

5. “Our Perfect Constitution” Revisited

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1. Introduction

In 1981, Henry Monaghan published an essay, “Our Perfect Constitution,” that was highly critical of the assumption prevalent among enthusiasts of the Warren Court that everything they believed desirable—particularly with respect to individual rights—could be achieved through proper interpretation of the existing Constitution.¹ Focusing on the then-lively conversation among academic constitutional theorists about constitutional interpretation and substantive due process, Monaghan described the “perfect Constitution” assumption in these terms:

[P]roperly construed, the constitution guarantees against the political order most equality and autonomy values which the

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1. Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

commentators think a twentieth century Western liberal democratic government ought to guarantee to its citizens.²

He continued, “Each [commentator] asserts that there is a clear and substantial connection between the constitution and *current* conceptions of political morality, a linkage *not* exhausted by any assumed constitutional guarantee of a fair political system.”³ As these statements indicate, the “perfect Constitution” assumption is closely tied to issues of constitutional interpretation.⁴

Monaghan’s concluding comments show that his critique actually bites much more deeply, raising questions about the utility of constitutional interpretation no matter what one’s interpretive approach is. After criticizing the “perfect Constitution” assumption, Monaghan wrote, “The constitution established a framework of government suitable to meet the middle distance needs of the nation at the end of the eighteenth century and, with the Civil War amendments, the nation’s needs at the turn of the twentieth century.”⁵ If that is so, we can describe the “perfect Constitution” assumption differently: The “perfect Constitution” assumption is that the existing Constitution—properly construed, as Monaghan said—is entirely adequate to meet the perceived needs of contemporary society. Properly construed, the Constitution authorizes the national government to engage in all the activities we (the people engaged in the discussion) believe are necessary to accomplish the goals set out in the Preamble—which is, in the present context, to “insure domestic Tranquility, provide for the common defence, [and] promote the general Wel-

2. *Id.* at 358 (emphasis in original removed).

3. *Id.*

4. Monaghan’s criticism of the commentators he discussed was predicated on his commitment to an interpretive method centering on originalism tempered by *stare decisis*. See, e.g., *id.* at 360 (“I write from the perhaps ‘puerile’ bias that original intent is the proper mode of ascertaining constitutional meaning, although important concessions must now be made to the claims of *stare decisis*.” [citation omitted]). See also *id.* at 374–83 (defending originalist interpretation against criticisms).

5. *Id.* at 395.

fare.” And, properly construed, the Constitution places limits on the exercise of the national government’s powers so as to “secure the Blessings of Liberty to ourselves and our Posterity.”

The “perfect Constitution” assumption induces people—lawyers and judges in particular—to believe more than that the existing Constitution provides *some* answer to whatever problems we face. The “perfect Constitution” assumption is that the answers we get from the existing Constitution are pretty good ones, though perhaps not the best imaginable ones. So, for example, the existing Constitution justifies the adoption of policies as part of the war on terrorism that effectively combat terrorism without unduly impairing civil liberties.

I argue that the “perfect Constitution” assumption is nearly inescapable. Every justice who wrote an opinion in *Hamdi v. Rumsfeld* made that assumption.⁶ This first part of the chapter demonstrates that proposition. In Part II, I explain why the assumption is so prevalent. The circumstances under which constitutional cases arise place real pressure on litigators and judges to assume that the (existing) Constitution provides the resources to solve the problems they face. Failing to find those resources in the existing Constitution means that problems whose solution seems urgent will go unsolved. Yet, it often turns out that the appearance of urgency is unjustified. What seemed at first like an incredibly urgent problem turns out to be a long-term condition. Rather than trying to solve the problem at once, we might as well have taken a breath and tried to resolve the condition at a more leisurely pace.

This process, flowing (as I argue) from the “perfect Constitution” assumption, has generally bad consequences, which I describe in Part III. To preview my conclusion: Although the assumption has some

6. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). Justice Scalia’s endorsement of the assumption came with a modest qualification. See text accompanying notes *infra* notes 46–47. For another exemplification of the “perfect Constitution,” see Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004), discussed text accompanying notes 76–83 *infra*.

positive consequences, it forces constitutional development into the mode of interpretation, which is technical and legalistic, rather than into the mode of public constitutional deliberation as exemplified by the possibility of express amendment. As Monaghan suggested, from an originalist point of view, it would be a miracle were the Constitution entirely adequate to address the nation's problems in the twenty-first century.⁷ Yet, the same point could be made about a Constitution interpreted by *any* method. The "perfect Constitution" assumption is that, properly construed, the Constitution lets us do whatever we think needs to be done but stops us from doing whatever we should not do. From the standpoint of any single decision maker, however, a Constitution is hardly needed to accomplish that. Such a decision maker *will* do whatever she thinks needs to be done and will *not* do whatever she thinks she should not do. The standard move at this point is one of institutional allocation: The Constitution, properly construed, confers adequate power on the national government's political branches to do what actually needs to be done, and—again, properly construed—it authorizes the courts to ensure that the political branches do not do what should not be done. Constitutional interpretation by the courts thus becomes the key to ensuring that the perfect Constitution operates as it should.⁸

In doing so, it opens the courts to justified criticism of the sort that Monaghan leveled against the Warren Court, and perhaps worse for those of us who do not believe that courts should enjoy any general immunity from criticism, it reduces the role ordinary citizens play in constitutional development.⁹ In short, it would be better were

7. But *cf.* CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787* (1966).

8. The institutional allocation poses its own difficulties, to the extent that it appears to license the courts to decide (1) whether the national government's political branches, taken together, have adequate power and, perhaps more important, (2) how the Constitution allocates power among the political branches. For additional discussion, see discussion of Justice Scalia's opinion and the separation of powers aspects of Justice O'Connor's opinion later in this chapter.

9. "Citizens" is a word not without significance in the present context.

the problems that terrorism poses for our constitutional order addressed by the citizenry in general, through constitutional deliberation channeled into the amendment process, rather than exclusively by the courts.¹⁰ The assumption that our Constitution is perfect converts that conceptual possibility into a practical impossibility.

II. The “Perfect Constitution” Assumption in *Hamdi*

Justice O’Connor’s plurality opinion clearly displays the “perfect Constitution” assumption in the care with which she constructs the defense of the proposition that the president had the authority to detain Hamdi and in the sloppiness with which she constructs the proposition that the government can continue to hold Hamdi only if it provides him with the opportunity to contest the grounds of his detention in a proceeding with characteristics that Justice O’Connor enumerates. The latter holding attracted the greatest share of public comment, perhaps because it contained the (I assume, deliberately inserted) attention-getting observation that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”¹¹ The “perfect Constitution” assumption is completely obvious in the plurality’s discussion of its holding about due process. The assumption is a bit harder to see in its discussion of presidential power, which is why I begin by bringing out the way in which that discussion makes the “perfect Constitution” assumption.

Justice O’Connor’s argument supporting the conclusion that the president had the authority to order Hamdi’s detention is constructed

10. I refer to the amendment process primarily for heuristic purposes—that is, to raise the possibility that modes of constitutional deliberation that are more open and public than constitutional litigation would produce better, that is, more stable and defensible, procedures for dealing with the kinds of issues posed by the war on terrorism. Relying on the amendment process as *the* formal mechanism for addressing those issues would require me to assume, as I do not, that the amendment process is one perfect component in an elsewhere imperfect Constitution.

11. *Hamdi*, 124 S. Ct. at 2650.

segment by segment. In form only a careful construction of the authority the president had under the congressionally enacted Authorization for the Use of Military Force (AUMF), O'Connor's argument is committed only to the proposition that the president's authority exists when *all* the segments are in place; take one away, and the president *might* lack authority (but perhaps he might have such authority even in the absence of one or more of the segments).¹² Justice O'Connor's opinion began by noting two preliminary points. First, the president claimed that Article II confers authority in him to detain a citizen as an unlawful combatant. Second, the term "unlawful combatant" was ill-defined. Justice O'Connor's opinion confined its holding to persons designated as unlawful combatants who were "part of or supporting forces hostile to the United States . . . in *Afghanistan* and who engaged in an armed conflict against the United States *there*."¹³ On the first question, Justice O'Connor's opinion avoided the president's contention by finding that Congress had, in fact, authorized Hamdi's detention in the AUMF, which authorized the president to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks" or "harbored such organizations or persons."¹⁴

12. Justice O'Connor's opinion does not commit those who signed it to any outcome when one of the segments is missing. Four justices—Scalia, Stevens, Souter, and Ginsburg—would have held that Hamdi's detention was not within the president's power (the latter two because the detention was not authorized by Congress), and Justice Breyer joined Justice Stevens's dissenting opinion in *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), which asserted that the detention of an American citizen who had been seized outside the theater of war was unconstitutional. There would thus appear to be five justices who think that the president lacks constitutional authority to order the detention of an American citizen absent congressional authorization or arising from a seizure outside the theater of war.

13. *Hamdi*, 124 S. Ct. at 2639 (emphasis added, internal quotation marks deleted).

14. Quoted *id.* at 2635. Justice Souter concluded that the AUMF did not authorize the detention of U.S. citizens, and that, in light of another statute's requirement that "[n]o citizens shall be imprisoned or otherwise detained by the United States

Justice O’Connor’s opinion found “no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban” were covered by the AUMF.¹⁵ Relying on the traditional laws of war, the opinion found that detention of such individuals “for the duration of the particular conflict in which they were captured” was a “fundamental and accepted . . . incident to war,”¹⁶ a means of ensuring that opponents would not return to the battlefield. Hamdi argued that Congress had not authorized indefinite detention, to which Justice O’Connor’s opinion replied by again invoking the laws of war, which allow detention for as long as “active hostilities” last.¹⁷ Conceding the ambiguity of defining in advance the termination point of a “war on terrorism,” the opinion said that it was enough for purposes of Hamdi’s case that “[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan.” Because the armed conflict giving rise to Hamdi’s seizure was continuing, the traditional purpose of detention—to prevent someone from returning to a battlefield—was served by his detention.¹⁸

except pursuant to an Act of Congress,” 18 U.S.C. § 4001(a), the president lacked (statutory) authority to detain Hamdi. That conclusion should have required an analysis of the president’s claim of authority from Article II alone (and the attendant claim that such authority could be exercised in the face of a congressional prohibition). Saying that the president had only “hint[ed] of a constitutional challenge” to § 4001(a) but had not “present[ed]” one, Justice Souter “not[ed] the weakness of the Government’s mixed claim of inherent, extrastatutory authority.” *Id.* at 2659 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). Justice Souter argued that the president could not rely on his power as commander-in-chief to implement the traditional laws of war with respect to Hamdi, because the conditions of Hamdi’s detention were inconsistent with those laws. *Id.* at 2658–59; see also *id.* at 2659 (asserting that “what I have just said about” the traditional laws of war in connection with statutory authorization “applies here [that is, to the constitutional question] as well.” In addition, Justice Souter “recall[ed] Justice Jackson’s observation that the President is not Commander in Chief of the country, only of the military.” *Id.*

15. *Id.* at 2640.

16. *Id.*

17. *Id.* at 2641.

18. *Id.* at 2641–42. The opinion noted, “indefinite detention for the purpose of interrogation is not authorized.” *Id.* at 2641.

The “perfect Constitution” assumption shows two facets in this analysis. First, the Constitution is perfect because it authorizes the president to engage in activities that the plurality concluded were appropriate for the national defense. Second, and more important, the segments of the opinions—and the qualifications each segment implicitly might place on the president’s authority—show that the Constitution is perfect because, in the plurality’s view, take any one segment away and Hamdi’s detention might become constitutionally troubling.¹⁹ The detention of an American citizen on the president’s say-so, without congressional authorization, would be constitutionally bothersome; so would the detention, even with authorization, of a citizen seized outside the theater of war;²⁰ so would the indefinite detention of a citizen seized in the theater of war for purposes of interrogation;²¹ and so on through each segment of the argument that the plurality opinion constructs. The “perfect Constitution” assumption underwrites the plurality’s apparent nervousness about the state of affairs when one segment is cut out.²²

As I indicated earlier, the other, seemingly more consequential aspect of the plurality opinion displays the “perfect Constitution” assumption even more dramatically. Here, the plurality adopts the standard two-stage form of constitutional analysis of questions of national power. The national government created by the Constitution is one of the enumerated powers. At the first stage, one must find out whether the national government—or, in the present context, the

19. I emphasize, though, that the plurality does not commit itself to the proposition that Hamdi’s detention would be unconstitutional if one or another segment were cut out.

20. Apparently, the detention of an American citizen seized *anywhere* other than Afghanistan would be constitutionally problematic.

21. Or the detention after active combat operations end in Afghanistan of someone seized there.

22. Still, the plurality maintains a bit of distance from the “perfect Constitution” assumption because it does not formally commit itself to the proposition that the president would not have the requisite authority were one or more of the segments lacking.

president—can locate a source in the Constitution for the authority it (or he) wishes to exercise. Authority alone is not enough, though, because the Constitution also limits the powers it unquestionably confers on the organs of the national government.²³ The second stage involves asking whether some constitutional provision—in *Hamdi*, the Fifth Amendment’s due process clause—limits the power the plurality concluded the president had.²⁴

Justice O’Connor’s reliance on the “perfect Constitution” assumption is apparent in her treatment of the due process question. Answering that question, she wrote, required the Court to balance “serious competing interests,”²⁵ guided by the Court’s decision in *Mathews v. Eldridge*.²⁶ The plurality held that due process required Hamdi to be given an opportunity to challenge the government’s claim that he was in fact someone who had taken up arms against the United States in Afghanistan by presenting his position to “a neu-

23. For example, no one today questions the national government’s power to regulate the interstate transportation of prescription drugs by making it a crime to mislabel such drugs. However, if the government compelled a defendant to testify about her knowledge of the drug’s actual composition in her own criminal trial for mislabeling, that would be a violation of the Fifth Amendment’s ban on self-incrimination.

24. Justice Thomas’s dissenting opinion has a passage that obscured this two-stage analysis. He began his discussion of the due process clause by raising the possibility that the clause “requires only ‘that our Government must proceed according to the ‘law of the land’—that is, according to written constitutional and statutory provisions,’” 124 S. Ct. at 2680 (Thomas, J., dissenting) (quoting *In re Winship*, 397 U.S. 358, 382 (1970) (Black, J., dissenting)). Though rejected by the Court, Justice Black’s position is analytically coherent in the context he was dealing with—that is, where the question is determining what limits the due process clause places on the power of a government of *general* power (as state governments are). In that context, Black’s position gives the clause the function of ensuring that government action be authorized by constitutional or statutory provisions. That function is served by *conferring* those powers on a national government with limited powers. Justice Thomas’s suggestion would make the Fifth Amendment’s due process clause redundant. It is also inconsistent with long-standing precedent. See, e.g., *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856).

25. *Hamdi*, 124 S. Ct. at 2646.

26. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

tral decisionmaker,” which could be “an appropriately authorized and properly constituted military tribunal.”²⁷ That decision maker could rely on hearsay evidence. In addition, “the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one.”²⁸ Thus, “once the Government puts forth credible evidence” that Hamdi was an enemy combatant, the burden could be shifted to Hamdi “to rebut that evidence with more persuasive evidence.”²⁹

Probably the best that can be said about these procedures is that the Court simply made them up, and its invention may not be entirely indefensible. Consider Justice O’Connor’s explanation for allowing hearsay evidence to be used and for allowing a rebuttable presumption in the government’s favor. She wrote that the “exigencies of the circumstances” justified those rules.³⁰

As to hearsay, that explanation may sometimes make sense, at least as long as the “exigencies” are closely tied to the definition of unlawful combatant—a person seized on the battlefield—with which Justice O’Connor worked. Although the person who captured the detainee might be abroad or injured or dead, he might have provided some account of the capture to a person who could testify.³¹ The difficulty, though, is that some rules against the admissibility of hearsay are predicated on the judgment that a decision maker cannot assess the credibility of a person whose story is recounted by another.

Hamdi’s case illustrates the difficulty. The record before the Court in Hamdi’s case was quite thin, but news accounts indicate that he was captured by the forces of the Northern Alliance, which was allied with the United States. The Northern Alliance turned

27. *Hamdi*, 124 S. Ct. at 2651.

28. *Id.* at 2649.

29. *Id.*

30. *Id.*

31. Justice O’Connor’s opinion did not address the obvious next question: Does the government bear any burden of establishing the unavailability of the person whose out-of-court statements are to be admitted?

Hamdi over to U.S. forces, at which time someone affiliated with the Northern Alliance told a U.S. soldier that Hamdi had been fighting in a Taliban unit that surrendered to the Northern Alliance and, in surrendering, turned over his rifle to the Northern Alliance.³² The legality of Hamdi’s detention turns on whether the account provided by the Northern Alliance is correct; but the neutral decision maker has no basis on which to assess its truthfulness.

Now add the possibility of shifting the burden to the detainee once credible evidence against him is introduced. Again, in some contexts, such a shift might be justified. The decision maker might invoke a presumption of regularity in connection with statements made by U.S. soldiers and officials: In the absence of other evidence, the decision maker could assume that U.S. soldiers and officials tell the truth. Such a presumption would then justify shifting the burden to Hamdi to explain why their statements were not true.

Compound hearsay and the rebuttable presumption, though, and we have real problems. The presumption of regularity allows the decision maker to conclude that the Northern Alliance forces did indeed tell some U.S. soldier that Hamdi had surrendered with a Taliban unit.³³ The statement by the U.S. soldier would be credible, and—if the information about Hamdi’s capture were accurate—it might justify shifting the burden to Hamdi. The real hearsay problem, though, is not with statements made by U.S. soldiers or officials; it is with the statements made *to* such officials by the Northern Alliance. Could a presumption of regularity be invoked as to those statements, the only ones that actually bear on the legality of Hamdi’s detention? Justice O’Connor’s opinion does not say.³⁴

32. See *Hamdi*, 124 S. Ct. at 2637 (quoting a declaration filed in the lower courts by Michael Mobbs).

33. In addition, it allows the decision maker to conclude that that soldier did indeed tell some other U.S. official that the Northern Alliance had said so.

34. Perhaps the statement recounted by the Northern Alliance is not “credible evidence” that the detainee was an unlawful combatant. Hearsay that is inadmissible

The procedures that the plurality makes up may be fine ones—allowing a person held as an unlawful combatant a fair chance to establish that he did not actually fit into the category, while respecting the difficulties the government might face in coming up with evidence in the middle of active combat operations.³⁵ Or, the procedures might be quite bad ones. They might be skewed in favor of detainees if many were captured by non-U.S. forces. More likely, they might be skewed in favor of the government by allowing the decision maker to rely on hearsay evidence whose accuracy is difficult, though not impossible, to assess and then to shift the burden to the detainee—who is likely to be in a position only to tell his own story, not to come up with evidence from anyone else—to rebut the government’s evidence.

As my phrasing indicates, I am skeptical about the adequacy of the procedures Justice O’Connor devised. My point, though, is not that the procedures are actually inadequate. It is that we simply cannot know whether they are—and, even more important, neither can Justice O’Connor or her colleagues. Justice Scalia called the plurality’s reliance on *Mathews v. Eldridge* “constitutional improvisation.”³⁶ A person who thought judicial balancing in constitutional law was acceptable might think that balancing works well when, but only when, the judges have had enough experience to allow them to see the advantages and disadvantages of a variety of procedures applied to a range of problems. The judges can then use a form of common-law reasoning (or, as it has come to be called, pragmatic judgment)

because of difficulties in assessing its accuracy might not be credible enough to justify shifting the burden from the government to the detainee.

35. Again, I think it worth noting the connection between the definition of “unlawful combatant” and the procedures the plurality found acceptable. Most obviously, the “exigencies of the circumstances” change rather dramatically once active combat operations have concluded and, in some cases, might well change significantly when the detainee was not seized on the battlefield.

36. *Hamdi*, 124 S. Ct. at 2672 (Scalia, J., dissenting).

to define the procedures that will properly balance the interests at stake in a new situation.³⁷

The plurality’s improvisation is troublesome precisely because the Court has essentially no experience on one side of the balance.³⁸ Justice O’Connor’s opinion identifies the interest on Hamdi’s side as “the most elemental of liberty interests—the interest in being free from physical detention”³⁹ and cites several cases in which the Court addressed the procedures suitable when that interest is implicated by varying statutory schemes. On the other side is the government’s interest in keeping enemies off the battlefield. In designing procedures that accommodate that interest, Justice O’Connor had nothing to go on. The paragraph setting out the hearsay–rebuttable presumption rules contains not a single citation.⁴⁰ As a matter of pure theory, Justice O’Connor’s opinion might have been specifying a constitutionally required minimum set of procedures, without suggesting that those procedures were the best, or even pretty good ones.⁴¹ However, the opinion’s rhetoric seems inconsistent with that theory. Even more, the Court’s lack of experience with the problem at hand left it with no basis for distinguishing between minimum requirements and pretty good procedures. What Justice O’Connor did have was the “perfect Constitution” assumption: Because the Constitution is per-

37. Cf. Monaghan, *supra* note 1 at 374 (“perfectionists . . . analogize constitutional interpretation to the evolutionary, open-ended, case-by-case approach characteristic of the common law method of adjudication.”).

38. Justice Scalia provided another, more scornful, characterization of the plurality’s approach. *Hamdi*, 124 S. Ct. at 2672 (describing *Eldridge* as “a case involving . . . the withdrawal of disability benefits!”) (ellipsis and emphasis in original). This characterization arose from his principled opposition to the kind of balancing *Eldridge* commends and need not be accepted by those who do not agree with that opposition.

39. *Id.* at 2646.

40. Nor, of course, did the justices in the plurality have relevant real-world experience with military affairs to draw on.

41. In other words, the opinion might be taken to identify the constitutionally required floor for procedures, without implying that there is no good policy reason for using more robust procedures.

fect, it *must* authorize the detention of unlawful combatants pursuant to procedures that adequately balance the competing interests.

Justice Scalia came close to seeing that the plurality relied on the “perfect Constitution” assumption, yet his perception was obscured by his obsession with judicial willfulness. He derided the plurality for its “Mr. Fix-it Mentality,” the view that the Court’s “mission [is] to Make Everything Come Out Right.”⁴² If the president failed to devise appropriate procedures, “Well, we will ourselves make that failure good, so that this dangerous fellow . . . need not be set free.”⁴³ Further, even Justice Scalia ended up accepting the “perfect Constitution” assumption, although he “d[id] not know whether” the “tools” provided by the Constitution “are sufficient to meet the Government’s security needs” because that judgment was “far beyond [his] competence . . . to determine.”⁴⁴ But, in the end, he too thought that the Constitution was perfect because the courts would not intervene were the president and Congress to decide that the tools the Constitution gave them, and in particular the provision authorizing them to suspend the privilege of the writ of habeas corpus, were insufficient and therefore forged other, more effective tools that the Constitution did not really give them. In short, Justice Scalia did not himself have the “Mr. Fix-it Mentality,” but he was willing to sit by and watch the president and Congress if *they* had that mentality.

Justice Scalia argued that the Constitution put the government to a choice when U.S. citizens took up arms against it: Prosecute the citizens for treason or suspend habeas corpus.⁴⁵ Criminal prosecutions come with the full set of procedures mandated by the Constitution.⁴⁶ If conditions make criminal prosecutions difficult or

42. *Hamdi*, 124 S. Ct. at 2673 (Scalia, J., dissenting).

43. *Id.*

44. *Id.*

45. As Justice Scalia’s initial formulation indicates—“prosecute him in federal courts for treason or some other crime”—nothing but rhetorical force flows from focusing on treason prosecutions. *Id.* at 2660.

46. Treason prosecutions come with the special requirement that treason be

impossible, suspending the writ of habeas corpus allows the government to relax or even entirely eliminate the procedural protections available in criminal prosecutions. Those detained by the government when the writ of habeas corpus is suspended get only those procedures that Congress and the president choose to give them.

So far, so good—demonstrating, to this point, the Constitution’s perfection. According to Scalia, the Constitution already provides adequate means for accommodating national security and individual liberty—at least if Congress agrees with the president that the writ should be suspended.⁴⁷ The Constitution, that is, imposes a *political* constraint on the power to meet national security needs. What if the president believes that national security requires detentions without the panoply of criminal procedure protections, and Congress disagrees, and, on reflection, we (or, as I will emphasize in the next section, the courts) conclude that the president was right? Perhaps the possibility of a dangerous political impasse can explain some uncertainty about the Constitution’s perfection.⁴⁸

More interesting, I think, are the problems associated with the suspension of the writ of habeas corpus. The Constitution appears to identify limited circumstances when Congress can suspend the writ—“when in cases of rebellion or invasion the public safety may require

proved by confession in open court or by testimony of two witnesses to the same act (U.S. Const., art. III, § 3, cl. 1).

47. Here I make the conventional assumption that Congress has the power to suspend the writ (or, less strongly, that presidential suspensions of the writ are permissible for only the period it takes for the president to seek congressional suspension and must terminate even if Congress fails to act one way or the other on such a request). *Cf. Hamdi*, 124 S. Ct. at 2659 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (describing the possibility that “in a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen if there is reason to fear he is an imminent threat to the safety of the Nation and its people”).

48. Justice Scalia expressed uncertainty about the adequacy of the government’s “tools” for protecting national security in a slightly different context—a discussion of detentions in connection with criminal prosecutions. *Id.* at 2673 (Scalia, J., dissenting).

it.”⁴⁹ As Justice Scalia noted, one might question whether the attacks of September 11 were an “invasion” within the meaning of the Constitution and whether an invasion could then justify a suspension of habeas corpus for an extended period thereafter.⁵⁰ The Constitution would be imperfect if it prevented Congress and the president from choosing to suspend the writ merely because the framers could not anticipate all the circumstances under which suspension would be an appropriate policy response to novel forms of military attack on the United States. Justice Scalia preserved the Constitution’s perfection by saying that determining whether there had been an invasion justifying suspension of the writ was a question for Congress, not for the courts.

For this proposition, Justice Scalia relied on a paragraph—really, a sentence—from Joseph Story’s *Commentaries on the Constitution*: “It would seem, as the power is given to congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge, whether exigency had arisen, must exclusively belong to that body.”⁵¹ Yet, Story does not quite say what Justice Scalia needs him to say.⁵² The suspension clause has two components: The writ can be suspended (1) in cases of rebellion or invasion or (2) when the public safety requires it. Story’s reference to exigency reads more comfortably as a reference to the second requirement than to the first.⁵³ At least under modern ideas about judicial competence, it would seem easy to conclude that the courts lacked competence to deter-

49. U.S. Const., art. I, § 9, cl. 2.

50. *Hamdi*, 124 S. Ct. at 2674.

51. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1336 (1833), available at http://www.constitution.org/js/js_332.htm (visited Nov. 3, 2004).

52. In addition, as Jeffrey D. Jackson, “The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding *Ex parte Merryman*” (unpublished manuscript in my possession), observed, Story provided no authority to support his conclusion, a point made by early critics of Story’s view.

53. Even though Story quoted only the first requirement.

mine whether public safety required the suspension of the writ and substantially more difficult to conclude that they lacked competence to determine whether an invasion or rebellion had occurred.⁵⁴ Justice Scalia preserves the “perfect Constitution” assumption by placing outside judicial ken the possibility that Congress and the president might suspend habeas corpus when no invasion or rebellion had occurred. Or, put another way, Justice Scalia modifies the “perfect Constitution” assumption slightly: The Constitution that the courts enforce is perfect, even if the Constitution as a whole might not be.

Justice Scalia’s discussion of the suspension of habeas corpus gave Justice Thomas the opportunity to express *his* agreement with the broader “perfect Constitution” assumption. Justice Thomas relied primarily on precedent to explain why detention of enemy combatants that was authorized by Congress in general and implemented by the president in good faith satisfied the requirements of due process. That approach meant that Thomas did not have to rely heavily on the kind of deep judgment embodied in the “perfect Constitution” assumption. In describing Justice Scalia’s position, though, Justice Thomas wrote, “Justice Scalia apparently does not disagree that the Federal Government has all power necessary to protect the Nation,”⁵⁵ which—if, as seems to be true, this reflects Justice Thomas’s view as well—is a version of the “perfect Constitution” assumption.⁵⁶ Justice Thomas’s response to Justice Scalia demonstrated, in a seemingly off-

54. The most relevant cases here are *Powell v. McCormack*, 395 U.S. 486 (1969), and *Walter Nixon v. United States*, 506 U.S. 224 (1993). The former holds that the courts have the power to determine that the Constitution’s reference to the “qualifications” of members of Congress refers to the three so-called standing requirements of age, citizenship, and residency. The latter holds, albeit with some ambiguity, that the courts do not have the power to determine whether impeachment proceedings pursuant to Senate rules constituted a “trial” within the meaning of the Constitution.

55. *Hamdi*, 124 S. Ct. at 2682 (Thomas, J., dissenting).

56. It should be noted as well that Justice Thomas’s opinion suggests no particular concern about the possibility of an unjust detention, and to that extent, his conclusion that the Constitution authorized Hamdi’s detention is at least consistent with the “perfect Constitution” assumption.

hand comment, that he did indeed share the assumption. Justice Scalia relied on Congress's power to suspend the writ of habeas corpus as a means of dealing with problems that cases like Hamdi's might present. But, Justice Thomas observed, suspending the writ "simply removes a remedy";⁵⁷ it does not make the president's actions lawful.⁵⁸ It followed, according to Justice Thomas, that Justice Scalia's position would require the president or Congress "to act unconstitutionally in order to protect the Nation."⁵⁹ And then, the "perfect Constitution" assumption comes out: "But the power to protect the Nation *must* be the power to do so lawfully."⁶⁰

The "perfect Constitution" assumption, then, is pervasive. I turn to an analysis of its causes and then to its consequences.

II. Why Do We Assume That the Constitution Is Perfect?

The "perfect Constitution" assumption is pervasive because it alleviates several concerns. Some constitutional issues seem to require urgent resolution, but the only materials immediately at hand are the provisions of the existing Constitution. To get the problem solved,

57. *Id.* at 2683.

58. This is the traditional understanding. So, for example, an official who arrests and detains a person without probable cause while the writ is suspended is liable to the detainee for damages. See WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS § 51 (1893). I have learned a great deal about these issues from Jackson, *supra* note 52.

59. *Hamdi*, 124 S. Ct. at 2683. Justice Thomas's analysis here might be incomplete. The suspension of the writ might bring into play *another* body of law—ordinarily referred to as martial law—under which the president's actions would be lawful. See Jackson, *supra* note 52 (citing JOEL PARKER, HABEAS CORPUS, AND MARTIAL LAW: A REVIEW OF THE OPINION OF CHIEF JUSTICE TANEY IN THE CASE OF JOHN MERRYMAN [1861]). The Supreme Court has held that the Constitution does not permit martial law to reign in areas where the ordinary civil courts are open. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). This would of course limit the possibility of the president's acting lawfully pursuant to martial law when the writ of habeas corpus had been suspended (as Justice Scalia seems to contemplate) in areas where the civil courts were open.

60. *Hamdi*, 124 S. Ct. at 2683 (emphasis added).

the Constitution *must* be perfect—and so we find ourselves forced to make the “perfect Constitution” assumption, because we believe we must solve the problem now.

We might avoid making the “perfect Constitution” assumption if we could somehow *avoid* resolving the seemingly urgent problem. However, the courts directly, and the public indirectly, will ordinarily not find it satisfactory to do so by saying, “This is indeed an important problem, which a decent Constitution would solve, but unfortunately the Constitution we have is imperfect and doesn’t solve it.” The reason for this is that not doing anything often will resolve the problem in line with the position taken by what we can call the *first mover*. So, for example, the president institutes a program for detaining U.S. citizens as enemy combatants, the scope of which is normatively troubling to some judges and members of the public. If the courts do nothing, the president wins—or, at least, is placed in a good position in any ensuing political struggle.⁶¹

Finally, and perhaps most interesting, the “perfect Constitution” assumption allows us today to place responsibility for our constitutional condition on the framers rather than on ourselves. Sometimes we might conclude that some misgivings we might have had about a particular policy were mistaken because the framers gave us a perfect Constitution. If our misgivings persist, the “perfect Constitution” assumption allows us simultaneously to blame the framers and to refrain from efforts to change the already perfect Constitution.

The role of urgency seems clear. Our constitutional system allows anyone to bring to the courts’ attention constitutional problems the litigant believes to be deeply important.⁶² Judges who share that belief will tend to think that they ought to do what they can to address

61. The president’s position would be strengthened by his ability to assert correctly that the existing Constitution does not prohibit him from instituting the program.

62. Subject, of course, to justiciability concerns not relevant here.

the litigants' constitutional complaint.⁶³ However, all they can use is the existing Constitution.⁶⁴ Therefore, they are likely to think that the Constitution *must* give them the tools to address what they believe to be an urgent problem—and, of course, to do so correctly. That, though, is the “perfect Constitution” assumption.

The issue of what to do with so-called enemy combatants illustrates the dynamics well. Combat operations or antiterrorist investigations have placed a number of people in the government's hands. Government officials believe that those people are bent on damaging the nation's security; thus, the officials have to do something about, and with, them. As a matter of both principle and political culture, the officials will need to find some constitutional justifications for what they end up doing.⁶⁵ To use the term that came up during the *Hamdi* litigation, there are no “law-free” zones under government control.⁶⁶ Government officials will therefore make the “perfect Constitution” assumption.

63. I describe the effects of urgency in general terms to indicate how we can locate Monaghan's concern with substantive due process decisions in a broader context. See text accompanying note 4, *supra*.

64. The difficulty of amending the Constitution might lead to, or at least support, the “perfect Constitution” assumption and its use of constitutional interpretation rather than amendment, as judges and other decision makers ask, “Do you really want us to delay resolution of this pressing problem until the cumbersome amendment process comes to its conclusion? Why shouldn't we instead act immediately by interpreting the existing—and perfect—Constitution in a way that reaches the right resolution?”

65. The principle is that officials of the national government, which is a government of limited and enumerated powers, have no (lawful) power to do anything for which the Constitution does not give them authority. The U.S. political culture is one in which all officials actually believe that they must find constitutional authority for what they do.

66. The first use of the term “law-free zone” in connection with the government's position that I have been able to locate is Toni Lacy, “Fates Unsure at U.S. Base in Cuba,” USA TODAY, Sept. 22, 2003. The applicable law may, of course, give executive officials unrestricted and unreviewable discretion. Yet, even in the situation where such discretion seems most relevant—the treatment of enemies in the immediate aftermath of their seizure on the battlefield—U.S. armed forces are governed by the laws of war. (What made the government's position in the *Hamdi* litigation

Constitutional challenges to the officials’ actions ensue. What will courts do? They too are likely to make the “perfect Constitution” assumption. They must do so if they are to invalidate the officials’ action because, again, the existing Constitution is the only tool they have. They are likely to do so if they uphold the officials’ action for the same reasons of principle and political culture that lead the officials themselves to make the assumption.

The “perfect Constitution” assumption has another seeming advantage. It allows decision makers, particularly judges, to place, or attempt to place, responsibility for policy outcomes on the shoulders of someone—or something—else: the Constitution and its framers. Justice Anthony Kennedy’s statement in the flag-burning case provides the best example of a justice coming as close as possible to saying, “It’s not my fault if you don’t like what we’re doing.” Explaining his vote to find unconstitutional a law prohibiting flag burning as a means of political protest,⁶⁷ Justice Kennedy wrote, “The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result.”⁶⁸

The strategy of using the “perfect Constitution” assumption to defer criticism can sometimes be difficult to pull off. Justice Kennedy preceded his effort to do so with a sentence that undercut his point: “The outcome can be laid at no door but ours.”⁶⁹ Similarly, the very

special was its claim that, while law in the form of the laws of war regulated the treatment of enemy soldiers, the laws of war did not regulate the treatment of enemy combatants, leaving the government with complete discretion with respect to people in that category.)

67. I believe that this is the best characterization of the Court’s holding: The Court interpreted the definition of “desecration” in an antidesecration statute to identify only instances of flag destruction as a means of political protest.

68. *Texas v. Johnson*, 491 U.S. 397, 420–21 (1989) (Kennedy, J., concurring). Justice Kennedy later expressed some misgivings about having made this “hand-wringing” statement. MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 178 (2003).

69. *Johnson*, 491 U.S. at 420.

offhandedness of the plurality's construction of permissible procedures in *Hamdi* demonstrated that the decision was the justices', not the Constitution's. Still, sometimes the "perfect Constitution" assumption does work to defer responsibility—as, for example, I believe it did with respect to Justice O'Connor's treatment of the relationship between presidential power to detain and congressional authorization thereof.

So far I have suggested the attractions of the "perfect Constitution" assumption. Courts, though, can avoid the "perfect Constitution" assumption by treating the constitutional questions posed to them as nonjusticiable. They can, in form, refuse to decide whether the Constitution authorizes or prohibits the officials' action, thereby refusing to express a view on whether the Constitution is perfect. Although available in theory, this course is unlikely to be pursued by judges who believe that the problem posed is one that urgently requires resolution.

The reason is that doing nothing leaves the situation where it was when the courts were first presented with the problem, and this is not quite the status quo ante. Rather, it is the status quo after the first mover—in the present context, the president—has done something.⁷⁰ Consider a relatively pure form of the ensuing problem. The president claims that the Constitution gives him authority to do what he did, without congressional authorization or even in the face of a congressional prohibition. The litigant challenging the president's action claims that the Constitution at least requires congressional authorization for what the president did. Abstaining from deciding between those claims gives the victory to the president.

That is not quite the end of the story. A court trying to stay out of the fight might say to the litigant that her constitutional position, although perhaps correct, must be vindicated through political action

70. More generally, the first-mover advantage results from the president's position as chief executive, whose situation-specific decisions can alter the contours of the political terrain on which discussions of general policy take place.

by persuading Congress to fight the president.⁷¹ As a matter of practical politics, though, this comes close to awarding the victory to the president—or, at least, guarantees that the political battle will be fought on grounds favorable to the president. The reason, again, is the first-mover advantage: The president has already acted. Congress must get the president to change his position, and that is likely to be difficult.⁷²

To summarize: Political actors and judges find that the “perfect Constitution” assumption supports their inclinations to act in situations where they believe action is urgently required. The assumption also allows them to defer responsibility for actual outcomes to the Constitution (and its framers), avoiding the necessity to take responsibility themselves. Finally, regarding the Constitution as imperfect will relegate the problem to a political arena in which the first mover, usually the president, has a systematic advantage, notwithstanding that doing so is formally neutral as to the outcome. If these are reasons for making the “perfect Constitution” assumption (or for rejecting the alternative), what are the assumption’s consequences?

III. The Consequences of Assuming That the Constitution Is Perfect

The “perfect Constitution” assumption has several consequences—some implicating the courts and the public response to their decisions, others implicating politics more broadly.

The “perfect Constitution” assumption is, again, that the Con-

71. *Cf. Goldwater v. Carter*, 444 U.S. 996 (1980) (opinion of Powell, J., concurring) (arguing that the courts should not consider the claim that the Constitution requires the Senate to participate in treaty terminations until the Senate itself as a body had asserted that claim).

72. I believe that the formal difficulties—that Congress can win its political battle with the president only by assembling the two-thirds majorities in both houses needed to override a veto—are often exaggerated. Compromises are more likely than are to-the-death combat, but the president’s first-mover advantage means that the practical compromises will tend to be favorable to the position the president initially staked out.

stitution, properly construed, provides the cure for all that ails us, and, I must emphasize, sometimes it does provide an entirely satisfactory cure. We have a thick history of constitutional adjudication, providing courts with many resources to address novel problems. Often enough, those resources will lead to a decent result through a decent process. And, of course, only the “perfect Constitution” assumption allows *someone*—the courts—to try to do something to combat the executive’s first-mover advantages.

The assumption’s advantages are not always present, though. Suppose we discover that the disease persists or that the cure is worse than the disease was. Having moved into the mode of interpretation, we will conclude that the problem lies not in the Constitution, but in its misconstruction by the courts. In principle, of course, there is nothing particularly troublesome about a deep assumption that places the courts under close and critical scrutiny. Still, it is worth noting the irony here: The “perfect Constitution” assumption seems to empower the courts and, I believe, is strongly endorsed by those who admire the role the courts can play in our constitutional system,⁷³ and yet the assumption opens the courts to the kinds of sharp criticism, manifested perhaps in this chapter, that admirers of the courts typically find distasteful.⁷⁴

An additional difficulty and another irony is that the “perfect Constitution” assumption leads to the development of incoherent and, I suggest, even anticonstitutional constitutional doctrine. Michael Stokes Paulsen’s recent invocation of the “perfect Consti-

73. That proposition is one of the underpinnings of Monaghan’s argument.

74. One recalls here Philip Kurland’s criticism of what he saw as the Warren Court’s technical incompetence, quoting the sign that supposedly appeared in bars on the frontier: “Don’t shoot the piano-player. He’s doing his best.” Philip Kurland, *The Supreme Court, 1963 Term—Foreword: “Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,”* 78 HARV. L. REV. 143, 176 (1964). Take the “perfect Constitution” assumption away, and the criticism takes on a different coloration: “Don’t shoot the piano-player; he’s doing the best that he can with badly written music.”

tion” assumption in defense of what Paulsen calls “the Constitution of necessity” provides a good illustration.⁷⁵ Paulsen’s thesis is this:

[T]he Constitution should be construed to avoid constitutional implosion . . . [a]nd where such an alternative saving construction is *not* possible, the necessity of preserving the Constitution and the constitutional order as a whole requires that priority be given to the preservation of the nation whose Constitution it is, . . . even at the expense of specific constitutional provisions. Moreover, the Constitution appears to vest the primary (but nonexclusive) duty for making these sorts of constitutional judgments . . . in the President.⁷⁶

To pin down the point: The Constitution, properly construed, gives the president the power to ignore (violate) specific constitutional provisions when, in the president’s judgment, doing so is indispensably necessary to preserve the nation.⁷⁷

Paulsen describes this as “a valuable and a dangerous arrangement”—dangerous because the power he finds in the Constitution “is capable of being misused.”⁷⁸ He seeks to temper concern about misuse by describing the president’s power to determine that violating the Constitution is indispensably necessary as being nonexclusive. For Paulsen, Congress and the courts have roles to play in checking the president’s power: through enactment of framework legislation, control over appropriations, the power to impeach the president, adjudication of ordinary cases.⁷⁹ Yet, as Paulsen seems to understand, these checks and, even more generally, the fact that the president’s

75. Paulsen, *supra* note 6. For parallel comments on Oren Gross’s attempt to develop an account of procedurally constrained extraconstitutional action, see L. Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 472–76 (2004). My criticism of Paulsen’s position is entirely derived from Seidman’s analysis.

76. Paulsen, *supra* note 6, at 1257–58.

77. Paulsen draws the “indispensably necessary” standard from Abraham Lincoln. See *id.* at 1290.

78. *Id.* at 1258, 1259.

79. *Id.* at 1292–93.

power under the Constitution is not exclusive, cannot truly eliminate the risk of abuse. “In the end,” he wrote, “it all turns back on the office of President of the United States.”⁸⁰ So, in the end, the prescription one gets from the “perfect Constitution” is, “Be very careful about who you elect as president.”⁸¹ That, however, is a deeply anti-constitutional prescription, because the point of constitutionalism is to ensure that the people’s liberty will be secured by institutional arrangements, not by the personal characteristics of those holding power. Ironically, then, at least in this context, the “perfect Constitution” assumption puts the Constitution in the service of anticonstitutionalism.⁸²

Another set of consequences of the “perfect Constitution” assumption involves politics. I begin at the foundation of the “perfect Constitution” assumption—the sense that specific problems urgently require resolution. That sense sometimes, even often, turns out to be mistaken. So, for example, litigation regarding the detention of enemy combatants was fueled by the sense that something needed to be done, and done quickly, to resolve the constitutional issues raised by those detentions. Yet, nothing was done for more than two years and,

80. *Id.* at 1296. To make the point obvious: Suppose the president decides that his course of action is indispensably necessary to preserve the nation and that Congress is likely to interfere with his decisions by denying him funds, attempting to impeach him, and the like. He therefore suspends the regular meeting of Congress or forcibly excludes from Congress all those he concludes are likely to vote against his program. (Similar examples could be developed for the courts.) Paulsen’s “Constitution of necessity”—the Constitution, properly construed—appears to give the president this power.

81. Barry Friedman commented, in a related context, that it may be that the only solution to the normative problems associated with judicial review is, “Be very careful to pick good judges.”

82. Paulsen’s analysis suggests that it may not be entirely satisfactory to confine the “perfect Constitution” assumption to important matters, such as national preservation, while acknowledging the possibility of its imperfection with respect to less important ones. Doing so would mean (only) that the “perfect Constitution” assumption leads to anticonstitutional conclusions when important matters are involved, while the Constitution’s imperfections regarding less important matters equally ironically *support* constitutionalist commitments.

in the case of Jose Padilla at this writing, counting. Suppose, then, that at the very outset, our instinct was not to say, “The Constitution, being perfect, resolves these problems, and all we need to do is to get the courts to construe the Constitution properly,” but was instead, “The Constitution, having been written two centuries ago, is probably inadequate to the task of resolving this problem properly, so what we have to do is amend it.”⁸³ Perhaps the public discussion of what the Constitution *should be made to say* would have yielded a better resolution, within the same two-year period, than we got from the Supreme Court.⁸⁴

Justice Souter’s opinion in *Hamdi* hinted at one way to reach this outcome, finding “one qualification” to his position that the president cannot detain a U.S. citizen without express congressional authorization: “[I]n a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen if there is reason to fear he is an imminent threat to the safety of the Nation and its people.”⁸⁵ The thought I take from this is the possibility of a system in which the president can act, subject to a requirement that the action be undone within a relatively short period, unless (in Justice Souter’s version) Congress acts quickly to authorize the president’s action or (in my more general version) the Constitution is amended to deal with the problem that the existing Constitution fails to deal with.

Justice Souter’s opinion adopts the “perfect Constitution” assumption. It would be inconsistent of me to do so. I therefore can-

83. I note later in this chapter one obvious way in which this scenario is an impossible one.

84. I should note my sense that public deliberation in Congress over the procedures to be used to determine whether a detained citizen was in fact an enemy combatant would have generated a set of procedures that would provide somewhat more robust protection to the detainee than Justice O’Connor’s opinion demanded as a minimum.

85. *Hamdi*, 124 S. Ct. at 2659 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

not assert that the Constitution, properly construed, gives the president the power to detain for a short period, subject to some enforceable order to release the detainee if the Constitution is not in fact amended within that period.⁸⁶ In addition, the first-mover problem I discussed earlier makes it impossible to prescribe rules predicated on the “imperfect Constitution” assumption. Until we think about the ways in which the Constitution should be amended, we cannot know whether the Constitution’s imperfection lies in the fact that it fails to authorize the president to take necessary actions (in which case the existing Constitution should be construed to require the immediate release of the detainees) or in the fact that it places inadequate procedural safeguards on the detention process (in which case the existing Constitution should be construed to allow the president to detain people without affording them significant procedural safeguards).

The “perfect Constitution” assumption licenses interpretations—of course, often quite contradictory ones—of the existing Constitution. The “imperfect Constitution” assumption cannot—that is its point. I suggest that the “imperfect Constitution” assumption is valuable in a different way. More than the “perfect Constitution” assumption does, the “imperfect Constitution” assumption may generate public deliberation over how a nation ordered by the Constitution should address problems quite different from those faced by the Constitution’s framers. Or, to adapt Larry Kramer’s formulation, We the People may do a better job of resolving our problems than They the Judges do.⁸⁷

86. Were I to accept the “perfect Constitution” assumption, I would formulate the rule as one requiring release unless some significant steps were taken to amend the Constitution within a relatively short period and as requiring periodic reconsideration of continued detention in light of the progress made toward constitutional amendment. Cf. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004) (proposing a system in which similar periodic reconsiderations occur).

87. For Kramer’s version, see Larry Kramer, *The Supreme Court 2000 Term: Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).