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The U.S. Constitution is Not a Code: Unraveling the Idea and the Meaning of Substantive Due Process

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THE U.S. CONSTITUTION IS NOT A CODE: UNRAVELING THE IDEA AND THE MEANING OF SUBSTANTIVE DUE PROCESS

Simona Grossi*

ABSTRACT

This Article delves into the nuanced meaning of substantive due process by tracing its historical and contemporary contexts. Beginning with the exploration of pre-ratification state constitutions, the debates surrounding ratification, and early Court views on the Constitution's nature (perceived not as a code but an enduring collection of principles), the study then addresses the role and meaning of stare decisis as positive of history and tradition, and the role of judicial decision-making in our system starting from Marbury v. Madison. The Article concludes by linking substantive due process to universally recognized fundamental rights, emphasizing that our Constitution's true intent is to safeguard these inalienable rights in service of our system and "We the People."

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I. INTRODUCTION

IN *Dobbs v. Jackson Women's Health Organization*,¹ the Supreme Court held that “the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.”² Sadly, this result was unsurprising. Since its decision in *Roe v. Wade*,³ on various occasions and over the course of the years, the Court expressed its discomfort with the opinion and its holding.⁴ Although somewhat expected, the *Dobbs* holding still upset the balance of our constitutional system. And if the constitutional shock—“serious jolt to the legal system,”⁵ as Chief Justice Roberts described it—caused by the majority’s opinion had not been enough, Justice Thomas’s concurrence certainly made it even more dramatic.

After agreeing with the Court’s holding that “under our substantive due process precedents, the purported right to abortion is not a form of ‘liberty’ protected by the Due Process Clause,”⁶ Justice Thomas pushed further his view of substantive due process as an “oxymoron . . . ‘lack[ing] any basis in the Constitution’”⁷ because the Due Process Clause “does not secure *any* substantive rights”⁸ as it “at most guarantees *process*.”⁹ Thus, according to Justice Thomas, “in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is ‘demonstrably erroneous.’”¹⁰

When confronting the possibility that some of the rights that the substantive due process jurisprudence had recognized and protected in the past could now remain without any constitutional protection, Justice Thomas mentioned the possibility of looking for that protection in the Privileges or Immunities Clause of the Fourteenth Amendment.¹¹ Yet, voicing his unease with an approach that recognized unenumerated rights in the Constitution, he indicated that “we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause protects *any* rights that are not enumerated in the Constitution and, if so, how to identify those rights.”¹²

1. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

2. *Id.* at 2279.

3. *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.

4. For a comprehensive discussion of the abortion rights jurisprudence and of the abortion rights litigation leading to *Dobbs*, see Simona Grossi, *Roe v. Wade Under Attack: Choosing Procedural Doctrines Over Fundamental Constitutional Rights*, 13 CONLAWNOW 39 (2022).

5. *Dobbs*, 142 S. Ct. at 2316 (Roberts, C.J., concurring).

6. *Id.* at 2300 (Thomas, J., concurring).

7. *Id.* at 2301 (quoting *Johnson v. United States*, 576 U.S. 591, 607–08 (2015)).

8. *Id.* (emphasis in original).

9. *Id.* (emphasis in original).

10. *Id.* (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1421 (2020) (Thomas, J., concurring)).

11. *See id.* at 2302.

12. *Id.* (emphasis in original).

Indeed, a problem that our Court and scholars continue to confront and struggle with is finding the proper interpretive approach to our Constitution—one that is truthful to it without sacrificing the needs of a continuously evolving society.

If the Court decides to follow the approach Justice Thomas proposed in his concurring opinion, under which only enumerated rights would be entitled to constitutional protection, rights like the right to privacy, the right to sexual intimacy, the right to same-sex marriage, and many others would lose constitutional protection, just as happened to the right to have an abortion. But where would the limit be? And what would the consequences be if we read the Constitution by forcing its text and trying to find textual support for rights that apparently have none? Would we disserve the Constitution then? Would the Court, engaging in such a disingenuous exercise, lose its legitimacy towards the public?

Describing substantive due process as a “legal fiction,”¹³ Justice Thomas went on to explain why, in his view, that fiction was “particularly dangerous.”¹⁴ Relying on Justice Scalia’s concurring opinion in *United States v. Carlton*,¹⁵ and on his own opinion in *McDonald v. City of Chicago*,¹⁶ Justice Thomas noted how “substantive due process exalts judges at the expense of the People from whom they derive their authority”¹⁷ because, given that the unenumerated rights are nowhere to be found in the text of the Constitution, “the Court’s approach for identifying those ‘fundamental’ rights ‘unquestionably involves policymaking rather than neutral legal analysis,’”¹⁸ informed by “its own, extraconstitutional value preferences”¹⁹ which “nullifies state laws that do not align with the judicially created guarantees.”²⁰

Justice Thomas found questionable that “the nature of the purported ‘liberty’ supporting the abortion right [had] shifted yet again.”²¹ The *Roe* Court had found a woman’s right to seek an abortion in “the Fourteenth Amendment’s concept of personal liberty” as one including a “right to privacy,”²² and then the *Casey* Court had identified such right in the “liberty” protected by the Fourteenth Amendment, and in “an ethereal ‘right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.’”²³ Thus, essentially, the test that used to protect the right had changed together with “the [changing] Court’s preferred manifestation of ‘liberty.’”²⁴ The fact that the plaintiffs and the

13. *Id.*

14. *Id.*

15. *United States v. Carlton*, 512 U.S. 26, 39–42 (1994) (Scalia, J., concurring).

16. *McDonald v. City of Chicago*, 561 U.S. 742, 805–58 (2010) (Thomas, J., concurring).

17. *Dobbs*, 142 S. Ct. at 2302 (Thomas, J., concurring) (citation omitted).

18. *Id.* (quoting *Carlton*, 512 U.S. at 41–42 (Scalia, J., concurring)).

19. *Id.* (quoting *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 794 (1986) (White, J., dissenting)).

20. *Id.*

21. *Id.*

22. *Id.* (quoting *Roe v. Wade*, 410 U.S. 113, 153 (1973)).

23. *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

24. *Id.*

United States in *Dobbs* were proposing still additional new content to the idea of “liberty”—“bodily integrity, personal autonomy in matters of family, medical care, and faith, and women’s equal citizenship”²⁵—could only further prove that the right sought to be enforced did not exist. “That 50 years have passed since *Roe* and abortion advocates still cannot coherently articulate the right (or rights) at stake,”²⁶ observed Justice Thomas, “proves the obvious: The right to abortion is ultimately a policy goal in desperate search of a constitutional justification,”²⁷ a description that Justice Thomas would most likely apply to all those unenumerated rights that found their source and soul in the concept of “liberty” and substantive due process.

Justice Thomas also observed that substantive due process doctrine and its jurisprudence “distorts other areas of constitutional law,”²⁸ as shown by the different types of scrutiny—strict, middle-level, or rational basis—and the more or less demanding approach which the Court has adopted over the years to assess the constitutional validity of laws that limit the “[Court’s] preferred rights”²⁹ or nonfundamental rights.

And finally, according to Justice Thomas, “substantive due process is often wielded to ‘disastrous ends,’”³⁰ like in *Dred Scott v. Sandford*³¹—in which the Court held that Congress could not, without violating due process of law, prohibit slave owners from carrying their slave property into the federal territories.³² In *Dred Scott*, Justice Thomas noted, “the Court invoked a species of substantive due process to announce that Congress was powerless to emancipate slaves brought into the federal territories.”³³ And even if *Dred Scott* was later overruled, “that overruling was ‘[p]urchased at the price of immeasurable human suffering.’”³⁴

Endorsing a strict textual approach that would only recognize enumerated rights, Justice Thomas indicated that, because there is no right to substantive due process in the Constitution, “in future cases, [the Court] should ‘follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to [procedural] due process when life, liberty, or property is to be taken away.’”³⁵

Justice Thomas’s concurring opinion contradicts itself on its own terms. It is also difficult to square with the foundational principles and ideas that animate our democratic system as expressed by history, tradition, and the jurisprudence embodying and reflecting those two. His approach also

25. *Id.* at 2303 (internal citations and quotations omitted).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1989 (2019) (Thomas, J., concurring)).

31. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

32. *Id.* at 450.

33. *Dobbs*, 142 S. Ct. at 2303.

34. *Id.* (alteration in original) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring)).

35. *Id.* at 2304 (quoting *United States v. Carlton*, 512 U.S. 26, 42 (1994) (Scalia, J., concurring)).

ignores the constitutional achievements of We the People over the years, as well as logic, common sense,³⁶ and the fundamental rights that the Constitution was intended to protect.

Thomas's approach is inherently contradictory, as a textual approach to the Due Process Clause cannot simply ignore its substantive component—life, liberty, or property—a phrase indicative of rights that need to be assigned content and meaning. True, the further one gets from core notions of liberty, the harder it might be to determine how broadly to read the term “liberty.” But if *anything* is within the concept of “liberty,” autonomy over one's own body seems to be squarely within that concept. Indeed, this is the only natural reading of it. Alternatively, supposing for the sake of discussion that there were any ambiguity (which there is not) about whether bodily autonomy were within the word “liberty,” that ambiguity could be cured by the judges through careful judicial decision-making.³⁷ For instance, judges would look at the Constitution as a whole to discern the content of ambiguous words. Thus, they would perhaps look at the Fourth Amendment and conclude that it would make no sense to provide for a right of the people to be “secure in their persons,”³⁸ but then allow the forcing of a man to be sterilized or of a woman to carry a child to term. And then, if this interpretive exercise were to still be considered unsatisfactory, judges could then confirm the content and meaning of “liberty” by considering the Founding Fathers' propensity to follow Locke's ideas of natural rights and by looking at contemporaneous thinking.³⁹ While it is true that it can be difficult to know where one person's liberty ends and another's begins, that tension cannot be relieved by concluding that women have *zero* “liberty” interest in their bodies. Assuming for purposes of discussion that a fetus has sufficient personhood to have a “liberty” interest, the resolution lies in a balancing of the two *competing* liberty interests—that of the fetus and that of the mother. This type of balancing is essential to any due process analysis,⁴⁰ and it is what *Roe v. Wade* and *Casey* attempted to do—conduct a balancing of competing interests. Justice Thomas and the conservative Justices, though, by overruling both cases and rejecting their approach, ignored the fundamentals of due process analysis.

From a principled and structural approach, Justice Thomas's proposed textual reading of the Constitution looking for a specific catalogue of rights to be protected also conflicts with the premises, animating principles, structure, history, and tradition of our constitutional system.⁴¹ Unfortunately

36. See also Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 299–300 (2017).

37. See *infra* Part VI.

38. U.S. CONST. amend. IV.

39. For further analysis on judicial decision-making in the context of substantive due process, see *infra* Part VI.

40. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976) (“In striking the appropriate due process balance the final factor to be assessed is the public interest.”); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (“Against this interest of the State we must *balance* the individual interest sought to be protected by the Fourteenth Amendment.” (emphasis added)).

41. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846–50 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022).

though, Justice Thomas's misunderstanding of the essential premises, matrix, metrics of our constitutional system, and of proper constitutional analysis is not an isolated episode.

Despite the teaching of the Founding Fathers and their wise determination to draft the Constitution in flexible terms that would be receptive to the ever changing needs of the evolving society our Constitution was intended to serve,⁴² the modern Court has increasingly tried to freeze the content of the individual rights to what they were at during specific historical moments, usually moments close in time to the ratification of the Constitution or of the amendment to be interpreted and applied. William Eskridge described this approach as "strikingly outdated,"⁴³ one that imposes "unrealistic burdens on judges, asking them to extract textual meaning that makes sense in the present from historical materials whose sense is often impossible to recreate faithfully."⁴⁴ According to Eskridge, this method of interpretation is fundamentally wrong because a proper interpretation requires a different approach:

The dialect of statutory interpretation is the process of understanding a text created in the past and applying it to a present problem. This process cannot be described simply as the recreation of past events and past expectations, for the 'best' interpretation of a statute is typically one that is most consonant with our current 'web of beliefs' and policies surrounding the statute.⁴⁵

The modern Court, though, has endorsed a historically frozen approach to constitutional rights. It has done so not only with reference to implied fundamental rights,⁴⁶ but also with regard to textual fundamental rights, including the First Amendment freedom of speech,⁴⁷ the Establishment Clause,⁴⁸ the Second Amendment right to keep and bear arms,⁴⁹ the Fourth

42. See, e.g., *M'Culloch v. Maryland*, 17 U.S. 316, 407 (1819).

43. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1482 (1987).

44. *Id.*

45. *Id.* at 1483.

46. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (stating that the Due Process Clause "protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's History and tradition.'" (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977))).

47. See *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 446 (2015) (recognizing "history and tradition of regulation" as relevant when considering the scope of the First Amendment); see also *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1475 (2022) (endorsing the same approach).

48. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) ("[T]his Court has instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings. The line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers." (internal citations and quotations omitted) (incorporating the Court's alterations)).

49. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2127 (2022) ("[T]he government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.").

Amendment right to be free from unreasonable search and seizure,⁵⁰ the Seventh Amendment right to a jury trial,⁵¹ and, at times, the Fourteenth Amendment right to substantive due process.⁵²

A reading of the Constitution locked into history and tradition is simply nonsensical. Take for example the First Amendment. It provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”⁵³ Some Founders were deeply suspicious of “Papists” holding high government office (because Catholics could not be trusted to adhere to their oath of upholding the Constitution if they had superior allegiance to the Pope).⁵⁴ If, historically, there were no Catholics as President or, for that matter, as Supreme Court Justices, then, according to the logic of the current Supreme Court majority, Congress could bar Catholics from being Supreme Court Justices because, even though the plain meaning of freedom of religion is very broad, the actual intent of the (hypocritical) Founding Fathers was very narrow. Would they apply that logic to themselves?

Like Justice Thomas, the conservative Justices inherently skew their “historical” review by ignoring views that were not expressed in any writings that survive. The personal writings of Jefferson, Washington, and others make crystal clear that they were acutely aware of how hypocritical they were being by speaking of “liberty” while owning slaves.⁵⁵ They justified it by convincing themselves that slavery was a necessary evil *during a transition period* for the young nation, but that it would die out on its own over time (and some historians believe that would not have occurred, but

50. *Carpenter v. United States*, 138 S. Ct. 2206, 2213–14 (2018) (“Although no single rubric definitively resolves which expectations of privacy are entitled to protection, the analysis is informed by historical understanding ‘of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.’” (alteration in original) (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925))).

51. *Colgrove v. Battin*, 413 U.S. 149, 155–57 (1973) (“Consistently with the historical objective of the Seventh Amendment, our decisions have defined the jury right preserved in cases covered by the Amendment, as ‘the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure’” (quoting *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935))).

52. Justice Scalia has pointed out that rights can be recognized under substantive due process only if there is a tradition of protecting them. *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989); see also *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); *Washington v. Glucksberg*, 521 U.S. 702, 710–19 (1997) (insisting that substantive due process rights may be protected only if they are enumerated in the text of the Constitution or if there is a tradition of protecting such rights).

53. U.S. CONST. amend. I.

54. See, e.g., Editorial Note, *Religious Toleration and the New York State Constitution*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jay/01-01-02-0216> [<https://perma.cc/PY2D-4B2P>] (discussing John Jay’s “fear of the divided loyalties of Catholics and his perception that the Catholic Clergy’s claim to be able to absolve sins or invalidate oaths of allegiance was a threat to the rule of law”).

55. See, e.g., Letter from Thomas Jefferson to John Holmes, <https://www.loc.gov/exhibits/jefferson/159.html> [<https://perma.cc/LBH7-P35A>] (In discussing the issue of slavery, Thomas Jefferson stated, “Justice is in one scale, and self preservation in the other.”); *Washington’s Changing Views on Slavery*, MOUNT VERNON, <https://www.mountvernon.org/george-washington/slavery/washingtons-changing-views-on-slavery> [<https://perma.cc/PS48-L5WF>] (discussing how Washington acknowledged the liberty issues innate to slavery, but continued to keep them personally for some time).

for the invention of the cotton gin).⁵⁶ They knew well how hypocritical they were being about “liberty” when it came to slaves. That’s probably why liberty was in the Preamble but not the Constitution, until the Fourteenth Amendment.⁵⁷ But if it were not for the happenstance that through their own writings we have some clues about their real thoughts, we would never know.

Most people in the 1700s might have firmly believed, if they really thought about it, that until “quickenings” it was a “woman’s business” to decide what to do about an unwanted pregnancy. But because of societal condemnation, concerns about “loose” women, or any number of other reasons (some very hypocritical), they might not have been willing to express in writing any belief that “liberty” would encompass any right to terminate a pregnancy.

History and tradition—“what history teaches are the traditions from which it developed as well as the traditions from which it broke”⁵⁸—should certainly guide our analysis if we intend to remain truthful to the spirit of the Constitution. However, history and tradition—and, even more so, specific historical understandings and meanings—should not be used as temporal traps. This could have never been the intent of the Framers who were trying to provide a document that would endure for ages to come.⁵⁹ As such, they must have intentionally used words like “liberty” or phrases like “due process” or “Privileges and Immunities,”⁶⁰ “cruel and unusual

56. See Jay Reeves, *Slavery’s Ghost Haunts Cotton Gin Factory’s Transformation*, L.A. TIMES (Nov. 22, 2022, 12:53 PM), <https://www.latimes.com/world-nation/story/2022-11-22/slaverys-ghost-haunts-cotton-gin-factorys-transformation> [https://perma.cc/J9VA-DXMV] (“More than one historian has stated that if it weren’t for the creation of the cotton gin, slavery would have died out.”).

57. See U.S. CONST. pmbl.; U.S. CONST. amend. XIV.

58. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S.Ct. 2228 (2022) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

59. Justice Breyer has noted,

The Framers . . . understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers’ invitation. It has kept true to the Framers’ principles by applying them in new ways, responsive to new societal understandings and conditions. Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment—the guarantees of “liberty” and “equality” for all.

Dobbs, 142 S. Ct. at 2325–26 (Breyer, J., dissenting).

60. U.S. CONST. art. IV, § 2. See also *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823):

The next question is, whether this act infringes that section of the [C]onstitution which declares that “the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states?” The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate.

punishment,”⁶¹ or “equal protection,”⁶² which do not lend themselves to finite lists and catalogues determined by reference to specific and isolated historical moments.⁶³ Text, history, and tradition must be read together with the constitutional achievements of the American people over the course of the years, those preceding as well as those following precise historical moments, through an interpretive synthesis that employs doctrinal matrices able to address and properly answer the new and constantly changing constitutional questions.⁶⁴

Philip Hamburger explained how, “[a]lthough Americans assumed that constitutions and statutes were positive acts of the people, Americans said that they should adopt constitutions and, more generally, civil laws that reflected natural law reasoning about noninjurious behaviour and the preservation of liberty.”⁶⁵ He showed that “natural law was typically not understood to require the adoption of a particular set of civil laws,” but rather was a “very abstract manner of reasoning.”⁶⁶ Thus, the rules adopted to recognize those preexisting rights would hardly lend themselves to catalogues. Also, “though considered immutable, natural law was understood to permit variations in civil laws to accommodate the different circumstances in which such laws would operate.”⁶⁷ That would inevitably require a formula conducive to that type of analysis.

As has been rightly observed,⁶⁸ if history and tradition had been the only interpretive metric of our Constitution, then we would not have had opinions like *Reynolds v. Sims*,⁶⁹ on the guarantee of equality in the political process; *Griswold v. Connecticut*,⁷⁰ recognizing procreative freedom; or *Brown v. Board of Education*,⁷¹ on equal access to education free from discrimination based on race. We could never justify those opinions based solely on the text of the Constitution, and/or upon history and traditions.

61. U.S. CONST. amend. XIII.

62. U.S. CONST. amend. XIV, § 1.

63. See also Ken Levy, *Why the Late Justice Scalia was Wrong: The Fallacies of Constitutional Textualism*, 21 LEWIS & CLARK L. REV. 45, 64–65 (2017). Levy noted,

[E]ven if we granted the Textualist this one extra-textual assumption—that is, that the proper method by which to interpret the Constitution is Textualism—the Textualist would still have to employ other extra-textual assumptions as well. After all, the text of the Constitution must be interpreted. And while the Textualist would like to think that the words bear their meanings “on their face,” they do not. Some of the words that the Constitution uses—words like “right,” “unreasonable,” “probable cause,” “due process,” “excessive,” “cruel and unusual,” and “equal protection”—are normative and open-ended. Their meaning and scope are not at all obvious or apparent.

Id.

64. This is true even when the text of the Constitution seems otherwise straightforward. See *id.* at 64–66.

65. Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 937 (1993).

66. *Id.*

67. *Id.*

68. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 526–27 (1989).

69. *Reynolds v. Sims*, 377 U.S. 533, 586–87 (1964).

70. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

71. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

But “[a]ren’t these decisions great precisely because they appeal to, and help shape, the moral aspirations of Americans of today, regardless of their connection to decisions made the day before yesterday?”⁷² Those decisions tried to harmonize the Constitution’s text and its history and tradition with the “constitutional achievements of the Founding, Reconstruction, and New Deal [eras] into a principled doctrinal whole,”⁷³ effectively capable of serving the evolving needs of We the People.

Justice Thomas’s opinion is also hard to square with logic. The procedural due process component of the Due Process Clause would be meaningless if it were not linked to (because it is triggered by) the infringement of a substantive right that (due) process would aim at remedying. After all, process has never been conceived as an end in itself, but rather as a means to achieving an end, that is, the protection of substantive rights.⁷⁴ This is how logic and common sense, coupled with the text, history, and tradition would demand that we read the Due Process Clause.

In line with the above premises, this Article seeks to show that substantive due process has historically been an integral part of our constitutional structure and rights. This was not only the intent of the Framers, but it was also consistent with the English common law and with State systems that preceded the adoption of the Constitution, as well as with logic and common sense. And the content and meaning of substantive due process developed with the American people, following their constitutional achievements, so that the newly recognized expressions of human liberty as embodied by our society could find protection in the Constitution.

Addressing Justice Thomas’s approach compels us to pause on the nature and spirit of the Constitution, the constitutionally valid interpretive approach which has made the Constitution a living document capable of enduring and serving the needs of the American people, plus the history and tradition revealing the natural-rights soul of substantive due process (which heavily depends on natural lawyering and judging for its protection).

Thus, Part II of this Article sets the stage for our constitutional analysis starting from its Preamble and shows, contrary to Justice Thomas’s view,⁷⁵ how the substantive due process rights of “liberty, life, or property” and their protection were animating ideas behind the adoption of our Constitution.

Addressing Justice Thomas’s discomfort with unenumerated constitutional rights,⁷⁶ Part III shows that substantive due process rights are not the only unenumerated components of our constitutional system. In fact—through proper and needed interpretive syntheses of the various constitutional achievements over the years, commonsense, and logic—other

72. Ackerman, *supra* note 68, at 527.

73. *Id.*

74. See also Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1662 (2019).

75. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring).

76. See *id.* at 2302.

unenumerated doctrines, powers, and rights have been historically recognized as essential components of our structure and rights.

Digging deeper into the history and tradition of substantive due process, Part IV shows that the Framers inherited substantive due process ideas from the State systems and that the States, before then, inherited those ideas from the common law. An analysis of the commentaries and the jurisprudence of substantive due process before ratification and at the time of the founding thus traces the history and tradition of substantive due process. Such history and tradition again negate Justice Thomas's view of substantive due process as lacking any basis in the Constitution.⁷⁷

In order to respond to Justice Thomas's concerns that substantive due process exalts judges at the expense of the people,⁷⁸ Parts V and VI show how the Constitution's language and spirit are such that their proper interpretation and application heavily depend on active judicial decision-making and natural lawyering and judging receptive of the ever-changing needs of an evolving society.⁷⁹ Words like "liberty," and phrases like "due process," "equal protection," "privileges and immunities" — all inspired by natural and fundamental rights of the individuals transcending geographical and temporal borders — cannot be frozen in time and constrained into specific textual, predetermined lists. These words and phrases, with their non-fixed, flexible content, call upon judges and lawyers to draw on their knowledge, wisdom, and understanding of the law and its consequences, to serve justice under the specific circumstances of the case.⁸⁰ Thus, Part V shows the relationship between natural rights and substantive due process, and how natural rights ideas influenced the Framers and the jurisprudence of the Court over the course of the years. Part VI explores the delicate and essential role of judicial decision-making in the enforcement of substantive due process rights. Finally, Part VII offers a few concluding remarks.

II. THE NATURE AND SPIRIT OF OUR CONSTITUTION: ENGAGING IN INTERPRETIVE SYNTHESIS

In *Dobbs v. Jackson Women's Health Organization*, the Court, with Justice Alito writing, decided that because the right to seek an abortion was nowhere to be found in the text of the Constitution, it was beyond constitutional protection.⁸¹ This holding was supported by the idea that, when the Fourteenth Amendment was ratified in 1868, the right to seek an abortion was not part of our constitutionally recognized rights and, thus, not part of our constitutional structure.⁸² Yet, if we were to crystalize the scope of

77. See *id.* at 2301.

78. See *id.* at 2302.

79. For the idea of natural lawyering and natural judging, see Charles E. Clark, *Pleading Under the Federal Rules*, 12 Wyo. L.J. 177, 181–85 (1958). See also Simona Grossi, *The Claim*, 55 HOUS. L. REV. 1, 6 (2017).

80. See Clark, *supra* note 79, at 181–85; Grossi, *supra* note 79, at 6.

81. See *Dobbs*, 142 S. Ct. at 2242.

82. See *id.* at 2252–54.

substantive due process rights at the time of ratification of the Fourteenth Amendment, we would have to conclude that several rights that have been considered an integral part of our system over the years, should not be entitled to constitutional protection. Should we become blind to societal developments? Ignore them for the sake of respecting the text of the Constitution? Wouldn't our interpretation then, by ignoring the spirit of the Constitution, disserve the Constitution or, worse, in fact violate it?⁸³

In *M'Culloch v. Maryland*,⁸⁴ Chief Justice Marshall explained that the Constitution was a living document "intended to endure for ages to come"⁸⁵ and, thus, to also endure the transforming challenges of the future. But the Constitution is not perfect. As Bruce Ackerman put it, it is in fact "imperfect, mistaken, evil in its basic premises and historical development. Never forget that James Madison was a slaveholder as well as a great political thinker. And who can imagine that our Constitution's peaceful coexistence with injustice came to an end with Emancipation?"⁸⁶ Remaining comfortable with the *status quo* would have been, and would still be, a mistake, so "the challenge is to build a constitutional order more just and free than the one we have inherited,"⁸⁷ one that would benefit from the societal development and more sophisticated understanding of human beings, its nature, and the best possible expression of rights and powers that would best serve the individual and the society as a whole. Thus, when interpreting the Constitution, we need to keep in mind that its basic institutional and substantive premises have been transformed since its existence.⁸⁸ After all, the Constitution was never intended as an immutable document, as it in fact endorses the possibility of subsequent revision by the People and makes it constitutional for Americans of later generations to reconsider the questions that the Constitution itself answered.⁸⁹ The fact that the People may constitutionally repeal many fundamental rights, as well as create new rights through the amendment process, shows that it is the People who are the source of the rights and not the other way around.⁹⁰ This would be consistent with the idea of a government and

83. See, e.g., Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 37–38 (2022):

When one settles on 1868 as the relevant year for the purpose of interpreting what the Constitution requires vis-à-vis people with the capacity for pregnancy, one has overdetermined the inquiry. Indeed, a decision to privilege any historical moment prior to the era in which social movements challenged traditional gender norms is a decision to read the Constitution as silent on abortion rights.

See also *id.* at 38–39 ("One could make the same point about the right to be free from coerced sterilization; indeed, when asked the question in 1927, the Court did not believe the Constitution protected such a right.").

84. *M'Culloch v. Maryland*, 17 U.S. 316 (1819).

85. *Id.* at 415.

86. Ackerman, *supra* note 68, at 455.

87. *Id.*

88. *Id.* at 465.

89. *Id.* at 469.

90. *Id.* at 470. See also Levy, *supra* note 63, at 76:

The Constitution has the unique status of being "the supreme Law of the Land." For better or worse, then, we are stuck with it for the long haul, inescapably bound by its edicts into the indefinite future. Given this situation, given

a constitution adopted “in accordance with the natural law principles of equal liberty and self-preservation.”⁹¹ A failure of a constitution to reflect natural law, and thus serve the people it was intended to serve, would be “a ground for altering or abandoning the constitution rather than for making a claim in court.”⁹² And *stare decisis* too, despite being a fundamental doctrine of our system, is “not an inexorable command,”⁹³ and thus it never prevented the Court from overruling interpretations of the Constitution, that is, constitutional law, which had become inconsistent with the constitutional needs and societal achievements. Consider, for instance, *Lawrence v. Texas*⁹⁴—where the Court overruled *Bowers v. Hardwick*⁹⁵ and recognized the right of adults to “engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution”⁹⁶—and *Roper v. Simmons*⁹⁷—where the Court overruled *Stanford v. Kentucky*,⁹⁸ and held that it is unconstitutional to impose capital punishment for crimes committed while under the age of eighteen.⁹⁹ In *Lawrence*, the Court departed from *stare decisis* to be receptive of and in line with its own evolving jurisprudence and international law, including the jurisprudence of the European Court of Human Rights, the European Convention of Human Rights and the United Nations Convention on the Rights of the Child.¹⁰⁰ And in fact, the Court has even pointed out how *stare decisis* “is at its weakest when we interpret the Constitution.”¹⁰¹

This approach accords with logic and common sense.¹⁰² The Founders created the Constitution to serve We the People, not the other way around.

that we cannot simply put the Constitution aside in one way or another when it does not suit our wishes, we should make the best of it. We should make the Constitution the best document it can be. We should continue to mold it into a tool that serves *our* purposes, the purposes of modern-day Americans. In the end, it is we who own the Constitution, not the Constitution which owns us. As President Theodore Roosevelt once said, “The Constitution was made for the people, not the people for the Constitution.”

91. Hamburger, *supra* note 65, at 940.

92. *Id.*

93. Pearson v. Callahan, 555 U.S. 223, 233 (2009) (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)).

94. Lawrence v. Texas, 539 U.S. 558 (2003).

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

96. Lawrence, 539 U.S. at 564, 578.

97. Roper v. Simmons, 543 U.S. 551 (2005).

98. Stanford v. Kentucky, 492 U.S. 361 (1989).

99. Roper, 543 U.S. at 575.

100. Lawrence, 539 U.S. at 573–76.

101. Agostini v. Felton, 521 U.S. 203, 235 (1997).

102. See Campbell, *supra* note 36, at 299–300. Campbell observed,

In response to Anti-Federalist admonitions about the liberty of the *press*, Federalists generally made two related arguments. First, many explained that bills of rights were merely declaratory of pre-existing rights and were therefore legally unnecessary. It was “absurd to construe the silence . . . into a total extinction” of the press right, John Jay insisted, because “silence and blank paper neither grant nor take away any thing.” The Virginia and New York ratification conventions later passed declaratory resolutions making the same point. Indeed, many Federalists thought that fundamental positive rights were recognized in the social contract, obviating any need for subsequent enumeration,

Imagine a modern society trapped in the logic, needs, and desiderata of a (different) society of over two centuries earlier. The Constitution's metric, spirit, and animating goals are the ones we need to preserve, not the means thought to be adopted two centuries ago to pursue them. This approach was advocated by the Founding Fathers and has been endorsed by the Court on several occasions, during the course of the years. The spirit of our dualist democracy—where decisions are made by the American People and by the government¹⁰³—“will die if today's Americans fail to discover in their Constitution a living language for self-government.”¹⁰⁴ To preserve that spirit, though, we need to identify it first, and in that endeavor we should perhaps start from the Preamble to the Constitution.

The Preamble to the Constitution reads:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.¹⁰⁵

John Welch and James Heilpern aptly described the Preamble as a “collective source of unifying objectives for the operation of the American democratic republic,”¹⁰⁶ a “formative statement of guiding principles to be used in interpreting the meaning of the words and structures found in the body of the Constitution,”¹⁰⁷ and the statement of reasons behind the operation of the federal government.¹⁰⁸ Indeed, the Preamble should be viewed as a rule of construction for the entire Constitution,¹⁰⁹ each of its words intended to inform the reading, understanding, and application of the constitutional provisions to follow.

In their study, Welch and Heilpern show how, in the drafting of the Preamble, the Committee on Style was influenced, among various sources,

just as modern legislation hardly needs to specify that it operates only within constitutional boundaries.

Id. (emphasis in original).

103. See Ackerman, *supra* note 68, at 461–71 (describing the dualist, monistic, and foundationalists rights models of democracy).

104. *Id.* at 486 (emphasis omitted).

105. U.S. CONST. pmb. This idea was consistent with the Declaration of Independence from Great Britain, which proclaimed that “all men” are born with certain “unalienable Rights,” including rights to “Life, Liberty, and the pursuit of Happiness.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

106. John W. Welch & James A. Heilpern, *Recovering Our Forgotten Preamble*, 91 S. CAL. L. REV. 1021, 1023 (2018).

107. *Id.*

108. See *id.*

109. The Preamble to the Constitution could be analogized to Rule 1 in the Federal Rules of Civil Procedure, which contains guiding principles of interpretation and application of the rules that would be capable of preserving the animating ideas and foundational principles. See FED. R. CIV. P. 1 (“These rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

by the Declaration of Independence when they decided to begin with the phrase “We the People.”¹¹⁰ As Welch and Heilpern explained,

This idea of popular authority, as opposed to the authority of the colonies or their resultant states, was reinforced in the Declaration by the further assertions that governments must “deriv[e] their . . . powers from the consent of the governed,” and that they must secure “certain unalienable Rights . . . among [which] are life, liberty, and the pursuit of happiness.”¹¹¹

To increase the chances that the Constitution be ratified, the Framers made frequent stylistic references to previously used language.¹¹² To ensure the support from those who had supported the Confederation, the Framers revived three of the Confederation’s objectives, i.e., providing for the common defense, promising the security of liberty, and promoting the general welfare.¹¹³ And further inspiration for the language used in the Preamble must have come from language found in several of the states’ constitutions, including the constitution of the state of Pennsylvania, that at that time spoke of “posterity” and “blessings of liberty.”¹¹⁴ Other state constitutions may have influenced the language of the Preamble too. Those constitutions either used the word “liberty” or phrases eliciting the same idea, but none of them listed the specific rights that would come under that term or idea.¹¹⁵ Indeed, the word “liberty,” very much like the phrase “due process,” is not a concept with fixed meaning that lends itself to a predetermined catalogs;¹¹⁶ its meaning and content is inevitably shaped by the peculiar circumstances

110. U.S. CONST. pmbl.; Welch & Heilpern, *supra* note 106, at 1034. In contrast, the Articles of Confederation began, “we the undersigned Delegates of the States.” ARTICLES OF CONFEDERATION of 1781 pmbl.

111. Welch & Heilpern, *supra* note 106, at 1034 (alterations in original) (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

112. *See id.*

113. *Id.* at 1035.

114. *Id.* at 1036.

115. Welch & Heilpern noted,

[T]he 1780 preamble of the Constitution of Massachusetts . . . featured words and phrases such as “to secure,” “safety and tranquility,” “the blessings of life,” “governed by certain laws for the common good,” . . . and “ordain, and establish, the following Declaration of Rights, and Frame of Government, as the Constitution of the Commonwealth of Massachusetts.”

And the opening section of the freshly redrafted 1786 Vermont Constitution advanced the “indispensable duty to establish such original principles of government as will best promote the general happiness of the people of this State, and their posterity, and provide for future improvements, without partiality,” and in order to accomplish such ends “do . . . ordain, declare and establish” that 1786 revision of the Green Mountain State’s Constitution.

Other earlier colonial and state constitutions and their declarations of rights reveal yet further possible origins for key provisions of the Preamble. In the central states of Pennsylvania, Virginia, and North Carolina, declarations of rights spoke of preserving the “blessings of liberty.” Pennsylvania’s earlier 1776 constitutional preamble spoke of “promot[ing] the general happiness of the people of this State, and their posterity.”

Id. at 1036–37 (alteration in original) (emphasis in original).

116. *See, e.g.,* *Hurtado v. California*, 110 U.S. 516, 546–48 (1884) (Harlan, J., dissenting).

of each case. Both “liberty” and “due process” would find, and did find, their perfect home in our Constitution.

Rejecting the idea of strict adherence to the text and enumerations, the Court talked about “implied power” more in the decades following the ratification of the Constitution.¹¹⁷ In 1819, in *M’Culloch v. Maryland*,¹¹⁸ Chief Justice Marshall expanded and articulated that idea more fully. When answering the question of whether the federal government had the power to incorporate a federal bank even if such power was not expressly mentioned in the Constitution, Chief Justice Marshall explained,

A [C]onstitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a *legal code*, and could scarcely be embraced by the human mind. *It would, probably, never be understood by the public.* Its nature, therefore, requires, that only its *great outlines* should be marked, its *important objects* designated, and the *minor ingredients* which compose those objects, be *deduced from the nature of the objects* themselves. That this idea was entertained by the framers of the American [C]onstitution, is not only to be inferred from the nature of the instrument, but from the language It is also, in some degree, warranted, by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a [C]onstitution we are expounding.¹¹⁹

And he added,

Among the multitude of means to carry into execution the powers expressly given to the national government, congress is to select, from time to time, such as are most fit for the purpose. It would have been impossible to enumerate them all in the [C]onstitution; and a specification of some, omitting others, would have been wholly useless.¹²⁰

Unintended as a legal code, the Constitution does not list every single power (nor every single right). Take, for example, the federal government’s power to punish for the violation of its laws. The Constitution gives the federal government the power to punish on some occasions.¹²¹ While this

117. *See, e.g.*, *United States v. Hudson*, 11 U.S. 32, 34 (1812):

Certain implied powers must necessarily result to our Courts of justice from the *nature* of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are *necessary* to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers.

(emphasis added).

118. *M’Culloch v. Maryland*, 17 U.S. 316 (1819).

119. *Id.* at 407 (emphasis added).

120. *Id.* at 356–57.

121. *See id.* at 416–17 (“Congress is empowered ‘to provide for the punishment of counterfeiting the securities and current coin of the United States,’ and ‘to define and

might suggest that the Constitution did not assign such powers on other occasions, all would “admit, that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of congress.”¹²²

The Constitution contains just an “outline[.]”¹²³ of “the great powers,”¹²⁴ and an intrinsic constitutional logic and pragmatism would compel a reading and understanding of those powers as implying the inferior powers too:

[I]t may with great reason be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution, by withholding the most appropriate means.¹²⁵

This was the most logical and sensible approach to the “great powers on which the welfare of a nation essentially depends”¹²⁶:

It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This

punish piracies and felonies committed on the high seas, and offences against the law of nations.”).

122. *Id.* at 416.

123. *Id.* at 407. See also James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1539–1540 (2011). Ryan notes,

The Constitution, properly understood, is not frozen in time and inextricably linked to the concrete expectations of the framers or ratifiers. But neither does its meaning change. Instead, the open-ended provisions of the Constitution establish general principles—equal protection, prohibitions on cruel and unusual punishment, and freedom of speech, among others. This is what the language means, and that meaning—and the general principles—do not change. What can change, however, is the application of those principles over time, based on technological, economic, and cultural changes.

.....

The expectations of the Founding generations might shed some light on the meaning of the text, but those expectations do not establish the text’s meaning. Indeed, these expectations might be inconsistent with the actual meaning of the words, or they might be the result of time-bound prejudices and beliefs that obscured the proper application of the text . . . [M]oreover, the language used in some constitutional provisions—the ones that generate the most litigation and controversy—establish principles that are meant to be enduring but nonetheless invite different applications in different contexts. To reduce those general principles to the specific expectations of a group of people long dead is to ignore, not respect, the language actually used in the Constitution.

Id.

124. *M’Culloch*, 17 U.S. at 407 (“[W]e find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies.”).

125. *Id.* at 408.

126. *Id.* at 415.

provision is made in a [C]onstitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.¹²⁷

When interpreting the word “necessary” in the Necessary & Proper Clause to determine whether, if not “implicit” in the outline of the great powers enumerated in the Constitution, the power to create a federal bank could still be considered a “necessary and proper” means for the federal government to implement the given great powers, still honoring the idea that the Constitution had to be able to adapt “to the various crises of human affairs” and to “future time[s],”¹²⁸ Chief Justice Marshall refused to adopt an interpretation that would require “an absolute physical necessity,”¹²⁹ because “[t]o have declared, that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of *experience*, to exercise its *reason*, and to accommodate its legislation to circumstances.”¹³⁰

Of course, Justice Marshall was talking about powers, not rights. But the idea that he was expressing transcends the Necessary and Proper Clause he was interpreting and the powers he was referring to. Rather, it involves the proper constitutional interpretive approach, the only one capable of preserving the very structure of our constitutional system and, inevitably, the individual rights as an essential component of it. Over the course of the

127. *Id.*

128. *Id.*

129. *Id.* at 413. The Court adopted a similar approach in *James Everard's Breweries v. Day*, 265 U.S. 545, 558–59 (1924):

In the exercise of such non-enumerated or “implied” powers it has long been settled that Congress is not limited to such measures as are *indispensably necessary* to give effect to its express powers, but in the exercise of its discretion as to the means of carrying them into execution may adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution.

(emphasis added); *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 155 (1919) (“The Constitution did not confer police power upon Congress. Its power to regulate the liquor traffic must therefore be sought for in the implied war powers; that is, the power ‘to make all laws necessary and proper for carrying into execution’ the war powers expressly granted.” (quoting U.S. CONST. art. I, § 8, cl. 18)); *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466, 478 (1939):

And since the power to create the agency includes the implied power to do whatever is needful or appropriate, if not expressly prohibited, to protect the agency, there has been attributed to Congress some scope, the limits of which it is not now necessary to define, for granting or withholding immunity of federal agencies from state taxation.

130. *M’Culloch*, 17 U.S. at 415 (emphasis added). The idea that reason and experience should inform judicial decision-making was advocated, among others, by Judge Clark. *See, e.g.*, Clark, *supra* note 79, at 181–85; *see also* Grossi, *supra* note 79, at 6.

years, the Court adopted a similar approach to (implied) rights precisely because the Constitution is not a building code.¹³¹

In *Hepburn v. Griswold*,¹³² the Court again endorsed a similar interpretive approach to the Constitution:

It is not necessary, however, in order to prove the existence of a particular authority to show a particular and express grant. The design of the Constitution was to establish a government competent to the direction and administration of the affairs of a great nation, and, at the same time, to mark, by sufficiently definite lines, the sphere of its operations. To this end it was needful only to make express grants of general powers, coupled with a further grant of such incidental and auxiliary powers as might be required for the exercise of the powers expressly granted. These powers are necessarily extensive. It has been found, indeed, in the practical administration of the government, that a very large part, if not the largest part, of its functions have been performed in the exercise of powers thus implied.¹³³

And the Court continued to adopt a similar approach over time.¹³⁴

131. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965):

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

Palmer v. Thompson, 403 U.S. 217, 233–34 (1971):

There is, of course, not a word in the Constitution, unlike many modern constitutions, concerning the right of the people to education or to work or to recreation by swimming or otherwise. Those rights, like the right to pure air and pure water, may well be rights “retained by the people” under the Ninth Amendment. May the people vote them down as well as up?

There is a symbiotic relationship between rights and powers, and only that symbiotic relationship can properly honor the spirit of the Constitution. Elsewhere I have written about the relationship between powers and rights. *See, e.g.*, Simona Grossi, *The Waiver of Constitutional Rights*, 60 HOUS. L. REV. 1021 (2023). Here, suffice it to say that the Preamble to the Constitution reminds us that the Constitution, each portion of it and foundational principle, including the separation of powers principle, was intended to have a collective dimension, one projecting the powers, making them functional to and in service of the rights, as the Constitution was intended to protect “We the People of the United States” by, among other things, securing “the Blessings of Liberty to ourselves.” U.S. CONST. pmbl.

132. *Hepburn v. Griswold*, 75 U.S. 603 (1869).

133. *Id.* at 613.

134. *See, e.g.*, *United States v. Hall*, 98 U.S. 343 (1878). There the Court noted, Implied power in Congress to pass laws to define and punish offences is also derived from the constitutional grant to Congress to declare war, to raise and support armies, to provide and maintain a navy, and to make rules for the land and naval forces, and to provide for organizing, arming, and disciplining the militia and for governing such parts of them as may be employed in the public service. Like implied authority is also vested in Congress from the power conferred to exercise exclusive jurisdiction over places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, and from the clause empowering Congress to pass all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or any department or officer thereof.

A proper interpretive approach that would be respectful of the true spirit of the Constitution is one capable of incorporating the constitutional achievements until that moment to push the system forward. Simply considering the constitutional text and the Framers' intent to capture the Constitution's spirit and to interpret it accordingly would not work. As Ackerman pointed out, we should engage in an interpretive exercise of synthesis, which, in addition to the text and the original intent, takes into account the constitutional achievements of the American people over the past centuries.¹³⁵ Eskridge called this approach "dynamic statutory interpretation,"¹³⁶ considering it not only proper, but necessary.¹³⁷

*Brown v. Board of Education*¹³⁸ offers an excellent example of such a constitutionally sound and successful approach. Justice Warren had realized that the problem of racial discrimination in access to public education could not be solved if the Court focused only on the constitutional text and on the ratification debate at the time of the adoption of the Fourteenth Amendment: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its *full development* and its *present place* in American life throughout the Nation."¹³⁹ Justice Warren continued,

Today, education is perhaps the most important function of state and local government. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the

Id. at 346. See also *McGrain v. Daugherty*, 273 U.S. 135, 173 (1927) ("The court recognized distinctly that the House of Representatives has implied power to punish a person not a member for contempt, as was ruled in *Anderson v. Dunn*[, 19 U.S. 204 (1821)]."); *Zivotofsky v. Clinton*, 566 U.S. 189, 191 (2012) (presupposing the power of the United States to recognize foreign sovereigns); *Ping v. United States*, 130 U.S. 581, 609 (1889) (recognizing a national power over immigration as one of the "incident[s] of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the [C]onstitution"); *Legal Tender Cases*, 79 U.S. 457, 553–54 (1870) (recognizing the power of the U.S. government to issue paper money as legal tender).

135. See Ackerman, *supra* note 68, at 476.

136. See Eskridge, *supra* note 43.

137. See *id.* at 1479. Eskridge noted,

Federal judges interpreting the Constitution typically consider not only the constitutional text and its historical background, but also its subsequent interpretational history, related constitutional developments, and current societal facts. Similarly, judges interpreting common law precedents normally consider not only the text of the precedents and their historical context, but also their subsequent history, related legal developments, and current societal context. In light of this, it is odd that many judges and commentators believe judges should consider only the text and historical context when interpreting statutes, the third main source of law. Statutes, however, should—like the Constitution and the common law—be interpreted "dynamically," that is, in light of their present societal, political, and legal context.

Id. Even accepting the traditional assumptions that in a representative democracy, the legislature is the primary lawmaking body and that in many cases statutory language will suffice to resolve the cases presented, "original legislative expectations should not always control statutory meaning. This is especially true when the statute is old and generally phrased and the societal or legal context of the statute has changed in material ways." *Id.* at 1481.

138. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

139. *Id.* at 492–93 (emphasis added); see also *Plessy v. Ferguson*, 163 U.S. 537 (1896).

importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. *Today* it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. *In these days*, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹⁴⁰

Plessy v. Ferguson's separate-but-equal no longer reflected the constitutional and societal developments that had occurred in the system,¹⁴¹ the rejection of *Lochner* being part of it.¹⁴² So *Plessy* could not be followed.

Rejecting an approach that requires strict adherence to the constitutional text and to a precise historical moment is, after all, in line with a rejection of strict adherence to *stare decisis*. If we had to respect *stare decisis* under any circumstances and at all costs, we'd have to continue to follow opinions like *Dred Scott*,¹⁴³ which was overruled by a subsequent constitutional amendment in line with the constitutional achievements following *Dred Scott*.

The opening words of the Fourteenth Amendment begin by reversing *Dred Scott's* state-centered definition of national citizenship, so that Americans would be citizens of the nation first and automatically citizens of any state in which they chose to reside.¹⁴⁴ As Ackerman put it, "The transformations in our higher lawmaking process and higher law substance went hand-in-hand [then]. Both expressed the new nationalistic sense of ourselves as We the People of the *United States* that Americans won in the aftermath of the bloodiest struggle for national self-definition of the nineteenth century."¹⁴⁵

A subsequent constitutional amendment, though, cannot be required every time we need to endorse a constitutional achievement if we do not want to distort the very nature of the Constitution which, as Justice Marshall explained at the time of Founding, was never intended as a legal code.

140. *Brown*, 347 U.S. at 493 (emphasis added).

141. See Ackerman, *supra* note 68, at 535 ("Whatever Justice Brown in *Plessy* might have thought, it was now absurd to dismiss the 'badge of inferiority' imposed by state officials as they shunted [B]lack children to segregated schools as if it were 'solely' the product of a 'choice' by the 'colored race . . . to put [a degrading] construction upon it.'" (alteration in original)).

142. See *id.* at 532–35.

143. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

144. See U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

145. Ackerman, *supra* note 68, at 509–10 (emphasis in original).

III. THE NOT-EXPRESSLY ENUMERATED POWERS, RIGHTS, AND DOCTRINES THAT HAVE BEEN CONSIDERED PART OF OUR CONSTITUTIONAL STRUCTURE AND RIGHTS

In 1803, in *Marbury v. Madison*,¹⁴⁶ the Court held,

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the [C]onstitution; if both the law and the [C]onstitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the [C]onstitution . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.¹⁴⁷

Thus, Justice Marshall announced the Court's (and the federal courts') power of judicial review, which is nowhere to be found in the text of the Constitution nor at common law. In fact, when our Constitution was adopted, courts in England had no power to invalidate an act of parliament,¹⁴⁸ and some had rejected this precise idea.¹⁴⁹ But even if the power of judicial review was unknown to England, because there the Parliament was supreme and common law courts did not have the authority to review the validity of parliamentary acts, the doctrine of judicial review predated the Constitution. Elbridge Gerry noted that judges in some states "set aside laws as being ag[ainst] the [C]onstitution. This was done too with general approbation."¹⁵⁰

Justice Marshall recognized that, although this principle was not written in the Constitution, it had to be part of it for the system to survive:

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society.¹⁵¹

146. *Marbury v. Madison*, 5 U.S. 137 (1803).

147. *Id.* at 177–78.

148. See CHRISTOPHER N. MAY, ALLAN IDES & SIMONA GROSSI, CONSTITUTIONAL LAW: NATIONAL POWER AND FEDERALISM 13 (2022).

149. See *Eakin v. Raub*, 12 Serg. & Rawle 330, 348 (Pa. 1825) (Gibson, J., dissenting):

It is the business of the judiciary to interpret the laws, not scan the authority of the lawgiver; and without the latter, it cannot take cognizance of a collision between a law and the [C]onstitution. So that to affirm that the judiciary has a right to judge of the existence of such collision, is to take for granted the very thing to be proved . . .

150. 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 97 (1911) (citing Elbridge Gerry's belief).

151. *Marbury*, 5 U.S. at 177.

In fact, without such a power, we would have to treat any law or act of legislature or executive inconsistent with the Constitution as enforceable notwithstanding, and this would “reduce[] to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction.”¹⁵² Here, once again, Justice Marshall found the principle of judicial review in a constitutional logic or matrix as it appeared essential to the survival of the system.¹⁵³ He later tried to confirm the existence of such a principle through the structure and the text of the Constitution,¹⁵⁴ but

152. *Id.* at 178.

153. A similar pragmatic interpretive approach driven by logic and necessity, as well as by a profound understanding of and respect for the spirit of the Constitution, was articulated by William Rawle addressing the power of judicial review:

We may then inquire, in what mode or form of language it could have been excluded from the Constitution, and what would have been the effect of such exclusion. Being in itself a necessary incident to a regular and complete government, its existence is implied from the mere fact of creating such a government; if it is intended that it should not be commensurate with all the powers and obligations of the government, or that it should not form any part of it whatever, express terms of qualification or exclusion would certainly be required.

Now it would be difficult to reconcile the minds of freemen, to whom was submitted the consideration of a scheme of government, professing to contain those principles by which a future legislature and executive were to be regulated, to any declarations that a subversion or abandonment of those principles, by either branch, and particularly by the legislature, should be liable to no resistance or control. The judicial power potentially existed before any laws were passed; it could not be without an object; that object is at first the Constitution. As the legislature proceeds to act, the judicial power follows their proceedings. It is a corrective imposed by the Constitution on their acts. The legislature are not deceived or misled. Nothing indicates that they alone are to decide on the constitutionality of their own acts, or that the people who may be injured by such acts, are unprovided with any other defence than open resistance to them. But without an adequate power in the judiciary to the effect required, the people would either be driven to such resistance; obliged to wait till they could obtain redress through the exercise of their elective powers; or be compelled to patient submission.

WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 199–201, 274–80 (2d ed. 1829), https://press-pubs.uchicago.edu/founders/documents/a3_1s35.html [<https://perma.cc/3D9V-UYMQ>].

154. Justice Marshall’s first argument was based on the tripartite structure of the federal government. He suggested that without judicial review, Congress could at pleasure ignore the limits that the Constitution places upon it, “giving to the legislature a practical and real omnipotence.” See *Marbury*, 5 U.S. at 178. But the Constitution defines and limits the powers of all three branches, including the judiciary, and the fact that Congress’s powers are limited by the Constitution does not give the Court any special license to assume the role of constitutional policeman. Also, federal courts do not have any power to monitor the actions of other branches like other branches do not have the power to monitor the actions or decisions of the courts. If this argument were sound, Congress would be entitled to respond to *Marbury* by passing a law overturning the decision because the Court had exceeded its constitutional authority in invalidating an act of the legislature. Justice Marshall’s following four arguments were based on the text of the Constitution. But like the structural argument, these textual arguments were not convincing. He argued that the power of judicial review could be based on Article III, § 2—stating that the federal judicial power, including the Court’s appellate jurisdiction, extends to cases arising under the Constitution—but this language does not prove that federal courts have the power of judicial review. See *id.* at 147. Justice Marshall then pointed to some provisions in the Constitution specifically addressed to courts. For

none of his arguments were particularly persuasive.¹⁵⁵ Justice Marshall's structural and textual reading of the Constitution suggests a plausible argument that each branch of the government would be able to construe the Constitution concerning its own function, and their interpretations would not be subject to review by other branches. But while the structural and textual arguments would not foreclose such interpretation, this interpretation would make the Constitution unenforceable—its requirements and limits turning into mere moral and political norms that each branch could honor or ignore as it pleased. Under this plausible interpretation, if federal officials violated the Constitution, they would only be subject to challenge through a political process, which would ultimately offer little protection for the violation of rights of those in the minority of the electorate. Thus, the power of judicial review was essential to the survival of the system, and the most effective and convincing argument in favor of its existence had to be searched for and found beyond the structure and the text of the Constitution, in the constitutional matrix and logic.

The Federalist Papers—a collection of letters authored by Alexander Hamilton, James Madison, and John Jay to persuade the people of New York to ratify the Constitution, appearing in New York newspapers in 1787 and 1788¹⁵⁶—made clear that at the time of the founding it was generally accepted that federal courts would have the power to declare acts of Congress unconstitutional. Hamilton, for instance, acknowledged that “there is

example, Article III, § 3, Clause 1—stating that no one may be convicted of treason except on the testimony of at least two witnesses. *See id.* at 179. “If the legislature should change that rule,” asked Justice Marshall, “must the constitutional principle yield to the legislative act?” *Id.* But this argument supports only a narrow principle of judicial review because it suggests that each branch of the federal government is charged with interpreting those provisions of the Constitution that are addressed specifically to it. Justice Marshall also claimed that textual support for the power of judicial review could be found in Article VI, Clause 3 of the Constitution, requiring judges to take an oath to support this Constitution. *See id.* at 180. Judges would violate this oath if they were to honor an unconstitutional law. But this argument is likewise unconvincing, as the Constitution imposes the same oath on members of Congress and officers of the executive branch. *See U.S. CONST.* art. IV, cl. 3. Would those have the power of judicial review as well? Finally, Justice Marshall thought textual support for the power of judicial review could be found in the Supremacy Clause of Article VI, Clause 2. *See Marbury*, 5 U.S. at 180. The Supremacy Clause provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .” U.S. CONST. art. IV, cl. 2. This Clause suggests that state judges may decide whether or not a federal statute conflicts with the Constitution. Since the Founders presumably did not intend to give state judges the last word on the validity of federal courts, they must have intended to give the Court, in its appellate capacity, the power to review a state court’s judgment on the constitutionality of federal laws. This argument, though, is based on the assumption that “in Pursuance” authorizes state judges to assess the substantive validity of federal laws, but the language may have meant simply that a federal law is valid as long as it was adopted pursuant to the procedural formalities of Article I. Only then a federal law would be “the supreme Law of the Land,” and neither a state court nor the Supreme Court could refuse to enforce it because they might consider the law unconstitutional.

155. *See* MAY, IDES & GROSSI, *supra* note 148, at 12–17.

156. Despite their unofficial character and their nature of propaganda papers, *The Federalist Papers* are often considered as helpful to shed light into the intent of the Framers. *See, e.g.,* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 139 n.†† (1912); Hines v. Davidowitz, 312 U.S. 52, 62 n.9 (1941); Powell v. McCormack, 395 U.S. 486, 539–40, 540 n.74 (1969); *id.* at 551 n.2 (Douglas, J., dissenting); Nixon v. Adm’r of Gen. Servs., 433 U.S. 425, 442–43 (1977).

not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution [Yet the principle] that wherever there is an evident opposition, the laws out to give place to the Constitution . . . [is] . . . deducible . . . from the general theory of a limited Constitution”¹⁵⁷

Thus, the power of judicial review, even if not in the text of the Constitution, was considered an essential component of the constitutional system. In fact, it would be hard to conceive of a system without courts with the power to interpret and enforce the Constitution against any act—of the legislature or of the executive—that would conflict with it. As Justice Marshall emphasized in *M’Culloch v. Maryland*, the Constitution was not intended to be a code.¹⁵⁸ History was intended to inform its interpretation and application to the constantly evolving circumstances. It was the “historical objectives” more than the history per se that was supposed to be used as an interpretive factor.

Particularly revealing in this respect is the Court’s opinion in *Colgrove v. Battin*¹⁵⁹ on the Seventh Amendment right to a jury trial. There the Court noted,

Consistently with the historical objective of the Seventh Amendment, our decisions have defined the jury right preserved in cases covered by the Amendment, as the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure The Amendment, therefore, does not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, and [n]ew devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice¹⁶⁰

After all, when requiring strict adherence to a specific historical moment, the Court found that requirement and different approach justified on the basis of the text of the Constitution.

That a precise moment in (past) history could not possibly freeze the content of the rights sought to be protected by the Constitution was also confirmed more recently by the Court, when addressing the scope of the

157. THE FEDERALIST NO. 81, at 120 (Alexander Hamilton) (emphasis in original). And in another paper, Hamilton noted that the life tenure given to federal judges would enhance their ability to engage in judicial review:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex-post-facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

THE FEDERALIST NO. 78, at 100 (Alexander Hamilton).

158. See *M’Culloch v. Maryland*, 17 U.S. 316, 407 (1819).

159. *Colgrove v. Battin*, 413 U.S. 149 (1973).

160. *Id.* at 156–57 (alteration and omissions in original) (internal citations and quotations omitted).

Second Amendment right to keep and bear arms in *New York State Rifle & Pistol Association v. Bruen*.¹⁶¹ There, Justice Thomas noted,

Much like we use history to determine which modern “arms” are protected by the Second Amendment, so too does history *guide* our consideration of modern regulations that were *unimaginable* at the founding. When confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge. Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are “relevantly similar.” And because “[e]verything is similar in infinite ways to everything else,” one needs “some metric enabling the analogizer to assess which similarities are important and which are not.”¹⁶²

To find that “metric,” Justice Thomas looked for the “‘central component of the Second Amendment right’”¹⁶³ in the jurisprudence interpreting the Second Amendment, which had settled on the metric of “‘individual self-defense.’”¹⁶⁴ And with that metric, one could look for an historical *analogue* rather than an historical *twin*, which might end up being actually inconsistent with the Constitution as applied to modern facts and circumstances:

To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory black check. On the other hand, courts should not “uphold every modern law that remotely resembles a historical analogue,” because doing so “risk[s] endorsing outliers that our ancestors would never have accepted.” On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.¹⁶⁵

Thus, “whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are ‘central’ considerations when engaging in an analogical inquiry.”¹⁶⁶

A similarly necessary, not-strictly-textual approach the Court has taken with reference to foreign affairs powers is found in *United States*

161. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

162. *Id.* at 2132 (alteration in original) (emphasis added) (internal citations omitted). It seems odd to suppose that the Founders’ intent was that their broad concepts like “liberty” would apply exactly the same way in their own day as to future generations, despite a growing and changing nation. After all, it is very different to bear firearms on the frontier and when fighting the British or Indians than it would be in downtown Philadelphia in the twenty-first century.

163. *Id.* at 2133 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010)).

164. *Id.* (quoting *McDonald*, 561 U.S. at 767).

165. *Id.* (alteration in original) (internal citation omitted).

166. *Id.* (quoting *McDonald*, 561 U.S. at 767).

v. *Curtis-Wright Export Corporation*.¹⁶⁷ When commenting on the broad nature of the foreign affairs powers, the Court noted,

The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, *is categorically true only in respect of our internal affairs*. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. That this doctrine applies only to powers which the states had is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source.¹⁶⁸

Thus, the sources of the federal government's domestic and foreign powers were different, with the latter deriving not from the constitutional text, but from nationhood and sovereignty.¹⁶⁹ And more recently, in *Zivotofsky v. Kerry*,¹⁷⁰ the Court noted, "In a world that is ever more compressed and interdependent, it is *essential* the congressional role in foreign affairs be

167. *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304 (1936).

168. *Id.* at 315–16 (emphasis added) (internal citation omitted).

169. *See id.* at 318. The Court noted,

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as *necessary concomitants of nationality*. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens; and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. The power to acquire territory by discovery and occupation, the power to expel undesirable aliens, the power to make such international agreements as do not constitute treaties in the constitutional sense, none of which is expressly affirmed by the Constitution, nevertheless exist as *inherently inseparable from the conception of nationality*. This the court recognized, and in each of the cases cited found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations.

Id. (emphasis added) (internal citations omitted). *See also* *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003):

Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the "executive Power" vested in Article II of the Constitution has recognized the President's "vast share of responsibility for the conduct of our foreign relations." While Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers, in foreign affairs the President has a degree of independent authority to act.

(quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–611 (1952) (Frankfurter, J., concurring)).

170. *Zivotofsky v. Kerry*, 576 U.S. 1 (2015).

understood and respected.”¹⁷¹ This approach has been endorsed by lower courts too.¹⁷² And the same approach—looking beyond the constitutional text—applies to an analysis of constitutional rights.

The U.S. Bill of Rights was added to the Constitution by amendment as a condition for that document’s ratification.¹⁷³ Many feared that under the new Constitution, the federal government might “deprive them of the liberty for which they valiantly fought and honorably bled,”¹⁷⁴ and demanded from the federal government the same protections “which they have long been accustomed.”¹⁷⁵ And when confronted with the fear that the rights enumerated in the Bill of Rights might “disparage” those rights not explicitly mentioned,¹⁷⁶ James Madison responded with an idea that was later incorporated into the Ninth Amendment to the U.S. Constitution, i.e., that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹⁷⁷

The Ninth Amendment confirms that the Constitution was not intended to be a statutory code. True, the Ninth Amendment was added almost as a rule of construction to the Bill of Rights to indicate that people’s federal rights were not intended to be limited to the ones expressly mentioned in the Bill of Rights.¹⁷⁸ On the other hand, the Fourteenth Amendment was adopted to recognize against the states individual rights that would be

171. *Id.* at 21 (emphasis added).

172. *See, e.g.,* *United States v. Bollinger*, 798 F.3d 201, 213 (4th Cir. 2015) (“Thus, there is good reason to expansively construe Congress’s legislative authority when it comes to matters that implicate the federal government’s regulatory power over foreign commerce.”); *United States v. Bin Laden*, 126 F. Supp. 2d 264, 273 (S.D.N.Y. 2000):

[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a *gloss* on “Executive Power” vested in the President by § 1 of Art. II.

(citing *Youngstown*, 343 U.S. at 610) (emphasis added) (alteration in original); *United States v. U.S. Dist. Ct. for E. Dist. of Mich.*, 407 U.S. 297, 321–22 (1972) (holding that there is no warrant exception for domestic security surveillances but “express[ing] no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents”). Also, former Deputy Attorney General Jamie Gorelick testified before the Senate Intelligence Committee on July 14, 1994, that “[t]he Department of Justice believes, and the case law supports, that the president has inherent authority to conduct warrantless physical searches for foreign intelligence purposes . . . and that the President may, as has been done, delegate this authority to the Attorney General.” Byron York, *Clinton Claimed Authority to Order No-Warrant Searches*, NAT’L REV. ONLINE (Dec. 20, 2005, 2:46 PM), <https://www.nationalreview.com/2005/12/clinton-claimed-authority-order-no-warrant-searches-byron-york> [https://perma.cc/WZ94-42AB].

173. *Cf.* U.S. CONST. Bill of Rights pmbl. (as proposed by U.S. Congress to the States).

174. *See* 1 ANNALS OF CONG. 449 (1789) (James Madison’s speech to Congress proposing a Bill of Rights).

175. *Id.* at 450.

176. *See id.* at 456.

177. U.S. CONST. amend. IX; *see generally* DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* (2007); CHARLES O. PRINCE, *THE PURPOSE OF THE NINTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: PROTECTING UNENUMERATED RIGHTS* (2005); RANDY BARNETT, *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* (1991).

178. *See* U.S. CONST. amend. IX.

enforceable by the federal government.¹⁷⁹ But the Ninth Amendment, and the ideas behind it, might have influenced the drafting of the Fourteenth Amendment. The drafters of the Fourteenth Amendment might have responded to the fears that led to the adoption of the Ninth Amendment, in that the Fourteenth Amendment’s “life, liberty, or property” formula was intentionally not specific to make sure that it would remain open and receptive to rights that, despite not being in the text of the Constitution or even not known to the people at that time, might still become so, and thus relevant and necessary to that liberty and pursuit of happiness of We the People that the Constitution was intended to serve and guarantee.

Thus, the interpretation of the Fourteenth Amendment I offer in this Article also reflects and respects the idea behind the Ninth Amendment and the fears that the Framers had about enumerating rights. An enumeration would betray the Constitution, disserve the people, and disserve the system.¹⁸⁰

IV. ZOOMING IN ON SUBSTANTIVE DUE PROCESS: BEFORE RATIFICATION, AT THE TIME OF FOUNDING, AND BEYOND

The Founding Fathers were influenced by contemporaneous political writings and European philosophers, including John Locke.¹⁸¹ As John Adams put it, “[M]any of our rights are inherent and essential, agreed on as maxims, and established as preliminaries, even before a parliament existed.”¹⁸² When the North American States formed their

179. See U.S. CONST. amend. XIV.

180. See also *Griswold v. Connecticut*, 381 U.S. 479, 492 (1965) (Goldberg, J., concurring) (“[T]he Ninth Amendment shows a belief of the Constitution’s authors that *fundamental rights* exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.” (emphasis added)).

181. See DAVID McCULLOUGH, JOHN ADAMS 121 (2002) (observing how Jefferson borrowed from his previous writings, the writings of George Mason and Pennsylvania delegate James Wilson, and “drawing on long familiarity with the seminal works of the English and Scottish writers John Locke, David Hume, Francis Hutcheson, and Henry St. John Bollingbroke, or such English poet as Defoe”); see also PAULINE MAIER, AMERICAN SCRIPTURE: MAKING OF THE DECLARATION OF INDEPENDENCE 104 (1998) (noting evidence that Jefferson hastily produced a draft of the Declaration in a day or two and adapted two texts to complete a draft in this short time-frame: the preamble to the Virginia Constitution, “which was itself based on the English Declaration of Rights,” and a preliminary version of the Virginia Declaration of Rights that had been drafted by George Mason); *id.* at 136 (noting that the Declaration’s reference to “the laws of nature and nature’s god” parallels the laws applicable to “individuals in a state of nature, a point, incidentally, that John Locke made explicitly in his *Second Treatise of Government*”); CARL BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 79 (1922) (noting that with respect to the political “philosophy of Nature” and natural rights referenced in the Declaration that the “lineage is direct: Jefferson copied Locke”); see also ALLEN JAYNE, JEFFERSON’S DECLARATION OF INDEPENDENCE: ORIGINS, PHILOSOPHY, AND THEOLOGY 44 (1988) (noting “the similarity of many of the provisions of [Locke’s] *Second Treatise* with those of the Declaration, which clearly shows that Jefferson not only had extensive knowledge of Locke’s work but put it to use in drafting the Declaration”).

182. John Adams, *Dissertation on the Canon and Feudal Law*, in THE WORKS OF JOHN ADAMS 463 (Charles Frances Adams ed., 1851); see also Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 231 (1983) (noting how the colonists premised their fight for independence on the natural law-social contract theory articulated by writers like John Locke, and how “[u]nder this natural law theory, individuals have a right

own independent governments, most included in their new written constitutions detailed declarations of rights, listing some of the “inherent rights,”¹⁸³ but these declarations did not represent an innovation as they merely followed the example of documents such as the Pennsylvania Charter of Privileges of 1701 or the Massachusetts Body of Liberties of 1641.¹⁸⁴ This language was then going to be adopted, among others, by the United States Bill of Rights of 1791 and finally by the Universal Declaration of Human Rights of December 10, 1948.¹⁸⁵

Some scholars argued that before 1789, courts had already developed a body of substantive due process law by which they guaranteed that unenumerated rights deemed fundamental were protected against infringement by the state or federal governments.¹⁸⁶ Thus, the Founding Fathers seemed to have intended the Constitution to protect unenumerated rights. In his study on natural rights and the First Amendment, Jud Campbell noted,

In response to Anti-Federalist admonitions about the liberty of the press, Federalists generally made two related arguments. First, many explained that bills of rights were merely declaratory of *pre-existing rights* and were therefore legally unnecessary. It was “absurd to construe the silence . . . into a total extinction” of the press right, John Jay insisted, because “silence and blank paper neither grant nor take away any thing.” The Virginia and New York ratification conventions later passed declaratory resolutions making the same point. Indeed, many Federalists thought that fundamental positive rights were recognized in the social contract, *obviating any need for subsequent enumeration*, just as modern legislation hardly needs to specify that it operates only within constitutional boundaries.¹⁸⁷

Scholars also argued that “antebellum courts repeatedly affirmed that legislative power was inherently limited by the ends for which legitimate governments are established,”¹⁸⁸ and that American courts began applying the doctrine of substantive due process at some point after the adoption of the Constitution¹⁸⁹ and before the adoption of the Fourteenth

to be governed by representatives whom they have chosen” and by a “government . . . as a creature of the people and instituted solely for their benefit, [having] the concomitant or derivative *right to govern*” (emphasis in original)).

183. For a comprehensive description and analysis, see M.N.S. Sellers, *Universal Human Rights in the Law of the United States*, 58 AM. J. COMP. L. 533, 534 (2010).

184. *See id.*

185. For a collection of the texts adopting this inherent/inalienable rights language, see FREDERIK MARI VAN BARON ASBECK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND ITS PREDECESSORS, 1679–1948* (1949); *see also infra* Part V.

186. *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 454–70 (2010).

187. Campbell, *supra* note 36, at 299–300 (emphasis added).

188. Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM & MARY L. REV. 1599, 1636 (2019). Barnett and Bernick point out how “implementing the Fourteenth Amendment does require a conception of the legitimate ends of government that is consistent with the original function—the spirit—of the Due Process of Law Clause in the Fourteenth Amendment; and it requires a doctrinal approach to give the text legal effect today.” *Id.* at 1638.

189. *See* David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 MERCER L. REV. 563, 585 (2009).

Amendment.¹⁹⁰ However, others rejected this thesis¹⁹¹ and argued that it was only after the adoption of the Fourteenth Amendment (in the 1870s) that courts began imposing substantive due process limitations on state legislatures.¹⁹² Other scholars still argued that the idea of substantive due process existed at the time the Fourteenth Amendment was ratified, as Justice Thomas Cooley's 1868 treatise provided the seeds for the police-powers limitations on state governments.¹⁹³ Before then, the courts simply talked about "liberty."

In his dissent to *Hurtado v. California*,¹⁹⁴ Justice Harlan noted that when common law rulings regarding the protection of life, liberty, and property were incorporated into the earlier constitutions of the original states, the above declarations were "emphasized in the most imposing manner"¹⁹⁵:

Massachusetts in its constitution of 1780, and New Hampshire in 1784, declared in the same language that "no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, *liberty*, or estate, but by the judgment of his peers or the law of the land;" Maryland and North Carolina in 1776 and South Carolina in 1778, that "no freeman of this State be taken or imprisoned, or dis-seized of his freehold, *liberties*, or privileges, outlawed, exiled, or in any manner destroyed or deprived of his life, *liberty*, or property, but by the judgment of his peers or the law of the land;" Virginia, in 1776, that "no man be deprived of his liberty except by the law of the land or the

190. See Bernard H. Siegan, *Rehabilitating Lochner*, 22 SAN DIEGO L. REV. 453, 488 (1985); Williams, *supra* note 186, at 454–70; see also DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 9 (2011) ("[T]he idea that the guarantee of 'due process of law' regulates the substance of legislation . . . arose from the long-standing Anglo American principle that the government has inherently limited powers" and from "long-standing American intellectual traditions that held that the government had no authority to enforce arbitrary 'class legislation' or to violate the fundamental natural rights of the American people.").

191. See Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 819–20, 825–52 (2020):

[C]loser examination of the cases [cited by scholars] reveals that antebellum courts applied a series of sometimes overlapping but distinct doctrines involving the police powers of legislative bodies

First, state courts routinely invalidated *municipal* bylaws for being "unreasonable" or in excess of the police powers to regulate for the health, safety, and morals of the local citizenry

Second, federal courts sometimes invalidated state legislative acts affecting interstate or foreign commerce if they were not genuinely for a police-power purpose and thereby impermissibly interfered with such commerce

Third, courts invalidated both state and municipal acts that impaired the obligations of contract.

(emphasis in original).

192. See *id.* at 820, 865–80.

193. See generally THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (Little, Brown & Company eds., 2d ed. 1871); see also James W. Ely Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 342–44 (1999); Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J.L. & LIBERTY 115, 154 (2010); Williams, *supra* note 186, at 493–94.

194. *Hurtado v. California*, 110 U.S. 516 (1884).

195. *Id.* at 540 (Harlan, J., dissenting).

judgment of his peers;” and Delaware, in 1792, that no person “shall be deprived of life, *liberty*, or property, unless by the judgment of his peers or the law of the land.” In the ordinance of 1789 for the government of the Northwestern Territory, it was made one of the articles of compact between the original States and the people and States to be formed out of that Territory—“to remain forever unalterable unless by common consent”—that “no man shall be deprived of his life, *liberty*, or property, but by the judgment of his peers or the law of the land.” These fundamental doctrines were subsequently incorporated into the Constitution of the United States.¹⁹⁶

Over the years, the Court continued to talk about “liberty” and to articulate that idea and concept as it had expressed itself through the contemporary society. In *Lochner v. New York*,¹⁹⁷ the Court held that the freedom of contract was a fundamental right under the liberty of the Due Process Clause.¹⁹⁸ In *Meyer v. Nebraska*,¹⁹⁹ the Court held that liberty denotes the following:

[N]ot 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.²⁰⁰

Then, in *Pierce v. Society of Sisters*,²⁰¹ on substantive due process grounds, the Court declared unconstitutional an Oregon law prohibiting parochial school education.²⁰² In *Loving v. Virginia*,²⁰³ the Court held that the right to marry is a fundamental right protected under the liberty of the Due Process Clause.²⁰⁴ Again, in *Zablocki v. Redhail*,²⁰⁵ citing *Griswold v. Connecticut*,²⁰⁶ the Court noted that “the right to marry is part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause.”²⁰⁷ And in *Roe v. Wade*,²⁰⁸ the Court held that the right to privacy was safeguarded through the Due Process Clause of the Fourteenth Amendment

196. *Id.* at 540–41 (emphasis added).

197. *Lochner v. New York*, 198 U.S. 45 (1905), *overruled in part* by *Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421 (1952), and *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

198. *Id.* at 58 (holding that “the limit of the police power has been reached and passed in this case,” as there is “no reasonable foundation for holding this [law] to be necessary . . . to safeguard the public health or the health of the individuals who are following the trade of a baker”).

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

200. *Id.* at 399.

201. *Pierce v. Soc’y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).

202. *See id.* at 572–74.

203. *Loving v. Virginia*, 388 U.S. 1 (1967).

204. *Id.* at 12.

205. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

206. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

207. *Zablocki*, 434 U.S. at 384 (citing *Griswold*, 381 U.S. at 486).

208. *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

or the Ninth Amendment, and it included the right of a woman to have an abortion.²⁰⁹ Thus, the soul of substantive due process can also be traced to natural rights.

V. NATURAL RIGHTS AND FUNDAMENTAL RIGHTS OF THE INDIVIDUAL IN A DEMOCRATIC SYSTEM DRIVEN BY A SPECIAL KIND OF CITIZENRY

In his study on natural rights and the Constitution, Hamburger noted,

In the 1780s and early 1790s, Americans occasionally specified which of their rights were natural rights and which were not, and they tended to agree in their characterizations. On the assumption that the state of nature was a condition in which all humans were equally free from subjugation to one another—in which individuals had no common superior—Americans understood natural liberty to be the freedom of individuals in the state of nature. That is, they understood natural liberty to be the freedom an individual could enjoy as a human in the absence of government. A natural right was simply a portion of this undifferentiated natural liberty. Accordingly, Americans often broadly categorized natural rights as consisting of life, liberty and property, or life, liberty and the pursuit of happiness.²¹⁰

Natural rights included the free exercise of religion, the freedom of conscience, the freedom of speech and press, the right of self-defense, the right to bear arms, and the right to assemble—all of which were enumerated in the Bills of Rights.²¹¹ But the right to one's reputation was also considered a natural right,²¹² and the Constitution protected unenumerated natural rights to the extent it did not grant power over those rights to the federal government.²¹³ Also,

Although Americans assumed that the people adopted a constitution and formed government in accordance with natural law principles of equal liberty and self-preservation, Americans understood that the people might adopt a constitution that did not adequately preserve their natural liberty or that otherwise failed to conform to the implications of natural law. In analyzing this type of failure, however, Americans tended to say that the people had a right and a responsibility to alter their constitution, either by amendment or, if necessary, by revolution. Far from being a form of constitutional law, natural law typically was assumed to be the reasoning on the basis of which individuals adopted constitutions and a means by which the people could measure the adequacy of their constitutions. A failure of a constitution

209. *See id.* at 153:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . , or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

210. Hamburger, *supra* note 65, at 918–19.

211. *Id.* at 919–20.

212. *Id.* at 920.

213. *Id.* at 954 n.129.

to reflect natural law was a ground for altering or abandoning the constitution rather than for making a claim in court.²¹⁴

According to Hamburger, the U.S. Constitution protected unenumerated natural rights only to the extent it did not grant power over those rights to the federal government.²¹⁵ “Thus, if, and only if, a constitution reserved a particular natural right from the government’s power, natural law suggested the degree to which the constitution protected that right, not because natural law was incorporated into the constitution, but because natural rights were understood to be subject to natural law.”²¹⁶

As we saw in Part II above, the language in the Declaration of Independence—as well as in the Constitution’s Preamble—refers to the inalienable, natural rights to life, liberty, and the pursuit of happiness that belong to the individual.²¹⁷ Natural rights and universal human rights provide theoretical foundations and legitimacy to any government. Thus, these fundamental, inalienable rights, which the Universal Declaration of Human Rights indicated needed to be “protected by the rule of law”²¹⁸ because “[a]ll human beings are born free and equal in dignity and rights,”²¹⁹ provide the basis of our government. This is the case to such an extent that the U.S. government and courts consider those rights, as recognized by international covenants and treaties, as mere restatements of existing U.S. laws and established constitutional guarantees.²²⁰

At the time of the Founding, the power of the federal government to protect those rights was contested, as this power was thought to belong to the states only.²²¹ When James Madison proposed the Bill of Rights to the First Congress, he observed that “there is more danger of those powers being abused by the State Governments than by the Government of the

214. *Id.* at 940.

215. *Id.* at 954 n.129.

216. *Id.* at 954.

217. See U.S. CONST. pmbl.; THE DECLARATION OF INDEPENDENCE para 2 (U.S. 1776); see also *supra* Part II. To explore the idea and content of rights at the time of independence, see generally THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND (Barry A. Shain ed., 2007); T.H. BREEN, THE LOCKEAN MOMENT: THE LANGUAGE OF RIGHTS ON THE EVE OF THE AMERICAN REVOLUTION (2001); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION (1980); MORTON GABRIEL WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION (1978); Hamburger, *supra* note 65; William F. Dana, *The Declaration of Independence*, 13 HARV. L. REV. 319 (1900).

218. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, pmbl. (Dec. 10, 1948).

219. *Id.* at art. 1.

220. See, e.g., Message from Jimmy Carter, President of the United States, to the United States Senate (Feb. 23, 1978) (archived by The American Presidency Project), <https://www.presidency.ucsb.edu/documents/human-rights-treaties-message-the-senate> [https://perma.cc/SVW6-4QWF] (concerning The International Convention on the Elimination of All Forms of Racial Discrimination, signed on behalf of the United States on September 28, 1966; The International Covenant on Economic, Social and Cultural Rights, signed on behalf of the United States on October 5, 1977; The International Covenant on Civil and Political Rights, signed on behalf of the United States on October 5, 1977; and The American Convention on Human Rights, signed on behalf of the United States on June 1, 1977).

221. See Sellers, *supra* note 183, at 537–40.

United States.”²²² This intuition became clear to “[t]he United States [when it] discovered in the eighteenth and nineteenth centuries . . . [that] local (‘national’ or ‘sovereign’) enforcement of the ‘great rights of mankind’ fails in the face of petty prejudice and the parochial self-interest of local ethnic, religious, and political factions.”²²³ The American people responded with the Civil War and the adoption of the Thirteenth and Fifteenth Amendments, as well as the Fourteenth Amendment which overruled *Dred Scott v. Sandford*,²²⁴ which held that the Constitution did not extend American citizenship to Black people of African descent,²²⁵ and *Barron v. City of Baltimore*,²²⁶ where the Court held that the Bill of Rights did not apply to state governments.²²⁷ But the American populace also gave Congress the power to enforce the provisions of the Fourteenth Amendment against the states “by appropriate legislation.”²²⁸ In fact, until then, American judges were not disagreeing about the existence of natural and inalienable rights, but only about whether the federal government had the power to enforce those rights against the states.

Dissenting in *Slaughter-House Cases*,²²⁹ Justice Field observed,

The first clause of fourteenth amendment . . . recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the [C]onstitution or laws of any State or the condition of their ancestry. A citizen of a State is now only a citizen of the United States residing in that State. The *fundamental rights*, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State. The exercise of these rights and privileges, and the degree of enjoyment received from such exercise, are always more or less affected by the condition and the local institutions of the State, or city, or town where he resides. They are thus affected in a State by the wisdom of its laws, the ability of its officers, the efficiency of its magistrates, the education and morals of its people, and by many other considerations. This is a result which follows from the constitution of society, and can never be avoided, but in no other way can they be affected by the action of the State, or by the residence of the citizen therein. *They do not derive their existence from its legislation, and cannot be destroyed by its power.*²³⁰

222. See ANNALS OF CONG., supra note 174, at 458 (James Madison’s speech to the Congress proposing a Bill of Rights).

223. Sellers, supra note 183, at 538.

224. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

225. *Id.* at 393.

226. *Barron v. City of Baltimore*, 32 U.S. 243 (1833).

227. See *id.* at 251.

228. See U.S. CONST. amend. XIV, § 5.

229. *Slaughter-House Cases*, 83 U.S. 36 (1872).

230. *Id.* at 95–96 (Field, J., dissenting) (emphasis added).

The Constitution had recognized those inalienable rights that existed before its adoption, and which “belong to the citizens of all free governments.”²³¹ Further, if the Fourteenth Amendment

refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence

. . . .

In *Corfield v. Coryell*, Mr. Justice Washington said he had “no hesitation in confining these expressions to those privileges and immunities which were, in their nature, fundamental; which belong of right to citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose the Union, from the time of their becoming free, independent, and sovereign;” and, in considering what those fundamental privileges were, he said that perhaps it would be more tedious than difficult to enumerate them, but that they might be “all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole.” This appears to me to be a sound construction of the clause in question.²³²

The Fourteenth Amendment “was intended to give practical effect to the [D]eclaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes.”²³³

In *Hurtado v. California*,²³⁴ the Supreme Court endorsed the aforementioned approach. Justice Harlan, dissenting, noted how “[t]he phrase ‘due process of law’ [was] not new in the constitutional history of this country or of England,” as it “antedates the establishment of our institutions.”²³⁵ He also noted,

Those who had been driven from the mother country by oppression and persecution brought with them, as their inheritance, which no government could rightfully impair or destroy, certain guaranties of the rights of life, liberty, and property which had long been deemed *fundamental* in Anglo-Saxon institutions. In the congress of the colonies, held in New York in 1765, it was declared that the colonists were entitled to all the *essential* rights, liberties, privileges, and immunities confirmed by *Magna Charta* to the subjects of Great Britain. It was under the consciousness . . . of the full possession of the rights, liberties, and immunities of British subjects that the colonists, in almost all the early legislation of their respective assemblies, insisted upon a declaratory act, acknowledging and confirming them On the fourteenth of October, 1774, the delegates from the several colonies and plantations,

231. *Id.* at 97 (emphasis omitted).

232. *Id.* (citing *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823)).

233. *Id.* at 105.

234. *Hurtado v. California*, 110 U.S. 516 (1884).

235. *Id.* at 539 (Harlan, J., dissenting).

in congress assembled, made a formal declaration of the rights to which their people were entitled, by the *immutable laws of nature*, the principles of the English constitution, and the several charters or compacts under which the colonial governments were organized.²³⁶

Justice Harlan then added,

I omit further citations of authorities, which are numerous, to prove that, according to the settled usages and modes of proceeding existing under the common and statute law of England at the settlement of this country, information in capital cases was not consistent with the “law of the land” or with due process of law. Such was the understanding of the patriotic men who established free institutions upon this continent. Almost the identical words of *Magna Charta* were incorporated into most of the state constitutions before the adoption of our national constitution. When they declared, in substance, that no person shall be deprived of life, liberty, or property except by the judgment of his peers or the law of the land, they intended to assert his right to the same guaranties that were given in the mother country by the great charter and the laws passed in furtherance of its fundamental principles.

My brethren concede that there are principles of liberty and justice lying at the foundation of our civil and political institutions which no state can violate consistently with that due process of law required by the [F]ourteenth [A]mendment in proceedings involving life, liberty, or property. Some of these principles are enumerated in the opinion of the [C]ourt.²³⁷

In *Downes v. Bidwell*,²³⁸ the Court noted,

We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one’s own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one’s own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage, and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the states to be unnecessary to the proper protection of individuals.²³⁹

236. *Id.* at 539–40 (emphasis added) (internal citations and quotations omitted).

237. *Id.* at 545–46.

238. *Downes v. Bidwell*, 182 U.S. 244 (1901).

239. *Id.* at 282–83 (internal citation omitted).

In *Madden v. Kentucky*,²⁴⁰ the Court emphasized that the Privileges and Immunities Clause “protects all citizens against abridgement by states of rights of national citizenship as distinct from the *fundamental or natural rights* inherent in state citizenship.”²⁴¹

Slowly, over the decades, the Court fully endorsed and articulated the notion that “all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States”²⁴² through the Fourteenth Amendment and its “controlling word”²⁴³: “liberty.”²⁴⁴

Concerning “liberty,” the Court noted,

Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, since *Mugler v. Kansas*, 12 U.S. 623, 660–61 (1887), the Clause has been understood to contain a *substantive component* as well, one “barring certain government actions regardless of the fairness of the procedures used to implement them.” *Daniels v. Williams*, 474 U.S. 327, 331 (1986). As Justice Brandeis (joined by Justice Holmes) observed, “[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the [D]ue [P]rocess [C]lause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.” *Whitney v. California*, 274 U.S. 357, 373 (1927) (concurring opinion). “[T]he guaranties of due process, though having their roots in Magna Carta’s ‘*per legem terrae*’ and considered as procedural safeguards ‘against executive usurpation and tyranny,’ have in this country ‘become bulwarks also against arbitrary legislation.’” *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds) (quoting *Hurtado v. California*, 110 U.S. 516, 532 (1884)).

The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights. We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States. It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. But of course this Court has never accepted that view.

It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a

240. *Madden v. Kentucky*, 309 U.S. 83 (1940).

241. *Id.* at 90–91 (emphasis added).

242. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992) (quoting *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

243. *Id.* at 846.

244. *Id.*

view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*, 388 U.S. 1, 12 (1967)

Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. As the second Justice Harlan recognized: “[T]he full score of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This ‘liberty’ is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a *rational continuum* which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.” *Poe v. Ullman*, 367 U.S. at 543.

. . . .

The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: *reasoned judgment*. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office See also *Rochin v. California*, 342 U.S. 165, 171–72 (Frankfurter, J., writing for the Court) (“To believe that this judicial exercise of judgment could be avoided by freezing ‘due process of law’ at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges”).²⁴⁵

In *Baldwin v. Fish and Game Commission of Montana*,²⁴⁶ the Court recognized that Justice Washington had “seemingly relied on notions of ‘natural rights’ when he considered the reach of the Privileges and Immunities Clause,”²⁴⁷ and concluded that the Clause’s protection should only be triggered “where a nonresident sought to engage in an essential activity or

245. *Id.* at 846–50 (most alterations in original) (emphasis added) (some internal citations omitted).

246. *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371 (1978).

247. *Id.* at 387.

exercise of a basic right,”²⁴⁸ which “[h]e himself [called] ‘fundamental,’ in the modern as well as the ‘natural right’ sense.”²⁴⁹ The *Baldwin* Court went on to find the same reference to fundamental rights and/or natural rights in

Paul v. Virginia[.] . . . *Ward v. Maryland*, *Canadian Northern R. Co. v. Eggen*, and *Blake v. McClung* . . . when it was concerned with the pursuit of common callings, the ability to transfer property, and access to courts, respectively. And comparable status of the activity involved was apparent in *Toomer*, the commercial-licensing case. With respect to such basic and essential activities, interference with which would frustrate the purposes of the formation of the Union, the States must treat residents and nonresidents without unnecessary distinctions.²⁵⁰

Justice Thomas, dissenting in *Obergefell v. Hodges*,²⁵¹ observed,

The founding-era understanding of liberty was heavily influenced by John Locke, whose writings “on natural rights and on the social and governmental contract” were cited “[i]n pamphlet after pamphlet” by American writers. Locke described men as existing in a state of nature, possessed of the “perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.”²⁵²

Justice Thomas also noted,

Locke’s theories heavily influenced other prominent writers of the 17th and 18th centuries. Blackstone, for one, agreed that “natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature” and described civil liberty as that “which leaves the subject entire master of his own conduct,” except as “restrained by human laws.” And in a “treatise routinely cited by the Founders,” Thomas Rutherford wrote, “By liberty we mean the power, which a man has to act as he thinks fit, where no law restrains him; it may therefore be called a man’s right over his own actions.”²⁵³

In *Rosenberger v. Rector and Visitors of University of Virginia*,²⁵⁴ Justice O’Connor noted,

[E]ven if more extreme notions of the separation of church and state can be attributed to Madison, many of them clearly stem from “arguments reflecting the concepts of natural law, natural rights, and the social contract between government and a civil society,” rather than the principle of nonestablishment in the Constitution.²⁵⁵

248. *Id.*

249. *Id.* (internal citation omitted).

250. *Id.*

251. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

252. *Id.* at 726 (Thomas, J., dissenting) (alteration in original) (internal citations omitted).

253. *Id.* at 726 n.4 (internal citations omitted).

254. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

255. *Id.* at 856 (O’Connor, J., concurring) (internal citation omitted).

And dissenting in *Alden v. Maine*,²⁵⁶ Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, pointed out,

Around the time of the Constitutional Convention . . . there existed among the States some diversity of practice with respect to sovereign immunity; but despite a tendency among the state constitutions to announce and declare certain inalienable and natural rights of men and even of the collective people of a State, *see, e.g.*, Pennsylvania Constitution, Art. III (1776) (“That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same”), no State declared that sovereign immunity was one of those rights.²⁵⁷

In that same opinion, Justice Souter explained how “Blackstone quoted Locke’s explanation for immunity, according to which the risks of overreaching by ‘a heady prince’ are ‘well recompensed by the peace of the public and security of the government, in person of the chief magistrate being thus set out of the reach of danger.’”²⁵⁸ Thus, “[b]y quoting Pufendorf and Locke,” according to Justice Souter, “Blackstone revealed to his readers a legal-philosophical tradition that derived sovereign immunity not from the immemorial practice of England but from general theoretical principles.”²⁵⁹ And even if

Blackstone thus juxtaposed the common law and natural law conceptions of sovereign immunity, he did not confuse them . . . [F]or although the two conceptions were arguably “consonant” in England, where according to Blackstone, the Crown was sovereign, their distinct foundations could make a difference in America, where the location of sovereignty was an issue that independence would raise with some exigence.²⁶⁰

And when the Court described Justice Souter’s approach to natural law as “an apparent attempt to disparage,”²⁶¹ Justice Souter responded with the following:

My object, however, is not to call names but to show that the majority is wrong, and in doing that it is illuminating to explain the conceptual tradition on which today’s majority draws, one that can be traced to the Court’s opinion from its origins in Roman sources. I call this conception the “*natural law*” view of sovereign immunity, despite the historical ambiguities associated with the term because the expression by such figures as Pufendorf, Hobbes, and Locke, of the doctrine that the sovereign might not be sued, was associated with a concept of sovereignty itself derived from natural law. The doctrine that the sovereign could not be sued by his subjects might have been thought by medieval civil lawyers to belong to *jus gentium*, the law of nations, which was a

256. *Alden v. Maine*, 527 U.S. 706 (1999).

257. *Id.* at 772 (Souter, J., dissenting).

258. *Id.* at 767 (citation omitted).

259. *Id.*

260. *Id.* at 767–68.

261. *Id.* at 758 (majority opinion).

type of natural law; or perhaps in its original form it might have been understood as a precept of positive, written law. . . . Through its reception and discussion in the continental legal tradition, where it related initially to the Emperor, but also eventually to a King, to the Pope, and even to a city-state, this conception of sovereign immunity developed into a theoretical model applicable to any sovereign body.”²⁶²

Here, Justice Souter was searching for a constitutional metric—a foundational principle harmonious with history, logic, tradition, and common sense.

Lower courts have similarly relied on the idea and concept of natural rights when interpreting the Constitution.²⁶³ In *United States v. Stevenson*,²⁶⁴ for instance, the District Court for the Southern District of West Virginia observed,

One of the fundamental principles underlying the Constitution was the people’s intent to establish a participatory democracy respecting the natural rights of the people. Natural rights, including the rights to life, liberty, the pursuit of happiness, property, religion, free speech, and free press, were considered so important that they were regularly described as unalienable, i.e., even acting truly voluntarily, an individual could not give them away. It was the people’s natural rights that the government was created to protect as well as to respect.²⁶⁵

In their constitutions, the states have also included references to “natural rights.”²⁶⁶

Even so, perhaps this endorsement of “natural rights” and “natural law” is not exclusively a product of a Lockean influence. In *Constitutional Politics/Constitutional Law*,²⁶⁷ after discarding the idea that the Founding Fathers had been influenced by Locke and the natural rights philosophy, Bruce Ackerman endorsed a similar thesis:

[A] reader of the *Federalist Papers* will search in vain for an elaborate description of a “state of nature,” or a penetrating analysis of our “natural rights,” Lockean or otherwise. These matters simply do not

262. *Id.* at 767 n.6 (Souter, J., dissenting) (emphasis added) (internal citations omitted).

263. *See, e.g., In re Money Ctrs. of Am., Inc.*, No. 17-319, 2018 WL 1535464, at *2 (D. Del. Mar. 29, 2018) (observing that “[t]ribal sovereign immunity is based on tribes’ status as ‘distinct, independent political communities, retaining their original natural rights’ and ‘separate sovereigns pre-existing the Constitution’” (citation omitted)); *see also Royer v. Shea*, No. 05-151-P-H, 2006 WL 1361220, at *16 n.27 (D. Me. May 17, 2006) (describing the provision in Article I, § 1 of the Maine Constitution as the “natural rights” provision).

264. *United States v. Stevenson*, 425 F. Supp. 3d 647 (S.D. W. Va. 2018).

265. *Id.* at 650.

266. *See, e.g., KAN. CONST. Bill of Rights, § 1* (“All men are possessed of equal and inalienable natural rights, among which are life, liberty, and pursuit of happiness.”); P.R. CONST. pmb1.:

We, the people of Puerto Rico, in order to organize ourselves politically on a fully democratic basis, to promote the general welfare, and to secure for ourselves and our posterity the complete enjoyment of human rights, placing our trust in Almighty God, do ordain and establish this Constitution for the commonwealth which, in the exercise of our natural rights, we now create within our union with the United States of America.

267. Ackerman, *supra* note 86.

gain the sustained attention of Madison, Hamilton, and Jay as they try to convince their fellow Americans to support to proposed Constitution. What *does* bulk large in *Federalist* is a profound diagnosis of the prospects and pathologies of citizenship in the modern world. This is not because the Founders thought that citizenship was everything and private rights were nothing. It was because they believed that the fate of private freedom in America, and much else besides, were dependent upon a realistic appreciation of what could, and what could not, be expected of American citizens. The liberal idea of citizenship is not only central to my interpretation of the Founding; it is also crucial to my view of the subsequent course of history.²⁶⁸

And this is because “the foundation of personal liberty is a certain kind of political life—one requiring the ongoing exertions of a special kind of citizenry. Rather than grounding personal freedom on some putatively pre-political ‘state of nature,’ this kind of liberalism makes the cultivation of *liberal citizenship* central to its enterprise.”²⁶⁹

David Bernstein makes the following observation:

“[T]he idea that the guarantee of ‘due process of law’ regulates the substance of legislation . . . arose from the long-standing Anglo American principle that the government has inherently limited powers” and from “long-standing American intellectual traditions that held that the government had no authority to enforce arbitrary ‘class legislation’ or to violate the fundamental natural rights of the American people.”²⁷⁰

And because the inalienable, fundamental rights are the ones that make a government legitimate—the ones on which a legitimate government should be premised—the states have endorsed those rights and have incorporated them in their constitutions (including their modern ones).²⁷¹ None of them, though, contain an exhaustive list of protected rights.

VI. THE ROLE OF JUDICIAL DECISION-MAKING IN THE ENFORCEMENT OF FUNDAMENTAL RIGHTS²⁷²

Justice Thomas and the other conservative Justices begin with the notion that if rights are not specifically enumerated in the Constitution, then they

268. *Id.* at 485 (emphasis in original).

269. *Id.* at 484 (emphasis in original).

270. BERNSTEIN, *supra* note 190, at 9.

271. *See, e.g.*, MASS. CONST. art. I (mentioning “natural, essential, and unalienable rights”); PA. CONST. art. I, § 1 (mentioning “inherent rights of mankind”); VA. CONST. art. I, § 1 (mentioning “inherent rights, of which . . . cannot, by any compact, deprive or divest their posterity”); CAL. CONST. art. I, § 1 (“All people by nature free and independent have inalienable rights.”); TEX. CONST. art. I, § 1 (mentioning rights which must be maintained by the individuals “free and independent State[s], subject only to the Constitution of the United States, and the maintenance of our free institutions”).

272. For further discussion on judicial decision-making, see Simona Grossi, *Courts as an Instrument of Democracy*, HUFFPOST (Nov. 4, 2017, 10:56 AM), https://www.huffpost.com/entry/courts-as-an-instrument-o_b_12782888 [<https://perma.cc/2ERA-LQ4Y>]; Simona Grossi, *Constitutional Courts as Lawmakers: A Commentary on the Lecture by Prof. Dr. Rupert Scholz, “Constitutional Court Jurisdiction Between Constitutional Law and Politics—Taking the German Federal Constitutional Court as an Example”* (Loy. Legal Stud. Paper,

can only exist if they are proven to have been historically recognized at the time of the Constitution's (or a given amendment's) enactment.²⁷³ However, this approach treats the Constitution like a building code—prescribing every detail—instead of a constitution, which by necessity paints with a broad brush.

Moreover, in the name of unearthing some mythical consensus about “original intent” of the Founding Fathers (or the ratifiers, or historical society, or some amorphous amalgam), these conservative Justices are ignoring the biggest intent of all: the delegation to judges that is inherent in using broad language in a constitution, which by definition overrides statutes.²⁷⁴ True, judges must use extreme caution when overriding the will of the people as expressed by a majority of their democratically elected representatives, however, when a statute conflicts with a clear constitutional mandate—such as bodily autonomy inherent in the term “liberty”—then judges must either strike down the statute or, if there is any countervailing constitutional mandate, reconcile or balance the statute and the Constitution.

In *The Least Dangerous Branch*,²⁷⁵ Alexander Bickel described judicial review as a “counter-majoritarian force in our system”²⁷⁶—because of the apparent tension between judicial review and the democratic process—and a “deviant institution in the American democracy” because it enables an unelected judiciary to override the decisions of majoritarian legislatures.²⁷⁷ Yet the role of judicial decision-making in the protection of fundamental substantive due process rights has been, and continues to be, essential.²⁷⁸

In *Moore v. City of East Cleveland*,²⁷⁹ when declaring an East Cleveland zoning ordinance limiting the number of unrelated individuals who could share a home unconstitutional, the Court noted,

Substantive due process has at times been a treacherous field for this Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to

Paper No. 2013-35, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346446 [<https://perma.cc/97ZN-ZWTC>].

273. See, e.g., Eric Pomaville, *Justice Thomas Takes on “Substantive Due Process” Doctrine in Dobbs*, FOUNDING FREEDOMS L. CTR. (July 12, 2022), <https://www.foundingfreedomslaw.org/legal-blog/justice-thomas-addresses-substantive-due-process> [<https://perma.cc/96J9-Z3LC>].

274. See, e.g., Erwin Chemerinsky, *A Progressive Vision of the Constitution*, AM. CONST. SOC'Y (Sept. 17, 2019), <https://www.acslaw.org/expertforum/a-progressive-vision-of-the-constitution> [<https://perma.cc/JF67-49Z2>] (discussing that the language of the Constitution is intentionally broad).

275. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

276. *Id.* at 16.

277. *Id.* at 18.

278. See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 794 (2010) (Scalia, J., concurring) (“It is only we judges, exercising our ‘own reasoned judgment’ who can be entrusted with deciding the Due Process Clause’s scope—which rights serve the Amendment’s ‘central values.’” (internal citations omitted)).

279. *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family.

Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful “respect for the teaching of history [and] solid recognition of the basic values that underlie our society.”²⁸⁰

Thus, judicial decision-making is essential to that necessary synthesis (of text, history, tradition, and societal constitutional achievements) that can only lead to the most effective and truthful understanding and application of the U.S. Constitution. In *Planned Parenthood v. Casey*,²⁸¹ the Court noted that the individual liberty that the Fourteenth Amendment preserves is “a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.”²⁸² The Court continued, noting that “[t]he inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: *reasoned judgment*. Its boundaries are not susceptible of expression as a simple rule.”²⁸³ Similarly, in *Obergefell v. Hodges*,²⁸⁴ the Court noted,

Courts must exercise *reasoned judgment* in identifying interests of the person so fundamental that the State must accord them its respect History and tradition guide and discipline the inquiry but do not set its outer boundaries When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.²⁸⁵

The *reasoned judgment* to which the *Casey* and *Obergefell* Courts referred reminds us of the “natural lawyering and judging”—a type of lawyering and judging premised on wisdom, knowledge, practices grounded in an understanding of the law and its consequences, as well as careful consideration of the specific circumstances of each case²⁸⁶—on which Judge

280. *Id.* at 502–03 (alteration in original) (emphasis added) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J. concurring)).

281. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

282. *Id.* at 848–49 (alteration in original) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

283. *Id.* at 849 (emphasis added).

284. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

285. *Id.* at 645 (emphasis added).

286. The idea that the Constitution was calling for a type of decision-making informed by reason and experience was also expressed by Chief Justice Marshall in *M’Culloch v. Maryland*, 17 U.S. 316, 413 (1819). See also Clark, *supra* note 79, at 181–85.

Clark, among the driving forces behind the adoption of the Federal Rules of Civil Procedure, was so insistent.²⁸⁷ And words like “liberty” and phrases like “due process” make this type of lawyering and judging not only possible, but necessary. “That does not mean,” according to the *Casey* Court, that “we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office.”²⁸⁸ After all,

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this [c]onstitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. *That tradition is a living thing.* A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.²⁸⁹

And reasoned judgment allows substantive due process “to perform a nationalizing function through the recognition and protection of fundamental rights as a matter of national constitutional law.”²⁹⁰ Also,

[T]he substantive content of these national rights is potentially expansive. Under the theory of reasoned judgment, the Court does not merely protect conventional rights in order to provide continuity and to honor a Burkean sense of traditional wisdom. Instead, under the theory of reasoned judgment, the Court is directly engaged in the identification of personal liberties that it deems appropriate for our contemporary society. This theory thus permits substantive due process to serve a *liberty-maximizing function*, which dramatically increases the doctrine’s functional significance.²⁹¹

287. See Clark, *supra* note 79, at 181–85.

288. *Casey*, 505 U.S. at 849.

289. *Id.* at 849–50 (emphasis added) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)); see also Caplan, *supra* note 182, at 236 n.84 (quoting 2 *DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS* 129 (L. Butterfield ed., 1961)) (noting how the Colonies adopted the common law “not as the common Law, but as the *highest Reason*” (emphasis added)).

290. Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 107 (2006) (emphasis omitted).

291. *Id.* (emphasis in original). Also, dissenting in *Dobbs*, Justice Breyer observed, “Throughout our history, the sphere of protected liberty has expanded, bringing in individuals formerly excluded. In that way, the constitutional values of liberty and equality go hand in hand; they do not inhabit the hermetically sealed containers the majority portrays. So before *Roe* and *Casey*, the Court expanded in successive cases those who could claim the right to marry—though their relationship would have been outside the law’s protection in the

Thus, according to Justice Blackmun and others, substantive due process should play a much more vibrant role than the one the Court has often assigned to it.²⁹²

Even so, in applying formulas such as due process, judges may avail themselves to the guidance of others. Indeed, they “must move within the limits of accepted notions of justice and . . . not . . . [within] the idiosyncrasies of a merely personal judgement.”²⁹³ Because tradition is a *living thing*, though, judges cannot be treated as “inanimate machines” or be expected to engage in mechanical exercises to determine if what society values centuries after the founding can be located in a historical check list.

Evolving standards and constitutional achievements must be considered together with the peculiar circumstances, variables, and conflicting interests of each case.²⁹⁴ This approach is consistent with the Framers’ original intent,²⁹⁵ and therefore consistent with an originalist reading of the

mid-19th century. And after *Roe* and *Casey*, of course, the Court continued in that vein. With a critical stop to hold that the Fourteenth Amendment protected same-sex intimacy, the Court resolved that the Amendment also conferred on same-sex couples the right to marry. In considering that question, the Court held, “[h]istory and tradition,” especially as reflected in the course of our precedent, “guide and discipline [the] inquiry.” But the sentiments of 1868 alone do not and cannot “rule the present.”

Dobbs v. Jackson Women’s Health Org., 142 S. Ct 2228, 2328 (2022) (Breyer, J., dissenting) (alterations in original) (internal citations omitted).

292. See Conkle, *supra* note 290, at 98.

293. *Adamson v. California*, 332 U.S. 46, 68 (1947).

294. Acknowledging the constitutional achievements and considering them in view of the evolving standards of decency, the Court, in *Roper v. Simmons*, noted,

The prohibition against “cruel and unusual punishments,” like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and *with due regard for its purpose and function in the constitutional design*. To implement this framework we have established the propriety and affirmed the necessity of referring to “*the evolving standards of decency that mark the progress of a maturing society*” to determine which punishments are so disproportionate as to be cruel and unusual.

In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), a plurality of the Court determined that our standards of decency do not permit the execution of any offender under the age of 16 at the time of the crime The plurality also observed that “[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community. . . .”

....

The next year, in *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Court . . . referred to contemporary standards of decency in this country. . . .

....

Three Terms ago the subject was reconsidered We held that standards of decency have evolved since *Penry* and *now* demonstrate that the execution of the mentally retarded is cruel and unusual punishment.

Roper v. Simmons, 543 U.S. 551, 560–62 (2005) (alteration in original) (emphasis added) (internal citations omitted).

295. See, e.g., Campbell, *supra* note 36, at 293–94:

For Americans with less elitist inclinations . . . determining the scope of natural rights was not exclusively within the ken of professionally trained lawyers.

Constitution.²⁹⁶ In fact, honoring the Constitution's original meaning might require reaching different outcomes to take into account the changing circumstances.²⁹⁷

Judges must be able to incorporate in their *reasoned judgment* the facts and the historical development that inevitably color the new and evolving constitutional questions presented. Is that not the beauty and strength of the common law system—a system where the law arises out of the facts, and evolves with them? This view of judicial decision-making is the only one that would make the Constitution a living document capable of serving the needs of We the People.

VII. CONCLUSION

As this Article shows, the idea of *liberty* permeates the entire Constitution, from its Preamble to the Due Process Clause and the entire text, if we properly conceive the powers as given in service of that liberty and happiness of the American people. After pausing, in Part II, on the nature and the spirit of the Constitution as a collection of principles and ideas—not as

James Madison's famous Virginia Report of 1800, for instance, made arguments from "plain principle, founded in *common sense*, illustrated by *common practice*, and essential to the nature of compacts" to wage an extended attack on Federalist reliance upon the common law. It would be a "mockery" to confine press freedom to a rule against prior restraint, Madison implored, because post-publication punishments would have the same effect of suppressing expression. Moreover, practical experience showed that American printers enjoyed a "freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law." It was thus "natural and necessary," Madison concluded, that press freedom in the United States went beyond the confines of English common law.

(emphasis added).

296. See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 Nw. U. L. REV. 549, 578 (2009). According to Balkin,

To respond to changes in the national political process, courts may have to discard a substantial proportion of existing doctrine. They must create new rights and powers where none existed before, overrule existing decisions, or distinguish them into irrelevance. Courts do this by ascending to the general—by going back to first principles and rearticulating those higher order principles in a new way. In *West Coast Hotel v. Parrish*, for example, the Supreme Court cast a skeptical eye on an entire generation of due process jurisprudence: "[T]he violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."

Id. (alteration in original) (quoting *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937)).

297. See Ryan, *supra* note 123, at 1542–43 (citing Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1165 (1993), and Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 395 (1995)).

a legal code—intended to adjust to the changing circumstances and serve the ever evolving needs of our constitutional system, Part III offered evidence of such nature and spirit by providing examples of doctrines, powers, and rights which, although not expressly mentioned by the text, have been considered historically part of our system. Zooming in on the substantive due process rights, Part IV showed how this non-strictly textual approach, intended by the Framers for individual rights and liberty more specifically, had been already endorsed by the States and expressed in their constitutions and/or jurisprudence preceding ratification. Thus, the Constitution and the Court’s jurisprudence, by endorsing a similar non-enumerated/ implied approach to those rights, appear as a product of “history and tradition” more than a novelty. And yet, even without that distant heritage, we could still say that the Court, over the course of the years, has built a history and tradition of *liberty* interpretations that constantly proved to adjust and grow with the evolving needs of the society. By further expanding the geographical and temporal scope of our study, Part V showed how the concept of liberty seemed to have preexisted the ratification and even common law—as comprising the collective natural rights of the individuals universally recognized over time—and how this idea influenced the Framers and the jurisprudence of the Court over the course of the years. Building on these findings, Part VI showed how the enforcement of the fundamental rights that the word *liberty* was intended to capture heavily depends on the *reasoned judgment* of careful judicial decision-making, one that endorses a dynamic interpretive approach to the relevant constitutional provisions, an approach capable to serve the Constitution and We the People.

Justice Thomas’s concurring opinion in *Dobbs*—and, more generally, the approach and method adopted by the conservative Justices on the Court—being at odd and inconsistent with all the above findings and analysis, is difficult to square with history and tradition as well as with the spirit and very nature of the Constitution, which, as Chief Justice Marshall aptly stated only a few decades after the adoption of the Constitution, was never intended to be treated as a legal code.

