

PROPOSAL

Fighting for the Constitution

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Since the election of Donald Trump and the Republican Congress, progressives are at a loss of what to do. This is especially so when it comes to the Supreme Court and the future of constitutional law. Until November 8, there was the hope that for the first time since 1971 there would be a majority of the justices on the Supreme Court appointed by Democratic presidents and that the Court would be a force for progressive change. But because of Republican stonewalling, President Trump was able to replace Justice Scalia with a staunch conservative and it is quite likely that he will get to make other appointments to the Supreme Court in the next four years. Since 1960, 78 years old is the average age at which a Supreme Court justice has left the bench and now there are three justices 79 or older. Thus, there soon may be a conservative majority on the Court who will end constitutional protection of abortion rights, gut federal civil rights laws, and weaken protections for the most vulnerable in society.

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

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

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

A new vision is long overdue. Progressives have spent too much of the last 45 years trying to preserve the legacy of the Warren Court's most important rulings and looking for areas for occasional advances. We have reacted to Republican-dominated Supreme Courts by criticizing erosions of rights in particular areas, but not by developing a progressive vision for the Constitution. Now more than ever, it is urgent to do this. A true alternative vision will provide the basis for opposing conservative changes in constitutional law in the years ahead and ultimately guide judges and justices to forge an inspiring direction in the future.

The stakes are huge. Because of the election of Donald Trump and probable coming vacancies on the Supreme Court, constitutional issues are likely to dominate the public discourse much more than at any time in recent American history. Basic questions about the meaning of the Constitution are going to arise in countless areas, ranging from immigration policy to reproductive

freedom to the environment. How these are answered will do much to determine the country and even world we live in for decades to come.

Fighting for the Constitution will be a relatively short book of about 50,000 words that criticizes the conservative paradigm for constitutional law and articulates a progressive alternative vision for the Constitution. My focus, unlike in my prior writings and the vast majority of what has been written about constitutional law in recent years by scholars and journalists, is not on the Supreme Court and its justices, but on the Constitution itself and what it should be understood to mean.

The first step must be to refute the notion that the meaning of the Constitution can be derived from the text and the intent of its framers – what the Republicans call value neutral judging. Conservatives say that all constitutional issues, including controversial questions like the constitutionality of the death penalty or of affirmative action, can be resolved based solely on the original meaning of the Constitution. That is nonsense. There is no such thing as “value neutral judging.” It is a myth that conservatives have advanced for decades and continue to espouse for their own purposes. Since the death of Justice Antonin Scalia on February 13, 2016, Republicans repeatedly have touted the idea that Supreme Court justices should just “apply the law” and decide cases without ideology playing any role. Senator Chuck Grassley, the chair of the Senate Judiciary Committee, issued a statement rejecting the idea that a justices’ views or life experiences should affect his or her decisions. Every Republican candidate in the presidential primaries espoused this position and the conviction that Supreme Court justices should follow the original meaning of the Constitution. They did this as a basis for blocking the Democratic appointee, Chief Judge Merrick Garland, and as a way of presenting themselves as defenders of judicial restraint. Donald Trump expressed this view during the presidential debates with Hillary Clinton.

But it is simply wrong to think that Supreme Court justices -- liberal or conservative -- can decide constitutional cases without making value choices or that decisions in controversial areas are about anything other than the ideology of the justices. This is a smokescreen to make Americans think conservatives are basing their decisions on the “true” meaning of the Constitution, when actually their rulings are a product of their own conservative views. In 2008, the five conservative justices on the Roberts Court for the first time in history declared unconstitutional a law as violating the Second Amendment. In 2010, these same justices found that corporations have the right to spend unlimited amounts of money in election campaigns. In 2013, they invalidated a federal civil rights law in the area of race – a key provision of the Voting Rights Act -- for the first time since the 19th century. By any measure, all these cases were conservative judicial activism: each overruled precedent, invalidated a law that was enacted with overwhelming support, broadly decided a matter when a narrow ruling was possible, and did so to advance conservative political values. Every one of these decisions was based on the ideology and values of the conservative Republican justices, not the text or the original meaning of constitutional provisions. It is laughable to say that the framers of the First Amendment intended that corporations should be able to spend unrestricted sums from their campaign treasuries to get candidates elected or defeated. Those who wrote the First Amendment did not envision campaign spending as it exists today, let alone modern corporations.

Conservatives assert claims of value neutral judging to paint a false picture of how constitutional cases can be decided. The Constitution was intentionally written in broad, open-ended language that rarely provides guidance for issues that must be resolved by the Supreme Court. Justices are obligated to give meaning to ambiguous words written almost 230 years ago. For example, what is “cruel and unusual punishment,” which is forbidden by the Eighth

Amendment? For over a half century, the Supreme Court has said that this is to be interpreted based on “evolving standards of decency.”

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

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

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

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

The conservative justices in the majority chose to read the Second Amendment as a right of individuals to possess handguns in their homes for the sake of security, while the liberals argued that the Second Amendment is a right to have guns solely for the purpose of militia service. Either is a plausible reading of the text of the Second Amendment and either can be supported by its history. Inescapably, how a justice reads the Second Amendment and decides cases about it are a reflection of that individual's views. There is nothing "value neutral" about it or about the five conservative justices, for the first time in history, adopting the NRA's view of the Second Amendment.

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

Moreover, constitutional law constantly requires the balancing of competing interests. I have taught constitutional law for 37 years and one of the most basic lessons for every student is

that virtually no right is absolute and the question in constitutional cases inevitably is about whether the government has an adequate justification for its actions. What is sufficient to justify the government's infringing a right or discriminating inescapably comes down to the justice's views.

In the language of constitutional law, depending on the right or the type of discrimination, the government must have a "compelling" or an "important" or at least a "legitimate" reason for its action. But what interests are "compelling" or "important" or "legitimate" involve value choices that neither liberal nor conservative justices can avoid or pretend don't exist. The constitutionality of affirmative action – another highly controversial contemporary constitutional issue – turns on whether colleges or universities have a compelling interest in having a diverse student body. Whether diversity matters enough to make affirmative action constitutional is a question each justice must personally answer and the conclusion is entirely a product of the justice's life experiences and views.

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

The fact that justices' values and views determine the outcome of cases does not mean that justices are the same as politicians. Those holding elected office must be responsive to the voters if they want to remain in their seats. Supreme Court justices serve for life and are expected to be independent of electoral politics. Lobbying of elected government officials is accepted; lobbying

of Supreme Court justices is never permissible and never occurs. Legislators sometimes trade votes; so far as we know, Supreme Court justices never do.

But justices are like politicians in one crucial way: justices constantly make choices that come down to their views and values. Justices Scalia and Ginsburg disagreed in almost every major case, not because one is smarter or better understands constitutional law or avoids decisions based on value choices. Rather, their disagreements reflect their differing ideology, life experiences, and worldviews.

What are the values embodied in the Constitution and how do we apply them?

If the conservatives' approach is empty and misleading, how do progressives replace it? The place to start is at the very beginning, with the Preamble to the Constitution, which articulates the purposes for the document. The Preamble states: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

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

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

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

The Supreme Court set the tone in 1905, in *Jacobson v. Massachusetts*, a case about the constitutionality of compulsory vaccination laws, when the Court ruled that laws cannot be challenged or declared unconstitutional based on the Preamble. The Court declared: “Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments.” Since then, the Court has taken this to mean that the Preamble essentially is to be ignored.

In the few occasions over the last century in which the Preamble has been mentioned, the Supreme Court has summarily rejected its relevance to constitutional interpretation and decisions. The result is that has played no role in constitutional arguments and analysis. Constitutional law textbooks, including mine, never discuss it. But this has been a mistake because the Preamble states the ideals for the Constitution and for the Republic.

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

Early in American history, it was different; the justices used the Preamble as part of constitutional interpretation. In another foundational case for American government, *McCulloch v. Maryland* (1819), Chief Justice John Marshall invoked the Preamble and stressed the importance of its language that the government was created by the people. The State of Maryland claimed that it was the state governments who formed the United States and that therefore it is the states who are sovereign. Maryland used this to argue that it was constitutional for it to tax the Bank of the United States. The Court rejected Maryland's argument, quoting the Preamble and declaring: "The government proceeds directly from the people; is 'ordained and established,' in the name of the people."

Yet in the two centuries since *McCulloch*, the Court has stopped looking to the Preamble in interpreting the Constitution. The Preamble is regarded as just rhetoric at the beginning of the document, often to be memorized in junior high school civics classes, but with no legal or interpretive significance. By ignoring the Preamble, we forget the idealistic vision that inspired the Constitution and what it was meant to achieve.

If the Preamble is read carefully and taken seriously, basic constitutional values can be found within it that guide the interpretation of the Constitution. The Preamble states that the Constitution exists "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, [and] promote the general Welfare." Throughout American history there have been battles over the authority of the federal government to take actions that aid citizens who are less powerful: limiting slavery, banning child labor, prohibiting race discrimination, protecting the environment. The guidance of the Preamble has been overlooked: the Constitution exists to ensure that the national government has the authority to do all of these things which are part of a "more perfect union" and providing for "the general welfare."

One of the most important roles of the Constitution is to provide “justice.” The concept of justice is critical for civilized governance. In 1215, the Magna Carta declared that justice requires *both* a fair process and fair results. The Bible, Deuteronomy 16:20, says, “Justice, justice shalt thou pursue.” Commentators have suggested that the word “justice” is repeated twice in the Bible to convey the importance of both procedural and substantive fairness. In American constitutional law, this means a requirement for both procedural due process (the government must follow adequate procedures when depriving a person of life, liberty, or property) and substantive due process (the government must have adequate reasons when taking away a person’s life, liberty, or property.)

The Constitution is founded to protect individual freedom, to ensure a society where personal liberty, not a duty to the state, is central. The Preamble states the goal that the Constitution exists to “secure the Blessings of Liberty to ourselves and our Posterity.” Interestingly, despite this commitment, the framers of the Constitution saw no need to provide a detailed statement of rights in the Constitution they drafted. In part, this is because they thought that the structure of the government they were creating would ensure liberty. Also, they were afraid that enumerating some rights inherently would be taken to deny the existence of other rights that were not mentioned. They wanted liberty to be broadly protected and not confined to specific aspects of freedom mentioned in the text of the Constitution. The ideals of liberty have great relevance to contemporary debates over whether the Court is justified in protecting rights not enumerated in the Constitution, such as the right to privacy, including the right to abortion.

Equality is never mentioned in the Preamble. This is not surprising for a Constitution that explicitly protected the institution of slavery and gave women no rights. But as the Supreme Court has decided since at least the mid-1950s, equality is an implicit and inherent part of “liberty”.

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

Fulfilling the Constitution's values

The largest part of the book would detail how the Constitution should be interpreted to achieve each of the ideals announced in the Preamble. The Preamble states the importance of democratic government, effective governance, justice, freedom, and (implicitly) equality for all Americans. These values should be the foundation of the progressive vision of the Constitution for the years ahead.

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

I will show how the values stated in the Preamble provide guidance in understanding the meaning of the Constitution and how they should help to decide today's most important and controversial issues.

Democratic governance. There are many provisions of the Constitution that seek to ensure democratic governance: the President and members of Congress are elected and serve fixed terms; the First Amendment protects speech that is essential for democratic governance; many

constitutional amendments protect and expand the right to vote. American democracy never has been understood as strict majority rule. In fact, the framers were deeply distrustful of majorities and therefore had Senators chosen by state legislatures, presidents selected by the Electoral College, and federal judges and Supreme Court justices appointed by the President and confirmed by the Senate. American government is a *constitutional* democracy, where majority rule is limited by the constraints of the Constitution.

There are crucial aspects of contemporary American government that are inconsistent with the Preamble's commitment to democratic governance. The allocation of votes in the Electoral College should be declared unconstitutional because it violates the basic democratic principle of one-person one-vote. The Constitution gives each state electors equal to its number of Senators and Representatives in Congress. This tremendously favors voters in small states over larger ones; a vote in Wyoming matters three times more than a vote in California with regard to the outcome in the Electoral College. The laws in 48 states providing for "winner take all" further increase these inequalities. It is why twice in the last 16 years -- and five times in American history -- the Electoral College has chosen a President who has lost the popular vote. The Constitution should be interpreted to mean that the requirement for equal protection found in the Fifth and Fourteenth Amendments modifies the text of Article II, which allocates representatives in the Electoral College. Courts should invalidate state laws requiring winner-take-all and require allocation of electors proportionate to population. Never again should there be the election of a President who lost the popular vote.

One of the greatest corruptions of the democratic process is partisan gerrymandering. It has been used especially by Republicans in control of state legislatures to redraw election districts and maximize safe seats for their party. The conservative justices on the Court wrongly have

prevented the judiciary from remedying this morally bankrupt practice. Sophisticated computer programs are used to create far more effective gerrymandering than ever before. For example, in 2012 Democrats won 51 percent of the congressional vote in Pennsylvania, but took just five of 18 House seats. North Carolina voters split almost exactly evenly between Democrats and Republicans in every election, but because of gerrymandering, Republicans have 10 of the 13 congressional seats in the state. Gerrymandering should be declared unconstitutional as inconsistent with the most basic precepts of democracy and majority rule.

Restrictions on voting – such as the requirement for photo identification – have been adopted by Republican state legislatures with the sole purpose and effect of keeping minorities from voting. In 2016, a federal district court found that the Texas voter identification law likely would keep 600,000 African-Americans and Latinos from being able to vote. Yet, some courts have wrongly upheld these laws stating the lie that massive voter fraud exists and it is unclear how the Supreme Court will rule in the cases that are likely to come before it in the next year.

Effective governance. The constitution structured American government around two principles: separation of federal powers (dividing authority among the three branches of the federal government) and federalism (allocating power between the federal government and the states). The goal of each is to ensure that government has the power to deal with society's needs, but also to ensure checks and balances to constrain government and prevent abuses of power.

The Constitution should be understood to require the agreement of at least two branches of government for all major federal actions to ensure the separation of powers. This precaution can be found in the structure of the Constitution: it generally takes two branches of government, Congress and the President, to make a law; two branches, the executive and the courts, to enforce a law; two branches, the President and the Senate, to enter into a treaty; two branches to place

Cabinet officials or Supreme Court justices or federal judges in office. This is a crucial check on federal power.

But all too often in recent years, Presidents have claimed the authority to take actions unilaterally. President George W. Bush asserted the right to detain individuals, change the definition of torture, and engage in warrantless electronic surveillance without congressional approval and without the possibility of review in the courts. President Barack Obama claimed the authority, without needing congressional approval, to require that coal-fired power plants meet stricter environmental standards. Although I see a huge difference between executive actions to allow torture as compared to those to prevent further climate change, unilateral executive action is troubling. Such actions, whether by Democratic or Republican Presidents, are inconsistent with the principle that two branches of government should be needed to authorize any major government actions. As we begin the Trump presidency, checks and balances seem more important than ever.

Federalism should be understood not as about limiting government authority, but rather as a way to empower government at all levels with the tools to deal with social ills. The genius of having multiple levels of government is that if one fails to deal with a problem, another can act. Sometimes those actions fall to the federal government, sometimes the states. When Congress saw that state governments were not providing adequate protection to women who were victims of rape and domestic violence, it created the Violence Against Women Act, which allowed victims of gender-motivated violence to sue in federal court. Unfortunately, the Supreme Court misunderstood what federalism means and declared this law unconstitutional as exceeding congressional power in *United States v. Morrison* (2000).

When states with a history of race discrimination in voting continued to disenfranchise African-Americans and Latinos, Congress voted almost unanimously to require in the Voting Rights Act that such jurisdictions get preclearance from the Attorney General before being permitted to change their election systems. Again the conservative majority of the Court overreached and declared this law unconstitutional as infringing states' rights in *Shelby County, Alabama v. Holder* (2013).

Federalism is meant to empower government to achieve the values of the Preamble to ensure a government that can "provide for the general welfare." State governments always can provide more protection of rights than federal law. Throughout American history, federalism and cries for "states' rights" have been used by conservatives to thwart progressive social change. But now it will fall to states like California now to protect immigrants, to impose stricter environmental protections than federal law, and to follow public opinion by legalizing marijuana. Will conservatives be true to their belief in states' rights and uphold these actions or hypocritically limit state power to achieve their ideological agenda? That remains to be seen, but effective governance to achieve the aspirations of the Preamble requires that states be allowed to take these vital actions.

Establishing justice. The Preamble says that the Constitution exists to "establish justice." Many provisions of the Constitution and several of the amendments are focused on the critically important area of criminal justice. Article I of the Constitution prevents Congress from suspending the writ of habeas corpus. Article III guarantees the right to trial by jury. The Fourth Amendment protects people from unreasonable searches or arrests. The Fifth Amendment protects the privilege against self-incrimination. The Sixth Amendment guarantees a speedy and public trial by an impartial jury, the right to confront one's accusers, and the right to assistance of counsel. The Eighth Amendment prohibits excessive bail and cruel and unusual punishment.

In attempting to fulfill the Preamble's promise of justice, the Constitution addresses three important aspects of the criminal justice system: policing, trials, and punishment. Yet in each area, the Constitution's promise has not been realized.

As has been tragically shown by police killings of unarmed African-American men and articulated by the Black Lives Matter movement, criminal justice reform must involve better oversight and control of the police to prevent abuses. Despite protests and public attention to this issue, we have largely overlooked how the Supreme Court, through a series of decisions, has made it very difficult to sue police and to hold officers and the governments that employ them accountable for wrong-doing. In *City of Los Angeles v. Lyons* (1982), the Court held that a person who was subjected to an unconstitutional police chokehold and almost died did not have standing to sue to enjoin that practice because he could not show that he was personally likely to be choked again in the future. This decision has greatly limited the ability of courts to address and remedy systemic police misconduct. The Court has held that a local government can be sued only if it is proven that it has an official policy that caused the constitutional violation. In virtually all other areas of law, an employer is liable if its employees inflict injuries in the course of their employment. But cities cannot be held liable unless it can be proven that they have a policy to violate the Constitution, something that rarely can be shown to exist.

Moreover, the Court has protected police and prosecutors from being sued even when they act illegally. A police officer cannot be sued – he or she has “absolute immunity” from civil suit – for committing perjury, even if it leads to the conviction of an innocent person. A prosecutor who knowingly uses perjured testimony to convict an innocent person likewise is accorded absolute immunity to civil suits for money damages. The Court's desire to protect police and

prosecutors from litigation has meant that victims of egregious abuses are left without remedies and there is no deterrence of future wrong-doing.

Even though the Sixth Amendment guarantees the right to counsel in criminal cases, the major failing in criminal trials is not ensuring adequate counsel for those accused of crimes. *Gideon v. Wainwright*, in 1963, spoke eloquently of the vital importance of an attorney for ensuring a fair process and held that all citizens facing a possible prison sentence have the right to an attorney. But the Supreme Court created no enforcement mechanism and the reality is that the poor often have grossly inadequate lawyers.

Gideon creates a strong presumption that the presence of counsel has insured adequate representation when the reality is starkly different. As someone who handles criminal appeals, I have represented clients I believe to be innocent who were convicted because of ineffective assistance of counsel and I have represented clients who I am convinced received death sentences because their counsel was grossly inadequate. Were these individuals really better off because of *Gideon*? Perhaps if they had been left to represent themselves they would have done better or maybe the courts would have looked more closely at their cases. Senator Patrick Leahy remarked: “Too often individuals facing the ultimate punishment are represented by lawyers who are drunk, sleeping, soon-to-be disbarred or just plain ineffective. Even the best lawyers in these systems are hampered by inadequate compensation and insufficient resources to investigate and develop a meaningful defense.”

The most powerful evidence of this disparity comes from studies which have compared the outcomes of cases depending on how the lawyer is compensated. The Bureau of Justice Statistics found that those with publicly funded counsel are more likely to be convicted than those who can afford privately paid attorneys. It concluded: “Of defendants found guilty in federal district courts,

88% with publicly financed counsel and 77% with private counsel received jail or prison sentences; in large state courts, 71% with public counsel and 54% with private attorneys were sentenced to incarceration.”

As in so many things, money matters. Professors James M. Anderson and Paul Heaton compared the outcomes in murder cases depending on whether there is a public defender and or an appointed counsel in Philadelphia courts. If a public defender is not available (and in some places there never is a public defender), courts appoint attorneys for indigent criminal defendants. These lawyers are usually poorly paid and often take the cases because they cannot get other work. Professors Anderson and Heaton found that compared to appointed counsel, public defenders reduce their clients’ murder conviction rate by 19% and lower the probability that their client will receive a life sentence by 62%. Public defenders, as compared to appointed counsel, reduce overall expected time served in prison by 24%. To say the obvious, these are dramatic differences.

Fulfilling the Preamble’s promise of “justice” requires remedying the tremendous inequities in the criminal justice system. It is long overdue for the Supreme Court to mandate that the government must provide *competent* counsel and to use a more realistic standard for determining when there is “ineffective assistance of counsel.”

Another issue is that punishment is hugely unfair in how it gets applied by the current system. The United States has the highest incarceration rate in the world, 716 in prison per 100,000 people. Put another way, the United States has less than 5 percent of the world’s population, yet we have almost 25 percent of the world’s total prison population. In part, this is because the Supreme Court has refused to find draconian sentences for minor crimes to be cruel and unusual punishment. In 2003, in *Ewing v. California*, the Court upheld a prison sentence of 25 years to life for a man who stole four golf clubs worth \$1,200.

The United States is the only western nation with the death penalty and only one of nine nations that continues to use capital punishment, along with countries not known for their belief in liberty: North Korea, China, Libya, Iran, and Somalia. The Court repeatedly has upheld the constitutionality of the death penalty, including most recently in 2015 holding that the burden is on a condemned person who is challenging the method of execution to demonstrate that there is a more humane way of carrying out the death penalty. It is absurd that a person facing execution must convince a court that there is a better way to kill him when the government is using a method of capital punishment that will inflict great pain and suffering.

Fulfilling the Preamble's commitment to justice would mean that grossly excessive sentences are cruel and unusual punishment in violation of the Eighth Amendment. Justice Stephen Breyer recently urged that the death penalty should be declared unconstitutional because of the inherent risk of innocent people being convicted due to wrongful convictions, because of the very arbitrary way the death penalty is carried out, and because of the lack of any evidence that the death penalty deters crime. The flaws in the criminal justice system disproportionately affect people of color; African-Americans and Latinos are much more likely to be subject to mass incarceration and sentenced to death.

Liberty. The Preamble says that the Constitution exists to "secure the blessings of liberty to ourselves and to our posterity." The Constitution thus protects basic aspects of personal freedom. Some of these are mentioned in the Constitution, such as freedom of speech and free exercise of religion. Others are not mentioned in the text, but are no less important. The Ninth Amendment says: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." For instance, freedom of travel is a

fundamental right that long has been protected by the courts even though it is never mentioned anywhere in the Constitution.

Privacy and autonomy are going to be especially important in the years ahead as courts confront technological developments and their impact on our lives. For almost a century, the Supreme Court has rightly found privacy and autonomy to be protected by the Constitution, even though these rights are not enumerated in the text. The Court has held that the term “liberty” in the Constitution protects a right to marry (including for gays and lesbians), a right to custody of one’s children, a right of parents to control the upbringing of their children, a right to procreate, a right to purchase and use contraceptives, a right to abortion, a right of competent adults to refuse medical care, and a right to engage in private adult consensual homosexual activity.

I would argue that reproductive freedom, autonomy for medical care decisions, and informational privacy, including protection from government gathering, storage, and collating information about people, also are essential aspects of the Constitution’s interpretation of liberty and freedom. As to the latter, the Court has refused to recognize a right to privacy in the Constitution that limits the ability of the government to gather unlimited amounts of information about people, including their DNA, and that protects people from the technology of the 21st century, such as drones, satellites, and cellular monitoring. It is urgent that the Court bring the Fourth Amendment’s protections into the 21st century to include safeguards for these key aspects of informational privacy.

Equality. As mentioned earlier, equality is not among the values stated in the Preamble. The proclamation in the Declaration of Independence, that “all men are created equal,” was not meant to include women or non-whites or Native Americans. The Constitution in its seven articles and the first 10 amendments never mentions equality.

But the Fourteenth Amendment, adopted in 1868, says that no state may deny any person of the equal protection of the laws. The Supreme Court has said that the liberty guaranteed by the Fifth Amendment means that the federal government, too, cannot deny equal protection. American history has seen great advances in equality in terms of race and gender and sexual orientation.

But enormous racial inequalities persist, in part because the Court has prevented the Constitution from being a tool for eradicating them. The Court has held since 1976 that equal protection is violated only if there is intentional race discrimination; proof of a discriminatory effect of a law or government policy, even an enormous disparate impact, is not enough for a constitutional violation. It is difficult, if not impossible to prove a racially discriminatory intent; rarely will government officials express a racist motive for their actions. The Court thus found no denial of equal protection even on proof of great racial disparities in the administration of the death penalty, in sentencing for crack and powder cocaine, in the drawing of election districts, and in government employment practices.

An alternative vision understands that such disparities are not coincidental, but reflect historical, institutional, and unconscious racism. Proof of disparate racial impact should mean that such laws are presumptively unconstitutional unless the government can offer a compelling non-racial justification for its actions.

For decades, the Supreme Court has treated laws benefiting minorities exactly the same as laws that discriminate against minorities. The Court has expressly rejected that remedying the history of race discrimination is a sufficient basis for upholding affirmative action programs. But there is an enormous difference between laws that discriminate against racial minorities and laws that seek to overcome racial inequalities by benefiting minorities.

The Supreme Court consistently has ruled that there is no constitutional right to basic government services and benefits, but that view is inconsistent with the vision set forth in the Preamble. In *San Antonio Board of Education v. Rodriguez* (1973), the Court held that there is no right to education under the Constitution and that therefore even great disparities in funding schools in a metropolitan area are constitutional. This decision has contributed to the continuation of separate and unequal schools throughout the country. The Court in that case also concluded that discrimination against the poor does not violate the Constitution. The Court has seen the Constitution as being about only “negative liberties,” restrictions on what the government can do, rather than requirements for what the government must do.

The Constitution had a larger and grander vision. We should find in the Constitution a right to minimum entitlements from the government, food, shelter, medical care, quality education. I am co-counsel in a lawsuit recently filed in Detroit that asks the federal court to recognize a right to adequate education for literacy for every child. The distinction between negative liberties and affirmative rights is arbitrary and unjustified. The Constitution, in many of its provisions, imposes duties on the government: the duty of police to get a warrant before a search, the duty to provide counsel to a person accused of a crime with a possible prison sentence, the duty to provide a fair trial before an impartial jury. Often the distinction between affirmative and negative liberties is just a matter of phrasing. Is it that the police cannot search without a warrant or that the police must get a warrant before searching? Is it that a person cannot be convicted without a competent lawyer or that the government must provide competent counsel? Ending the myth that the Constitution is just about negative liberties paves the way to recognizing constitutional rights to the basic needs for individuals to survive. Judicial protection of a right to these minimum entitlements would lessen the effects of the serious and growing wealth disparities in this country.

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

Looking at the Constitution in a progressive way would produce a very different approach, one that would do much more to provide liberty and justice for all. In most areas, it would not take more than the shift of a single justice to create decisions pointing constitutional law in a fairer direction that does much more to realize the promise of the Preamble and the Constitution.