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### Life to Death: Our Constitution and How It Grows

*Judge Stephen Reinhardt\**

Edward Barrett, the founding Dean of the UC Davis School of Law, for whom this lecture series was named, is a renowned scholar of constitutional law who, during his service as a special assistant to the Attorney General of the United States, contributed to the development of the first civil rights legislation in this country since Reconstruction.<sup>1</sup> Dean Barrett's life and work reflect an unwavering commitment to the values enshrined in our Constitution, in particular, the Founders' aspiration to "establish justice" for all Americans.<sup>2</sup>

As you are all by now aware, I am a federal judge on the United States Court of Appeals for the Ninth Circuit. As a judge, I have the

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\* Circuit Judge, United States Court of Appeals for the Ninth Circuit. This Essay was originally delivered as the Edward L. Barrett, Jr., Lecture on Constitutional Law at UC Davis School of Law on February 25, 2010. I am grateful to my law clerk, Stella Burch Elias, for her invaluable assistance. The views expressed in this lecture are mine and not those of the United States Court of Appeals for the Ninth Circuit.

<sup>1</sup> See Harold Hongju Koh, Gerard C. & Bernice Latrobe Smith Professor of Int'l Law, Yale Univ., Edward L. Barrett, Jr. Lecture on Constitutional Law: Paying "Decent Respect" to World Opinion on the Death Penalty (Nov. 7, 2001), in 35 UC DAVIS L. REV. 1086 n.1 (2002).

<sup>2</sup> See U.S. CONST. pmbl.

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opportunity to engage, on a daily basis, with the provisions and promises of our nation's founding document, as I endeavor, in my own work, to "establish justice," a task that is not always easy in the current judicial atmosphere. A judge's vision of the Constitution, of the ways in which it protects and shapes our rights, and of its continued relevance in modern society, forms a part of his jurisprudence and helps determine the results that he reaches in many of the cases that come before him. For a judge, constitutional interpretation is neither an academic enterprise, nor a fascinating theoretical pursuit, but rather a task that defines his role, in the fulfillment of his responsibilities to the nation. For this reason, I have decided to speak to you today about the pressing need for a deeper understanding by practitioners, the legal academy, and jurists, of the correct way to interpret our Constitution and, thereby, vindicate the inalienable rights that it guarantees to all of us — irrespective of race, sex, religion, sexual orientation, or national origin — from the cradle to the grave.

Please understand that to the extent that I express any personal views as to what the Constitution means, or should mean in the future, these are not views that I am necessarily free to apply to the cases on which I sit as a judge of the Ninth Circuit. As a judge, I must follow the law as set forth in the decisions of the Supreme Court of the United States and, often, as well, in the decisions of my own court, whether I agree with them or not. Thus, should a case come before me that raises an issue that I may discuss here today, either directly or indirectly, I may be compelled by precedent to vote in a way that is different from that in which I would vote if I were free to depart from the established law of the Ninth Circuit or the United States Supreme Court.

As even the first-year law students among you must be aware, differing visions of the Constitution currently prevail on the federal bench, as well as in the legal academy. One school of constitutional interpretation, so-called "originalism," which is advocated by Supreme Court Justice Antonin Scalia,<sup>3</sup> sees the Constitution as primarily a technical charter that, in the late eighteenth century, allocated responsibility among the three branches of the national government — legislative, executive, and judicial — and between the federal government and the states.<sup>4</sup> In addition, these "originalists" view specific textual protections (of which there are, in fact, few) narrowly and literally — or at least that is their contention. For "originalists,"

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<sup>3</sup> See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 15-48 (1997).

<sup>4</sup> *Id.*

who cleave to the notion that the only permissible interpretation of the text of the Constitution is that which existed at the time in which it was drafted, the Constitution is in many ways a historical artifact, designed to enshrine permanently the status quo of that time.<sup>5</sup> The “originalists’” interpretation of the Constitution is shared, in many respects (although not all), by jurists and scholars who identify themselves as “textualists” and by those who call themselves “strict constructionists.” During this lecture, I will use the umbrella term “conservative” to describe the judicial philosophies of these three overlapping groups.

For others, amongst whom I count myself, the Constitution is a “living” document that primarily guarantees rights and privileges to the inhabitants of contemporary America, rights and privileges that may expand as our nation continues to develop.<sup>6</sup> For those of us who believe in a “living” Constitution, the Constitution itself is much more than a mere historical text to be parsed for its literal, original meaning; rather, it is a collective covenant designed to effectuate the broad purposes outlined in its Preamble: “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.”<sup>7</sup>

Justice Holmes observed in *Missouri v. Holland* that “when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.”<sup>8</sup> I believe that judges in twenty-first century America must continue to adhere to the broad principles set forth by the Framers, even when doing so involves invoking constitutional guarantees — whether of due process, privacy,

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<sup>5</sup> See, e.g., Diarmuid F. O’Scannlain, U.S. Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, Remarks Delivered to the Notre Dame Law School Chapter of the Federalist Society for Law and Policy Studies: Rediscovering the Common Law (Oct. 16, 2003), in 79 NOTRE DAME L. REV. 755, 756 (2003) (“[T]he Framers adopted a written Constitution to prevent change . . .”).

<sup>6</sup> The phrase “living Constitution” first entered common usage in 1927 when a Columbia professor published a book of the same name, HOWARD LEE MCBAIN, *THE LIVING CONSTITUTION* (1927), and attained a greater degree of prominence in the 1960s when Charles Reich published an article entitled “The Living Constitution and the Court’s Role.” Charles Reich, *The Living Constitution and the Court’s Role*, in HUGO BLACK AND THE SUPREME COURT 177 (Stephen Parks Strickland ed., 1967).

<sup>7</sup> U.S. CONST. pmb1.

<sup>8</sup> *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

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or equal protection — in contexts that could not have been imagined in the 1790s, or perhaps even in the 1970s. For the moment, let us call those of us who share this view “living constitutionalists.” (Let us also, however, not forget that those of us who are living constitutionalists, are, like the conservatives, not a monolithic bloc, with only one approach to the Constitution, but rather we approach constitutional interpretation with varying degrees of dedication to formalism, legal realism, or critical legal theory.)

Conservatives argue that living constitutionalists are “activists” who seek to overturn precedent and discover new and unwarranted protections in the provisions of the Constitution. They suggest that, in contrast, their own judicial philosophy is static and concerned only with the accordance of due respect to the words of the Constitution and to precedent. In my opinion, the conservatives are utterly mistaken, first, because living constitutionalists do accord the respect that is due to precedent and to the text of the Constitution, as well as to its purposes; and second, because the conservatives themselves often produce judicial opinions that can only be described as remarkably “activist,” and because they do not respect precedent to any greater extent than their colleagues with different constitutional philosophies. Indeed, they often show respect for precedent to a lesser extent these days.<sup>9</sup>

Living constitutionalists understand that jurists are inevitably called upon to interpret the Constitution, in the context of contemporary conditions, because the correct applications of its general clauses, such as the Due Process Clause or Equal Protection Clause, let alone phrases such as “unreasonable search and seizure,” are not always self-evident in individual cases, nor could they possibly be over 200 years after the Constitution was adopted.<sup>10</sup> For conservatives, however, contemporary constitutional interpretation is to be avoided, in part, because, in their view, it allows for the possibility of bias on the part of the judge, whose role, conservatives contend, should be only that of a passive, neutral decisionmaker. According to the conservatives, the only way to avoid judges’ contemporary concerns and personal biases from infecting their judicial decision making is to resort to a rigid, textualist interpretation of the Constitution and, some would say, to

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<sup>9</sup> See, e.g., *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 912 (2010) (noting that “[s]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision” (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940))).

<sup>10</sup> See Ruth Bader Ginsburg, U.S. Supreme Court Justice, John H. Tucker Lecture in Civil Law: An Overview of Court Review for Constitutionality in the United States (Oct. 24, 1996), in 57 *LA. L. REV.* 1019, 1021 (1997).

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ascertain precisely what the Founders intended at the time they adopted specific words that today's judges must apply. Such a methodology, according to its adherents, forces judges to remain value-neutral because it constrains their decision making to strict construction, or a straightforward application, of what our founding document actually means.<sup>11</sup>

This viewpoint captured the public's imagination during Chief Justice Roberts's confirmation hearings. During those hearings, the Chief Justice compared the role of a judge to that of a baseball umpire, claiming: "Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role."<sup>12</sup> The Chief Justice further stated that if he were confirmed, he would "remember that it's [his] job to call balls and strikes, and not to pitch or bat."<sup>13</sup> My colleague on the Ninth Circuit, Judge Diarmuid O'Scannlain, quarrels with even that analogy, arguing that it might imply too much rule-making discretion on the part of the judge, because "baseball umpires may define their own strike zones!"<sup>14</sup> For Judge O'Scannlain, a judge is not, therefore, most akin to a baseball umpire, but rather to a football referee.<sup>15</sup>

This vision of the judiciary as little more than umpires or referees at sporting events has become so pervasive that even jurists who would never contemplate describing themselves as conservatives are now rushing to establish their credentials as unmoved and unmoving enforcers of the proscribed rules and procedures. Last year, as you may remember, President Obama's first nominee to the Supreme Court, Justice Sonia Sotomayor, not only distanced herself from the President's suggestion that "empathy" was a worthy attribute for a Supreme Court Justice, but also stated repeatedly during her own confirmation process that "the task of a judge is not to make the law, it is to apply the law."<sup>16</sup> Justice Sotomayor was at pains to demonstrate

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<sup>11</sup> See SCALIA, *supra* note 3, at 15-48.

<sup>12</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).

<sup>13</sup> *Id.* at 56.

<sup>14</sup> Diarmuid F. O'Scannlain, *The Role of the Federal Judge Under the Constitution: Some Perspectives from the Ninth Circuit*, 33 HARV. J.L. & PUB. POL'Y 963, 965 (2009).

<sup>15</sup> *Id.*

<sup>16</sup> *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 59 (statement of Sonia Sotomayor).

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that she too believed that “judges can’t rely on what’s in their heart” and should not “apply feelings to facts.”<sup>17</sup>

Interestingly enough, four years earlier, in 2005, a Republican nominee, Justice Samuel Alito, who identifies himself as a strict-constructionist to no lesser extent than Chief Justice Roberts, adopted an entirely different approach. During his Senate hearings, Justice Alito stated that if he were confirmed, he would draw upon his personal experience and that of his family members, to empathize with the litigants appearing before him.<sup>18</sup> Many possible inferences could be drawn from the conflicting statements of Chief Justice Roberts, Justice Alito, and Justice Sotomayor. I leave it up to you to decide which testimony was most genuine, or perhaps, to put it more kindly, most accurate. My own conclusion based on the Justices’ testimony, and my own almost thirty years of experience on the bench is as follows: No judge, not even one committed to the neutral parsing of statutory language, can ever truly avoid his own values and predispositions. Given that fact, the most honest approach that any jurist can take is to acknowledge the positive influence of his own experience and beliefs on his jurisprudential philosophy and on his decision making.

To digress momentarily, I personally believe that perhaps the true lesson that can be drawn from the testimony of Chief Justice Roberts, Justice Alito, and Justice Sotomayor is that testimony at confirmation hearings is not worth much, and the entire confirmation process is hardly a “teachable moment,” as our President might put it. How the confirmation process could be overhauled, or even dispensed with, apart from the Senate vote, is an interesting question, but one that is, I’m sorry to say, well beyond the scope of this address.

So, to return to the subject of this lecture, and the conservatives’ view of the correct method of constitutional interpretation: the suggestion made by textualists that avoidance of one’s own beliefs is both possible and admirable, constituting the pinnacle of “judicial restraint,” is unquestionably erroneous, and is disproved by our nation’s judicial history, from John Marshall to Earl Warren — as well as by the opinions handed down by conservative, textualist jurists themselves — opinions that are suffused with the authors’ own philosophical views. Indeed, the jurisprudence of the conservatives on

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<sup>17</sup> *Id.* at 120-21.

<sup>18</sup> Justice Alito’s exact words were: “When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender. And I do take that into account.” *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 475 (2006) (statement of Samuel Alito).

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the Supreme Court today, and in recent years, shows the extent to which their distinct ideology influences their decisions — leading them to advance a backward-looking approach when revisiting important constitutional questions; to limit access to courts on dubious procedural grounds; and in numerous instances, to break with precedent, supposedly the holy grail of their interpretative methodology.

With respect to revisiting important constitutional questions, the real concern of conservative judges is not ordinarily with which method their colleagues employ in deciding cases, but rather with what those colleagues ultimately say — that is, with the results reached in decisions. For conservative judges, conservative outcomes in cases or controversies are often the only results that they consider to be constitutionally legitimate. This perspective is clear from the public expressions of outrage by conservatives at what they perceive to be the “judicial encroachments” over the past fifty years with respect to issues such as abortion, affirmative action, gay rights, the death penalty, and prayer in public schools.

This view is also plainly demonstrated in the opinions penned by “originalist” or “strict constructionist” jurists. Justice Scalia’s dissent in *Lawrence v. Texas*, for example, which describes the majority opinion as “the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda,”<sup>19</sup> could hardly be said to be “value neutral”! Nor could the majority decision in *District of Columbia v. Heller*, which declared unconstitutional a thirty-five-year-old D.C. ordinance prohibiting private ownership of handguns and imposing restrictions on long-guns,<sup>20</sup> be seen as necessarily consistent with centuries-old tradition — from 1791, when the Second Amendment was ratified, until 2008, not one law was found to violate its provisions. *Heller* does, however, demonstrate the extraordinary impact that judges’ personal views or ideological commitments can bring to bear on constitutional questions. It is, of course, almost unfair to conservatives to cite the example of *Bush v. Gore*,<sup>21</sup> perhaps the most telling illustration of what occurs when a conservative activist Court’s proclaimed philosophy is put to the test of political practicality. Examples of conservative activism are evident not merely in cases involving constitutional questions, however, but also in cases involving statutory interpretation and the consideration of rules and

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<sup>19</sup> *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

<sup>20</sup> *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821-22 (2008).

<sup>21</sup> *Bush v. Gore*, 531 U.S. 98, 111 (2000).

doctrine. Indeed, the differing approaches of conservatives and living constitutionalists permeate all aspects of judging.

In recent times, the conservatives on the Supreme Court have taken what might fairly be described as an extremely “activist” approach in several areas to limiting access to courts. Conservatives appear determined to expand the application of technical procedural rules designed to limit such access to courts in civil cases and to curtail the rights of prisoners to collaterally attack unjust convictions. In the civil area, I need do no more than mention the case of Lilly Ledbetter, a worker at a tire factory in Alabama, who was unquestionably discriminated against because of her gender, but whose claim of sex discrimination was, the Supreme Court held in *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>22</sup> barred by Title VII’s statute of limitations, prompting Congress to pass a bill, the Lilly Ledbetter Fair Pay Act,<sup>23</sup> to prevent future similar injustices.

In the criminal area, there are too many disturbing cases to list. I will, however, offer three examples, each of which was decided by a 5–4 vote, with a majority composed of the conservative members of the Supreme Court. The first example is that of Roger Coleman, a death row prisoner in Virginia, who was executed following his attorney’s failure to strictly observe all the applicable procedural rules.<sup>24</sup> Coleman was executed after his lawyer missed a state filing deadline by three days.<sup>25</sup> In denying Coleman’s petition, the Supreme Court expressed more concern about the harm to “Virginia’s dignity” than it did about whether the state was unconstitutionally executing a habeas petitioner.<sup>26</sup>

The second example is that of Tommy Thompson, a death row prisoner whose conviction was reversed by the Ninth Circuit Court of Appeals on the grounds of ineffective assistance of counsel and prosecutorial misconduct. The Supreme Court refused to consider the merits of the case, holding, again by a 5–4 conservative majority, that the court of appeals had delayed too long in recalling the mandate.<sup>27</sup> In so holding, the Court adopted a new rule as to when a court of appeals

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<sup>22</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007).

<sup>23</sup> Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

<sup>24</sup> See *Coleman v. Thompson*, 501 U.S. 722, 727-29 (1991).

<sup>25</sup> See *id.* at 727; see also Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. “Process,”* 74 N.Y.U. L. REV. 313, 321 (1999).

<sup>26</sup> *Coleman*, 501 U.S. at 738 (noting that “[s]tate courts presumably have a dignitary interest in seeing that their state law decisions are not ignored by a federal habeas court, but most of the price paid for federal review of state prisoner claims is paid by the State”).

<sup>27</sup> *Calderon v. Thompson*, 523 U.S. 538, 549 (1998).



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could recall a mandate. The result was that Thompson was executed notwithstanding the egregious constitutional violations that led to his conviction and that deprived him of a fair trial.<sup>28</sup> Again, the interests of justice were sacrificed to those of procedural regularity.

The final example is that of Keith Bowles, imprisoned for life in Ohio, who was told by a district court judge that he had until February 27, 2004, to file an appeal.<sup>29</sup> He filed on February 26, 2004. The district court judge was mistaken and should have told Bowles to file by February 24. The Supreme Court held that because of the district court's error, Bowles had irrevocably lost his right to appeal. As Justice Souter noted, writing in dissent, "It is intolerable for the judicial system to treat people this way."<sup>30</sup> The Framers could not possibly have anticipated such outcomes for litigants in United States courtrooms when they drafted a Constitution intended to "establish Justice . . . and secure the Blessings of Liberty to ourselves and our Posterity."<sup>31</sup>

With respect to the question of precedent, it is, ironically, the very same conservative jurists who profess to believe in limiting the judicial role and adhering scrupulously to precedent and previous interpretations of constitutional provisions who have been the most active in overturning precedent in recent years. The supposedly "activist" Warren Court of the 1950s and 1960s invalidated just nineteen federal statutes, whereas the more conservative Court under Chief Justice Burger and Chief Justice Rehnquist invalidated a combined total of fifty-five such statutes.<sup>32</sup> The current Court appears set to follow in its conservative predecessors' footsteps — so much so that, at the end of the 2006 Supreme Court Term, Justice Breyer remarked from the bench that "[i]t is not often in the law that so few have so quickly changed so much."<sup>33</sup>

In recent years, the conservative Justices have not hesitated to overturn decades of clearly established precedent. Indeed, there are too many instances to list during this speech, but a few examples will serve to illustrate my point. *Hein v. Freedom from Religion Foundation*<sup>34</sup>

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<sup>28</sup> See Reinhardt, *supra* note 25, at 319.

<sup>29</sup> *Bowles v. Russell*, 551 U.S. 205, 207 (2007).

<sup>30</sup> *Id.* at 215 (Souter, J., dissenting).

<sup>31</sup> U.S. CONST. pmbl.

<sup>32</sup> Lori A. Ringhand, *The Rehnquist Court: A "By the Numbers" Retrospective*, 9 U. PA. J. CONST. L. 1033, 1036, 1049 (2007).

<sup>33</sup> See Jeffrey Toobin, *No More Mr. Nice Guy*, NEW YORKER, May 25, 2009, at 42, 48, available at [http://www.newyorker.com/reporting/2009/05/25/090525fa\\_fact\\_toobin](http://www.newyorker.com/reporting/2009/05/25/090525fa_fact_toobin).

<sup>34</sup> *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 615 (2007).

is one such case. In *Hein*, the conservative majority, in a 5–4 opinion, held that individual taxpayers had no standing to assert an Establishment Clause challenge to George W. Bush’s “faith-based initiative” program, even though in *Flast v. Cohen*,<sup>35</sup> almost forty years previously, the Supreme Court had recognized taxpayer standing to assert an Establishment Clause challenge to the constitutionality of congressional expenditures.<sup>36</sup> In *Gonzales v. Carhart*,<sup>37</sup> the same conservative majority upheld the constitutionality of a federal ban on so-called “partial birth abortion” even though the Court had struck down a nearly identical state partial-birth abortion law seven years earlier, in *Stenberg v. Carhart*.<sup>38</sup> In *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>39</sup> the conservative majority similarly held that school districts in Seattle and Louisville could not use race as a factor when considering public school admissions in an attempt to diversify the student bodies, even though *Grutter v. Bollinger*,<sup>40</sup> only four years earlier had upheld the use of race as a factor in graduate and professional schools’ admissions to foster diversity in the classroom.

*Citizens United v. Federal Election Commission*,<sup>41</sup> decided in January 2010, provides a further example of the willingness of conservatives to overrule precedent. In *Citizens United*, the five conservative Justices formed a majority that overruled two major cases that had governed the field of campaign financing for a significant period of time.<sup>42</sup> Justice John Paul Stevens described the decision as one that is as “at war with the views of generations of Americans.”<sup>43</sup> He added in his dissent that “[t]he only relevant thing that has changed since” the previous campaign finance opinions of 1990 and 2003 “is the

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<sup>35</sup> *Flast v. Cohen*, 392 U.S. 83, 103-06 (1968).

<sup>36</sup> The opinion rests on a distinction which the Court creates between the permissible limits that can be imposed on the different branches of government. *Hein*, 551 U.S. at 609 (“*Flast* focused on congressional action, and we must decline this invitation to extend its holding to encompass discretionary Executive Branch expenditures.”). However, the distinction is, in my opinion, far from persuasive.

<sup>37</sup> *Gonzales v. Carhart*, 550 U.S. 124, 156 (2007).

<sup>38</sup> *Stenberg v. Carhart*, 530 U.S. 914, 945-46 (2000).

<sup>39</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 708-10 (2007).

<sup>40</sup> *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

<sup>41</sup> *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 886 (2010).

<sup>42</sup> *Id.* at 886, 942; see *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 223-24 (2003); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 654-55 (1990).

<sup>43</sup> See Adam Liptak, *Stevens Era, Nearing End, Takes on An Edge*, N.Y. TIMES, Jan. 26, 2010, at A12.

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composition of this Court.”<sup>44</sup> Justice Stevens’s remarks were reminiscent of those of Justice Thurgood Marshall, who, on the final day of the Court’s 1990 Term, the day of his retirement from the bench, declared that “[p]ower, not reason, is the new currency of this Court’s decisionmaking.”<sup>45</sup>

The conservatives’ suggestion that it is the living constitutionalist judges who are “activist” is thus clearly erroneous. Equally erroneous is the conservatives’ contention that there is a tension between understanding the original principles and purposes of the Framers of our founding document and applying those principles to the contemporary world. The United States Constitution sets forth a highly complex governmental structure, designed to endure through the ages. As Justice Souter observed recently, the Constitution “uses a certain amount of open-ended language that a contract draftsman would try to avoid” and contains language that “grants and guarantees many good things, and good things that compete with each other and can never all be realized, all together, all at once.”<sup>46</sup> Such an extraordinary document should, therefore, properly be understood as a broad charter of government, rather than a detailed code.<sup>47</sup> When considering “the various crises of human affairs,” our Constitution delegates to jurists a unique role — the role, as Justice Black so eloquently put it, of “stand[ing] against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.”<sup>48</sup> The Constitution is thus not merely a historical document, but rather a mandate that is capable of growing and changing, as required by the times in which we live, to promote individual rights. For this reason, living constitutionalism, with its recognition of the application of constitutional protections to the challenges of the modern world, is, in my view, the fitting and proper approach to constitutional interpretation.

In a number of instances, the greatest affronts to the original purposes of the Framers of our Constitution have been perpetrated by jurists who would identify themselves as conservatives, and the

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<sup>44</sup> *Citizens United*, 130 S. Ct. at 942.

<sup>45</sup> *Payne v. Tennessee*, 501 U.S. 808, 844 (1991).

<sup>46</sup> David Souter, *Harvard Commencement Remarks (as Delivered)*, HARV. GAZETTE, May 27, 2010, <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/>.

<sup>47</sup> For an alternative view, see John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2004-07 (2009).

<sup>48</sup> *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

greatest adherence to those original purposes has been demonstrated by judges whose approach would best be described as living constitutionalism. Cases such as *Dred Scott*,<sup>49</sup> *Plessy v. Ferguson*,<sup>50</sup> and *Bowers v. Hardwick*<sup>51</sup> are among the most egregious examples of instances in which conservative jurists abdicated their duty to our nation and to the Framers' vision of the Constitution, by purportedly strict interpretations of our founding document. Conversely, for a brief period of the twentieth century, from the 1950s to the 1970s, under the leadership of Chief Justice Earl Warren, the Supreme Court of the United States's living constitutionalists, though not known by that name, sought to fulfill that vision in opinions that protected individual rights and promoted access to the courts for those most in need of protection. Some commentators have deemed the Warren Court's approach "activism." I believe, however, that it is better understood as reasoned fidelity to the purposes and objectives of the Constitution.<sup>52</sup>

The constitutional vision of the Warren Court, according to one of its members, Justice Brennan, was clear: "[T]he Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being."<sup>53</sup> The Warren Court, consistent with this understanding of the true meaning of the Constitution, provided a model for how the judiciary can and should use the promises inherent in our founding document to protect the rights of the poor, the disenfranchised, and the underprivileged. The difference between the just and humanitarian approach to judging that was followed by the Warren Court and the spiritless techniques of strict constructionism, textualism, and originalism employed by more recent conservative members of the Supreme Court could not be more striking. It would be hard, for example, to determine from their writings how the majority of the members of today's Supreme Court would have ruled in *Brown v. Board of Education*.<sup>54</sup>

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<sup>49</sup> *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 405-06 (1856).

<sup>50</sup> *Plessy v. Ferguson*, 163 U.S. 537, 543-44 (1896).

<sup>51</sup> *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

<sup>52</sup> See JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 455 (2006).

<sup>53</sup> William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* 23, 23 (Jack N. Rakove ed., 1990).

<sup>54</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Justice Scalia has derided this question, saying that those who raise it are "waving the bloody shirt of *Brown*." Yet, at the same time, he has thus far failed to answer it, conceding only that he would have voted with the dissent in *Plessy*, 163 U.S. at 552, while avoiding divulging how he

President Kennedy once said, “Change is the law of life[,] and those who look only to the past or present are certain to miss the future.”<sup>55</sup> In so doing, he echoed the words of Thomas Cooley, a Chief Justice of the Michigan Supreme Court and Dean of the University of Michigan Law School, who declared in 1886 that “[c]hange is the law of life, and it enters into all things, seen and unseen.”<sup>56</sup> The evolution of constitutional jurisprudence during the time of the Warren Court clearly illustrates the great strength of interpreting our Constitution as a prospective, aspirational mandate, shaped by the Framers’ original purposes and principles. The development of doctrines concerning coerced confessions,<sup>57</sup> the provision of counsel for indigent defendants,<sup>58</sup> the expansion of the guarantee of equality in access to education<sup>59</sup> and to the voting booth,<sup>60</sup> as well as the equality of each “man’s” vote itself<sup>61</sup> — developments that would likely be reviled by today’s conservatives as “stretching” the Framers’ words beyond their original meaning — fairly ensured that many of the rights and freedoms originally specified by the Framers would continue to be effective in the modern world.

The Bill of Rights explicitly enunciates protections for all Americans, those in the majority *and* those in the minority. It is hardly “activism” to consider minority rights as a fundamental part of our nation’s ideals and a core element of our American democracy. The current Court decisions like *Parents Involved*<sup>62</sup> or *Washington v. Glucksberg*<sup>63</sup> that curtail the rights of minorities, whether children in the classroom or the elderly in hospice care, are antithetical to the original purpose of the Constitution, which is to guarantee the rights of all Americans, from childhood to old age. The guarantees of minority rights and the assurances of equal protection for all are

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would have actually voted in *Brown*, 347 U.S. 483, or why. See Adam Liptak, *From 19th Century View, Desegregation Is a Test*, N.Y. TIMES, Nov. 10, 2009, at A16.

<sup>55</sup> President John F. Kennedy, Address in the Assembly Hall at Paulskirche in Frankfurt (June 25, 1963).

<sup>56</sup> Thomas M. Cooley, The Influence of Habits of Thought upon Our Institutions: Second Annual Address Delivered Before the South Carolina Bar Association, Columbia, S.C. (Dec. 2, 1886), available at <http://hdl.handle.net/2027/mdp.39015071637891>.

<sup>57</sup> See *Miranda v. Arizona*, 384 U.S. 436, 439 (1966).

<sup>58</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 336-38 (1963).

<sup>59</sup> See *Brown*, 347 U.S. at 487-88.

<sup>60</sup> See *Baker v. Carr*, 369 U.S. 186, 187-88 (1962).

<sup>61</sup> See *Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

<sup>62</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709-11 (2007).

<sup>63</sup> *Washington v. Glucksberg*, 521 U.S. 702, 705-06, 732 (1997).

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integral to our system of justice. When the Warren Court interpreted the Bill of Rights and other legal texts broadly to promote equal justice for all Americans, but especially for those most in need, it did so in full recognition of the overriding *purpose* of the Framers, as set forth in the Preamble to the Constitution.

Fidelity to the Constitution does not mean parsing each word for its original meaning, but rather looking to the broader purpose of the document and its application in the contemporary world. Espousing pure “originalism,” “textualism,” or “strict construction” is of little value when confronted by a novel, specific, contemporary problem — a problem that the Founders could not possibly have anticipated. Yet, there are numerous substantive, fundamental questions confronting our courts that require clear-sighted answers. The resolution of these questions cannot be achieved by a limited, purely textualist, backward-looking analysis. Nor does living constitutionalism necessarily provide an immediate answer in itself, at least not simply as a result of uncontextualized theory. Rather, critical, rigorous, and careful study of the Constitution’s text and purposes is needed, as well as an enlightened comprehension of what we have experienced and achieved as a nation since the day that our founding document was adopted. Living constitutionalism requires an understanding of how we have grown and how our Constitution has grown with us.

To turn from theory to reality, I would like to outline a few questions that may arise in forthcoming years. The answers will likely depend on the approach to constitutional law employed by the judges who sit on the various courts that will decide them. Most important, however, the answers will ultimately depend on the judicial philosophy of the then-sitting Supreme Court Justices. In that respect, we can only hope for a judiciary that is both wise and enlightened, and that understands the true meaning and purpose of our Constitution — and that, in turn, will depend at least in substantial part on the philosophies of the Presidents who appoint them and the extent to which those Presidents recognize that the appointment of judges and, in particular, the appointment of Supreme Court Justices may, apart from the exercise of their war-making power, be the most important and long-lasting deeds they perform during their presidencies.

In my view, one constitutional question that would be deserving of reconsideration is the meaning of the Eleventh Amendment. The language of the Amendment seems straightforward: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United

States by Citizens of *another* State, or by Citizens or Subjects of any *Foreign* State.”<sup>64</sup> There is nothing in the Amendment to suggest that citizens may not sue their own states in federal courts, only that they may not sue another state. Yet, since its 1890 holding in *Hans v. Louisiana*, this language has been held by the Supreme Court, to do just the opposite of what it says — to prevent suits by citizens against their own state.<sup>65</sup>

One hundred and nine years after the Court issued its initial ruling in *Hans*, it revisited its odd reading of the Eleventh Amendment, in *Alden v. Maine*.<sup>66</sup> The conservative majority in that case again upheld the states’ immunity from suits brought by their own citizens, but this time, rather than rely solely on the Eleventh Amendment, it held that the immunity derived “from the structure of the original Constitution itself” and from “fundamental postulates implicit in the constitutional design.”<sup>67</sup> Conservatives have frequently mocked living constitutionalists for “finding” rights in the structure of the Constitution, or in locations other than its specific language, yet this is exactly what they did in *Alden*. Unlike the living constitutionalists, however, who seek to use such means of constitutional interpretation to safeguard fundamental rights, the conservatives in *Alden* sought by their unfamiliar means of interpretation to prevent citizens from vindicating their rights by barring them from filing legal actions.

As a result of the Court’s longstanding interpretation of the Eleventh Amendment in a manner that conflicts directly with its plain language, a number of complex and often contradictory legal doctrines have been developed that permit individuals to seek redress against their states in federal courts under some circumstances. Individuals may, for example, bring suit against municipalities and political subdivisions of a state,<sup>68</sup> but they may not do so when the state primarily funds the municipalities’ actions.<sup>69</sup> Under *Ex parte Young*, individuals may sue state officers for injunctive relief, even when the remedy will enjoin the implementation of an official state policy.<sup>70</sup> Monetary damages may be sought against state officers only in their

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<sup>64</sup> U.S. CONST. amend. XI (emphasis added).

<sup>65</sup> *Hans v. Louisiana*, 134 U.S. 1, 10, 21 (1890).

<sup>66</sup> *Alden v. Maine*, 527 U.S. 706, 723-24 (1999).

<sup>67</sup> *Id.* at 728-29.

<sup>68</sup> See, e.g., *N. Ins. Co. of N.Y. v. Chatham Cnty.*, 547 U.S. 189, 194 (2006) (noting that “[b]ecause the County may claim immunity neither based upon its identity as a county nor under an expansive arm-of-the-State test, the County is subject to suit”).

<sup>69</sup> See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 123-24 (1984).

<sup>70</sup> See *Ex parte Young*, 209 U.S. 123, 155-56 (1984).

“individual capacity,”<sup>71</sup> so as to protect the state from having to pay a monetary judgment, but prospective, injunctive relief may be granted, even if the injunction in question will ultimately cost the state a substantial sum of money.<sup>72</sup> The series of artificial rules that courts have developed to limit the effect of the Supreme Court’s Eleventh Amendment decision in *Hans* have understandably created enormous confusion among litigants in federal courts. Perhaps *some* day the conservative Justices will apply the principles to which they purport to adhere, overrule their previous decision, and give the Eleventh Amendment the meaning that its plain language dictates.

A more basic question exists with respect to the Ninth Amendment, which states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>73</sup> Conservatives frequently contend that the only rights available to citizens under the Constitution are those expressly listed in its text — for example, the right to freedom of speech,<sup>74</sup> the right to bear arms,<sup>75</sup> or the right to a speedy and public trial<sup>76</sup> — or perhaps, they might say, those rights widely understood to have existed and been acknowledged by the Framers, at the time of ratification. Conservatives frequently use this argument — that only specified rights are protected — to justify their opposition to women’s rights,<sup>77</sup> gay rights,<sup>78</sup> or other rights that have evolved or developed since 1791.<sup>79</sup>

Yet, if the conservative argument were not otherwise demonstrably incorrect, the Ninth Amendment would appear clearly to answer it. The amendment expressly provides that the absence of a particular right from the text of the Constitution does *not* serve to preclude its

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<sup>71</sup> See *Kentucky v. Graham*, 473 U.S. 159, 167-68 (1985) (discussing distinction between suits against officer in individual as opposed to official capacity).

<sup>72</sup> See, e.g., *Quern v. Jordan*, 440 U.S. 332 (1979) (finding that “a federal court . . . may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury” (citing *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974))); *Milliken v. Bradley*, 433 U.S. 267 (1977) (finding that “District Court was authorized to provide prospective equitable relief, even though such relief requires the expenditure of money by the State” (citing *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974))).

<sup>73</sup> U.S. CONST. amend. IX.

<sup>74</sup> U.S. CONST. amend. I.

<sup>75</sup> U.S. CONST. amend. II.

<sup>76</sup> U.S. CONST. amend. VI.

<sup>77</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 507-10 (1965) (Black, J., dissenting).

<sup>78</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

<sup>79</sup> See Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 5-6 (1971).



recognition.<sup>80</sup> The Ninth Amendment suggests that the people retain many different rights — indeed, Justice Douglas recognized this in his concurrence in *Roe v. Wade* when he suggested that the right of a woman to an abortion was protected under the Ninth Amendment.<sup>81</sup> Should the courts now consider reviving and reinvigorating the Ninth Amendment? And if so, what additional rights might exist, and how would the courts determine which they are?

Another area of constitutional interpretation that should, perhaps, be revisited is Substantive Due Process. The Court has for some time now read substantive content into the Due Process Clause of the Fifth and Fourteenth Amendments. The test used by the Court to determine the existence of a fundamental, substantive right that is cognizable under the Due Process Clause, is, however, on its face extremely restrictive. As set forth thirteen years ago, in the right-to-die case, *Washington v. Glucksberg*, the test is whether the right being sought constitutes a liberty interest that is “deeply rooted in this Nation’s history.”<sup>82</sup> Yet, many of the rights that have been vindicated in the name of Substantive Due Process: the right, for example, of married couples to use contraception,<sup>83</sup> of parents to pursue bilingual education for their children,<sup>84</sup> or of interracial couples to marry,<sup>85</sup> are not necessarily rights that would have met that test at the time they were decided. Fortunately, however, all were decided before *Glucksberg*. The question, then, is whether the Court should adopt a more expansive and flexible test than the “deeply rooted in our Nation’s history” standard, in recognition of the fact that in an ever-changing society, new circumstances and changing societal mores deserve recognition, so as to enable us to fulfill the promises of the Constitution. And, if the Court does adopt a new test, what should that test be? Is there a role for social consensus in that test, and if so,

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<sup>80</sup> See LAURENCE TRIBE, *IT IS A CONSTITUTION WE ARE EXPOUNDING: COLLECTED WRITINGS ON INTERPRETING OUR FOUNDING DOCUMENT* 22 (2009).

<sup>81</sup> *Roe v. Wade*, 410 U.S. 113, 179 (1973) (Douglas, J., concurring) (“The Ninth Amendment obviously does not create federally enforceable rights. It merely says, ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’ But a catalogue of these rights includes customary, traditional, and time-honored rights, amenities, privileges, and immunities that come within the sweep of ‘the Blessings of Liberty’ mentioned in the preamble to the Constitution.”).

<sup>82</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

<sup>83</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

<sup>84</sup> *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (observing that bilingual instruction was sought in German).

<sup>85</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

how should such consensus be measured? What about the consensus in other developed nations? What other considerations are appropriate? In short, in the absence of a test based on tradition alone, how should judges draw the line between rights that may be vindicated in the name of substantive due process and purported rights that are not entitled to such constitutional protection?<sup>86</sup>

Another question arises in an entirely different context. That is the question of the constitutionality of the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”),<sup>87</sup> which was enacted by Congress with the express intention of drastically curtailing the right of state inmates to challenge the constitutionality of their state convictions and sentences by seeking a federal writ of habeas corpus. A key section of AEDPA bars federal courts from granting a writ, unless the state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”<sup>88</sup> Under this provision, a state court decision upholding a petitioner’s conviction or sentence, including a capital sentence, may be unconstitutional under the law of the circuit, or even under clearly established Supreme Court law, but neither will alone entitle the petitioner to relief.<sup>89</sup> Relief for a constitutional violation may not be granted unless the state court decision constitutes an *unreasonable* interpretation of clearly established Supreme Court law.<sup>90</sup> In other words, even if the conviction or sentence is unconstitutional under clearly established Supreme Court law, a state court ruling to the contrary will not be overturned and the petitioner will remain incarcerated or may be executed, unless the ruling of the state court was not only wrong, but unreasonably so. Can this really be the law? Is AEDPA constitutional? Does its limitation of access to the writ of habeas corpus by persons unconstitutionally sentenced or convicted, including capital

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<sup>86</sup> See *Glucksberg*, 521 U.S. at 720 (“[W]e have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.”) (citation and quotation omitted).

<sup>87</sup> Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

<sup>88</sup> 28 U.S.C. § 2254(d)(1) (2006).

<sup>89</sup> See, e.g., *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (“The ‘unreasonable application’ clause requires the state court decision to be more than incorrect or erroneous. The state court’s application of clearly established law must be objectively unreasonable.”).

<sup>90</sup> *Id.*

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defendants, conform with the Framer's purpose of "establishing justice"? It would hardly appear to do so.

Another constitutional question that arises at the intersection of state and federal laws is whether same-sex partners have the right to marry, or rather, whether either the states or the federal government has the right to prohibit such partners from marrying. All of you are undoubtedly aware of the federal trial challenging the constitutionality of California's Proposition 8, in which the decision by the district judge will have been announced by the time you read this.<sup>91</sup> You probably also know that the Supreme Courts of Massachusetts and Connecticut have found bans on same-sex marriage to violate their state constitutions,<sup>92</sup> and that in our court, a final administrative order has been issued, holding that the denial of health care benefits to a same-sex spouse of a federal employee violates the Due Process Clause of the Fifth Amendment.<sup>93</sup>

As the question of the constitutionality of same-sex marriage and of the federal Defense of Marriage Act<sup>94</sup> is one that may come before my court in the near future, it would be inappropriate for me to comment further on that subject here. The issue, however, raises many of the fundamental questions that have previously arisen in some of our most significant constitutional cases, and it will be interesting to see, not only what the outcome will be, but how the judicial philosophies of the living constitutionalists and conservatives influence the decisions of the judges involved.

There are many other problems facing today's judges endeavoring to interpret the provisions of a Constitution adopted in the late eighteenth century. Technological and scientific advances, ranging from internet-based communications to DNA testing to other unforeseen medical advances may fundamentally affect an individual's right to privacy, a right that the Supreme Court has identified as part of "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."<sup>95</sup> How to apply properly the protections inherent in the Constitution to questions of privacy rights in the twenty-first century will present difficult questions and

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<sup>91</sup> See Jesse McKinley, *Proposition 8 Trial Pauses, but Not for Ruling*, N.Y. TIMES, Jan. 27, 2010, at A18.

<sup>92</sup> *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 970 (Mass. 2003) (Greeney, J., concurring).

<sup>93</sup> *In re Levenson*, 587 F.3d 925, 934 (9th Cir. 2009).

<sup>94</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

<sup>95</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973).

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undoubtedly lead to previously unthought-of constitutional responses. Living constitutionalists, originalists, and other conservatives will all have to apply their differing philosophies to questions that not only the Founding Fathers, but even their own parents, could never have imagined.

It will also be interesting to see how our nation's constitutional jurisprudence will change and grow with respect to matters of life and death. We can dispose quickly of questions of life at its inception. As more information develops regarding the beginning of life, and new technologies develop regarding the prevention and termination of pregnancies, the questions that courts confront may change dramatically, as may the constitutional answers. The question of death is, however, more difficult. In my opinion, it is likely that the Supreme Court will someday come to the decision that capital punishment, "the machinery of death," as Justice Blackmun described it in his dissent in *Callins v. Collins*,<sup>96</sup> constitutes cruel and unusual punishment. How and when we reach that decision, and whether conservative jurists and living constitutionalist will agree on the basis, is entirely unpredictable. However, in a civilized society the result seems inevitable.

I am equally confident that at some point in the future, the Court will revisit its prior ruling that individuals do not have the right to die peacefully and painlessly, aided by medication prescribed by their physicians. Fourteen years ago, I wrote an opinion that held that the right to die with dignity should be recognized as an essential part of the substantive due process guaranteed to all Americans by the Constitution.<sup>97</sup> The Supreme Court did not agree. Still, I stand by my belief, and I am certain that, at some point, the Supreme Court will do so also. Such is the nature of evolutionary change as contemplated by the drafters of the Constitution.

Which brings me back, in my concluding remarks, to the text of the Preamble and the Framers' intention to "establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."<sup>98</sup> Those last two words, "our posterity" are particularly important. My remarks today have, of necessity, focused on the past — on the Founding Fathers, on the Warren Court in the mid-twentieth century, and on the Court today, in the early years of the

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<sup>96</sup> *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

<sup>97</sup> *Compassion in Dying v. Washington*, 79 F.3d 790, 816 (9th Cir. 1996) (en banc) (Reinhardt, J.), *rev'd*, *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>98</sup> U.S. CONST. pmbl.

twenty-first. The real strength of the Constitution, however, lies not just in its remarkable past, but also in its future. What is needed in that future is not interpretation through “originalism,” “textualism,” or “strict construction,” but a greater understanding of the principles and purposes underlying our great, prospective, founding document — a comprehension of its essence as a living, growing instrument. As judges and scholars strive to interpret the Constitution in the future, they must recognize that we in the judiciary have a duty to engage with the true substance and promise of that document. The Constitution is an unprecedented achievement. I firmly believe that our understanding of that magnificent instrument of hope and ideals will continue to grow, as will the strength of the promises it contains, sometimes in ways that we cannot yet foresee, but always for our benefit, and for that of “our posterity.”