

NEW YORK UNIVERSITY LAW REVIEW

VOLUME 80

OCTOBER 2005

NUMBER 4

MADISON LECTURE

OUR 18TH CENTURY CONSTITUTION IN THE 21ST CENTURY WORLD

THE HONORABLE DIANE P. WOOD*

In this speech delivered for the annual James Madison Lecture, the Honorable Diane Wood tackles the classic question of whether courts should interpret the United States Constitution from an originalist or dynamic approach. Judge Wood argues for the dynamic approach and defends it against the common criticisms that doing so allows judges to stray from the original intent of those who wrote the Constitution or take into consideration improper foreign influences. She argues the necessity of an “unwritten Constitution” since a literalist approach to interpretation would lead to unworkable or even absurd results in the modern context, and since restricting constitutional interpretation to literal readings would mean that the Constitution has outlived its usefulness. Judges may “find” unwritten constitutional rules by using evolving notions of a decent society to interpret broad constitutional language broadly; acknowledging that certain liberties are so fundamental that no governmental entity may deny them; acknowledging that much of the Bill of Rights applies to states through selective incorporation; and inferring principles from the structure of the Constitution and pre-constitutional understandings.

INTRODUCTION

Fine wines and Stradivarius violins improve with age, taking on greater richness and depth as the years go by. For many, if not most, other things in today’s frenetic world, value is evanescent. To be old is all too often to be out of date and ready for disposal. In this paper, I explore which conception of age better describes our Constitution—now 215 years old. Is this eighteenth century document, along with its

* Copyright © 2005 by Diane P. Wood, Judge, United States Court of Appeals for the Seventh Circuit. B.A., 1971, University of Texas at Austin; J.D., 1975, University of Texas Law School. An earlier version of this essay was delivered for the James Madison Lecture on October 18, 2004 at the New York University School of Law.

eighteenth century Bill of Rights and other seventeen Amendments, still up to the job? How well is it serving the demands we are placing upon it, particularly in the area of individual rights, or what international scholars call human rights?

One's answer depends critically on which model of constitutional interpretation one chooses: the originalist approach or the dynamic approach. While there may be a certain attraction to so-called "plain language" literalism, the Constitution, when viewed in that light, fares badly as a charter for twenty-first century America. On the other hand, while the dynamic approach has prevailed over time, for the most part, and allowed the Constitution to adapt to the demands of a modern society, this approach has proven vulnerable to criticism.

How serious is that criticism? Has the time now come for us to consider amending our basic charter to bring it up to date, taking to heart the advice that so many American scholars have so assiduously given over the last decade and a half to countries emerging from the Communist shadow? One who advocates a narrow, text-based approach to the Constitution would be compelled to answer that the Constitution has reached the end of its rope, for reasons I shall explain in this paper. If, on the other hand, one is willing to give the broad provisions in the Constitution and its Amendments a generous reading, thereby validating the many adaptations that the Court and country have endorsed over the years, our old Constitution has stood the test of time admirably. The basic charter that suited a small, relatively powerless, rural economy with a population of 3.9 million now serves a global superpower of nearly three hundred million citizens,¹ where economically the relevant stage is the entire world, where national and global communications are instantaneous, and where it is easier to get from New York to Honolulu than it once was to get from New York to Philadelphia.

But not all have welcomed this achievement. The doctrines the Supreme Court has used to allow the Constitution to grow with the times have been hotly contested. Many people today question whether the Court has strayed too far from the original intent of the Framers. They also assert that it is not proper to look to foreign experience when we consider which human rights have constitutional status. While critics are right to note that some of the most important constitutional developments rest on what some have called the

¹ The population of the United States is now 294,379,807 according to the website maintained by the U.S. Census Bureau. See U.S. Census Bureau, Population Clocks, <http://www.census.gov> (last visited September 27, 2004).

“unwritten Constitution,”² this does not mean that we should reject them. The price of doing so would be far too high both for the structural provisions of the Constitution and our commitment—both domestically and internationally—to the protection of human rights. Rejection would be tantamount to an unnecessary conclusion that the Constitution has indeed outlived its usefulness. It is time, therefore, to end the long-standing and unproductive methodological debate over “originalism” versus “dynamism” or “evolution” and focus instead on how, as a substantive matter, we should interpret the Constitution in the twenty-first century, and what it has to say on questions unimaginable to our eighteenth-century Framers.

I

WHAT DO WE EXPECT OF THE CONSTITUTION?

In order to set the stage, let me begin by reviewing what we rightly expect the Constitution to do, and how well it manages to meet those expectations. It is well understood that the United States Constitution, like most constitutions, contains both provisions that allocate powers among the institutions of government and provisions that protect individual rights. A quick overview of both areas is enough to illustrate how far we have evolved in each one from the literal text of the Constitution and how much we depend upon the elaboration that has largely come from the Supreme Court.

A. *Structural Rules*

Because the original Constitution was primarily concerned with the structure of the new federal government, and because its first three articles are almost exclusively about structure, let me begin there. We are all familiar with the basic outline. Despite the absence of an article or clause announcing that the new United States would adopt a modified structure of separation of powers, where a system of checks and balances would operate, it is plain from Articles I, II, and III of the Constitution that this is exactly what was being done. Moreover, as everyone knows, the Constitution spells out numerous ways in which each branch was to interact with its fellows. To name just a few examples, the Vice President presides over the Senate;³ the Senate tries all impeachments;⁴ before a bill becomes law, the President must sign it, or a supermajority of Congress must pass it over his

² See generally Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

³ U.S. CONST. art. I, § 3, cl. 4.

⁴ U.S. CONST. art. I, § 3, cl. 6.

veto;⁵ the President's appointment and treaty powers are limited by the need to obtain the Senate's advice and consent;⁶ and the appellate jurisdiction of the Supreme Court is subject to "such Exceptions, and . . . Regulations as the Congress shall make."⁷ The last of these has been in the news recently in connection with legislation passed by the House of Representatives that would strip the Supreme Court of jurisdiction to hear cases challenging the phrase "under God" in the Pledge of Allegiance.⁸

There are additional structural rules found in the Constitution and its Amendments. Congress's power to tax was the subject of the Sixteenth Amendment;⁹ the Seventeenth Amendment changed the way in which Senators are chosen;¹⁰ and the Twenty-Seventh Amendment governs laws affecting the compensation of members of Congress.¹¹ The text of the Constitution also contains rules about federal elections in the Twelfth Amendment,¹² the Fourteenth Amendment,¹³ the Twentieth Amendment (which sets the dates from which the terms of the President and the Congress run),¹⁴ the Twenty-Second Amendment (which limits any one person to two terms as President),¹⁵ and the Twenty-Fifth Amendment (which outlines what happens upon the disability or death of the President).¹⁶

Finally, the Constitution has a few things to say about the federal structure of the nation, although not as much as one might think. Principal among these textual provisions is Article IV of the original Constitution, which contains such important guarantees as the Full Faith and Credit Clause,¹⁷ the Privileges and Immunities Clause,¹⁸ the Extradition Clause,¹⁹ and the rules for admitting new states and governing territories.²⁰ Article VI contains the Supremacy Clause, which addresses the place of federal law in the hierarchy of federal and state

⁵ U.S. CONST. art. I, § 7, cl. 2.

⁶ U.S. CONST. art. II, § 2, cl. 2.

⁷ U.S. CONST. art. III, § 2, cl. 2.

⁸ See H.R. 2028, 108th Cong. (2004). For one view of the reason why such a bill might be passed, see Newt Gingrich, *Runaway Courts*, WASH. TIMES, Sept. 23, 2004, at A19.

⁹ U.S. CONST. amend. XVI.

¹⁰ U.S. CONST. amend. XVII.

¹¹ U.S. CONST. amend. XXVII.

¹² U.S. CONST. amend. XII.

¹³ U.S. CONST. amend. XIV.

¹⁴ U.S. CONST. amend. XX.

¹⁵ U.S. CONST. amend. XXII.

¹⁶ U.S. CONST. amend. XXV.

¹⁷ U.S. CONST. art. IV, § 1.

¹⁸ U.S. CONST. art. IV, § 2, cl. 1.

¹⁹ U.S. CONST. art. IV, § 2, cl. 2.

²⁰ U.S. CONST. art. IV, § 3.

law.²¹ In addition, the Tenth Amendment underscores the fact that the federal government is indeed a government of limited and delegated powers, and that the powers not specifically given to it are reserved to either the States or the people.²² Last, there is the Eleventh Amendment, which, to a literalist says that federal judicial power does not extend to cases brought against a State by a citizen of another State.²³

That all sounds comprehensive, but it has turned out not to be enough for a growing country. I mention here some of the more important structural doctrines that developed, particularly in the twentieth century, to help the United States adapt to its changing size and to the changing world.

Justice Byron White eloquently took note of these changes in his dissenting opinion in *INS v. Chadha*,²⁴ which held the single-house legislative veto unconstitutional. Explaining why he would have upheld this device, which by that time appeared in nearly 200 statutes, he wrote as follows:

From the summer of 1787 to the present the Government of the United States has become an endeavor far beyond the contemplation of the Framers. Only within the last half century has the complexity and size of the Federal Government's responsibilities grown so greatly that the Congress must rely on the legislative veto as the most effective if not the only means to insure its role as the Nation's lawmaker. But the wisdom of the Framers was to anticipate that the Nation would grow and new problems of governance would require different solutions. Accordingly, our Federal Government was intentionally chartered with the flexibility to respond to contemporary needs without losing sight of fundamental democratic principles.²⁵

Even though Justice White made this point in dissent, its basic truth has been reflected many times over in the Court's majority opinions. Justice White himself commented in his separate opinion in *Buckley v. Valeo* that "[t]here is no doubt that the development of the administrative agency in response to modern legislative and administrative need has placed severe strain on the separation-of-powers principle in its pristine formulation."²⁶ But, he went on, there is similarly no doubt that the independent agency has come to be accepted as an important and lawful part of the federal government. The New Deal

²¹ U.S. CONST. art. VI, cl. 2.

²² U.S. CONST. amend. X.

²³ U.S. CONST. amend. XI.

²⁴ 462 U.S. 919, 967 (1983) (White, J., dissenting).

²⁵ *Id.* at 978.

²⁶ 424 U.S. 1, 280-81 (1976) (White, J., concurring in part and dissenting in part).

ushered in the administrative state, and along with it the Court's decisions rejecting constitutional challenges to the so-called independent agency. In *Crowell v. Benson*,²⁷ the Court considered the constitutionality of certain provisions of the Longshoremen's and Harbor Worker's Compensation Act²⁸ that called for the use of a deputy commissioner to find critical jurisdictional facts. It came to the brink of holding the statute unconstitutional as an impermissible infringement of the powers of the judicial branch. It pulled back at the last minute, saving the statute with a narrow construction, under which the ultimate fact of employment would be determined by a court.²⁹ Even more frankly, in *Sunshine Anthracite Coal Co. v. Adkins*³⁰ it found that the Bituminous Coal Act of 1937³¹ did not contain an invalid delegation of legislative or judicial powers to the Bituminous Coal Commission, noting pragmatically that "the effectiveness of both the legislative and administrative processes would become endangered if Congress were under the constitutional compulsion of filling in the details beyond the liberal prescription here."³² In a similar vein, the Court a few years earlier had held in *Humphrey's Executor v. United States*³³ that a commissioner of the Federal Trade Commission was not a "purely" executive officer and thus could not be removed at the President's pleasure. The Court wrote, somewhat vaguely, that the FTC was constituted to perform "legislative and judicial" duties and thus could not be viewed exclusively as an arm of the executive branch.³⁴

Congress has continued to create agencies and officials that are neither fish nor fowl, and the Court has continued to evaluate them for consistency with the structure of the Constitution. Thus, in 1989 the U.S. Sentencing Commission dodged the constitutional bullet when the Court found in *Mistretta v. United States*³⁵ that Congress had neither impermissibly delegated legislative power to the Commission (which was described as an "independent commission in the judicial branch of the United States") nor violated separation-of-power princi-

²⁷ 285 U.S. 22 (1932).

²⁸ 33 U.S.C. §§ 901 to 950 (2000).

²⁹ 285 U.S. at 62-63.

³⁰ 310 U.S. 381, 397, 400 (1940).

³¹ 15 U.S.C. §§ 828 to 852 (repealed 1966).

³² 310 U.S. at 398.

³³ 295 U.S. 602 (1935).

³⁴ *Id.* at 631, 630 (emphasis added).

³⁵ 488 U.S. 361 (1989).

ples.³⁶ Once again, a practical approach pervades the Court's discussion of both the nondelegation doctrine and the separation-of-powers argument.

This does not mean that the Court now takes an "anything goes" approach to separation of powers. The majority in *Chadha*, as noted earlier, found the device of the one-house legislative veto to be incompatible with the constitutional design, but the four separate opinions reveal a deeply felt concern over the appropriate role for the Court in reconciling the modern federal system with the literal assignment of functions found in the constitutional text.³⁷ In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*,³⁸ the Court struck down a board of review that Congress created to administer certain aspects of the operation of the two Washington, D.C. area airports on the ground that a board composed of nine members of Congress with veto power over the Airport Authority represented too great a legislative encroachment upon judicial and executive powers, as well as state law. Three Justices dissented from the Court's unwillingness to accept what they called "yet another innovative and otherwise lawful governmental experiment."³⁹

Two other areas where unwritten rules have profoundly affected the current constitutional balance are also worth noting. Both excited passionate debate thirty years ago, and to varying degrees they have since gained public acquiescence. I am referring to the ability of the President to refuse to spend funds appropriated by Congress, using the practice known as "impoundment," and the ability of the President to commit U.S. troops to hostilities without a formal declaration of war by the Congress. With respect to the former, the constitutional question was whether, as part of his duty faithfully to execute the laws, the Chief Executive was required to spend the monies appropriated by Congress in accordance with the governing legislation. Presidents over the years had exercised the authority to refrain from such expenditures when they found it in the country's interest, but when President Richard Nixon took this practice to new heights, controversy erupted. It was resolved for the most part by the Congressional

³⁶ *Id.* at 368. In the wake of *United States v. Booker*, 124 S. Ct. 738 (2005), the Commission's role has changed from enacting legally-binding sentencing rules to writing advisory guidelines. Its structural legitimacy, however, was unaffected by that decision.

³⁷ Chief Justice Warren Burger wrote for the six-person majority; Justice Lewis Powell filed an opinion concurring only in the judgment; Justices White and Rehnquist each filed a dissenting opinion, with Justice White joining Justice Rehnquist's dissent. 462 U.S. 919, 922 (1983).

³⁸ 501 U.S. 252 (1991).

³⁹ *Id.* at 277 (White, J., dissenting).

Budget and Impoundment Control Act of 1974,⁴⁰ Title X of which begins with a disclaimer: “Nothing contained in this Act, or in any amendments made by this Act, shall be construed as . . . asserting or conceding the constitutional powers or limitations of either the Congress or the President.”⁴¹ Professor Gerald Gunther refers to the Act as “quasi-constitutional in nature, for it seeks to clarify and define basic relationships among the branches of government.”⁴² Indeed the Act does seek to do this: It permits the President to defer spending appropriated funds, unless either house of Congress passes a resolution disapproving the deferral; it permits the President to refuse altogether to spend funds for a particular purpose or beyond a fiscal year only with the affirmative concurrence of both houses of Congress.

War powers bring into even sharper focus the difference between today’s Constitution and the text adopted in 1789. Article I, Section 8, Clause 11 confers on the Congress the power “to declare War.” One could be forgiven for thinking that this short phrase must mean that the country cannot enter into hostilities without first obtaining a formal declaration from Congress, and that this declaration will specify with what country or group of countries the United States is at war. Neither of those suppositions is true in the post-Vietnam War period. First, the Congress specifically recognized the power of the President to commit U.S. troops to hostile action without a formal declaration of war in the War Powers Resolution of 1973.⁴³ It provides that not only a declaration of war, but also “specific statutory authorization” or a national emergency created by an attack on the United States is enough to justify the President as Commander-in-Chief to initiate action. Second, the idea of “war” itself has become hopelessly fuzzy. In an era where one can have “wars” on phenomena like terrorism or organized crime—in which there is no enemy with whom to negotiate, no power capable of surrender, and thus no way to know when the “war” is over—the text of the Constitution is not very helpful.

Perhaps the most important stretch beyond the literal language of the Constitution that affects the structure of the federal government has come in the last decade, in the area of state sovereignty. The Framers knew perfectly well that the Constitution they crafted took important powers away from the States (in response to the unsatisfactory experience under the Articles of Confederation), yet left many

⁴⁰ 2 U.S.C. §§ 681–688 (2000).

⁴¹ *Id.* § 681.

⁴² GERALD GUNTHER, *CONSTITUTIONAL LAW* 332 (12th ed. 1991).

⁴³ Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–1548 (2000)).

powers still in state hands. With the latter especially in mind, they were careful (at least in the Tenth Amendment) to dissipate any impression of a negative inference about state power from the existence of the enumerated powers. But the express provisions of the Constitution leave much unsaid. They do not spell out, for example, answers to such important questions as whether Congress, acting pursuant to its Article I powers, may enact legislation creating rights that private parties may enforce against the States; if there is a pre-constitutional doctrine of sovereign immunity of the States, whether the scope of that immunity was absolute or restricted; and if the state sovereign immunity doctrine will evolve over the years in the same way as the foreign sovereign immunity doctrine.

The Supreme Court has found that the Eleventh Amendment provides the answers to these questions, despite the narrowness of its language. Indeed, the Court has been remarkably frank about the lack of a textual basis for its doctrine in this field. Justice Anthony Kennedy, for instance, commented in *Alden v. Maine*⁴⁴ that the phrase “Eleventh Amendment immunity” was “convenient shorthand but something of a misnomer,”⁴⁵ because State sovereign immunity “neither derives from nor is limited by the terms of the Eleventh Amendment.”⁴⁶ To similar effect, Justice Clarence Thomas wrote in *Federal Maritime Commission v. South Carolina State Ports Authority*⁴⁷ that “the Eleventh Amendment does not define the scope of the States’ sovereign immunity; it is but one particular exemplification of that immunity.”⁴⁸ For present purposes, I am willing to say “so be it.” The important point is that this vital part of our governmental structure rests on extra-textual constitutional doctrine that delineates the relative power of the central government and the states.

B. Individual Rights

When we turn from the Constitution’s structural provisions to the area of individual rights—the places where the Constitution, as amended, seeks to ensure, as James Madison put it in *Federalist No. 10*, that “an interested and over-bearing majority” does not trample on “the rules of justice, and the rights of the minor party”⁴⁹—we find

⁴⁴ 527 U.S. 706 (1999) (holding that Congress has no power under Article I to subject nonconsenting states to private suits for damages in state courts).

⁴⁵ *Id.* at 713.

⁴⁶ *Id.*

⁴⁷ 535 U.S. 743 (2002) (holding that state sovereign immunity precludes federal administrative agency from adjudicating private party’s complaint against state entity).

⁴⁸ *Id.* at 753.

⁴⁹ THE FEDERALIST NO. 10 (James Madison).

a similar elaboration of the express text. Even at the time the ratification debates were underway after 1787, it was well recognized that the original Constitution contained very few explicit provisions on this topic. The brief list included the qualified guarantee against suspension of the writ of habeas corpus in Article I, Section 9, Clause 2—suspension only “when in Cases of Rebellion or Invasion the public Safety may require it”; the prohibition in Article I, Section 9, Clause 3 against bills of attainder and ex post facto laws; the guarantee of a jury trial in the place where the crime was committed in Article III, Section 2, Clause 3; and the Privileges and Immunities clause in Article IV, Section 2. The impression the *Federalist Papers* leave is that the Framers believed that these individual rights did not need to be spelled out, both because of the structural protections they had built into the foundational document and because the constitutions of most states had bills of rights.⁵⁰

As we all know, this point was not ultimately persuasive to the ratifying conventions in the states, and thus we gained a ten-article, Federal Bill of Rights in 1791. There is no need here to go through an exhaustive review of each Amendment—they are already quite well known. A few examples are enough to make the point about written versus unwritten understandings. The First Amendment literally says that “Congress shall make no law” abridging the various freedoms that it enumerates, but it does not say anything about state laws that may have the same effect. (Nor, for that matter, do any of the other Amendments.) The first phrase of the Second Amendment speaks of “a well regulated Militia, being necessary to the security of a free State,” before the Amendment goes on to say anything about a right to keep and bear arms. Are those phrases independent, as the National Rifle Association believes, or are they interlinked, as almost all courts have thought thus far?⁵¹ Another kind of interpretive question arises with the Amendments that use broad terms like “unreasonable,”⁵² “due process of law,”⁵³ “just” compensation,⁵⁴ “speedy”

⁵⁰ See, e.g., WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* 299 (2001) (referring to *The Federalist No. 84*, where Alexander Hamilton defended omission of bill of rights).

⁵¹ Compare *United States v. Miller*, 307 U.S. 174 (1939) (construing Second Amendment as protecting right to bear arms only insofar as it relates to maintenance of militia), *United States v. Parker*, 362 F.3d 1279, 1283 (10th Cir. 2004) (same), and *United States v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992) (same), with *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) (rejecting so-called “collective rights model” and finding individual right to bear arms). See also *Printz v. United States*, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring) (citing literature advocating individual rights model).

⁵² U.S. CONST. amend. XIV.

⁵³ U.S. CONST. amend. V.

⁵⁴ *Id.*

trial,⁵⁵ and “excessive” bail and “cruel and unusual” punishment.⁵⁶ What do those terms mean? Is their meaning constant over time, or does something like “reasonableness” change as society itself changes? Finally, there are the Ninth and Tenth Amendments. Taken together, they certainly seem to indicate that there are some rights that do not reside in any governmental body. Instead, this admittedly undefined set of rights is “retained by the people,” according to the Ninth Amendment, or is “reserved . . . to the people,” under the Tenth Amendment. At a minimum, these texts make it impossible to apply the maxim *expressio unius est exclusio alterius* (to express one thing is to exclude others) to the preceding articles of the Bill of Rights. Whether they mean anything else in addition is another matter about which, as we like to say in the law, reasonable people have disagreed.

The Bill of Rights obviously does not exhaust the Constitution’s protections for individual rights. There are, in addition, the three pivotal Civil War Amendments that not only ensured that slavery would be abolished⁵⁷ and that the right to vote could not be denied on the basis of race,⁵⁸ but also that the States were forbidden to pass certain kinds of laws: those abridging the privileges and immunities of citizens of the United States (defined in the same Amendment to include every person born in the United States and all persons who become naturalized citizens); laws depriving *any* person of “life, liberty, or property, without due process of law;” and laws that “deny to *any* person within [the State’s] jurisdiction the equal protection of the laws.”⁵⁹ All three Amendments also confer upon Congress the right to enforce them by “appropriate legislation.” In addition to the Civil War Amendments, one should add to the list the Nineteenth Amendment,⁶⁰ guaranteeing that the right to vote shall not be abridged on account of sex; the Twenty-fourth Amendment,⁶¹ forbidding poll taxes; and the Twenty-sixth Amendment,⁶² giving eighteen-year-olds the right to vote.

Much of the sound and fury that has arisen since World War II over constitutional developments has centered not on judicial elaborations concerning constitutional structure, but instead on judicial elaborations of the meaning of the individual-rights guarantees. Not very

⁵⁵ U.S. CONST. amend. VI.

⁵⁶ U.S. CONST. amend. VIII.

⁵⁷ U.S. CONST. amend. XIII.

⁵⁸ U.S. CONST. amend. XV.

⁵⁹ U.S. CONST. amend. XIV (emphasis added).

⁶⁰ U.S. CONST. amend. XIX.

⁶¹ U.S. CONST. amend. XXIV.

⁶² U.S. CONST. amend. XXVI.

many people outside the legal academy will have passionate feelings about the growth of the administrative state, or the revival of states' rights in the name of the Eleventh Amendment. But they do feel strongly about many of the individual rights I am about to mention, although some excite more attention than others, and some are now seen as so obvious or so mundane that it is hard to recall why they were ever contested.

Let us start with the obvious or mundane rights that the Supreme Court has recognized over the years as implicit in the "liberty" recognized by both the Fifth and the Fourteenth Amendments. The Court has held that the protection against deprivation of "liberty" without due process has a substantive floor—a point where even the best "process" in the world would not be "due." I am referring, of course, to the oft-criticized doctrine of "substantive due process"—a phrase that some think is oxymoronic, and others think reflects a fundamental truth about the American system of government—namely, that there are some areas that are so personal to the individual that no aspect of government can intrude into them. American constitutional law started down this path in a way that has since become disavowed, with *Lochner v. New York* and its decision to strike down the state's maximum-hour law in the name of the substantive right of freedom of contract.⁶³ The Court's concerns are worth recalling, because they are not entirely wrong even today:

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint.⁶⁴

This was hardly the first time in constitutional history that someone expressed concern about a doctrine that would lead to the ability of one organ of government—here the states collectively—to exercise unrestrained power. And whatever one might think of *Lochner's* holding, this concern was a serious one.

Several years later and, interestingly, before the late 1930s saw the end of *Lochner*-style economic substantive due process, the Court considered whether a Nebraska statute forbidding the teaching of for-

⁶³ 198 U.S. 45 (1905).

⁶⁴ *Id.* at 56.

eign languages in any school in the state violated the Federal Constitution.⁶⁵ Unlike many newer constitutions in the world, the U.S. Constitution does not mention the topic of languages.⁶⁶ Nonetheless, the Court, over dissents from Justices Holmes and Sutherland, held that the statute was unconstitutional. In a passage that became famous more than fifty years later when the infinitely more contentious issue of abortion was before the Court, Justice McReynolds wrote the following on behalf of the majority:

While this Court has not attempted to define with exactness the liberty thus guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁶⁷

The Court went on to say that, important though the state interest was in the physical, moral, and mental health of its citizens, “the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue.”⁶⁸

The Court continued with this theme a few years later in *Pierce v. Society of Sisters*.⁶⁹ This time it held unanimously that a state law requiring all children to receive their education in a public school—on pain of finding the parent or guardian guilty of a misdemeanor—was unconstitutional. It announced in rather grand language that “[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”⁷⁰

For a variety of reasons, the theories articulated in *Meyer* and *Pierce* lay dormant for many years, until the Supreme Court turned once again to them in the group of cases that dealt with privacy rights,

⁶⁵ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁶⁶ *But see* *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (dismissing on standing and mootness grounds case challenging 1988 amendment to Arizona Constitution making English official language of Arizona).

⁶⁷ *Id.* at 399.

⁶⁸ *Id.* at 401.

⁶⁹ 268 U.S. 510 (1925).

⁷⁰ *Id.* at 535.

reproductive rights, and issues concerning the family unit starting in the 1960s. The case that has always struck me as telling in this group is not the obvious one—*Roe v. Wade*—but is instead *Moore v. City of East Cleveland*.⁷¹ That case involved a city ordinance that was undoubtedly inspired by the desire of city leaders to stamp out hippie communes. To do so, the City of East Cleveland enacted an ordinance that began by limiting occupancy of a dwelling unit to members of one family, and then defined the term “family” with extraordinary parsimony. The appellant, Mrs. Inez Moore, was convicted of a misdemeanor under the ordinance and sentenced to five days in jail and fined twenty-five dollars because she had living under her roof both of her sons and their respective sons. The ordinance violation came about because the grandchildren were cousins rather than brothers. The Ohio courts rejected her constitutional challenge to the ordinance, and so the case arrived at the U.S. Supreme Court on appeal.⁷²

What is notable about the case is how the Justices struggled with it. Four members of the Court, led by Justice Lewis Powell, concluded that the ordinance was unconstitutional under the line of cases including *Meyer*, *Pierce*, and many others.⁷³ Justice William Brennan, joined by Justice Thurgood Marshall, wrote separately to emphasize that the idea of the “family” is itself culturally dependent and that there were serious (and negative) racial and economic undertones in the East Cleveland ordinance.⁷⁴ Justice John Paul Stevens provided the crucial fifth vote to strike down the ordinance, but he saw it as an undue restriction of the property rights of the owner that was invalid under the Court’s zoning jurisprudence.⁷⁵ Chief Justice Warren Burger dissented on the ground that there could be no constitutional violation until Mrs. Moore exhausted her local administrative remedies by seeking a variance (an odd view, given the fact that the state courts themselves did not think that such a requirement existed).⁷⁶ Justice Potter Stewart, joined by then-Justice William Rehnquist, saw nothing unconstitutional about the ordinance, which in his view was just one of the ways that the city was entitled to define permissible

⁷¹ 431 U.S. 494 (1977).

⁷² At the time, 28 U.S.C. § 1257 (1988) provided for appellate jurisdiction in cases where the state courts had upheld a state law against a federal constitutional challenge. This changed in 1988 with the passage of the Supreme Court Case Selections Act, Pub. L. No. 100-352, § 3, 102 Stat. 662, 662 (1988) (codified at 28 U.S.C. § 1257(a) (2000)), which repealed the U.S. Code sections creating appellate jurisdiction and substituted certiorari for all requests to review decisions from state courts.

⁷³ 431 U.S. at 499.

⁷⁴ *Id.* at 506–13.

⁷⁵ *Id.* at 513–21.

⁷⁶ *Id.* at 521–31.

property use.⁷⁷ Finally, Justice White wrote a thoughtful dissent in which he tried to come to grips with the entire line of substantive due process cases.⁷⁸ While he was not advocating that any particular case recognizing a substantive due process right be overruled, he did stress that the Court would be well-advised “to restrict the liberties protected by the Due Process Clause to those fundamental interests ‘implicit in the concept of ordered liberty,’”⁷⁹ quoting *Palko v. Connecticut*.⁸⁰ The majority might have replied that it believed that it was doing exactly that, in declaring something as elemental as the family unit to be off-limits to restrictive legislative measures. But perhaps this merely illustrates how hard it is to draw lines, and how vulnerable any such judicially drawn lines are to outside criticism.

“Critical” is the mildest word one could choose to describe the reaction to the Supreme Court’s recognition that the “liberty” clauses of the Constitution protect a private sphere surrounding intimate personal decisions such as the obtaining of contraceptives, abortion, and the choice of sexual partner without regard to criteria like race or sexual orientation.⁸¹ For the sake of argument, let us assume that these questions have been resolved for now, though at least the reproductive choice right may leave the constitutional lists depending on what changes take place in the Supreme Court’s membership, or it may even become constitutionalized in the opposite direction. Other freedoms may yet achieve constitutional recognition, even if we, as a society, and the Supreme Court, as the responsible institution, continue to move cautiously. It is possible, for example, that we have not heard the last word on personal autonomy over end-of-life deci-

⁷⁷ *Id.* at 531–41.

⁷⁸ *Id.* at 541–52.

⁷⁹ *Id.* at 546.

⁸⁰ 302 U.S. 319 (1937).

⁸¹ See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding unconstitutional criminalization of adult consensual homosexual unions); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (concerning abortion); *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977) (regarding distribution and advertising of nonprescription contraceptives to minors); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (concerning distribution of contraceptives to unmarried individuals); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (concerning access of married couples to contraceptives). Compare the preceding cases with *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down Virginia’s anti-miscegenation law on equal protection grounds, despite the fact that at least from one point of view, the racial classification by definition affected whites and blacks identically. Interestingly, the Court observed along the way that “the State does not contend . . . that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of *Meyer* . . . and *Skinner v. Oklahoma*.” *Id.* at 7 (internal citations omitted). The Court in *Skinner* struck down Oklahoma’s forced sterilization of certain criminals as a violation of the Equal Protection Clause. 316 U.S. 527, 538 (1942).

sions, even though the Court for now has left that delicate area to further development in the states.⁸²

The idea that government must refrain altogether from some takings, no matter how much compensation is offered, because they are not for a public purpose, is another perennial. In *Kelo v. City of New London*,⁸³ the Court reaffirmed the principle that government may not take property solely for the purpose of conferring a private benefit on a particular private party, nor may it take property under a mere pretext of public use.⁸⁴ On the other hand, it adopted a broad interpretation of the term “public use,” and in so doing, it upheld the right of a city to take private property for purposes of an economic development plan, even though some of that property would wind up in private hands.⁸⁵ It is doubtful that this will be the last word on how to draw the line between permissible and impermissible uses of eminent domain to transfer private property to different private hands. Finally, of course, some would argue that implicit in the Second Amendment is an unqualified right to bear arms, without any necessary connection to a “Well-Regulated Militia.”

While this brief review is hardly an exhaustive exploration of judicially elaborated constitutional provisions—both structural and individual—it suffices to illustrate the point that we are relying today on far more than the literal written Constitution in the area of individual rights. This is not surprising, especially when we recall that the Framers (like most draftsmen) deliberately left some things unresolved, in order to obtain the consensus needed for ratification. Moreover, we would sorely miss these constitutional elaborations, if I may call them that, if they were to be swept away with the stroke of a pen or the tap of a “delete” key. The United States has been rightfully proud of the example it has set for the world in the field of

⁸² See *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997); see also *Oregon v. Gonzales*, 368 F.3d 1118 (9th Cir. 2004), cert. granted, 125 S. Ct. 1299 (2005) (presenting question whether Attorney General may interpret federal law to prohibit distribution of federally controlled substance to facilitate suicide, regardless of state law authorizing such distribution). After this lecture was delivered, the nation's attention became riveted by the case of Theresa Marie Schiavo, where the question was whether any law, federal or state, prevented Mrs. Schiavo's husband from ordering that her feeding tube be disconnected, in light of medical advice that she had for many years been in a persistent vegetative state. See *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223 (11th Cir. 2005); *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270 (11th Cir. 2005), stay denied, No. 04A844, 125 S. Ct. 1722 (2005). Although the Supreme Court did not intervene, and Mrs. Schiavo was allowed to die, it appears as of the time of this paper that the issues presented are far from resolved.

⁸³ 125 S. Ct. 2655 (2005).

⁸⁴ *Id.* at 2661.

⁸⁵ *Id.* at 2663–66.

human rights, particularly since the end of World War II. It was Eleanor Roosevelt, after all, who led the successful effort for the United Nations to adopt the Universal Declaration of Human Rights.⁸⁶ Building from that nonbinding General Assembly resolution, many other international human rights conventions followed. Although the United States has not adhered to all of them, it has joined many of the most important ones.⁸⁷ Invariably, in doing so, the ratification documents have proclaimed that the obligations that the nation is undertaking are already reflected in U.S. domestic law—especially in our constitutional law.⁸⁸ When we take a look at those obligations, we will see that our legal recognition of many of the core human rights recognized by the international community as a whole depends critically on the judicially recognized rights we have just reviewed.

C. *Individual Rights on the International Stage*

Of all these conventions, the one with the most general sweep and the one that shows most dramatically how much we depend on our evolving Constitution is the International Covenant on Civil and Political Rights. The Covenant, which currently has 152 State Parties,⁸⁹ expressly recognizes the following rights: equal rights of men

⁸⁶ G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1, 183d plen. mtg., at 71, U.N. Doc. A/810 (1948).

⁸⁷ The following list of human rights conventions presently in force in the United States is taken from TREATY AFFAIRS STAFF, U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2004, available at <http://www.state.gov/s/l/38294.htm>: (1) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, 24 I.L.M. 535 (entered into force June 26, 1987; for U.S. Nov. 20, 1994); (2) Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967; for U.S., Nov. 1, 1968); (3) International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Exec. Doc. E (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976; for U.S., Sept. 8, 1992); (4) International Covenant on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, S. Exec. Doc. C (1978), 660 U.N.T.S. 211 (entered into force Jan. 4, 1969; for U.S., Nov. 20, 1994); (5) Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951; for U.S., Feb. 23, 1989); (6) Inter-American Convention on the Granting of Political Rights to Women, May 2, 1948, 27 U.S.T. 3301, 1438 U.N.T.S. 63 (entered into force Mar. 17, 1949; for U.S., May 24, 1976); (7) Convention on the Nationality of Women, Dec. 26, 1933, 49 Stat. 2957, 3 Bevans 141 (entered into force Aug. 29, 1923; for U.S., Aug. 29, 1934).

⁸⁸ See, e.g., International Covenant on Civil and Political Rights, 6.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., 1496th plen. mtg. at 168–74, U.N. Doc. A/631b (1966), United States, Understandings and Declarations (describing in greater detail relation between U.S. law and Convention obligations).

⁸⁹ See Office of the United Nations High Comm'r for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (June 9, 2004), available at www.unhchr.ch/pdf/report.pdf.

and women;⁹⁰ the “inherent right to life” and protection against arbitrary deprivation of life;⁹¹ the prohibition against torture or “cruel, inhuman or degrading treatment or punishment”;⁹² a ban on slavery;⁹³ a prohibition on arbitrary arrest or detention;⁹⁴ a right to travel;⁹⁵ procedural rights in a criminal trial,⁹⁶ including a right to an appeal;⁹⁷ a prohibition on ex post facto laws;⁹⁸ a right to privacy;⁹⁹ freedom of thought, conscience, and religion;¹⁰⁰ freedom of opinion and expression;¹⁰¹ protection of the family;¹⁰² the right of “men and women of marriageable age” to marry and found a family;¹⁰³ the protection of children;¹⁰⁴ the right to vote and take part in public affairs;¹⁰⁵ a broad nondiscrimination obligation;¹⁰⁶ and the right of minority groups to associate and maintain their culture and religion, and to use their own language.¹⁰⁷

The Declarations and Understandings of the United States quite clearly reserve the right of the United States to derogate from some of these obligations—for instance, the United States has reserved the authority (though certainly not the obligation as the Court’s 2005 decision in *Roper v. Simmons*¹⁰⁸ has now made clear as a matter of domestic law) to impose the death penalty on a person below the age of 18—but just as clearly those Declarations and Understandings

⁹⁰ International Covenant on Civil and Political Rights, art. 3, *supra* note 87, S. Exec. Doc. E at 24, 999 U.N.T.S. at 174.

⁹¹ *Id.*, art. 6.1, S. Exec. Doc. E at 25, 999 U.N.T.S. at 174.

⁹² *Id.*, art. 7, S. Exec. Doc. E at 25, 999 U.N.T.S. at 175.

⁹³ *Id.*, art. 8, S. Exec. Doc. E at 25, 999 U.N.T.S. at 175.

⁹⁴ *Id.*, art. 9.1, S. Exec. Doc. E at 26, 999 U.N.T.S. at 175.

⁹⁵ *Id.*, art. 12, S. Exec. Doc. E at 27, 999 U.N.T.S. at 176.

⁹⁶ *Id.*, art. 14, S. Exec. Doc. E at 27, 999 U.N.T.S. at 176.

⁹⁷ *Id.*, art. 14.5, S. Exec. Doc. E at 28, 999 U.N.T.S. at 177.

⁹⁸ *Id.*, art. 15.1, S. Exec. Doc. E at 28, 999 U.N.T.S. at 177.

⁹⁹ *Id.*, art. 17, S. Exec. Doc. E at 29, 999 U.N.T.S. at 177 (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”).

¹⁰⁰ *Id.*, art. 18, S. Exec. Doc. E at 29, 999 U.N.T.S. at 178.

¹⁰¹ *Id.*, art. 19, S. Exec. Doc. E at 29, 999 U.N.T.S. at 178. But see *id.*, art. 20, S. Exec. Doc. E at 29, 999 U.N.T.S. at 178, which provides that there is no right to advocate national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence. The United States has taken an exception to this language, insofar as it might prohibit speech that is protected by the First Amendment.

¹⁰² *Id.*, art. 23.1, S. Exec. Doc. E at 30, 999 U.N.T.S. at 179.

¹⁰³ *Id.*, art. 23.3, S. Exec. Doc. E at 30, 999 U.N.T.S. at 179.

¹⁰⁴ *Id.*, art. 24, S. Exec. Doc. E at 30, 999 U.N.T.S. at 179.

¹⁰⁵ *Id.*, art. 25, S. Exec. Doc. E at 30, 999 U.N.T.S. at 179.

¹⁰⁶ *Id.*, art. 26, S. Exec. Doc. E at 31, 999 U.N.T.S. at 179.

¹⁰⁷ *Id.*, art. 27, S. Exec. Doc. E at 31, 999 U.N.T.S. at 179.

¹⁰⁸ See *Roper v. Simmons*, 125 S. Ct. 1183, 1198 (2005) (holding that Eighth Amendment prohibits execution of person who committed his or her crime before reaching age of 18).

reflect the assumption that United States law already protects everything to which an express reservation was not made.¹⁰⁹ Accordingly, the United States disavowed any need to create separate private rights of action under the Convention.¹¹⁰

While some have bemoaned the Declarations and Understandings because they appear to cabin the United States' commitment to the Convention, the implication that U.S. law is already doing the job should be seen in a positive light. Nonetheless, the United States cannot support this assertion without relying on the unwritten constitutional protections we have been reviewing. The Constitution does not explicitly mention equal rights of men and women; a right to travel; a right to be free from arbitrary interference with one's privacy, family, and home; protection of the family; the right to marry; or cultural rights of minority groups. Yet as presently understood, U.S. law affords protection to most, if not all, of these rights as a matter of constitutional law. For examples, one need think only of cases like *United States v. Virginia*,¹¹¹ *Shapiro v. Thompson*,¹¹² *Moore v. City of East Cleveland*,¹¹³ *Loving v. Virginia*,¹¹⁴ *Lawrence v. Texas*,¹¹⁵ and *Whalen v. Roe*.¹¹⁶ The cultural rights of minority groups often involve nothing more nor less than the right to practice a particular religion, which the First Amendment protects, or the right to speak a particular language, which *Meyer* addressed, or the right to follow a particular lifestyle, which *Wisconsin v. Yoder*¹¹⁷ and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*¹¹⁸ both addressed, though through a religious lens. If our understanding of our own Constitution were more cramped, we would be forced to admit that there is no secure constitutional foundation in United States law for these international human rights norms. Although one might hope that statutes could be passed that would fill the gap, there is first a question whether Section

¹⁰⁹ See *supra* note 88, United States Declarations and Understandings.

¹¹⁰ *Id.*

¹¹¹ 518 U.S. 515 (1996) (striking down all-male admissions policy at Virginia Military Institute).

¹¹² 394 U.S. 618 (1969) (acknowledging constitutional dimension to right to travel); see also *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902–03 (1986); *Saenz v. Roe*, 526 U.S. 489 (1999) (citing *Shapiro*).

¹¹³ 431 U.S. 494 (1977) (striking down single-family zoning restriction).

¹¹⁴ 388 U.S. 1 (1967) (protecting right to interracial marriage).

¹¹⁵ 539 U.S. 558 (2003) (striking down statutes criminalizing adult consensual homosexual acts).

¹¹⁶ 429 U.S. 589 (1977) (protecting right to confidential doctor-patient relationship).

¹¹⁷ 406 U.S. 205, 214 (1972) (holding that Free Exercise Clause protects "the traditional interest of parents with respect to the religious upbringing of their children").

¹¹⁸ 508 U.S. 520 (1993) (finding ordinances restricting Santerian religious practices unconstitutional).

5 of the Fourteenth Amendment would suffice as a basis for a nationally enforceable code of human rights. Recall, in this connection, the fate of the Violence Against Women Act in *United States v. Morrison*¹¹⁹ and ask whether the understanding of the treaty power expressed in *Missouri v. Holland*¹²⁰ would be enough to support legislation enacting the Covenant's rights in the eyes of a strict constructionist. In addition, there is always the risk that unpopular minorities might be left behind.

II

DEVICES USED TO FIND UNWRITTEN RULES

No one in the United States thought that we had come to such a pass during the heyday of American leadership in the field of human rights, which began right after World War II and continued through at least the end of the Cold War era. Our strong national commitment to individual rights, however, depended during that period and continues to depend on several crucial constitutional understandings that have always had their critics, and more recently have come under sharper attack.¹²¹ Those understandings include the following: (1) broad language may legitimately be interpreted broadly, in a manner informed by evolving notions of a decent society; (2) as a matter of federal constitutional law, some liberties are beyond the power of any governmental entity to deny; (3) most parts of the Bill of Rights, in particular through the doctrine of selective incorporation, apply to state action as well as to federal action; (4) constitutional principles can be inferred from sources such as the structure of the overall document and preconstitutional understandings. I will elaborate on these points in order.

First and most important is the idea that we should take seriously the fact that the text of the Constitution tends to reflect broad principles, not specific prescriptions. Neither James Madison, for whom this lecture is named, nor any of the other Framers of the Constitution, were oblivious, careless, or otherwise unaware of the words they chose for the document and its Bill of Rights. The papers they left behind leave no doubt that they hoped to be writing for the ages.

¹¹⁹ 529 U.S. 598 (2000) (striking down Violence Against Women Act as unauthorized by either Commerce Clause or section 5 of Fourteenth Amendment).

¹²⁰ 252 U.S. 416 (1920) (Holmes, J.) (holding that if treaty is valid, then statute that provides necessary and proper means for executing treaty is also valid; rejecting argument that subject matter covered by treaties must be limited to same subjects on which Congress is permitted to legislate).

¹²¹ See generally ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* (2003).

There is no more reason to think that they expected the world to remain static than there is to think that any of us holds a crystal ball. The only way to create a foundational document that could stand the test of time was to build in enough flexibility that later generations would be able to adapt it to their own needs and uses.

That is exactly what the Framers did. Rather than spelling out every last detail of the structure of government and of the way that government would relate to individual citizens, they chose to enshrine only the broadest principles in the Constitution. Whether they were doing so for lofty reasons or, as appears to be the case in some instances, out of political expediency, hardly matters; what does matter is the language that was ultimately adopted. One need not write in this way, of course, and we can see the alternative approach reflected in the constitutions of some states. Perhaps the ultimate example of this is the Constitution of Texas, which today runs more than two hundred pages long, and, as of 2003, has been amended 432 times (out of a total of 606 possible amendments passed by the Texas legislature).¹²² Had the Federal Constitution followed that model, it would undoubtedly by now contain a comparable number of amendments. It is even possible that those amendments would protect the very same individual rights that have emerged instead through constitutional interpretation. But there was no need to burden the Federal Constitution with endless amendments, because it was supple enough to accommodate this growth without them.

The jurisprudence of the Eighth Amendment provides a good example. The words “excessive” in the fines clause and “cruel and unusual” in the punishments clause are relative words. If one were to take the view that the only fines it prohibits are those that would have been thought excessive in 1791,¹²³ there would be no meaningful ceiling on criminal fines today. Civil punitive damages might be outside the reach of the Amendment as well, if one thought the word “fine” implies criminal enforcement. More to the point, the Amendment might as well not exist if the only punishments that were deemed to be “cruel and unusual” were the ones that an eighteenth-century audience would have abhorred. The Court in *Weems v. United*

¹²² Legislative Reference Library of Texas, Constitutional Amendments, <http://www.lrl.state.tx.us/legis/constAmends/lrlhome.cfm> (last visited Apr. 14, 2005).

¹²³ Not only is it possible that ideas of excessiveness have changed, but it is also undisputed that the value of a dollar has changed. For example, \$20 in 1791 would have been worth \$389.49 in 2003 using the Consumer Price Index, but it would have been worth a whopping \$882,489.05 using the relative share of GDP. See Econ. History Servs., What Is Its Relative Value in US Dollars?, <http://www.eh.net/hmit/compare/>. This suggests that there is no meaningful way to apply an historical approach to the idea of excessive fines.

*States*¹²⁴ referred to Blackstone's understanding that executions of various types were permissible, but that disemboweling, drawing and quartering, and torture were not. But in *Weems*, the Court struck down as incompatible with the Eighth Amendment the far "milder" punishment of twelve years' hard and painful labor and imprisonment for the crime of falsifying two entries in public records. Later, in *Trop v. Dulles*,¹²⁵ the Court said that it had recognized in *Weems* "that the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹²⁶

That is the approach that the Court has continued to take, as it has steadily narrowed the circumstances under which the death penalty may be imposed: first establishing strict procedural requirements for any sentence of death, in a quintuplet of cases decided in 1976,¹²⁷ then rejecting death for any crime that did not itself result in death, in *Coker v. Georgia*,¹²⁸ and still later categorically rejecting the death penalty for mentally retarded persons, in *Atkins v. Georgia*.¹²⁹ In the spring of 2005, the Court decided in *Roper v. Simmons* that the Eighth Amendment prohibits the death penalty for an offender who committed murder at the age of seventeen.¹³⁰ Just as in *Atkins*, the Court was closely divided. Justice Scalia, writing for himself, Chief Justice Rehnquist, and Justice Thomas, reiterated his opposition to the *Trop* idea that the Amendment must be understood in the light of evolving standards of decency.¹³¹ Both the majority and Justice O'Connor in dissent, however, were willing to undertake an inquiry into what it means in 2005 to be "cruel and unusual." In doing so, the majority relied on a national consensus against the death penalty for juveniles, as evidenced both by the states that have abolished the death penalty

¹²⁴ 217 U.S. 349, 357–58, 381 (1910) (holding that punishment of fifteen years imprisonment, civil interdiction, lifetime surveillance, deprivation of office, loss of voting rights and right to acquire honors, and loss of retirement pay was cruel and unusual in light of offense of falsifying public document).

¹²⁵ 356 U.S. 86 (1958) (finding that loss of United States citizenship as punishment for crime of wartime desertion violated Eighth Amendment).

¹²⁶ *Id.* at 100–01.

¹²⁷ *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

¹²⁸ 433 U.S. 584 (1977) (finding unconstitutional death penalty for rape not resulting in death of victim).

¹²⁹ 536 U.S. 304 (2002) (holding that executions of mentally retarded criminals constitute "cruel and unusual punishments").

¹³⁰ 125 S. Ct. 1183 (2005).

¹³¹ *Id.* at 1217–18 (Scalia, J., dissenting).

altogether and those that maintain it but exclude juveniles from its reach.¹³² The Court also noted that the United States was “the only country in the world that continues to give official sanction to the juvenile death penalty,”¹³³ even as it carefully pointed out that this fact was “not controlling our outcome.”¹³⁴ In doing so, the Court appropriately chose to enrich its understanding of the issue by reviewing international practice, acknowledging implicitly that the American people are indeed part of the broader human community and at least presumptively share its core values.

The willingness to give content to other broad terms, such as “due process,” or “equal protection of the laws,” or “liberty,” or “unreasonable,” has allowed recognition of the other core rights the Court has identified. Inferences from constitutional structure have also played their role, as in the case of the often-disputed but still-recognized constitutional right to travel.¹³⁵ Perhaps critics of the latter right would think better of it if they took a look at the profound restrictions on liberty that arise in countries that have denied it to their citizens, such as the former Soviet Union.

The reason why these debates have been so contentious in the United States is, quite simply, because many of our most precious rights have achieved federal protection through the incorporation doctrine,¹³⁶ through the substantive component of the Fourteenth Amendment’s Due Process Clause,¹³⁷ or through the equal protection component of the Fifth Amendment’s Due Process Clause.¹³⁸ These

¹³² *Id.* at 1192–94.

¹³³ *Id.* at 1198.

¹³⁴ *Id.* at 1200.

¹³⁵ See *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding state statutory provisions which deny benefits to residents of less than one year unconstitutional).

¹³⁶ See *Palko v. Connecticut*, 302 U.S. 319, 323–27 (1937) (rejecting wholesale incorporation of first eight Amendments through Fourteenth Amendment; discussing which Amendments have been incorporated and which have not); see, e.g., *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporating Fifth Amendment privilege against compulsory self-incrimination); *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating Fourth Amendment protections against unreasonable searches and seizures); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (incorporating Sixth Amendment right to counsel in criminal cases).

¹³⁷ See *supra* notes 63–83 and accompanying text.

¹³⁸ See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

The Fifth Amendment . . . does not contain an equal protection clause But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The ‘equal protection of the laws’ is a more explicit safeguard of prohibited unfairness than ‘due process of law,’ and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Id. at 499.

were the critical constitutional moves, and each one requires a broad understanding of the words that appear on the page.

I am willing to make that move, in spite of the fact that it carries with it a risk of error on the part of the Supreme Court—error in the sense that the Court may from time to time push out in a direction that is inconsistent with the constitutional plan, and error in the sense that the Court may be too far out of step with American society and the elected branches of government. Over the medium to long run, the Court corrects those errors, or (occasionally) the Constitution is amended. That, in my view, is the best we can do. We would not be better off with constant amendments to the Constitution, because such a process would ultimately devalue the Constitution and make it the same kind of repository of special interest rules that one can observe in all too many state constitutions. And, as I will argue in Part III, we even more clearly would not be better off with a strict constitutional reading that jettisoned all of the unwritten extrapolations that have occurred since the beginning of the Republic.

III

WHAT WOULD THE LITERAL CONSTITUTION LOOK LIKE, AND WHY HAS EVERYONE REJECTED IT?

The literal Constitution, for which some have argued, would be a woefully inadequate document for the American people today. As a matter of constitutional structure, it would require a radical restructuring of the administrative state, placing a nearly unbearable legislative burden on the Congress to specify in detail exactly what powers it was conferring on executive branch agencies and to monitor the minutiae through some kind of oversight mechanism. Presidents would lose the flexibility to make adjustments in the rate of federal spending. The ability of the commander in chief to take rapid action to protect the United States against unusual threats that do not correspond to any eighteenth-century model would be severely compromised if we were required always to wait for the Congress to pass a resolution declaring war. Taking a strict view of the Commerce Clause (and taking cases like *United States v. Lopez*¹³⁹ and *United States v. Morrison*¹⁴⁰ to their logical extreme), it would be impossible for the United States to function as a single integrated economic entity. This would be ironic indeed, given the fact that the European countries

¹³⁹ 514 U.S. 549 (1995) (holding that Gun-Free School Zones Act exceeded Congress's authority under Commerce Clause).

¹⁴⁰ 529 U.S. 598 (2000) (holding that Violence Against Women Act exceeded Congress's authority under either Commerce Clause or Section 5 of Fourteenth Amendment).

have steadily been increasing the size of their own common market from the original six countries that founded what has become the European Union (EU) in 1958 to the powerhouse of twenty-five countries today. They have done so by conferring upon EU institutions the power to enact EU-wide regulations in all areas affecting trade between member states. The United States achieved this goal almost two centuries earlier, thanks to the early Commerce Clause decisions of Chief Justice John Marshall,¹⁴¹ but all that would be up for grabs if one were to try to discern and adopt the strictest possible reading of the eighteenth-century document.

The story would be even more disturbing in the area of individual rights. Like many people, I thought it was regrettable at best, absurd at worst, when the United States lost its place on the United Nations Commission on Human Rights in 2002, after continuous membership from 1947 through 2001, even though it then resumed membership from 2003 to the present.¹⁴² This was hardly a reflection of the actual record of leadership in the field of human rights that the United States has built. The fact that there are blemishes on this record only says that we have not been perfect. But the legal tools are in place to correct problems when they arise, if we have the political will to use them. That toolbox would be sorely depleted if we were to decide now that the Constitution cannot protect the full range of individual rights after all.

But, one might say, the states also have their Bills of Rights and judiciaries ready and willing to implement them. That is true, but irrelevant. It ignores the lessons of history that brought us the Civil War Amendments: States may fail at times to respect due process and to give equal protection of the laws, and these are exactly the times when, in a unified nation, federal law must step in.¹⁴³ It also ignores the fact that it is usually local prejudices that must be overcome, and a national perspective is the best way to accomplish that task. From the standpoint of protecting international human rights, the only relevant actor is the United States as a whole. The Constitution confers the

¹⁴¹ See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (reading Commerce Clause to reach all navigation within states, to extent that it is connected at all to interstate, foreign, or Indian commerce); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (upholding power of Congress to establish Bank of the United States, based on Necessary and Proper Clause).

¹⁴² See The United Nations Commission on Human Rights website for a list of the years during which every country has held a seat on the Commission, <http://www.ohchr.org/eng/lish/bodies/chr/docs/membership.doc> (last visited Apr. 24, 2005).

¹⁴³ For early articulations of this view of federalism, see *THE FEDERALIST* NO. 9 (Alexander Hamilton) and *THE FEDERALIST* NO. 10 (James Madison).

entirety of the foreign affairs power on the federal government¹⁴⁴ and thus places the entire responsibility for compliance with international norms at the federal level.

If we really had a narrow, literal Constitution, it would be ready for the dustbin unless it was amended significantly. But logical consistency should force even the most zealous advocates of “original intent” and “plain language” to admit that we have long since crossed the Rubicon. No principle allows one to draw a distinction between asserting the legitimacy of a living constitution when it comes to structural matters, and denying the validity of the same approach when it comes to individual rights. This means that we face a stark choice: disregarding the strong textual and historical evidence indicating that the Framers themselves used broad language to facilitate constitutional growth and turning the clock back two centuries for *all* purposes, or accepting the fact that elaborations of all parts of the Constitution will occur over the years. The former choice is, in my opinion, exceedingly unattractive. It would lead in the long run to a federal constitution that looks like the most detailed of today’s state constitutions—for example, the constitution of my adopted home state of Texas, for which the word micromanagement was invented.¹⁴⁵

If we were doomed to go down that path by something we could find in the constitutional text, we would have to live with it. But we are not. The *Federalist Papers* and other documents from the Founding period make it abundantly clear that the Framers knew that they were creating a set of constitutional standards, not prescribing rigid constitutional rules. They knew that courts would need to define and interpret words like “liberty,” “cruel and unusual,” “due” process, and “equal” protection. They also knew, having given Congress the power to pass “necessary and proper” legislation, that the reach of federal legislation was likely to change over time. The fact that the federal government of 2005 does not look much like the federal government of 1789, and the fact that the list of recognized individual rights has expanded, should not cause weeping and gnashing of teeth.

¹⁴⁴ See, e.g., *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000) (striking down Massachusetts law aimed at trade with Burma (also known as Myanmar) as unconstitutional under Supremacy Clause).

¹⁴⁵ The Texas Constitution regulates such minutiae as assistance to local fire departments, TEX. CONST. art. III, § 51-a-1; the establishment of a State Medical Educational Board, TEX. CONST. art. III, § 50-a; the establishment of numerous other boards, such as the Water Development Board, to which it devotes more than seven pages and eleven articles, TEX. CONST. art. III, §§ 49-c to 49-d; the provision of student loans, TEX. CONST. art. III, §§ 50-b-4 to 50-b-5; and, famously to graduates of the University of Texas, the establishment of a state university “of the first class,” TEX. CONST. art. VII, § 10.

CONCLUSION

Instead, those developments demonstrate that the Constitution has proven to be up to the job. It has realized the fondest hopes of its creators, and it has put to rest their worst fears. Debate over its meaning is inevitable whenever something as specific as the Bankruptcy Clause or the Titles of Nobility Clause is not at issue, but the existence of debate does not imply that one side's position is illegitimate, unpatriotic, or otherwise unworthy, while the other side's position is foreordained.

Both courts and society would be stronger if we stopped arguing over the interpretive conventions of so-called original intent versus purposive or dynamic interpretation¹⁴⁶ and focused instead on content. This does not mean that courts should or could legitimately ignore the constitutional text. Far from it; the text will always be the proper starting point. It does mean, however, that we should understand both the words in the text and the structure of the constitutional system at a high level of generality. When it is presented with the question of whether a punishment is "cruel and unusual," or whether a state is denying "equal protection of the laws," or whether a certain right should be regarded as a constitutionally protected "liberty," the Court ought to consider what those terms mean in today's world, cognizant of the norms Americans have adopted, whether those norms flow from our membership in the human race as a whole or are more particularized. It must then explain how the more specific rules flow from the constitutional language and framework. In that way, evolution will continue to occur through adjudication. There is no reason to suppose that it will move systematically in either a "liberal" or a "conservative" direction, as any observer of the change from the original *Roe v. Wade* decision to the current regime governing abortion represented by decisions like *Planned Parenthood v. Casey*,¹⁴⁷ *Maher v. Roe*,¹⁴⁸ and *Harris v. McRae*¹⁴⁹ knows well. The same point is

¹⁴⁶ See, e.g., Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 64–84 (2002) (arguing that purposive interpretation is appropriate method for all legal texts).

¹⁴⁷ 505 U.S. 833 (1992) (replacing trimester framework of *Roe v. Wade* with rule forbidding state regulations that place undue burden on women's right to choose abortion before fetus attains viability; subsequent to viability state may regulate or prohibit abortion, as long as law has exception for preservation of life or health of mother).

¹⁴⁸ 432 U.S. 464 (1977) (holding that Constitution does not require state participating in Medicaid program to pay for nontherapeutic abortions of indigent women, even if it chooses to pay for prenatal care and childbirth).

¹⁴⁹ 448 U.S. 297 (1980) (holding that title XIX of Social Security Act does not require state government to pay for medically necessary abortions for which federal reimbursement is unavailable under Hyde Amendment, Pub. L. 96-123, § 109, 93 Stat. 923, 926

reflected in the evolution from *Plessy v. Ferguson*¹⁵⁰ to *Brown v. Board of Education*,¹⁵¹ or the contrast between *Korematsu v. United States*¹⁵² and *Rasul v. Bush*¹⁵³ and *Hamdi v. Rumsfeld*.¹⁵⁴

If the interactive process that occurs through dialogue among the Supreme Court, the lower courts, legal scholars, and society at large, coupled with the occasional changes in personnel on the Court over time, is not fast enough for modern tastes, then and only then would it be advisable to consider amending the Constitution. But, taking a page from the Founders, the way to amend it would not be to add long laundry lists of recognized rights and prohibitions that enshrine one generation's pet issues into the document forever and doom it to obsolescence. Suppose, for example, we had written the original Pledge of Allegiance of 1942¹⁵⁵ into the Constitution. It then would have taken a constitutional amendment in 1954 to add the words "under God" to the text, rather than simply changing it by legislation.¹⁵⁶ Or, more seriously, what if the Constitution had enshrined the Jim Crow system, or the view of women expressed in such infamous decisions as *Bradwell v. Illinois*¹⁵⁷ or *Goesaert v. Cleary*?¹⁵⁸ Over the long run, even though it can sometimes be frustrating to wait for the long run, it has been better to allow constitutional understandings to grow with the times.

If, and only if, one were to conclude that there is a broad, systematic problem with the pace of constitutional change, should one consider how to address that (hypothetical) problem. On this point also, we would be well advised to take a page from the book of the Framers and to look to structural mechanisms. If the problem is, as President Franklin Roosevelt once thought, the lack of turnover on the Supreme

(1979) (codified as amended in scattered sections of 42 U.S.C.), thus further restricting de facto access to abortions for indigent women).

¹⁵⁰ 163 U.S. 537 (1896).

¹⁵¹ 347 U.S. 483 (1954).

¹⁵² 323 U.S. 214 (1944) (upholding constitutionality of military order requiring exclusion from described West Coast areas of all individuals of Japanese ancestry).

¹⁵³ 124 S. Ct. 2686 (2004) (finding federal courts not barred from hearing claims of aliens held at Guantanamo Bay).

¹⁵⁴ 124 S. Ct. 2633 (2004) (holding unconstitutional detention of United States citizen as enemy combatant without meaningful opportunity to contest).

¹⁵⁵ See Act of June 22, 1942, Pub. L. No. 623, § 7, 56 Stat. 380 (1942).

¹⁵⁶ See Act of June 14, 1954, Pub. L. No. 396, 68 Stat. 249 (1954) (codified as amended at 4 U.S.C. § 4 (2000)).

¹⁵⁷ 83 U.S. 130 (1872) (Miller, J.) (upholding Illinois statute denying women right to be licensed as attorneys).

¹⁵⁸ 335 U.S. 464 (1948) (upholding Michigan statute prohibiting women from bartending unless they were wives or daughters of liquor establishment owners), *overruled by* *Craig v. Boren*, 429 U.S. 190, 210 (1976) (overruling *Goesaert* insofar as it upheld sex-based classifications related to sale of alcoholic beverages).

Court, then one might reconsider whether there should be some outer limit for the number of years any particular Justice can serve. If the amendment process is not enough (though it is worth noting that the Constitution has been amended six times since 1950),¹⁵⁹ then we might look north and adopt some mechanism like the power of the legislature in Canada to override constitutional holdings in extraordinary circumstances—a power that is rarely used, to be sure, but that stands as yet another democratic safeguard.¹⁶⁰ However radical these options might seem—and I do not wish to be understood as advocating either of them—they would be far preferable to the expedient of refusing to recognize any constitutional right or structure that has not been spelled out in black and white in the document itself, abandoning the timeless principles that have served us so well, for so long. Our eighteenth-century Constitution, while a bit cryptic at the edges, is nonetheless a real treasure. Approached the right way, there is every reason to be confident that the dynamic process that has sustained it will continue to do so through the years, decades, and even centuries to come.

¹⁵⁹ U.S. CONST. amend. XXVII (1992); U.S. CONST. amend. XXVI (1971); U.S. CONST. amend. XXV (1967); U.S. CONST. amend. XXIV (1964); U.S. CONST. amend. XXIII (1961); U.S. CONST. amend. XXII (1951).

¹⁶⁰ See, e.g., Constitution Act, 1982, sched. B, pt. I (citing Canadian Charter of Rights and Freedoms, § 33, which details power of Parliament or legislature of province to make overriding declarations).