe v. Wade*. The rhetoric is also animated, however, by a prima facie compelling argument. The argument is that if no one ever thought of such a right as that of privacy, for example, until over 100 years after the adoption of the Constitution, the Court can hardly be appealing to the *Constitution* in basing any decision on such a right. The Court must be importing such rights into the Constitution, the argument continues, and so is making law.

Such reasoning supports at least two truths about the Supreme Court: the Court's Constitutional task is to expound the Constitution, not make law, and it is constrained in that task, not free to interpret however it wishes. These truths need supporting, but, I shall argue, that prima facie compelling argument used to support them rests upon a fundamental misunderstanding of the nature of law.

That misunderstanding turns upon a general puzzle about interpretation that is peculiarly acute in the law. The puzzle is that we can seemingly operate perfectly well with a concept, making our way through the world without difficulties, thinking, if we think about it at all, that we understand perfectly well what the concept means and

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1 An underlying appeal to this argument may be one reason why former Attorney General Meese is so concerned to press the otherwise trivial claim that the Constitution and "the few, slim paragraphs that have been added to the original Constitution as amendments" are not (numerically) identical to the Court's "nearly 500 volumes of *Reports of cases*" ("The Law of the Constitution," Bicentennial Lecture at the Tulane University Citizens' Forum on the Bicentennial of the Constitution, p. 6).

As I shall note below, it is appropriate to say, to the extent such matters can be dated, that the concept of privacy first entered the law in the 1890s. See footnote 31.

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so entails, and yet find ourselves, one day, with a puzzle about how to apply the concept that means, no matter what we do, that we did not understand the concept perfectly well. We must change our understanding of the concept, and that will sometimes mean not just cleaning up its fuzzy edges, but radically altering it, and one crucial aspect of the puzzle we face is whether we project that new conception into the past, reinterpreting the past in its new light, or maintain that there is a clean break between the old and the new, or argue that the conception is there, in the past, but confusedly.

If the concept is in the law, any alteration may radically change the prior configuration of legal relations, as happened in Roe v. Wade, giving rights and powers to those who did not have them, or knew that they had them. But it is morally wrong either to hold someone accountable for an act or omission about which the law appears silent or to deny someone a right if they are entitled to it. Yet if we can hold that there was a Constitutional right to privacy in, say, 1964, then the Connecticut officials who upheld the state law at issue in Griswold v. Connecticut, where the alleged right to privacy made its introduction into Constitutional literature in 1965, were responsible for denying a right — though it is arguable that, from their perspective, for all the world it looked as though the Constitution was silent on the matter.

This moral problem may push us either to resist new conceptions or to say that the new understanding is only that, a new understanding of what was always there. Conservatives who think the Court cannot be appealing to the Constitution in basing any decision on such a right as that of privacy and Ronald Dworkin, who argues that “there always is a legally right answer in hard cases”, respond to the same moral concern: the right must have been there if people are to rely on it or to be accountable by it.

Dworkin's theory is the result of a number of factors, including a certain contingent institutional feature of courts, but the response he shares with conservatives is not the only response to the general problem of interpretation. How one comes to grips with the general problem of interpretation and, in particular, how one responds to the past in articulating a new conception, will do much to determine one's philosophy of law.

Some of the issues in this nest of problems regarding interpretation separated Myke Bayles and me, and this paper began some time ago as an attempt to state my own position clearly enough that he could tell me where I had gone wrong. It is one of my deepest regrets at his loss that someone else will have to find the problems with my views.

I shall argue, first, that the Constitution can be so conceived, perhaps without interpretative strain, that it would not be astonishing for a right to be given Constitutional protection which, like the right to privacy, did not surface until over a hundred years after the Constitution's adoption. Hamilton may have conceived the Constitution in this way. I shall then argue, in Part II, that fundamental features of law should make one anticipate the possibility of such protection, and, in Part III, I shall illustrate that point using privacy as the test case, summarizing in Part IV.

Hamilton argues in Number 84 of the Federalist Papers that the proposed bill of rights would be “not only unnecessary”, but even have is so designed, so structured, that whatever enters it, in whatever forms, tends to be transformed into claims of rights.

"It is not so much", he says, "that adjudicators decide only issues presented by claims or rights or accusations. The point is rather that whatever they decide, or whatever is submitted to them for decision, tends to be converted into a claim of right or an accusation of fault or guilt" (Harvard Law Review 92 (1978): 369).

My claim, though I shall not pursue it here, is that the rights thesis works as a thesis about how courts actually decide only within an institutional setting in which courts are designed to transform any issues that come before them into rights. A system like that of the Japanese, in which negotiation is at the fore, is not one in which one party has a right and the other not. The system is designed to minimize the loss of face and so designed not to transform issues into rights and claims.
dangerous." With our history of the Bill of Rights, his claims seem misconceived. It is difficult to imagine our society having developed as it has without a Bill of Rights, supplemented by the Civil War Amendments and Amendment 19 regarding women's suffrage. One might suspect Hamilton's motives—given the vigor of his rhetoric—but he has a vision of the Constitution to underpin his concern.

The Constitution, as he conceives it, is "founded upon the power of the people, and executed by their immediate representatives and servants." Rights traditionally were "abridgments of prerogative in favor of privilege" and thus presume that power lies with "the prince," as he puts it. The people "have no need of particular reservations" since they do not give up their rights in granting power to their representatives. Indeed, listing rights would imply the very form of political association repudiated by the Constitution. For such rights would look like exceptions to powers and be a basis for inferring that power lies in the government, with the people having rights only to the exceptions they are given.

So, on Hamilton's view, the Constitution with a Bill of Rights is incoherent: the Constitution presupposes that power lies with the people, and a Bill of Rights would presuppose that power lies with the prince. Far from protecting the people, listing rights will expose them to the dangers of a prince who conceives himself as having full power to do as he wishes, constrained only by the rights listed in the Bill of Rights. Hamilton is thus saying, "Do not add a Bill of Rights if you wish to preserve rights."

Hamilton's argument goes to the heart of the American political revolution. Instead of conceiving of a government as based on a natural relation of rulers over the ruled, in which rights serve as a bulwark against the otherwise unlimited power of those ordained to rule, we ought to conceive of a government as an arrangement of equals, in which some are elected to serve to preserve the social arrangement and to further its good. Those elected to power are prevented from denying their peers their rights by the Constitution's being itself a bill of rights, by a complex system of checks and balances, and by an electoral process in which, as Madison remarks regarding representatives,

Before the sentiments impressed on their minds by the mode of their elevation, can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; those for

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2 Ibid., p. 436.
3 Ibid., pp. 436–37 for this and the preceding quotation.
4 Hamilton thus says that a bill of rights "would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?" He goes on to add, "I would not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power" (Ibid., p. 437).
5 I mean revolution in a conceptual sense like that we refer to when we talk about the Copernican Revolution or the Darwinian Revolution. I mean to imply that before 1775, say, the common mode of thinking about political power made the conception of our Constitution unthinkable and that what occurred over the next few years was a conceptual revolution in which the previous conception became inappropriate and even ludicrous. This revolution in thought took time, of course, and began fundamentally with John Locke's Two Treatises of Government, and it led through men like David Hume, for example, who remarks, "The mere name of king commands little respect; and to talk of a king as GOD'S viceregent on earth, or to give him any of those magnificent titles, which formerly dazzled mankind, would but excite laughter in every one", in 'The British Government', Essays: Moral, Political, and Literary, ed. Eugene F. Miller (Indianapolis Liberty Classics, 1985), p. 51, see p. 467.
6 It is only if one puts oneself under the preceding conception (rather like thinking oneself back into Aristotle's physics) that one can understand the remark of a Swedish scholar whom Archibald Cox quotes as having said regarding President Nixon and the Supreme Court's decision that he must turn over the Watergate tapes, "The chief of state can't be subject to the orders of the court. It can't be. It's unthinkable." Cox responded, "Well, I'm sorry. It can't be unthinkable, because Americans have been thinking it for quite a while" (The New Yorker, January 20, 1975, p. 28). For an analysis of David Hume's contribution to this revolution, see my 'Hume and the Constitution', in Constitutionalism: The Philosophical Dimension, ed. Alan S. Rosenbaum (New York: Greenwood Press, 1988), pp. 31–53.
ever to remain, unless a faithful discharge of their trust shall have established their title to a renewal of it.

In arguing that the Constitution "is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS," Hamilton points to its express provisions protecting citizens against *ex post facto* laws, providing the writ of *habeus corpus*, requiring a jury in the "trial of all crimes, except in cases of impeachment," denying titles of nobility, and providing for impeachment and punishment for treason. These provisions were not randomly inserted for Constitutional protection. As Hamilton points out,

the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments have been in all ages the favourite and most formidable instruments of tyranny.

The provision for a trial by jury means that peers of an accused shall decide what, effectively, the law means when applied in particular cases. The provision protects the people from a law which may be enacted in proper form, but would abuse the rights of citizens were it not that they, equally subject to the law, judge guilt or innocence. The prohibition of titles of nobility means that all are peers: no person shall be accorded special favor in a court of law, or elsewhere, because

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10 Ibid., p. 438.
11 Article IV, Section II.
12 Ibid., p. 435.
13 See Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1982), p. 74. The fundamental argument is that a jury can literally create law by refusing to convict under some interpretations of the law. For instance, one of the complaints about New York's mandatory sentencing law for armed robbery is that prosecutors have been unable to convince juries that robbing a store with a gun is automatically worth ten years in prison. Faced with recalcitrant juries, prosecutors have tended to make lesser charges, using the mandatory sentencing law as leverage in plea bargaining and hoping that the accused do not understand how little leverage there is. The reluctance of juries to convict for armed robbery has effectively changed the impact of the law and thus, I would argue, effectively changed the net of laws regarding robbery.

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11 The Constitution and the Nature of Law

of some position they occupy. As a last resort, if anyone elected to office does betray their trust, they can be impeached and imprisoned, if need be, for treason.

So, Hamilton argues, adding a Bill of Rights is unnecessary as well as dangerous and incoherent: what is there protects us.

In addition, in listing rights in a Bill of Rights one must presume that one can both determine and rank rights. But such a presumption would have been at odds with recent history. As Bailyn remarks,

the provision of English law did not and properly could not wholly exhaust the great treasury of human rights. No documentary specification ever could. Laws, grants, and charters merely stated the essentials . . . insofar, and only insofar, as they had come under attack in the course of English history. They marked out the minimum not the maximum boundaries of right.

Even if one were to assume, that is, that one's rights are natural and immutable, being "born with us", nothing follows about one's knowledge of such rights. We become aware of rights, Bailyn is suggesting, when they become subject to abuse or attack by a government, and a corollary of his claim about our epistemological state must be that we cannot in advance preclude the possibility of new forms of governmental abuse or attack, giving rise to discoveries of rights not previously recognized.

We have so enshrined our rights that we forget that their appear-

14 It is no accident that the rights listed are procedural and that they form part of Lon Fuller's list of desiderata for a legal system, in *The Morality of Law* (New Haven: Yale University Press, 1964), pp. 39ff.
16 Ibid., p. 77.
17 It has thus been argued that advances in technology have created the basis for new forms of governmental harm so that telephones can be tapped, personal records collected and assessed, and so on. No one would have predicted the invention of the telephone, for instance, at the time of the adoption of the Constitution, and so no one would have determined that one form of governmental abuse to be guarded against was such an invasion of privacy. On Bailyn's argument, it is the new form of attack that makes us aware of what can be a pre-existing right, always there, but previously unrecognized because unneeded by any immediate problem.
ance in human history is recent. But the founding fathers could hardly be ignorant of the discovery of the right against self-incrimination, for example. It had been a little more than a hundred years since Lilburne had been tried in England and the right against self-incrimination had become established. Before Lilburne, it would be true to say that there had effectively been no right; after Lilburne, there was such a right, accorded the same stature as other natural rights. As Levy notes, Examen Legum Angliae: Or the Laws of England, a book published in 1656 [just three years after Lilburne's crucial trial], recalled that the oath ex officio had violated "the Law of Nature", claimed that the nemo tenetur maxim was "agreed by all men", discoursed on the soundness of the maxim, cited Nicholas Fuller's Argument, and observed that in neither criminal cases at common law nor in chancery cases involving fraud was a man obliged "to confess the truth against himself".

To suppose that somehow, by 1787, humans could list all their rights is to enshrine them at the expense of other rights, as yet undiscovered because nothing has occasioned their discovery, or not yet fully comprehended because either too little or too much has occasioned their discovery. The Ninth amendment was added in part as a recognition of this problem.

Those who claim the Court is legislating can appeal to our own sense of astonishment at having the Court find in the Constitution a right, like the right to privacy, no one at the time of the adoption of the Constitution or the Bill of Rights could have had in mind. But, we can now see, conceptual space could exist for the Court's providing Constitutional protection for such a right consistent with the right not having been recognized before.

Conceptual space could exist for such a Constitutional right as privacy, but does it? That is, could the Court be appealing to the Constitution — in an obvious and unastonishing way — in giving Constitutional protection to the right to privacy, for instance? One cannot argue to that conclusion on the basis of the evidence I have given, for three different reasons.

First, I have cited Hamilton's remarks in the Federalist Papers, constructing a theory of the Constitution in explicating his attack on the proposed Bill of Rights. But to go from that theory to the claim that the Constitution provides conceptual space for new rights would be to assume that something significant has been discovered about Hamilton's intentions and that those intentions would be relevant to or, rather, determinative of a general claim about the nature of the Constitution. Those are not simple assumptions, but imply a host of others — that one can determine intentions, that Hamilton spoke for himself in writing to persuade a group of delegates to a political end, that Hamilton spoke for anyone other than himself, that the intentions of Hamilton or anyone else are relevant to understanding the Constitution, that groups have intentions, that one can ascertain the intentions.

19 Ibid.
20 Hamilton's discussion implies a distinction between rights that have a clear meaning and rights that do not. In the latter camp is liberty of the press. He asks, "What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion?" (The Federalist Papers, op. cit., p. 438). I am suggesting that part of the difficulty with treating liberty of the press as a right, on Hamilton's view, is that it encompasses too much or, put another way, too many different things to different people. Listing such a right would thus not provide a clear protection since any invasion could be justified by the claim that liberty of the press did not mean to protect against the harm being inflicted. Hamilton makes just such a move himself in a footnote on the same page when he protests that the power of taxing publications is not a denial of freedom of the press. One need only remember the Stamp Act to comprehend how concerned someone might be about the relation of the taxing power to freedom of the press (see The Federalist Papers, p. 438, fn. 1).

21 Part of the difficulty the Supreme Court has had about Roe v. Wade, and part of the source of our own sense of astonishment about the decision, is that it felt compelled to find the right to privacy invoked within the Bill of Rights. For it is clearly not obvious that it is there. One might wonder why the Court did not appeal to the Ninth Amendment. One can understand, however, the Court's hesitancy in that regard. The Ninth is completely open-ended, and if the Court were to appeal to it, it would provide almost no constraint on judicial power. It is a symptom of the Court's self-imposed constraint on its power that it presumed to find the right to privacy implied by other rights in the Bill of Rights.
of groups, and so on. These are all highly contentious assumptions, and some impossible to sustain.

Second, we do not live in the Constitutional world Hamilton envisaged. A Bill of Rights was added, and though we live in a world of Constitutional tensions, it is not the incoherent legal world Hamilton feared.

Third, Hamilton’s argument would need to be supplemented to support the claim that rights not in the Constitution itself — like the right to freedom of religion, or the right to privacy — can be Constitutionally protected. Such an addition is a puzzle on Hamilton’s view: how can a court have power to protect rights not within the Constitution when its power “to declare all acts contrary to the manifest tenor of the constitution void,” as he argues, comes from the Constitution’s being “limited?”

So I would not like to rest much on the vision of the Constitution we can pull from Hamilton’s remarks in the Federalist Papers, any more than I would like to rest any alternative view on a reconstruction of some founder’s intentions. But it is worth noticing that vision, for it makes clear that though Hamilton might be astonished were he transported to our Constitutional world and told it was an extension of his, he might not be astonished at the Court’s having articulated a right to privacy, for example. He might be more surprised, given the passage of time and the immense social changes, at how few new rights have found their way into our world. For we have, with that vision, a Constitution much more open to change than we might think were we to read only the rhetoric directed against the Court by those who purport to appeal to the intentions of the framers.

Appealing to Hamilton may thus defuse the claim that giving Constitutional protection to such a right as the right to privacy is counter to the Constitution itself — in some deep metaphysical sense. The appeal to Hamilton should loosen the grip that initial argument may have on us. “How can one find in the Constitution something clearly not there?” is not a rhetorical question. For that question to have substantive weight it must become a conclusion backed by substantive arguments about the Constitution: one cannot just appeal to the Constitution.

Indeed, if one does appeal to the Constitution, that appeal in itself, fully understood, will guarantee the possibility of such rights as privacy having Constitutional protection. That appeal will guarantee that we shall have to consider whether the right has Constitutional protection: such a consideration cannot be ruled out a priori just because that right did not surface until many years after the Constitution’s adoption. For legal rules and principles are underdetermined by what gives rise to them, and one consequence is that our understanding of them, in new cases, will change, no matter what the decision, no matter, that is, whether the rules and principles are expanded or constrained.

II.

Any attempt at understanding requires that we theorize. We may play tennis well, but unless we begin to be self-conscious about why we play well, and thus develop some theory about how to do so, we shall not understand our playing well. In trying to work our strategies for playing chess, for instance, one begins with a number of judgments — do not expose one’s queen unnecessarily, use one’s castle in the end game to pin down the opposing king, and so on. One then builds a theory of chess strategy to explain, and deepen, one’s understanding of the original judgments. We may throw some out as being, though prima facie plausible, inappropriate after consideration, and we may add some that had not occurred to us until we began to build a theory and drew some of its implications.

When we become self-conscious about what we do — from playing chess to refinishing furniture to writing — and begin to build theories about what we are doing, we begin with data — our initial judgments — and build to explain them. The theory we ride may uncover new data that completely undermines our original theory — as those early
“electricians” like Benjamin Franklin, who thought of electricity as a subtle fluid, were led by that conception into trying to bottle the stuff and thus to batteries, that is, “dry” electricity, which could not be explained on that original theory. Indeed, as that example suggests, the very way we conceive the data may change as our theoretical understanding proceeds or is revolutionized by some profound insight. On our theory in chess it may be “protecting the king”, but on another, more profound theory, we may see it as “a defensive attack” and it means something different on that theory, having different implications for our chess. What the early electricians saw as “electrical flow”, we may come to see as “electrical transmission”, a different sort of phenomenon.

We need not look to the history of science to make the point. We build such theories all the time. I was told before I went to France on an extended trip that I should order a “croque monsieur” at any French bar. I did a number of times and received a hot ham and cheese sandwich. Then one day my request was followed by a cooked, but cold ham and cheese sandwich — not, to my mind, a French culinary delight. I was then faced with a theoretical problem: was that a croque monsieur, or had I received something different, an old croque monsieur, for instance? Was my theory biased by past good luck, or not?

I had three options. Should I extend my understanding of croque monsieur to include such cooked, but cold sandwiches, should I contract it to exclude cold croques monsieurs as real croque monsieurs (that is, anything one would offer a guest), then my previous concept needs no addition. But the concept is now clearer than it was. Not having thought before about whether a croque monsieur needed to be hot, I would not have noted that feature in recommending the plate to others. Now I would, and the concept is crisper to that extent.

(a) If I contract my concept to exclude cold croque monsieurs as real croque monsieurs (that is, anything one would offer a guest), then my previous concept needs no addition. But the concept is now clearer than it was. Not having thought before about whether a croque monsieur needed to be hot, I would not have noted that feature in recommending the plate to others. Now I would, and the concept is crisper to that extent.

(b) If I extend my concept, the change in my understanding in this case is relatively minor, we presume, though I must take more care in ordering if I do not like them cold, but in other cases we could find such extensive extensions as to overwhelm the features of the original concept. The concept of a planet changed so radically because of the Copernican Revolution that it is unclear whether we should say the previous concept was extended or radically altered by a new one. We often think we understand clearly what something is — a boat, say — and then face a case that oddly fits in with our clear examples — like a floating restaurant, moored to a dock, that has no internal means of locomotion, though it looks like a boat and was originally, say, an elegant barge used on a canal. Is it a boat, or a floating build-

In considering the extension of concepts, we should keep in mind that some extensions are so major as to cause us an embarrassed smile at our previously impoverished conception and that we may be unable to decide whether we have merely extended a concept or radically altered it.

(c) But we may not just radically change, but jettison our previous concept. If a croque monsieur were really the cheapest meal available in French bars, then we must understand my previous lunches in a radically different way: rather than ordering a delightful sandwich, I rather stupidly ordered whatever was the cheapest and lucked into a hot and good meal. Sometimes when one is lucky in chess, what one's opponent thinks is "a decidedly clever move" is really "a really stupid mistake that somehow worked": the concepts are completely different.

The theory of understanding suggested by these brief remarks needs much support, depending as it does upon a number of contentious presuppositions and having a number of contentious implications. One implication is that it matters to what I currently do what I do about my previous concept — extend, contract, or jettison it. If this cold abomination is a croque monsieur, I now embarrass myself if I complain that it is old — and so no longer a croque monsieur; if I do not complain, and it is old, I mark myself as a mark.

One implication of particular concern to us because of its relevance to our understanding of changes in the law is the projection of our new determinate content onto our history. When I contract or extend my concept, or alter it radically and replace it with something new, we are faced with three options in projecting it onto the past:

1. The recently determined concept may have been there all the time, simply waiting for the word that would properly capture it or make one aware of it. In such a case one may comprehend and say, "Ah, yes, how exactly right".

2. The recently determined concept may not have been there at all. Galileo did not have the concept of uniform motion in a straight line being natural motion while Descartes and Newton did. Tacitus did not have the concept of a novel.

3. The recently determined concept may be there, but in some unclear way — the median between (1) and (2). If I read into what happened what I am now clear about, I am clarifying what occurred, but in ways that the participants themselves might not recognize or appreciate. Sometimes things just are unclear; that is of their essence. Sometimes things were clear which we now see as unclear. It is arguable, at least, that Aristotle's physics is clear — given his conceptions of the nature of the world — though we would now see him as confused about any of a number of things. To clarify what happened in the past by imposing a recently determined concept may be unhistorical to the extent the current clarity distorts the confusion actually present.
Choosing between (1), (2), and (3) matters. If a croque monsieur can be cold, but cooked, then I misunderstood and unfairly responded to what, after all, may have been an act of kindness on the waiter’s part. Both a correct understanding and a proper moral assessment turn on that choice. One needs to support one’s choice and cannot just say, “Well, it’s obvious that so-and-so meant such-and-such.”

This implication — that one needs to support projections into the past — is of special importance when one examines the ramifications of this view about understanding in law.

Law is (at least) the subjection of certain sorts of behavior to rules. When a judge decides that a person who won at a slot machine owes money to a partner who had left the room, that decision both creates a particular obligation (and a correlative right) and a rule for similar cases. Law is normative, of course, and so the aim of a judge is not to explain behavior, but to state norms for behavior, to say of some behavior that it is illegal and of other behavior that it is not. But that makes for no crucial difference between a judge deciding a case and an intellectual entrepreneur trying to understand chess or me trying to understand the subtleties of the French. The decision, and thus the rule created, is tailored to the case before the judge just as a theory of chess is tailored to the data available to the chess theorist.

Just as our theory in chess may be so firmly entrenched that we are not likely to see anything new in a particular chess problem, a case may be so backed by precedent and institutional understanding that a judge is not likely to, and should not, see anything new in it: a decision further contracts the relevant concepts, making later change that much less likely because of the additional friction caused by the additional weight. But if a case is about something new, not clearly considered before, a judge is suddenly confronted with having to make a decision like the one I faced regarding croque monsieurs. If that judge extends the relevant concepts or jettisons the old ones, then any observer, or another judge, will be that much more uncertain how another case, somewhat similar, but somewhat different, would be decided. What happens if the partner left two hours before the winning silver dollar, or left in a huff?

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A nice example of this phenomenon is Lon Fuller’s series of five cases involving various forms of fraudulent obtaining of a horse. The cases are designed to guarantee that when one gets to the fifth example, one will be faced with a choice between two principles, each firmly based in previous cases and equally plausible. See The Forms and Limits of Adjudication, Harvard Law Review 92 (1978): 375–76.

I am not concerned to explore here the constraints that operate on the determination of a theory. Some of these concern the point of having a legal system, having to do, for example, with precedent and thus with a deeply embedded principle that people have the right to expect that they can make decisions affecting their futures with a relatively firm reliance on the stability of laws. Other constraints have to do with meaning. The law is as subject to principles of understanding as any theoretical enterprise, and one sort of constraint that operates, for example, is that one cannot just change the meaning of terms willy-nilly. If cruel and unusual punishment means a certain thing, then one cannot, without more ado, just make it mean something else.
Does equal protection require equal funding for education? Does that mean the same amount of money for every child or a certain basic minimum? And who is to be counted in calculating? Every child within a state? Within a school district?

Is the principle underlying the equal protection clause that persons shall not be "treated differently in ways that profoundly affect their lives because of differences for which they have no responsibility"? If so, color would not be a relevant difference: a person is not responsible for having been born a particular color. But then, equally, we should provide equal protection regardless of sex: a person is not responsible for being born male or female. The ERA would then be found in the Fourteenth Amendment's Equal Protection clause.

One could go on with such queries, but the point should be clear: such clauses as the Fourteenth Amendment's Equal Protection clause are inherently subject to redetermination. A question about whether busing for desegregation denies equal protection arises only because of a certain history - of court decisions requiring desegregation, of de facto segregation because of housing patterns, and so on. The question only makes sense because of that complex history, and yet that history and any importation into the law of our ordinary understanding (if any) of equal protection are insufficient to imply any particular judicial decision in cases involving equal protection.

The judge must make the best case possible for one judgment rather than another. That means building a theory that best accounts for the data available, allows us to extend and deepen our understanding of previous decisions, may force us to reject some of those decisions, and makes it clear why one decision is favored in the present case.

The judge must do what we all do when faced with an unclear case. We all know what ambiguous statements are. Nixon may have made one when he said, "I shall not run for any other office", upon being asked whether he would run for the Presidency after his loss of the governor's race in California in 1962. Nixon may have meant to say that he would not run for political office again, or he may have meant to say that he made a mistake in running for any other office than the Presidency. Our judgment about which he meant to say, or whether he meant to make an ambiguous statement, will depend on theories about Nixon, on whether, for example, he is devious and, if so, how much.

Similarly, when a judge considers what equal protection implies for school funding, he or she must build a theory which, like the theory about Nixon, fits with what we know, with the history we are aware of, and so on. Ambiguity is only one sort of indeterminacy, and a judge may face other sorts, but, in any sort, the judge is not doing anything wonderfully exotic or magical, but what we all do when we try to understand something that is different from what we have seen before: we take what we have, the concepts available to us, and try them for fit.

A law or judicial ruling is necessarily underdetermined by judicial decisions and by the history of its origination, including the intentions of any framers. Since the data is sparse, by the very nature of the judicial process, the theory will extend beyond the data available to projected cases, real or imaginary, and so will mean more, as it were, than can be given by the data alone. We may thus discover only at a later date the "real meaning" of what was said because we only later come to understand the principles that underlie our original judgment, or, even more radically, we may come to discover that our previous understanding should properly be replaced with an entirely new one.

So it should cause no astonishment for a Court to discover, for example, that the Equal Protection Clause of the Fourteenth Amendment requires racial desegregation - even though it may be argued that the framers of the Clause never intended it to apply to what might be called "social rights". If the original (intended) object of


28 Raoul Berger thus quotes "Wilson, its sponsor in the House", who "advised the House that the words 'civil rights ... do not mean that all citizens shall sit on juries, or that their children shall attend the same schools. These are not civil rights.' Berger concludes from this that "Wilson's statement is proof positive that desegregation was excluded from the scope of the bill" (Government by
concern in the Fourteenth Amendment were such civil rights as the right of all persons to appear as witnesses in their own behalf, no matter what their race or color, then the Court's "extension" of that object to such social rights as attending a public school without regard to race or color is not the admission of new unthought of cases at the borderline of a vague concept, but a radical overturning of a previous concept to make room for another, with different implications, including some that may well flow back into what, on the previous conception, would have been the distinct province of civil rights. For we may come to see that if race is generally an improper basis for discrimination, neither is place of residence in regard to voting, for example, for we may come to see that what matters is that contingencies for which one is not responsible ought not to be used as a basis for legal discrimination. Such discoveries should cause no astonishment since they occur all the time in trying to understand something.27

The conclusion to draw in regard to the law is thus that even if there were never any new rights added to the law, then, by virtue of that feature of our legal system in which judges make decisions in particular cases, and by virtue of the nature of language itself, not just legal language, rights already in the law would accommodate new cases, accepting some and rejecting others.

No one would have found a cold, but cooked ham and cheese sandwich may be a croque monsieur. Just so, a right to privacy could not have been found in the Constitution at the time of its adoption: the concept had not seriously surfaced yet. Yet the right to privacy may be a Constitutionally protected right.

Whether it is or not will depend on particular arguments similar to the sort we marshal in determining what is properly a croque monsieur. Our understanding of the Constitution may require, or not require, the right's inclusion when faced with a case like Griswold v. Connecticut. No argument I have given has as its conclusion that that right must or must not be given Constitutional protection. I am arguing that the nature of law makes it possible, indeed, I would argue, even necessary, to consider arguments about whether it is or is not Constitutionally protected.

The form and substance of such arguments — the constraints that operate on judges in making such a decision — are not my immediate concern, but my claim does have at least one implication about such arguments and constraints: a judge is not limited to what those who enacted a law, or a constitution, intended. For those intentions underdetermine the law, or Constitution, as much as any particular factual situation underdetermines a rule of law drawn from a case.

I am asserting that a certain form of argument, often used in Constitutional discussions, is unacceptable. The argument proceeds by quoting a founding father, Madison on the commerce clause in Federalist Paper Number 42, for instance, and then asking, in a proposition containing the substantive conclusion one is supposed to draw, "Who can doubt . . . ?"28 The rhetorical question contains the substantive conclusion to be drawn. I am asserting that substantive conclusions need substantive arguments. That claim should be a truism, especially in arguing about the Constitution, but it is not.


28 Mr. Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, gave just such an argument in a Forum discussion of Federalism in the Hofstra University's Conference on The Bicentennial of the Constitution: A Celebration, April 24th, 1987.
The claim that the nature of law requires consideration of the possibility of apparently new rights being given Constitutional protection will not persuade until it is buttressed by numerous detailed examples of how the law works in practice. I will provide here a brief sketch of one, the right to privacy.

The right to privacy found its way into the language of the law in an article by Brandeis and Warren in 1890 in the *Harvard Law Review.* Warren was a Bostonian social power who became furious that newspapermen invaded his yard and disrupted the wedding reception of his daughter. He felt that he and his daughter had been harmed, and he and Brandeis argued that there was a right to be left alone — a right to privacy — denied by the yellow journalists who hung over his back fence to take photographs.

They argued that the right had been at issue in a number of previous cases, though unrecognized as a right to privacy. The most telling example was an 1881 Michigan case in which a man, wanting to see a live birth, followed a doctor into a house to see a delivery. The doctor thought the man was the husband; the woman thought to see a live birth, followed a doctor into a house to see a delivery. The woman thought

The subsequent history of the legal right is complicated, but its origins are clear. New York passed a law in 1903 in response to a court’s failure to find for a young socialite, Abigail Roberson, who, after having her picture taken, found it on a sack of flour advertised as the “Flour of the Family”. The early history of the development of the right turns on such commercial uses of what was conceptualized as one’s property, such as one’s photographic image and one’s name. The law treated the harm as a form of theft of property and assimilated privacy to a property right.

Privacy’s complicated subsequent history — its expansion into four torts or its use in Constitutional law — is checkered. Our theoretical understanding of it is not clear, and its various permutations are not obviously related — a right against having facts about one’s personal

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12 I would argue, first, that privacy is not a form of property so that cases of appropriation are inappropriately categorized as privacy cases; second, that the tort of false light is a form of disclosure, an odd one, but still properly allied to it; third, that disclosure and intrusion are distinct kinds of harms; fourth, that both are properly conceived of as invasions of privacy; and, fifth, that the Constitutional right to privacy is a separable concept, more closely tied to autonomy over certain matters than to disclosure or intrusion.

One of the oddities of discussion about privacy has been the attempt to assimilate privacy to a form of property. See, in this regard, Judith Jarvis Thomson, ‘The Right to Privacy’, *Philosophy and Public Affairs* 4 (1975): 295–333. The attempted assimilation may have an historical basis, but is, I would argue, conceptually confused. The claim requires detailed argument, but when someone sticks their hand in the front pocket of my pants, it does seem that they have done more than trespass on my property.

A second oddity of discussion about privacy has been the attempt to assimilate all forms of invasion of privacy to a single form, as though one and only one harm is at issue. Gerety, for instance, reduces all invasion of privacy to intrusion so that disclosure becomes a form of intruding upon someone’s privacy while Charles Fried reduces all invasion of privacy to disclosure so that intrusion becomes, for him, a form of disclosure (see fn. 33 for the reference to Gerety, and for Fried see ‘Privacy’, *The Yale Law journal* 77 (1968): 475). Again, the point needs arguing, but if I read a friend’s diary and then tell someone about what I have read, I have harmed my friend in two ways, first by reading something

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13 Samuel D. Warren & Louis D. Brandeis, ‘The Right to Privacy’, *Harvard Law Review* 4 (1890): 193–220. Privacy was in the air at the time. Thus, E. L. Godkin, in that portion entitled “To His Own Reputation” of a series of articles on “The Rights of the Citizen” in *Santner’s Magazine* for 1890 (Vol. XIII, July–December, pp. 58–67), notes that “closely allied to” attacking reputation “is the disposition to intrude on privacy” and then goes on to discuss the issue at some length, arguing that privacy is essential to personal dignity, “the fine flower of civilization” (p. 65).

life disclosed not being obviously related to a right not to have one’s name used without one’s permission. Yet, for all that, we have and share a concept in the law that did not effectively exist a hundred years ago.

Such developments in the law are not uncommon. They often start in response to some particular felt harm — as in the case of Warren — but I do not want to provide a general pathology of how new rights come into existence in the law. My point, first, is that they do. The right to privacy is a paradigm case. Second, our understanding of such a right usually reflects all the confusion one normally finds in any theoretical enterprise when a new concept appears. We attempt to assimilate it to concepts with which we are familiar and which have the sort of power we would like this new right to have or find that it does have. So privacy is often assimilated to a form of property. We find that the right often covers a variety of rather different claims, not obviously connected. And, third, we attempt to understand the new concept both by imaginative projection into future cases and by historical reconstruction. We “discover” that the concept appeared under a different guise prior to its discovery; we project it into the past, that is, Warren and Brandeis thus found the right to privacy, as a tort, in a case involving Lord Byron.

Can we project the right of privacy into the Constitution? Such a question invites, as I have argued above, only three possible responses:

(1) the right to privacy is already in the Constitution, (2) it is not in the Constitution, or (3) it is there, but confusedly. If the right is already there, it is not a new right, but only newly recognized and we are just naming it. If it is not in the Constitution, it is new, and one must argue that it is fundamental enough to justify Constitutional protection. This second option would be available if what I have suggested may be Hamilton’s view of the Constitution had prevailed, if one had as well a compelling argument to protect rights not listed in the Constitution itself, and if the Supreme Court were not restrained from creating the law and required only to expound it. But Hamilton’s view did not prevail, and various constraints — Constitutional, institutional, and political — prevent the Supreme Court from taking the second option.

So the Court ends up saying that a right that only came into our consciousness over 100 years after the adoption of the Constitution and the Bill of Rights really was there all the time, underlying, perhaps, and thus grounding such rights as the right against illegal search and seizure. The Court’s recognition of that right sits confusedly, I would argue, between saying that it is there and saying that it is confusedly there, between (1) and (3), that is, but, I would also argue, the Court has good reasons for such mugwumpery.

The claim that the right to privacy is in the Constitution, confusedly or clearly, may seem astonishing, but it is no less astonishing than a simple claim that it is not there. Whenever one projects any concept into the past, one finds proponents on both sides of the projection. Some find it obvious that a particular concept was there, and some find it obvious that it was not. One need only examine the

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.private and so intruding upon my friend’s privacy, and second by disclosing what is private to others. It is not obvious that it helps clarity to treat these two harms as though they were the same.

The example I have in mind is the case of an impersonator of Richard Avedon, the photographer. A man would approach women, primarily in bars, introduce himself as Avedon, remark on their extraordinary beauty, and offer to take a series of photographs of them, taking care to note that oftentimes beautiful women do not photograph well so that he could make no promises. He would then escort the women to his room or theirs, sometime pretend to take their pictures, sleep with them if they were willing and sometimes when they were not, sometimes beat them, and con them out of money. The man was using Avedon’s name to claim Avedon’s identity, for non-commercial gains. See ‘The Phony Photographer’, Newsweek, Vol. 90, Sept. 19, 1977, p. 43.

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An important issue and a great deal of history is hidden here in these phrases. It is not obvious that a court and the Supreme Court in particular is not to appeal beyond the Constitution, say, to fundamental rights that exist independently of any Constitution and would require changing legislation and so would allow the Court to create law, and the history of how it came to limit its power to interpreting the Constitution and, more importantly, the reasons for that limitation are of moral import. But that is the subject for another paper. We need only note here that there is an important issue here to be explored.
controversies surrounding Kepler's laws and the underlying claim that planetary orbits are elliptical to sense how much hangs on such a claim: a whole conceptual world may be lost or transformed.

Those who think privacy in the Constitution ask, almost rhetorically, how the founding fathers could not have meant to protect such a right in saying, for instance, that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." Those who think it obvious that the concept is not there proceed in the same way, asking "How could they...?". The answer to both responses is the same: little is obvious in Constitutional law, and a substantive conclusion requires a substantive argument, not a question. Neither projection is obvious, and which is correct depends ultimately on whether a good case can be made for the right's really either underpinning other clearly specified Constitutional rights, or being a clear implication of such rights, and upon what may seem an odd ontological issue: what is the status of rights before they are recognized? Can a right exist unperceived? For upon the answer to that question rests a concern about whether the Court, in such a case as Roe v. Wade, legislates or expounds. Regarding rights, is esse percipi? 38

38 It is one of the curious features of the uncovering of a new concept — like that of privacy — that when we project it into the past, we find it hard to conceive of what it would have been like not to have had the concept, clearly articulated and underlying one's other conceptions. So we today find it difficult to understand how Aristotle could not have seen a pendulum, but saw instead a heavy object constrained in its attempt to get back to its natural place, earth. Just so, it may be difficult to see how the Fourth Amendment right against unreasonable searches and seizures could not have been a right regarding privacy, but we should take care not to project into our understanding of what they were protecting our present conception. Their concern may have been simply to guarantee the security of themselves and of their personal effects from unreasonable searches and seizures. The two concepts are not identical.


We have moved, with this question, a long way from that simple prima facie plausible argument with which we began, and we can now, I hope, see some of its faults. One is that it presupposes a conception of the law in which, once stated, no development or change is possible in the meaning of, and in our understanding of, any provision of law. This position — that no change is possible — is false. No theoretical enterprise precludes changes in our understanding of its original suppositions. Not even logical truths have such immunity, for we understand logical truths more clearly today, with developments in modern logic, than, say, Aristotle did — though Aristotle would clearly recognize our laws of logic.

But legal rules and principles, developed as responses to particular social problems, are even less likely, a priori, to have the feature of immutability not even logical truths have. The history of the equal protection clause of the Fourteenth Amendment has been in part the result of the unfolding of the unarticulated principle that people should not be "treated differently in ways that profoundly affect their lives because of differences for which they have no responsibility". If that principle does underlie that clause — and one would have to argue for that claim — then we may understand it differently than those who proposed it, and that is no more cause for concern than our having a different and deeper understanding of gravity than Newton's rather truncated conception.

A second problem is that it seems taken as a given that when the Court decides, it recognizes a pre-existing right. What is bothersome about Roe v. Wade for many just is that there is no obvious pre-existing right to which to appeal. But the claim that there is a right answer, even in hard cases, where that means that one of the parties has a right which the court ought to recognize, cannot be a primitive of any system. There is a moral reason, of course, for making that claim: how else could one morally justify denying someone's claim? But there are also moral reasons for denying it, as conservatives emphasize. In hard cases the Court will sometimes appear to be arguing for a policy matter as though it were a matter of right. To the
extent its arguments have that appearance, it puts at risk its reputation as an objective arbiter of disputes. But, in any event, no matter which position one takes, one needs to argue for it, giving substantive Constitutional reasons, and one needs to argue for it on a case-by-case basis. Who is to know, a priori, which solution is best when one of our concepts, like that of equal protection, suddenly seems as inappropriate as my concept of a croque monsieur?

Change in our understanding of the Constitution, in short, is possible. The stakes, however, must be high for one to have to argue for what ought to be such an obvious truth. One fear is judicial anarchy. But judges are no more free to make the law mean what they wish than I am to make a croque monsieur mean coq au vin. Judges must deal with history and institutional constraints, among other things, and though I would like still to have to deal with Myke Bayles about this, he would think it right that I have to deal with the French.