

Gnostic Due Process

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[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.

Justice Douglas, *Griswold v. Connecticut*

And they strove to weave a Shadow of the Emanation
To hide themselves. . . .

William Blake, "Jerusalem"

I. Gnosticism in American Constitutionalism

A. Introduction

In *Griswold v. Connecticut*,¹ a defining moment in modern American constitutionalism, a visionary reading of the Bill of Rights coils for the leap to substantive due process. On the far side of the leap—our side—both *Roe v. Wade*² and *Bowers v. Hardwick*³ have served to measure the legitimacy and the reach of *Griswold*'s vision. It is a mistake, however, to make the Court's later cases about abortion or homosexuality, however one appraises the adequacy of their outcomes or justifications, the measure of *Griswold*'s importance. When Justice Douglas, writing for the Court in *Griswold*, offered his generous new interpretation of the texts of liberty, he at once opened and closed far wider horizons of constitutional thought. To grasp the larger significance of what Douglas said and did in *Griswold*, it is helpful to recognize in his opinion certain themes, aspirations, and

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1. 381 U.S. 479 (1965).

2. 410 U.S. 113 (1973).

3. 478 U.S. 186 (1986).

hermeneutical moves that have always been associated with Gnosticism.

Throughout this Article, "Gnosticism" and "Gnostic" will refer to a variety of traditions and speculations that flourished in Hellenistic culture, and that produced texts which (for all their differences) share common features justifying their inclusion by contemporary experts in anthologies of sources.⁴ Uncapitalized, "gnosticism" and "gnostic" refer to poetic or constitutional ideas comparable to (but not necessarily influenced by) those expressed in the ancient traditions and speculations. In offering an interpretation of *Griswold* as a gnostic writing, and in explaining how that interpretation brings out *Griswold's* wider significance in American constitutionalism, I make no claim about Douglas's own familiarity with, or intellectual indebtedness to, Gnostic religious texts. The distinction between "Gnostic" and "gnostic" is meant to maintain this analytic separation.

Griswold is gnostic, I will suggest, hermeneutically: that is, in its interpretive posture toward the Constitution (and more specifically toward the Bill of Rights as the text of liberty). Douglas's interpretation of the text of liberty offers the prospect of a more complete realization of liberty's concealed meaning. Formally, *Griswold's* gnosticism consists in its strategy for redemptive or emancipatory interpretation: retelling the creation story in such a way as to relativize conventional accounts of the natural order and to privilege an account of a more vivid and consequential reality by backdating it, rendering it first in time and first in priority. Substantively, *Griswold's* gnosticism inheres in its treatment of the themes of sacred marriage, nonprocreativity, "penumbra," and "emanation." Ultimately, in viewing *Griswold* as a gnostic writing, we are made newly aware that stories of creation and redemption help define the ambiguities of embodiment and generation by bringing out surprising meanings in traditional, canonical texts.

Today more than ever we need to be surprised into thought by the intense meanings of the texts of liberty. An interpretation of *Griswold* as a gnostic writing highlights its emancipatory passion and refuses to mask its strangeness. The interpretation resists the domestication of *Griswold* into a contemporary constitutional world of majoritarian resignation and lowered expectations. But by understanding *Griswold* as a gnostic writing we highlight not only its promise but also its disappointment, and the relation of the two to one another. If the higher meanings of the texts of liberty are to be championed once again, we will need not so much to follow Douglas as to redeem him.

4. See BENTLEY LAYTON, *THE GNOSTIC SCRIPTURES* (1987).

Douglas's effort to reveal and realize the higher meanings of the texts of liberty has aroused both admiration and scorn. It is a measure of *Griswold's* importance that pretenders to orthodoxy have felt the need to denounce the opinion as dangerous heresy.⁵ Neither its friends nor its critics, however, have taken the true measure of *Griswold's* heterodoxy. To appreciate the more challenging aspects of the opinion, we must situate Douglas's themes in relation not only to prevailing directions of constitutional interpretation and argument but also to certain undercurrents in American constitutional thought. Two such undercurrents—the constitutional ethic of creation and redemptive constitutionalism—merit special concern. *Griswold's* originality consists in its bid to redefine redemptive constitutionalism in opposition to the ethic of creation. I will briefly define these constitutional currents, then explain *Griswold's* gnostic aspirations in relation to them.

B. Creation and Redemption

The constitutional ethic of creation conceives of all human persons as sharing equally the unique dignity and worth that attaches to the one creature made in the image and likeness of God. Adherents of this ethic typically associate it, among the texts of American constitutionalism, with the Declaration of Independence.

Sometimes the ethic is sharply critical, as when Lincoln made it the basis of his challenge to the partisans of slavery:

These communities, by their representatives in old Independence Hall, said to the whole world of men: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." This

5. See ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 234, 263, 95 (1990) (describing *Griswold* as an "intellectual catastrophe," a decision whose reasoning "was not meant to be taken seriously," and as the "construction of a constitutional time bomb").

Justice Scalia stands foremost, perhaps, among those who denounce gnostic constitutionalism. In demanding that the Constitution be read according to the public traditions of the common law rather than according to the private revelations of the judge (however wise or penetrating), Scalia plays the modern-day Bishop, casting himself as Irenaeus and Douglas as Valentinus: "The notion that the Constitution, through some penumbra emanating from the Privileges and Immunities Clause and the Commerce Clause, establishes this Court as a Platonic check upon the society's greedy adherence to its traditions can only be described as imperious." *Burnham v. Superior Court*, 495 U.S. 604, 627 n.5 (1990).

The Gnostics agreed that there was an overt tradition of Christian belief and worship, but then also claimed that the apostles of Jesus and their followers had kept alive a covert tradition, reflecting the true meaning of what Jesus said, and of who he was. Irenaeus insisted that the only valid tradition was the public one. ELAINE PAGELS, *THE Gnostic GOSPELS* 54 (1981). So Scalia insists today. For him, the textual penumbra is above all a realm of uncertain private knowledge or opinion, undisciplined by the objectivity of public institutional tradition.

was their majestic interpretation of the economy of the Universe. This was their lofty, and wise, and noble understanding of the justice of the Creator to His creatures. [Applause.] Yes, gentlemen, to *all* His creatures, to the whole great family of man. In their enlightened belief, nothing stamped with the Divine image and likeness was sent into the world to be trodden on, and degraded, and imbruted by his fellows.⁶

At other times the ethic is more complacent in tone and more apologetic in function, as when Justice Bradley made the following well-known remarks in his concurrence in *Bradwell v. Illinois*⁷:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.⁸

Although Lincoln's and Bradley's remarks seem to run in opposite political directions, they share moral and constitutional features. Morally, both Lincoln and Bradley appeal to the created order of nature as the ground of obligations among persons. Constitutionally, both understand fundamental law in a way that refers it necessarily to this moral ground. Thus, the ethic of creation supplies constitutionalism with a metaphysical basis for decisions about the content of rights and obligations.

There is no general agreement, however, that constitutionalism needs or wants such a metaphysical basis. Indeed, one might go so far as to say that orthodoxy in modern constitutional law is defined by its adoption of the antimetaphysical position of Justice Holmes's celebrated dissent in *Lochner v. New York*.⁹ Many would find that "all men are created equal" is neither a legitimate constitutional premise (since a constitution "is made for people of fundamentally differing views"¹⁰) nor a useful one (since "[g]eneral propositions do not decide concrete cases"¹¹).

6. ABRAHAM LINCOLN, Speech at Lewistown (Aug. 21, 1858), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 546 (Roy Basler ed., 1953) [hereinafter WORKS OF LINCOLN].

7. 83 U.S. (16 Wall.) 130 (1873) (rejecting constitutional challenge to state law barring women from practice of law).

8. *Id.* at 141 (Bradley, J., concurring).

9. 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

10. *Id.* at 76.

11. *Id.*

The constitutional ethic of creation has exerted its characteristic pressure upon orthodox constitutionalism by means of a special kind of historical revisionism: a redating of the Creation designed at once to relativize the conventional founding narrative and to privilege a tale of earlier and more fundamental origins. This historical revisionism defines the formal element of gnosticism. In Gnostic religious traditions, the Creator God of Genesis is represented as a belated demigod who, far from creating humankind, imprisons it in a derivative materiality.¹² To achieve this representation, Gnostic mythology draws back the curtains to reveal the drama of earlier and more decisive beginnings. Lincoln revises history to the same effect in the Gettysburg Address and especially in his First Inaugural, as we shall see in Section IV.B.2. The union, together with its constitutional commitments, predates the Constitution itself. To tell the creation story of American constitutionalism properly is to hark back to the principles of 1776, which in turn refer to an even earlier and more decisive creation story. Thus the constitutionalism animated by the ethic of creation seeks legitimation by formal gnosticism.

A wide array of theological commitments, however, remain unfilled by the ethic of creation and the formal gnosticism that seeks to establish the ethic's legitimacy and priority. Those who reject the call of creation define human nature and destiny in terms of the looming prospect of redemption. The status of having been chosen by God for salvation, however salvation is understood, displaces the status of having been made in God's image and likeness as the basis of rights and responsibilities, thus uprooting the very constitutional ethic that the status was marshalled to support.

From what and to what we are redeemed, however, remain sharply controverted. Are we redeemed from the sinfulness that destroyed Eden, to a second Eden achieved by grace with the cooperation of faith? Or are we redeemed from the very limitations of nature, from the finitude that inheres precisely in the status of creatureliness, to a reintegration with divinity itself?

It is unnecessary here to give a complete account of these alternatives or to decide just what is at stake in them. It is enough to notice that it is common to deny that humankind's status as created in God's image and likeness states the final word on the human condition, and instead to give priority to some account of the human situation that stresses the presence (or expectation) of redemption and the response that God's redemptive act should elicit. Gnosticism in religion has offered one way of working out the relationship between

12. GIOVANNI FILORAMO, *A HISTORY OF GNOSTICISM* 78 (1990).

redemption and creation. If the formal aspect of gnosticism consists in revising creation stories in order to privilege new accounts of the beginnings and their associated commitments, the substantive aspect of gnosticism is defined by an account of redemption as a final overthrow of the limits inherent in the creaturely state. Theologically, Gnosticism stands not only against the ethic of creation, but also against competing views of redemption that would subordinate creation to redemption, though not in the specifically Gnostic way. Only by achieving the higher meaning and knowledge hidden behind the facade of the cosmogonic narrative (the formal element) can the human person participate in the acosmic redemptive drama that finally realizes the being and power of *anthropos*, humanity.¹³

If the ethic of creation has motivated a countercurrent in American constitutionalism, so has the aspiration to redemption. Robert Cover defined "redemptive constitutionalism" as the comprehensive social vision of a community or association that requires a "transformational politics that cannot be contained within the autonomous insularity of the association itself."¹⁴ Professor Cover traced redemptive constitutionalism to the evolution of antislavery jurisprudence. Of course, almost any antislavery legal theory would be redemptive in the sense of seeking an emancipation from bondage. But Frederick Douglass's constitutionalism was redemptive in a specifically constitutional sense. In order to redeem the slave community, the whole constitutional order must redeem itself, and vice versa. The Constitution must be read anew with fresh eyes, capable of seeing that the apologies for slavery were built not on the text itself but on historical or political claims.¹⁵

Let us return, with these ideas in mind, to Lincoln. His genius in constitutional theory consisted in the way he turned the constitutional ethic of creation to a salvific task, the purification and renewal of constitutional faith. Lincoln not only worked out a relation between creation and redemption,¹⁶ as every Christian thinker must, but made that relation the engine of a redemptive constitutionalism. But precisely because Lincoln's way of relating creation and redemption preserved the moral significance of the created endowment, Lincoln's redemptive constitutionalism was not gnostic in the substantive sense, however much Lincoln depended on the formally gnostic strategy of retelling creation stories to privilege radical proposals and to relativize

13. PAGELS, *supra* note 5, at 147.

14. Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 34 (1983).

15. *Id.* at 38.

16. On Lincoln's theology, see GARRY WILLS, *UNDER GOD: RELIGION AND AMERICAN POLITICS* 195-221 (1990).

the claims of the orthodox. Indeed, given the sectarian and individualistic organizational form that gnosticism has typically adopted (or into which it has been thrust in the brutal battles against heresy), there is room to doubt whether a gnostic constitutionalism could ever be a redemptive constitutionalism of the kind described by Cover.¹⁷

C. *Gnostic Due Process*

It would have been possible for slavery's destruction of ordinary domestic life to have convinced African-Americans of the desolation of nature, and for the constitutional vision informed by that experience to have adopted a gnostic solution to the problem of relating creation and redemption. The same possibility arose in recent decades when the United States Supreme Court confronted perplexing problems about the relation between the person and the body, and about sexuality, procreation, and the meaning of marriage.

If a gnostic sitting on a court confronting these issues were to declare openly his or her thoughts, such a judge might begin by affirming that without saving knowledge, we die. "If one does not understand how body, which he bears, came into existence, he will [perish] with it."¹⁸ Justice Douglas makes no such overt declaration; but then, if he were truly a gnostic, he could not be expected to cast his pearls before swine. So he does not quite say, in *Griswold*, that averting physical generation is a marital sacrament that expresses the higher meaning of the texts of liberty and the redemptive triumph of hidden knowledge over the order of creation.

The gnostic meanings of Douglas's opinion in *Griswold* surface only when care is taken to trace the meaning of the famous, although obscure, references to textual "penumbras" and "emanations," and to "the sacred precincts of marital bedrooms." These concepts and themes, alone and especially in combination, have been central to the expression of Gnostic views about the relation between creation and redemption. By interpreting Douglas's use of these themes, I offer a

17. Pagels concludes that "[f]ar from legitimizing any institution," certain Gnostic sayings "direct one instead to oneself—to one's inner capacity to find one's own direction, to the 'light within.'" PAGELS, *supra* note 5, at 144. Any tendency of Gnostic teachings to put a premium on inwardness and not on institutional form may have burdened the Gnostic communities with a comparative disadvantage in their struggles with the Catholic Bishops, who could claim to speak on behalf of a public institution safeguarding a public tradition. See *id.*

Douglas's gnostic constitutionalism suffers from a similar comparative disadvantage. While Douglas spoke for a majority in *Griswold*, his commitments led him to nurture his "inner capacity to find [his] own direction," which often enough meant dissent. The hidden meaning of the texts of liberty congruent with the "light within" did not lend itself to the formation of a stable majority who could claim to speak on behalf of permanent public meanings.

18. *The Dialogue of the Savior* 134:11-15, in THE NAG HAMMADI LIBRARY IN ENGLISH 250 (James M. Robinson ed., 1990).

reading of *Griswold* as a gnostic writing. That reading includes four main ideas.

First: Douglas, like Lincoln, employs the formally gnostic device of revising the received creation story in order to privilege a new account of origins that relativizes an accepted ethic and strengthens the case for a proposed alternative. Again with Lincoln, Douglas's revision of the creation narrative stresses the priority of the sacred marriage. *Griswold* associates the sacredness of marriage, the privacy of the bedroom, and the priority of privacy as a constitutional norm emanating from the texts of liberty, with the temporal priority of marriage.

Second: Unlike Lincoln, Douglas rejects an interpretation of marriage as an order of creation. *Griswold* is gnostic not only formally, but substantively. Redemption does not restore but displaces that with which we are "endowed by our Creator." While nature supplies the freedom to procreate, the texts of liberty (backdated to reflect the priority of marriage) supply the freedom not to procreate.

Third: In supplying the freedom not to procreate, the texts of liberty "emanate." Emanation, understood gnostically, is both a metaphysical event internal to divinity, and a publication or revelation of the higher meaning of the text. Taken together, the metaphysical ramifying of divinity and the hermeneutic that reveals this unfolding of divinity comprise a redemptive emanation. The body, conceived constitutionally, is an emanation of the texts of liberty; the word becomes flesh. To read the texts of liberty correctly is to achieve a redemptive constitutionalism and to defy the antimetaphysical limits imposed by constitutional orthodoxy.

Together, these three ideas aspire to rest a redemptive constitutionalism on gnostic grounds. This aspiration, however, is both expressed and resisted in *Griswold*. For the emanations of the text, according to Douglas, finally form penumbras. It is in these penumbras, or places of partial shadow, that the zones of privacy are located. Once the gnostic meaning of these formulations is recovered, the final element of the reading is obtained.

Fourth: The higher meaning of the texts of liberty is blocked. The light of emanation subsides into shadow. The liberty to couple with one another nonprocreatively instantiates not the final redemptive unfolding of divinity but the need to withhold ourselves from one another in secrecy. The texts of liberty, in the final analysis, do not yield up their higher meaning, which remains lost in half-shadowed obscurity. Nor do our couplings succeed in sublimating mere physical generation into a higher spiritual regeneration.

The argument proceeds chiefly through the interpretation of texts. Part II briefly presents the Gnostic themes of emanation and shadow,

and the Johannine idea of the word-become-flesh.¹⁹ Part III then offers an interpretation of *Griswold* in the light of these themes. Part IV relies on William Blake's prophetic poem, "Milton," to identify respects in which Douglas's achievement was frustrated or incomplete, and to suggest the lines along which it might be realized and intensified. In "Milton," Blake brings out the peculiar valorization of the body in Christian gnosticism, and helps make those ideas available to Douglas's jurisprudence. In particular, Blake reveals the ambiguity in Douglas's celebration of "the sacred precincts of marital bedrooms," and retrieves the emanation from the penumbra into which it has fallen.

Part V returns to the Johannine *logos* doctrine, and to a Christian standard by which to judge the nature and scope of Douglas's achievement.²⁰ The questions here surround the necessary difference between seeing the word of God and the word of (limited) humankind as taking human form. Douglas cannot be John, or even take John as his model, because the constitutional word of which he is custodian cannot become flesh in the fully Biblical sense, hence there can be no public constitutional proclamation of redemptive incarnation. Blake and John offer limiting cases for Christian interpretations or extensions of Douglas's ideas about the status of the body. John sets the upper limit. From his evangelical viewpoint, the incarnation of the word is an achievement of God and not of humankind. In no way can "we the people" ordain the world-making word of grace and truth. On no conception of "Constitution" can one say "and the Constitution was God," and remain within the horizon of Christian faith. Even the very highest realization of the

19. The nature of the material with which we will be working makes it impossible, unfortunately, to give each of the main ideas (emanation, shadow, *logos*, and so on) a fully independent treatment. From time to time it will be necessary to express one theme in relation to another, or in connection with larger topics, either mythological or hermeneutic. The reader interested in a more extensive analysis of the underlying concepts is encouraged to turn to the studies cited in the notes.

20. Douglas was the son of a Presbyterian minister, and was raised in a devout and observant Presbyterian home. See Nadine Strossen, *The Religion Clause Writings of Justice William O. Douglas*, in "HE SHALL NOT PASS THIS WAY AGAIN": THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 91, 101 (Stephen L. Wasby ed., 1990) [hereinafter LEGACY]. He made no secret of this fact, referring to "my own Presbyterians" in his dissent in *Wisconsin v. Yoder*, 406 U.S. 205, 246 (1972).

In addition to believing that individual rights flowed from some general notions of religion and a Supreme Being, Douglas also saw them as flowing specifically from the Christian concepts of God and Jesus. He wrote: "Though our concepts of equity and justice come from numerous sources, they have been more greatly influenced by Jesus than by anyone else. The Sermon on the Mount is a charter of political freedom."

Strossen, *supra*, at 102 (quoting WILLIAM O. DOUGLAS, AN ALMANAC OF LIBERTY 184 (1954)). Without exaggerating the significance of Christian ethics in Douglas's constitutional jurisprudence, one may reconstruct the notion of a "penumbra of rights" as an expression of a Christian insight, and assess its adequacy along those lines.

Constitution's promise for the security of the person and the privacy of "the sacred precincts of marital bedrooms" cannot express the body's worth and the holiness of marriage as understood within the reception of the *logos*-become-flesh.

Blake provides the limiting case of vision that thoroughly expresses an aspiration to Christian liberty and perfection, while honoring the Johannine boundary. If Douglas were to follow Blake toward a more fully realized ideal of the spiritually integrated body, in which the creative emanations are embraced and reassumed rather than hidden in the penumbra, he would say as much as a Christian can say about such matters (and no doubt a great deal more than a *judge* can say, at least in a judicial opinion).

The guiding aim of this Essay is to express, so far as this may be done within Christian premises, Douglas's intimation of a humane and emancipatory extension of the Constitution's fundamental rights provisions, unfolding and ramifying the very characteristics of *Griswold* that seem to depart farthest from orthodox patterns of justification in constitutional argument. In treating *Griswold* as a gnostic writing, I am adopting an interpretive stance toward Justice Douglas's opinion that highlights, I believe, the respects in which that opinion brings us to a constitutional crossroad. The opinion is gnostic in its aspiration to release and reveal the higher meanings of the texts of liberty, and in the correlation it draws between an emancipatory reading, an overcoming of the bonds of the natural or created order, and an awakening of humankind to the freeing possibilities of a spiritually reconceived embodiment. It is equally gnostic in the characteristic failure of these themes, alone and in connection with one another, to achieve their promise.

If there is nothing in Douglas's background to explain his recourse to specifically gnostic imagery in a context that suggests gnostic aspirations, students of Douglas's writing on the Court will recall that he did avow a more generic spirituality which he associated with American constitutionalism. Long before expressing his gnostic formulations in *Griswold*, Douglas declared that "We are a religious people whose institutions presuppose a Supreme Being."²¹ The First Amendment to the United States Constitution, Douglas went on to

21. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). While Douglas came to hold stricter Establishment Clause views, he never repudiated his *Zorach* statement; indeed, he quoted it in later opinions. Strossen, *supra* note 20, at 100-02. In the same year in which he wrote *Zorach*, Douglas embraced the right of privacy as adumbrated by Justice Brandeis, and in that sense foreshadowed *Griswold*. See Dorothy J. Glancy, *Douglas's Right of Privacy: A Response to His Critics*, in LEGACY, *supra* note 20, at 155, 156-58. See also *infra* note 23. Thus it does not seem inappropriate to associate Douglas's presentation of the right of privacy in *Griswold* with his general belief in a spiritual source for the basic democratic and constitutional institutions.

say, accommodates "the spiritual needs of man"; in normative democratic society, the state "respects the religious nature of our people and accommodates the public service to their spiritual needs."²² Douglas agreed with his predecessor, Justice Brandeis, who stated:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.²³

In short, in addition to having a material nature, we also have a spiritual nature which requires the cultivation of certain feelings, intellections, emotions, and sensations. Although these dispositions of mind can be given physicalist interpretations, Brandeis chooses to regard them as central to our spiritual nature. Douglas follows Brandeis here, and again follows Brandeis in conceiving the right to privacy as essential to fostering these dispositions.

A reading of *Griswold*, then, which is meant to bring out the relationship between substantive due process and understandings of our "spiritual nature," is connected to certain broad lines in the development of Douglas's ideas. For the same reason, this reading (at least in its broader outlines) may be squared with the intellectual history of the right to privacy in the Supreme Court. But any interpretation of the *Griswold*-ian side of modern constitutionalism that brings out its spiritual commitments, whether conceived along vaguely humanist or specifically gnostic lines, is bound to raise more questions about legitimacy in constitutional argument than it can hope to answer, at least in an Article such as this.

22. 343 U.S. at 313-14.

23. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Justice Goldberg quotes this passage in his *Griswold* concurrence, 381 U.S. at 494. Before writing the Court's opinion in *Griswold*, Douglas had referred to the "right 'to be let alone'" in his dissent in *Poe v. Ullman*, 367 U.S. 497, 521 n.12 (1961), in explaining why the "notion of privacy is not drawn from the blue" but "emanates from the totality of the constitutional scheme under which we live." Earlier, Douglas embraced Brandeis's *Olmstead* dissent when he said that "[t]he right to be let alone is indeed the beginning of all freedom." *Public Util. Comm'n v. Pollak*, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting). In his concurrences to *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), Douglas continued to honor "the 'right to be let alone'" and to regard it as central to the freedom of marital and procreative choice. 410 U.S. at 211 (Douglas, J., concurring).

I hope to show here how the language and themes of *Griswold* open at every turn a horizon of "spiritual nature" that heightens appreciation for the burden and the beauty of embodiment. Whether a constitutional discourse that opens this horizon may stand the test of legitimacy, on either a political or a Christian standard, must remain undecided.

II. THE GNOSTIC BACKGROUND

A. *The Body as a Publication of the Word*

One way in which certain Gnostic writings endow the body with a surprisingly affirmative meaning in the drama of redemption is by representing the body as a hypostasis of the "word," the essential unit of the revelatory and authoritative text. Outside of Gnosticism, of course, there are any number of ways to "read" the body, from seeking the hidden causes of parapraxes to heeding the body's rhythms. But in the Gnostic writings in which I am interested, the *significance* of the body (its moral and spiritual relevance) is located precisely in a bodily extension or realization of the revealed word. "[T]he Word that is in the heart of those that speak it, has come forward. It is not just a sound, but it became a body."²⁴

The body manifests or publishes the word, revealing it more fully. *The Gospel of Truth*, a Valentinian text, revisits the Passion narrative to establish this central claim about embodiment.

Since the father of the entirety is invisible—and the entirety derives from him, from whom every way emanated—Jesus appeared, wrapped himself in that document, was nailed to a piece of wood, and published the father's edict upon the cross.²⁵

The body of Jesus is, then, a document that publishes that which is otherwise invisible in the father, "from whom every way emanated." Publication, in effect, is a compensatory emanation. (We shall see that Justice Douglas's concept of emanation shares these features. The constitutional emanation is a visible bodily publication of libertarian good news, an "edict" otherwise withheld from us.)

The opening verses of the Gospel of John, called the Prologue, offer a strikingly concise and distinctive formulation of the embodiment of *logos*. John begins by revising Genesis: "In the beginning was the Word, and the Word was with God, and the Word was

24. *The Gospel of Thomas* 26:6-8, in LAYTON, *supra* note 4, at 257.

25. *The Gospel of Truth* 20:19-26, in LAYTON, *supra* note 4, at 255.

God.”²⁶ The revised creation story enables a Christology: “And the Word became flesh and dwelt among us, full of grace and truth; we have beheld his glory, glory as of the only Son from the Father.”²⁷ This affirmation of a certain becoming, not antithetical to divine being, steers the Gospel of John away from reductive dualisms. The word-become-flesh raises *sarx*, the decomposable human materiality, to the dignity of *logos*, God’s revealed word. While the Biblical body had always been a vehicle of holiness (in the observance of rules of abstinence and ritual preparation) and a medium expressing both law (“written in the heart”)²⁸ and covenant (circumcision),²⁹ and had represented the full range of the human existent called to devotion, never before had the word of God, through which all was made, strictly *become* flesh.

The relation between John and the various Gnostic texts and traditions is a subject for historical and textual specialists. I will say only that, in the Prologue, no limit is placed on the audience who receives the word-become-flesh. The incarnation, the embodying of the word, is a publication, a making-public, in the widest sense. It has been characteristic of Christian Gnosticism, however, to regard the history and drama of the fullness, or *pleroma*, the emanations within it, the ultimate descent into cosmos and body, and the redemptive coming of the word in and through Jesus, as knowledge available only to the elect or the initiate. One might draw (possibly overdraw) the contrast by saying that while in the Johannine formulation the word becomes flesh in the full light of publicity, in the Gnostic version acquaintance with the redemptive, communicative body is achieved privately.³⁰ Accordingly, the Christian story of incarnation is as-

26. *John* 1:1 (Revised Standard Version). Authority for the revision includes *Psalms* 33: By the word of the Lord the heavens were made, and all their host by the breath of his mouth. . . . For he spoke, and it came to be: he commanded, and it stood firm.

Psalms 33:6, 9.

27. *John* 1:14.

28. *Jeremiah* 31:31-33; cf. *Hebrews* 8:10; *Romans* 2:14-15.

29. *Genesis* 17:1-23; *Deuteronomy* 10:16; *Jeremiah*. 9:25; *Romans* 2:29.

30. John says that the Word is “the light of *all* the people”; correspondingly, the mission of John the Baptist was to testify to the coming of “the true light, which enlightens *everyone*.” *John* 1:4, 9 (emphasis added). A distinction may be drawn between the class of those who are in principle enlightened by the Word, and the class of those who “receive” the Word and are thereby given new birth. In John the former class includes all humanity, while the latter class includes only those “born of God” (1:13) or “born from above” (3:3), and excludes those born “of blood or of the will of the flesh” (1:13) or “all who . . . do not come to the light” (3:20). I understand the author of the Valentinian text, “The Gospel of Truth,” to agree with John that the class of those who receive the Word includes less than everyone; in the Gnostic text, the recipient group is called “the perfect” or “the elect.” *The Gospel of Truth*, in LAYTON, *supra* note 4, at 254-362. If there is disagreement, it regards the class of those to whom the light comes in principle. Compare *John* 1:4, 9, *supra*, to these Valentinian affirmations: “The proclamation

sociated with a public hermeneutics, and the Gnostic story with a private or esoteric hermeneutics.

B. *Emanation and Shadow*

In Gnostic cosmogonies, emanation is the central concept linking the original fullness of being and divinity (the *pleroma*), the word as its manifestation (the *logos*), and the descent of the spirit into the cosmos and the embodied human existent. "This process of emanation, of the progressive issue of the divine substance, by means of which God manifests to himself the totality of his infinite potentialities, is a process of enrichment, but also of impoverishment."³¹ The overflowing of divine fullness sets in motion a sequence of subordinate emanations, degenerating at last into the creation of the cosmos and the alienation of spirit. But divine emanation also enables an ultimate restoration: "In this manner, the Word of the father goes forth in the entirety . . . taking the outward manifestation of the entirety and purifying it, bringing it back into the father, into the mother, Jesus of the infinity of sweetness."³²

In one version of the Valentinian cosmology,³³ the unknown God is envisioned dyadically as the Deep (the perfect, unengendered parent) and its consort Silence (thought, loveliness). From the womb of Silence, in which the seed of the Deep is planted, pairs of masculine and feminine energies (the Aeons) descend. From Silence emanate Intellect ("the only being that comprehended the magnitude of its parent"³⁴) and Truth, which in turn emit Word and Life. "And from the Word and Life (Zōē) emanated the human being and the church, as a pair."³⁵ Five further pairs of Aeons, coupling images of stability, or unchangeableness, and sexual intercourse, proceed from

of the truth is a joy for those who have received grace through the father of truth, that they might learn to know him through the power of the Word that emanated from the fullness. . . . [T]he term 'proclamation' refers to the manifestation of hope, a discovery for those who are searching for him." *The Gospel of Truth* 16:31-35, 17:1, in LAYTON, *supra* note 4, at 253. "It is to the perfect that this, the proclamation of the one they search for, has made itself known, through the mercies of the father." *Id.* at 18:11-14.

31. FILORAMO, *supra* note 12, at 59.

32. *The Gospel of Truth*, 23:33-24:9, in LAYTON, *supra* note 4, at 257 n.17a. Layton glosses "entirety" as "spiritual reality as alienated from its source." *Id.*

33. The account given in this paragraph summarizes main features of the myth elaborated by Valentinus's student Ptolemy, as presented by St. Irenaeus of Lyon in *Against Heresies*. *Ptolemy's Version of the Gnostic Myth*, in LAYTON, *supra* note 4, at 276-302. While the idea of an original fullness whose radiance both glorifies the ineffable god and precipitates division and fall, giving rise to humankind and to the drama of redemption, is common to several versions of Gnosticism both classical and Christian, these versions also differ in many respects. *See id.* at 12-17, 223-24; HANS JONAS, *THE GNOSTIC RELIGION* 174-97 (1963); PAGELS, *supra* note 5, at 59-67; FILORAMO, *supra* note 12, at 56-100.

34. *Ptolemy's Version of the Gnostic Myth* line 1.1, in LAYTON, *supra* note 4, at 281.

35. *Id.* at 282.

Word and Life; six further pairs, including the theological virtues, emanate from human being and church. The last of the twelve to emanate, Wisdom (Sophia), "charged forward and experienced passion without the involvement of her consort, the wished-for."³⁶ The fruit of this incomplete and frustrated passion, by an Aeon incapable of knowing the Deep, is Achamōth (the lower wisdom), who was "cast forth in a region of shadow and emptiness; and necessarily so, for it had come to be outside the light and the fullness, without form and imageless, like an aborted fetus."³⁷ Jesus comes from the fullness, and proceeds, as Word, to marry and redeem the lower wisdom, giving form to Wisdom's formless thought.

From Sophia's abortive effort to think or know the Deep arises the craftsman or demiurge, creator of cosmos, materiality, and humankind. In some texts, such as *The Reality of the Rulers*, the demiurge is associated with Sophia's shadow.

A veil exists between the world above and the realms (aeons) that are below; and shadow came into being beneath the veil; and that shadow became matter; and that shadow was projected apart. And what she had created became a product in the matter, like an aborted fetus. And it assumed a plastic form molded out of shadow, and became an arrogant beast resembling a lion.³⁸

The demiurge, in its arrogance, boasts that it is the creator of heaven and earth; in fact the creator is but a deformed reproduction of the full being of the ineffable divinity. By the same logic, humankind, made in the image and likeness of the creator, is twice degraded, the shadow of shadow. Caught in a material world likened to afterbirth of the deformed shadow, humanity (*anthropos*) is redeemed only by a saving knowledge that looks beyond Wisdom and beyond the border of the *pleroma*. This redemption will not take place "[u]ntil the moment when the true human being, within a modeled form [body], reveals the existence of the spirit of truth, which the parent has sent."³⁹

III. THE SECOND INCORPORATION OF THE BILL OF RIGHTS

While these teachings are esoteric, their influence on poetry and theology has been pervasive. However deeply run the streams of influence, it is nonetheless surprising to recognize central themes of gnostic cosmogony—emanation, shadow, frustrated procreation, and

36. *Ptolemy's Version of the Gnostic Myth* line 2.2, in LAYTON, *supra* note 4, at 283.

37. *Ptolemy's Version of the Gnostic Myth* line 4.1, in LAYTON, *supra* note 4, at 288.

38. *The Reality of the Rulers (Hypostasis of the Archons)* in LAYTON, *supra* note 4, at 74 (94:8-18).

39. *Id.* at 76 (96:32) (editorial marks eliminated).

revelation of the long-hidden meaning of the word—in the modern constitutional case law of substantive due process.

Writing for the Court in *Griswold*, Justice Douglas echoes these central themes of gnostic myth.⁴⁰ In *Griswold*, the Court struck down a Connecticut statute that made it a crime to use any drug or article to prevent conception. A majority of the Justices agreed that the statute violated a right of privacy, or of marital privacy, secured by some provision or provisions of the Constitution. But nowhere is the word “privacy” to be found in the Constitution,⁴¹ nor any discussion of the incidents of marriage. It is not surprising, then, that Justices who agreed that the statute was invalid disagreed about just which portions of the Constitution rendered the statute so.

On the one hand, privacy could be regarded as an element of the liberty that the due process clause of the Fourteenth Amendment of the United States Constitution protects against substantive deprivation by irrational state laws. The difficulty with this line of thought for the *Griswold* judges was that precedents for securing families from state laws intruding on family choices regarding child-raising were clouded by association with a discredited, long-renounced form of judicial activism.⁴² On the other hand, privacy could be found to be implicit in various provisions of the Constitution, such as those provisions guaranteeing freedom of association, freedom of the person and home from unreasonable searches and seizures, and the right not to incriminate oneself. The difficulty with this approach was that some of the Justices did not believe that the Fourteenth Amendment fully “incorporated” all of the relevant provisions of the Bill of Rights, rendering them applicable against state (as distinct from federal) laws.⁴³

Douglas’s solution was to effect a second “incorporation” of the Bill of Rights through the due process clause: an incorporation, not only of text into corpus of text, but also of text into corpus of body.⁴⁴

40. It is helpful to read the opinion in the light of the ironies surrounding it: that this so-called “rebirth”—e.g., *The Birth of the Second Era of Substantive Due Process*, in PAUL BREST & SANFORD LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 946 (3rd ed. 1992)—giving rise to case law described as *Griswold*’s “progeny”—see *Thornburgh v. American College of Obstet. and Gyn.*, 476 U.S. 747, 775 (1986); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1436 (1992)—protects contraceptive use (as if doctrinal procreation stood in for the procreation of the body), and that this new birth of due process liberty spurns the due process clause and takes its stand instead upon an expansive reading of the Bill of Rights. *Griswold* participates in a series of sublimated births.

41. “Private property,” however, is protected by the Just Compensation Clause of the Fifth Amendment. See U.S. CONST. amend. V, cl. 4.

42. Justice Douglas vented his concerns about substantive due process and declined to adopt the analysis symbolized by *Lochner v. New York*, 195 U.S. 45 (1905). *Griswold*, 381 U.S. at 482.

43. 381 U.S. at 486 (Goldberg, J., concurring).

44. Corpus means “embodied person,” as it does in the writ of habeas corpus, which requires that the person be brought before the court. The Constitution adopts this language to restrict

This second incorporation is a saving "publication" of the word of liberty.⁴⁵ Justice Black, who dissented in *Griswold*, is said to have carried the text of the Constitution with him in his pocket, so that he could refer to its language as needed. Douglas goes Black one better; we need not carry the Constitution in our pockets because we bear it in our bodies.

Once the body incorporates and publishes the meaning of constitutional liberty, the violation of the person is at once revealed and denounced as a violation of the Constitution.⁴⁶ The space common to both violations is "privacy," which is located in the "penumbra," the half-shadow cast by the provisions of the text. "In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion."⁴⁷ Douglas's language is not that of logical implication—of more specific protections implying a more general right—but of spatial extension. The First Amendment "has a penumbra," casts a partial shadow; what is half-concealed by that shadow is private, protected from governmental intrusion. Both the body and the bedroom belong to this concealed space.

After considering several other provisions of the Bill of Rights, together with cases interpreting them, Douglas concludes: "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."⁴⁸ Here Douglas brings together two central concepts of gnostic cosmogony, the emanation and the shadow. The word, the language of the text, emanates, thereby participating in the ambiguous process by which *logos* emanates in the *pleroma*. The emanation of the word brings life: "[A]nd the word was with God. . . . All things came into being through him. . . . What has come into being in him was life, and the life was the light of all people."⁴⁹ But instead of bringing light, this emanation brings shadow, the penumbra's half-concealment. Thus the process of emanation is revealed in all its

the suspension of the writ of habeas corpus. U.S. CONST. art. I, § 9.

45. See *supra* text accompanying note 25.

46. The wording of Clause 1 of the Fourth Amendment invites this interpretation. It provides that "[t]he right of the people to be secure in their persons . . . shall not be violated." The word "violated," unlike, say, "impair" (contracts clause), or "abridging" (Free Speech Clause of the First Amendment), participates simultaneously in a phenomenology of embodiment (conveying the invasion of the person) and in a discourse of rights. (Such an invasion, at least when "unreasonable," infringes "the right of the people.")

The Fourth Amendment's concept of person requires embodiment (else the security of the person cannot be violated), just as Article I's concept of corpus, see *supra* note 44, refers to the person. The two vocabularies converge in treating the person, at least in standard instances, as the living body.

47. 381 U.S. at 483.

48. *Id.* at 484.

49. *John* 1:1-4.

ambiguity; what begins as a radiation of full being culminates in a shadowy abortion. The word emanates into the fallen state of materiality.

The jurisprudential counterpart to this shadowy space is uncertainty. Not long before Douglas wrote his *Griswold* opinion, H. L. A. Hart had given wide currency to "penumbra" as a term denoting the area of uncertainty in a word's meaning and legal application, surrounding the "core" of certainty.⁵⁰ Long before Hart, Justice Holmes had spoken of "questions of penumbra, of shadowy marches where it is difficult to decide."⁵¹ In the shadowy marches of materiality, anxiety, and the indefinite are the rule.⁵² When Justice Cardozo spoke of the "penumbra of uncertainty obscuring judgment,"⁵³ he clearly drew the consequences of the shadow image; for if it is in the nature of a complete shadow to eclipse, it is in the nature of a penumbra, a partial shadow, to obscure—and the mental state of the judge corresponding to obscurity is uncertainty.

Prior to *Griswold*, Douglas himself had used "penumbra" in this imagistically appropriate sense, that is, the sense that corresponds to "partial shadow." Addressing the question of whether the state of

50. See H.L.A. HART, THE CONCEPT OF LAW 119 (1961); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 610 (1958).

51. *Hanover Milling Co. v. Metcalf*, 240 U.S. 404, 426 (1916) (Holmes, J., concurring). This is the earliest use of the term "penumbra" that I have found in a case decided by the Supreme Court. Holmes meant by "penumbra" in the *Hanover Milling* case what he had meant years earlier when, as Chief Justice of the Massachusetts Supreme Court, he had observed that "constitutional rules, like those of common law, end in a penumbra where the Legislature has a certain freedom in fixing the line." *Danforth v. Groton Water Co.*, 178 Mass. 472, 476 (1901). Later, dissenting in *Olmstead*, Holmes said: "I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them." 277 U.S. 438, 469 (1927) (Holmes, J., dissenting). Here the image of the "shadowy marches" is recalled; the penumbra of the text is imaged as a shadow that either "covers the defendant" or falls short of him. The question of whether or not the shadow covers him is likewise shadowy; we can agree that "the words of a law" have a meaning that extends beyond them, but disagree about what that meaning is and how it applies to the instant case.

For the history of the legal use of "penumbra," see Burr Henly, *Penumbra: The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81 (1987). See also Henry Greeley, *A Footnote to "Penumbra" in Griswold v. Connecticut*, 6 CONST. COMMENTARY 251 (1989) (criticizing Douglas's use of metaphor).

52. The material world, according to one account of the Valentinian creation myth, "was generated from three kinds of passion: fear; grief; uncertainty." *Ptolemy's Version of the Gnostic Myth* 1.5.4, in LAYTON, *supra* note 4, at 291. The body resides within this penumbra of uncertainty:

Inasmuch as the entirety had searched for the one from whom they had emanated, and the entirety was inside of him—the inconceivable uncontained, who is superior to all thought—ignorance of the father caused agitation and fear. And the agitation grew dense like a fog, so that no one could see. Thus error found strength and labored at her matter in emptiness. Without having learned to know the truth, she took up residence in a modeled form [the human body], preparing by means of the power, in beauty, a substitute for truth.

The Gospel of Truth 16:4-21, in LAYTON, *supra* note 4, at 253. Cf. *supra* note 32.

53. *Schechter Co. v. United States*, 295 U.S. 495, 554 (1934) (Cardozo, J., concurring).

Louisiana could, under its own law, confiscate timber without paying compensation, Douglas observed: "There is no square holding of the Louisiana courts on this point. The problem lies in the penumbra of Louisiana law, making all the more difficult a prediction as to what the Louisiana courts would hold."⁵⁴

Read as a gnostic text, Douglas's *Griswold* opinion is striking in its use of the image of partial shadow to convey uncertainty and obscurity, the characteristic qualities of the material world. The constitutional word of liberties casts a shadow; it does not emit a radiance.⁵⁵ Within that shadow we are free to choose and to act, both maritally and judicially, but not in confidence that we are achieving a higher realization of the human. Above all, the shadow of the text is a place of privacy, not publicity. The incorporation of the Bill of Rights into the body is visible only through an esoteric hermeneutic; there is no line of justification that can vindicate or secure this incorporation through a public reading of the text. To see this, we must turn from the penumbra to the emanations that form it.

In its original usage, emanation as a concept of constitutional law referred to the political legitimation of governmental authority. Chief Justice Marshall used the concept in this way in a well-known passage from *McCulloch v. Maryland*.⁵⁶

The government of the Union, then, (whatever may be the influence of this fact on the case,) is, emphatically, and truly, a government of the people. In form and in substance *it emanates from them*. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.⁵⁷

The claim here seems so self-evident that it is easy for a modern reader to glide over the reference to emanation without being troubled by its uncertain meaning. Not only the content but the rhetoric of the claim has seeped into our public mythology by means of the Gettysburg Address, which repeats Marshall's assertion that the federal government is the "government of the people," "by" the

54. *General Box Co. v. United States*, 351 U.S. 159, 169 (1955) (Douglas, J., dissenting).

55. The imagery does not lend itself to happy allegorization. In Charles Reich's cheery reconstruction, "Douglas argued that the rights explicitly enumerated have broader meanings today; in his memorable phrase, they have penumbras. They mark an area larger than themselves. They are like street lights illuminating a darkened street, the whole of the street representing liberty, the lights being only those aspects of liberty marked out by the Framers." Charles Reich, *Foreword: "He Shall Not Pass This Way Again,"* in *LEGACY*, *supra* note 20, at xii. Yet in Douglas's phrase, the emanations form the penumbras, rather than partially dispelling them. Further, Reich's night scene does not retain the association between the penumbra and the private, impenetrable precinct of the bedroom. The whole point of the half-shadow of privacy *formed* by the text's emanations is that one *does not want* the full light of day to fall there.

56. 17 U.S. (4 Wheat.) 316 (1819).

57. *Id.* at 404-05 (emphasis added).

people, and “for” the people. But Marshall makes these claims precisely because they are not self-evident: “counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States.”⁵⁸ The nature and distribution of sovereignty, and the question of its divisibility, were contested throughout the period of the framing and ratification of the Constitution. *McCulloch* testifies to the fact that adoption of the Constitution did not settle the matter.

Maryland’s contention implies that grants of sovereign power ought to be construed narrowly. Congress’s powers, accordingly, should be interpreted in favor of the sovereign grantor (the states) and against the grantee (Congress). In order to bring the power to incorporate a bank within the delegated powers of Congress, Marshall had to read the whole corpus of enumerated powers in the light of an implicit larger purpose, the prosperity of the growing nation, which the powers were meant to advance.⁵⁹ He did not describe this method of interpretive generalization and inference as “emanating” the text, or discerning its “emanations.” “Emanation” named the relation of political legitimacy between the people and the federal government, not the hermeneutic subordinate to that relation.

For the greater part of its constitutional history, the concept of emanation has stayed in the neighborhood of Marshall’s robust idea. The Constitution is said to emanate from the people; so, too, does the sovereign power.⁶⁰ Laws emanate from the sovereign; the authority of law emanates from the people.⁶¹ A regulation emanates from legislative authority; an Act of Congress emanates from its delegated powers.⁶² In all of these uses, emanation means the political legitimation of an exercise of power. Because judging is such an exercise, it too must be legitimated. “It is the authority and laws

58. *Id.* at 402.

59. *Id.* at 407.

60. See *Adkins v. Children’s Hospital*, 261 U.S. 525, 544 (1923) (stating that Constitution emanates from the people); *Groves v. Slaughter*, 40 U.S. 449, app. xi (1841) (counsel contending that “[t]he formation of the constitution of a state is an act of sovereign power emanating directly from the people”).

61. See *Testa v. Katt*, 330 U.S. 386, 390 (1947) (holding that states cannot consider federal laws as emanating from foreign sovereign); *United States v. Barnett*, 376 U.S. 681, 700 (1964) (holding that state judges exercise and enforce authority and laws emanating from the people).

62. See *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 112 (1804) (counsel contending municipal regulation emanates from municipal authority of nation); *United States v. Bryan and Woodcock*, 13 U.S. 374, 376 (1815) (counsel arguing that inappropriate regulation cannot emanate from Necessary and Proper Clause).

emanating from the people, which the judges sit to exercise and enforce.”⁶³

Marshall *needed* to appeal to the emanation of legitimating energy from the people because he had to justify his broad construction of the constitutional texts of federal power. He *could make* this appeal because it sounded in a widely held, if equally widely disputed, political theory. And he could talk the language of emanation *with confidence* because he knew he could communicate his vision of great works by a great government for a great people. That which had to be said could be said “emphatically, and truly,” because a sound (though controversial) political vision effectively guaranteed the meaningfulness of the otherwise obscure claim that legitimation “emanates” from its source.

Douglas’s constitutional emanationism departs from Marshall’s by displacing the concept of emanation from its function in the political theory of the delegation of sovereign power. For Douglas, emanation names that which comes forth from the text rather than that which comes forth from the people. A certain similarity of interpretive method, however, survives this distinction. Regarded as an exercise in generalization, Douglas’s hermeneutics of rights resembles Marshall’s hermeneutics of powers. In both, a general principle or purpose is teased out of a series of related constitutional provisions, and that more general principle or purpose then serves as a premise in reasoning to a conclusion about the instant case. But in Douglas’s hands, “emanation” serves to call attention to that which must be justified, rather than to rationalize a political argument.

Lacking the tether to a generally negotiable political argument, Douglas’s emanation appears to be mystical or free-floating. Douglas reacts to this appearance defensively in *Poe v. Ullman*.⁶⁴ Dissenting from the Court’s decision that a challenge to Connecticut’s contraceptive ban was nonjusticiable, Douglas adumbrates the concepts he will bring to his majority opinion in *Griswold* four years later. “This notion of privacy is not drawn from the blue. It emanates from the totality of the constitutional scheme under which we live.”⁶⁵ Because he has nothing robust to say on behalf of his emanationism, he renounces defensively the very language that the gnostic might

63. See *Watson v. Williams*, 36 Miss. 331, 341-42 (1858), *quoted in* *United States v. Barnett*, 376 U.S. 681, 700 (1963).

64. 367 U.S. 497 (1961).

65. *Id.* at 521 (Douglas, J., dissenting) (citations omitted). In this passage, Douglas traces the emanation not to the larger implications of specific constitutional provisions, but to the whole text and more. (The “constitutional scheme under which we live” may comprise not only the whole text but the range of traditions and dispositions that surround it.) Compare Douglas’s claim, elsewhere in the same opinion, that “[l]iberty” is a conception that sometimes gains content from the emanations of other specific guarantees.” *Id.* at 517.

employ creatively. If the emanation does not proceed upward from the people, as it did for Marshall, then perhaps it is "drawn from the blue," descending from the *pleroma* as conceived in the imagination.

Likewise in *Bell v. Maryland*,⁶⁶ sandwiched between *Ullman* and *Griswold*, struggling to explain why the emanations do not require the conclusion that the private owner of a restaurant can discriminate against black customers, Douglas refers to the Fourth Amendment's "aura of privacy around private interests."⁶⁷ Douglas speaks articulately and passionately in denouncing this discrimination as "apartheid,"⁶⁸ but has nothing of comparable insight to say about the content and justification of the zone of privacy. By characterizing the emanation as an "aura," he gestures toward a mystical emanationism. But he does not do more than gesture, and this gesture may do more to raise doubts than to quiet them.

Bringing together the concepts of penumbra and emanation, we now see how appropriate it is for Douglas to describe the text's emanations as forming a shadowy place of uncertainty. No justification is offered for the text's emanation in this or that direction, or to any particular extent, or indeed for emanation at all. The absence of such a justification is felt as doubt, an uneasy existence in the "shadowy marches." Marshall's confidence in arranging the bits of textual tile into a larger and more meaningful mosaic is lost. That does not mean, however, that Douglas is the lesser creator. *Griswold* is creative but incomplete or not fully realized; the artist resists, rather than embraces, the conclusion that his emanations are "drawn from the blue." Resisting, his "Emanation scatter'd thro' the deep / In torment,"⁶⁹ Douglas retires into the penumbra of privacy.

IV. REDEEMING THE EMANATIONS

A. "*The vast breach of Milton's descent*"⁷⁰

We have seen that, for Justice Douglas, a visionary reading of the texts of liberty is one that incorporates the higher meaning of those texts in the body and the bedroom. No longer a merely external law, the Constitution dwells among us, fundamentally freeing us. But what promises to be a wider publication of hidden meanings actually confirms the inevitability of concealment and obscurity. The

66. 378 U.S. 226 (1963).

67. *Id.* at 254.

68. *Id.* at 254.

69. WILLIAM BLAKE, *Milton*, bk. 1, plate 2, lines 19-20 [hereinafter *Milton*], in COMPLETE WRITINGS 481 (Geoffrey Keynes ed., 1972).

70. "But Milton entering my Foot, I saw in the nether / Regions of the Imagination . . . the vast breach of Milton's descent." *Id.*, bk. 1, plate 21, lines 4-5, 7, at 503.

emanation of the texts of liberty forms a penumbra, a half-shadowy place of doubt. Protected by the shadows, the bodies in the bedroom couple ungeneratively.

Taken as a gnostic writing, Douglas's opinion in *Griswold* reports the mythic prehistory in which the emanation lapses into shadow. What is needed, from a gnostic point of view, is to go on with the story, constantly bringing out the possibility that the emanation may be redeemed from the shadow of concealed meaning, anxiety, and ungenerativity into which it has been cast. In this section I will call upon William Blake, the great intensifier of the Christian gnostic imagination, to resume the narrative as he did in his prophetic books.⁷¹ Especially in "Milton," Blake sets out to rescue the fallen or alienated emanation of the creative genius, retrieving for humankind a more delineated depiction and celebration of the imaginative body. Douglas's emanations invite a comparably visionary rescue attempt.

Milton, as understood by Blake, was just such a visionary figure as Douglas, renewing the old creation stories with an eye toward the redemption that overcomes or realizes them, fathering emanations that promise emancipation but subside into captivity.⁷² In *Eternity*, Milton is moved by the advent of new poetic possibility to descend, to enter Blake inspirationally, and to initiate the redemption of his emanations, their restorative reunion with the divine body.⁷³

But Milton entering my Foot, I saw in the nether
Regions of the Imagination. . . . the vast breach of Milton's
descent. . . .
And all this Vegetable World appear'd on my left Foot
As a bright sandal form'd immortal of precious stones & gold.
I stooped down & bound it on to walk forward thro' Eternity.⁷⁴

Milton had his Blake; who shall play Blake to Justice Douglas?
Who will raise Douglas up until he declares, with the redeemed

71. In the next section, I will return to the sense in which Douglas's Spectre is specifically a shadow of *privacy*. It will be necessary to consider Douglas's understanding of the privacy of the marital bedroom in the light of gnostic ideas about the bridal chamber and of Blake's treatment of the ambiguities of Beulah, the married land.

72. Apart from how Milton appeared, and Douglas might have appeared, in Blake's eyes, the Puritan author of the *Areopagitica* and the Presbyterian author of so many judicial opinions in defense of civil freedoms shared a motivation to speak out on behalf of Christian liberty, as exercised robustly by the individual.

73. "What moves Milton is in the first place his realization that his own vision needs to be reseen. He has left behind him in the torment of unredeemed nature his Emanation. . . . Milton must descend in order to redeem his creations. . . ." HAROLD BLOOM, *BLAKE'S APOCALYPSE* 308-09 (1963).

74. *Milton*, bk. 1, plate 21, lines 4-5, 7, 12-14, *supra* note 69, at 503.

Milton, "And every Generated Body in its inward form / Is a garden of delight & a building of magnificence"?⁷⁵

In an examination of Blake's work Harold Bloom explains that:

An emanation is literally what comes into being from a process of creation in which a series of effluxes flow from a creator. As a created form an emanation can be male or female or both; either way it is opposed to the Spectre or shadow, a baffled creation or residue of self that has failed to emanate, to reach an outer but connected existence.⁷⁶

Douglas's "penumbra of privacy," read gnostically, becomes what Blake called the Spectre, "a protective shadow whose 'guarding' has become an ambiguous menace."⁷⁷ In Douglas, the emanations *form* the shadow, rather than (as in Blake) contesting it.⁷⁸

We may adopt Blake's call to a more complete realization of musculature and sensation as a proposal for redeeming Douglas's emanations from their shadowy exile. Blake offers an inviting account of a human body that rises above its lower or merely natural endowment as created entity, humanizing itself in and through an increase in imaginative art. Blake's *anthropos*, "The Eternal Great Humanity Divine,"⁷⁹ offers an ideal type of the human body improved by complete incorporation of a Constitution no longer limited either by the interpretive framework of orthodox constitutionalism or by the naturalistic metaphysics of the ethic of creation.

As an artist, Blake set himself against forms of painting that sacrificed clear delineation of corporeal form to shadows and obscurity. In a catalogue entry describing his aims in executing an experimental illustration to Milton's *Paradise Lost*, Blake denounced "that infernal machine called Chiaro Oscuro, in the hands of Venetian and Flemish Demons," and renounced "temptations and perturbations, labouring to destroy Imaginative power," which "cause that the execution shall be all blocked up with brown shadows. They put

75. *Id.*, bk. 1, plate 26, lines 31-32, at 512.

76. BLOOM, *supra* note 73, at 195.

77. Quoted in HAROLD BLOOM, *THE VISIONARY COMPANY* 285 (1971).

78. Blake suggests the terms of this contest in a poem from his Note-book:

My Spectre around me night & day
Like a Wild beast guards my way.
My Emanation far within
Weeps incessantly for my sin.

Milton, *supra* note 69, at 415. The Spectre "guards [one's] way" in an ironic sense, limiting one's freedom like a wild beast that always threatens, so that I must carefully watch my step. One's Emanation weeps for the sin of not fully giving creative release (the Emanation remains "far within"). *Id.*

79. *Milton*, bk. 1, plate 2, l. 8, *supra* note 69, at 481.

the original artist in fear and doubt of his own original conception.”⁸⁰ Obscurity prevents sublimity of conception and execution. The shadow is the Spectre of art, as the penumbra is the Spectre of jurisprudence, casting creative thought into fear and doubt.

For Blake, the only cure is through a more careful and precise delineation of the vision, dispelling all fearful vagueness. As Blake says in another catalogue entry:

The Prophets describe what they saw in Vision as real and existing men, whom they saw with their imaginative and immortal organs; the Apostles the same; the clearer the organ the more distinct the object. A Spirit and a Vision are not, as the modern philosophy supposes, a cloudy vapour, or a nothing; they are organized and minutely articulated beyond all that the mortal and perishing nature can produce. He who does not imagine in stronger and better lineaments, and in stronger and better light than his perishing, mortal eye can see, does not imagine at all.⁸¹

Blake could be speaking of Douglas and to him when he goes on to say: “Moderns wish to draw figures without lines, and with great and heavy shadows; are not shadows more unmeaning than lines, and more heavy? O who can doubt this!”⁸²

Blake invites Douglas to a more clearly articulated vision of the body, freed from shadowy suggestion. In this respect a Blakean critique of *Griswold* coincides with the usual critique; what is needed is a more carefully delineated right, corresponding to a more minutely interpreted text and a more precisely defined regime of bodily liberty.⁸³ But where the usual critic wants Douglas to retire from prophecy to a more legitimate interpretive stance, Blake beckons

80. WILLIAM BLAKE, *A Descriptive Catalogue of Pictures*, No. 9, in *COMPLETE WRITINGS* 582 (Geoffrey Keynes ed., 1972).

81. *Id.* at 576 (No. 4).

82. *Id.* at 577.

83. Douglas's concurrence in *Roe v. Wade* marks in some respects, but not in others, an advance toward this goal. In his concurrence, Douglas identifies three classes of liberty interests protected substantively by the due process clause:

First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality. . . . Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children. . . . Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.

Roe v. Wade, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179, 210-15 (1973) (Douglas, J., concurring) (writing one concurrence for both cases). By comparison with most opinion-writing in the area of personal liberty, this inventory of interests, together with its supporting discussion of precedent, rises to a level of comprehensiveness seldom seen. But Douglas remains silent about the human good that is to be achieved, or not achieved, in marriage or strolling. “Freedom from bodily restraint” is not stated with sufficient particularity to justify the adoption of a standard of review; one must know more about the significance of the body in order to decide which forms of restraint are most humanly destructive, hence most in need of special governmental justification.

toward a more thoroughgoing and ambitious prophecy. The body must be drawn in all particularity and in full light, improving on nature through increase of perceptual power, overcoming fatal dualism. Blake achieves this by means of the engraver's art: "[T]he notion that man has a body distinct from his soul is to be expunged; this I shall do by printing in the infernal method, by corrosives, which in Hell are salutary and medicinal, melting apparent surfaces away, and displaying the infinite that was hid."⁸⁴ Douglas must use analytical corrosives with care, lest they further disfigure the infinite.⁸⁵ But he can follow Blake the painter in more carefully delineating the body, reclaiming on its behalf the open horizon of perceptual possibility.⁸⁶

The restoration or improvement of the senses defines one of the main aims of a renewed incorporation. Joy and delight, accessible through the portals of sensation, and made available to the intellect, constitute a medium that unites body and soul, bridging what the jurisprudence of privacy has described as material and spiritual nature.⁸⁷ A more fully realized jurisprudence of gnostic due process would identify aspects of perceptual potential that form a part of the liberty of the body.

In Blake's myth, the shadow that falls upon the senses, limiting their perceptual range and hindering poetic and artistic execution, is dispelled by the prophet, conceived as a laboring smith:

Los beheld undaunted, furious,
His heav'd Hammer; he swung it round & at one blow
In un pitying ruin driving down the pyramids of pride,
Smiting the Spectre on his Anvil & the integuments of his Eye
And Ear unbinding in dire pain, with many blows
Of strict severity self-subduing, & with many tears labouring.⁸⁸

Through these self-transformative hammer blows, the smith challenges and redeems the work of the demiurgic craftsman.

In constitutional law, the labors of the smith, the artist, the engraver, and the poet, devolve in the first instance upon the justices

84. *The Marriage of Heaven and Hell*, plate 14, in BLAKE, *supra* note 80, at 154.

85. Following Holmes, the legal realists (among whom Douglas can be numbered), proposed "to redefine supernatural concepts in natural terms, to wash ideas in cynical acid." Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 830 (1935). This naturalizing conceptual reductionism defines the opposite of Blake's corrosive method. Blake wanted to wash away the regime of natural appearances, so as to reveal what Cohen regarded as "supernatural" but what Blake understood as fully human.

86. Blake denounced the fallen or restricted powers of the five senses. See *Milton*, bk. 1, plate 5, lines 19-37, *supra* note 69, at 484-85. Cleansed, the senses would perceive the union of body and soul. *The Marriage of Heaven and Hell*, plate 4, in BLAKE, *supra* note 80, at 149.

87. See *supra* note 23 and accompanying text.

88. *Jerusalem*, plate 91, lines 42-47, in BLAKE, *supra* note 80, at 738.

of the Supreme Court, although in a larger sense “we the people” retain all of these works in our own hands. The hammer that forges and frees, the pen and brush that delineate, the corrosives that wash away appearances, the strong poetic line that opens a vision of possibility and beauty—we wield all of these when we expound the Constitution. If our hands are subtle and our imaginations capable, we may challenge and redeem the work of the Founders. *Griswold* issues such a challenge and intimates such a redemption, but Douglas supplies neither a subtlety nor an imagination adequate to the prophetic task.

Vagueness in execution is not essential to *Griswold*’s vision. To the contrary, any reader of *Griswold* who shares that vision, as I do, wishes for the penumbra of uncertainty to give way to a more definite articulation of the perceptual range which extends our human possibility beyond the merely natural. We await the redemptive return of Douglas, as Blake invited the return of Milton; we await a more careful delineation of body that each of us bears and is, an emanation of constitutional freedom.

B. In “the sacred precincts of marital bedrooms”

1. The ambiguities of Beulah

The “zone of privacy” is the emanation of the word into the body. The government violates the word when it violates the body, but because the site of violation is in partial shadow, the judicial intelligence falls into uncertainty and difficulty. The word does not emanate fruitfully. To these characteristics of the “penumbra of privacy” must be added a final predicate: this zone of inviolability also comprises what Douglas calls “the sacred precincts of marital bedrooms.”⁸⁹ The theme of the sacred marriage and of its protected space, the marital bedroom, is central to the gnostic reading of *Griswold*. While some forms of contraceptives are used more or less continuously (rather than employed *ad hoc* at the time of intercourse), and while intercourse may take place in spaces other than the marital bedroom, the scene that Douglas conjures in *Griswold* consists of married persons, in their bedrooms, using devices to avert conception. The gnostic effect of Douglas’s appeal to the “sacred precincts” is thus to invert the conventional valuation. The marital space is sacred precisely because it is the place where couples choose to enact their intimacy nonprocreatively.

89. *Griswold*, 381 U.S. at 485.

Ambiguities of creativity link two of *Griswold's* tropes: the surprising image of the emanation-turned-shadow and the paean to a sacred marital space where conception is avoided. Renunciation of procreation is a meaningful spiritual choice on gnostic (as on many other) assumptions.⁹⁰ Blake's prophet Los expresses the underlying idea compactly when he spurns what he regards as a vegetative and nurturing existence "Lest the Sexual Generation swallow up Regeneration."⁹¹ Yet the act of warding off conception also symbolizes a failure to emanate fully,⁹² or a victory by the "guardian" Spectre in divorcing the emanative creation from redemptive reassumption in the creator. The savior's song that opens Blake's epic, "Jerusalem," implies that marital happiness depends upon a retirement into shadow that conceals the couple, not only from the tiresome world, but also from divine insemination or fecundity.

Where hast thou hidden thy Emanation, lovely Jerusalem,
 From the vision and fruition of the Holy-one?
 I am not a God afar off, I am a brother and friend;
 Within your bosoms I reside, and you reside in me:
 Lo! we are One, forgiving all Evil, Not seeking recompense.
 Ye are my members, O ye sleepers of Beulah, land of shades!⁹³

Albion, Blake's *anthropos*, has produced lovely Jerusalem, his emanation, and hidden her away from divine vision and fruition. Resting in the pleasant married land, Beulah, Albion is lulled by soft shadows into forgetfulness that he is part of the divine body.

Blake's Beulah, recalling Isaiah's married land,⁹⁴ "is a pleasant

90. The ancient Thomas tradition depicts Jesus saying to a couple who are about to be married: "If you abandon this filthy intercourse, you become holy temples, pure and free from afflictions and pains both manifest and hidden, and you will not be girt about with cares for life and children, the end of which is destruction." *Acts of Thomas* 12, in WAYNE MEEKS, *THE ORIGINS OF CHRISTIAN MORALITY: THE FIRST TWO CENTURIES* 137 (1993). All "intercourse for production of children" is condemned. *Id.*

Douglas does not express a view in *Griswold* on the question of whether married couples, in their sacred space, the bedroom, should enact their intimacy and community procreatively or nonprocreatively. Earlier, writing for the Court in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), Justice Douglas explained that a state law requiring sterilization of certain classes of repeat offenders must be subjected to close judicial scrutiny because it involves "one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." A compulsorily sterilized person can look forward to "no redemption," because "[h]e is forever deprived of a basic liberty." *Id.* at 541.

91. *Jerusalem*, ch. 4, plate 90, line 37, in BLAKE, *supra* note 80, at 737. Cf. *Milton*, bk. 2, plate 31, line 19, *supra* note 69, at 520.

92. The Gnostic teacher and poet, Valentinus, imaged the harvest of redemptive emanation as "Crops rushing forth from the deep / A babe rushing forth from the womb." *Summer Harvest* 6-7, in LAYTON, *supra* note 4, at 248. The "Crops rushing forth from the deep" are emanations from the heart or source of the *pleroma*; "A babe rushing forth from the womb" suggests the Incarnation, the redemptive emanation, or "procession of the divine Word." *Id.* at 246.

93. *Jerusalem*, ch. 1, plate 4, lines 16-21, in BLAKE, *supra* note 80, at 622.

94. *Isaiah* 62:4. For a helpful discussion of the ambiguities of Beulah, see JEAN H. HAGSTRUM, *THE ROMANTIC BODY: LOVE AND SEXUALITY IN KEATS, WORDSWORTH, AND*

lovely Shadow / Where no dispute can come.”⁹⁵ There the emanations are covered by “a pleasant Mild Shadow above, beneath, & on all sides round,”⁹⁶ a protective covering that dulls contrariety and imaginative progression. Although marriage conventionally symbolizes a union of persons, Blake’s shadowy marital land is a space in which the self may be secured against communion.⁹⁷ Communion is possible only among persons who have acknowledged their imaginative energies and accepted responsibility for the exercise of their imaginative powers.⁹⁸ The integration of human faculties required for the building of Jerusalem presupposes the commitment that Blake expresses in the well-known poem that prefaces “Milton”: “I will not cease from Mental Fight / Nor shall my Sword sleep in my hand.”⁹⁹ In Beulah, mental fight relapses into a sleepy and pleasant restfulness.

In the totality of a well-ordered life, such restfulness is tonic. One cannot be fully creative and involved in the clash of contraries at every moment. Beulah mitigates self-absorption, moreover, even if it does not suffice for communion.¹⁰⁰ And sexual pleasure in marriage prefigures paradise. Yet Blake helps us to appreciate the implications for all the human goods, and especially for spirituality, of the association that *Griswold* forges between the marital space, the shadow that covers the emanation, and nonprocreativity. Unless the prospects for human realization are carefully delineated, and the gates of perception opened to take in the beauties of the human form, one who retires into the penumbra of privacy surrounding the marital bedroom is not thereby stimulated toward a more complete emancipation of the “spiritual nature.” The task we face, then, in redeeming *Griswold*’s promise of a humanizing incorporation, is one of coming to an understanding of fruition that can inform our experience of bodily intimacy.

BLAKE 109-45 (1985).

95. *Milton*, bk. 2, plate 30, lines 2-3, *supra* note 69, at 518.

96. *Id.*, bk. 2, plate 30, lines 32-33, at 519.

97. Compare Blake’s earlier association of the epithets “Obscure, shadowy, void, solitary,” in *The Book of Urizen*, plate 2, line 4, in BLAKE, *supra* note 80, at 222. The poem continues: “Lo, a shadow of horror is risen / In Eternity! Unknown, unprolific, / Self-clos’d, all-repelling.” *Id.*, plate 3, lines 1-3, at 222. Note the association of the shadow, not only with obscurity, *see supra* notes 50-53 and accompanying text, but also with solitariness and sterility.

98. *Jerusalem*, ch. 4, plate 88, lines 10-15, in BLAKE, *supra* note 80, at 733.

99. *Milton*, plate 1, prefatory poem, lines 13-14, *supra* note 69, at 481.

100. Hagstrum helpfully shows that while Beulah is not sufficient for the highest human good, it is nonetheless valuable. HAGSTRUM, *supra* note 94, at 131.

2. "The right to be let alone"

Griswold offers a revision of the received constitutional creation myth. In this respect, *Griswold* deserves comparison to the preeminent retelling of the creation myth in American constitutionalism: Lincoln's Gettysburg Address. Both texts are formally gnostic, in that they take us behind and before ostensible origins in order to reveal not only the legitimacy but also the priority of specific aspirations and commitments. For both texts these aspirations and commitments are redemptive. *Griswold*, like the Gettysburg Address, is meant to stimulate a "new birth of freedom."

In both texts, the stimulus to new and higher liberty acquires strength from paradox, contrast, and substitution. In Lincoln's speech, the new birth of freedom substitutes for the death of the soldiers. In Douglas's *Griswold* opinion, the new birth of freedom substitutes for the births averted by contraception. Lincoln's pattern of substitution is more conventional than Douglas's, as is his appeal to marriage as the symbol of constitutional fidelity and generativity. Nonetheless, Douglas's disturbing association between marital privacy and frustrated procreativity is prefigured, surprisingly, in Lincoln's own remarks.

The Address begins with a formally gnostic move. Lincoln pushes back the founding, revealing that what had previously seemed to be the creation was actually a subordinate event. Before there was a Constitution, there was a Declaration of Independence, whose commitment to the principle of the equality of the created is traceable to the hierogamic union of the fathers and the continent: "[O]ur fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal."¹⁰¹ Committing the bodies fallen on the fields of Gettysburg to the soil on which the fathers begat the nation recalls and repeats the fruitful union, issuing in "a new birth of freedom."¹⁰² This whole salvation-history, which telescopes the constitutional founding into Jefferson's more distant creation event, and that event into Genesis (all men are *created* equal, and endowed by their *Creator* with certain unalienable rights), is invisible to the orthodox constitutionalist. Chief Justice Taney, the representative of orthodox constitutionalism, misunderstands and misuses the Constitution precisely because he is ignorant of the larger drama of creation and redemption in which that

101. ABRAHAM LINCOLN, Address Delivered at the Dedication of the Cemetery at Gettysburg, Final Text, in 7 WORKS OF LINCOLN, supra note 6, at 23.

102. *Id.*

text figures. Betraying Taney's ignorance is his mistaken assertion, in the *Dred Scott* case, that the union is formed by the Constitution.¹⁰³

Lincoln takes pains in his First Inaugural to correct Taney's error. Once again, Lincoln uses marital imagery to reveal the more spiritually significant origin that is half-reflected, half-concealed behind the demiurgic Constitution.

The Union is much older than the Constitution. It was formed, in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured and the faith of all the then thirteen States expressly plighted and engaged that it should be perpetual, by the Articles of Confederation in 1778. And finally, in 1787, one of the declared objects for ordaining and establishing the Constitution, was "to form a more perfect union."¹⁰⁴

The deed of constitution making is likened to the pledging of perpetual faith. An exchange of vows, as between lovers, both reenacts and deepens the hierogamic origins of the nation's constitutional order. Marriage is a sacrament of constitutionalism: specifically, of fidelity as a first principle of union.

For Douglas, too, marriage is a sacrament of constitutionalism. The moral content of the sacrament is not fidelity, however, but privacy. Douglas says that before there was a Constitution, there was a right of privacy:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.¹⁰⁵

The sacred marriage sacramentalizes moral relations so that they are prior in a double sense: historically prior to the Constitution and morally prior to values and claims arising in the ordinary affairs of government. Marriage so sacralizes the right to privacy that it is even prior to "our prior decisions." But marriage in *Griswold* cannot serve, as it did for Lincoln, as the motivating analogy to political obligation

103. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403 (1857).

104. ABRAHAM LINCOLN, First Inaugural Address: Final Text, in 7 WORKS OF LINCOLN, *supra* note 6, at 265. Lincoln borrows the idea of the exchange of sacred vows from the closing lines of the Declaration of Independence. See Ronald R. Garet, *Creation and Commitment: Lincoln, Thomas, and the Declaration of Independence*, 65 S. CAL. L. REV. 1477 (1992).

105. *Griswold*, 381 U.S. at 486.

and commitment. No longer symbolizing the absoluteness of fidelity, marriage is at best “hopefully enduring.”

Lincoln’s hierogamy, in which the fathers sire the nation upon the continent, rhetorically occupies a more fecund space than “the sacred precincts of marital bedrooms,” the territory to which Douglas appeals immediately before his just-quoted conclusion. For in these sacred precincts, married couples use devices, not only to avert disease, but to prevent conception and childbirth. But the appearance of relative fecundity in Lincoln’s view of marriage is deceiving. For Lincoln, as for Justice Douglas, the sacred precincts of marital bedrooms belong to a priestly religion which draws, as Blake said, “a little curtain of flesh on the bed of our desire.”¹⁰⁶

In his speech at Springfield in the campaign against Stephen Douglas, Lincoln declared:

Now I protest against that counterfeit logic which concludes that because I do not want a black woman for a *slave* I must necessarily want her for a *wife*. I need not have her for either, I can just leave her alone. In some respects she certainly is not my equal; but in her natural right to eat the bread she earns with her own hands without asking leave of any one else, she is my equal, and the equal of all others.¹⁰⁷

Speaking in Chicago, a year later, Lincoln made a similar yet more chilling appeal, which throws a long shadow over the first sentence of the Gettysburg Address.

I protest, now and forever, against that counterfeit logic which presumes that because I do not want a negro woman for a slave, I do necessarily want her for a wife. [Laughter and cheers.] My understanding is that I need not have her for either, but as God made us separate, we can leave one another alone and do one another much good thereby. There are white men enough to marry all the white women, and enough black men to marry all the black women, and in God’s name let them so be married.¹⁰⁸

The proposition that all men are created equal, birthright of the nation “conceived in liberty” through the marital act of the Founding, means that “we can leave one another alone and do one another much good thereby.” Lincoln’s phrase supplies the ironic precursor to Brandeis and, ultimately, to Douglas; “we can leave one another

106. *The Book of Thel*, plate 6, line 20, in BLAKE, *supra* note 80, at 130.

107. ABRAHAM LINCOLN, Speech at Springfield, Illinois (June 26, 1857), in 2 WORKS OF LINCOLN, *supra* note 6, at 405.

108. ABRAHAM LINCOLN, Speech at Chicago (July 10, 1858), in *id.* at 498.

alone” becomes “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”¹⁰⁹

Lincoln agrees with Jefferson that we are created equal but Lincoln adds that “God made us separate.” Separate but equal, we will not marry one another, we will not bring forth fruit from one another in sacred imitation of the hierogamy that took place *in illo tempore*. “The doors of marriage are open,” as Blake said in his visionary interpretation of the American revolution, “and the Priests in rustling scales / Rush into reptile coverts, hiding from the fires of Orc.”¹¹⁰ In Blake’s critique of heaven and earth, “the sacred precincts of marital bedrooms” are revealed as regions of the Shadow or Spectre, frustrating rather than encouraging creative accomplishment.

The ironic connection between the shadow of privacy, the right to be let alone, the regime of separate but equal, and a constitutional order whose birthright is the equal liberty of those who are created in the image and likeness of God, is brought out by reading *Griswold* and “Gettysburg” together, and reading them gnostically. Yet irony is not a relation either of logical entailment or of contradiction. There is no reason why a constitutional right of marital privacy must insulate people from one another and from responding progressively to the challenges of sexual energy (“the fires of Orc”), cultural diversity, and social inequality. Carefully adapted, such a right may help us instead to grow in body and spirit through marriage. If the enrichment of our material and spiritual nature is indeed a defining commitment of a regime of constitutional liberty,¹¹¹ then one might be justified in concluding that marriage is, or ought to be, not only a religious but also a constitutional sacrament. Marriage is a religious sacrament when it symbolizes and furthers the spiritual relation between God and humankind; it is a constitutional sacrament when it symbolizes and furthers fidelity, mutuality, communion, or any other human good for which the exercise of liberty might be valuable.

Gnosticism offers its own special way of conceiving marriage as sacrament. We turn to this special conception in an effort to reconceive the penumbra of privacy so that marriage does not imprison us in the ironies of “all men are created equal,” but frees us instead for redemption. Needless to say, there is room to reject this special conception, in favor of some more traditional way of understanding the sacred significance of marriage. But *some* such understanding is needed if we are to honor, not merely avert the eyes from, the sacred

109. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). See *supra* note 23.

110. *America: A Prophecy*, plate 15, lines 19-20, in BLAKE, *supra* note 80, at 202.

111. See *supra* note 23.

precincts of marital bedrooms. Once again, *Griswold's* silences are pregnant. The opinion tells us that marriage is "an association for as noble a purpose as any involved in our prior decisions"¹¹² but does not tell us what that purpose is.

3. *The Bridal Chamber*

The Gospel According to Philip, an anthology of Valentinian Gnostic sayings, makes reference to a sacrament about which little is known: the sacrament of the bridal chamber.¹¹³ For the Valentinians, this sacrament may have directed a shared Christian concept, that Christ is the groom and the church his bride, toward a peculiarly Gnostic conception of Christ's redemptive descent. In this concept the savior lifts the veil of creation so that we are returned to that which precedes and exceeds it, the radiance of the fullness. For us, the Valentinian celebration of the bridal chamber offers a way not only to understand the hiddenness of the marital space, interpreted constitutionally as a right of privacy in the marital bedroom, but also to redeem *Griswold's* emanation from the penumbra that guards and restrains it.

The exchange of wedding vows became a constitutional as well as a religious sacrament when Lincoln called on the plighting of faith as an effective symbol of fidelity in the union. The sacrament of the bridal chamber becomes a constitutional sacrament when it symbolizes and motivates the defining principle of gnostic constitutionalism: that the redemption of the Constitution rests not, as with Lincoln, in a realization of the created endowment of natural rights, but instead in a repudiation of creation itself.¹¹⁴

Philip defines the mission of Jesus, his incarnation and virgin birth, in these terms:

How fitting it is to speak of a mystery! The parent of the entirety joined with the virgin who came down, and fire illuminated him. On that day he revealed the great bridal bedroom; it was for this purpose that his body came into being. On that day he came forth from the bridal bedroom as from what comes to pass between a bridegroom and a bride.¹¹⁵

112. 381 U.S. at 486.

113. See LAYTON, *supra* note 4, at 326.

114. *Philip* actually links the aspect of marriage that Lincoln valued, its claim to fidelity and its status as an enduring union, to the meaning of marriage that more specifically commended it to Gnosticism as a metaphor for the improvement upon creation. "Now, a woman joins with her husband in the bridal bedroom, and those who have joined in the bridal bedroom will not re-separate. Thus Eve became separate from Adam because it was not in the bridal bedroom that she joined with him." *Philip* 70:17-21, in LAYTON, *supra* note 4, at 343.

115. *Id.* at 344 (71:3-10).

The birth of Jesus corrects for the sin of Sophia, for he comes forth from a complete union in the sacred space, while she attempted to generate without complete union, and in so doing violated holy boundaries. The bodies that descend from Sophia's abortion are enveloped in shadow, while the body of Christ glows in fiery illumination.

The incarnation thus supplies an allegory of perfected embodiment¹¹⁶ through a new and superior creation, both like and unlike procreation. "The child of the human being received from god so that he might create. . . . A creator works [openly], and is visible as well. A begetter begets [secretly] and is hidden. . . . A creator then [creates] visibly, while one who begets [begets] offspring secretly."¹¹⁷ Yet secrecy in the marital bedroom is not just a veil politely concealing sinful indulgence or the fateful harboring of the spirit in the naturally generative body. "No [one can] know when [a male] and a female have intercourse with one another but they alone. For the marriage of this world is a mystery for those who have married. If the marriage of pollution is hidden, how much more is unpolluted marriage a genuine mystery!"¹¹⁸ Thus, while conventional marital intercourse is hidden in the sense of being secret, the sacrament of the bridal chamber involves a form of open creativity, since it touches on a *genuine* mystery. "Bridegrooms and brides belong to the bridal chamber. No one can see a bridegroom or a bride except by becoming such."¹¹⁹ Privacy in the marital space ceases to occupy the shadows and begins to symbolize initiation into the light of truth.

Philip offers an interpretation of "the sacred precincts of marital bedrooms" that makes respect for those holy places a symbol of "the mysteries of truth," and entry into them an allegory of rising from the created order to a higher spirituality.¹²⁰

116. *Philip* presents the bridal chamber as protecting the initiate from male and female "unclean spirits": "when they see a man and his wife sitting together, the female ones cannot make advances to the male, nor can the male ones make advances to the female." *Philip* in LAYTON, *supra* note 4, at 340 (65:1, 19-22). While *Philip* affirms a kind of protective spiritual androgyny, whose sacrament is marital, Blake inverts these values; androgyny or hermaphroditic form is associated with the guardian Spectre, who thwarts the full expression and incorporation of creative vision. Hence the decline of sexual contrariety into "a mournful form double, hermaphroditic, male & female" expresses one of the risks of Beulah. *Milton*, bk. 1, plate 14, line 37, *supra* note 69, at 496.

117. *Philip* in LAYTON, *supra* note 4, at 350-51 (81:19, 28-32). I take this to be a comparison between the higher creativity that is available to the human being who has "received from god" and the lower creativity of those who are capable only of physical procreation, because their marital intimacy takes place outside of the bridal chamber, the sacrament of redemptive knowledge.

118. *Id.* at 351 (81:34-82:6).

119. *Id.* (82:23-24).

120. *Id.* at 352 (84:20).

At present we have access to the visible aspects of creation. We say that they are what is mighty and glorious, while hidden things are powerless and contemptible. Are the hidden aspects of truth like this? Are they powerless? And are they contemptible? No, rather these hidden aspects are mighty, glorious.¹²¹

The sacredness of the bedroom communicates the power of the truth that lies behind creation: "Now, the mysteries of truth are manifestly representations and images. Thus the bedroom is hidden away: this stands for the holy within the holy."¹²² But redemption tears the veil that hides the sacred space; the penumbra is dispelled, all things are seen in pure light of the fullness, and we sacramentally enter the sacred precincts. "Thus perfect things were opened to us, along with the hidden aspects of truth. And the holy of holies was uncovered. And the bedroom invites us in."¹²³

V. CONCLUSION

A. *A Hidden Redemption*

In the decades that have followed *Griswold*, the Supreme Court has looked to the due process clause to decide whether the right of privacy is violated by state laws regulating abortion,¹²⁴ or disapproving of certain forms of sexual intercourse,¹²⁵ or requiring clear and convincing evidence of a patient's competent wishes before lifesaving care may be withdrawn from an individual who is irreversibly comatose.¹²⁶ Perhaps unsurprisingly, the Court has not adopted in these cases, at least overtly, any view of how the right of privacy advances our "spiritual nature."¹²⁷ Indeed, the Court has been reluctant to base decisions on premises about what is humanly good or worthwhile, whether spiritually or otherwise. As John Finnis observes, this judicial abstention from thought about what is or is not a human good has eased the way to conclusions such as "(i) what is true of sexual relations that express and support a mutual commitment which makes possible a good environment for the emergence and development of children must equally, and obviously, be true of even the most casual one-night stand; and (ii) what is true of the decision to try to have a child must be true of the decision not to

121. *Id.* (84:14-19).

122. *Id.* (84:20-23).

123. *Id.* (85:18-20).

124. *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

125. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

126. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

127. *See supra* text accompanying note 23.

have a child.”¹²⁸ These conclusions reflect *Griswold*’s double move: affirmation that marriage deserves special protection due to its noble purpose, coupled with silence regarding the nature of that purpose.

When individual judges have been willing to take stands about what is good in life, or what makes life worth living, their positions have come under attack as undeveloped or poorly reasoned. Finnis criticizes Justices Stevens and Brennan for concluding hastily that life in a persistent vegetative state is of no value.¹²⁹ Their implicitly dualistic position, Finnis concludes, is false to the “complex unity” of personal identity, and inconsistent with the fact that “one’s living body is one’s person.”¹³⁰ Some might say that it is precisely the vulnerability of propositions about what is humanly good or worthwhile to criticism, especially under the social conditions characteristic of modern democratic political life, that disqualifies them from serving as premises in arguments resolving constitutional claims. In some cases, however, justifications of constitutional decisions may well be rendered weaker, not stronger, through judges’ unwillingness to blend premises about the good into the argumentative mix.

The question of the place of ideas about human nature and human flourishing in the public justification of constitutional choices in a constitutional democracy is deep and complex.¹³¹ Under the conditions of cultural diversity and enduring disagreement that characterize modernity, the ideal of equal citizenship may require those who offer public justification for public choices, perhaps especially judges who state reasons for their holdings in constitutional cases, to work with reasons whose force does not depend on metaphysical or spiritual premises.¹³² Appeal to the ethic of creation may violate this stricture. Claims about God’s creation are assertions, necessarily controversial, about the ground of being. Yet constitutional arguments framed in terms of the ethic of creation may not always violate the boundaries of democratic consensus. The language of the Declaration

128. John Finnis, *The “Value of Human Life” and “The Right to Death”: Some Reflections on Cruzan and Ronald Dworkin*, 17 S. ILL. U. L.J. 559, 561 (1993) (referring to *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that equal protection clause bars government from restricting contraceptive use to married persons)).

129. 497 U.S. 261, 345 (1990) (Stevens, J., dissenting); *Id.* at 309-10 (Brennan, J., dissenting).

130. Finnis, *supra* note 128, at 568. Finnis’s justification of legal regulation of sexual conduct or orientation in order to avert personal disintegration provides the definitive contemporary elaboration of natural law within the limits of the ethic of creation: the ethic that gnosticism challenges. See Ronald R. Garet, *Deposing Finnis*, S. CAL. INTERDISC. L.J. (forthcoming 1995).

131. See John Rawls, *The Idea of Public Reason: Further Considerations*, Lecture (Nov. 2, 1993) (text on file with author).

132. *Id.* at 15 (“[I]deally, on fundamental political matters, democratic citizens should be prepared to argue their case in the public forum, not directly from their comprehensive doctrines, religious or otherwise, but from their shared political conception of justice.”).

of Independence, for better and for worse, has domesticated the ethic of creation, and tamed metaphysical claims about human nature into a shared political principle of equal rights.

Constitutional arguments that take their cue from our status as redeemed or redeemable (in whatever sense), rather than from our status as created, are not so readily absorbed within the complex patterns of political consensus within our democratic culture. Moreover, arguments that rest on the conviction that the offer of redemption provides our most reliable reality act as reagents within the culture, bringing the creationist appeals out of solution, revealing them in their discrete metaphysical particularity. Whether Messianic, or generically Christian, or specifically gnostic, these arguments, springing from the apprehension of a regime of grace that is epistemically and ontologically prior to the laws of nature, provoke the ethic of creation to reveal itself for what it is: a contested metaphysics.

The natural law tradition has assumed that reason is the human faculty that preserves the *imago dei*,¹³³ and that reason is at home in the natural order, capable of discerning intelligible goods and strict negative precepts.¹³⁴ This tradition, as articulated by Finnis and others, has claimed the warrant of reason for the two proposals mentioned above: that the person is the living body (persons do not *have* bodies), and that marriage is a special relationship oriented to significant human goods. Within the tradition, proposals such as these issue in a denunciation of contraceptive practices as unreasonable and unworthy.¹³⁵

Griswold, on the interpretation of it that I have offered here, confronts these natural law claims at every turn. Constitutional freedoms, the opinion intimates, should be understood not as natural rights but as Christian liberties. Reason is fitted to the created order, but the eye of imagination looks beyond that order. The body is not only part of creation, blessed with an endowment and subject to natural laws, but is also and more importantly dignified by the redemptive incarnation of the Word. The sacredness of marriage is a function not only of its representation of the founding, or of the created order, or of the original paradise, but also and more importantly of its sacramental status, involving us in the reception of and response to the Word. Claims such as these are made in Blake's

133. See generally Edmund N. Santurri, *Who Is My Neighbor? Love, Equality, and Profoundly Retarded Humans*, in *THE LOVE COMMANDMENTS: ESSAYS IN CHRISTIAN ETHICS AND MORAL PHILOSOPHY* 104-37 (Edmund Santurri & William Werpehowski eds., 1992).

134. See JOHN FINNIS, *MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH* 73-74, 99 (1991).

135. Germain Grisez et al., "Every Marital Act Ought To Be Open To New Life": Toward a Clearer Understanding, 52 *THE THOMIST* 365-426 (1988).

confession of his Christian faith: "I know of no other Christianity and of no other Gospel than the liberty both of body & mind to exercise the Divine Arts of Imagination, Imagination, the real & eternal World of which this Vegetable Universe is but a faint shadow, & in which we shall live in our Eternal or Imaginative Bodies when these Vegetable Mortal Bodies are no more."¹³⁶

Yet Justice Douglas does not say this "openly & publicly" as Blake would have him do.¹³⁷ And there is room to doubt whether he would have wanted to say it even privately. For the Douglas who wrote *Griswold* was also the champion of environmentalism,¹³⁸ the protector of wilderness, the man whose lifelong recreation was pursued in long walks among the mountains. Therefore, we must not be surprised when Douglas closes ranks with "the laws of nature and of nature's God" and embraces (however clumsily) a naturalistic interpretation of "all men are created equal" and of the texts of liberty.¹³⁹ Douglas's naturalistic intuitions and commitments ill-suited him to play the part of the gnostic visionary. At home in the ethic of creation, he could never entertain an emancipatory vision that unequivocally required the subordination of creation to redemption in the name of spiritual freedom.¹⁴⁰

136. *Jerusalem*, plate 77, in BLAKE, *supra* note 80, at 716-17.

137. *Id.* at 717.

138. See Christopher Stone, *Commentary: William O. Douglas and the Environment*, in LEGACY, *supra* note 20, at 229-31; Charles Wilkinson, *Justice Douglas and the Public Lands*, in LEGACY, *supra* note 20, at 233-37.

139. Douglas cited the creationist passages of the Declaration of Independence approvingly in *McGowan v. Maryland*, 366 U.S. 420, 562-63 (1961) (Douglas, J., dissenting). See also WILLIAM O. DOUGLAS, *THE RIGHT OF THE PEOPLE* 89 (1958) ("The penumbra of the Bill of Rights reflects human rights which, though not explicit, are implied by the very nature of man as a child of God."). While Douglas may have meant in this passage only to affirm the ethic of creation, the statement is ironic when taken gnostically. The gnostic meaning is that human nature as created can only imply rights dubiously, that is, in partial shadow.

140. Douglas's soulmate among the Romantics would have been Wordsworth, not Blake. Douglas could have joined the "high argument" of his fellow follower of nature:

How exquisitely the individual Mind
(And the progressive powers perhaps no less
Of the whole species) to the external World
Is fitted:—and how exquisitely too—
Theme this but little heard of among men—
The external World is fitted to the Mind.

Prospectus to *The Recluse*, lines 63-68, in THE POETICAL WORKS OF WORDSWORTH 755 (Thomas Hutchinson ed., 1939). Blake's caustic annotation to these lines was: "You shall not bring me down to believe such fitting & fitted. I know better & please your Lordship." Annotations to *The Excursion*, in BLAKE, *supra* note 80, at 784. "I see in Wordsworth the Natural Man rising up against the Spiritual Man Continually, & then he is No Poet but a Heathen Philosopher at Enmity against all true Poetry or Inspiration." *Annotations to Poems by William Wordsworth*, in Complete Writings 481 (Geoffrey Keynes ed., 1972).

The great issue surrounding Lincoln's invitation to read the Constitution in the light of "all men are created equal" is whether we shall approach Jefferson through the medium of Wordsworth or Blake. For an exercise in the Wordsworthian interpretation of the Declaration of Independence, see Ronald R. Garet, *The Resolution of Independence*, 29 HOUSTON L. REV.

B. *Reading by Dim Light*

Whether naturalist or gnostic, however, a Christian must share the faith that "the Word became flesh and dwelt among us,"¹⁴¹ and must make sense of that faith in the practice of life and law. In making John's affirmation one's own, a Christian confesses that God is encountered in the flesh and in the body (however that is to be understood). How far could Douglas as a Christian judge, engaged in the work of interpreting and applying the Constitution in the course of judicial review, give effect to that fundamental affirmation? Apart from any limits set by the nature and justification of the institution of judicial review in a constitutional democracy, what limits are set by Christian principles?

The decisive Christian limit is set by the distinction between the *logos*, the Word of God, and the Constitution, the word of (a portion of) humankind. From a Christian point of view it is the former, and not the latter, however ideally written and read, that redeems. The word-of-God-become-flesh is the divine body of Jesus, while the word-of-humankind-become-flesh is a monster or an idol. For the *logos* is the Torah, which is God's self-revelation. It is both the command of God and the meaningful order inherent in and operating within the created world. It is the divine performative that makes us God's children.¹⁴²

In becoming flesh, the *logos* is hypostatized not merely in the general sense of pervading the cosmos as its animating meaning, the rational order that directs it, but also in the narrower and more difficult sense of becoming a person, empowered to engender our personhood as God's children. "Thus the Logos, or Wisdom, which was the original principle of creation, acts creatively once again in giving men a new birth as sons of God."¹⁴³ The word-become-flesh concentrates God's creative thought "in an individual who is what humanity was designed to be in the divine purpose, and therefore is rightly called the 'Son of Man,'"¹⁴⁴ or "the divine, essential

867 (1992). For an absorbing study of the gnostic themes in Romanticism, see PAUL CANTOR, *ROMANTIC MAN: CREATURE AND CREATOR* (1984).

141. *John* 1:14. See *supra* text accompanying notes 26-29.

142. C. H. DODD, *THE INTERPRETATION OF THE FOURTH GOSPEL* 270-85 (1968). Dodd says that the *logos* enjoys the performative power of a judicial declaration of rights. "Those who received the word, to them it gave the right to become children of God." *Id.* at 270 (citing *John* 1:12). Dodd translates *exousia* as "right" rather than "power." "What God 'calls' men, that in fact they are, for His word possesses and confers *exousia*." *Id.* at 271 n.1. The word is declaratory of new jural relations: more specifically, of a new birth; for the "children of God" are those "who were born, not of blood or of the will of the flesh or of the will of man, but of God." *John* 1:13.

143. DODD, *supra* note 142, at 282.

144. *Id.*

humanity.”¹⁴⁵ “He is the reflection of God’s glory and the exact imprint of God’s very being, and he sustains (bears along) all things by his powerful word.”¹⁴⁶

The Prologue to the Gospel of John readies the reader to be reborn by the word that brings humanity into being. It is appropriate, then, that it introduces the mission of John the Baptist, who prepared the way for Jesus, and testified to his identity. The first words of this introduction are *Egeneto anthropos*: “there became, there came into existence, a man.”¹⁴⁷ The coming-into-being of the human is induced by that which is eternal, permanent being, entering into the realm of becoming (flesh). The individuality of the Baptist reminds us to particularize this replenishing of human being from God’s fullness;¹⁴⁸ a particular human person, John, came to testify, and likewise the object of his testimony was a particular person, not a type of humankind, nor a reed through which the spirit blows. “Flesh” suggests not only the “becoming” of the human existent (born into life, subject to death) but its instantiation in particular human persons.¹⁴⁹

Whatever else it may be, the Constitution is not a person, hence it cannot bring out the personhood in us in the way that only relations among persons can. For this reason it cannot bring out in us the embodiment that is fundamental to our personhood, the embodiment that is to be raised up.¹⁵⁰ Yet the Christian judge working with the constitutional text is not in this respect much worse off than the Christian poet working with the texts of other Christian poets. While we do not know what texts, canonical or otherwise, were known to

145. *Id.* at 281.

146. *Hebrews* 1:3.

147. Frank Kermode, *John*, in *THE LITERARY GUIDE TO THE BIBLE* 446 (Robert Alter & Frank Kermode eds., 1987).

148. *John* 1:16.

149. The New Testament image of the church as the body of Christ is not inconsistent with this central account of redemption or rebirth as a possibility addressed to individual human persons. The church as “his body, the fullness of him who fills all in all,” *Ephesians* 1:23, is one dimension of the grace to which John refers in the Prologue: “From his fullness we have all received grace upon grace,” *John* 1:16. Thus, we share in the *pleroma* in all structures of our existence, personal and communitarian. In all such structures we are embodied; our “person” is one such body, the church is another. (This insight is weakly reflected in ordinary English usage, which describes organizations like churches as “corporate” entities: entities which are bodily, somatic, or (via the Latin) corporate.)

Sexual union also creates a body: “Do you not know that whoever is united to a prostitute becomes one body with her? For it is said, ‘The two shall become one flesh.’” 1 *Corinthians* 6:16.

Thus, if the primary referent of the word-become-flesh is the embodied person, the secondary referent is the embodied community.

150. John makes the resurrection of the body a sign confirming Jesus’s teaching; not only does the word become flesh, but the resurrection of the body confirms the word. Jesus says of “the temple of his body”: “Destroy this temple, and in three days I will raise it up;” “After he was raised from the dead, his disciples remembered that he had said this; and they believed the scripture and the word that Jesus had spoken.” *John* 2:21, 2:19, 2:22.

Valentinus, we can say with confidence that Blake had before him the text of *Paradise Lost*, and (through Milton and many another medium) the Bible and the canon of the classics. Blake knew the Bible as few today know the Constitution, but he also knew Milton (and Michelangelo) and was able to conceive his idea of *anthropos*, "The Eternal Great Humanity Divine,"¹⁵¹ only because he invoked the genius of the poet and the artist. He offered to redeem their vision, and in return they fashioned for him the "bright sandal" with which "to walk forward thro' Eternity."¹⁵²

The promise of gnostic due process was, necessarily, unfulfilled. The text of liberty did not emanate in radiance, but relapsed into partial shadows of concealment. Even now, however, the genius of the constitutionalist supplies a fitful light by which to read the traces of redemption. Therefore I say of the Constitution what the hymnist said of Scripture: that though its full meaning is withheld from me, "I can read His righteous sentence by the dim and flaring lamps."¹⁵³ No other reading is possible until the beams of love dispel the penumbra of privacy. Douglas, you are no Milton, and heaven knows I am no Blake; but, having no other light to read by, I hold my text closer to your dim and flaring lamp.

151. *Milton*, bk. 1, plate 2, line 8, *supra* note 69, at 481.

152. *Id.*, bk. 1, plate 21, lines 8, at 503.

153. Julia Ward Howe, "The Battle Hymn of the Republic," stanza 2, in *AMERICAN HYMNS OLD AND NEW* 286 (Albert Christ Janer et al. eds., 1980)