

## Preface

Like most liberals, I found the outcome of the November 8, 2016 presidential election to be devastating. I never have been so afraid for the country or the things that I believe in. I worry what the Trump administration's environmental policies will mean for the future of the planet. I fear that his xenophobic policies on immigration will be calamitous for so many people's lives. I am concerned that his ugly rhetoric has legitimized the expression of racism in a way that has not been seen for decades. Until the white supremacist demonstration in Charlottesville in August 2017, I never had seen someone in public carrying a sign, "Kikes belong in the oven." President Trump did not even condemn this, though every prior president since the 1930s has found it easy to denounce Nazism and white supremacy.

As someone who has spent his professional career teaching and writing and litigating about constitutional law, I am worried about what the election of Donald Trump will mean for the future of the Supreme Court and the Constitution. Republican voters understood the importance of this election for the Supreme Court much more than Democratic ones. Of those who voted for Trump, 56% said that the Supreme Court was the most important factor in their choice for president, but only 41% of those who voted for Hillary Clinton said this.<sup>1</sup>

Instead of a liberal majority on the Supreme Court for the first time since the end of the Warren Court in 1969, there will be a conservative majority for years and maybe decades to come. The Court will become substantially more conservative if President Trump gets to replace one or more of the justices who are 79 or older: Ruth Bader Ginsburg, Anthony Kennedy, or Stephen Breyer.

I thus have struggled since the November 8 election with the question of how to react to this and what liberals should be saying about the Supreme Court and constitutional law in light

of this reality. My conclusion is that it is imperative that we articulate an alternative vision of the Constitution to that being put forward by Donald Trump and the Republicans on the Supreme Court. We must develop and defend a progressive vision for the Constitution.

That is my goal in this short book. I write it not in the belief that my vision will come to be the law soon, but in the hope that it will someday. Dr. Martin Luther King, Jr. got it exactly right when he proclaimed that “the arc of the moral universe is long, but it bends towards justice.” Over the course of American history, there have been enormous advances in equality for racial minorities and women and gays and lesbians, though obviously much remains to be done. There have been great gains in individual freedom. We are at a moment with a president who is not committed to these values and face the prospect of a Supreme Court that likely will be more hostile to them for the foreseeable future.

But this will change. Someday there will be a majority of the justices committed to using the Constitution to advance liberty and equality. We need to be providing the foundation for their work. For now, at the very least, we must be providing an intellectual framework for opposing the regressive policies of the Trump administration and the conservatives on the Supreme Court.

Actually, focusing just on the Supreme Court in considering constitutional law is a huge mistake. The Constitution belongs to all of us: “We the People.” Every elected official, at every level of government, takes an oath to uphold the Constitution. Each needs to have an understanding of what it should mean. Constitutional issues constantly arise and affect all of us, often in the most important and intimate aspects of our lives. All of us should have informed views about the meaning of the Constitution. Each of us needs to interpret the document for ourselves in evaluating government actions, as well as court decisions.

Even though there is a Republican President and a majority on the Supreme Court appointed by Republican Presidents, progressives must not yield the Constitution to them. We must develop and defend and fight for a progressive vision of constitutional law.

## Notes for Preface

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<sup>1</sup> <http://www.cnn.com/election/results/exit-polls>

## Chapter 1

### What now?

#### *What might have been*

Everything changed in the Supreme Court on Saturday, February 13, 2016, when Justice Antonin Scalia died. From 1971, when President Nixon had his third and fourth nominees confirmed for the Court, until February 13, 2016, there always were at least five justices and at times as many as eight justices who had been appointed by a Republican president. More often than not, for 46 years, when the Court was ideologically divided, there were five votes for a conservative result.

But Justice Scalia's death meant that there were only four justices appointed by Republican presidents for the first time in decades: Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas and Samuel Alito. And, of course, there were an equal number appointed by Democratic Presidents: Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Although there have been times in American history where justices' ideology did not correspond to the political party of the appointing president, that is not true today.

Roberts, Thomas, and Alito are very conservative. Many have a misleading impression of Roberts because he joined the liberal justices to uphold the Affordable Care Act.<sup>1</sup> But overall Roberts virtually always votes with his conservative colleagues, especially in the high profile areas such as abortion rights, affirmative action, rights for criminal defendants, gay and lesbian rights, gun rights, voting rights, and religious freedom. At the same time, Ginsburg, Breyer, Sotomayor, and Kagan consistently vote in a liberal direction.

Justice Kennedy is the swing justice. Every year, he is the justice, by far, most often in the majority. In 2016-17, officially known as October Term 2016, he was in the majority in 97% of all of the decisions. The year before, he was in the majority in 98% of the cases. He has been the fifth vote with the four liberal justices to strike down laws prohibiting same sex marriage,<sup>2</sup> restricting access to abortion,<sup>3</sup> and challenging affirmative action programs.<sup>4</sup> But overall, he votes with the conservatives about 75% of the time in ideologically divided 5-4 rulings. For example, he was the key fifth vote to strike down gun control laws for the first time in American history,<sup>5</sup> to reject constitutional challenges to the death penalty,<sup>6</sup> to allow corporations to spend unlimited amounts of money in election campaigns,<sup>7</sup> and to allow business owners to refuse to provide contraceptive coverage for their employees based on the owners' religious beliefs.<sup>8</sup>

In the past, there have been ideological surprises on the Supreme Court. Justices John Paul Stevens and David Souter were appointed by Republican presidents (Gerald Ford and George H.W. Bush, respectively), but by the end of their tenure on the Court were consistently with the liberal bloc. Justice Byron White was appointed by President John F. Kennedy, but was much more often with the conservative justices, such as in rejecting a constitutional right to abortion and in dissenting in cases expanding rights for criminal defendants.<sup>9</sup> Earlier, Justice Felix Frankfurter was appointed by President Franklin Roosevelt and expected to be liberal, but turned out to be a very conservative justice.

Such ideological surprises are much less likely today. Some of that is because the country is more divided along ideological lines than at many earlier times and this is reflected in the justices who are picked. For instance, President Dwight Eisenhower was a Republican, but not particularly ideologically defined. There was uncertainty as to whether he was going to run for president as a Democrat or a Republican. He appointed liberals, such as Earl Warren and

William Brennan (a Democrat), to the Court. It is impossible to imagine a president today appointing someone from the other political party. There also is far more vetting today to make sure of a nominee's ideology. For Republicans, they are explicit that they want to be sure that there are no more David Souters. Souter, a former justice on the New Hampshire Supreme Court and briefly a federal court of appeals judge, was picked for the Court by President George H.W. Bush in 1990. Presidential advisor John Sununu and Senate Warren Rudman assured President Bush that Souter would be a "home run" in his conservatism. Once on the Court, he much more often voted with the liberal justices, such as in being the fifth vote to reaffirm *Roe v. Wade*,<sup>10</sup> and to limit prayer in public schools.<sup>11</sup> Both Republican and Democratic presidents have learned from this and now do a much more thorough vetting of the ideology of prospective nominees. The last picks for the Supreme Court – Roberts, Alito, Sotomayor, Kagan, and Gorsuch – all have been exactly what the party of their nominating president have wanted.

The death of Justice Scalia and the resulting 4-4 split on the Court, offered the possibility of a majority of justices appointed by a Democratic president for the first time since 1971. This is important because major ideological shifts on the Supreme Court are rare. The Court became very conservative by the 1880s and remained that way until 1936, striking down over 200 progressive laws, such as those limiting child labor and imposing minimum wages and maximum hours in the workplace.

This changed in 1937 and soon after, President Franklin Roosevelt was able to fill the Court with Democrats committed to upholding New Deal programs. From the late 1930s through 1971, there always was a majority of the justices who had been appointed by Democratic Presidents. Especially under the leadership of Chief Justice Earl Warren, the Court was famously liberal, such as in striking down laws requiring racial segregation, applying the Bill of

Rights to state and local governments, significantly increasing the rights of criminal defendants, and greatly expanding voting rights.

President Richard Nixon was able to select four Supreme Court justices between 1969 and 1971: Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist. There has been a solid Republican-appointed majority on the Court ever since. Replacing Justice Scalia with a Democrat would have dramatically shifted the Court's ideological balance for the first time since then. That is why Senate Republicans refused to hold hearings or a vote on President Barack Obama's nomination of Chief Judge Merrick Garland for the Supreme Court. Garland unquestionably was superbly qualified. He had the perfect resume for the position: a graduate of Harvard College and Harvard Law School, he clerked on the Supreme Court, was a federal prosecutor and a partner at a law firm before becoming a federal court of appeals judge. He served longer as a federal appellate judge than any Supreme Court nominee in history. By all accounts, he is a moderate, which is perhaps why President Obama picked him hoping that would get him confirmed even in a presidential election year.

But from the day of Justice Scalia's death, Senate Majority Leader Mitch McConnell made clear that the Senate Republicans would not consider Garland's nomination. This was unprecedented. This was the twenty-fifth time in American history that a vacancy occurred during the last year of a president's term. In 21 of the 24 prior instances, the Senate confirmed and in the other three, the Senate refused to approve. Here, the Senate did nothing and there wasn't a thing that President Obama or Senate Democrats could do about it.

If Hillary Clinton had been elected president, she would have renominated Garland or perhaps picked someone younger and more liberal. But the election of Donald Trump meant that the Republican strategy of blocking Garland paid off. President Trump replaced Scalia with a



staunch conservative: Neil Gorsuch. In his first months on the Court, Gorsuch voted together with Clarence Thomas – as conservative as any justice in recent memory – 100% of the time. Gorsuch was a very conservative federal court of appeals judge and was known for his conservative views when serving in the Department of Justice during the George W. Bush administration. No one, liberal or conservative, has any doubts that Neil Gorsuch will be exactly what Republicans hoped for: a justice who will be at least as conservative as the jurist he replaced, Antonin Scalia.

### *What it means*

The ideological balance on the Court remains the same as before Justice Scalia's death. The major shift that would have occurred with Clinton's election obviously did not happen and will not happen for a long time. Keeping this ideological balance has real consequences. Consider some examples as to what replacing Scalia with Gorsuch instead of Garland means:

**Guns.** Few issues so closely correspond to ideology and political party affiliation as the meaning of the Second Amendment. From 1791 until 2008, the Supreme Court never had invalidated any law as violating the Second Amendment. The Court always had ruled that the Second Amendment was about a right to have guns for the purpose of militia service. But in *District of Columbia v. Heller* (2008), the Court, 5-4, struck down a 32 year-old District of Columbia ordinance that prohibited private ownership or possession of handguns.<sup>12</sup> Justice Scalia wrote for the Court, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. Two years later, in *McDonald v. City of Chicago*, the same five justices were the majority in a 5-4 decision holding that the Second Amendment is a fundamental right that applies to state and local governments.<sup>13</sup> These are the only cases in all of American history to invalidate laws as violating the Second Amendment.

Without Scalia, the Court was split 4-4 on the meaning of the Second Amendment. Merrick Garland or a Clinton nominee would have meant a Court that was unlikely to extend gun rights and very well might have overruled *Heller* and *McDonald*. Replacing Scalia with a conservative, Gorsuch, means a Court likely to strike down many other laws regulating firearms.

**Unions.** It now seems inevitable that the Supreme Court will deal a severe blow to unions by holding that non-union members cannot be required to pay the share of the union dues that support the collective bargaining activities of the union. In 1977, in *Abood v. Detroit Board of Education*, the Supreme Court reaffirmed that no one can be forced to join a public employees' union. The Court, though, held that non-union members can be required to pay the share of the union dues that go to support the collective bargaining activities of the union.<sup>14</sup> The Court explained that non-union members benefit from collective bargaining in their wages, their hours, and their working conditions. They should not be able to be free riders. The Court said, though, that non-union members cannot be required to pay the share of the union dues that go to support the political activities of the unions; that would be impermissible compelled speech in violation of the First Amendment.

In two recent cases, in 2011 and 2014, the five conservative justices then on the Court – Roberts, Scalia, Kennedy, Thomas, and Alito – strongly indicated a desire to overrule *Abood* and prevent public employees from being required to pay their “fair share” of the union dues that go to support collective bargaining.<sup>15</sup>

A case, *Friedrichs v. California Teachers Association*, was filed to provide that vehicle. Rebecca Friedrichs, a middle school teacher at a charter school in Orange County, California, objected to having to pay the share of the union dues that go to support collective bargaining. Hers was to be the test case to give the Court the vehicle to overrule *Abood*.

The case was argued on Monday, January 11, and there seemed little doubt that the Court was poised to overrule *Abood*. Not one of the five conservative justices asked a single question or made a single comment that left doubt that he was going to vote to do so. This would be devastating in California and 21 other states that do not have “right to work” laws; there would be a substantial decrease in union revenues, union membership, and union political influence.

Justice Scalia died before the Court issued its decision and so the justices announced that they were deadlocked 4-4, which means that the case was dismissed without decision by the Supreme Court.<sup>16</sup> *Abood* remains the law. But with Justice Scalia being replaced by a conservative, the overruling of *Abood* is just delayed and now seems a certainty. In fact, in the fall of 2017, the Court again granted review in a case – *Janus v. American Federation* – that poses the question of whether *Abood* should be overruled.<sup>17</sup> No one – liberal or conservative – has the slightest doubt as to what the Supreme Court will do or that this will be a very significant blow to unions and their political influence.

**Separation of church and state.** Views on the Establishment Clause of the First Amendment, too, very much track political party ideology. Conservatives interpret this provision narrowly as only prohibiting the government from establishing a church or coercing religious participation. Liberals see the Establishment Clause as, in the words of Thomas Jefferson, creating a wall separating church and state. Prior to Justice Scalia’s death, the Court was split 5-4 between these two views, with the conservative position having the majority to allow much more government support for religion and much more religious involvement in government activities.

Replacing Scalia with Garland or a Clinton nominee, would have meant five justices in favor of enforcing the separation of church and state. But with Trump replacing Gorsuch, there

again is a majority to allow much more in the way of prayer in public schools and other government events, religious symbols on government property, and government aid to parochial schools for religious instruction.<sup>18</sup>

**Access to the courts.** In a series of ideologically divided 5-4 decisions, with Justice Scalia in the majority, the Supreme Court in recent years has greatly protected businesses at the expense of injured consumers and employees. The Court, for example, has ruled that clauses requiring arbitration in form contracts must be enforced and can be used to keep those with valid claims from suing in court.<sup>19</sup> Similarly, the Court has significantly restricted the ability of those hurt to sue in class action suits.<sup>20</sup> Especially when a large number of people each suffer a small injury, it often is a class action or nothing as a remedy.

Replacing Scalia with a Democratic appointee would have shifted this balance. The Roberts Court has been the most pro-business Court since the mid-1930s, virtually always in 5-4 rulings with the majority comprised of Roberts, Scalia, Kennedy, Thomas, and Alito. Gorsuch replacing Scalia means that this will continue and that new limits on access to the courts, especially to sue businesses, will be imposed.

**Campaign finance.** For 40 years, the Supreme Court has held that people have a First Amendment right to spend unlimited amounts of money in election campaigns.<sup>21</sup> *Citizens United v. Federal Election Commission*, in 2010, extended this to hold that corporations can spend unlimited sums from their corporate treasuries to get candidates elected or defeated.<sup>22</sup> Large expenditures by rich individuals and corporations on behalf of candidates always raise the appearance of government officials beholden to those who spent the money to get them elected. Political races sometimes are decided by the money given, especially those of lower visibility where large expenditures can make a real difference. A progressive Court not

only could have overruled *Citizens United*, but could have reconsidered the earlier holdings that equate money with speech and allow unlimited expenditures by the rich in election campaigns. In her campaign, Hillary Clinton said that she wanted to appoint justices who would overrule *Citizens United* and it is very likely that she would have done so.

### *The future*

Since 1960, 78 years old is the average age at which a Supreme Court justice has left the bench. When Donald Trump was inaugurated on January 20, 2017, there were three justices 78 or older: Ruth Bader Ginsburg was 83, Anthony Kennedy was 80, and Stephen Breyer was 78. Even assuming that Trump serves only one term, it seems unlikely that all three of these justices will be on the bench on January 20, 2021. No one has doubt that if given the opportunity, President Trump will pick another conservative like Neil Gorsuch.

This would create the most conservative Supreme Court since at least the mid-1930s. I have no doubt whatsoever that it would mean five votes to overrule *Roe v. Wade* and eliminate all constitutional protection for abortion rights, five votes to eliminate all forms of affirmative action, five votes to eliminate the rule that requires the exclusion of illegally obtained evidence in criminal cases. These have been the conservative targets for decades, but there never have been more than four votes for these results. Replacing Ginsburg *or* Kennedy *or* Breyer will mean a majority for all of these conservative outcomes.

And if President Trump gets such a pick, that likely would create a solid conservative majority for years to come. In 2017, the year of Donald Trump's inauguration, John Roberts is 62, Samuel Alito is 67, and Clarence Thomas is 69. Neil Gorsuch was 49 when he was sworn in as a justice on April 10, 2017. It is easy to imagine these four justices remaining on the Court 10 or 15 years, or even longer.

### *How should progressives respond?*

How progressives react to this reality will have enormous long term consequences. Conservatives responded to the liberal decisions of the Supreme Court, such as to the rulings of the Warren Court era and to cases like *Roe v. Wade*, by developing and honing a clear vision of constitutional interpretation. Think tanks like the Heritage Foundation and groups like the Federalist Society led this effort and conservative scholars, such as Robert Bork, wrote books articulating an intellectual framework to guide conservative justices, politicians, lawyers, and academics.

Progressives must fight back by offering an alternative vision of constitutional interpretation and constitutional law based on fulfilling the Constitution's promise of liberty and justice for all. The conservative approach to constitutional law is an emperor with no clothes; it is conservative justices imposing their conservative values while professing not to do so. Constitutional law inherently and always is about value choices by those in the robes on the high court, whether the justices are conservative or liberal. Progressives need to expose how conservatives are using the Constitution to advance their own agenda that favors business over consumers and employees, and government power over individual rights.

But it is not enough to reveal the conservative's false promise of judicial neutrality. Progressives must offer their own vision for what the Constitution should be understood to mean and how this view far better achieves the goals of our nation, as stated in the Constitution's Preamble, of ensuring democratic rule, effective government, justice, liberty and equality.

A new vision is long overdue. Progressives have spent too much of the last 45 years trying to preserve the legacy of the Warren Court's most important rulings and looking for areas for occasional advances. We have reacted to Republican-dominated Supreme Courts by

criticizing erosions of rights in particular areas, but not by developing a progressive vision for the Constitution. Now more than ever, it is urgent to do this. An alternative vision will provide the basis for opposing conservative changes in constitutional law in the years ahead and ultimately guide judges and justices to forge an inspiring direction in the future.

The stakes are huge. Because of the election of Donald Trump and probable coming vacancies on the Supreme Court, constitutional issues are likely to dominate the public discourse much more than at any time in recent American history. Basic questions about the meaning of the Constitution are going to arise in countless areas, ranging from immigration policy to reproductive freedom to the environment. How these are answered will do much to determine the country and even world we live in for decades to come.

That is my goal in this book: to articulate a progressive vision of constitutional law. My focus is not on what the Supreme Court is likely to do in the foreseeable future. If Hillary Clinton had won, this would have been a very different book focusing on what a Court with a majority of justices appointed by Democratic presidents should be doing. But Donald Trump's election means a conservative Court now and perhaps for the rest of my life.

*Should we turn away from the Constitution and the Court?*

In light of the ideological composition of the Supreme Court for the foreseeable future, it is reasonable to ask whether progressives should direct their attention away from the Constitution and the judiciary. The odds are low for the Court to be a vehicle for progressive results in my lifetime. I predict that many liberals in the years ahead will argue against the power of the Supreme Court to declare laws unconstitutional and advocate for a very minimal role for the judiciary and the Constitution.

The Constitution does not expressly give to the courts the power to review the constitutionality of laws and executive actions. No court had this power in England and it might be expected that the Constitution would have said so if it meant to change government in such an important way. The power of judicial review was created in *Marbury v. Madison*, in 1803, which held that the courts may declare unconstitutional both federal laws and executive actions. Chief Justice John Marshall explained that the Constitution exists to impose limits on government and those limits are rendered meaningless if not enforced. He famously declared that “it is emphatically the province and duty of the judicial department to say what the law is.”<sup>23</sup>

Judicial review has existed for almost all of American history, but it is not an inevitable aspect of having a Constitution. The Netherlands, for example, has a written Constitution, but that document is explicit that it does not empower the courts to strike down government actions. The Netherlands has functioned as a democracy and without tyranny even though its courts do not have the power of judicial review.

In recent years, some prominent scholars have made a strong case for eliminating judicial review in the United States. Harvard Law Professor Mark Tushnet wrote a book titled, “Taking the Constitution Away from the Courts.”<sup>24</sup> In a chapter titled, “Against Judicial Review,” he asks what would happen if the Court overruled *Marbury v. Madison* and said, “We will no longer invalidate statutes, state or federal, on the ground that they violate the Constitution.” He says that over time “[t]he effects of doing away with judicial review, considered from a standard liberal or conservative perspective, would probably be rather small, taking all issues into account.”

Professor Tushnet says that the experiences in other democracies without judicial review show that a nation without judicial review need not look like Stalinist Russia. He points out that “[t]he examples of Great Britain and the Netherlands show that it is possible to develop systems



in which the government has limited powers and individual rights are guaranteed, without having U.S.-style judicial review.” Professor Tushnet argues that a “popular constitutionalism” would develop where the people and their elected officials would feel more need to comply with the Constitution once they knew that the courts were not engaged in judicial review. Professor Tushnet believes that the results of “popular constitutionalism” would be more progressive than the constitutional law which results from Supreme Court decisions. And he wrote this long before the Trump presidency and the Supreme Court that may emerge from it.

Professor Tushnet is not alone among prominent constitutional scholars in making this argument. For example, former Stanford Law Dean Larry Kramer wrote a well-received book espousing what he also terms “popular constitutionalism.”<sup>25</sup> Although Dean Kramer does not define popular constitutionalism with any precision and he does not go so far as to call for the elimination of judicial review, he does call for an end to “judicial supremacy” and a return of constitutional interpretation to the people. Professor Kramer, for example, argues that the people can be trusted, and he defends the deliberative processes of Congress as at least equal to those of the judiciary. He rightly points out that if Congress makes a mistake, it can be changed by that or the next or a future Congress. The change can be based on public pressure or election returns. But if the Court makes a mistake, the only way to overturn it is a constitutional amendment or to wait until the Supreme Court changes its mind.

Influential political scientists, too, have advocated the elimination of judicial review. Pulitzer Prize winner James MacGregor Burns, a professor of government at Williams College, urges the elimination of judicial review and says that “would be based on the fact that the Constitution never granted the judiciary a supremacy over the government, nor had the Framers ever conceived it. It would remind Americans that the court’s vetoes of acts of Congress are

founded in a ploy by John Marshall that was exploited and expanded by later conservatives until the court today stands supreme and unaccountable, effectively immune to the checks and balances that otherwise fragment and disperse power throughout the constitutional system.”<sup>26</sup> Professor Burns argues, like Professors Tushnet and Kramer, that without judicial review elected government officials would be more vigilant about their duties to uphold the Constitution.

Voices such as Mark Tushnet, Larry Kramer, and James MacGregor Burns must be taken seriously. And they are not alone among contemporary academics who have called for an elimination, or at least substantial curtailment, of judicial review. I predict that this will be the rallying cry among many progressives in the years ahead. I am tempted to join them.

But I think that this effort is misguided and focusing attention on it will gain little. The Supreme Court and the lower federal courts will continue to engage in judicial review regardless of what progressives say. Conservative justices will continue to strike down laws as they have in recent years, such as campaign finance restrictions and gun control statutes and key provisions of the Voting Rights Act; calls to eliminate this power are not going to matter in the least. The pleas to eliminate, or drastically reduce judicial review, are not going to matter so why waste time on them? Since judicial review will continue to exist, the much better focus should be on its content and especially on the desired meaning of the Constitution.

Those who argue for the elimination or substantial restriction of judicial review can rightly accuse me in this response of a double standard: I am not focusing in this book on what likely will happen, but what should happen. It is therefore an unsatisfying defense of judicial review to say that it won't be eliminated. So why keep judicial review, especially in light of the reality of what the Supreme Court and the lower federal courts will be for years and maybe for decades to come?

My answer is that I believe that the Constitution is desirable and that it has meaning only if enforced. The Constitution, to be sure, is a flawed document. As written, it institutionalized and protected slavery. It prohibited Congress from restricting the importing of slaves for 20 years, counted slaves as only three-fifths of a person in drawing congressional districts, and mandated the return of an escaped slave to his or her owner. The Constitution, as written, gave no rights to women. It was written in the late 18<sup>th</sup> century for an agrarian slave society and it seems absurd to use it to answer 21<sup>st</sup> century questions, such as whether the government limit minors' access to violent videogames or whether the police need a warrant to use cell tower information to track a person's movements.

Yet, we also should admire the Constitution for providing for democratic rule with orderly transitions of power since it was ratified in 1787. The separation of powers, and the checks and balances it creates, have prevented tyrannical rule. Overall, there has been a tremendous expansion of liberty and equality under it over the course of American history. Besides, if we turn our backs on the Constitution, what is the alternative and why believe that it would be any better?

Once I accept that the Constitution is worth keeping, then I also think it follows that it needs to be enforced. The classic argument for judicial review – put forth in *Marbury v. Madison* – is that the Constitution exists to limit the government and those limits often will be meaningless unless there are courts to enforce them.

Especially for progressives, it is crucial to remember that those without political power have nowhere to turn for protection except the Constitution and the judiciary. In a telling passage, Professor Tushnet admits “[m]y wife is Director of the National Prison Project of the American Civil Liberties Union. She disagrees with almost everything I have written in this

chapter.” The reality is that the political process has no incentive to be responsive to the constitutional rights of prisoners. Admittedly, the Rehnquist and Roberts Court have an overall less than stellar record of protecting prisoners' rights, but I do not think that one could deny that judicial review has dramatically improved prison conditions for countless inmates who would be abandoned by the political process.<sup>27</sup> When is the last time that a legislature adopted a law to expand the rights of prisoners or criminal defendants? Moreover, how much worse might it be if politicians and prison officials knew that the constitutionality of their actions could not be reviewed by the courts?

More generally, there is little incentive for the political process to protect unpopular minorities, such as racial or political minorities. How long would it have been before Southern state legislatures declared segregation of public facilities unconstitutional if not for *Brown v. Board of Education* and the decisions that followed it? How long would it have taken Congress, dominated by Southerners in key committee chairs, to have acted in this regard?

Sometimes the political process even will fail the majority. Reapportionment is the classic example here. By the 1960s, many state legislatures were badly malapportioned with legislative districts of vastly different sizes. The migration of population from rural to urban areas was not accompanied by a redrawing of election districts. The result was that urban districts were much more populous than the rural districts, but had less representation. Malapportioned state legislatures were not about to reapportion themselves so as to decrease the political power of those in office. Every incentive led those who benefited from malapportionment to retain the existing system. Only judicial review could institute one-person, one-vote.

These, of course, are just some of the examples where the political process cannot be relied on to comply voluntarily with the Constitution. In all of these areas, it is likely the courts or nothing for enforcing and upholding the Constitution.

Judicial review also is essential to ensure that state and local governments comply with the Constitution. The nature of the federalist structure of American government is that there are fifty states and tens of thousands local governments that can violate the Constitution. These include not only every town, city, and county, but every school board and zoning commission. Scholars like Tushnet, Kramer, and Burns focus especially on Congress and the President in discussing the incentives for voluntary compliance with the Constitution. Dean Kramer, for example, compares favorably the deliberative process in Congress to that of the Supreme Court.

This focus ignores, however, the likelihood of constitutional infringements by all of the other levels of government and the corresponding benefits of judicial review. A few examples illustrate this point. Without judicial review, the Bill of Rights would not be applied to the states. It was not until well in to the 20<sup>th</sup> Century that the Supreme Court held that the Bill of Rights apply to state and local governments. Although most states might voluntarily comply with most of the Bill of Rights, some states certainly would not follow all of its provisions, especially where it was expensive or politically unpopular to do so. For instance, many states did not provide free attorneys to criminal defendants in felony cases until *Gideon v. Wainwright* in 1963.<sup>28</sup> In this respect, those who advocate for the elimination of judicial review ignore the its benefits in securing state and local compliance with the Constitution. How many local governments would advance religion in all sorts of ways if not for courts enforcing the First Amendment's prohibition of laws "respecting the establishment of religion"?

As I have become increasingly more disillusioned with the Supreme Court and as I look to what the Court will be like in the years ahead, I have become more sympathetic to those who call for the elimination of judicial review. Yet, on reflection, I believe that eliminating, or substantially curtailing, judicial review would be a huge mistake. I think that those who call for eliminating judicial review or dramatically limiting it overestimate the likelihood of voluntary compliance by the other branches of government and underestimate the likely benefits of judicial review. I have spent the last 35 years arguing appeals on behalf of prisoners and those whose civil liberties have been violated. The first Supreme Court case I argued was on behalf of a man who was sentenced to life in prison with no possibility of parole for 50 years for stealing \$153 worth of videotapes from K-Mart Stores. (I lost 5-4, with the Court rejecting my argument that the sentence was cruel and unusual punishment.) The second Supreme Court case I argued was on behalf of a homeless man challenging a six foot high, three foot wide Ten Commandments monument that sits exactly at the corner between the Texas State Legislature and the Texas Supreme Court. (I lost 5-4, with the Court rejecting my argument that this violated the Establishment Clause of the First Amendment.) I argued the first case on behalf of Guantanamo detainees, in federal district court and in the United States Court of Appeals for the Ninth Circuit, in 2002.

As one who often argues cases on behalf of prisoners or those whose civil liberties have been violated, I have the sense that popular constitutionalism is the product of an academic detachment failing to recognize that, for clients like mine, it is often the courts or nothing. Prisoners and civil rights litigants very well might lose in the courts, but often they have no recourse except in the judicial process.

*What now?*

If the answer for progressives is not to turn their back on the Constitution and the courts, it must be to argue for an alternative vision to that being put forward by conservatives.

The first step – and this is the focus of Chapter 2 -- must be to refute the notion that the meaning of the Constitution can be derived from the text and its original meaning, what is often called originalism. Conservatives say that all constitutional issues, including controversial questions like the constitutionality of the death penalty or of affirmative action, can be resolved based solely on the original meaning of the Constitution. Conservatives say that this allows justices to decide cases without imposing their own values. That is nonsense. There is no such thing as “value neutral judging.” It is a myth that conservatives have advanced for decades and continue to espouse for their own purposes.

It is simply wrong to think that Supreme Court justices -- liberal or conservative – can decide constitutional cases without making value choices or that decisions in controversial areas are about anything other than the ideology of the justices. This is a smokescreen to make Americans think conservatives are basing their decisions on the “true” meaning of the Constitution, when actually their rulings are a product of their own conservative views. In 2008, the five conservative justices on the Roberts Court for the first time in history declared unconstitutional a law as violating the Second Amendment. In 2010, these same justices found that corporations have the right to spend unlimited amounts of money in election campaigns. In 2013, they invalidated a federal civil rights law in the area of race – a key provision of the Voting Rights Act -- for the first time since the 19<sup>th</sup> century. By any measure, all these cases were conservative judicial activism: each overruled precedent, invalidated a law that was enacted with overwhelming support, broadly decided a matter when a narrow ruling was possible, and did so to advance conservative political values. Every one of these decisions was

based on the ideology and values of the conservative Republican justices, not the text or the original meaning of constitutional provisions. It is laughable to say that the framers of the First Amendment intended that corporations should be able to spend unrestricted sums from their campaign treasuries to get candidates elected or defeated. Those who wrote the First Amendment did not envision campaign spending as it exists today, let alone modern corporations.

If the conservatives' approach is empty and misleading, how do progressives replace it? The document should be interpreted to fulfill its central values. Therefore, it is essential to begin by identifying the core underlying values that the Constitution is meant to achieve. This is the focus of chapter 3. The place to start is at the very beginning, with the Preamble to the Constitution, which articulates the purposes for the document. The Preamble states: "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."

The Preamble exists to do much more than tell us that the document is to be called the "Constitution" and that it is meant to establish a government. The Preamble describes the core values that the Constitution seeks to achieve: democratic government, effective governance, justice, and liberty. The Preamble reminds us that the Constitution is created by "we the people." The people are sovereign. This phrase makes clear that the United States is to be a democracy, not a monarchy or a theocracy or a totalitarian government, the dominant forms of government throughout the world in 1787 and before. The Preamble tells us that the Constitution exists to ensure that the national government has the authority to do everything that



is part of creating a “more perfect union” and providing for “the general welfare.” The Preamble states that the Constitution is meant to ensure justice and to protect liberty.

Unfortunately, the Preamble has been largely ignored in Supreme Court decisions and in scholarly writings. It has been treated as just a rhetorical flourish to the Constitution. But the Preamble is much more: the words articulate the basic values of the Constitution and what it should be interpreted to achieve for all Americans.

Viewed in this way, the Preamble is not redundant of what is found in the Constitution. To the contrary, it provides a lens through which the document can be examined. The Preamble should be seen as articulating the values that, above all, the Constitution should be interpreted to accomplish.

Finally, the largest part of this book, Chapters 4-8, details how the Constitution should be interpreted to achieve each of the ideals announced in the Preamble. The Preamble states the importance of democratic government, effective governance, justice, freedom, and (implicitly) equality for all Americans. These values should be the foundation of the progressive vision of the Constitution for the years ahead. Each of these chapters describes a progressive vision for one of these core values.

I, of course, am not making an argument that I know the intent of the framers of the Constitution in these areas. Their intent cannot be known and should not limit contemporary constitutional law. The Constitution must be adapted to the problems of each generation; we are not living in the world of 1787 and should not pretend that the choices for that time can guide ours today. Chief Justice John Marshall expressed this realization almost 200 years ago when he said that “we must never forget that it is a Constitution we are expounding”, a Constitution “meant to be adapted and endure for ages to come.”

My goal is to show how the values stated in the Preamble provide guidance in understanding the meaning of the Constitution and how they should help in deciding today's most important and controversial issues.

Given Donald Trump's election it is not likely that my vision will be adopted in the immediate future. But that's not the point. Conservatives, in their think tanks and Federalist Society cliques, have spent years articulating and elaborating a conservative vision of constitutional law and the role of the Supreme Court. They did this even during years when conservatives were out of power. Liberals may have thought it futile to create a different and progressive vision with conservative justices in the majority on the Supreme Court for the last 45 years. Perhaps, too, progressives have been wedded for too long to the Warren Court's vision and not thought enough beyond it. Now is the time to provide and defend and fight for an alternative, grander and more inclusive interpretation of the Constitution.

Looking at the Constitution in a progressive way would produce a very different approach, one that would do much more to provide liberty and justice for all. In most areas, it would not take more than the shift of a single justice to create decisions pointing constitutional law in a fairer direction that does much more to realize the promise of the Preamble and the Constitution. Maybe the unexpected will happen and there will be a progressive majority on the Court sooner than I or anyone expects. But I am confident that someday it will happen and what is said today will powerfully influence what can be done then.

It is so tempting to look at the composition of the Supreme Court as a historic inevitability. But in reality it is a product of coincidences between the timing of vacancies and who is in the White House. If Hubert Humphrey rather than Richard Nixon won in 1968, and it was a very close election, then a Democratic president would have picked four new justices

between 1969 and 1971 and that would have continued a liberal majority on the Court for decades more. If Al Gore or John Kerry had been president in 2005 when William Rehnquist and Sandra Day O'Connor left the Court, there would be six justices appointed by Democratic presidents on the Court today notwithstanding the election of Donald Trump and the appointment of Neil Gorsuch. If Hillary Clinton had been elected president – and she did win the popular vote by 5 million votes – and had replaced Antonin Scalia, the next years and perhaps decades of constitutional law would be vastly different.

So I think it is important to step away from the current composition of the Supreme Court and focus instead on what should be the meaning of the Constitution. How should progressives interpret this majestic, but flawed document?

## Notes for Chapter 1

<sup>1</sup> National Federation of Independent Business v. Sebelius, 132 S.Ct. 2566 (2012) (upholding the individual mandate in the Patient Protection and Affordable Care Act).

<sup>2</sup> Obergefell v. Hodges, 135 S.Ct. 2584 (2015) (declaring unconstitutional state laws prohibiting same sex marriage)

<sup>3</sup> Whole Women's Health v. Hellerstedt, 136 S.Ct. 2922 (2016) (declaring unconstitutional a Texas law that required that a doctor have admitting privileges near the facility where abortions were performed and they they have "ambulatory surgical facilities.")

<sup>4</sup> Fisher v. University of Texas, Austin, 136 S.Ct. 2196 (2016) (upholding University of Texas affirmative action program).

<sup>5</sup> District of Columbia v. Heller, 554 U.S. 570 (2008) (declaring unconstitutional a District of Columbia ordinance prohibiting private ownership and possession of handguns).

<sup>6</sup> Glossip v. Gross, 135 S.Ct. 2726 (2015) (upholding the use of a three-drug protocol for lethal injections).

<sup>7</sup> Citizens United v. Federal Election Commission, 558 U.S. 310 (2010) (declaring unconstitutional key provisions of the McCain-Feingold Bipartisan Campaign Finance Reform Act).

<sup>8</sup> Burwell v. Hobby Lobby, 134 S.Ct. 2751 (2004) (concluding that it violated the Religious Freedom Restoration Act to require that owners of close corporations provide contraceptive coverage for their employees that violates the owners' religious beliefs).

<sup>9</sup> Roe v. Wade, 410 U.S. 113 (1973); Miranda v. Arizona, 384 U.S. 436 (1966).

<sup>10</sup> Planned Parenthood v. Casey, 505 U.S. 833 (1992) (reaffirming Roe v. Wade; striking down some provisions and upholding others of a Pennsylvania law restricting access to abortions).

<sup>11</sup> See, e.g., Lee v. Weisman, 505 U.S. 577 (1992) (declaring clergy-delivered prayers at public school graduations to violate the Establishment Clause of the First Amendment).

<sup>12</sup> District of Columbia v. Heller, 554 U.S. 570 (2008).

<sup>13</sup> McDonald v. City of Chicago, 561 U.S. 742 (2010).

<sup>14</sup> Abood v. Detroit Board of Education, 431 U.S. 209 (1977) (holding that it does not violate the First Amendment to require that public employees pay the share of union dues that support the collective bargaining activities of the union).

<sup>15</sup> Knox v. SEIU, 132 S.Ct. 2277 (2012); Harris v. Quinn, 134 S.Ct. 2618 (2014).

<sup>16</sup> When the justices are divided 4-4, they affirm the lower court, without opinion, by an evenly divided Court. Here that meant that the lower court decision following *Abood* was upheld.

<sup>17</sup> Janus v. American Federation, 851 F.3d 746 (7<sup>th</sup> Cir. 2017), *cert. granted*, 138 S.Ct. 54 (2017).

<sup>18</sup> I discuss this in detail in Chapter 7.

<sup>19</sup> AT & T Mobility LLC v. Concepcion, 563 U.S. 233 (2011).

<sup>20</sup> Wal-mart Stores, Inc. v. Dukes, 564 U.S. 339 (2011).

<sup>21</sup> Buckley v. Valeo, 424 U.S. 1 (1976).

<sup>22</sup> Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

<sup>23</sup> Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>24</sup> Mark Tushnet, Taking the Constitution Away from the Court (1999).

<sup>25</sup> Larry Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2005).

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<sup>26</sup> James MacGregor Burns, *Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court* (2009).

<sup>27</sup> *See, e.g., Brown v. Plata*, 563 U.S. 493 (2011) (upholding a court-mandated limit on prison population to remedy cruel and unusual punishment).

<sup>28</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963) (states must provide counsel to those who cannot afford it in any criminal case where there is a possible prison sentence).

## Chapter 2

### The Myth of Value Neutral Judging

#### *The conservative quest for value neutral judging*

In 2010, the Supreme Court heard oral arguments in a case that concerned the constitutionality of a California law that prohibited the sale or rental of violent videogames to minors without parental consent.<sup>1</sup> Many states had adopted similar statutes. Legislators were shocked by the graphic violence and were concerned by the studies that showed a correlation between playing such videogames and violent behavior. The concern was that the participatory aspect of videogames makes them different from comic books or television programs or movies, all of which also can have violent content.

As was his practice, Justice Scalia was very active in the oral argument and was pressing the attorney defending the California law about whether the state's law could be reconciled with original understanding the First Amendment. Finally, Justice Alito interjected and said: "Well, I think what Justice Scalia wants to know is what James Madison thought about video games." Putting it that way shows the absurdity of trying to answer today's constitutional questions by looking at the world of 1787 when the Constitution was drafted or 1791 when the First Amendment was ratified or 1868 when the Fourteenth Amendment was approved.

The Court, in a 7-2 decision, found that videogames are a form of speech and that the California law is unconstitutional. Justice Scalia wrote the opinion for the Court. I do not question the wisdom of the decision, but rather whether it can be squared with Justice Scalia's often stated view – referred to as "originalism" -- that the meaning of a constitutional provision is fixed at the time it was adopted and can be changed only through the constitutional amendment process. Justice Scalia, in countless speeches, proclaimed that the Constitution is

“dead, dead, dead, dead.”<sup>2</sup> Not long before he died, Justice Antonin Scalia remarked in an interview in *California Lawyer* that discrimination against women never violates equal protection because the framers of the Fourteenth Amendment never meant to protect them.<sup>3</sup> The comment attracted national media attention with the reaction being mostly of the “there he goes again, saying something provocative.” But the response should be that this shows why Scalia’s originalist philosophy is unacceptable.

Nor is this an isolated example of the difficulty of answering contemporary issues from the perspective of a society that could not have imagined them. In October 2017, the Court considered the very important issue – discussed in detail in Chapter 4 – of whether federal courts can hear challenges to partisan gerrymandering.<sup>4</sup> This is the practice where the political party that controls the legislature draws election districts to maximize safe seats for that political party. Gerrymandering is nothing new; its title comes from the name of a Massachusetts Governor, Elbridge Gerry, who did this early in American history. But sophisticated computer programs have made it possible to gerrymander with much more precision than ever before. It is an issue with enormous consequences for our democratic system of government. It allows elected officials to choose their voters in a way that greatly exaggerates and enhances the power of the party controlling the legislature.

The framers of the Constitution, though, strongly disliked the idea of political parties and envisioned a government without them. That is why the Constitution provided that the top vote getter in the Electoral College would become President and the runner-up would be Vice President. Political parties, though, developed quickly in American history and the Twelfth Amendment was ratified to eliminate the chance that we would end up with Donald Trump as President and Hillary Clinton as Vice President. But it also explains why it is futile to look to

the Constitution and its original intent to tell us anything about what the Constitution means when it comes to partisan gerrymandering that is accomplished through sophisticated computer programs.

Or to pick another example: In November 2017, the Court heard oral arguments in a case that involved whether police need to get a warrant before accessing information from cell phone companies that can be used to tell a person's location and track a person's movements. Timothy Carpenter was suspected of committing a series of armed robberies. The FBI went to his cell phone company and got the cell phone tower records that revealed his location and his movements for 127 days. The FBI received this information without a warrant from a judge. The cell tower information was crucial evidence used to convict him and sentence him to 119 years in prison.

Every time we use our cell phone – to send and receive calls or texts or emails or access the internet – it connects to cell towers. The records – generated hundreds and sometimes thousands of times per day – include the precise GPS coordinates of each tower as well as the day and time the phone tried to connect to it. It is possible to determine our location at almost any point in time and track our movements through this information. The police constantly use this technology: in 2016, Verizon and AT&T alone received about 125,000 requests for the cellular information from law enforcement agencies.

The issue in *Carpenter v. United States* is whether the Fourth Amendment, which prohibits unreasonable searches and arrests, requires that the police obtain a warrant in order to access this information.<sup>5</sup> The Fourth Amendment, and its warrant requirement, is an essential protection of our privacy. It demands that the police show a judge that there is probable cause – good reason to believe that evidence of a crime will be obtained – before there is a search.



It is frightening to realize that the government can track virtually all of us and our movements any time it wants just by asking for our cell phone records. A great deal can be learned about a person from this information. As one court explained, “[a] person who knows all of another’s travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts.”<sup>6</sup>

The Court last dealt with a similar issue in 2012 in *United States v. Jones*.<sup>7</sup> The police put a GPS device on the undercarriage of Antoine Jones’ car without a valid warrant and tracked his movements for 28 days. The Court unanimously held that this violated the Fourth Amendment. Justice Antonin Scalia wrote the opinion for the Court and held that putting the GPS device on the car was a trespass. He relied on an English law precedent from 1765. But what if the police had tracked Jones’ movements, not through a GPS device physically placed on the car, but rather through cellular or satellite technology? That is precisely the issue in *Carpenter v. United States*. It is absurd to think that the case can be resolved by looking at the text of the Fourth Amendment or what was intended by it in 1791. I am confident that even if he were alive, not even Justice Scalia could find an 18<sup>th</sup> century English law precedent about whether use of cellular technology is a search within the meaning of the Fourth Amendment.

Yet, conservative justices and professors repeatedly tell us that the Constitution must be interpreted based solely on its original understanding. The newest member of the Supreme Court, Justice Neil Gorsuch, declared: “Judges should instead strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text,

structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be.”<sup>8</sup>

Despite decades of powerful criticism, originalism seems to be growing in acceptance. An article in a recent *New Yorker* says that 40 percent of people identify themselves as originalists.<sup>9</sup>

Why? Conservatives repeatedly emphasize that they want a method of interpretation that avoids justices and judges needing to make value choices. In one of the initial and most influential arguments in favor of originalism, Judge Robert Bork (who was later nominated for the Supreme Court and rejected by the Senate) said that “a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society.”<sup>10</sup>

In a particularly famous defense of originalism, then Attorney General Edwin Meese advocated for the “text of the document and the original intention of those who framed it . . . [as] the judicial standard in giving effect to the Constitution.”<sup>11</sup> Accusing the Supreme Court of “roam[ing] at large in a veritable constitutional forest,” he concluded that a “jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection.”<sup>12</sup>

Antonin Scalia is the justice most associated with originalism. He often explained that the alternative to his approach had judges making value choices and that was inconsistent with democratic rule. For instance, in one opinion he defended originalism by declaring: “Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.”<sup>13</sup>

When John Roberts went before the Senate Judiciary Committee for his confirmation hearings in 2005, in his opening statement he famously declared: “Judges are like umpires. Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.”<sup>14</sup> In this way, Roberts was conveying that he believes that the views of justices are irrelevant; judges are not to make value choices in interpreting the Constitution. No one expects or wants baseball umpires to be making calls based on their views or values.

After the death of Justice Antonin Scalia on February 13, 2016, Republicans repeatedly touted the idea that Supreme Court justices should just “apply the law” and decide cases without ideology playing any role. Senator Chuck Grassley, the chair of the Senate Judiciary Committee, issued a statement rejecting the idea that a justices’ views or life experiences should affect his or her decisions.<sup>15</sup> Every Republican candidate in the 2016 presidential primaries espoused this position and the conviction that Supreme Court justices should follow the original meaning of the Constitution. They did this as a basis for blocking the Democratic appointee, Chief Judge Merrick Garland, and as a way of presenting themselves as defenders of judicial restraint. Donald Trump expressed this view during the presidential debates with Hillary Clinton.<sup>16</sup>

The centerpiece of the conservative approach to the Constitution for the last several decades has been the premise that judges should decide cases without making value choices and that they have an approach to constitutional interpretation – originalism – that achieves that. This has understandable rhetorical appeal. There is discomfort in thinking of unelected justices imposing their own views on society or constitutional law being nothing more than the preferences of those on the Court at a particular moment.

*The false claim of judicial restraint*

But it is simply wrong to think that Supreme Court justices -- liberal or conservative -- can decide constitutional cases without making value choices or that decisions in controversial areas are about anything other than the ideology of the justices. The claim of value neutral judging is a smokescreen to make Americans think conservatives are basing their decisions on the “true” meaning of the Constitution, when actually their rulings are a product of their own conservative views.

Beginning at least with Richard Nixon’s campaign for president in 1968, conservatives have championed judicial restraint and lamented judicial activism. But looking at the behavior of conservatives on the Supreme Court shows that they, as much or more than any liberal justices, impose their own values in deciding constitutional cases. Consider a few examples.

In 2008, the five conservative justices on the Roberts Court for the first time in history declared unconstitutional a law as violating the Second Amendment.<sup>17</sup> From 1791 when the Second Amendment was adopted until June 2008, not once did the Supreme Court find any law regulating firearms unconstitutional. The Court always had interpreted the Second Amendment literally; it was understood as being about a right to have guns for militia service.<sup>18</sup> But in *District of Columbia v. Heller*, the Court declared unconstitutional a 32 year-old District of Columbia ordinance prohibiting private ownership and possession of handguns. The ruling was 5-4 with Justice Scalia writing for the Court, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito.

In 2010, in *Citizens United v. Federal Election Commission*, these same five justices found that corporations have the right to spend unlimited amounts of money in election campaigns.<sup>19</sup> The Court declared unconstitutional a provision of a federal law – the McCain-Feingold Bipartisan Campaign Finance Reform Act – which limited expenditures by

corporations and unions in federal elections. The bill had been overwhelmingly passed by Congress, with strong bipartisan support, and signed into law by President George W. Bush. The Court explicitly overruled a precedent from just seven years earlier that had upheld the very provisions the Court declared unconstitutional in *Citizens United*.

In 2013, these same five justices invalidated a federal civil rights law in the area of race -- a key provision of the Voting Rights Act of 1965 -- for the first time since the 19<sup>th</sup> century.<sup>20</sup> The Court held that it was unconstitutional for Congress to require that jurisdictions with a history of race discrimination get preapproval from the Justice Department before changing their election systems. The Court said that this violated the constitutional principle that Congress is required to treat all states the same. The basis for this constitutional principle was then, and is now, unknown.

By any measure, all of these cases were conservative judicial activism: each overruled precedent, invalidated a law that was enacted with overwhelming support, broadly decided a matter when a narrow ruling was possible, and did so to advance conservative political values. Every one of these decisions was based on the ideology and values of the conservative Republican justices, not the text or the original meaning of constitutional provisions. It is laughable to say that the framers of the First Amendment intended that corporations should be able to spend unrestricted sums from their campaign treasuries to get candidates elected or defeated. Those who wrote the First Amendment did not envision campaign spending as it exists today, let alone modern corporations. There is nothing in the Constitution that says that Congress must treat all states the same. In fact, the very same Congress that ratified the Fourteenth Amendment also passed the Reconstruction Act that imposed military rule on the

South, likely the most extreme example in history of Congress treating some states differently from others.

Each of these examples of conservative judicial activism will have enormous consequences. Striking down laws restricting handguns likely will mean more deaths and serious bodily injuries. Corporations and unions spending unlimited amounts of money in election campaigns will change who runs for office and who gets elected, as well as the confidence people have in the electoral system. Invalidating key provisions of the Voting Rights Act of 1965 will make it easier for state and local governments with a history of race discrimination in voting to continue to do so. There is no way to understand any of these 5-4 decisions other than as a reflection of the values of the five conservative justices on the Court.

The simple reality is that liberals and conservatives both sometimes want to defer to government, and sometimes to declare government action unconstitutional; both sometimes want to follow precedent and sometimes to overrule it. They differ as to when and it is all based on their ideology and preferences. Two consecutive days in June 2013 powerfully illustrate this.

On Tuesday, June 25, the Court, in a 5-4 decision, in *Shelby County v. Holder*, mentioned above, declared unconstitutional key provisions of the federal Voting Rights Act. The conservative justices were in the majority and Justice Ginsburg wrote for the dissent urging judicial restraint and deference to Congress.<sup>21</sup> The next day, Wednesday, June 26, the Court, in a 5-4 decision, in *United States v. Windsor*, declared unconstitutional a key provision of the federal Defense of Marriage Act, which provided that for the purpose of federal benefits a marriage had to be between a man and a woman.<sup>22</sup> Justice Kennedy, joined by the four liberal justices, were the majority; the conservatives dissented urging judicial restraint and deference to Congress. Only Justice Kennedy was in the majority in both decisions.

Conservatives and liberals both want courts to strike down actions that they perceive as unconstitutional; they just disagree as to when. The reason that Justice Scalia and Justice Ginsburg usually disagreed in constitutional cases is not that one was smarter or knew constitutional law better than the other. Rather, the difference is in their views and ideology.

*The inevitability of value choices in constitutional decision-making*

To be clear, I am not saying that conservatives engage in judicial activism, while liberals practice judicial restraint. I actually find those labels meaningless and long have thought that “judicial activism” is just the label people use for the decisions they dislike. My point is that all justices – liberal and conservatives alike – inevitably must make value choices. No method of constitutional interpretation, including originalism can avoid that. The only difference is that conservatives pretend that they are doing something different.

There are many reasons why value choices are inevitable in interpreting the Constitution.<sup>23</sup> First, the Constitution was intentionally written in broad, open-ended language that rarely provides guidance for issues that must be resolved by the Supreme Court. Justices are obligated to give meaning to ambiguous words written almost 230 years ago. What is “speech”? For example, should spending money in an election campaign be regarded as speech? This, of course, is the key issue in terms of whether laws regulating campaign spending violate the First Amendment.<sup>24</sup> The text of the Constitution cannot answer this question of whether spending money is speech. Nor was there any thinking about that when the First Amendment was drafted; campaign spending did not exist as it does today.

What is “cruel and unusual punishment,” which is forbidden by the Eighth Amendment? For over a half century, the Supreme Court has said that this is to be interpreted based on “evolving standards of decency.”<sup>25</sup> But there is no way to determine that apart from the views

and values of the justices.

For example, in recent years, the Court has had to decide whether it is cruel and unusual punishment to impose the death penalty on the intellectually disabled or for crimes committed by juveniles or through the use of particular drugs in lethal injections.<sup>26</sup> Whether these penalties are inconsistent with “evolving standards of decency” cannot be determined based on what those who drafted and ratified the Eighth Amendment thought in 1791. Whether such punishments are consistent with evolving standards of decency cannot be answered except through the values of today; the text and the framers’ intent are useless.

The meaning of the Eighth Amendment and “cruel and unusual punishment” was the issue in the first case I argued in the Supreme Court, *Lockyer v. Andrade* in 2002.<sup>27</sup> The question was whether it was cruel and unusual punishment to impose, under California’s “Three Strikes” law, a sentence of life in prison with no possibility of parole for 50 years for a man who shoplifted \$153 worth of videotapes. The Court, in a 5-4 decision split along ideological lines, upheld the sentence even though my client never had committed a violent crime and even though no one in the history of the country had received a life sentence for shoplifting before California’s Three Strikes law. The five conservative justices made a value choice to allow state governments to impose draconian punishments for minor crimes. My client would not have been eligible for parole until 2046 when he would have been 87 years old, except that thankfully California voters in 2012 amended the law to say that a third strike had to be a serious or violent crime.

One of the most controversial parts of the Constitution, the Second Amendment reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” Is this a right to have guns only for militia service



or does this create a more general right of people to possess firearms? Conservatives tend to favor gun rights, while liberals support gun control. It was not surprising then that the Court split 5-4 exactly along ideological lines in *District of Columbia v. Heller* (2008) and declared unconstitutional a 32 year-old ordinance prohibiting ownership or possession of handguns.

The conservative justices in the majority chose to read the Second Amendment as a right of individuals to possess handguns in their homes for the sake of security, while the liberals argued that the Second Amendment is a right to have guns solely for the purpose of militia service. Either is a plausible reading of the text of the Second Amendment and either can be supported by its history. Inescapably, how a justice reads the Second Amendment and decides cases about it are a reflection of that individual's views. There is nothing "value neutral" about it or about the five conservative justices, for the first time in history, adopting the NRA's view of the Second Amendment. Justice Scalia's majority opinion said that the first half of the Second Amendment is "prefatory" language, while the second half is "operative." But that is pure sophistry; why isn't all of the language of the Second Amendment to be deemed operative language?

Even parts of the Constitution that are seemingly clear require interpretation. The Constitution says that the President must be a "natural born citizen." But does that mean a citizen as of birth or that the person was born within the United States? Ted Cruz came up against this controversy in his run for the presidency because he was born outside the United States, but was an American citizen at birth. There is still no answer as to what it means to be a natural born citizen and whether it would have been constitutional for Ted Cruz to have been elected President. The words of the Constitution and the intent of the framers provide no resolution.

Nor is looking back to history to discover the framers' intent or the original understanding behind a constitutional provision likely to be helpful, even if it were assumed that this should be determinative in constitutional interpretation. So many people were involved in drafting and ratifying the Constitution it is not tenable to think that there was a single understanding waiting to be discovered. In teaching constitutional law, I point out to my students the many instances where James Madison and Alexander Hamilton – the most frequently quoted architects of the Constitution because of their Federalist Papers essays – disagreed. These involved major issues, with enormous contemporary significance, such as whether there are inherent presidential powers<sup>28</sup> and the scope of Congress' power to tax and spend.<sup>29</sup> Nor is Justice Scalia's approach of discovering original meaning by looking to practices at the time of ratifying a constitutional provision likely to be useful; there likely were great variations and besides, adopting a constitutional provision could have been more about changing on-going practices than ratifying them. Former constitutional law professor Barack Obama explained: "Anyone like Justice Scalia, looking to resolve our modern constitutional dispute through strict construction, has one big problem: The founders themselves disagreed profoundly, vehemently, on the meaning of their masterpiece. Before the ink on the constitutional parchment was dry, arguments had erupted not just about minor provisions, but about first principles; not just between peripheral figures, but within the revolution's very core."<sup>30</sup>

Historians long have reminded us that "what [history] yields is heavily dependent upon the premises of its users."<sup>31</sup> The famous historian R.G. Collingwood succinctly expressed this when he said: "History means interpretation . . . . [W]e can view the past, and achieve our understanding of the past, only through the eyes of the present."<sup>32</sup> It is hardly surprising then that when Justice Scalia and Justice Stevens each looked exhaustively at history in deciding

whether the Second Amendment protects a right to own and possess handguns, they came to opposite conclusions that exactly mirrored their ideology. More generally, Justice Scalia, the Court's most ardent originalist, interpreted the Constitution to allow unlimited government aid to parochial schools, to permit prayers in public schools, to protect a right of people to have guns in their homes, to permit the death penalty, to allow states to prohibit same sex marriage, to permit states to completely prohibit all abortions. It is hardly coincidence, that Antonin Scalia, a conservative found in the original meaning of the Constitution the choices expressed in the 2016 Republican platform.

Second, value choices are inevitable in interpreting the Constitution because following just the text and the original understanding would lead to absurd and undesirable results. The world of today is so radically different from that of 1787, when the Constitution was drafted, or 1791, when the Bill of Rights was ratified, or 1868, when the Fourteenth Amendment was adopted. For example, Article II refers to the President and Vice President with the pronoun "he." The framers undoubtedly intended that those holding these offices would be men. From an originalist philosophy, it would be unconstitutional to elect a woman as President or Vice President until the document is amended.

The same Congress that ratified the Fourteenth Amendment also voted to segregate the District of Columbia public schools. Under an originalist philosophy, *Brown v. Board of Education* (1954), was wrongly decided and laws mandating segregation were constitutional.

As Justice Scalia said, as Robert Bork did before him, from an originalist perspective, sex discrimination does not violate the Constitution because the original understanding of the Fourteenth Amendment did not mean to stop this. But few would accept a view of the

Constitution that would make *Brown v. Board of Education* an illegitimate decision or see no constitutional limit on sex discrimination.

This is why the Constitution is and always has been regarded as a living document. Even the power of judicial review – the authority of courts to review the constitutionality of executive and legislative acts – is nowhere mentioned in the text of the Constitution. It is at best unclear whether it was intended by the Constitution's drafters.

Indeed, if a majority of the Court ever were to adopt an originalist philosophy, there would be a radical change in constitutional law. No longer would the Bill of Rights apply to state and local governments. No longer would there be the protection of rights not mentioned in the text of the Constitution, such as the right to travel, freedom of association, and the right to privacy. This would mean the end of constitutional protection for liberties such as the right to marry, the right to procreate, the right to custody of one's children, the right to keep the family together, the right of parents to control the upbringing of their children, the right to purchase and use contraceptives, the right to abortion, the right to refuse medical care, the right to engage in private consensual homosexual activity. No longer would women or gays and lesbians be protected from discrimination under the equal protection clause. In fact, no longer would equal protection apply to the federal government; the equal protection clause of the Fourteenth Amendment, by its terms and intent, applies only to state and local governments.

Of course, originalists can try to avoid these problems by foregoing constraint and developing a theory that allows the justices discretion to avoid the unacceptable results. Some who call themselves originalists -- like Professors Will Baude and Randy Barnett and Jack Balkin -- look at the more abstract goals of a constitutional provision, rather than the specific understanding of those who drafted and ratified it.<sup>33</sup> Baude, for example, defends the Supreme

Court's decision in *Obergefell v. Hodges*,<sup>34</sup> which struck down state laws prohibiting same sex marriage, under his theory of originalism. But then, as Professor Eric Segall powerfully shows in a new book, originalism and non-originalism become indistinguishable. If the meaning of a constitutional provision is stated at an abstract enough level, almost any result can be justified. The goals of the Constitution included equality and liberty; stated at that level of abstraction, there is no result that cannot be justified. Scholars can call it originalism if they want, but the constraint on judging that inspired originalism is gone.

This illustrates an even greater problem with the conservative claim that originalism constrains judges: the original meaning of a constitutional provision can be stated at many different levels of abstraction and the choice of the level of abstraction is arbitrary and all about the results the interpreter wants to achieve. Consider, for example, the Fourteenth Amendment's assurance that no state can deny any person equal protection of the laws. Should the purpose of this provision be seen just as protecting former slaves who were deemed to desperately need its assistance when the Fourteenth Amendment was ratified? Or should the equal protection clause be regarded as protecting those of African descent? Or should it be seen as protecting all racial minorities? Or should its purpose be regarded as protecting all who have historically suffered discrimination? Or should the focus be on its language which says that the government shall not deny "to any person" equal protection of the laws? All are reasonable ways to understand the equal protection clause; there is no principled way to choose one level of abstraction over another. Yet, under some of these approaches discrimination against gays and lesbians is unconstitutional; under other views the equal protection clause provides them no protection whatsoever.

The reality is that even conservatives, such as Justices Scalia and Thomas, abandon originalism when it does not serve their purpose. For example, the Congress which ratified the Fourteenth Amendment also adopted numerous race-based programs, like the Freedmen's Bureau, to benefit racial minorities.<sup>35</sup> Following the original meaning of the Fourteenth Amendment should lead originalists, such as Justices Scalia and Thomas, to favor affirmative action. Not surprisingly, they never mention this original understanding when they express their strong hostility to affirmative action programs.

There is nothing whatsoever to indicate that those who drafted and ratified the First Amendment meant to protect the right of corporations to spend unlimited amounts of money in election campaigns. But that, of course, did not keep the five conservative justices from finding such a right in *Citizens United v. Federal Election Commission* in 2010.

Finally, and perhaps most importantly, the desire for value neutral judging in constitutional cases is an impossible quest because balancing of competing interests is inescapable and a justice's own ideology and life experiences inevitably determine how he or she – or anyone interpreting the Constitution – strikes the balance. This is a crucial flaw in the claims of originalists and others who claim to have a way to interpret the Constitution that is not about the values of the justices.

No constitutional right is absolute and constitutional cases constantly involve balancing of the government's interest against the claim of a right. To pick an easy example, the Fourth Amendment prohibits "unreasonable" searches and arrests. But what is reasonable or unreasonable cannot be answered from the text of the Constitution or any original understanding. Whether it is unreasonable for police to access cell tower location information without a warrant, the issue in *Carpenter v. United States*, requires that the Court make a choice that balances

privacy interests with law enforcement needs. When the Court considered whether the police can take a DNA sample from a person arrested for a serious crime to see if it matches DNA from an unsolved crime in the police data base, the Court explicitly balanced the law enforcement benefits from obtaining the information against the intrusion on to privacy and ruled, 5-4, in favor of the government.<sup>36</sup>

Over the last half century, the Supreme Court has articulated principles for how balancing generally is to be done in most constitutional cases. If the government infringes a fundamental right, such as freedom of speech, or discriminates based on race or national origin, it must meet “strict scrutiny” – its action must be shown to be necessary to achieve a compelling government interest. This is a heavy burden which the government rarely meets. By contrast, if the government discriminates based on sex or against non-marital children, its action must meet “intermediate scrutiny” and be shown to be substantially related to achieve an important government interest. All other government actions that discriminate, say on the basis of age or disability, or that interfere with rights that are not deemed fundamental, only have to meet “rational basis review.” This means that they will be upheld so long as they are rationally related to a legitimate government purpose. The government almost always prevails under rational basis review.

These tests are about how the weights should be arranged on the scales for the balancing of competing interests. If it is the government discriminating based on race or interfering with a fundamental right, the weights are put on the scale to favor the challenger and the government has a significant burden to meet to justify its action. But if it is a type of discrimination that does not raise suspicion (say a 14 year-old challenging not being able to get a drivers’ license until

age 16), the weights are put on the scale to favor the government and it is the challenger who has to meet a heavy burden.

But what is a “compelling” or an “important” or a “legitimate” government interest inevitably requires a value choice. It never can be answered by the text of the Constitution or its original understanding. For example, in cases involving whether colleges and universities can engage in affirmative action, the central question is whether diversity in the classroom is a compelling government interest.<sup>37</sup> The justices all agreed that the use of race in admissions must meet strict scrutiny. The disagreement was entirely over whether achieving diversity is a compelling interest and what must be shown for a college or university to demonstrate that its affirmative action program is necessary.<sup>38</sup> But that requires a value choice by the justices. Not surprisingly, the liberal and more moderate justices have found that achieving diversity is a compelling interest, while the most conservative justices reject this as being a sufficient basis to allow affirmative action programs.

To take another example, laws prohibiting same sex marriage have to meet at least rational basis review under equal protection. Gays and lesbians cannot marry, while opposite sex couples can. No one denied that this is discrimination based on sexual orientation; the issue was whether the discrimination was justified. At the very least treating gays and lesbian couples differently from opposite sex couples still has to meet rational basis review, which requires that the government interest has to be rationally related to a legitimate government purpose. Every justice on the Court therefore had to face the question of whether there is any “legitimate” reason to keep gays and lesbians from marrying. Originalism can provide no answer.

The conclusion is thus inescapable that anyone interpreting the Constitution – the Supreme Court, lower federal court judges, members of a legislature, you or me – is inevitably



engaged in the process of making value choices. Does society's interest in protecting children justify the laws restricting speech by prohibiting child pornography? Does the need for public safety justify laws keeping ex-felons from having firearms? Does protecting girls' from pregnancy justify statutory rape laws that make it a crime for to have sex with a girl under age 18 but not a boy under age 18? The examples are endless.

As I wrote over a quarter of a century ago, "[c]onstitutional law is now, will be, and always has been about, largely a product of the views of the Justices."<sup>39</sup> The conservatives quest for value neutral judging is a futile one; their claim that they have achieved it through originalism is, to be blunt, nonsense.

The ideology and values of each justice on the Court make all the difference. Republicans, of course, know this as much as Democrats. That is why there was such an intense fight over who would replace Justice Scalia and why Merrick Garland never got a hearing from the Republicans. We need to stop pretending that there is such a thing as value-free judging and get rid of ridiculous and untrue slogans like, "justices apply the law, they don't make the law." Everything the Supreme Court does makes the law.

The fact that justices' values and views determine the outcome of cases does not mean that justices are the same as politicians. Those holding elected office must be responsive to the voters if they want to remain in their seats. Supreme Court justices serve for life and are expected to be independent of electoral politics. Lobbying of elected government officials is accepted; lobbying of Supreme Court justices is never permissible and never occurs. Legislators sometimes trade votes; so far as we know, Supreme Court justices never do.

But justices are like politicians in one crucial way: justices constantly make choices that come down to their views and values. Justices Scalia and Ginsburg disagreed in almost every

major case, not because one is smarter or better understands constitutional law or avoids decisions based on value choices. Rather, their disagreements reflect their differing ideology, life experiences, and worldviews.

One of the consequences of the November 8, 2016 presidential election is that originalism lives on as an important approach to constitutional interpretation. If Hillary Clinton had won the presidency, she would have re-nominated Merrick Garland or perhaps someone younger and more liberal to replace Justice Antonin Scalia. There then would have been a majority of justices appointed by Democratic presidents for the first time since 1971. It is easy to imagine Justice Ginsburg and perhaps Justice Breyer choosing to retire to allow a Democratic President to pick their successors. Justice Kennedy, too, might well retire in the four years of this presidential term regardless of who is in the White House. With Clinton's picks to the Court, a Democratic appointed majority would have been secure, likely for many years to come.

Originalism would have been relegated to dissents, especially by Justice Clarence Thomas. Neither Chief Justice John Roberts nor Justice Samuel Alito tend to write their opinions in originalist terms. None of the Democratic appointees to the Court's embrace originalism. Conservative law professors would have continued to champion originalism and would have used it to criticize liberal decisions. The academic debate over originalism would have continued, but as a method of constitutional interpretation invoked by the Court, it would have faded into obscurity.

Everything, though, is different because Donald Trump won the presidency. Neil Gorsuch, a self-avowed originalist, and not Merrick Garland, replaced Antonin Scalia. It will be President Trump who fills any other vacancies in the next three years and his list is filled with conservatives with strong Federalist Society ties who espouse a belief in originalism. Even

though the flaws of originalism have been revealed for decades, conservatives espouse it and pretend that it provides answers to decide constitutional cases. Do they not see the problems with originalism? Of course, they do. But the rhetoric of originalism lets them portray themselves as not engaged in making value choices, but instead following the “true” meaning of the Constitution. It is important that progressives point out over and over again that this is truly an emperor with no clothes.

*But if not originalism, then what?*

Never in American history has a majority of the Supreme Court embraced originalism (though that could still come depending on when vacancies occur and who fills them). On many occasions, the Supreme Court has expressly and forcefully rejected originalism. In *McCulloch v. Maryland*, in 1819, Chief Justice John Marshall famously declared: reminded us that “we must never forget that it is a Constitution we are expounding”, a Constitution “meant to be adapted and endure for ages to come.”<sup>40</sup>

In *Home Building & Loan Association v. Blaisdell*, the Court, during the depression, upheld a Minnesota law that prevented foreclosure on farm mortgages.<sup>41</sup> This law violated the text of Article I, Section 9 of the Constitution that prevents states from impairing the obligation of contracts. Also, it was undisputed that the original intent of the provision was to keep states from adopting exactly this kind of debtors’ relief laws. But the Court, recognizing the necessity of such legislative actions at the time, rejected the relevance of the original understanding and declared:

It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of

its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning: 'We must never forget, that it is a constitution we are expounding' 'a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.'

It is hard to imagine a clearer rejection of originalism.

Similarly, in *Brown v. Board of Education*, the Court explicitly rejected as irrelevant the fact that the original understanding of the equal protection clause allowed states to impose segregation based on race.<sup>42</sup> Chief Justice Earl Warren, writing for a unanimous Court, declared: "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. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."

The Court again explicitly rejected originalism as a method of interpreting the Constitution in *Harper v. Virginia Board of Elections*, which declared unconstitutional poll taxes – the requirement that people pay a fee in order to vote.<sup>43</sup> Justice William Douglas wrote for the Court: "Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental

rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.”<sup>44</sup>

More recently, in *Obergefell v. Hodges*, in declaring unconstitutional state laws prohibiting same sex marriage, Justice Anthony Kennedy wrote for the Court and explained how the Constitution must be regarded as a living, not a dead document: “The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.”<sup>45</sup>

But if constitutional law is not, never has been, and should not be about divining the original meaning of a constitutional provision, what is the proper basis for decisions? After all, one of Justice Scalia’s constant refrains in defending originalism was that he had a theory of constitutional interpretation, but his opponents don’t.

As I have explained above, no method of constitutional interpretation – not Justice Scalia’s or any other – obviates the need for the justices or whoever is interpreting the Constitution to make value choices. The process of interpreting the Constitution always involves beginning with the document’s text. Sometimes it is clear. Article I, for example, says that members of the House of Representatives serve for two years and Senators have a six year term. Article II says that the President must be 35 years old. Article III is explicit that there will be a Supreme Court. But virtually always the cases coming to the Supreme Court, or that raise legal or public controversies, involve textual provisions that aren’t clear as to their meaning.

Certainly interpretation can include any insights to be gained from looking at the original understanding, if any can be determined, though with the understanding that it is not determinative. History and tradition as to how the Constitution has been interpreted, including prior precedent, matter too. And current social needs are very relevant too. Justice Kennedy expressed this well in his majority opinion in *Obergefell v. Hodges*:

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, ‘has not been reduced to any formula.’ Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.

Most of all, though, the Constitution should be interpreted to achieve its underlying values. The world of the early 21<sup>st</sup> century is vastly different from that of the late 18<sup>th</sup> century when the Constitution was drafted. It is silly to think that we can be governed by the specific views of those who knew nothing about the issues we face today. But their values, the goals animating the document and its provisions, are enduring.

But what are these values? That is the focus of the next chapter.

## Notes for Chapter 2

<sup>1</sup> *Brown v. Entertainment Merchants*, 564 U.S. 786 (2011).

<sup>2</sup> Clare Kim, *Justice Scalia: The Constitution is Dead* <http://www.msnbc.com/the-last-word/justice-scalia-constitution-dead> (Supreme Court Justice Antonin Scalia took the stage at Southern Methodist University Monday night and argued the Constitution is “not a living document” and is “dead, dead, dead.”)

<sup>3</sup> Emi Kolawole, *Scalia: Constitution Does Not Protect Women From Discrimination*, Washington Post, Jan. 11, 2011 (In an interview with California Lawyer, Scalia said that the Constitution itself does not protect women and gay men and lesbians from discrimination. Such protections are up to the legislative branch, he said.)

<sup>4</sup> *Gill v. Whitford*, 218 F.Supp. 3d 837 (W.D.Wis. 2016), *probable jurisdiction noted*, 137 S.Ct. 2268 (2017).

<sup>5</sup> *Carpenter v. United States*, 819 F.3d 880 (6<sup>th</sup> Cir. 2016), *cert. granted*, 137 S.Ct. 2211 (2017).

<sup>6</sup> *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010).

<sup>7</sup> *United States v. Jones*, 565 U.S. 400 (2012).

<sup>8</sup> The Hon. Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W.RES.L.REV. 905 (2016).

<sup>9</sup>

<sup>10</sup> Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Indiana L.J. 1, 6 (1971).

<sup>11</sup> Edwin Meese, Speech to American Bar Association on “Jurisprudence of Original Intention” (July 9, 1985), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf>

<sup>12</sup> Edwin Meese, Speech to American Bar Association on “Jurisprudence of Original Intention” (July 9, 1985), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf>

<sup>13</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 148 n.6 (1989).

<sup>14</sup> Chief Justice Roberts statement, Nomination Process <http://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process>

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<sup>17</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>18</sup> *United States v. Miller*, 309 U.S. 174 (1939).

<sup>19</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

<sup>20</sup> *Shelby County, Alabama v. Holder*, 133 S.Ct. 2612 (2013).

<sup>21</sup> *Id.*

<sup>22</sup> *United States v. Windsor*, 133 S.Ct. 2655 (2013).

<sup>23</sup> In a forthcoming book, Professor Eric Segall does a superb job of examining originalism in its various forms and showing its inherent flaws. Eric Segall, *Originalism as Faith* (forthcoming).

<sup>24</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

<sup>25</sup> *See, e.g.*, 543 U.S. 551, 561 (2005) (this Court has 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.”) *See also* *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958).

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- <sup>26</sup> See, e.g., *Atkins v. Virginia*, 536 U.S. 404 (declaring the death penalty cruel and unusual punishment when imposed on the intellectually disabled); *Roper v. Simmons*, 543 U.S. 551 (2005) (declaring the death penalty unconstitutional when applied for crimes committed by juveniles); *Glossip v. Gross*, 135 S.Ct. 2726 (2015) (rejecting a constitutional challenge to the method of lethal injection for imposing the death penalty).
- <sup>27</sup> *Lockyer v. Andrade*, 538 U.S. 63 (2003).
- <sup>28</sup> See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 351-352 (5<sup>th</sup> ed. 2015) (contrasting Hamilton's and Madison's views on inherent presidential power).
- <sup>29</sup> See *United States v. Butler*, 297 U.S. 1 (1936) (contrasting Hamilton's and Madison's views on the scope of Congress's spending power).
- <sup>30</sup> Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* 90 (2004).
- <sup>31</sup> William Van Alstyne, *Interpreting this Constitution: The Unhelpful Contributions of Special Theories of Constitutional Interpretation*, 35 U. Fla. L. Rev. 209, 233 (1983).
- <sup>32</sup> R.G. Collingwood, *The Idea of History* 218-19 (1946).
- <sup>33</sup> See Jack Balkin, *Living Originalism* (2014); Randy Barnett, *Our Republican Constitution: Securing the Liberty and Sovereignty of We the People* (2016); William Baude, *Essay, Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).
- <sup>34</sup> William Baude, *Essay, Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).
- <sup>35</sup> Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 478, 499 (1998).
- <sup>36</sup> *Maryland v. King*, 465 U.S. 435 (2013).
- <sup>37</sup> See *Grutter v. Bollinger*, 509 U.S. 306 (2003). I discuss affirmative action in detail in Chapter 8.
- <sup>38</sup> *Fisher v. University of Texas, Austin*, 136 S.Ct. 2198 (2013).
- <sup>39</sup> Erwin Chemerinsky, *The Vanishing Constitution*, 103 Harv. L. Rev (1989).
- <sup>40</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 415 (1819).
- <sup>41</sup> *Home Building & Loan v. Blaisdell*, 290 U.S. 398, 435 (1934).
- <sup>42</sup> *Brown v. Board of Education*, 347 U.S. 483, 492 (1954).
- <sup>43</sup> *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).
- <sup>44</sup> *Id.* at 669.
- <sup>45</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2015).



## Chapter 3

### The Values of the Constitution: Rediscovering the Preamble

#### *Beginning at the beginning*

If the conservatives' approach is empty and misleading, how do progressives replace it? If constitutional interpretation should be based on achieving the underlying values of the Constitution, where are these values to be found? The place to start is at the very beginning, with the Preamble to the Constitution, which articulates the purposes for the document. The Preamble states: "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."

The Preamble does much more than tell us that the document is to be called the "Constitution" and that it is meant to establish a government. The Preamble describes the core values that the Constitution seeks to achieve: democratic government, effective governance, justice, and liberty. The Preamble begins by proclaiming that the Constitution is created by "we the people." The people are sovereign. This phrase makes clear that the United States is to be a democracy, not a monarchy or a theocracy or a totalitarian government, the dominant forms of government throughout the world in 1787 and before. The Preamble tells us that the Constitution exists to ensure that the national government has the authority to do everything that is part of creating a "more perfect union" and providing for "the general welfare." The Preamble states that the Constitution is meant to ensure "justice" and to protect "liberty".

Seeing the Preamble as the articulation of the underlying values of the Constitution is not new. Joseph Story, who served for decades on the Supreme Court in the 19<sup>th</sup> century, wrote in

1833 that a “preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute. . . . [and] it is properly resorted to, where doubts or ambiguities arise upon the words of the enacting part.”<sup>1</sup> As Professor Eric Axler expressed much more recently, “To discover the spirit of the Constitution, it is of the first importance to attend to the principal ends and designs it has in view. These are expressed in the [Preamble.]”<sup>2</sup> Former Congressman Peter Rodino, Jr., similarly said that the Preamble is the “heart, soul, and spirit of the Constitution.”<sup>3</sup> Thus, he and a co-author said that the “Preamble should be the focal point in constitutional interpretation. It declares the framers ‘constitutional aspiration’ and gives the document as a whole its direction.”<sup>4</sup>

This, of course, is not unique to the United States Constitution, but common to constitutions all over the world which begin with Preambles. The Supreme Court of India, for example, declared: “It seems to me that the Preamble of our Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble.”<sup>5</sup> The preamble of a constitution is thus not idle words; it is the distillation and articulation of the central purpose of the document. Preambles to constitutions “are not just the hortatory language that introduces a series of operative provisions, they are not just the ‘ornately designed cover’ of a book called ‘the Constitution’. If a preamble has been written the words it contains have a reason.”<sup>6</sup>

The preamble is thus the obvious place to begin in discerning the values of the Constitution. Unfortunately, though, the Preamble has been largely ignored in Supreme Court decisions and in scholarly writings. As has been widely noted, “[w]hile almost every other provision has been subjected to exhaustive analysis and a rich and often long history of judicial construction, the preamble has been surprisingly ignored by the overwhelming majority of

commentators' and relegated to sheer irrelevance by the courts.”<sup>7</sup> It has been treated as just a rhetorical flourish to the Constitution.

The Supreme Court set the tone of dismissing the Preamble in 1905, in *Jacobson v. Massachusetts*, a case about the constitutionality of compulsory vaccination laws, when the Court ruled that laws cannot be challenged or declared unconstitutional based on the Preamble. The Court declared: “Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments.”<sup>8</sup> Since then, the Court has taken this to mean that the Preamble essentially is to be ignored. Courts “have rejected, repeatedly, the argument that constitutional rights or limitations can be inferred directly from the preamble.”<sup>9</sup> Over a half century ago, Professor William Crosskey remarked that the Preambles words “are now universally regarded as empty verbal flourish.”<sup>10</sup>

In the few occasions over the last century in which the Preamble has been mentioned, the Supreme Court has summarily rejected its relevance to constitutional interpretation and decisions. The result is that it plays no role in constitutional arguments and analysis. Constitutional law textbooks, including mine, never discuss it.<sup>11</sup> I have taught constitutional law for 38 years, but until recently – as a result of my work on this book – I almost totally ignored the Preamble in my classes. As one commentator noted, “the preamble remains a neglected subject in the study of American constitutional theory and receives scant attention in the literature.”<sup>12</sup>

But this has been a mistake because the Preamble states the ideals for the Constitution and for the Republic. It also is a mistake to ignore any words of the Constitution in interpreting

the document. In the foundational case of *Marbury v. Madison*, in 1803, the Court declared “[i]t cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it.” Yet, for over a century, the Court has treated the Preamble as being entirely without effect.

Early in American history, it was different; the justices used the Preamble as part of constitutional interpretation. In *Martin v. Hunter’s Lessee*, the Court established its authority to review state court decisions and invoked the Preamble: “The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by ‘the people of the United States.’ There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority.”<sup>13</sup>

In another foundational case for American government, *McCulloch v. Maryland* (1819), Chief Justice John Marshall invoked the Preamble and stressed the importance of its language that the government was created by the people.<sup>14</sup> The State of Maryland claimed that it was the state governments who formed the United States and that therefore it is the states who are sovereign. Maryland argued on this basis that it was constitutional for it to tax the Bank of the United States. The Court rejected Maryland’s argument, quoting the Preamble and declaring: “The government proceeds directly from the people; is ‘ordained and established,’ in the name of the people.”

Yet in the two centuries since *McCulloch*, the Court has stopped looking to the Preamble in interpreting the Constitution. The Preamble is regarded as just rhetoric at the beginning of the

document, often to be memorized in junior high school civics classes, but with no legal or interpretive significance. By ignoring the Preamble, we forget the idealistic vision that inspired the Constitution and what it was meant to achieve.

*What are the values stated in the Preamble?*

If the Preamble is read carefully and taken seriously, basic constitutional values can be found within it that should guide the interpretation of the Constitution. The Preamble states “we the people” have created a Constitution “to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, [and] promote the general Welfare.” I find in this four crucial values.

First, there is the commitment to a democratic form of government, as expressed in the first three words: “we the people.” Or as Abraham Lincoln famously declared in the Gettysburg Address, it is a “government of the people, by the people, for the people.”

Second, there is the desire of creating an effective government. The Constitution followed the failed Articles of Confederation, which were the initial effort to govern after the new nation was formed. Under the Articles of Confederation, there was a very weak federal government. Congress had no authority to tax or to regulate individuals’ conduct. The President had little power. There was no federal judiciary. Those who met in Philadelphia in 1787 recognized this and chose not to revise the Articles of Confederation, but rather to draft a new document: the Constitution. An effective government must do many things: create a peaceful society (“ensure domestic Tranquility”), ensure protection from external threats (“provide for the common defence”), and act to benefit its citizens (“promote the general welfare”).

Third, there is the desire to “establish Justice.” The goal is a government that is fair in its treatment of its citizens. There must be both fair processes of government and just outcomes

from government actions. So many of the complaints in the Declaration of Independence were about the unfairness and lack of justice under English rule. The Declaration of Independence lamented the absence of trial by jury in the American colonies. It spoke of judges who lacked independence and were beholden to the king, meaning a lack of fair proceedings for those before them. It strongly objected to the absence of voting rights and therefore taxation without representation.

Finally, the Preamble says that it exists to provide freedom: “to secure the Blessings of Liberty to ourselves and our Posterity.” The Constitution is founded to protect individual freedom, to ensure a society where personal liberty, not a duty to the state, is central. In part, of course, this was about structuring government to prevent tyrannical rule. But it was more than that: it was about ensuring government in a manner that would protect basic aspects of liberty for its citizens. Alexander Hamilton even stated that the Bill of Rights was not necessary because the Preamble was able to function as one.<sup>15</sup>

It is notable that there is another key value that is omitted: equality. Equality is never mentioned in the Preamble or for that matter in the seven articles of the Constitution that were drafted in 1787 or the ten amendments that were ratified in 1791. This is not surprising for a Constitution that explicitly protected the institution of slavery and gave women no rights. The Declaration of Independence proclaimed that “all men are created equal,” but the Constitution does not say or imply this. It was not until 1868, when the Fourteenth Amendment was adopted, that the Constitution came to include a guarantee of equal protection of the laws.

But as the Supreme Court has decided since at least the mid-1950s, equality is an implicit and inherent part of “liberty”.<sup>16</sup> The Fourteenth Amendment applies only to state and local governments, which leads to the embarrassment that there is no constitutional provision that

keeps the federal government from denying equal protection. But it can't be right that the federal government can discriminate, including based on race or sex, with impunity and without constitutional constraints. So the Supreme Court sensibly ruled that the due process clause of the Fifth Amendment – which provides that the federal government cannot deny a person of life, liberty, or equality – includes an assurance of equal protection as well.

I believe then that these five values, four explicitly stated in the Preamble and one that should be seen as implied, should guide interpreting the Constitution: democratic governance, effective governance, justice, liberty, and equality. In fact, I would go further and argue that virtually every provision in the Constitution can be seen as embodying and implementing one or more of these five values.

Before considering this for each of these five values, I want to be clear as to what I am not doing. I am not making an originalist argument that the meaning of these concepts should be derived from what the drafters of the Constitution intended. Instead, I am arguing that looking at the structure of the Constitution confirms that these are the five values that should be seen as most important. Nor am I saying or implying that these values will yield determinate, clear answers to constitutional issues. As I explained in the prior chapter, there is no method of constitutional interpretation that can do that.

Rather my hope is to show that it is reasonable, indeed persuasive, to see these as the core values of the Constitution. They are found not just in the Preamble, but confirmed by looking at the structure of the document and what it contains. As the late Yale law professor Charles Black, Jr., persuasively argued over a half century ago, a great deal can be understood by looking at the structure of the Constitution.<sup>17</sup> My goal, then, is to show that the structure of the Constitution confirms that these are the central values that should guide constitutional interpretation.

Democratic governance. It is profoundly significant that the Constitution begins with the words, “We the People.” Many countries in the preambles to their constitution invoke God as the basis for government authority. As Professor Orvid explains: “Some preambles emphasize God’s supremacy, such as the preambles to the Canadian Charter (‘the supremacy of God’) or the Swiss Constitution (‘in the Name of Almighty God’). Other preambles refer to a religion: the Greek preamble refers to the Holy Trinity; in the Irish preamble, the Holy Trinity is mentioned as ‘our final end’ and a source of authority toward which all actions of ‘men and states must be referred.’”<sup>18</sup>

The absence of invocation of religion, or any mention of God in the Constitution, reflects a desire to create a secular government. This should not be surprising because those who drafted the Constitution saw themselves as children of the Enlightenment where reason had replaced religion as a basis for decisions.

The greatest significance of beginning the document with the words “We the People,” was to convey that indeed it was the people who were creating the Constitution and therefore the people who hold ultimate sovereignty. This was in stark contrast to England, and most countries in the world at the time, where sovereignty was thought to reside in a monarchy.

The original version of the preamble stated: “We the people of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.”<sup>19</sup> The text was changed by the Committee of Style, whose members were William Samuel Johnson, Alexander Hamilton, Gouverneur Morris, James



Madison, and Rufus King. However, there is no historical record of the drafting process of the preamble, or the reasons for the changes made by the Committee of Style.

Both the initial version and the one adopted begin with the key words, “We the people.” But the initial version identifies them as people of the states that then existed, while the final version says, “We the people of the United States.” In one sense, these phrasings mean exactly the same thing: the people of the United States, by definition, were the people of these states that existed at the time. The difference, though, seems important. In the enacted version, the people saw themselves and declared themselves to be United States citizens; their regional identity as citizens of particular states was subordinate. There also is an important enduring quality in that “We the people of the United States” can include all who will come to be part of this at any future time and not just those who are in the enumerated states. In fact, it is notable in light of current controversies that it does not say, “We the citizens of the United States,” although there are constitutional provisions limited to citizens.<sup>20</sup> The Constitution should be interpreted to protect all of the people within it.

Making it clear that the Constitution was created by the people and not by the state governments has had great significance. At very points in American history, there have been claims that state governments created the United States government and therefore possessed ultimate sovereignty. This was Maryland’s argument as to why it had the power to tax the Bank of the United States. In the early 19<sup>th</sup> century, John Calhoun argued that states are sovereign and could interpose their sovereignty between the federal government and the states to prevent abolition of slavery. This argument was tried again during the 1950s and 1960s by Southern states trying to avoid desegregation.

There is a textual basis for this claim of state sovereignty. Article VII of the Constitution provides that “the ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same.” The Constitution was ratified by the states, not by a national referendum. But as explained above, early in American history, the Supreme Court in *McCulloch v. Maryland* emphatically rejected this argument. Chief Justice John Marshall wrote: “The government proceeds directly from the people; is ‘ordained and established’ in the name of the people....The assent of the States, in their sovereign capacity, is implied, in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments.”<sup>21</sup>

Marshall’s argument is rhetorically powerful; it concludes that “[t]he government of the Union...is, emphatically, and truly, a government of the people.”<sup>22</sup> The Court rejected the view that the Constitution should be regarded as a compact of the states and that the states retain ultimate sovereignty under the Constitution. Ever since, Chief Justice Marshall’s view has been the law of the Constitution.

Most important, though, the phrase “we the people” conveys that the United States shall be a democracy. There are many forms of government and democracy was hardly the most common in the late 18<sup>th</sup> century. Although defining “democracy” is a difficult task and one beyond my scope here, at the very least it includes officials being chosen by election and serving for fixed terms in office. That is exactly what the Constitution provides. Article I specifies that members of the House of Representatives serve for two year terms and are elected by the voters, while Senators serve six year terms and were chosen by state legislatures until the adoption of the Seventeenth Amendment in 1913. Under Article II, the President is chosen by the Electoral

College and serves for a four year term.<sup>23</sup> These provisions are not incidental to the Constitution: they ensure that those exercising power will serve for limited years and face regular electoral review. The First Amendment, too, is crucial for democracy. Open discussion of candidates is essential for voters to make informed selections in elections; it is through speech that people can influence their government's choice of policies; public officials are held accountable through criticisms that can pave the way for their replacement.

It is notable that many of the amendments adopted since the Bill of Rights are about perfecting the democratic process and especially expanding who can participate in elections. The Fifteenth Amendment assures that the right to vote cannot be infringed based on race or previous conditions of servitude. The Seventeenth Amendment, mentioned above, provides that the people will directly choose their Senators. The Nineteenth Amendment guaranteed women the right to vote, declaring: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex." The Twenty-third Amendment provides for the District of Columbia to participate in the electoral college. The Twenty-fourth Amendment outlaws the poll tax – a requirement that people pay a fee in order to vote – in federal elections. The Twenty-sixth Amendment guarantees the right to vote for those 18 or older.

All of this reflects how much creating democratic rule is truly at the heart of the Constitution and must be regarded as a central value of the Constitution.

Effective governance. In parsing the words of the Preamble, it is striking how much of it is about creating an effective federal government. Core characteristics of any effective government are stated in the Preamble: the Constitution exists to "insure domestic Tranquility, provide for the common defence, promote the general Welfare." This focus on effective

government should not be a surprise and was not accidental. Those who drafted the Constitution were acutely aware of the failure of the Articles of Confederation. Indeed, at the Constitutional Convention, Edmund Randolph explained that a key purpose of the Preamble was to recognize the past failure in governance and to create a successful government. He said: "the object of our preamble ought to be briefly to declare, that the present foederal government is insufficient to the general happiness [and] that the conviction of this fact gave birth to this convention."<sup>24</sup>

The challenge for the framers was to create a government with sufficient powers to be able to govern effectively and to deal with problems that were sure to emerge, but that was sufficiently constrained by checks and balances so as to avoid tyranny and the type of abuses that occurred under British rule (and elsewhere through world history). To achieve the goals of a federal government that could "insure domestic Tranquility, provide for the common defence, promote the general Welfare" they gave Congress, unlike under the Articles of Confederation, many specific powers, including: the power to raise taxes, to pay debts, to "provide for common defense and general welfare," to borrow money, to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," to coin money, to establish post offices and roads, to issue copyrights and patents, to create courts, to raise an Army and a Navy, and many other powers. They amplified all of this by saying that Congress could "make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

But the framers also were distrustful of congressional power. They limited Congress to the powers "herein granted." They required that it take action of both houses of Congress, with

each quite differently, constituted to enact a law. They gave the President the power to veto a bill passed by Congress, though with Congress possessing the ability to override the veto.

Unlike the Articles of Confederation, the president was given significant powers and there was a federal judiciary, in the form of a Supreme Court and whatever other federal courts Congress would choose to create. All of this was meant to establish a government with the necessary powers to effectively govern and achieve the goals of the Preamble, but without a significant risk of abuses of power.

Far more than the framers could have imagined, the Constitution has succeeded in this. The government they designed has last for almost two and a half centuries. It has fought many wars, most successfully. It has grown from being a small nation largely protected by the oceans in the 18<sup>th</sup> century world to the growth of the United States across the continent and beyond and into the greatest power the world ever has seen. It has endured a great depression and many serious recessions into a very wealthy nation, albeit with many still impoverished and with great and growing wealth inequalities. And it has done this all with constant orderly changes of power and without what would be regarded as tyrannical rule, though with decades of slavery and times of serious denials of liberty and freedom.

Focusing on the Constitution's mission of creating an effective government is important in analyzing some of the most important issues that have arisen and likely will continue to arise: the scope of Congress's power to deal with serious social and economic issues. Throughout American history there have been battles over the authority of the federal government to take actions that aid citizens who are less powerful: limiting slavery, banning child labor, prohibiting race discrimination, protecting the environment. All too often the Supreme Court has limited federal power in these areas, such as in striking down the first federal statute limiting the use of

child labor,<sup>25</sup> declaring unconstitutional key provisions of the Voting Rights Act,<sup>26</sup> and invalidating important federal environmental laws.<sup>27</sup> The guidance of the Preamble has been overlooked: the Constitution exists to ensure that the national government has the authority to do all of these things which are part of a “more perfect union” and providing for “the general welfare.” As Professor William Croskey declared: “[U]nless the Preamble is supposed to have been a delusion and a snare, the government established by the Constitution was one with power adequate to the objects the Preamble covers.”<sup>28</sup>

Establishing justice. The Preamble, of course, explicitly states its goal to “establish justice” and no one would deny that this is among the most important purposes of the Constitution. The concept of justice is critical for civilized governance. In 1215, the Magna Carta declared that the government must provide justice and that justice requires *both* a fair process and fair results. This concept long predates even the Magna Carta. The Bible, Deuteronomy 16:20, says, “Justice, justice shalt thou pursue.” Commentators have suggested that the word “justice” is repeated twice in the Bible to convey the importance of both procedural and substantive fairness. In American constitutional law, this means a requirement for both procedural due process (the government must follow adequate procedures when depriving a person of life, liberty, or property) and substantive due process (the government must have adequate reasons when taking away a person’s life, liberty, or property.)

This, too, is reflected in the structure of the Constitution, though was made far more explicit in the Bill of Rights that were added soon after its ratification. Article III of the Constitution, which creates the Supreme Court and the authority for Congress to establish lower

federal courts, provides that judges “shall hold their Offices during good Behaviour.” The Constitution thus bestows life tenure on federal judges. That is, they hold their positions until they die, retire, or are impeached and removed from office. This job security is to help ensure that judges decide cases based on their best understanding of the facts and law of the matters before them, not to please the voters at a coming election. Many studies have shown that judges who are electorally accountable are much less likely to issue unpopular rulings, such as in favor of those who are on death row. It is impossible to imagine elected judges in Southern states striking down the laws that mandated segregation or enforcing the Supreme Court’s desegregation orders. Judicial independence is seen as key to the assurance of justice.

Article III, section 2 guarantees trial by jury, thought to be a crucial check on government power. It provides that “The trial of all Crimes, except in Cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed.” Article III also seeks to assure justice in some of the most important cases that could arise: accusations of treason. The Constitution provides that “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt act, or on Confession in open Court.”

But it is the Bill of Rights, with its much greater focus on individual rights than the text of the Constitution, that contains many provisions that are about ensuring justice. The Fifth Amendment, for example, says that no person can be deprived of life, liberty, or property without due process of law. It is remarkable how many of the provisions of the Bill of Rights are about securing justice for those accused of crimes. The Fourth Amendment protects people

from arbitrary searches or arrests by the police, declaring: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The Fifth Amendment prohibits double jeopardy, meaning that a person cannot be tried twice for the same crime, requires a grand jury indictment for a person to be tried for a federal crime, and says that no person can be compelled to be a witness against himself. The Sixth Amendment focuses on “criminal prosecutions” and assures the “right to a speedy and public trial, by an impartial jury,” to be confronted with the witnesses against him, and “to have the Assistance of Counsel for his defence.” The Eighth Amendment forbids excessive bail and says that “nor shall cruel and unusual punishment be imposed.”

There is a logical structure to these amendments: the Fourth Amendment limits what police can do in investigating crimes. The Fifth Amendment restricts prosecutors in bringing criminal prosecutions, such as in preventing double jeopardy and in requiring a grand jury indictment. The Sixth Amendment then governs how criminal trials are to be conducted. And the Eighth Amendment, among other things, says that people cannot be subjected to excessive fines or cruel and unusual punishment. All of this is about fulfilling the Preamble’s goal of establishing justice. The provisions are a reaction to the abuses under English rule, where government has the power to search through colonists’ possessions, prosecute them for suspected violations of law on weak evidence, and transport them across the seas to trial in England by a judge appointed by the king. A person could be held in prison indefinitely awaiting trial. A trial



could occur without a defendant being able to confront his accuser or having assistance of counsel. Harsh punishments, far disproportionate to the crime committed, could be imposed. Many of the Constitution's provisions, and especially those in the Bill of Rights, reflect the desire to prevent these abuses and overall, the central importance of justice.

Securing liberty. The Preamble states the goal that the Constitution exists to “secure the Blessings of Liberty to ourselves and our Posterity.” Interestingly, despite this commitment, the framers of the Constitution saw no need to provide a detailed statement of rights in the Constitution they drafted. Although protecting individual liberties is popularly regarded as the Constitution's most significant goal, there are few parts of the Constitution, apart from the Bill of Rights, that pertain to individual rights. Article I, §§9 and 10, respectively, say that neither the federal nor state governments can enact an ex post facto law or a bill of attainder. An ex post facto law is one that criminally punishes conduct that was lawful when it was done or that increases the punishment for a crime after it was committed. A bill of attainder is a law that orders the punishment of a person without a trial. Article I, §9 says that Congress cannot suspend the writ of habeas corpus, except in instances of rebellion or invasion. This was to ensure that those who claim to be illegally held by the government can get a remedy from the courts. Article I, §10, also provides that no state shall impair the obligations of contracts.

Article IV provides that the “Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” This provision limits the ability of a state to discriminate against out-of-state residents with regard to what are called “privileges and immunities.”

The only other provisions of the Constitution, apart from the Bill of Rights, that deal with individual liberties focus on protecting the rights of slave owners. Article I, §9, prohibited Congress from banning the importation of slaves until 1808, and Article V, which concerns constitutional amendments, provides that this provision cannot be amended. Article IV, §2, contains the fugitive slave clause which required that a slave escaping from one state, even to a non-slave state, be returned to his or her owner. Slavery was very much a part of the fabric of the Constitution and it was not abolished until the Thirteenth Amendment was adopted in 1865 after the conclusion of the Civil War.

There are many explanations for the absence of a more elaborate statement of individual rights in the Constitution. Some believe that the framers thought it unnecessary because rights were adequately protected by the limitations on the power of the national government and the checks and balances created by the Constitution. Also, the framers might have been fearful that enumerating some rights could be taken as implicitly denying the existence of other liberties. Thus, the Ninth Amendment to the Constitution declares: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

Several states ratified the Constitution, but with the insistence that a Bill of Rights be added.<sup>29</sup> Almost immediately after Congress began its first session, James Madison started drafting amendments to the Constitution. Seventeen amendments passed the House of Representatives and were sent to the Senate.<sup>30</sup> The Senate approved 12 of them. Interestingly, one that the Senate did not approve would have prohibited state infringement of freedom of conscience, speech, press, and jury trial; Madison referred to this as “the most valuable amendment in the whole lot.”

Many of the constitutional amendments that were ratified were about protecting liberties. In addition to the many criminal procedure protections described above, the First Amendment protects religious freedom by preventing Congress from enacting any law “respecting an establishment of religion or prohibiting the free exercise thereof,” or “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” As discussed in the earlier chapters, the Second Amendment protects a right of people to “keep and bear arms,” though its language is an enigma in its declaration: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” The Third Amendment prevents the government from requiring that people house soldiers, a practice of the British government that was objected to in the Declaration of Independence. The Fifth Amendment provides that the government can take private property for public use, but only if pays just compensation, and also ensures that the government must provide due process when it deprives a person of life, liberty, or property. The Seventh Amendment protects a right to trial by jury in civil cases.

Many of the freedoms protected by the Supreme Court are not enumerated, but come instead from its interpreting the word “liberty” in the due process clauses. For example, over the course of the last century, the Court has protected rights that are not mentioned in the Constitution’s text, such as freedom of association, the right to marry, the right to procreate, the right to custody of one’s children, the right to keep the family together, the right of parents to control the unbringing of their children, the right to purchase and use contraceptives, the right to abortion, the right of competent adults to refuse medical care, and the right of adults to engage in private consensual homosexual activity. All of this reflects the importance of “securing liberty”

as a central value of the Constitution, as stated in its Preamble, reflected in its provisions, and embodied in decades of Supreme Court jurisprudence.

Two characteristics about the protection of individual rights in the Constitution should be noted. First, the Constitution's protections of individual liberties apply only to the government; private conduct generally does not have to comply with the Constitution. Only the Thirteenth Amendment, which prohibits slavery and involuntary servitude, directly protects individuals from private conduct.

Second, the Bill of Rights provisions protecting individual liberties initially were deemed to apply only to the federal government and not to state or local governments. Not until the twentieth century did the Supreme Court decide that almost all of the Bill of Rights provisions apply to state and local governments through the due process clause of the Fourteenth Amendment.

Equality. My goal through this chapter has been to identify the values of the Preamble and to show that they are reflected throughout the text of the Constitution. My hope is that those of all ideologies can agree that these are core values of the Constitution. But unlike the other values I have identified – democratic government, effective governance, establishing justice, securing liberty – equality is never mentioned in the Preamble. Nor is it mentioned in the text of the Constitution or any of the Bill of Rights provisions. Unlike the other values, it is not plausible to argue that equality was a central value of the Constitution when it was drafted in 1787. As I have explained, the Constitution protected the rights of slave owners, accorded women no rights, and really was about protecting the rights of white male property owners.

My argument for treating equality as a central value of the Constitution must go beyond the Preamble. I would think that few today would deny the importance of this value, even though

there will be enormous disagreement about what it should mean. I, of course, can argue – as the Supreme Court has concluded – that equality is implicit in a guarantee of liberty. That is how the Court has found a constitutional requirement for equal protection that applies to the federal government.<sup>31</sup> But there also is something inherently unsatisfying about this argument because equality is not simply an aspect of liberty; equality is a crucial value in itself. Indeed, there is a constant tension between liberty and equality. Any law that prohibits discrimination limits a freedom to discriminate.

I think it is stronger to argue that the Fourteenth Amendment reflects and embodies the importance of equal protection as a central value of the Constitution. It is a huge mistake – often made by originalists – to focus on the Constitution as originally written and ignore how it was subsequently changed. The post-Civil War Amendments – the Thirteenth, Fourteenth, and Fifteenth Amendments – profoundly changed the relationship between the federal government and the states. The Thirteenth Amendment denied the ability of states to allow slavery. The Fourteenth Amendment says that *state* governments cannot deprive their citizens of the privileges or immunities of citizenship, or deprive any person of life, liberty, or property without due process of law, or deny any person of equal protection of the laws.

Although the Fourteenth Amendment made equal protection for all persons a core constitutional value, it took a long time for this to be recognized. In its initial decisions concerning equal protection, the Court took a very narrow approach. The first Supreme Court case to interpret the Thirteen and Fourteenth Amendments came soon after they were ratified, in 1873, in *The Slaughter-House Cases*.<sup>32</sup> Seeing a huge surplus of cattle in Texas, the Louisiana legislature gave a monopoly in the livestock landing and the slaughterhouse business for the City of New Orleans to the Crescent City Livestock Landing and Slaughter-House Company. The law

required that the company allow any person to slaughter animals in the slaughterhouse for a fixed fee. The monopoly was created to give enormous profits to a small group of people in Louisiana. They could cheaply buy Texas cattle and then sell it for monopoly profits.

Several butchers brought suit challenging the grant of the monopoly. They argued that the state law impermissibly violated their right to practice their trade. The butchers invoked many of the provisions of the recently adopted constitutional amendments. They argued that the restriction created involuntary servitude, deprived them of their property without due process of law, denied them equal protection of the laws, and abridged their privileges and immunities as citizens.

The Supreme Court narrowly construed all of these provisions and rejected the plaintiffs' challenge to the legislature's grant of a monopoly. As for equal protection, the Court said that the equal protection clause only was meant to protect blacks and offered the prediction that "[w]e doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."<sup>19</sup> That, of course, is not what the Constitution says. The Fourteenth Amendment could have been written so that it was limited to guaranteeing equal protection to former slaves or to those of African descent. But instead it says that "*no* person" shall be denied equal protection of the laws.

For almost a century after the *Slaughterhouse Cases*, the Court followed this narrow reading of the equal protection clause and refused to use it to stop other types of discrimination. For example, two years after the *Slaughterhouse Cases*, in 1875, the Supreme Court held that it was constitutional to deny women of the right to vote.<sup>33</sup> Virginia Minor, a leader of the women's suffrage movement in Missouri, attempted to register to vote on October 15, 1872, in

St. Louis County, Missouri. Missouri refused to allow this because she was a woman. Her husband, Francis Minor, who was a lawyer, filed a lawsuit against Reese Happersett, the registrar who had rejected her application to register to vote. Minor argued that the denial of the right to vote to women violated equal protection and infringed the “privileges or immunities” of citizenship guaranteed by the Fourteenth Amendment. In *Minor v. Happersett*, in 1875, the Court flatly rejected these contentions and held it constitutional for a state to deny women the right to vote.

It took another 45 years, until the Nineteenth Amendment was adopted in 1920, for women to be granted the right to vote. It was not for another 96 years, until 1971, that the Supreme Court for the first time found that sex discrimination violated equal protection. The Court’s prophecy in the *Slaughterhouse Cases* that equal protection would never be used except to stop race discrimination turned out to be wrong, but it took a century for the Court to abandon that view which so ignores the Fourteenth Amendment’s assurance that no person may be denied equal protection of the laws.

At the same time that the Court was limiting equal protection to racial discrimination, it also was refusing to find racist government actions to be unconstitutional. An institution that exists especially to protect minorities did exactly the opposite, consistently upholding laws that harmed minority races. The Court did not create the racist attitudes that led to the laws that required segregation of the races. The Court did not adopt those laws. But the Court could have declared them unconstitutional and held that laws mandating segregation are based on the assumption of the superiority of one race and the inferiority of another and that is inconsistent with a guarantee of equal protection of the laws. Or the Court could have ruled narrowly by finding that the facilities were not equal and that separate and unequal facilities violate the

Constitution. Either way, the Court could have prevented and ended the apartheid which lasted for decades.

The most important case was *Plessy v. Ferguson*, in 1896.<sup>34</sup> It, too, is widely regarded as one of the Supreme Court's worst decisions in history. In *Plessy v. Ferguson*, the Court upheld laws that mandated that blacks and whites use "separate, but equal facilities."

A Louisiana law adopted in 1890 required railroad companies to provide separate but equal accommodations for whites and blacks; the law required there to be separate coaches, divided by a partition, for each race. In 1892, Louisiana prosecuted Homer Adolph Plessy, a man who was seven-eighths Caucasian, for refusing to leave the railroad car assigned to whites. This was a test case deliberately brought by those who opposed government-mandated segregation. Plessy – an "octaroon" by virtue of his having one of eight great-grandparents being of African descent – was regarded as the ideal plaintiff to challenge laws like Louisiana's that had become so common in the south after the end of Reconstruction.

In a 7-1 decision, the Supreme Court ruled against Plessy and upheld the Louisiana law. The opinion was written by Justice Henry Billings Brown, who had been appointed to the Court in 1890 by President Benjamin Harrison. Brown had grown up in Massachusetts and practiced law in Detroit before becoming a federal judge. Although a northerner, Justice Brown concluded that laws requiring "separate, but equal" facilities are constitutional and declared: "[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures." The same Congress that ratified the Fourteenth Amendment also had voted to



segregate the District of Columbia public schools, indicating that it did not see government mandated segregation as a denial of equal protection.

Plessy argued to the Supreme Court that laws requiring segregation are based on an assumption of the inferiority of blacks and thus stigmatize them with a second-class status. Such actions by a state government, deeming one race superior and the other inferior, should be regarded as inimical to the Constitution's guarantee of equal protection of the laws. The Supreme Court rejected this argument: "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."<sup>30</sup> Stunningly, then, the Court said that it was the fault of the "colored race" that it saw laws segregating the races as being based on a belief in white superiority, even though that was often expressed in legislatures and by elected officials especially in southern states.

Justice Harlan was the sole dissenter and wrote that "[e]very one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons."<sup>31</sup> Of course, he is right: laws requiring segregation were all about proclaiming the superiority of one race and the inferiority of the other. Justice Harlan concluded eloquently: "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful."

Justice Harlan, of course, was correct: *Plessy v. Ferguson* is remembered as among the most tragically misguided Supreme Court decisions in American history. But it took over a half century before the Supreme Court repudiated its racist holding. After *Plessy*, “separate but equal” became the law of the land even though separate was anything but equal. Southern states, border states, and even parts of some Northern states had laws that segregated the races in every aspect of life. Whites and blacks were born in separate hospitals, played in separate parks and on separate beaches, drank from separate water fountains and used separate bathrooms, attended separate schools, ate at separate restaurants and stayed at separate hotels, served in separate army units, and were buried in separate cemeteries. By every measure and standard, separate was never equal as the facilities for blacks were never nearly the same as those for whites.

It is often forgotten today that *Plessy v. Ferguson* was not an isolated Supreme Court decision. In case after case, the Court reaffirmed and upheld the ability of states to enforce apartheid.

For example, “separate but equal” was expressly approved in the realm of education. In *Cumming v. Board of Education*, in 1899, the Court upheld the government’s operation of a high school open only for white students while none was available for blacks.<sup>35</sup> The Court emphasized that local authorities were to be allowed great discretion in allocating funds between blacks and whites and that “any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.”

In *Berea College v. Kentucky*, in 1908, the Supreme Court affirmed the conviction of a private college that had violated a Kentucky law that required the separation of the races in

education.<sup>36</sup> In *Gong Lum v. Rice*, in 1927, the Supreme Court concluded that Mississippi could exclude a child of Chinese ancestry from attending schools reserved for whites.<sup>37</sup> The Court said that the law was settled that racial segregation was permissible and that it did not “think that the question is any different, or that any different result can be reached...where the issue is as between white pupils and the pupils of the yellow races.”<sup>37</sup>

All of this did not begin to change until *Brown v. Board of Education* in 1954.<sup>38</sup> Of course, all of this is a powerful argument against originalism. Few today would accept a method of interpretation that provides no protection from discrimination under equal protection to women or that finds segregation to be constitutional. It also is why the values of the Constitution should not be identified or defended in term of the original understanding. Equal protection should be deemed a core value of the Constitution even if it only has been viewed as such for the last half century.

The recognition of the importance of equality as a basic constitutional value, in part, is about fundamental fairness. It is wrong to treat a person differently from others similarly situated – especially if it is on the basis of immutable characteristics like race, sex, or sexual orientation – without a sufficient reason. Also, the history of racism and sexism and homophobia should cause us to be suspicious when the government in using these characteristics as a basis for a decision and to insist that there is an adequate justification for the government’s action.

Having identified the core values of the Constitution – democratic government, effective governance, establishing justice, securing liberty, providing equality – the question is how to realize these goals. The Constitution should be interpreted to effectuate these values. In the next

chapters, I focus on each of these values and offer a progressive vision of the meaning of the Constitution in light of them.

### Notes on Chapter 3

<sup>1</sup> Joseph Story, Commentaries on the Constitution of the United States § 459-60 (Bos., Billiard, Gray & Co. 1833)

<sup>2</sup> Eric M. Axler, *The Power of the Preamble and the Ninth Amendment: the Restoration of the People's Unenumerated Rights*, 24 SETON. HALL LEGIS. J. 431, 432 (2000).

<sup>3</sup> Id. at 471.

<sup>4</sup> Gilbert Carrasco, Peter Rodino Jr., "Unalienable Rights," *The Preamble, and the Ninth Amendment: The Spirit of the Constitution*, 20 Seton Hall L. Rev. 498 (1990)

<sup>5</sup> Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225 (India) (Sikri, C.J.). For a discussion of different types of preambles in constitutions across the world, see, Justin O. Frosini, *Constitutional Preambles: More Than Just A Narration of History*, 2017 U. Ill. L. Rev. 603, 606 (2017)

<sup>6</sup> Ebrahim Afsah, Book Review, 11 Int'l J. Const. L. 831-34 (2013) (reviewing Frosini, JUSTIN O. FROSINI, CONSTITUTIONAL PREAMBLES AT A CROSSROADS BETWEEN POLITICS AND LAW (2012).)

<sup>7</sup> Brian Leiter, Carole E. Handler & Milton Handler, *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 CARDOZO L. REV. 117 (1990).

<sup>8</sup> Jacobson v. Massachusetts, 197 U.S. 11 (1905).

<sup>9</sup> Liav Orgard, *The Preamble in Constitutional Interpretation* (2010), Downloaded from <https://academic.oup.com/icon/article-abstract/8/4/714/667109> on 26 December 2017

<sup>10</sup> William Crosskey, POLITICS AND THE CONSTITUTION 363, 374-79 (The Univ. of Chi. Press 1953).

<sup>11</sup> Erwin Chemerinsky, Constitutional Law (5<sup>th</sup> ed. 2017); Erwin Chemerinsky, Constitutional Law: Principles and Policies (5<sup>th</sup> ed. 2014).

<sup>12</sup> Liav Orgard, *The Preamble in Constitutional Interpretation* (2010), Downloaded from <https://academic.oup.com/icon/article-abstract/8/4/714/667109> on 26 December 2017

<sup>13</sup> 14 U.S. 304, 324-25, (1816)

<sup>14</sup> McCulloch v. Maryland, 14 U.S. 304, 324-25 (1816)

<sup>15</sup> See The Federalist No. 84.

<sup>16</sup> Bolling v. Sharpe, 347 U.S. 497 (1954).

<sup>17</sup> Charles Black, Jr., Structure and Relationship in Constitutional Law (1969).

<sup>18</sup> Liav Orgard, *The Preamble in Constitutional Interpretation* (2010), Downloaded from <https://academic.oup.com/icon/article-abstract/8/4/714/667109> on 26 December 2017

<sup>19</sup> The Records of the Federal Convention of 1787 177 (Max Farrand ed., vol. II, 1937)

<sup>20</sup> See Article IV, section 4, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

<sup>21</sup> McCulloch v. Maryland at 403-04

<sup>22</sup> Id at 404.

<sup>23</sup> I discuss the Electoral College in detail in Chapter 4.

<sup>24</sup> Supplement to Max Farrand's Records of the Federal Convention of 1787 183 (James H. Hutson ed., 1987) (hereinafter Supplement to Max Farrand).

<sup>25</sup> Hammer v. Dangenhart, 247 U.S. 251 (1918).

<sup>26</sup> Shelby County, Alabama v. Holder, 133 S.Ct. 2612 (2013).

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<sup>27</sup> See, e.g., *New York v. United States*, 505 U.S. 144 (1992).

<sup>28</sup> William Crosskey, *POLITICS AND THE CONSTITUTION* 363, 374-79 (The Univ. of Chi. Press 1953).

<sup>29</sup> See John P. Kaminski, *Restoring the Grand Security: The Debate over a Federal Bill of Rights, 1787-1792*, 33 *Santa Clara L. Rev.* 887 (1993).

<sup>30</sup> For an excellent history of the drafting and ratification of the Bill of Rights, see Burt Neuborne, *Madison's Music* (2015), pp. 195-221.

<sup>31</sup> *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>32</sup> 383 U.S. (16 Wall.) 36 (1872).

<sup>33</sup> *Minor v. Happersett*, 88 U.S. 162 (1875).

<sup>34</sup> 163 U.S. 537 (1896).

<sup>35</sup> 175 U.S. 528 (1899).

<sup>36</sup> 211 U.S. 45 (1908).

<sup>37</sup> 275 U.S. 78 (1927).

<sup>38</sup> 347 U.S. 483 (1954).