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

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TABLE OF CONTENTS

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I. INTRODUCTION

In *Dobbs v. Jackson Women's Health Organization*,[1] the Court held that "the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives."[2] Sadly, this result did not surprise. Since its decision in *Roe v. Wade*,[3] on various opportunities and over the course of the years, the Court had expressed its discomfort with the opinion and its holding.[4] Although somewhat expected, the *Dobbs*'s holding still upset the balance of our constitutional system. And if the constitutional shock caused by the majority's opinion hadn't been enough, Justice Thomas' concurrence certainly contributed to make it even more dramatic.

After agreeing with the Court's holding that "under our due process precedents, the purported right to abortion is not a form of 'liberty' protected by the Due Process Clause,"[5] Justice Thomas pushed further his view of substantive due process as an "oxymoron [] 'lack[ing] any basis in the Constitution,"[6] because the Due Process Clause "does not secure *any* substantive rights"[7] as it "at most guarantees *process*."[8] Thus, "in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is "demonstrably erroneous."[9]

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[1] 142 S.Ct. 2228 (2022).
[2] *Id.* at 2279.
[3] 410 U.S. 113 (1973), *overruled*, Dobbs v. Jackson, 142 S.Ct. 2228 (2022).
[4] For a comprehensive discussion of the abortion rights jurisprudence and of the abortion rights litigation leading to *Dobbs v. Jackson* see Simona Grossi, *Roe v. Wade Under Attack: Choosing Procedural Doctrines over Fundamental Constitutional Rights*, 13 CONLAWNOW 39 (2022).
[5] *Dobbs*, at 2300 (Thomas, J., concurring).
[6] *Id.*, at 2301.
[7] *Id*.
[8] *Id.* (emphasis in original).
[9] *Id.*(internal citations omitted).

When confronting the possibility that some of the rights that the substantive due process jurisprudence had recognized and protected in the past could now remain without any constitutional protection, Justice Thomas mentioned the possibility of looking for that protection in the Privileges or Immunities Clause of the Fourteenth Amendment.[10] Yet, voicing his unease with an approach that recognized unenumerated rights in the Constitution, he indicated that "we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause protects *any* rights that are not enumerated in the Constitution and, if so, how to identify those rights."[11]

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

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

Describing substantive due process as a "legal fiction,"[12] Justice Thomas went on to explain why in his view that fiction was "particularly dangerous."[13] Relying on Justice Scalia's concurring opinion in *United States v. Carlton*[14] and on his own opinion in *McDonald v. Chicago*,[15] Justice Thomas noted how "substantive due process exalts judges at the expense of the People from whom they derive their authority"[16] because, given that the unenumerated rights are nowhere to

[10] *Id.*, at 2302.
[11] *Id.* (emphasis in original).
[12] *Id.*
[13] *Id.*
[14] 512 U.S., at 41-42.
[15] 561 U.S. 812.
[16] *Dobbs*, at 2303 (Thomas, J., concurring).

be found in the text of the Constitution, "the Court's approach for identifying those 'fundamental' rights 'unquestionably involves policymaking rather than neutral legal analysis,"[17] informed by "'its own, extraconstitutional value preferences'"[18] which "nullifies state laws that do not align with the judicially created guarantees."[19]

Justice Thomas found questionable that "the nature of the purported 'liberty' supporting the abortion right [had] shifted."[20] The *Roe* Court had found the woman's right to seek an abortion in the "Fourteenth Amendment's concept of personal liberty" as one including a "right to privacy," and then the *Casey* Court had identified such right in the "liberty" protected by the Fourteenth Amendment,[21] and in "an ethereal 'right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'"[22] Thus, essentially, the test used to protect the right had changed together with "the [changing] Court's preferred manifestation of 'liberty."[23] The fact that the plaintiffs and the United States in *Dobbs* were proposing still additional new content to the idea of "liberty"—"bodily integrity," "personal autonomy in matters of family, medical care, and faith," and "women's equal citizenship"[24] —could only further prove that the right sought to be enforced did not exist. "That 50 years have passed since *Roe* and abortion advocates still cannot coherently articulate the right (or rights) at stake,"[25] observed Justice Thomas, "proves the obvious: The right to abortion is ultimately a policy goal in desperate search of a constitutional justification,"[26] a description that Justice Thomas would most likely apply to all those unenumerated rights that found their source and soul in the concept of "liberty" and substantive due process.

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[17] *Id.*, at 2302.
[18] *Id.*
[19] *Id*. (citing White, J., dissenting opinion in *Thornburgh v. American College of Obstetricians and Gynecologists*, 475 U.S. 747, 794 (1986).
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*

Justice Thomas also observed that substantive due process doctrine and its jurisprudence "distort other areas of constitutional law,"[27] as shown by the different types of scrutiny—strict, middle level, or rational basis—and the more or less demanding approach which the Court has adopted over the years to assess the constitutional validity of laws that limit the "[Court's] preferred rights"[28] or nonfundamental rights.

And finally, according to Justice Thomas, "substantive due process is often wielded to disastrous ends,"[29] like in *Dred Scott v. Sandford*—[30]in which the Court held that Congress could not, without violating due process of law, prohibit slave owners from carrying their slave property into the federal territories.[31] In *Dred Scott,* Justice Thomas noted, "the Court invoked a species of substantive due process to announce that Congress was powerless to emancipate slaves brought into the federal territories."[32] And even if *Dred Scott* was later overruled, "that overruling was '[p]urchased at the price of immeasurable human suffering.'"[33]

Endorsing a strict textual approach that would only recognize enumerated rights, Justice Thomas indicated that, because there is no right to substantive due process in the Constitution, "in future cases, we should 'follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to [procedural] due process when life, liberty, or property is to be taken away."[34]

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

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[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] 19 How. 393, 60 U.S. 393 (1857).
[31] *Id.*, at 450.
[32] *Id.*
[33] *Id.* (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995)(Thomas, J., concurring in part and concurring in judgment).
[34] *Id.* (citing Scalia's opinion in *Carlton*, 512 U.S., at 42).

People over the years, as well as logic, common sense,[35] and the fundamental rights that the Constitution was intended to protect.

Thomas's approach is inherently contradictory, as a textual approach to the Due Process Clause cannot simply ignore its substantive component–life, liberty or property—a phrase indicative of rights that need to be assigned content and meaning. True, the further one gets from core notions of liberty, the harder it might be to determine how broadly to read the term "liberty." But if *anything* is within the concept of "liberty," autonomy over one's own body seems to be definitely within that concept. Indeed, this is the only natural reading of it. Alternatively, supposing for the sake of discussion that there were any ambiguity (which there is not) about whether bodily autonomy were within the word "liberty," that ambiguity could be cleared by the judges through careful judicial decision-making.[36] For instance, judges would look at Constitution as a whole to discern the content of ambiguous word. Thus, they would perhaps look at the Fourth Amendment and conclude that it would make no sense to provide for a right of the people to be "secure in their person,"[37] but then allow the forcing of a man to be sterilized or of a woman to carry a child to term. And then, if this interpretive exercise were to still be considered not satisfactory, judges could then confirm the content and meaning of "liberty" by considering the Founding Fathers' propensity to follow Locke's ideas of natural rights and by looking at contemporaneous thinking.[38] It is true that it can be difficult to know where one person's liberty ends and another's begins. But that cannot mean that women have *zero* "liberty" interest in their bodies. It only means that, assuming for purposes of discussion that a fetus has sufficient personhood to have a "liberty" interest, then there should be some sort of balancing of the two *competing* liberty interests, the one of the fetus and the one of the mother. This type of balancing is essential to any due process analysis,[39] and that is what *Roe v. Wade* and *Casey* attempted to do—

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[35] *See also* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L. J. 246, 299-300 (2017).

[36] See Part VI *infra*.

[37] US CONST., Fourth Am.

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

[39] *See, among others, Mathews v. Eldridge*, 424 U.S. 319, 348, (1976) ("in striking the appropriate due process balance the final factor to be assessed is the public interest"), and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("Against this interest of the State we must *balance* the individual interest sought to be protected by the Fourteenth Amendment.").

a balancing of competing interests. Justice Thomas and the conservative Justices, though, by overruling both cases and rejecting their approach, ignored the fundamentals of due process analysis.

From a principled and structural approach, Thomas's proposed textual reading looking for a specific catalogue of rights to be protected, also conflicts with the premises, animating principles, structure, history, and tradition of our constitutional system.[40] Unfortunately, though, Justice Thomas's misunderstanding of the essential premises, matrix, and metrics of our constitutional system and of proper constitutional analysis, is not an isolated episode.

Despite the teaching of the Founding Fathers[41] and their wise determination to draft the Constitution in flexible terms that would be receptive to the ever changing needs of the evolving society our Constitution was intended to serve[42]—thus inevitably requiring the abandonment of a narrow textual approach such as might be found in a legislatively enacted building code—the modern Court has increasingly tried to freeze the content of the individual rights to what they were at specific historical moments, usually moments close in time to the time of ratification of the Constitution or of the Amendment to be interpreted and applied. Eskridge described this approach as "strikingly outdated,"[43] one imposing "unrealistic burdens on judges, asking them to extract textual meaning that makes sense in the present from historical material whose sense is often impossible to recreate faithfully,"[44] and fundamentally wrong because a proper interpretation requires a "process of understanding a text created in the past and applying it to a present problem. This process cannot be described simply as the recreation of past events and past expectations, for the 'best' interpretation of a statute is typically one that is most consonant with our current 'web of beliefs' and policies surrounding the statute."[45]

The modern Court, though, has endorsed an historically frozen approach to constitutional rights, and it has done so not only with

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[40] *See, among others*, Planned Parenthood v. Casey, 505 U.S. 833, 846-850 (1992), *overruled*, Dobbs v. Jackson, 142 S.Ct. 2228 (2022).
[41] *See, among others*, M'Culloch v. Maryland, 17 U.S. 316, 407 (1819).
[42] *Id.*
[43] Eskridge, *Dynamic Statutory Interpretation*, *supra* __, at 1482.
[44] *Id.*
[45] *Id.*

reference to implied fundamental rights,[46] but also with reference to textual fundamental rights, including the First Amendment freedom of speech,[47] the Establishment Clause,[48] the Second Amendment right to keep and bear arms,[49] the Fourth Amendment right against unreasonable search and seizure,[50] the Seventh Amendment right to a jury trial,[51] and, at times, also the Fourteenth Amendment substantive due process.[52]

A reading of the Constitution locked into history and tradition is simply nonsensical. Take, for example, the First Amendment. It provides that "Congress shall make no law respecting an establishment

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[46] *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (that "the implied fundamental rights be objectively, deeply rooted in this Nation's history and tradition") (internal quotation marks omitted).

[47] See *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 466 (2015) (recognizing "history and tradition of regulation" as relevant when considering the scope of the First Amendment); *see also*, City of Austin, Texas v. Reagan National Advertising of Austin, LLC, 142 S.Ct. 1464, 1475 (2022) (endorsing the same approach).

[48] *Kennedy v. Bremerton School District*, 142 S.Ct. 2407, 2428 (2022) ("[T] Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings. '[T]he line' that courts and governments 'must draw between the permissible and the impermissible' has to 'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'") (internal citations omitted).

[49] *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111, 2127 (2022) ("[T]he government must affirmatively prove that its firearms regulation is part of the historical traditional that delimits the outer bounds of the right to keep and bear arms.").

[50] *Carpenter v. United States*, 138 S.Ct. 2206, 2213-14 (2018) ("Although no single rubric definitely resolves which expectations of privacy are entitled to protection, the analysis is informed by historical understanding 'of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.'") (citing *Carroll v. United States*, 267 U.S. 132, 149 (1925).

[51] *Colgrove v. Battin*, 413 U.S. 149, 155-57 (1973) ("Consistently with the historical objective of the Seventh Amendment, our decisions have defined the jury right preserved in cases covered by the amendment, as 'the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure…'") (citing *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935)).

[52] In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), Justice Scalia pointed out that rights can be recognized under substantive due process only if there is a tradition of protecting them. *Id.*, at 127, n. 6; *see also Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), *overruled* Laurence v. Texas, 539 U.S. 558 (2003), and *Washington v. Glucksberg*, 521 U.S. 702, 710-719 (1997), where the Court insisted that substantive due process rights may be protected only if they are enumerated in the text of the Constitution or if there is a tradition of protecting such rights.

of religion, or prohibiting the free exercise thereof ….”[53] Many Founders were deeply suspicious of “Papists” holding high government office (because Catholics could not be trusted to adhere to their oath of uphold the Constitution if they had superior allegiance to the Pope). If, historically, there were no Catholics as President or, for that matter, as Supreme Court Justices, then, according to the logic of the current Supreme Court majority, Congress could bar Catholics from being Supreme Court Justices because, even though the plain meaning of freedom of religion is very broad, the actual intent of the (hypocritical) Founding Fathers was very narrow. Would they apply that logic to themselves?

Like Justice Thomas, the conservative Justices inherently skew their “historical” review by ignoring views that were not expressed in any writings that survive. Jefferson, Washington, and others’ personal writings make it crystal clear that they were acutely aware of how hypocritical they were being by speaking of “liberty” while owning slaves. They justified it by convincing themselves that slavery was a necessary evil *during a transition period* for the young nation, but that it would die out on its own over time (and some historians believe that would have occurred, but for the invention of the cotton gin). They knew well how hypocritical they were being about “liberty” when it came to slaves. (That’s probably why liberty was in the preamble but not the Constitution, until the Fourteenth Amendment.) But if it weren’t for the happenstance that we have some clues about their real thoughts, we’d never know.

And Justice Thomas’s—and the conservative Justices’ approach—runs against common sense. If the Fourteenth Amendment’s prohibition on States’ deprivation of liberty without due process only addresses the *procedure*, then it would be entirely possible for the States to make working for life on a chain gang the penalty for, say, jaywalking. Then, if someone accused of jaywalking had a full and fair opportunity to prove that they did not jaywalk, but a jury found otherwise, they could be sentenced to working for life on the chain gang. That is a silly, sophomoric reading of the Fourteenth Amendment (although it’s also pretty close to what actually happened in the decades after reconstruction). But that silly reading of the Fourteenth

[53] U.S. CONST., First. Am.

Amendment is no less silly than any definition of "liberty" that does not recognize a person's bodily autonomy as part of "liberty."

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

History and tradition—"what history teaches are the traditions from which it developed as well as the traditions from which it broke"[54]— should certainly guide our analysis if we intend to remain truthful to the spirit of the Constitution. However, history and tradition and, even more so, specific historical understandings and meanings, should not be used as temporal traps. This could have never been the intent of the Framers who were trying to provide a document that would endure for ages to come. As such, they must have intentionally used words like "liberty" or phrases like "due process" or "privileges and immunities,"[55] "cruel and unusual punishment,"[56] or "equal protection,"[57] which do not lend themselves to finite lists and catalogues

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[54] Planned Parenthood of Pennsylvania v. Casey, 505 U.S. 833, 850 (1992), quoting Justice Harlan dissenting in Poe v. Ullman, 367 U.S. 497, at 542 (1961), *overruled*, Dobbs v. Jackson, 142 S.Ct. 2228 (2022).

[55] U.S. CONST., Art. IV, §2. *See also* Corfield v. Coryell, 6 F. Cas. 546, 551 (1825):

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

Id.

[56] U.S. CONST., Eight Am.

[57] U.S. CONST., Fourteenth Am.

determined by reference to specific and isolated historical moments.[58] Text, history and tradition must be read together with the constitutional achievements of the American people over the course of the years, those ones preceding as well as those following precise historical moments, through an interpretive synthesis that employs doctrinal matrices able to address and properly answer the new and constantly changing constitutional questions.[59]

Hamburger explained how, "[a]lthough Americans assumed that constitutions and statutes were positive acts of the people, Americans said that they should adopt constitutions and, more generally, civil laws that reflected natural law reasoning about noninjurious behaviours and the preservation of liberty."[60] He showed that natural law was typically not understood to require the adoption of a particular set of civil laws, but rather as a "very abstract manner of reasoning."[61] Thus, the rules adopted to recognize those preexisting rights would hardly lend themselves to catalogues. Also, "though considered immutable, natural law was understood to permit variations in civil laws to accommodate the different circumstances in which such laws would operate."[62] That would inevitably require formula conducive to that type of analysis.

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[58] *See also* Ken Levy, *Why the Late Justice Scalia was Wrong: The Fallacies of Constitutional Textualism*, 21 Lewis & Clark L. Rev. 45, 64-65 (2017). Levy noted how

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

Id.

[59] This is true even when the text of the Constitution seems otherwise straightforward. *See* Levy, *Why the Late Justice Scalia was Wrong*, *supra note__*, at 65-66.

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

[61] *Id.*

[62] *Id.*

As has been rightly observed,[63] if history and tradition had been the only interpretive metric of our Constitution, then we would have not had opinions like *Reynolds v. Sims*,'[64]on the guarantee of equality in the political process, *Griswold v. Connecticut*,[65] recognizing procreative freedom, or *Brown v. Board of Education*,[66] on equal access to education free from discrimination based on race. We could never justify those opinions based solely on the text of the Constitution, and/or upon history and traditions. But "[a]ren't these decisions great precisely because they appeal to, and help shape, the moral aspirations of Americans of today, regardless of their connection to decisions made the day before yesterday?"[67] Those decisions tried to harmonize the Constitution's text, its history and tradition, together with the "constitutional achievements of the Founding, Reconstruction, and New Deal [eras] into a principled doctrinal whole,"[68] effectively capable of serving the evolving needs of We the People.

Justice Thomas's opinion is also hard to square with logic. The procedural due process component of the Clause would be meaningless if not linked to (because triggered by) the infringement of a substantive right that (due) process would aim at remedying. After all, process has never been conceived as an end in itself, but rather as a means to achieving an end, that is, the protection of substantive rights.[69] This is how logic, common sense, coupled with the text, history, and tradition would demand that we read the Due Process Clause.

In line with the above premises, this Article seeks to show that substantive due process has historically been an integral part of our constitutional structure and rights. This was not only the intent of the Framers, but it was also consistent with the English common law and with State systems that preceded the adoption of the Constitution, as well as with logic and common sense. And the content and meaning of substantive due process developed with the American people,

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[63] Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L. J. 453, 526-527 (1989).
[64] 377 U.S. 533 (1964).
[65] 381 U.S. 479 (1965).
[66] 347 U.S. 483 (1954).
[67] Bruce Ackerman, *Constitutional Politics, supra* __, at 527.
[68] *Id.*
[69] *See also* Randy E. Barnett and Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM & MARY L. REV. 1599, 1662 (2019).

following their constitutional achievements, so that the newly recognized expressions of human liberty as embodied by our society could find protection in the Constitution.

Addressing Justice Thomas's approach and concerns compels us to pause on the nature and the spirit of the Constitution, the constitutionally valid and needed interpretive approach and outcomes which have made the Constitution a living document capable of enduring ages to come and to serve the needs of the American people, the history and tradition of due process as traced by the commentaries and the jurisprudence over the course of the years and revealing the substantive due process's natural-rights soul, which expression and protection heavily depends on natural lawyering and judging.

Thus, Part II of this Article sets the stage for our constitutional analysis starting from its Preamble and showing, contrary to Justice Thomas's view,[70] how the substantive due process rights of "liberty, life, or property" and their protection were animating ideas behind the adoption of our Constitution.

Addressing Justice Thomas's discomfort with unenumerated constitutional rights,[71] Part III shows that substantive due process rights are not the only non-enumerated components of our constitutional system. In fact—through proper and needed interpretive syntheses of the various constitutional achievements over the years, and common-sense and logic—other unenumerated doctrines, powers, and rights have been historically recognized as essential components of our structure and rights.

Digging deeper into the history and tradition of substantive due process, Part IV shows that the Framers inherited substantive due process ideas from the State systems and that the States, before then, inherited those ideas from the common law. An analysis of the commentaries and the jurisprudence of substantive due process before ratification and at the time of the founding thus traces the history and tradition of substantive due process. Such history and tradition again negate Justice Thomas's view of substantive due process as lacking any basis in the Constitution.[72]

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[70] *Dobbs*, 142 S.Ct., at 2301 (Thomas, J. concurring).
[71] *Id.*, at 2302
[72] *Id.*, at 2301.

In order to respond to Justice Thomas's concerns that substantive due process exalts judges at the expense of the people,[73] Part V and Part VI show how the Constitution's language and spirt are such that their proper interpretation and application heavily depend on active judicial decision-making and natural lawyering and judging,[74] one receptive of the ever-changing needs of an evolving society. Words like "liberty," phrases like "due process," "equal protection," "privileges and immunities"—all inspired by natural and fundamental rights of the individuals transcending geographical and temporal borders—are such that can't be frozen in time and constrained into specific textual, predetermined lists. Those words and phrases, with their non-fixed, flexible content, are calling judges and lawyers to draw upon their knowledge, wisdom, and understanding of the law and its consequences, to serve justice under the specific circumstances of the case.[75] Thus, Part V shows the relationship between natural rights and substantive due process, and how natural rights ideas influenced the Framers and the jurisprudence of the Court over the course of the years. And Part VI explores the delicate and essential role of judicial decision-making in the enforcement of substantive due process rights.

Finally, Part VII offers a few concluding remarks.

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

In *Dobbs v. Jackson*, Justice Alito decided that because the right to seek an abortion was nowhere to be found in the text of the Constitution, then it was beyond constitutional protection. This holding was supported by the idea that, when the Fourteenth Amendment was ratified in 1868, such right was not part of our constitutionally recognized rights and, thus, of our structure. Yet, if we were to crystalize the scope of substantive due process rights at the time of ratification of the Fourteenth Amendment, we would have to conclude that several

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[73] *Id.*, at 2303.

[74] For the idea of natural lawyering and natural judging see Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181-85 (1958); *see also* Simona Grossi, *The Claim*, 55 HOUS. L. REV. 1, 6 (2017).

[75] For the idea of natural lawyering and natural judging ***see*** Clark, *Pleading Under the Federal Rules*, *supra*__, at 181-85; *see also* Grossi, *The Claim*, *supra* ___, at 6.

rights that have been considered an integral part of our system over the years, should not be entitled to constitutional protection. Should we become blind to societal developments? Ignore them for the sake of respecting the text of the Constitution? Wouldn't our interpretation then, by ignoring the spirit of the Constitution, disserve the Constitution or, worse, in fact violate it?[76]

In *M'Culloch v. Maryland*,[77] Chief Justice Marshall explained the Constitution was a living document "intended to endure ages to come"[78] and, thus, the transforming challenges of the future. But the Constitution wasn't perfect. As Bruce Ackerman put it, it is in fact "imperfect, mistaken, evil in its basic premises and historical development. Never forget that James Madison was a slaveholder as well as a great political thinker. And who can imagine that our Constitution's peaceful coexistence with injustice came to an end with Emancipation?"[79] Remaining comfortable with the *status quo* would have been, and would still be, a mistake, so "the challenge is to build a constitutional order more just and free than the one we have inherited,"[80] one that would benefit from the societal development and more sophisticated understanding of the human beings, its nature, and the best possible expression of rights and powers that would best serve the individual and the society as a whole. Thus, when interpreting the Constitution, we need to keep in mind that its basic institutional and substantive premises have been transformed since its existence.[81] After all, the Constitution was never intended as an immutable document, as it in fact endorses the possibility of subsequent revision by

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[76] *See, among others*, Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 135 HARV. L. REV. 23, 37(2022) ("[w]hen one settles on 1868 as the relevant year for the purpose of interpreting what the Constitution requires vis-à-vis people with the capacity for pregnancy, one has overdetermined the inquiry. Indeed, a decision to privilege any historical moment prior to the era in which social movements challenged traditional gender norms is a decision to read the Constitution as silent on abortion rights;" and "[o]ne could make the same point about the right to be free from coerced sterilization; indeed, when asked the question in 1927, the Court did not believe the Constitution protected such a right." *id.*, at 38-39).

[77] 17 U.S. 316 (1819).

[78] 17 U.S., at 415.

[79] Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L. J. 453, 455 (1989).

[80] *Id*.

[81] *Id.*, at 465.

the People and make it constitutional for Americans of later generations to reconsider the questions that the Constitution itself answered.[82] The fact that the People may constitutionally repeal many fundamental rights, as well as create new rights through the Amendment process, shows that it is the People who are the source of the rights, and not the other way around.[83] This would be consistent with the idea of a government and a constitution adopted in accordance with the natural law principles of equal liberty and self-preservation."[84]A failure of a constitution to reflect natural law, and thus serve the people it was intended to serve, would be "a ground for altering or abandoning the constitution rather than for making a claim in court."[85] And *stare decisis* too, despite being a fundamental doctrine of our system, never prevented the Court from overruling interpretations of the Constitution, that is, constitutional law, which had become inconsistent with the constitutional needs and societal achievements. Consider, for instance, *Lawrence v. Texas*[86]—where the Court overruled *Bowers v. Hardwick*[87] and recognized the right of adults to engage in "private conduct in the exercise of their liberty under the Due Process clause of the Fourteenth Amendment to the Constitution" [88]— and *Roper v. Simmons*[89]—where the Court overruled *Stanford v.*

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[82] *Id.*, at 469.

[83] *Id.*, at 470. *See also* Ken Levy, *Why the Late Justice Scalia was Wrong: The Fallacies of Constitutional Textualism*, 21 Lewis & Clark L. Rev. 45, 76 (2017):

> The Constitution has the unique status of being "the supreme Law of the Land." For better or worse, then, we are stuck with it for the long haul, inescapably bound by its edicts into the indefinite future. Given this situation, given that we cannot simply put the Constitution aside in one way or another when it does not suit our wishes, we should make the best of it. We should make the Constitution the best document it can be. We should continue to mold it into a tool that serves *our* purposes, the purposes of modern-day Americans. In the end, it is we who own the Constitution, not the Constitution which owns us. As President Theodore Roosevelt once said, "The Constitution was made for the people, not the people for the Constitution.

Id.

[84] Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L. J. 907, 940 (1993).

[85] *Id.*

[86] 539 U.S. 558 (2003).

[87] 478 U.S. 186 (1986).

[88] *Lawrence*, 539 U.S., at 564.

[89] 543 U.S. 551 (2005).

Kentucky,[90] and held that it is unconstitutional to impose capital punishment for crimes committed while under the age of eighteen.[91] There the Court departed from *stare decisis* to be receptive of, and in line with its own evolving jurisprudence and international law, including the jurisprudence of the European Court of Human Rights, the European Convention of Human Rights and the United Nations Convention on the Rights of the Child.[92]

This approach accords with logic and common sense.[93] The Founders created the Constitution to serve We the People, not the other way around. Imagine a modern society trapped in the logic, needs, and desiderata of a (different) society of over two centuries earlier. The Constitution's metric, its spirit and animating goals are the ones we need to preserve, not the means thought to be adopted two centuries ago to pursue them. This approach had been advocated by the Founding Fathers and have been endorsed by the Court on several occasions, during the course of the years. The spirit of our dualist democracy—where decisions are made by the American People and by the government[94]—"will die if today's Americans fail to discover in their Constitution a living language for self-government."[95] To

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[90] 492 U.S. 361 (1989).
[91] *Roper*, 543 U.S., *supra*, at 575.
[92] *Id.*, at 575-576.
[93] *See also* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L. J. 246, 299-300 (2017). Campbell observed:

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

Id.
[94] See Ackerman, *Constitutional Politics*, *supra* __, at 461-471, for a description of the dualist, monistic, and foundationalists rights models of democracy.
[95] *Id.*, at 486.

preserve that spirit, though, we need to identify it first, and in that endeavor, we should perhaps start from the Preamble to the Constitution.

The Preamble to the Constitution reads:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic tranquility, provide for the common defence, promote the general Welfare, and secure the Blessing of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[96]

Welch and Heilpern aptly described the Preamble as a "collective source of unifying objectives for the operation of the American democratic republic,"[97] a "formative statement of guiding principles to be used in interpreting the meaning of the words and structures found in the body of the Constitution,"[98] the statement of reasons behind the operation of the federal government.[99] Indeed, the Preamble should be viewed as a rule of construction for the entire Constitution,[100] each of its word intended to inform the reading, understanding, and application of the constitutional provisions to follow.

In their study, Welch and Heilpern show how, in the drafting of the Preamble, the Committee on Style was influenced among various sources by the Declaration of Independence when they decided to

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[96] U.S. CONST., Preamble. This idea was consistent with the Declaration of Independence from Great Britain, which proclaimed that "all men" are born with certain "unalienable rights," including rights to "life, liberty, and the pursuit of happiness." The Unanimous Declaration of the thirteen United States of America (July 4, 1776).
[97] John W. Welch, James A. Heilpern, *Recovering Our Forgotten Preamble*, 91 SCALRV 1021, 1023.
[98] *Id.*
[99] *Id.*
[100] The Preamble to the Constitution could be analogized to Rule 1 in the Federal Rules of Civil Procedure ("These rules...should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding"), containing guiding principles of interpretation and application of the rules that would be capable of preserving the animating ideas and foundational principles. See FED. R. CIV. P. 1.

begin with the phrase "We the People."[101] As Welch and Heilpern explained, "[t]his idea of popular authority, as opposed to the authority of the colonies or their resultant states, was reinforced in the Declaration by the further assertions that governments must "deriv[e] their…powers from the consent of the governed," and that they must secure "certain unalienable Rights…among [which] are life, liberty, and the pursuit of happiness."[102]

To increase the chances that the Constitution be ratified, the Framers made frequent stylistic reference to previously used language.[103] To ensure the support from those who had supported the Confederation, the Framers revived three of the Confederation's objectives, i.e., providing for the common defense, promising the security of liberty, and promoting the general welfare.[104] And further inspiration for the language used in the Preamble must have come from language found in several of the states' constitutions, including the constitution of the state of Pennsylvania that at that time spoke of "posterity" and "blessings of liberty."[105] Other state constitutions may have influenced the language of the Preamble too. Those constitutions either used the word "liberty" or phrases eliciting the same idea, but none of them listed the specific rights that would come under that term or idea.[106] Indeed, the word "liberty" very much like the phrase "due

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[101] U.S. CONST. pmbl. In contrast, the Articles of Confederation began, "We, the undersigned Delegates." ARTICLES OF CONFEDERATION of 1781, pmbl.; Welch & Heilpern, *Recovering Our Forgotten Preamble*, at 1034.

[102] *Id.*; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[103] Welch & Heilpern, *Recovering Our Forgotten Preamble*, at 1034.

[104] *Id.*, at 1035.

[105] *Id.*

[106] Welch & Heilpern noted that

> the 1780 preamble of the Constitution of Massachusetts…featured words and phrases such as 'to secure,' 'safety and *tranquility*,' 'the *blessings* of life,' 'governed by certain laws for the *common* good,' and '*ordain, and establish*, the following Declaration of Rights, and Frame of Government, as the Constitution of the Commonwealth of Massachusetts.' And the opening section of the freshly redrafted 1786 Vermont Constitution advanced the 'indispensable duty to *establish* such original principles of government as will best *promote the general* happiness of the people of this State, and their *posterity*, and *provide for* future improvements, without partiality,' and in order to accomplish such ends '*do …ordain*, declare *and establish'* that 1786 revision of the Green Mountain State's Constitution. Other earlier colonial and

process," are not concepts with fixed meaning that lend themselves to predetermined catalogues,[107] their meaning and content being inevitably shaped by the peculiar circumstances of each case. Both "liberty" and "due process" would find and did find their perfect home in our Constitution.

Rejecting the idea of strict adherence to the text and enumerations, the Court talked about "implied power" more in the decades since the ratification of the Constitution,[108] and in 1819, in *M'Culloch v. Maryland*,[109] Justice Marshall expanded and articulated that idea more fully. When answering the question of whether the federal government had the power to incorporate a federal bank even if such power wasn't expressly mentioned in the Constitution, Chief Justice Marshall explained:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a *legal code*, and could scarcely be embraced by the human mind. *It would, probably, never be understood by the public*. Its nature, therefore, requires, that only its *great outlines* should be marked, its *important objects* designated,

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

Id., at 1036-1037.

[107] *See, among others*, Hurtado v. People of State of California, 110 U.S. 516, 521-523 (Harlan, J., dissenting) (1884).

[108] *See, e.g., United States v. Hudson*, 11 U.S. 32, 34, 3 L. Ed. 259 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the *nature* of their institution. But jurisdiction of crimes against the stat is not among those powers. To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are *necessary* to the exercise of all others; and so far our Courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers."). *Id.* (Emphasis added).

[109] 17 U.S. 316 (1819).

> and the *minor ingredients* which compose those objects, be *deduced from the nature of the objects* themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language…. It is also, in some degree, warranted, by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a *constitution* we are expounding.[110]

And he added,

> Among the multitude of means to carry into execution the powers expressly given to the national government, congress is to select, from time to time, such are most fit for the purpose. It would have been impossible to enumerate them all in the constitution; and a specification of some, omitting others, would have been whole useless.[111]

Being not intended as a legal code, the Constitution does not list every single power (nor every single right). Take, for example, say Justice Marshall, the federal government's power to punish for the violation of its laws. The Constitution gives the federal government to power to punish on some occasions.[112] While this might suggest that the Constitution did not assign such powers on other occasions, all would "admit, that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of congress."[113]

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[110] *Id.*, at 407 (emphasis added).
[111] *Id.* at 357.
[112] *Id.*, at 416-417 ("Congress is empower 'to provide for the punishment of counterfeiting the securities and current coin of the United States,' and 'to define and punish piracies and felonies committed on the high seas, and offences against the law of the nations.'").
[113] *Id.* at 416.

The Constitution contains just an "outline"[114] of "the great powers,"[115] and an intrinsic constitutional logic and pragmatism would compel a reading and understanding of those powers as implying the inferior powers too:

> [I]t may with great reason be contented, that a government, intrusted with such ample powers, on the execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution, by withholding the most appropriate means.[116]

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

> The Constitution, properly understood, is not frozen in time and inextricably linked to the concrete expectations of the framers or ratifiers. But neither does its meaning changes. Instead, the open-ended provisions of the Constitution establish general principles—equal protection, prohibitions on cruel and unusual punishment, and freedom of speech, among others. This is what the language means, and that meaning—and the general principles—do not change. What can change, however, is the application of those principles over time, based on technological, economic, and cultural changes….The expectations of the Founding generations might shed some light on the meaning of the text, but those expectations do not establish the text's meaning. Indeed, these expectations might be inconsistent with the actual meaning of the words, or they might be the result of time-bound prejudices and beliefs that obscured the proper application of the text…moreover, the language used in some constitutional provisions—the ones that generate the most litigation and controversy—establish principles that are meant to be enduring but nonetheless invite different applications in different contexts. To reduce those general principles to the specific expectations of a group of people long dead is to ignore, not respect, the language actually used in the Constitution.

Id.

[115] *Id.* ("to lay and collect taxes; to borrow money, to regulate commerce; to declare and conduct a war; and to raise and support armies and navies.").

[116] *Id.*, at 407-408.

This was the most logical and sensible approach to the "great powers on which the welfare of a nation essentially depends:"[117]

> It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."[118]

When interpreting the word "necessary" in the Necessary & Proper Clause to determine whether, if not "implicit" in the outline of the great powers enumerated in the Constitution, the power to create a federal bank could still be considered a "necessary and proper" means for the federal government to use to implement the given great powers, still honoring the idea that the Constitution had to be able to adapt "to the various crises of human affairs" and to "future times," Chief Justice Marshall refused to adopt an interpretation that would require "an absolute physical necessity,"[119] because "[t]o have

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[117] *Id.*, at 415.
[118] *Id.*
[119] *Id.*, at 413. A similar approach the Court adopted in *James Everard's Breweries v. Day*, 265 U.S. 545, 558-59 (1924) ("In the exercise of such non-enumerated powers it has long been settled that Congress is not limited to such measures as are *indispensably necessary* to give effect to its express powers, but in the exercise of its discretion as to the means of carrying them into execution may adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution). *Id.* (Emphasis added); Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 155 (1919) ("The Constitution did not confer police power upon Congress. Its power

declared, that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of *experience*, to exercise its *reason*, and to accommodate its legislation to circumstances."[120]

Of course, Justice Marshall was talking about powers, not rights. But the idea that he was expressing transcends the Necessary and Proper Clause he was interpreting and the powers he was referring to. It rather involves the proper constitutional interpretive approach, the only one capable of preserving the very structure of our constitutional system and, inevitably, the individual rights as an essential component of it. Over the course of the years, the Court adopted a similar approach to (implied) rights, precisely because the Constitution is not a building code.[121]

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to regulate the liquor traffic must therefore be sought for in the implied war powers; that is, the power 'to make all laws necessary and proper for carrying into execution the war powers expressly granted. Art 1, §8, cl. 18."); Graves v. People of State of New York ex rel. O'Keefe, 306 U.S. 466, 478 (1919) ("And since the power to create the agency includes the implied power to do whatever is needful or appropriate, if not expressly prohibited, to protect the agency, there has been attributed to Congress some scope, the limits of which it is not now necessary to define, for granting or withholding immunity of federal agencies from state taxation.").

[120] *Id.* (emphasis added). The idea that reason and experience should inform judicial decision-making was advocated, among others, by Judge Clark. Charles Clark, *Pleading Under the Federal Rules*, *supra*__, at 181-85; *see also* Grossi, *The Claim*, *supra* __, at 6.

[121] *See, among others,* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights."); Palmer v. Thompson, 403 U.S. 213, 233-234 (1971) ("There is, of course, not a word in the Constitution, unlike many modern constitutions, concerning the right of the people to education or to work or to recreation by swimming or otherwise. Those rights, like the right to pure air and pure water, may well be rights 'retained by the people' under the Ninth Amendment. May the people vote them down as well as up?"). There is a symbiotic relationship between rights and powers, and only that symbiotic relationship can properly honor the spirit of the Constitution. Elsewhere I have written about the relationship of powers and rights. *See, among others,* Simona Grossi, *The Waiver of Constitutional Rights*, __ HOUS. L REV. ___ (2023). Here, suffice it to say that the Preamble to the Constitution reminds us that the Constitution, each portion of it and foundational principle, including the separation of powers principle, was intended to have a

In *Hepburn v. Griswold*,[122] the Court again endorsed a similar interpretive approach to the Constitution:

> It is not necessary, however, in order to prove the existence of a particular authority to show a particular and express grant. The design of the constitution was to establish a government competent to the direction and administration of the affairs of a great nation, and, at the same time, to mark, by sufficiently definite lines, the sphere of its operations. To this end it was needful only to make express grants of general powers, coupled with a further grant of such incidental and auxiliary powers as might be required for the exercise of the powers expressly granted. These powers are necessarily extensive. It has been found, indeed, in the practical administration of the government, that a very large part, if not the largest part of its functions have been performed in the exercise of powers thus implied.[123]

And the Court continued to adopt a similar approach over the course of the years.[124]

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collective dimension, one projecting the powers, making them functional to and in service of the rights, as the Constitution was intended to protect "We the People of the United States" by, among other things, securing "the blessings of Liberty to ourselves." U.S. CONST., Preamble.

[122] 75 U.S. 603(1869).

[123] *Id.*, at 613.

[124] *See, among others*, United States v. Hall, 98 U.S. 343, 346, 25 L.Ed. 180 (1878). There the Court noted:

> Implied power in Congress to pass laws to define and punish offences is also derived from the constitutional grant to Congress to declare war, to raise and support armies, to provide and maintain a navy, and to make rules for the land and naval forces, and to provide for organizing, arming, and disciplining the militia and for governing such parts of them as may be employed in the public service. Like implied authority is also vested in Congress from the power conferred to exercise exclusive jurisdiction over places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, and from the clause empowering Congress to pass all laws which shall be necessary and proper for carrying into execution the

A proper interpretive approach that would be respectful of the true spirit of the Constitution is one capable of incorporating the constitutional achievements until that moment, to push the system forward. Simply considering the constitutional text and the Framers' intent to capture the Constitution's spirit and to interpret it accordingly, would not work. As Ackerman pointed out, we should engage in an interpretive exercise of synthesis, which, in addition to the text and the original intent, takes into account the constitutional achievements of the American people over the past centuries.[125] Eskridge called this approach "dynamic statutory interpretation,"[126] considering it not only proper, but necessary.[127]

> foregoing powers, and all other powers vested by the Constitution in the government of the United States, or any department or officer thereof.

Id. at 346. *See also* McGrain v. Daugherty, 273 U.S. 135, 173 (1927) ("The court recognized distinctly that the House of Representatives has implied power to punish a person not a member for contempt, as was ruled in *Anderson v. Dunn*."); Ex rel. Zivotofsky v. Clinton, 566 U.S. 189 (2012) (presupposing the power of the United States to recognize foreign sovereigns); The Chinese Exclusion Case, 130 U.S. 581, 609 (1889) (recognizing a national power over immigration as one of the "incident[s] of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution"); The Legal Tender Cases, 79 U.S. 457, 553–54 (1871) (recognizing the power of the U.S. government to issue paper money as legal tender).

[125] Ackerman, *Constitutional Politics*, *supra* __, at 476.

[126] William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987).

[127] *Id.*, at 1479. Eskridge noted:

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

Id.

Brown v. Board of Education[128] offers an excellent example of such constitutionally sound and successful approach. Justice Warren had realized that the problem of racial discrimination in access to public education could not be solved if the Court focused only on the constitutional text and on the ratification debate at the time of the adoption of the Fourteenth Amendment:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its *full development* and its *present place* in American life throughout the Nation.[129]

And

> *[t]oday*, education is perhaps the most important function of state and local government. Compulsory attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. *Today* it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. *In these days*, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[130]

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

[128] 348 U.S. 886 (1954).

[129] *Id.*, at 492-493 (emphases added).

[130] *Id.*, at 493 (emphasis added).

Plessy v. Ferguson's separate-but-equal did no longer reflect the constitutional and societal developments that had occurred in the system,[131] the rejection of *Lochner* being part of it.[132] So *Plessy* could not be followed.

Rejecting an approach that requires strict adherence to the constitutional text and to a precise historical moment, is after all in line with a rejection of strict adherence to *stare decisis*. If we had to respect *stare decisis* under any circumstances and at all costs, we'd have to continue to follow opinions like *Dred Scott*,[133] which was overruled by a subsequent constitutional amendment in line with the constitutional achievements following *Dred Scott*.

The opening words of the Fourteenth Amendment begin by reversing *Dred Scott*'s state-centered definition of national citizenship, so that Americans would be citizens of the nation first, and automatically citizens of any state in which they chose to reside. As Ackerman put it, "[t]he transformations in our higher lawmaking process and higher law substance went hand-in-hand [then]. Both expressed the new nationalistic sense of ourselves as We the People of the *United* States that Americans won in the aftermath of the bloodiest struggle for national self-definition of the nineteenth century."[134]

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

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

[131] *See also* Ackerman, *Constitutional Politics*, *supra* ___, at 535 ("Whatever Justice Brown in *Plessy* thought, it was now absurd to dismiss the 'badge' of inferiority imposed by state officials as they shunted black children to segregated schools as if it were 'solely' the product of a 'choice' by the 'colored race….to put [a degrading] construction upon it.'").
[132] *Id.*
[133] Dredd Scott v. Sandord, 60 U.S. (19 How.) 393 (1857).
[134] Ackerman, *Constitutional Politics*, supra___, at 510.

CONSTITUTIONAL STRUCTURE AND RIGHTS

In 1803, in *Marbury v. Madison*,[135] Justice Marshall held that

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.[136]

Thus, Justice Marshall announced the Court's (and the federal courts') power of judicial review which is nowhere to be found in the text of the Constitution, nor at common law. In fact, when our Constitution was adopted, courts in England had no power to invalidate an act of parliament,[137] and some had rejected this precise idea.[138] But even if the power of judicial review was unknown to England, because there the Parliament was supreme and common law courts did not have the authority to review the validity of parliamentary acts, the doctrine of judicial review predated the Constitution. As Elbridge Gerry noted at the Constitutional Convention, "[i]n some States the Judges had actually set aside laws as being ag[ainst] the constitution. This was done too with general approbation."[139]

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[135] 5 U.S. (1 Cranch) 137 (1803).
[136] *Id.*, at 177-178.
[137] See CHRISTOPHER N. MAY, ALLAN IDES, SIMONA GROSSI, CONSTITUTIONAL LAW NATIONAL POWER AND FEDERALISM 13 (2022).
[138] Chief justice John Gibson of the Pennsylvania Supreme Court noted that "[i]t is the business of the judiciary to interpret the laws, not scan the authority of the lawgiver; and without the latter, it cannot take cognizance of a collision between a law and the constitution. So that to affirm that the judiciary has a right to judge of the existence of such collision, is to take for granted the very thing to be proved…."*Eakin v. Raub*, 12 Serg. & Rawle 330, 347 (Pa. 1825) (Gibson, J., dissenting).
[139] 1 Farrand, *The Records of the Federal Convention of 1787*, at 97 (1911).

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

> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.
>
> This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society.[140]

In fact, without such a power, we would have to treat any law or act of legislature or executive inconsistent with it as enforceable notwithstanding, and this would

> reduce[] to nothing what we have deemed the greatest improvement on political institutions-a written constitution-would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction.[141]

Here, once again, Justice Marshall found the principle of judicial review in a constitutional logic or matrix as it appeared essential to the survival of the system.[142] He later tried to confirm the existence of

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[140] *Marbury*, 5 U.S. (1 Cranch), at 177.
[141] *Id*., at 178.
[142] A similar pragmatic interpretive approach driven by logic and necessity, as well as by a profound understanding of and respect for the spirit of the Constitution was articulated by William Rawle addressing the power of judicial review:

> We may then inquire, in what mode or form of language it could have been excluded from the Constitution, and what would have been the effect of such exclusion. Being in itself a necessary incident to a regular and complete government, its existence is implied from the mere fact of creating such a government; if it is

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

William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 199-201, 274-80, 1829 (2nd ed.).

such principle through the structure and the text of the Constitution,[143] but none his arguments was particularly persuasive.[144] Marshall's

[143] Marshall's first argument was based on the tripartite structure of the federal government. He suggested that without judicial review, Congress could "at pleasure ignore the limits that the Constitution places upon it, "giving to the legislature a practical and real omnipotence…." 5 U.S. (1 Cranch) at 178. But the Constitution defines and limits the powers of all three branches, including the judiciary, and the fact that Congress' powers are limited by the Constitution doesn't give the Court any special license to assume the role of constitutional policeman. Also, federal courts don't have any power to monitor the actions of other branches like other branches don't have the power to monitor the actions/decisions of the courts. If this argument were sound, Congress would be entitled to respond to *Marbury* by passing a law overturning the decision because the Court had exceeded its constitutional authority in invalidating an act of the legislature. Marshall's following four arguments were based on the text of the Constitution. But like the structural argument, these textual arguments were not convincing. He argued that the power of judicial review could be based on Article III, §2—stating that the federal judicial power, including the Court's appellate jurisdiction, extends to cases arising under the Constitution—but this language doesn't prove that federal courts have the power of judicial review. Marshall then pointed to some provisions in the Constitution specifically addressed to courts. For example, Article III, §3, cl. 1—stating that no one may be convicted of treason except on the testimony of at least two witnesses. "If the legislature should change that rule," asked Marshal, "must the constitutional principle yield to the legislative act?" 5 U.S. (1 Cranch), at 179. But this argument supports only a narrow principle of judicial review, because it suggests that each branch of the federal government is charged with interpreting those provisions of the Constitution that are addressed specifically to it. Marshall also claimed that textual support for the power of judicial review could be found in Article VI, cl. 3 of the Constitution, requiring judges to take an oath "to support this Constitution." Judges would violate this oath if they were to honor an unconstitutional law. But this argument is likewise unconvincing, as the Constitution imposes the same oath on members of Congress and officers of the executive branch. Would those have the power of judicial review as well? Finally, Marshall thought textual support for the power of judicial review could be found in the Supremacy Clause of Article VI, cl. 2, providing that '[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof …shall be the supreme law of the Land." This Clause suggests that state judges may decide whether or not a federal statute conflicts with the Constitution. Since the Founders presumably did not intend to give state judges the last word on the validity of federal courts, they must have intended to give the Court, in its appellate capacity, the power to review a state court's judgment on the constitutionality of federal laws. This argument, though, is based on the assumption that "in Pursuance" authorizes state judges to assess the substantive validity of federal laws, but the language may have meant simply that a federal law is valid as long as it was adopted pursuant to the procedural formalities of Article I. Only then a federal law would be "the supreme Law of the Land" and neither a state court nor

structural and textual reading of the Constitution suggests a plausible argument that each branch of the government would be able to construe the Constitution concerning its own function, and their interpretations would not be subject to review by other branches. But while the structural and textual arguments would not foreclose such interpretation, this interpretation would make the Constitution unenforceable, its requirements and limits turning into mere moral and political norms that each branch could honor or ignore as they pleased. Under this plausible interpretation, if federal officials violated the Constitution, they would only be subject to challenge through a political process, which would ultimately offer little protection for the violation of rights of those in the minority of the electorate. Thus, the power of judicial review was essential to the survival of the system, and the most effective and convincing argument in favor of its existence had to be searched for and found beyond the structure and the text of the Constitution, in the constitutional matrix and logic.

The Federalist Papers—a collection of letters authored by Alexander Hamilton, James Madison, and John Jay to persuade the people of New York to ratify the Constitution, appearing in New York newspapers in 1787 and 1788[145]—made clear that at the time of the founding it was generally accepted that federal courts would have the power to declare acts of Congress unconstitutional. Hamilton, for instance, acknowledged that "there is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution…[yet the principle] that wherever there is an evident opposition, the laws out to give place to

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the Supreme Court could refuse to enforce it because they might consider the law unconstitutional.

[144] See CHRISTOPHER N. MAY, ALLAN IDES, SIMONA GROSSI, CONSTITUTIONAL LAW NATIONAL POWER AND FEDERALISM 12-17 (2022).

[145] Despite their unofficial character and their nature of propaganda papers, *The Federalist Papers* are often considered as helpful to shed light into the intent of the Framers. *See, e.g.*, *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 139 n.++ (1912); *Hines v. Davidowitz*, 312 U.S. 52, 62 & n.9 (1941); *Powell v. McCormack*, 395 U.S. 486, 539-540 & n.74, 551 n.2 (1969); *Nixon v. Administrator of Gen. Services*, 433 U.S. 425, 442 (1977).

the constitution…[is] …. [d]educible…from the general theory of a limited Constitution…."[146]

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

Particularly revealing in this respect, is the Court's opinion in *Colgrove v. Battin*,[147] on the Seventh Amendment right to a jury trial. There the Court noted:

> Consistently with the historical objective of the Seventh Amendment, our decisions have defined the jury right preserved in cases covered by the Amendment, as 'the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure….' The Amendment, therefore, does not 'bind the federal courts to the exact procedural incidents or

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[146] *The Federalist No. 81,* at 482 (Clinton Rossiter ed., 1961). And in another paper, Hamilton noted that the life tenure given federal judges would enhance their ability to engage in judicial review:

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

The Federalist No. 78, at 466 (Clinton Rossiter ed., 1961).

[147] 413 U.S. 149 (1973).

> details of jury trial according to the common law in 1791,' and '(n)ew devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice…."[148]

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

That a precise moment in (past) history could not possibly freeze the content of the rights sought to be protected by the Constitution was also confirmed more recently by the Court when addressing the scope of the Second Amendment right to keep and bear arms in *New York State Rifle & Pistol Association, Inc. v. Bruen*.[149] There, Justice Thomas noted:

> Much like we use history to determine which modern "arms" are protected by the Second Amendment, so too does history *guide* our consideration of modern regulations that were *unimaginable* at the founding. When confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge. Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are "relevantly similar." And because "[e]verything is similar in infinite ways to everything else," one needs "some metric enabling the analogizer to assess which similarities are important and which are not.[150]

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[148] *Id.*, at 155-157 (internal citations omitted). *See also*, *Chauffeurs, Teamsters & Helpers, Loc. No. 391 v. Terry*, 494 U.S. 558, 592-593 (1990).

[149] 142 S.Ct. 2111 (2022).

[150] *Id.*, at 2132 (internal citations omitted) (emphasis added). It seems odd to suppose that the Founders' intent was that their broad concepts like "liberty" would apply exactly the same way in their own day as to future generations, despite a growing

To find that "metric," Justice Thomas looked for the "'central component of the Second Amendment right,'"[151] in the jurisprudence interpreting the Second Amendment which had identified such metric in the "individual self-defense."[152] And with that metric, one could look for an historical *analogue* rather than an historical *twin,* which might end up being actually inconsistent with the Constitution as applied to modern facts and circumstances:

> To be clear, analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory black check. On the other hand, courts should not "uphold every modern law that remotely resembles a historical analogues," because doing so "risk[s] endorsing outliers that our ancestors would never have accepted." On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.[153]

Thus, "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are 'central' considerations when engaging in an analogical inquiry."[154]

A similar necessary, not-strictly-textual approach, the Court has taken with reference to foreign affairs powers. In *United States v. Curtis-Wright Export Corp*.,[155] when commenting on the broad nature of the foreign affairs powers the Court noted how

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and changing nation. After all, it is very different to bear firearms on the frontier and when fighting the British or Indians than it would be in downtown Philadelphia in the 21st Century.

[151] *Id.*, at 2133.

[152] *Id.*

[153] *Id.*

[154] *Id.* (internal citations omitted).

[155] 299 U.S. 304 (1936).

> [t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, *is categorically true only in respect of our internal affairs.* In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. That this doctrine applies only to powers which the states had is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source.[156]

Thus, the sources of the federal government's domestic and foreign powers were different, with the latter deriving not from the constitutional text, but from nationhood and sovereignty.[157] And more

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[156] *Id.*, at 315-316.

[157] *Id.*, at 318. The Court noted:

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

recently, in *Zivotofsky v. Kerry*,[158] the Court noted how, "[i]n a world that is ever more compressed and interdependent, it is *essential* the congressional role in foreign affairs be understood and respected."[159] This approach has been endorsed by lower courts too.[160] And the same approach looking beyond the constitutional text applies to rights.

The U.S. Bill of Rights was added to the Constitution by amendment as a condition for that document's ratification,[161] as many feared that under the new constitution, the federal government might "deprive them of the liberty for which they valiantly fought and honorably

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> conclusions not in the provisions of the Constitution, but in the law of nations.

Id. See also American Insurance Association v. Garamendi, 539 U.S. 396 (2003) ("Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on "executive Power" vested in Article II of the Constitution has recognized the President's "vast share of responsibility for the conduct of our foreign relations." While Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers, in foreign affairs the President has a degree of independent authority to act.")

[158] 576 U.S. 1 (2015).

[159] *Id.*, at. 21.

[160] *See*, *among others*, U.S. v. Bollinger, 798 F.3d 201, 213 (4th Cir.) (2015) ("Thus, there is good reason to expansively construe Congress's legislative authority when it comes to matters that implicate the federal government's regulatory power over foreign commerce."); United States v. Bil Laden, F. 126 Supp. 2d 264. 273 (S.D. NY 2000) ("citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a *gloss* on 'Executive Power' vested in the President by §1 of Art. II.") (emphasis added); United States v. United States Dist. Court, 407 U.S. 297, 321-322 (1972) (holding that there is no warrant exception for domestic security surveillances but "express[ing] no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents"). Also, former Deputy Attorney General Jamie Gorelick testified before the Senate Intelligence Committee on July 14, 1994 that "[t]he Department of Justice believes, and the case law supports, that the president has inherent authority to conduct warrantless physical searches for foreign intelligence purposes…and that the President may, as has been done, delegate this authority to the Attorney General." Byron York, Clinton Claimed Authority to Order No-Warrant Searches, National Review Online, Dec. 20, 2005, http:// www.nationalreview.com/york/york200512200946.asp.

[161] Preamble of the "Bill of Rights" as proposed by U.S Congress to the States (March 4, 1789).

bled,"[162] and demanded towards the federal government the same protections "which they have long been accustomed to."[163] And when the fear was expressed that given that the Federal Bill of Rights listed the rights sought to be protected and thus, such list might "disparage" those rights not explicitly mentioned,[164] James Madison responded with an idea that was later incorporated in the Ninth Amendment to the U.S. Constitution, i.e., that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[165]

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

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[162] See James Madison's speech to the Congress proposing a Bill of Rights. The Annuals of Congress, House of Representatives, First Congress, 1st Session (June 8, 1789), at 449.

[163] *Id.*, at 450.

[164] *Id.*, at 456.

[165] U.S. CONSTITUTION, Ninth Am. On the scope of the Ninth Amendment, *see generally*, Daniel A. Farber, RETAINED BY THE PEOPLE (2007); Charles O. Prince, THE PURPOSE OF THE NINTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (2005); Randy Barnett, RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (1991). The Ninth Amendment confirms that the Constitution was not intended as a code. However, it is to be kept separate from the Fourteenth Amendment substantive due process analysis which is the scope of this Article, as the Ninth Amendment and the Fourteenth Amendment have different functions and meanings. While the Ninth Amendment was added almost as a rule of construction to the Bill of Rights, to indicate that people's rights towards the federal government were not to be intended as limited to the ones expressly mentioned in the Bill of Rights, the Fourteenth Amendment was adopted to recognize against the states individual rights which would be enforceable by the federal government. And yet, the Ninth Amendment and the animating ideas behind it, might have influenced the drafters of the Fourteenth Amendment. The Drafters of the Fourteenth Amendment might have responded to the fears that led to the adoption of the Ninth Amendment, in that the Fourteenth Amendment's "life, liberty, or property" formula was intentionally not specific to make sure that it'd remain open and receptive to rights that, despite not being in the text of the Constitution, might be still relevant and necessary to that liberty and pursuit of happiness of We the People that the Constitution was intended to guarantee. Thus, the interpretation of the Fourteenth Amendment I offer in this Article reflects and respects the idea behind the Ninth Amendment and the fears that Framers had about enumerating rights.

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

Thus, the interpretation of the Fourteenth Amendment I offer in this Article also reflects and respects the idea behind the Ninth Amendment and the fears that Framers had about enumerating rights. An enumeration would betray the Constitution, disserve the people, disserve the system.[166]

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

The Founding Fathers were influenced by contemporaneous political writings and European philosophers and writers, including Locke.[167]

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[166] *See also* Griswold v. Connecticut, 381, U.S. 479, 488 ("the Ninth Amendment shows a belief of the Constitution's authors that *fundamental rights* exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.")

[167] See David McCullogh, JOHN ADAMS 121 (2001) (observing how Jefferson borrowed from his previous writings, the writings of George Mason and Pennsylvania delegate James Wilson, and "drawing on long familiarity with the seminal works of the English and Scottish writers John Locke, David Hume, Francis Hutcheson, and Henry St. John Bollingbroke, or such English poet as Defoe"); Pauline Maier, *American Scripture* 104 (1998) (noting evidence that Jefferson hastily produced a draft of the Declaration in a day or two and adapted two texts to complete a draft in this short time-frame: the preamble to the Virginia Constitution, "which was itself based on the English Declaration of Rights," and a preliminary version of the Virginia Declaration of Rights that had been drafted by George Mason); *id.* at 136 (noting that the Declaration's reference to "the laws of nature and nature's god" parallels the laws applicable to "individuals in a state of nature, a point, incidentally, that

As John Adams put it, "many of our rights are inherent and essential, agreed on as maxims, and established as preliminaries, even before a parliament existed."[168] When the North American States formed their own independent governments, most included in their new written constitutions detailed declarations of rights, listing some of the "inherent rights,"[169] but these declarations did not represent an innovation, as they merely followed the example of documents such as the Pennsylvania Charter of Privileges of 1701 or the Massachusetts Body of Liberties of 1641.[170] This language was then going to be adopted, among others, by the United States Bill of Rights of 1791, and finally by the Universal Declaration of Human Rights of December 10, 1948.[171]

Some scholars argued that before 1789, courts had already developed a body of substantive due process law by which they guaranteed that unenumerated rights deemed fundamental were protected against infringement by the state or federal governments.[172] Thus, the Founding Fathers seemed to have intended the Constitution to protect

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John Locke made explicitly in his *Second Treatise of Government*"); and Carl Becker, *The Declaration of Independence: A Study in the History of Ideas* 79 (1922) (noting that with respect to "the political philosophy of Nature and natural rights" referenced in the Declaration that the "lineage is direct: Jefferson copied Locke"); see also Allen Jayne, *Jefferson's Declaration of Independence: Origins, Philosophy and Theology* 44 (1988) (noting "the similarity of many of the provisions of [Locke's] *Second Treatise* with those of the Declaration, which clearly shows that Jefferson not only had extensive knowledge of Locke's work but put it to use in drafting the Declaration").

[168] John Adams, A Dissertation on the Canon and Feudal Law (1765) in Adams, Charles Frances (ed.) THE WORKS OF JOHN ADAMS, volume III (1865), at 463. *See also* Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 230 (noting how the colonists premised their fight for independence on the natural law-social contract theory articulated by writers like John Locke, and how "[u]nder this natural law theory, individuals have a right to be governed by representatives whom they have chose" and by a "government…as a creature of the people and instituted solely for their benefit, [having] the concomitant or derivative right to govern.") *Id.*

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

[170] *Id.*

[171] For a collection of the texts adopting this inherent/inalienable rights language, see Frederik Mari, baron van Asbeck, ed., THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND ITS PREDECESSORS (1679-1948) (1949). See also Part V *infra*.

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

unenumerated rights. In his study on natural rights and First Amendment,[173] Campbell noted how

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

Scholars also argued that "antebellum courts repeatedly affirmed that legislative power was inherently limited by the ends for which legitimate governments are established,"[174] and that American courts began applying the doctrine of substantive due process no longer after the adoption of the Constitution,[175] and before the adoption of the

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[173] Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L. J. 246, 299-300 (2017) (emphasis added).

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

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

Fourteenth Amendment.[176] However, others rejected this thesis,[177] and argued that it was only after the adoption of the Fourteenth Amendment, in the 1870s, that courts began imposing substantive due process limitations on state legislatures.[178] Other scholars still argued that the idea of substantive due process existed at the time the Fourteenth Amendment was ratified, as Justice Thomas Cooley's 1868 treatise provided the seeds for the police-powers limitations on state governments.[179] Before then, the courts simply talked about "liberty."

In *Hurtado v. People of the State of California*,[180] Justice Harlan, dissenting, noted that when the doctrines of the common law regarding the protection of people's life, liberty, and property were

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[176] *See* Bernard H. Siegan, *Rehabilitating* Lochner, 22 SAN DIEGO L. REV. 453, 454, 488 (1985), citing *Baltimore v. Pittsburgh & Connellsville Railroad Co.*, 2 F. Cases 570 (CC WD Pa 1865); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L. J. 408, 454-470 (2010); *see also* David E. Bernstein, *Rehabilitating* Lochner: *Defending Individual Rights Against Progressive Reform* 9 (Chicago 2011) ("the idea that the guarantee of 'due process of law' regulates the substance of legislation … arose from the long-standing Anglo American principle that the government has inherently limited powers" and from "long-standing American intellectual traditions that held that the government had no authority to enforce arbitrary 'class legislation' or to violate the fundamental natural rights of the American people.").

[177] Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 819 (2020) ("[C]loser examination of the cases [cited by scholars] reveals that antebellum courts applied a series of sometimes overlapping but distinct doctrines involving the police powers of legislative bodies. First, state courts routinely invalidated *municipal* bylaws for being "unreasonable" or in excess of the police powers to regulate for the health, safety, and morals of the local citizenry….Second, federal courts sometimes invalidated state legislative acts affecting interstate or foreign commerce if they were not genuinely for a police-power purpose and thereby impermissibly interfered with such commerce….Third, courts invalidated both state and municipal acts that impaired the obligations of contract."). *Id.*, and *id.*, at 825-852.

[178] *Id.*, at 820, and 865-880.

[179] *See generally* Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS' WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Little, Brown 1868); *see also* James W. Ely Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMEN 315, 342-344 (1999); Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 NYU J. L. & LIBERTY 115, 154 (2010); Williams, Williams, *The One and Only Substantive Due Process Clause*, *supra*__, at 493-494.

[180] 110 U.S. 516 (1884) (Harlan, J., dissenting).

incorporated into the earlier constitutional of the original states, the above declarations were "emphasized in the most imposing manner:"[181]

> Massachusetts in its constitution of 1780, and New Hampshire in 1784, declared in the same language that 'no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, *liberty*, or estate but by the judgment of his peers or the law of the land;' Maryland and North Carolina in 1776, and South Carolina in 1778, that 'no freeman of this state be taken or imprisoned, or disseized of his freehold, *liberties*, or privileges, outlawed, exiled, or in any manner destroyed or deprived of his life, liberty, or property but by the judgment of his peers or the law of the land;' Virginia, in 1776, that 'no man be deprived of his liberty except by the law of the land or the judgment of his peers;' and Delaware, in 1792, that no person 'shall be deprived of life, *liberty*, or property, unless by the judgment of his peers or the law of the land.' In the ordinance of 1789 for the government of the Northwestern territory, it was made one of the articles of compact between the original states and the people and states to be formed out of that territory—'to remain forever unalterable unless by common consent'—that 'no man shall be deprived of his life, *liberty*, or property but by the judgment of his peers or the law of the land.' These fundamental doctrines were subsequently incorporated into the constitution of the United States."[182]

The Court continued, over the years, to talk about "liberty" and to articulate that idea and concept as it had become manifest, and as it expressed itself through the contemporary society. In *Lochner v. New York*,[183] the Court held that the freedom of contract was a fundamental

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[181] *Id.*, at 540.
[182] *Id.*, at 540-541.
[183] 195 U.S. 45 (1905), *overruled in part*, Ferguson v. Skrupa, 372 U.S. 726 (1963).

right under the liberty of the due process clause.[184] In *Meyer v. Nebraska*,[185]the Court held that liberty "[d]enotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[186] Then, in *Pierce v. Society of Sisters*,[187] on substantive due process grounds, the Court declared unconstitutional an Oregon law prohibiting parochial school education. In *Loving v. Virginia*,[188] the Court held that the right to marry is a fundamental right protected under the liberty of the due process clause.[189] Again, in *Zablocki v. Redhail*,[190] citing *Griswold v. Connecticut*,[191] the Court noted that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."[192] And in *Roe v. Wade*[193] the Court held that the right to privacy was safeguarded through the due process clause of the Fourteenth and Ninth Amendments and it included the right of a woman to have an abortion.[194] Thus, the soul of substantive due process can also be traced to natural rights.

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

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[184] *Id.*, at 58 (holding that "the limit of the police power has been reached and passed in this case," as there is "no reasonable foundation for holding this [law][to be necessary … to safeguard the public health, or the health of the individuals who are following the trade of a baker).
[185] 262 U.S. 390 (1923).
[186] *Id.*, at 399.
[187] 268 U.S. 510 (1925).
[188] 388 U.S. 1 (1967).
[189] *I.d.*, at 12.
[190] 434 U.S. 374 (1978).
[191] 381 U.S. 479, 486 (1965).
[192] *Zablocki*, 434 U.S. at 384.
[193] 410 U.S. 113 (1973), *overruled*, Dobbs v. Jackson, 142 S.Ct. 2228 (2022).
[194] *Id.*, at 153 ("the right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action or…in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.")

KIND OF CITIZENRY

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

> [i]n the 1780Ss and early 1790s, Americans occasionally specified which of their rights were natural rights and which were not, and they tended to agree in their characterizations. On the assumption that the state of nature was a condition in which all humans were equally free from subjugation to one another-in which individuals had no common superior-Americans understood natural liberty to be the freedom an individual could enjoy as a human in the absence of government. A natural right was simply a portion of this undifferentiated natural liberty. Accordingly, Americans often broadly categorized natural rights as consisting of life, liberty, and property, or life, liberty and the pursuit of happiness.[195]

Natural rights were considered the free exercise of religion or freedom of conscience, the freedom of speech and press, the right of self-defense, the right to bear arms, and the right to assemble, all of which were enumerated in the bills of rights. But natural right was also considered the right to one's reputation,[196] and the Constitution protected unenumerated natural rights to the extent it did not grant power over those rights to the federal government.[197] Also,

> [a]lthough Americans assumed that the people adopted a constitution and formed government in accordance with natural law principles of equal liberty and self-preservation, Americans understood that the people might adopt a constitution that did not adequately preserve their natural liberty or that otherwise failed to conform to the implications of natural law. In analyzing this type of failure, however, Americans tended to say that the people had a right and a responsibility to

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[195] Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L. J. 907, 918-919 (1993).
[196] *Id.*, at 919.
[197] *Id.* at 954 n. 129.

> alter their constitution, either by amendment or, if necessary, by revolution. Far from being a form of constitutional law, natural law typically was assumed to be the reasoning on the basis of which individuals adopted constitutions and a means by which the people could measure the adequacy of their constitutions. A failure of a constitution to reflect antural law was a ground for altering or abandoning the constitution rather than for making a claim in court.[198]

According to Hamburger, the U.S. Constitution protected unenumerated natural rights only to the extent it did not grant power over those rights to the federal government.[199] Thus, "only if[]a constitution reserved a particular natural right from the government's power, natural law suggested the degree to which the constitution protected that right, not because natural law was incorporated into the constitution, but because natural rights were understood to be subject to natural law."[200]

As we saw in Part II above, the language in the Declaration of Independence as well as in the Constitution Preamble refers to the inalienable, natural rights to life, liberty, and the pursuit of happiness that belong to the individual.[201] Natural rights, universal human rights provide theoretical foundations and legitimacy to any government. Thus, these fundamental, inalienable rights—which the Universal Declaration Human Rights indicated they need to be protected by "the rule of law,"[202] because "all human beings are born free and equal in dignity

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[198] *Id.*, at 940.
[199] *Id.*, at 954, n. 129.
[200] *Id.*, at 954.
[201] See U.S. CONSTITUTION, Preamble; The Unanimous Declaration of thirteen united States of America (July 1776); see also Part II *supra*. To explore the idea and content of rights at the time of independence, *see generally* Barry A. Shain, (ed), THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND (2007); T.H. Breen, THE LOCKEAN MOMENT: THE LANGUAGE OF RIGHTS ON THE EVE OF THE AMERICAN REVOLUTION (2001); John P. Reid, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF CONSTITUTIONS IN THE REVOLUTIONARY ERA, trans. Rita Kimber and Robert Kimber (1980); Morton G. White, THE PHILOSOPHY OF THE AMERICAN REVOLUTION (1978); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L. J. 907-960 (1993); William F. Dana, *The Declaration of Independence as Justification for Revolution*, 13 HARV. L. REV. 319-343 (1900).
[202] The Universal Declaration of Human Rights (December 10, 1948), Preamble.

and rights,"[203]—provide the basis of our government too, so much so that the U.S. government and courts consider those rights, as recognized by international covenants and treaties, as mere restatement of existing U.S. laws and established constitutional guarantees.[204]

At the time of founding, the power of the federal government to protect those rights was contested, as this power was thought to belong to the States only.[205] When James Madison proposed the Bill of Rights to the First Congress, he observed that "there is more danger of those powers being abused by the State Governments than by the Government of the United States."[206] This intuition became clear to the "[t]he United States [when it] discovered in the eighteenth and nineteenth centuries….[that] local ('national' or 'sovereign') enforcement of the 'great rights of mankind' fails in the face of petty prejudice and the parochial self-interest of local ethnic, religious, and political factions."[207]The American people responded with a Civil War and the adoption of the Thirteenth and Fifteenth Amendment, as well as the Fourteenth Amendment which overruled *Dredd Scott v. Sandford*[208]—holding that the Constitution did not extend American citizenship to people of black African descent—and *Barron v. Baltimore*—where the Court held that the Bill of Rights did not apply to state governments.[209]But they also gave Congress the power to enforce the provisions of the Fourteenth Amendment against the State "by appropriate legislation."[210] In fact, until them, American judges were not disagreeing about the existence of "natural and inalienable right," but only on whether the federal government had the power to enforce those rights against the States.

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[203] *Id.*, Art. 1.

[204] See., e.g., Message of President Jimmy Carter to the United States Senate, February 23, 1978 (concerning the International Convention on the Elimination of All Forms of Racial Discrimination, signed on behalf of the United States on September 28, 1966; The International Covenant on Economic, Social and Cultural Rights, signed on behalf of the United States on October 5, 1977; The International Covenant on Civil and Political Rights, signed on behalf of the United States on October 5, 1977; and the American Convention on Human Rights, signed on behalf of the United States on June 1, 1977).

[205] Sellers, *Universal Human Rights*, *supra* at 537-540.

[206] James Madison, in *The Annuals of Congress, House of Representatives*, First Congress, First Session (June 8, 1789), at 458.

[207] *Id*., at 538.

[208] 60 U.S. (19 How.) 393 (1857).

[209] 32 U.S. 243 (1833).

[210] U.S. CONST., Fourteenth Am., §5.

Dissenting in *Slaughter-House Cases*,[211] Justice Field observed:

> The first clause of fourteenth amendment…recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry. A citizen of a State is now only a citizen of the United States residing in that State. The *fundamental rights*, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State. The exercise of these rights and privileges, and the degree of enjoyment received form such exercise, are always more or less affected by the condition and the local institutions of the State, or city, or town where he resides. They are thus affected in a State by the wisdom of its laws, the ability of its officers, the officiency of its magistrates, the education and morals of its people, and can never be avoided, but in no other way can they be affected by the action of the State, or by the residence of the citizen therein. *They do not derive their existence from its legislation, and cannot be destroyed by its power.*[212]

The Constitution had recognized those inalienable rights that existed before its adoption, and which "belong to the citizens of all free governments,"[213] and if the Fourteenth Amendment

> refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence…In *Corfield v. Coryell*, Mr. Justice Washington said he had 'no hesitation in confining these expressions to those privileges and immunities which were, in their nature, fundamental' which belong of right to citizens of all free governments, and which

[211] 83 U.S. 36 (1872)
[212] *Id.*, at 95-96 (Field, J. dissenting) (emphasis added).
[213] *Id.*, at 97.

> have at all times been enjoyed by the citizens of the several States which compose the Union, from the time of their becoming free, independent, and sovereign;' and, in considering what those fundamental privileges were, he said that perhaps it would be more tedious than difficult to enumerate them, but that they might be 'all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole.' This appears to me to be a sound construction of the clause in question.[214]

The Fourteenth Amendment "was intended to give practical effect to the declaration of 1776 of inalienable rights which are the gift of the Creator, which the law does not confer, but only recognizes."[215]

The Supreme Court endorsed the above approach and ideas. In *Hurtado v. People of the State of California*,[216] Justice Harlan, dissenting, noted how "[t]he phrase 'due process of law' [was] not new in the constitutional history of this country or of England [as] [i]t antedates the establishment of our institutions."[217] He also noted,

> Those who had been driven from the mother country by oppression and persecution brought with them, as their inheritance, which no government could rightfully impair or destroy, certain guaranties of the rights of life, liberty, and property which had long been deemed *fundamental* in Anglo-Saxon institutions. In the congress of the colonies, held in New York in 1765, it was declared that the colonists were entitled to all the *essential* rights, liberties, privileges, and immunities confirmed by *Magna Charta* to the subjects of Great Britain. Hutch. Hist. Mas. -Bay, Appendix F. 'It was under the consciousness,' says STORY, 'of the full

[214] *Id.*
[215] *Id.*, at 105.
[216] 110 U.S. 516 (1884) (Harlan, J., dissenting).
[217] *Id.*, at 540.

> possession of the rights, liberties, and immunities of British subjects that the colonists, in almost all the early legislation of their respective assemblies, insisted upon a declaratory act, acknowledging and confirming them.' 1 Story, Const. § 165…. On the fourteenth of October, 1774, the delegates from the several colonies and plantations, in congress assembled, made a formal declaration of the rights to which their people were entitled, by the *immutable laws of nature*, the principles of the English constitution, and the several charters or compacts under which the colonial governments were organized…."[218]

And then added:

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

[218] *Id.*, at 539-540 (emphasis added).

> Some of these principles are enumerated in the opinion of the court.[219]

In *Downes v. Bidwell*,[220] the Court noted:

> We suggest, without intended to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship to suffrage, and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the states to be unnecessary to the proper protection of individuals.[221]

In *Madden v. Kentacky*,[222] the Court emphasized that the Privileges and Immunities Clause "protects all citizens against abridgement by states of rights of national citizenship as distinct from the *fundamental or natural rights* inherent in state citizenship."[223]

Slowly, over the decades, the Court fully endorsed and articulated the idea that "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the

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[219] *Id.*, at 545-546.
[220] 182 U.S. 244 (1901).
[221] *Id.*, at 282-283.
[222] 309 U.S. 83 (1940).
[223] *Id.*, at 90-91 (emphasis added).

States[224] through the Fourteenth Amendment and its "controlling word,"[225] "liberty"[226] it was intended to preserve.

About "liberty," the Court said:

> Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, since *Mugler v. Kansas*, 12 U.S. 623, 660-661 (1887), the Clause has been understood to contain a *substantive component* as well, one "barring certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). As Justice Brandeis (joined by Justice Holmes) observed, "[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. *Whitney v. California*, 274 U.S. 357, 373 (1927) (concurring opinion). "[T]he guaranties of due process, though having their roots in Magna Carta's '*per legem terrae'* and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.'" *Poe v. Ullman*, 367 U.S. 497, 591 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds) (quoting *Hurtado v. California*, 110 U.S. 516, 532 (1884)).
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> The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights. We have held that the Due Process

[224] Justice O'Connor, Justice Kennedy, and Justice Souter, writing for the majority in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 847 (1992) quoting Justice Brandeis' concurring opinion in Whitney v. California, 274 U.S. 357, 373 (1927), *overruled*, Dobbs v. Jackson, 142 S.Ct. 2228 (2022).
[225] *Planned Parenthood*, 505 U.S., at 846.
[226] *See* Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992), overruled, Dobbs v. Jackson, 142 S.Ct. 2228 (2022).

> Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States. It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. But of course this Court has never accepted that view.
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> It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*…. Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. As the second Justice Harlan recognized: "[T]he full score of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a *rational continuum* which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, … and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to

> justify their abridgement." *Poe v. Ullman*, 367 U.S., at 543….The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: *reasoned judgment*. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office….See also *Rochin v. California*, 342 U.S., at 171-172 (Frankfurter, J., writing for the Court) ("To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time of thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges")[227]

In *Baldwin v. Fish and Game Commission of Montana*,[228] the Court recognized that Justice Washington had "seemingly relied on notions of 'natural rights' when he considered the reach of the Privileges and Immunities Clause,"[229] and concluded that the Clause's protection should only be triggered "where a nonresident sought to engage in an essential activity or exercise of a basic right,"[230] which "[h]e himself [called] 'fundamental,' in the modern as well as the 'natural right' sense."[231] The *Baldwin* Court went on to find the same reference to fundamental rights and/or natural rights in

> *Paul v. Virginia* … [in] *Ward v. Maryland, Canadian Northern R. Co. v. Eggen*, and *Blake v. McClung*…when it was concerned with the pursuit of common callings, the ability to transfer property, and access to courts, respectively. And comparable status of the activity involved was apparent in *Toomer*, the commercialicensing case. With respect to such basic and essential activities, interference with which would frustrate the purposes of the formation of the Union,

[227] *Id.*, at 846-850.
[228] 436 U.S. 371 (1978).
[229] *Id.*, at 387.
[230] *Id.*
[231] *Id.* (internal citations omitted).

> the States must treat residents and nonresidents without unnecessary distinction.[232]

Justice Thomas himself, dissenting in *Obergefell v. Hodges*,[233] observed how "[t]he founding-era idea of civil liberty as natural liberty was heavily influenced by John Locke, whose writings "on natural rights and on the social and governmental contract" were cited '[i]n pamphlet after pamphlet' by American writers. Locke described men as existing in a state of nature, possessed of the 'perfect freedom to order their actions and dispose of their possessions as persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.'"[234] Justice Thomas also noted:

> Locke's theories heavily influenced other prominent writers of the 17th and 18th centuries. Blackstone, for one, agreed that "natural liberty consists properly in a power of acting as one think is fit, without any restraint or control, unless by the law of nature" and described civil liberty as that "which leaves the subject entire master of his own conduct" except as "restrained by human laws." 1 Blackstone 121-122. And in a "treatise routinely cited by the Founders," *Zivotofsky v. Kerry*, ---- U.S.----, 135 S.Ct. 2076 (2015) (Thomas, J., concurring in judgment in part and dissenting in part), Thomas Rutherford wrote, "By liberty we mean the power, which a man has to act as he thinks fit, where no law restrains him; it may therefore be called a mans right over his own actions." 1 T. Rutherforth, Institutes of Natural Law 146 (1754).[235]

In *Rosenberger v. Rector and Visitors of University of Virginia*,[236] the Court noted that "even if more extreme notions of the separation of church and state can be attributed to Madison, many of them clearly stem from 'arguments reflecting the concepts of natural law, natural rights, and the social contract between government and a civil

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[232] *Id.* (internal citations omitted).
[233] 576 U.S. 644 (2015).
[234] *Id.*, at 726 (Thomas, J., dissenting).
[235] *Id.*, n. 4.
[236] 515 U.S. 819 (1995).

society,' rather than the principle of nonestablishment in the Constitution."[237]

And dissenting in *Alden v. Maine*,[238] Justice Souter, joined by Justice Stevens, Justice Ginsburg, and Justice Breyer, pointed out how "[a]round the time of the Constitutional Convention…there existed among States some diversity of practice with respect to sovereign immunity; but despite a tendency among the state constitutions to announce and declare certain inalienable and natural rights of men and even of the collective people of a State, see, *e.g.*, Pennsylvania Constitution, Art. III (1776) ("That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same"), no State declared that sovereign immunity was one of those rights."[239] In that same opinion, Justice Souter explained how "Blackstone quoted Locke's explanation for immunity, according to which the risks of overreaching by 'a heady prince' are 'well recompensed by the peace of the public and security of the government, in person of the chief magistrate being thus set out of the reach of danger.' (quoting J. Locke, *Second Treatise of Civil Government* §205 (1690 J. Gough ed. 1947))."[240] Thus, "[b]y quoting Pufendorf and Locke," according to Justice Souter, "Blackstone revealed to his readers a legal-philosophical tradition that derived sovereign immunity not from the immemorial practice of England but from general theoretical principles."[241] And even if "Blackstone thus juxtaposed the common law and natural law conceptions of sovereign immunity, he did not confuse them…for although the two conceptions were arguably 'consonant' in England, where according to Blackstone, the Crown was sovereign, their distinct foundations could make a difference in America, where the location of sovereignty was an issue that independence would raise with some exigence."[242] And when the Court described Justice Souter's approach to natural law as "an apparent attempt to disparage."[243] Justice Souter responded that

> My object, however, is not to call names but to show that the majority is wrong, and in doing that it is

[237] *Id.*, at 856.
[238] 527 U.S. 706 (1999).
[239] *Id.*, at 772 (Souter, J., dissenting).
[240] *Id.*, at 767.
[241] *Id.*
[242] *Id.*, at 767-768.
[243] *Alden*, 527 U.S., at 758.

> illuminating to explain the conceptual tradition on which today's majority draws, one that can be traced to the Court's opinion from its origins in Roman sources. I call this conception the "*natural view*" of sovereign immunity, despite the historical ambiguities associated with the term because the expression by such figures as Pufendorf, Hobbes, and Locke, of the doctrine that the sovereign might not be sued, was associated with a concept of sovereignty itself derived from natural law. The doctrine that the sovereign could not be sued by his subjects might have been thought by medieval civil lawyers to belong to *jus gentium*, the law of nations, which was a type of natural law; or perhaps in its original form it might have been understood as a precept of positive, written law…. Through its reception and discussion in the continental legal tradition, where it related initially to the Emperor, but also eventually to a Kind, to the Pope, and even to a city-state, this conception of sovereign immunity developed into a theoretical model applicable to any sovereign body…."[244]

Here, Justice Souter was looking for that constitutional metric, that foundational principle which accorded with history, logic, tradition, and common sense.

Lower courts have similarly relied on the idea and concept of natural rights when interpreting the Constitution.[245] In *United States v. Stevenson*,[246] for instance, the district court for the Southern District of West Virginia, observed:

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[244] *Alden*, 527 U.S., at 767, n. 6 (internal citations omitted) (Souter, J., dissenting) (emphasis added).

[245] See, among others, *In re Money Centers of America, Inc.*, 2018 WL 1535464 (2018), where the court observed that "[t]ribal sovereign immunity is based on tribes' status as 'distinct, independent political communities, retaining their original natural rights' and 'separate sovereigns pre-existing the Constitution[.]'" *Id.*, at *2 (internal citations omitted). In *Royer v. Shea*, 2006 WL 1361220 (2006), the Maine district court described the provision in Article I §1 of the Maine Constitution as the "natural rights" provision. *Id.*, n. 27.

[246] 425 F.Supp.3d 647 (2018).

> One of the fundamental principles underlying the Constitution was the people's intent to establish a participatory democracy respecting the natural rights of the people. Natural rights, including the right to life, liberty, the pursuit of happiness, property, religion, free speech, and free press, were considered so important that they were regularly described as unalienable, i.e., even acting truly voluntarily, an individual could not give them away. It was the people's natural rights that the government was created to protect as well as to respect.[247]

And the States have as well included in their constitutions a reference to "natural rights."[248]

But perhaps this endorsement of "natural rights" and "natural law" is not or is not exclusively a product of a Lockean influence. In his *Constitutional Politics/Constitutional Law*,[249] Bruce Ackerman endorsed a similar thesis, after discarding the idea that the Founding Fathers had been influenced by Locke and the natural rights philosophy:

> a reader of the *Federalist Papers* will search in vain for an elaborate description of a "state of nature," or a penetrating analysis of our "natural rights," Lockean or otherwise. These matters simply do not gain the sustained attention of Madison, Hamilton, and Jay as they try to convince their fellow Americans to support to proposed Constitution. What *does* bulk large in *Federalist* is a profound diagnosis of the prospects and pathologies of citizenship in the modern world. This is

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[247] *Id.*, at 650.

[248] See, e.g., Section 1 of the Kansas Bill of Rights ("all persons possessed of equal and inalienable natural rights including life, liberty and pursuit of happiness"). Kan. Const. Bill of Rights §1. The Puerto Rico Constitution's Preamble reads "We, the people of Puerto Rico, in order to organize ourselves politically on a fully democratic basis, to promote the general welfare, and to secure for ourselves and our posterity the complete enjoyment of human rights, placing our trust in Almighty God, do ordain and establish this Constitution for the commonwealth which, in the exercise of our natural rights, we now create within our union with the United States of America. P.R. Const., Preamble.

[249] 99 YALE L. J. 453 (1989).

> not because the Founders thought that citizenship was everything and private rights were nothing. It was because they believed that the fate of private freedom in America, and much else besides, were dependent upon a realistic appreciation of what could, and what could not, be expected of American citizens. The liberal idea of citizenship is not only central to my interpretation of the Founding; it is also crucial to my view of the subsequent course of history.[250]

And this is because, "the foundation of personal liberty is a certain kind of political life—one requiring the ongoing exertions of a special kind of citizenry. Rather than grounding personal freedom on some putatively prepolitical "state of nature," this kind of liberalism makes the cultivation of *liberal citizenship* central to its enterprise."[251]

David E. Bernstein observed that "the idea that the guarantee of 'due process of law' regulates the substance of legislation … arose from the long-standing Anglo American principle that the government has inherently limited powers" and from "long-standing American intellectual traditions that held that the government had no authority to enforce arbitrary 'class legislation' or to violate the fundamental natural rights of the American people."[252]And because the inalienable, fundamental rights are the ones that make a government legitimate, the ones on which a legitimate government should be premised, the States have endorsed those rights and have incorporated them in their constitutions, including their modern ones.[253] None of them, though, contain an exhaustive list of the rights sought to be protected.

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[250] *Id.*, at 485.
[251] *Id.*, at 484.
[252] *Rehabilitating* Lochner: *Defending Individual Rights Against Progressive Reform* 9 (Chicago 2011).
[253] *See, among others*, the Massachusetts Constitution, mentioning "natural, essential, and unalienable rights," Constitution of the Commonwealth of Massachusetts, Article CVI; or the "inherent rights of mankind," Constitution of the Commonwealth of Pennsylvania, Article 1, Section 1; or "inherent rights, of which…they cannot, by any compact, deprive or divest their posterity," Constitution of Virginia, Article 1, Section 1; and "All people by nature free and independent have inalienable rights," California Constitution, Article 1, Section 1; or rights which must be maintained by the individuals' "free and independent State[s], subject only to the Constitution of the United States, and the maintenance of our free institutions," The Texas Constitution, Article 1, Section 1.

VI. THE ROLE OF JUDICIAL DECISION-MAKING IN THE ENFORCEMENT OF FUNDAMENTAL RIGHTS[254]

Justice Thomas and the other conservative Justices start with the notion that if rights are not specifically enumerated in the Constitution then they can only exist if they're proven to have been historically recognized at the time. But this approach treats the Constitution like a building code—prescribing every detail—instead of a constitution, which of necessity paints in broad brush.

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

In "The Least Dangerous Branch,"[255] Alexander Bickel described judicial review as a "counter-majoritarian force in our system"[256]—because of the apparent tension between judicial review and the democratic process—and a "deviant institution in the American democracy because it enables an unelected judiciary to override the decisions of majoritarian legislatures."[257] Yet the role of judicial decision-

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[254] On judicial decision-making, *see also*, Simona Grossi, *Courts as an Instrument of Democracy*, https://www.huffpost.com/entry/courts-as-an-instrument-o_b_12782888; *see also* Simona Grossi, *Constitutional Courts as Lawmakers: A Commentary on the Lecture by Prof. Dr. Rupert Scholz, 'Constitutional Court Jurisdiction between Constitutional Law and Politics – Taking the German Federal Constitutional Court as an Example'*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346446.

[255] Alexander Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

[256] Id., at 16.

[257] Id., at 18.

making in the protection of fundamental substantive due process rights has been, and continues to be, essential.[258]

In *Moore v. City of East Cleveland*,[259] when declaring an East Cleveland zoning ordinance limiting the number of unrelated individuals who could share a home unconstitutional, the Court noted:

> Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the Lochner era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary the boundary of the nuclear family.
>
> Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful "respect for the teaching of history (and), solid recognition of the basic values that underlie our society.'"

Thus, judicial decision-making is essential to that necessary synthesis—of text, history, tradition, and societal constitutional achievements—that can only lead to the most effective and truthful understanding and application of our Constitution. In *Planned Parenthood v. Casey*,[260] the Court noted that the individual liberty that the Fourteenth Amendment preserves is

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[258] In McDonald v. City of Chicago, Ill., 561 U.S. 742, 794 (2010), the Court held that "It is only we judges, exercising our 'won reasoned judgment' who can be entrusted with deciding the Due Process Clause's scope—which rights serve the Amendment's 'central values'".

[259] 431 U.S. 494 (1977).

[260] 505 U.S., *supra* __, at 848-849 (emphasis added).

> a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, … and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement." *Poe v. Ullman*, 367 U.S., at 543 ….The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: *reasoned judgment*. Its boundaries are not susceptible of expression as a simple rule."[261]

Similarly, in *Obergefell v. Hodges*,[262] the Court noted how "[c]ourts must exercise *reasoned judgment* in identifying interests of the person so fundamental that the State must accord them its respect. History and tradition guide and discipline the inquiry but do not set its outer bounders. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."[263]

The *reasoned judgment* that the *Casey* and the *Obergefell* Court are referring to reminds us of the "natural lawyering and judging"—a type of lawyering and judging premised on wisdom, knowledge, practices grounded in an understanding of the law and its consequences, as well as careful consideration of the specific circumstances of each case[264]—which Judge Clark, among the driving forces behind the adoption of the Federal Rules of Civil Procedure, was so insistent on.[265] And words like "liberty" and phrases like "due process" make this type of lawyering and judging possible and, in fact, necessary. "That does not mean," continued the *Casey* Court, that "we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office."[266] After all,

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[261] *Id.*, at 849.
[262] 576 U.S. 644 (2015).
[263] *Id.*, at 645 (emphasis added).
[264] The idea that the Constitution was calling for a type of decision-making informed by reason and experience was also expressed by Chief Justice Marshall in *M'Culloch v. Maryland*, 17 U.S. 316, 413 (1819). *See also supra* n. __.
[265] *See* nn. __*supra*.
[266] *Id.*

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. *That tradition is a living thing*. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint."[267]

And the reasoned judgment allows substantive due process "to perform a nationalizing function through the recognition and protection of fundamental rights as a matter of national constitutional law."[268]

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

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[267] *Id.*, at 849-850 (emphasis added). *See also* Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 230 (citing the DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 129 (L. Butterflied ed. 1961) and noting how the Colonies adopted the common law "not as the common law, but as the *highest Reason*.") (emphasis added).

[268] Daniel O' Conkle, *Three Theories of Substantive Due Process*, 85 N.C.L.REV. 63, 107 (2006).

increases the doctrine's functional significance."[269] Thus, according to Justice Blackmun and others, substantive due process should play a much more vibrant role than the one that the Court has often assigned to it.[270]

Yet that doesn't mean that, in applying formula like the due process one, judges are without any guidance. Indeed, they "must move within the accepted notions of justice and [are] not … [within] the idiosyncrasies of a merely personal judgement."[271] Because tradition is a *living thing*, though, judges cannot be treated as "inanimate machines" and to engage in mechanical exercises intended the check lists prepared centuries earlier to see whether the item that a society centuries later generated can be found in there.

Evolving standards and constitutional achievements must be considered, together with the peculiar circumstances, variables, and conflicting interests of each case.[272] This approach is consistent with the

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[269] *Id.*

[270] *Id*., at 98.

[271] Adamson v. California, 332 U.S. 46, 68 (1947).

[272] Acknowledging the constitutional achievements and considering them in view of the evolving standards of decency, the Court in *Roper v. Simmons*, 543 U.S. 551 (2005), noted:

> The prohibition against "cruel and unusual," like other expansive language in the Constitution, must be interpreted according to tis text, by considering history, tradition, and precedent, and *with due regard for its purpose and function in the constitutional design*. To implement this framework we have established the propriety and affirmed the necessity of referring to "*the evolving standards of decency that mark the progress of a maturing society"* to determine which punishments are so disproportionate as to be cruel and unusual. In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), a plurality of the Court determined that our standards of decency do not permit the execution of any offender under the age of 16 at the time of the crime….The plurality also observed that "[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community…. The next year, in *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Court…referred to contemporary standards of decency in this court….Three Terms

original intent[273] and, thus, ultimately, with an originalist reading of the Constitution.[274] In fact, being truthful to the original meaning

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

Id., at 560-563 (emphasis added) (internal citations omitted).

[273] *See, e.g.*, Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L. J. 246, 293-294 (2017), noting how

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

Id. (emphasis added).

[274] *See also* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 Nw. U. L. Rev. 549, 578 (2009). According to Balkin,

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

might require reaching different outcomes to take into account the changing circumstances. [275]

Judges need to be able to incorporate in their *reasoned judgment* the facts and the historical development which inevitably color the new and evolving constitutional questions presented. And isn't that the beauty and the strength of the common law system, a system where the law comes from the facts, and evolve with them? This view of judicial decision-making is the only one that would make the Constitution a living document capable of serving the needs of We the People.

VII. CONCLUSION

As this Article shows, the idea of *liberty* permeates the entire Constitution, from its Preamble to the Due Process Clauses and the entire text, if we properly conceive the powers as given in service of that liberty and happiness of the American people. After pausing on the nature and the spirt of the Constitution as a collection of principles and ideas—not as a legal code—intended to adjust to the changing circumstances and serve the ever evolving needs of our constitutional system (Part II), Part III has offered evidence of such nature and spirit by providing examples of doctrines, powers, and rights which, although not been expressly mentioned by the text, have been considered historically part of our system, the structure and the rights. Zooming in on the substantive due process rights, Part IV showed how this non-strictly textual approach, intended by the Framers for individual rights and liberty more specifically, had been already endorsed by the States and by them expressed in their constitution and/or jurisprudence preceding ratification. Thus, the Constitution and the Court's

> the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

Id.

[275] Ryan, *Laying Claim to the Constitution, supra* __, at1542-1543 (citing Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1165 (1993); and Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 395 (1995).

jurisprudence, by endorsing a similar non-enumerated/implied approach to those rights, appear as a product of "history and tradition," more than a novelty. And yet, even without that distant heritage, we could still say that the Court, over the course of the years, has indeed built a history and tradition of *liberty* interpretations that constantly proved to adjust and evolve with the evolving needs of the society. By further expanding the geographical and temporal scope of our study, Part V showed how the concept of liberty seemed to have preexisted the ratification and even common law—as comprising the collective natural rights of the individuals universally recognized over time—and how this idea influenced the Framers and the jurisprudence of the Court over the course of the years. Building on these findings, Part VI showed how the enforcement of the fundamental rights that the word *liberty* was intended to capture heavily depends on the *reasoned judgment* of careful judicial decision-making, one that endorses a dynamic interpretive approach to the relevant constitutional provisions, an approach capable to serve the Constitution and We the People.

Justice Thomas's concurring opinion in *Dobbs*—and, more generally, the approach and method adopted by the conservative Justices on the Court— being at odd and inconsistent with all the above findings and analysis, is difficult to square with history and tradition as well as with the spirit and very nature of the Constitution, which, as Chief Justice Marshall aptly stated only a few decades after the adoption of the Constitution, was never intended, and is not to be treated as a legal code.