SYMPOSIUM

THE CONSTITUTIONALIZATION OF CHILDREN'S RIGHTS: INCORPORATING EMERGING HUMAN RIGHTS INTO CONSTITUTIONAL DOCTRINE

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I. INTRODUCTION

The challenge that brings us together is implicit in the title of this Symposium: “Established and Emerging Rights: Exploring Juvenile Rights Under the Constitution.” Our topic is juvenile rights, but the underlying dilemma is how to incorporate these rights into an existing framework of established constitutional law. The experiences of abolitionists and women’s suffragists teach us that the birthing process for new rights is far from easy or painless. Even within the same polity or the same family, each new generation of rights seekers will encounter resistance from established rights bearers. We tend to perceive rights as a zero-sum game in which others’ gains are our losses, rather than as a common enterprise in which each new right adds value to its neighbors. Even if emerging rights were welcomed into the community with open arms, the incorporation of new rights into an established constitutional scheme would pose formidable challenges of harmonization, re-balancing, and integration.

Children and juveniles are the newest kids on the human rights block. Only ten years ago, the 1989 United Nations Convention on the Rights of the Child1 first articulated a comprehensive scheme of rights specifically tailored to juveniles. Today, the U.N. Convention has been adopted by every nation in the world community except the United States.

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However, recognition of children's rights on an international scale is a beginning, not an ending. Each political community makes rights real through incorporation into the constitutions and laws of nations and states and through acceptance. The process of incorporating the next generation of rights-bearers into the world's constitutions is taking place, in many stages and variations, all around the globe. In the United States, however, advocates seeking to secure a place for children in the constitutional scheme face substantial doctrinal and political barriers.

The doctrinal barriers are complex and rooted in our own Constitution's peculiar history and structure. Our written Constitution is silent on rights for juveniles, and many scholars and judges harbor great skepticism about the legitimacy of incorporating un-enumerated rights into the constitutional scheme. Parental rights established a constitutional foothold seventy-five years ago, during the heyday of substantive due process, in cases like *Meyer v. Nebraska* and *Pierce v. Society of Sisters.* But the same door may not be open to rights for children. Controversy over the Supreme Court's role in enunciating rights in the context of economics, labor, and, more recently, abortion has made judges wary of additional claims that substantive rights can be incorporated by judicial interpretation into the due process clause's guarantees against state deprivations of life, liberty and property. After extending heightened scrutiny beyond race to laws burdening other classes such as women and illegitimate children, it seems that the Justices have grown weary of discovering new "suspect classes," making it difficult to use the Constitution to challenge differential treatment of children as a class.

The political barriers are obvious. Children do not vote. In addition, many conservatives reject the concept of rights for children as a threat to family values. Conversely, critics on the left fear that rights for children will be used to invade family privacy and threaten women's autonomy. Finally, Americans harbor deeply ambivalent feelings towards children. While our rhetoric makes children our highest priority, we rate very low on the scale of industrialized nations when it comes to making these promises a reality. Racism and eco-

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2 "Incorporation" is a term of art in U.S. constitutional jurisprudence, referring to the process of discerning which parts of the Bill of Rights should be binding on state governments as well as the federal government, because implicitly "incorporated" in the Fourteenth Amendment's guarantees of "due process." I use the term "incorporation" in a broader sense, to describe the process of bringing emerging rights into a new or existing constitutional scheme.

3 262 U.S. 390 (1923).

4 268 U.S. 510 (1925).
nomics complicate all of our political responses, including our responses to children's rights. We tend to see children in shades of rich and poor, black and white, and "them" against "us." Our own children are our most precious personal possessions. Other people's children are armed and dangerous, alien and out of control. No wonder Americans have trouble knowing what to do with this newest claim of rights.

Recently, while visiting the Republic of South Africa ("South Africa" or "RSA"), I was struck by the contrast between the American and South African Constitutional treatment of rights. However marginalized many children and their families may remain economically, their legal status is clear. An explicit and detailed Bill of Rights for children is incorporated into the new South African Constitution. Why, I wondered, should the notion of constitutional rights for children be so transparent in one setting and remain so highly contested in the other? I began to ponder the various ways in which emerging claims of rights find their way into national constitutions. This paper is the result. This paper, comparing two very different experiences, that of South Africa and that of the United States, has application beyond the specific topic of rights for juveniles. It focuses attention on a range of elements that seem to ease or complicate the process of bringing each succeeding generation of claimants into the world of constitutional rights.

The South African and United States constitutions differ in many respects. The U.S. Constitution is over two hundred years old while South Africa's is barely three years old. In addition, the process of drafting was markedly different. The U.S. Constitutional Convention gathered several dozen property white men in Philadelphia to deliberate and draft their document in strictest secrecy. Not only social but also geographical distance burdened communications between the drafters and their constituencies. The U.S. Bill of Rights was an afterthought. By contrast, the drafting of the new South African Constitution involved the entire populace of South Africa and their Bill of Rights took a place of pride. If you log onto the South African Constitutional Assembly's web site, you will find megabytes of discussion papers, proposals by Non-Governmental Organizations ("NGOs"), letters from school children, and oral communications to the Constitutional Assembly hotline from citizens of every class and color.

The U.S. Constitution is quite short—only about 8,000

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words—and often frustratingly vague. The 1996 Constitution of the Republic of South Africa ("South African Constitution") is easily ten times longer, with fourteen exhaustive chapters, totaling two-hundred and forty three detailed sections, followed by forty pages of tables and schedules. Even more than other modern constitutions, it contains explicit provisions defining the relation between government and family and between individuals within the family: rights of privacy and reproductive choice; protection against discrimination based on sex, marital status, pregnancy, sexual orientation and age; protections of linguistic and cultural values; and protection of such economic rights as housing and education that are central to family survival and children's development. Explicitly embracing the newest category of rights-bearers, the RSA Constitution provides a detailed listing of the rights of children. By contrast, the U.S. Constitution's text is silent as to virtually all of these important issues. Not only is it silent as to children's rights, it says nothing about gender and age discrimination, pregnancy and reproduction, or the rights of parents and families.

The RSA Constitution is explicit not only about the substance of rights, but also about numerous procedural and jurisprudential issues such as standing and interpretation. It makes various rights binding not only on public but also on private action, and establishes government structures for monitoring and enforcing these rights. By contrast, the U.S. Constitution is silent, restrictive or ambiguous regarding the scope, application and enforcement of rights. The South African document includes careful instructions on its interpretation, and many provisions that constitute "tests" to apply in

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8 See, e.g., S. AFR. CONST. of 1996, ch. 2, §§ 9 (equality), 12(2) (bodily integrity and reproductive freedom), 15 (religious and customary family law), 16(2) (protection from race- and gender-based hate speech), 18 (freedom of association), 26 (right to housing and protection from eviction), 27 (health care, food and water, social security), 28 (children's rights), 29 (education), 30 (protection of language and culture).
9 See id. at ch. 2, § 28 (children's rights).
10 The Preamble states that one constitutional purpose is "to secure the blessings of liberty to ourselves and our posterity," U.S. CONST. preamble, but the only explicit prohibitions against sex and age discrimination in the U.S. Constitution are contained in the Nineteenth and Twenty-sixth Amendments which respectively extended the right to vote to women and citizens age eighteen and over. U.S. CONST. amends. XIX, XXVI.
11 See, e.g., S. AFR. CONST. of 1996, ch. 2, §§ 38 (listing who may appear before the Court), 39 (providing clauses to interpret the Bill of Rights).
12 See, e.g., id. at ch. 2, § 38(a) (stating that "[a]nyone acting in their own interest" may approach the court); ch. 9, § 181(1) (outlining the various state institutions designed to "strengthen constitutional democracy in the Republic").
situations where competing rights and interests clash. Here again, the U.S. document provides only minimal guidance, leaving a vacuum that has been filled over the centuries by elaborate constructions of judicial interpretation.

In spite of this silence, a large body of U.S. constitutional law protecting or shaping family life has emerged gradually from "between the lines" of the written Constitution. Many of the principles made explicit in the RSA Constitution have long been a part of U.S. constitutional doctrine. Both systems have traveled the road from officially sanctioned racialist and patriarchal laws to a rejection of de jure racism and sexism and a redefinition of basic principles like freedom, equality, and property to include the interests of those previously excluded. A comparison of the paths each nation has followed in redefining rights provides insights into the benefits and costs of two methods of constitutional change in response to emerging claims of human rights: (1) growth through an incremental process of judicial interpretation and re-interpretation—the predominant United States model—and (2) growth at a transformational moment through enactment of explicit and specific written provisions—the new South African model. How has the growth process shaped the form of constitutional law in each of these settings, and how is form likely to influence the process of regenerating rights, and thus the direction and shape of future substantive growth?

Professor Frederick Schauer recently commented on the relation of textual form to substantive outcomes, pointing for his example to the U.S. and RSA Constitutions. As he points out, much depends on how one perceives the process of adjudication. Both the "legal realist" and the "critical legal studies" proponent, Schauer suggests, would conclude that specificity or generality of a text should have little effect on outcomes, since outcomes are essentially political. Conversely, the "formalist" or "textualist" would believe that differences in textual style ought to produce significant differences in outcomes. Of course, no simple dichotomy can adequately capture the complex methods that characterize judges' attempts to maintain both fidelity and flexibility in interpreting a constitutional text in America and elsewhere. Constitutional scholars have brought new tools and increasing sophistication to the project of analyzing what judges in

13 See id. at ch. 2, § 39 ("Interpretation of Bill of Rights").
14 See Schauer, supra note 7, at 1295-98.
15 See id. at 1296.
16 See id. at 1298.
various national systems actually do when confronted with the task of "applying" or "interpreting" texts. They have probed more critically the effects of history and the context in which judges operate. They have asked what the form, discourse, and rhetoric of judges' written opinions conveys about the relationship of decisions to the legal texts on which they are based. They have explored what decisional law says about the legal culture that produces it. Scholars such as Mitchell de S.-O.-I'E. Lasser employ the techniques of literary theory to challenge the common wisdom that judges choose between two incompatible modes of analysis, either approaching texts from a position of rigid textualism or treating them as invitations to free-wheeling judicial policy-making.

They have demonstrated that the form of a text and the accepted conventions surrounding its interpretation tell only a part of the complex story conveyed by judicial discourse. Nevertheless, the form adopted by the drafters of a constitution inevitably both affects and reflects assumptions about the scope and shape of constitutional interpretation, and influences the outcomes in constitutional cases.

Observers commonly note that the American constitutional experience has been shaped by the generality that characterizes many parts of the document. In the United States, constitutionalization of new rights often occurs by in-

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18 See generally Lasser, supra note 17.

19 Professor Schauer argues that fidelity to the text does not foreclose and sometimes even demands readings based on judicial perceptions of morality or overarching policy, but he contends that the text should be "the primary signaler of moral and non-moral readings. . . ." Schauer, supra note 7, at 1312.

20 See generally RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) (exploring how this generality allows for a moral reading of the Constitution); LAWRENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION (1991) (assuming this level of generality as a starting point in their analysis of the structure of the debate over differing modes of constitutional interpretation); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 7 (1999) ("Although the clauses and structures that make up the text cannot be simply empty of meaning, for they are clearly recognizable as language, the meaning that they do convey may be so broad and undetermined as to be incapable of faithful reduction to legal rules.").
cremental interpretation, involving detours and dead ends, abdications of duty and spurts of activism. Nowhere is this more true than in the constitutionalization of family rights. Over the past half century, the U.S. Supreme Court’s interpretations of the open-textured language of the Bill of Rights and of the Civil War Amendments have created an ad hoc edifice of family-related rights that has reshaped our underlying conceptions of relations between family members and relations between the family and the state. Because of their reliance on implicit norms rather than explicit language, these rights are controversial and even members of the U.S. Supreme Court question their status.21 They are constantly subject to revocation through outright overruling, or to piecemeal dismantling by re-interpretation. These family-related rights are protected only by the doctrine of stare decisis—a principle never mentioned in the U.S. Constitution.22

This paper compares the formal status of children, the newest competitors for a place at the table of rights, under the U.S. and South African constitutions. I do not mean to suggest that rights necessarily translate into justice or that children’s actual lives match the images presented in the legal discourse—in both the United States and South Africa, the rhetoric of respect is contradicted by the reality of marginalization, rejection, abuse and neglect. I do argue, however, that a constitution’s form, discourse and rhetoric can and do influence the construction of new rights. First, I will examine the history of rights for children in the U.S., which developed in the process not of drafting but of interpreting the text. I will look at avenues for constitutional growth in the U.S. system and trace the erratic path that U.S. constitutional law of the family has traveled. I will pay special attention to the relation of the U.S. Constitution’s form to the process of judicial interpretation employed in formulating the doctrines which have given birth to new rights for subjugated groups. Advocates for people of color, women and children have used the open textured phrases of the Constitution to reshape the law by redefining notions of liberty, equality, and property in the U.S. Constitution to make them responsive to evolving social perceptions of human rights. This same generality, however, has allowed development of theories, such as economic substantive due process, grounded in notions of vested

21 See Planned Parenthood v. Casey, 505 U.S. 833, 980-1002 (1992) (Scalia, J., dissenting) (questioning whether the concept of “liberty” includes the right of a woman to terminate her pregnancy before bringing the fetus to term).
22 See id. at 854-69 (opinion of the Court) (discussing the rare circumstances that justify the Court’s decision to overrule established precedent).
property rights.

Substantive due process theory—whether the economic strand protecting vested property rights or the privacy and fundamental rights strands protecting vested liberties—encourages entrenchment of tradition, rather than challenging traditional divisions of wealth and power. Since rights are treated as a zero-sum game, each new class of rights-bearers who are able to battle their way into the safe haven of the U.S. Constitution must become a gate-keeper, excluding those who wish to follow. This is especially evident in the arena of family rights. In constitutionalizing parental rights, American law, I will suggest, became trapped in the amber of a specific historical moment—the Lochner era. It remains burdened by the conservative legacy that first gave us substantive due process theory. By conceptualizing the child as a form of private property, and the parent-child relationship as a private liberty interest of the parent, the Court gave constitutional force to traditional hierarchies of power and erected barriers to the recognition of children's rights that advocates for children are now struggling to dismantle.

Next, I will sketch out the process of research, drafting, and public consultation that lead to the inclusion of rights for children in the South African Constitution's Bill of Rights. I will suggest, not surprisingly, that the process—which has been described as a "revolution...negotiated between the oppressor and the oppressed"—contributes to the creation of a very explicit text in which children earned a special place because of their role in South Africa's struggle against apartheid.

Finally, I will examine how the differences produced by process and form have played out in the two different systems in the context of a particular claim of rights—children's rights to be protected from abuse. Americans, I will argue, must learn from South Africa's experience if we are to reinvigorate the U.S. Constitution and reshape our approach to constitutional interpretation to hear and embrace rather than to suppress emerging claims of human rights.

II. THE AMERICAN EXPERIENCE OF CONSTITUTIONALIZING NEW RIGHTS

Children have few clearly articulated or firmly established constitutional rights in the United States of America. Children enjoy few independent rights outside the context of

\[\text{See infra note 105 and accompanying text.}\]
criminal or administrative proceedings, because children's rights (generally called "interests") are conceptualized as subsumed within the rights of parents. Children's interests are defined by parents, who exercise their constitutionally protected rights to physical custody and control of children's upbringing. Children have succeeded in asserting rights in various narrow areas, which are confined primarily to criminal procedure and equal protection law and based entirely in decisional doctrines rather than text. If children have few "first generation rights," they have absolutely no "second generation rights." They enjoy no federal constitutional rights to education or to programs of protection from abuse and exploitation, and no rights to the basic nutrition, income supports, shelter, and health care on which the right to life obviously depends. Children's federal welfare entitlements, addressed only by statute, have been increasingly "privatized" by Congress in keeping with contemporary market theories.

As noted earlier, the U.S. Senate has refused to consider ratification of the U.N. Convention, in large part because of opposition from conservatives and the religious right, who claim that the Convention would undermine constitutional rights of parents to raise their children as they see fit, and that the recognition of socio-economic rights would deprive parents and local governments of autonomy while draining state and private resources.

24 See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972) (holding that parents control a child's free exercise claim except "if it appears that parental decisions will jeopardize the health or safety of the child.").

25 See, e.g., In re Gault, 387 U.S. 1 (1967) (recognizing juvenile rights to notice of charges, to counsel, to confrontation and to cross-examination of witnesses).

26 Many South African writers use terminology for discussing rights which differs somewhat from typical terminology of "negative" and "positive" rights often used by American scholars. "First generation" or "blue" rights are those associated with liberal democracies and include rights of political participation. "Second generation" or "red" rights are socio-economic rights, such as rights to shelter and medical care. "Third generation" or "green" rights are environmental rights. Distinction is also drawn between "negative" rights and "programmatic" rights, the former operating negatively as restrictions on government action, and the latter requiring positive government action to create programs that vindicate rights. As in the United States, critics have attacked this distinction, pointing out that many so-called negative rights involve positive action by government. See Dion Basson, South Africa's Interim Constitution: Text and Notes 19-21 (1995).

27 See Alexia Pappas, Note, Welfare Reform: Child Welfare or the Rhetoric of Responsibility?, 45 DUKE L.J. 1301, 1301-02 (1996) ("The Clinton/Republican direction of welfare reform, by focusing on parental behavior control, threatens to nullify the vital progress that child-centered policy has made toward protecting the well-being of poor children.").

What accounts for this striking judicial and political hostility to children's rights, so different from the discourse found in the new South African Constitution? In the following section, I will offer some historical and legal background on American constitutional law that may partially explain this miscarriage of justice for children. I trust that readers already familiar with American constitutional history will pardon me for rehearsing familiar facts and arguments and for my necessarily selective and subjective account of American law, knowing that what I offer is only one among many competing versions. I will begin by discussing the process of constitutional change through interpretation. While this process is just beginning for South Africa's Constitution, it provides the bulk of American constitutional law. Judicial decisions have displaced much of the text, providing new texts and outlining the methodology for discussing emerging rights.

A. Towards a More Perfect Union: Avenues for Constitutional Growth

All constitutions are born imperfect. To believe otherwise is to believe in human infallibility. It is also to believe in the chimera of textual "plain meaning" divorced from interpretive context. The U.S. Constitution is a compelling case in point. As originally drafted, it had several flaws so serious that they might well have been fatal. First, in weighing property interests and the interest in social stability against principles of liberty and equality, our Constitution sacrificed justice in favor of order. While some critics contend that the South African Constitution makes similar compromises by protecting interests in property, the comparison is unfair. The most glaring difference is the U.S. Constitution's express recognition and perpetuation of slavery—property interests in persons. Second, and less widely discussed, the U.S. Constitution, as originally promulgated in 1789, lacked any explicit protection of what we now call fundamental or human rights. While the first ten amendments, known as the "Bill of Rights,"

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29 Surely the most amusing illustration of this truth is provided by Jordan Stelker et al., Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility, 74 Tex. L. Rev. 237 (1995), a parody that employs a literal reading of the text of the U.S. Constitution to disqualify all persons born after 1789 from election to the Presidency of the United States.
30 See generally Dorothy E. Roberts, The Meaning of Blacks' Fidelity to the Constitution, 65 Fordham L. Rev. 1761, 1763 (1997) (arguing that African-Americans' fidelity to the Constitution has never been grounded in the Constitution itself but rather in a commitment to its reformation through re-interpretation to effect a true inclusion of all persons).
were added in 1791, even the amended version of the Constitution remained imperfect as a guardian of rights. A third flaw was the Framers' casting of the new government in a purely passive role, bound to respect pre-existing rights, but not as an active agent in promoting, enforcing, and interpreting them.

From its inception, the U.S. Constitution allowed two primary avenues for evolution. One is explicitly set forth in the process for formal amendment, described in Article V. This process makes change extremely difficult, especially if the change is controversial—as is always the case with new claims of rights which threaten vested interests. Article V requires a super-majority both to initiate the amendment process and to ratify any new amendments. Like any authors, the Framers must have wanted to minimize meddlesome editing. Their choice of methods for formal amendment is consistent with the conservative thrust of the U.S. constitutional scheme, which employed numerous checks and balances to minimize the dangers of radical or imprudent change.

Given the difficulty of formal amendment, Americans would have had to invent another avenue for protecting emerging rights had it not already existed. The other primary avenue for changing the United States Constitution has been judicial interpretation of the constitutional text in the course of judicial review of government laws and actions. Within the U.S. legal culture, the power of judicial review, most famously articulated in the case of Marbury v. Madison, gives the judiciary authority to strike down laws and government actions if they violate norms embodied in the Constitution. Since the United States Supreme Court, sitting in Washington, D.C., has appellate jurisdiction of such cases, its nine

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32 U.S. CONST. art. V.

33 A massive literature has grown up around the methods judges use to interpret the meaning of the U.S. Constitution. See, e.g., DWORKIN, supra note 20, at 2 (asserting that a "moral reading . . . brings political morality into the heart of constitutional law"); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 20-25 (1997) [arguing that the text rather than legislative intent should be the method used to interpret statutes]; Robert H. Bork, The Constitution, Original Intent, and Economic Rights, 23 SAN DIEGO L. REV. 823 (1986); Michael W. McConnell, The Role of Democratic Politics in Transforming Moral Convictions into Law, 98 YALE L. J. 1501 (1998) (reviewing MICHAEL J. FERRY, MORALITY, POLITICS, AND LAW (1998)).

34 5 U.S. (1 Cranch) 137 (1803).
Justices are the ultimate arbiters of "what the law is."\(^{35}\)

\textbf{B. The Interpretive Process: Finding Meaning Between the Lines}

While the distinction between explaining (interpreting) and rewriting (amending) the law may seem elusive, the common law tradition has always relied on a gradual accretion of precedent in successive cases, to flesh out the meaning of laws and legal principles.\(^ {36}\) In contrast to many other constitutional schemes, under Article III, the U.S. federal courts may not consider hypothetical questions, or pass on the constitutionality of a law before it is enacted.\(^ {37}\) Courts may consider only actual cases and controversies. Thus, the law is inevitably shaped as much by the litigants and by their times, as by the courts. Every constitutional case that reaches the U.S. Supreme Court begins with an advocate whose client has been directly affected by the law, standing before a trial judge telling his or her unique story. Presented with a concrete dispute in a specific factual context, judges must give meaning to the constitutional text, not in the abstract but as it applies to a particular party and set of facts. Judges understand that each decision not only explains but potentially "makes" new law.\(^ {38}\)

American scholars and jurists have long debated various theories to describe and justify the roles of judges in this process. Many are made uneasy by the fact that the very process of judicial interpretation poses risks that translations will slide into substitutions and ultimately repudiations of the text as originally written and intended. Scholars debate whether it is possible to maintain fidelity to the words on the parchment of the Constitution without sacrificing its larger purposes. Political scientists worry about what has been termed "the counter-majoritarian difficulty"—the power of

\(^{35}\) Id. at 167 ("It is, emphatically, the province and duty of the Judicial department to say what the law is.").

\(^{36}\) Justice Antonin Scalia indicts this very same common law tradition for having instituted bad habits in American judges and lawyers, encouraging them to approach statutory and constitutional texts as if they were judge made law. See Scalia, supra note 33, at 9-14.

\(^{37}\) See U.S. Const. art. III, § 2, cl. 1.

\(^{38}\) Professor Lasser argues that, in the American system, the original constitutional text is often displaced by a series of judicially created multi-pronged tests. These tests assume the role of authoritative texts to be applied in subsequent cases, creating the perception that law is inherently stable (because based on application of a specific text to the problem at hand) but also socially responsive (because the test incorporates examination of an array of external purposes and effects relevant to the problem). See Lasser, supra note 17, at 702-35.
judges, who are not elected, to strike down popular laws.39 On one extreme are "originalists" who believe judges should be confined to applying the text according to its authors' "original intent" or the "original meaning" of their words and can thus avoid changing or expanding the law at all.40 On the other, are "Critical Legal Scholars" who claim the text and its framers' and ratifiers' intentions are so inherently subjective, contingent, unknowable, diffuse and/or irrelevant that judges should frankly admit they are imposing their own value choices in the game of politics.41 A third approach would allow judges great authority to police the democratic process, stepping in to correct failures of representation, but would allow very little room to second-guess bad substantive results if arrived at through good procedures.42 Finally, many modern U.S. scholars endorse an eclectic or pragmatic approach, often called "practical reason" or "pragmatism," which employs a variety of methods to arrive at a functional and sensible reading.43 In my view, there is some value to each of these approaches, yet no single one of them adequately captures what judges actually do, or even what they ought to do, in applying constitutional norms.

The Framers gave us no owners' manual for the Bill of

39 See, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962) (stating that "judicial review is a counter-majoritarian force in our system").
40 The most prominent originalists acknowledge the subjectivity of original intent and focus instead on what meaning a reasonable reader at the time of the Constitutional Convention would have given to the text. See ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990) (arguing that judges must give the constitutional text whatever would have been its generally accepted meaning at the time of its adoption); SCALA, supra note 33, at 37-41 (arguing in favor of "original meaning" as the proper interpretive model).
41 This is a rather gross characterization of the arguments made far more subtly by the Critical Legal Studies (CLS) movement. See, e.g., MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988) (critiquing textual interpretivist, representation-reinforcing and normativist theories); Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518, 522-28 (1980) (describing the "subordination of law to interest group politics").
43 See RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 302-09 (1990) (arguing that the Supreme Court’s change of direction in interpreting the Fourteenth Amendment in Brown to strike down American apartheid is justified not by technical legal materials but by ethical and political ends such as “promoting social peace through racial harmony, . . . finding a new institutional role for the Supreme Court to replace the discredited one of protecting economic liberty; [and] breathing new life into the equal protection clause”); Daniel Farber & Phillip Frickey, Practical Reason and the First Amendment, 54 UCLA L. REV. 1615, 1645-56 (1987) (advancing practical reason over fundamental approaches).
Rights. Nor can "history" tell us precisely what the Framers intended. According to historians, debates about the respective importance of original intent, overarching purposes and principles, and political pragmatism began well before the Constitutional Convention and opinion was as divided during the early years of the nation's history as it is today.\textsuperscript{44} According to some, the legal practice of the late eighteenth century rarely focused on "original intent"—rather, "the prevailing rules of construction... called for a closely reasoned analysis of the text emphasizing manifest language, internal consistency, and fidelity to general principles."\textsuperscript{45} Lawyers were accustomed to the notion that "the 'intent' of any legal document is the product of the interpretive process and not some fixed meaning that the author locks into the document's text at the outset."\textsuperscript{46} Yet, the creators of the Constitution did not ignore evidence of "original intent" when it suited them to refer to it. In fact, members of the First Congress turned to the legislative history, calling upon their own memories of deliberations and their own and each others' subjective intentions at the time of drafting, discussing or signing the document, to argue the pros and cons of competing interpretations of the constitutional text.\textsuperscript{47} And, as in our times, these moves were answered by counter-arguments citing the impossibility of identifying a specific original intent, and the importance of interpreting constitutional language in light of general principles, experience, and current exigencies.\textsuperscript{48}

An examination of U.S. Supreme Court opinions over the past two hundred years provides convincing evidence that no single method has dominated. The Court often relies on close textual reading, but it has also played an active role in "applying values not articulated in the constitutional text"\textsuperscript{49} to the resolution of constitutional questions. The results are...

\textsuperscript{44} See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1997). Rakove shows how different players held differing views of the interpretive process, and how key players, such as Madison or Hamilton, changed their views and tactics according to the issue at hand or in response to pragmatic judgments. See id. at 339-65.

\textsuperscript{45} Id. at 349.


\textsuperscript{47} See RAKOVE, supra note 44, at 350 (describing an interaction in the First Congress in which Alexander Hamilton disagreed with a member of the House of Representative's argument that relied explicitly on the Federalist Papers).

\textsuperscript{48} Rakove quotes the mature Jefferson's statement that "forty years experience in government is worth a century of book-reading." See id. at 367 (internal citations omitted).

\textsuperscript{49} Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703, 705 (1975).
sometimes plainly inconsistent with a strict interpretation of the text and hard to square with what we know of the drafters' and ratifiers' specific intentions. The Supreme Court often overtly draws upon what it conceives as shared contemporary ideals about fairness and justice.\textsuperscript{5} I am not suggesting, that the justices create these ideals out of whole cloth—rather, the Court relies for its legitimacy on various broad textual provisions about liberty, equality and human rights located within the document, as well as upon inferences drawn from the Constitution's structures and purposes. The Court attempts to articulate and apply these values, "even when the content of these ideals is not expressed as a matter of positive law in the written Constitution."\textsuperscript{51}

It is not my purpose, in this paper, to join in the nuanced and complicated debates over precisely which method or combination of methods of interpretation is "correct." I am asserting here only that amendment through interpretation is an historical fact of American jurisprudence. Personally, I believe the Framers and ratifiers understood the impossibility of locking immutable understandings or intentions into the text and understood that the interpretive process would continue to shape the law, long after they were gone. They also agreed on the strategy of keeping the text simple and focused on "essential principles only; lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events."\textsuperscript{52} Over the course of time, perhaps to an extent undreamed of by the Framers, the judiciary has become the primary vehicle for "up-dating" textual meaning. Inevitably, judges bring modern knowledge and evolving social and moral sensibilities to defining and applying the document's terms in contemporary contexts.

Judges, however, do not act in isolation. Their partners in this enterprise are ordinary people, from the voters whose choices influence judicial appointments and Senate confirmations, to the litigants and advocates who call upon the

\textsuperscript{50} School desegregation cases are one notable example. See Brown v. Board of Educ., 347 U.S. 483, 495 (basing its holding that "[s]eparate educational facilities are inherently unequal" upon the view that this separation creates a feeling of inferiority). Other examples include cases involving the Eighth Amendment's prohibition of cruel and unusual punishment and cases discussing reproductive choice. See Grey, supra note 49, at 708-09, 711-12 (noting that the rights relied on by the Court in these cases cannot be derived from the interpretation of the text of the Constitution).

\textsuperscript{51} Grey, supra note 49, at 706.

\textsuperscript{52} Rakove, supra note 44, at 342 (quoting from the advice of Edmund Randolph to the Committee of Detail at the Constitutional Convention in Philadelphia).
courts to confront emerging constitutional problems. Although this concept of judges as interpreters and translators of the U.S. Constitution gives the judiciary great power, that power is checked and balanced in ways, both practical and political, which I would argue are sufficient to mitigate the dangers of abuse. The primary check on judicial power is the fact that judges are embedded in a particular legal culture. It is the judge's commitment to and training in a craft of judging which obligates her to perform her task with circumspection, consistency, impartiality, and restraint, to truly hear and respond in good faith to reasoned argument, and to explain and justify her conclusions in written opinions. This is the system we have developed, for better or worse. I will use the general term "constitutional interpretation" to signify this amalgam of approaches that judges in the American common law tradition actually use in attempting to draw meaning from the constitutional text.

C. Formal Amendment and the Bill of Rights: The Interplay of Specificity and Silence

I have highlighted two primary avenues for change of the U.S. Constitution. Often, they have played complementary roles—silences or ambiguities within the text have generated controversial interpretations followed by a call for formal amendment. Amendments, in their turn, have created new pockets of silence or ambiguity, generating more interpretations. In the United States' experience, much as during the South African transition, silences in the text created a demand for formal amendment almost before the ink was dry. In 1789, the drafters emerged from two years of extremely secretive work, to present their document for ratification by "the People." They quickly learned that ratification would not be possible without certain key changes, yet a new Constitutional Convention would have opened a Pandora's box of problematic issues. As a compromise, the Federalists promised to propose amendments to the document during the new government's first Congress, and in 1791 the Constitution was expanded by adding a "Bill of Rights"—really eight substantive amendments plus two amendments providing canons of interpretation. The history behind these first ten amendments illustrates the inherent tension between the certainty

53 See Robin West, Integrity and Universality: A Comment on Ronald Dworkin's Freedom's Law, 65 FORDHAM L. REV. 1313, 1317 (1997) (arguing that interpretation is constrained by principles of legal justice, including consistency).
54 See generally RAKOYE supra note 44, at 94-160.
and stability provided by specific enumeration and the flexibility and social responsiveness provided by silence and by open textured phrases. It also illustrates the central role the Framers expected constitutional interpretation, as well as formal amendment, would play in subsequent constitutional development.

The purpose of these early amendments was to make explicit to doubters wary of the new federal government what the Federalists, who supported the Constitution, claimed was implicit and needed no clarification. The original document was primarily concerned with enumerating federal powers and setting up a tripartite federal government of checks and balances. It said very little either about state powers or about fundamental rights, although both of these principles were implicit in the larger scheme, as significant checks on federal power. The Anti-Federalists feared that, without explicit prohibitions, the new federal government might abuse its enumerated powers to violate the fundamental rights of the people or to aggrandize federal authority in violation of state sovereignty. The Federalists argued that no specific text preserving individual or states’ rights was necessary, since any powers and rights which the federal government was not explicitly granted obviously must remain with the States and the People. They argued that specifying protected rights would be a mistake, because it would suggest to future readers that those rights not enumerated were not protected.55 Likewise, enumerating state powers would suggest that those not enumerated could be exercised by the federal government. To satisfy their critics, however, the Federalists drafted eight Amendments enumerating specific rights, including religious liberty, freedom of speech, property rights, freedom from cruel and unusual punishments and many more. They also added two other amendments clarifying that issues not specifically addressed by the text were to be interpreted in light of the overarching principles of fundamental rights and federalism. The Ninth Amendment states a canon of interpretation embodying the principle of fundamental rights: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”56 This same phrase, was borrowed by South Africa’s

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55 For a discussion of this debate, see RAKOVE, supra note 44. at 288-89 & nn. 1 & 2.
56 U.S. CONST. amend. IX. Cf. S. AFR. CONST. of 1996, ch. 2, § 39(3) (“The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent they are consistent with the Bill.”) Both the RSA and the U.S. provisions are ambiguous about the status of newly “discovered” or emerging rights.
constitutional convention with the added caveat that retained or pre-existing rights must be consistent with the new Bill of Rights. The Tenth Amendment of the U.S. Constitution provides a canon of interpretation embodying the principle of federalism: that powers not granted the federal government are retained by the States. Some judges and scholars regard the Ninth and Tenth Amendments as meaningless tautologies. To me, they read as confirmation that the Framers never expected their document to provide an encyclopedic enumeration and always assumed it would be interpreted according to underlying structural context and overarching philosophical purposes. More importantly, the purposes of a constitution would be defeated by a requirement that all things not explicitly included are thereby excluded.

Perhaps the most influential proponent of this view was Chief Justice John Marshall, who led the United States Supreme Court through its formative period. In *McCulloch v. Maryland*, he stated: "It would [be] an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur." The question presented was whether the federal government possessed the power to incorporate a National Bank. The Court rejected the argument that the failure to specify such a power in the text must be interpreted as denying such authority to Congress. Instead, Marshall opted for pragmatism and flexibility, pointing to the clause vesting in Congress the authority "to make all laws which shall be necessary and proper" for the execution of its enumerated powers.

The interpretive process I have described plays a significant role in every arena of constitutional law, from separation of powers to federalism. It makes its most dramatic and controversial appearances when dealing with unenumerated

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58 See U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").
59 There is a place for the useful canon of interpretation, "Expressio unius est exclusio alterius," but it is only one of many tools for reading a text and is contradicted by other equally important canons. See generally Mary Ann Glendon, Comment, in *SCALIA*, supra note 33, at 95-114 (discussing European experience with canons of interpretation and their importance in the interpretive process).
60 17 U.S. 316, 415 (1819). Marshall made this statement in connection with the argument that, had the Framers intended to empower the federal government to create a bank, they would have said so explicitly. Such arguments in favor of open-ended construction of enumerated federal powers become even more compelling in the context of rights. In this case, Marshall made his famous statement "Iwle must never forget, that it is a constitution we are expounding . . . ." *Id.* at 407.
61 *Id.*
rights. In American constitutional history, repeatedly we have seen subjugated members of society draw upon the general themes of protection of liberty, property and equality, seeking to “re-constitute” the legal principles governing the institutions which perpetuate their subjugation. Advocates for the rights of people of color, women, and children, have all been engaged in a struggle to reshape old institutions. These subjugated groups have challenged institutional norms grounded in concepts of hierarchy and ownership and have argued for rules predicated on more egalitarian concepts in keeping with evolving values. Often, the Supreme Court has employed the open textured language given to us by the Framers to allow constitutional law to evolve with changing conceptions of liberty, property, and equality.

Why should one be concerned about a constitution’s capacity for change? Why not simply enforce the explicit and specific intentions of its drafters? Examining the United States’ two-hundred year-old experience, and even the very young South African experience, the answer should be obvious. The process of constitution-making involves bargains and compromises which may be necessary but should not be written in stone. As noted earlier, the Constitutional text of 1789 lacked the broad statements about equality found in the more revolutionary Declaration of Independence of 1776. This is hardly surprising since the delegates who opposed slavery had been forced to strike a bargain which continues to haunt us two hundred years later. In order to reassure the Southern states, the Constitution explicitly acknowledged the enforceability of state laws which treated humans as property, and it granted protection to the trade in human beings.62

Slavery was not the only deprivation of liberty or example of entrenched inequality in the Framer’s world. It was simply the most glaring and controversial. Many other inequalities remained virtually invisible to eighteenth-century eyes and were simply accepted as natural, and not man-made. Thomas Jefferson and his co-authors acted in good faith when they penned the Declaration of Independence, proclaiming that “all men are created equal and endowed by their Creator

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62 See U.S. Const. art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence on any Law or Regulation therein, be discharged from such Service or Labour….”). In other provisions, it provided that persons of color be counted as three fifths of a person in computing representation in Congress and taxation. Id. art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free persons . . . three fifths of all other persons.”).
with certain inalienable rights." Jefferson quite consciously did not include the enslaved African-American male within the company of "all men." But neither did he or the other Framers mean to include women of any condition or color in the promise of civil liberty and equality. And they certainly did not mean to include children. Only a few of the Drafters harbored any doubts at all about the equity or morality of the categorical exclusion of women and children. The Drafters' notion of "equality" was a far cry from today's internationally recognized benchmark which assumes as a basic criterion of self-determination a system guaranteeing "one person one vote."

As this history illustrates, consent of the governed is not a static concept. It is constantly challenged by evolving conceptions of citizenship and personhood: Who are the "People" whose consent is necessary to a just political order? A radical shift in how international law answers this question was the driving force behind "the New South Africa" and the new South African Constitution. As in the Old South Africa, in the eighteenth-century culture of Revolutionary America, those who believed they could speak for "We the People" were, by today's standards, a select elite. The representatives to the Constitutional Convention in Philadelphia as well as those who voted to ratify the U.S. Constitution at the state level, all were white, adult, property-owning males nominated and elected by other white, adult, property-owning males. Yet, they purported to speak for their entire region's population. At the time, ordinary working people were considered too unruly and unsophisticated to govern, and their voices were channeled and filtered in ways that now seem profoundly paternalistic.

The American experience shows how difficult it can be to transcend the limitations of a flawed vision of vested property rights and an incomplete vision of liberty and equality. In 1789, each of the subjugated and excluded categories named—blacks, Indians, women, children, landless laborers, indentured servants—were almost universally perceived as lesser and limited beings. Often, they were not civil persons at all, but rather a form of property or quasi-property, belonging to the patriarch or head of household, and subject to his virtually unchecked authority.

These exclusions were challenged, one by one. First to be heard, were slaves. The Constitution contained clauses which made clear that slaves were a constitutionally recog-

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63 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
nized form of human property. As Roger Taney, an educated and respected Chief Justice of the United States Supreme Court, wrote in *Dred Scott v. Sandford*, the owners of this human property actually had the Constitution on their side when they claimed a fundamental right to protection of their ownership.64 Women, children and free people of color were treated, at worst, as quasi-property and, at best, with benign condescension. They were believed lacking by their very nature in the "capacity" to participate intelligently in civil life. In contrast to South Africa's transitional moment, our original moment occurred while the untruth of these beliefs was still far from evident.

Neither the process of formal amendment nor the process of judicial interpretation was able to cure the subjugation of African-Americans. It took a Civil War to force a confrontation with the evil of slavery. In the aftermath of the war, the country began the remediation process with the Civil War Amendments which forbade slavery, and prohibited the states from depriving "any person" of equality or of life, liberty or property without due process and guaranteed to adult "male" citizens the right to vote.65 These Amendments also expressly provided Congress with the power to enforce these basic rights.66 This era marked a watershed in United States legal history, explicitly engaging the federal powers in policing the relationship of the states and their citizens, and opening the door to enforcement of civil rights of all U.S. citizens at both state and federal levels. The Supreme Court's subsequent interpretations of the Civil War Amendments, especially the Fourteenth Amendment, have provided the vehicle for giving constitutional force to ideals of liberty and equality. The explicit protection of property has operated to provide stability.

But champions of the amendment process should be careful about pointing to the Civil War Amendments as evidence of its effectiveness. The Civil War Amendments, which

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64 60 U.S. (19 How.) 393, 411 (1856) (The "Constitution ... point[s] directly and specifically to the negro race as a separate class of Persons . . . ").
65 U.S. Const. amends. XIII ("Neither slavery nor involuntary servitude . . . shall exist within the United States . . . "), XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws.")., XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").
66 See U.S. Const. amends. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation.")., XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.")., XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").
provide the foundation for much of our modern constitutional jurisprudence, owe their ratification to the fact that the victorious Northern states forced the vanquished Southern states to vote for these Amendments as a condition of rejoining the Union. The failure of the amendment process as a vehicle for addressing the crisis that lead to our Civil War suggests caution about building into the constitutional structure potentially insurmountable barriers against change. It was not the persuasive force of reason but force of arms which gave the abolitionist North sufficient power to impose the Civil War Amendments on a defeated South.

The Thirteenth, Fourteenth and Fifteenth Amendments erased from the Constitution the principle that one adult male could legally own another, and see that ownership protected as a matter of constitutional right. They also established the principal of equal treatment regardless of race, in courts, legislatures and the voting booth. Yet, de jure discrimination against people of color persisted until the middle of this century. De jure discrimination against women dominated family laws and policies until the last quarter of the Twentieth Century and de jure discrimination against children in every area of law still continues. American women, after decades of struggle, ridicule and abuse, finally gained the right to vote with ratification of the Nineteenth Amendment, in 1920.67 To this day, gender equality remains a pale half sister to racial equality, protected only by judicial interpretations which apply "intermediate scrutiny" to measure sex discrimination—a test far less stringent than the "strict scrutiny" applied to race discrimination.68 As for children, the U.S. Constitution seems to operate as an impediment rather than an aid in developing a coherent concept of children's rights—a concept now recognized worldwide.

As we have seen, judicial interpretation has provided a vehicle for the creation of new rights that were too controversial to surmount the amendment process. Does this make them illegitimate? I think not, both as a matter of morality and of pragmatics. Even the harshest critics of judicial activism have never seriously advocated a return to plain meaning and originalism because the consequences would be unthinkable in an age which has come to accept formerly controversial

67 See U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").
68 See Craig v. Boren, 429 U.S. 190, 197 (1976) (articulating for the first time the "intermediate scrutiny" standard in holding that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").
claims as self-evident truths.\textsuperscript{69} If we were to purge American constitutional law of every doctrine or theory not grounded in plain meaning or original intent, we would have to abandon, not only those controversial cases protecting abortion and gay rights,\textsuperscript{70} but also cases on racial and gender justice, family privacy and fundamental liberty, which have become civic icons.\textsuperscript{71} If plain meaning were the test, we could no longer rely on a host of textually suspect but absolutely pivotal legal constructs, such as the "incorporation doctrine," which makes the Bill of Rights binding on the states as well as the federal government.\textsuperscript{72}

Having become familiar with the detailed South African document, I find it sobering to realize that Americans owe their fundamental freedoms not to the express language of a Constitution, but to this ad hoc process of missed moves, power plays, tricky strategies, and creative lawyering. Yet even doubters like Justices Scalia and Thomas have never seriously advocated a rigid adherence to plain meaning and the original text because the consequences would be unthinkable in an age which has come to accept formerly controversial claims to individual dignity and equality—claims that never could have commanded the super majorities necessary to formal amendment—as self-evident truths.

On the other hand, the very qualities that permitted the U.S. Constitution to grow and survive—the open textured


\textsuperscript{70} See generally Romer v. Evans, 517 U.S. 620, 636 (1996) (invalidating an amendment to the Colorado Constitution on the grounds that it "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."); Roe v. Wade, 410 U.S. 113, 154 (1973) (holding that "the right of personal privacy includes the abortion decision").

\textsuperscript{71} See generally Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding that "the sacred precincts of marital bedrooms" are protected from government regulation of contraceptives); Brown v. Board of Educ., 347 U.S. 483, 493 (1953) (holding that racial segregation in public schools "depriv[e] the children of the minority group of equal educational opportunities").

\textsuperscript{72} Under modern incorporation doctrine, guarantees that are "fundamental" to the judicial processes maintained in the United States may be incorporated through the Fourteenth Amendment. See Duncan v. Louisiana, 391 U.S. 145, 149-50 n.14 (1967). Consider the even more astonishing "reverse incorporation theory," which Thurgood Marshall and his NAACP colleagues persuaded the Court could be used to make the guarantees of equal protection, announced in 1868 in the Fourteenth Amendment, binding on the federal government via the Fifth Amendment, ratified in 1791—an exercise of interpretive creativity which defies linear logic. See Bolling v. Sharpe, 347 U.S. 497, 499 (1953) [noting that, while the Fifth Amendment does not contain an equal protection clause, "the concepts of equal protection and due process ... are not mutually exclusive ... discrimination may be so unjustifiable as to be violative of due process"].
language, the openness of the process to political and historical influence, the ad hoc process and context specific nature of case by case adjudication—have been impossible to control. The lack of specificity about the scope and application of rights and about methods of interpretation has allowed "liberal or forward-looking" judges great freedom and has permitted "conservative or backward-looking" judges, arriving after the moment of constitutional transformation, to backslide on the promises of the Bill of Rights and the Fourteenth Amendment. As the story of the post-Reconstruction backlash illustrates, judicial activists have played a role in reading new rights out of as well as into the Constitution.\textsuperscript{73} Courts will continue to use constitutional interpretation to break down the barriers between public and private, to reconfigure institutions such as the family and the workplace according to evolving constitutional principles, and to create new rights and new rights-bearers. But sometimes judges will take the interpretive process down dead ends and along pointless detours, even going so far as to repudiate the principles which provided the original textual point of departure.

Far more than explicit text, a mistaken or wayward interpretation is always open to re-interpretation. For example, Brown v. Board of Education\textsuperscript{74} overruled the interpretation in Plessy v. Ferguson\textsuperscript{75} that the equality principle was satisfied by facilities that were "separate but equal" and Reed v. Reed\textsuperscript{76} rejected prior cases such as Bradwell v. Illinois,\textsuperscript{77} which limited women's equal participation in the public sphere. Often, these re-constructions of constitutional meaning have involved a re-balancing of competing rights. The traditional rights of whites to choose with whom they associate and of the patriarch to control all family decision-making, generally accepted at one time, gave way to competing claims for equality and freedom from people of color and from women. Currently, a major challenge to the constitutional law of the family in the United States is: whether the Constitution can evolve through re-interpretation to include the notion, uni-

\textsuperscript{73} See infra text accompanying note 93.
\textsuperscript{74} 347 U.S. 483, 495 (1953) (holding that "in the field of public education the doctrine of 'separate but equal' has no place").
\textsuperscript{75} 163 U.S. 537, 548 (1895) (holding that "the enforced separation of the races ... neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the Fourteenth Amendment").
\textsuperscript{76} 404 U.S. 71, 76 (1971) (holding that "[t]o give a mandatory preference to either sex over members of the other ... is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment").
\textsuperscript{77} 83 U.S. (16 Wall.) 130, 137-39 (1872) (affirming the Illinois Supreme Court's refusal to admit a woman to the bar).
versally accepted in international law, that children are persons with rights. I will show how the emerging notion of children's rights has been blocked by backward-looking constitutional interpretation, and I will suggest the time is here for the U.S. Supreme Court, borrowing from the experiences of the rest of the world, to re-interpret family rights to make room for the rights of the child.

III. THE FAMILY IN U.S. CONSTITUTIONAL LAW

The politics of the family has often been reflected in the constitution of government. One of the Constitution's most influential architects, John Adams, imagined that the legislature would be a miniature of society. How right he was. Each of society's injustices was reflected in the original scheme of representation. When Adams' wife Abigail protested the exclusion of women, and asked that "the ladies" be remembered by those meeting in Philadelphia, he scoffed at the idea.

Adams's reaction and the U.S. Constitution's silence on the topic of the family are not surprising. The rights of children and family would never have occurred as a subject of constitution-writing to the U.S. Constitution's drafters, since they deemed these issues both "private" and "local." Private and local issues were not on the agenda of the Constitutional Convention, at which representatives of the thirteen original states sought to create a stronger but still limited central government, while leaving local and state laws intact—except to the extent they were superseded by enumerated federal powers. The framers used provisions such as the Necessary and Proper Clause to suggest that judges should use their good judgment in determining whether the exercise by the federal government of its powers fell inside or exceeded proper constitutional bounds.

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78 See Letter from John Adams to John Penn (Mar. 27, 1776), in 4 PAPERS OF JOHN ADAMS 78, 80 (Robert J. Taylor ed., 1979). In a private correspondence to John Penn, Adams wrote "[a]s the Representative Assembly, should be an exact Portrait, in Miniature, of the People at large, as it should think, feel, reason and act like them great Care should be taken in the Formation of it, to prevent unfair, partial and corrupt Elections." Id. at 80.

79 See Letter from Abigail Adams to John Adams (Mar. 31, 1776), in THE BOOK OF ABBIGAIL AND JOHN: SELECTED LETTERS OF THE ADAMS FAMILY, 1762 - 1784, 120, 121 (L.H. Butterfield et al. eds., 1975) [hereinafter SELECTED LETTERS]; Letter from John Adams to Abigail Adams (Apr. 14, 1776) in SELECTED LETTERS 121, 122-23. In this exchange of letters, Abigail Adams asks her husband to include women in their nascent efforts of codifying laws; John Adams responds to this request by writing, "[a]s to your extraordinary Code of Laws, I cannot but laugh." Id. at 122.

80 U.S. CONST. art. I, § 8, cl. 18.
Today, the dichotomy between private and public, relegating family issues to local and state "private" as opposed to "public" law, can no longer claim the unquestioned explanatory power and coherence it once enjoyed. The evolution of constitutionalism worldwide has brought into the foreground the important role played by families in the scheme of democratic government and by democracy in the governance of families. Modern European constitutions explicitly discuss family rights.\(^{81}\) Human rights treaties and conventions recognize the importance of the protection of families and children.\(^{82}\) Still, the U.S. Constitution—although amended twenty-seven times since 1789—makes no mention of the words "family," "parent," or "child."

The first major appearance of family law in U.S. constitutional doctrine dates to the late nineteenth century,\(^{83}\) when Myra Bradwell sued the State of Illinois for denying her a license to practice law in violation of the Fourteenth Amendment stricture that no state shall deny "to any person within its jurisdiction the equal protection of laws."\(^{84}\) In *Bradwell*, the Supreme Court upheld Illinois's disparate treatment of Mrs. Bradwell, which the state court justified by noting that as a married woman she could not enter into contracts or manage her own property.\(^{85}\) Women and men naturally occupied different spheres—women cared for the private sphere of home and children while men went forth into the public world of commerce, the professions and politics. In barring women from the practice of law, Justice Bradley in his concurrence asserted that Illinois simply recognized this reality.\(^{86}\) The Court in *Bradwell* attributed constitutional meaning to the Victorian model of family life, which concentrated authority and control over all family members in the hands of the patriarch.

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\(^{81}\) See, e.g., Grundgesetz [Constitution] [GG] art. 6(1) (F.R.G.) [stating that "[m]arriage and family shall enjoy the special protection of the state").

\(^{82}\) See, e.g., *Universal Declaration of Human Rights*, G.A. Res. 217(A)(III) arts. 16, \(\S\) 3, U.N. GAOR, 3d Sess. (1948) [declaring that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State").

\(^{83}\) See *Bradwell* v. Illinois, 83 U.S. (16 Wall.) 130 (1872).

\(^{84}\) U.S. CONST. amend. XIV, \(\S\) 1.

\(^{85}\) See *Bradwell*, 83 U.S. (16 Wall.) at 131. The Supreme Court chose to couch its holding in more general terms: "the right to control and regulate the granting of license to practice law in courts of a State is one of those powers which are not transferred for its protection to the Federal government . . . ." *Id.* at 139.

\(^{86}\) See *id.* at 141 (Bradley, J., concurring) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfit[s] it for many of the occupations of civil life.").
A. The Conservative Role of Substantive Due Process

I have described at length in other writings what I identify as the problematic legacy of two other Supreme Court cases—Meyer v. Nebraska\(^\text{87}\) and Pierce v. Society of Sisters\(^\text{88}\)—decided in 1923 and 1925 during the heyday of economic substantive due process.\(^\text{89}\) In these writings I trace the relationship between substantive due process theory and family rights, examining them in the larger historical context of opposition to turn-of-the-century social reforms. Meyer and Pierce are revealed as an integral part of resistance by conservatives to a large range of programs such as mandatory free public schooling, restriction of child labor, and maternal and infant health programs supported by progressives and populists.

Substantive due process theory is one of the more bizarre creations of the interpretive process. Around the turn of the last century, conservative forces sought to use the Constitution as a shield against state regulation of business and commercial activity. The architects of substantive due process built an elaborate edifice of theory—based entirely on interpretation and drawing heavily on external sources such as the Magna Carta. They located virtually absolute protections of private property and rights of contract in the due process clause of Section 1 of the Fourteenth Amendment.\(^\text{90}\) Section 1 of the Fourteenth Amendment, ratified in 1868, reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.\(^\text{91}\)

The first sentence of this provision overruled Dred Scott, in which the pre Civil War Court had concluded that ownership of human beings was a constitutionally protected property interest, and that African-Americans, although born in the

\(^{87}\) 262 U.S. 390 (1923).

\(^{88}\) 268 U.S. 510 (1925).


\(^{90}\) See id. at 1070-80 (arguing that Justice McReynolds injected the Fourteenth Amendment with a substantive due process theory of parental rights of control as a result of his own, subjective political views and background).

\(^{91}\) U.S. CONST. amend. XIV, § 1.
U.S., could not be considered "citizens" within the meaning of the Constitution.\textsuperscript{92} Within a few years of its ratification, however, the rest of the Fourteenth Amendment, designed to advance racial equality and liberty, had been derailed by a post-Civil War backlash. In \textit{The Civil Rights Cases}, the Court interpreted the Fourteenth Amendment's clauses on equality and on privileges and immunities so narrowly they were useless in combating race-based injustices.\textsuperscript{93}

Moreover, within a few decades, creative conservative advocates managed to build on the Due Process language of the Fourteenth Amendment, which prohibits the state from depriving any person of life, liberty or property without due process, to create a new theory which limited congressional attempts to enact socio-economic policy through legislation. Due process, conservatives argued, had a substantive content: it enshrined the right to liberty and property, so firmly rooted in history and tradition that they were essential to any scheme of ordered liberty. These phrases often were shorthand for vested economic rights. Their target and nemesis was redistributive politics. Conservatives persuaded the Court to adopt this theory to strike down all sorts of economic legislation, on the ground that such regulation amounted to a "deprivation of property" or "liberty" in violation of vested common law rights. Since the U.S. Constitution contains no limitations clause,\textsuperscript{94} it was a simple matter for the Justices known as the Nine Horsemen to use the doctrine of substantive due process to block reasonable attempts on the part of the New Deal to redistribute highly concentrated power of wealthy taxpayers and industrialists to meet the needs of the unemployed, children, farmers and laborers, and generally to mitigate the injustices of entrenched inequalities of resources.

In the early nineteen-twenties, the battle lines were sharply drawn. Because children were still widely perceived as parental property, the claims of their parents that mandatory schooling laws, health laws, and laws against child labor infringed their vested common law rights fell neatly into the paradigm of constitutional protection of property interests and of patriarchal authority structures. While \textit{Meyer} and \textit{Pierce} are now often described as cases about intellectual lib-

\textsuperscript{92} See Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 453 (1856).
\textsuperscript{93} See \textit{The Civil Rights Cases}, 109 U.S. 3 (1883) (limiting protections of the Fourteenth Amendment to race-based deprivations by the State, not by solely private conduct).
\textsuperscript{94} See infra notes 110 & 166 and accompanying text describing the South African Constitution's Limitations Clause, which places limits on the courts' powers to derogate from certain rights.
Property and family integrity, when placed in the context of their times, they are revealed as closely linked to the line of economic substantive due process cases. Although the New Deal Court repudiated the limitations placed on Congress by the Substantive Due Process doctrine with respect to economic legislation, the court never overruled the line of personal substantive due process cases traceable to *Meyer* and *Pierce*.

The Court has continued to treat parents' rights to have control of their children, which under common law were merely correlatives of their responsibilities, as constitutionally protected personal liberties. Yet, as observed in the appellant's brief in *Pierce*, "it is a strange perversion of the meaning of the word 'liberty' to apply it to a right to control the conduct of others." To this day, history and "tradition"—which too easily translates into the powers historically and traditionally enjoyed by free white men—has provided the benchmark under substantive due process theory for defining those personal "liberties" upon which the state may not infringe. Emerging claims to new rights, by definition, will fail the test of deeply rooted tradition.

Children's rights are such an emerging claim, challenging American history and tradition but rooted in broad concepts like liberty, equality, and especially dignity. Cases like *Meyer* and *Pierce* protected the family unit from destructive state intervention, but at a high price for children. The American focus on parents' rights, rather than children's rights, made children's status, and a constitutional theory of childhood, especially difficult to bring to light. This fact has become glaringly evident as Americans have failed to respond to international pressures to acknowledge children's rights. Finally, the lack of an explicit "dignity" principle and of expansive canons of interpretation hampers the natural growth of children's constitutional rights. The difficulty of constructing a theory of children's rights on the foundation of American

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95 See, e.g., Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995) ("Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination— including even the right to liberty in its narrow sense ... They are subject, even as to their physical freedom, to the control of their parents or guardians.").

96 Supplement to Brief of Appellant, the Governor of the State of Oregon at 8, Pierce v. Society of Sisters, 268 U.S. 510 (1924) (No. 584) (arguing that the Fourteenth Amendment is not so broad as to protect every right and "liberty" belonging to individuals); see also Woodhouse, supra note 89, at 1000-01 ("Meyer announced a dangerous form of liberty, the right to control another human being."); Symposium, *Developments in the Law, the Constitution and the Family*, 93 HARV. L. REV. 1156, 1355 (1980) (explaining that the constitutional right of parents to control their children is unusual in that it protects the ability to control another person).

97 See infra note 151.
constitutional doctrine arises in part from the fact that children are different from adults, and our constitution deals badly with real difference. It is complicated by the fact that children are essentially dependent on adults, and the U.S. Constitution deals poorly with dependency. And, as illustrated, it is complicated by the fact that children figured in early constitutional cases on the family almost as a form of parental "property," and control of children appeared as an element of parental "liberty," both values which receive explicit recognition in the text of the U.S. Constitution. In addition, children have suffered from being on the wrong side of the sharp line between public and private spheres drawn by a Constitution that requires "state action" to trigger protections of the Bill of Rights.

IV. THE NEW SOUTH AFRICAN CONSTITUTION

South Africans and international legal scholars who lived the events firsthand, and even took part in the drafting process and in subsequent adjudications, will pardon my sins of omission and oversimplification, since no brief description could do justice to the complex social, political and cultural forces which shaped the process. Let me begin by describing the end product: a document that firmly entrenches gender equality as a guiding principle, prohibits age discrimination, and explicitly protects the rights of children. This is not to suggest that internal tensions are absent—there will be many cases in which courts must harmonize or prioritize competing rights. Moreover, abstract rights are difficult to

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98 See generally Minow, supra note 17.
99 See generally Martha A. Fineman, Masking Dependency: The Political Role of Family Rhetoric, 81 VA. L. REV. 2181, 2205 (1995) ("In the societal division of the labor among institutions, the private family bears the burden of dependency, not the public state. Resort to the state is considered a failure.").
101 See Albie Sachs, Protecting Human Rights in a New South Africa 79 (discussing tensions between protection of children from both parents and the state); Yvonne Mokgoro, Traditional Authority and Democracy in the Interim South African
translate into true equality. Yet, one fact remains clear: children are specifically recognized in the text of South Africa's Constitution as rights bearers with powerful claims for justice. How was this revolutionary document produced?

In February 1990, negotiations between liberation forces and the de Klerk government led to repeal of the ban on anti-apartheid groups and the release of African National Congress ("ANC") leader Nelson Mandela. In December 1991, the Convention for a Democratic South Africa ("CODESA") began negotiating the ground rules for a fully democratic election and a new Constitution, a project continued by the Multi Party Negotiating Process ("MNNP"). The parties invented a two-phase process. First, they agreed upon an interim Constitution ("IC"), adopted in November 1993. This IC would govern temporarily, while the nation held democratic elections. A Constitutional Assembly ("CA") consisting of the democratically elected National Assembly and the Senate, sitting jointly, would draft and approve by a two-thirds vote a permanent Constitution. The IC, in effect, supplied the blueprint for transition. More importantly, it provided a guarantee to the white citizens, soon to become a minority, that the formerly disempowered majority would respect certain agreed upon principles in rewriting the Constitution. The IC created an eleven member Constitutional Court with jurisdiction of all constitutional questions, and stipulated that the permanent Constitution would not take force and effect until the Constitutional Court had certified its compliance with thirty-four specific Constitutional Principles ("CP"). These Constitutional Principles, characterized as a "solemn pact" in the Preamble to the interim Constitution, provided the key to a process that has been described as a "revolution... negotiated between the oppressor and the oppressed." This process irrevocably committed the country to "a non-racial, non-sexist multi-party democracy with three tiers of government and a justiciable Bill of Rights." As insurance against derogation of rights by the elected representatives who would

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See generally Mutua, supra note 100, at 69 (citing the United States as an example of rights rhetoric ultimately protecting the interests of the wealthy and powerful).

S. AFR. CONST. of 1993 (IC).

Id. at Sched. 4.

Justice of the Constitutional Court of South Africa Yvonne Mokgoro. Address to Philadelphia School Children at University of Pennsylvania Law School. Phila., Pa. (Dec. 9, 1997); see also BASSON, supra note 26, at xxi.

BASSON, supra note 26, at xdl.
draft the final document, CP II stated, “everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this [interim] Constitution.” **107** The Constitutional Principles protected rights of property, a matter of deepest concern to affluent white South Africans who would now be a voting minority. They also guaranteed fundamental political, civil, and due process rights, a matter of deepest concern to the liberation movement whose members had suffered relentless state persecution. In addition, Constitutional Principle III provided: “The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.” **108** Although Constitutional Principles II and III played a central role in the framing of family-related rights under the final Constitution, there were other Constitutional Principles which also had great bearing: CP I required the Constitution to establish a democratic system of government committed to achieving equality between men and women of all races; CP IV made the Constitution the supreme law of the land, binding on all organs of state at all levels of government; CP V stipulated that the legal system shall ensure equality before the law and equity in the legal process, regardless of race or gender; CP VIII provided for universal adult suffrage; CP XII preserved collective rights of free association; CP XII preserved the institutions of traditional leadership and indigenous law, but made them subject to fundamental rights. **109**

Several other key features, while not given the status of immutable principle, also made their appearance in the interim Constitution. The first was a “Limitation Clause.” Section 33 of the IC provided that rights might be limited by laws of general application, but only to the extent “reasonable” and “justifiable in an open and democratic society based on freedom and equality” and only if the limitation did not “negate the essential content” of the right. **110** Certain rights, including those to dignity, freedom and personal security; to religious freedom, political rights and rights in detention; and children’s rights to protection from abuse, exploitative labor, and to their rights in detention, were singled out for additional

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107 S. Afr. Const. of 1993 (IC), Sched. 4, Const. Princ. II.

108 Id. at Const. Princ. III.

109 See id. at Sched. 4.

110 Id. at ch. 3, § 33.
protection, and could be limited only if "necessary." The limitations concept was borrowed, with adaptations, from textual sources such as the Canadian Constitution, the Convention for the Protection of Human Rights and Fundamental Freedoms, and the German Constitution. The "necessary" prong was compared, as well, to the U.S. Supreme Court's "strict scrutiny" test, but commentators were quick to point out the differences between the South African limitations provision and those of the systems from which it was partially borrowed.

Second, the interim Constitution's Section 98(5) contained a "suspension" provision, empowering the Constitutional Court to declare a law unconstitutional, but allow it to remain in force during a specified period while the competent authorities corrected the defect. To American readers, this type of provision stands in sharp contrast to the absolute messages of our own rights discourse. The provision created the possibility of recognizing the existence of new rights, while negotiating the terms of their realization.

Third, the interim Constitution cast the government in an active rather than passive role in furthering rights. Chapter 8 established various bodies such as a Human Rights Commission and a Commission on Gender Equality, charged with promoting a culture of human rights. In addition, Section 35 of Chapter 3 (Fundamental Rights) explicitly addressed principles of "Interpretation," to be applied in construing the provisions on fundamental rights. Based on this provision the interim Constitution appears to have endorsed what critics such as Justice Antonin Scalia have branded "judicial activism" to the extent that the IC mandated a purposive or holistic interpretation, rather than confining judges to the most literal and narrow "grammatical" construction of the text's original meaning at the time it was drafted. It instructed

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111 Id.
115 See, e.g., BASSON supra note 26, at 51-53 (arguing that the limitations clause in the South African constitution is not exactly similar to the clauses found in other jurisdictions and comparative studies should be approached with caution).
116 See S. AFR. CONST. of 1993 (IC), ch. 7, § 98(5).
117 See id. at ch. 8, § 115-20.
118 See id. at ch. 3, § 35.
119 See State v. Makwanyane and Another, 1995 (3) SALR 391, 403 (CC) (sanctioning a method of constitutional interpretation that "whilst paying due regard to the language that has been used, is 'generous' and 'purposive' and gives expression to the underlying values of the Constitution.") (internal citations omitted); see also
the judge engaged in interpreting the text of the Chapter to "promote the values which underlie an open and democratic society based on freedom and equality," and it further provided that courts "shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law."\(^{120}\)

With this interim Constitution in place, Nelson Mandela was elected President of the "new South Africa" in April 1994, the ANC captured over sixty per cent of the vote, the Constitutional Court was chosen through a process also involving significant citizen participation, the Assembly set to work, and two years later issued a draft of the final Constitution of the Republic of South Africa. The May 8, 1996 draft of the new Constitution, submitted to the Constitutional Court by the CA, was accompanied by over two thousand pages of written submissions and followed by extensive oral arguments.\(^{121}\) While the Constitutional Court, by its judgment of September 6, 1996, praised the text as complying with the overwhelming majority of the requirements of the CP, the court referred back to the CA for certain amendments to conform to the Constitutional Principles. The amended text of October 11, 1996 was certified by the Constitutional Court on December 4, 1996, signed into law by President Mandela on December 10, 1996, and went into effect in January 1997.

Five aspects of the South African experience stand out as especially illustrative of how the process and the context in which a document is drafted may influence both the form and the substance of its text. First, the South African process was extremely public. As a consequence, inherent tensions may have been more likely to surface openly, although some issues were still obscured with vague language, shifting to the judiciary the task of resolving them. Second, the process evolved in two phases, which created a species of "trial marriage" during which the text of the interim Constitution could be tested before the public and in cases brought before the Constitutional Court. The example I will discuss below of

\(^{120}\) See S. AFR. CONST. of 1993 (IC), ch. 3, § 35(1).

\(^{121}\) See Goldstone, supra note 100, at 454.
"horizontal rights" illustrates this phenomenon.122 Third, the drafters consulted constitutional experts, borrowed models from other constitutional systems, and treated international human rights law as compelling authority in their project of creating a comprehensive and inclusive catalogue of modern rights. Section 72 of the interim Constitution required the CA to appoint an independent panel of five recognized South African constitutional experts to assist it in the process of drafting.123 “Indeed, the persons drafting the document searched the world for more unusual models from which to borrow.”124 Fourth, the drafters consciously sought (or were pushed) to include the voices of politically disempowered groups such as women and children, and they intentionally borrowed from these "outsider" perspectives.125 Fifth, the drafters researched, borrowed, and embodied in written text not only substantive constitutional principles, but also various canons of interpretation and principles of application, with an eye to entrenching not only the text itself but the transformational spirit behind it.

An Explanatory Memorandum, which was adopted by the CA and prefaces the text, states:

[The process of drafting this text involved many South Africans in the largest public participation programme ever carried out in South Africa. After nearly two years of intensive consultations, political parties represented in the Constitutional Assembly negotiated the formulations contained in this text which are an integration of ideas from ordinary citizens, civil society and political parties represented in and outside of the Constitutional Assembly. This text therefore represents the collective wisdom of the South African people and has been arrived at by general agreement.]

This process also provided a voice to people formerly excluded entirely from such high-level decision making, generating both high excitement and (a risk that astute participants fully understood) high expectations for results.127

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122 See infra notes 154 to 161 and accompanying text.
123 See S. AFR. CONST. of 1993 (C), ch. 5, § 72(2).
124 Dickson, supra note 100, at 537.
125 See Wing & Carvalho, supra note 100, at 77 n.162 & 90 (describing the protests of the ANC Women's League demanding inclusion of women in CODESA negotiations and the creation of the Women's National Coalition to lobby for changes during the drafting process).
127 See Interview with Yvonne Mokgoro, Justice of the Constitutional Court of South Africa, in Johannesburg, South Africa (Aug. 13, 1997) (observing that the greatest challenge facing the new South Africa is the challenge of meeting its citizens' high expectations for change, but also remarking that the right to be heard constituted a significant change and was greeted as a valued right in and of itself).
Here is how the Constitutional Court, in its September 1996 decision, described the process:

Numerous public and private sessions were held and a wide variety of experts on specific topics were consulted on an ongoing basis. In response to an intensive country-wide information campaign, including public meetings and open initiations to the general public, the CA also received numerous representations, both oral and written. When the new text of the Constitution was submitted for certification, "because of the importance and unique nature of the matter, the directions [issued by the Constitutional Court] also invited any other body or person [besides political parties] wishing to object to the certification to submit a written objection." Examination of the documents in the CA's online archives illustrates the reach of this process. Individuals, as well as political parties and NGOs contributed extensively. A telephone hotline was created allowing any person to submit oral comments, and information was disseminated in all eleven of South Africa's official languages. As the Court explained, in order to achieve certification, the document would have to entrench all "fundamental rights," and thus the CA and the Justices were obliged to consider the status of rights worldwide, to determine whether all those rights generally deemed "fundamental" had been properly entrenched in the new document.

The record suggests, at least to this observer, that the consultative, open, two-stage process contributed to greater specificity, both linguistically and analytically, in the text of the final document. Explicit protection of "decisions concerning reproduction," which in American doctrine wanders like a lost child between theories of liberty, due process, family privacy and individual autonomy, was clearly articulated as a form of "bodily integrity" in Section 12 (Freedom and Security of the Person) of the new text of the 1996 Constitution. This process also permitted the Constitutional Court,

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129 Id. at 783.
in its certification opinions, to comment contemporaneously on the nature of the rights created in a manner that should carry significant weight with lower courts and help future Constitutional Courts ascertain the meaning of the rights in the context of South Africa's transition to a racially neutral, non-sexist democracy.

A. Inclusion of Rights for Children in the Republic of South Africa's Constitution

The RSA Constitution contains the most explicit constitutionalization to date of children's rights. It is no accident that the South African Constitution singles out children for special protections. One scholar suggested that, "the conception of justice in periods of political change . . . is alternately constituted by, and constitutive of, the transition. . . . As a state undergoes political change, legacies of injustice have a bearing on what is deemed transformative."134 The transitional moment in South Africa coincided with a transitional moment for children worldwide and in Africa—the promulgation and virtually universal acceptance of the 1989 United Nations Convention on the Rights of the Child135 and the 1990 promulgation of the African Charter on the Rights and Welfare of the Child.136 Perhaps even more telling in situating children's rights as part of South Africa's transformative agenda is the fact that children played a central and highly visible role in the South African struggle for dignity, freedom, and equality. Participants in the national debate on rights emphasized the debt owed by the nation to its youth, the sacrifices of youth in the battle against apartheid and the destructive impact of the apartheid system across every aspect of the lives and prospects of the majority of the country's children.137 Observers emphasized how apartheid laws such as the Group Areas Act and "influx control" laws forced parents to leave their children in order to find work, forced children to leave their homes and

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137 See Justice of the Constitutional Court of South Africa Yvonne Mokgoro, Address to Philadelphia School Children at University of Pennsylvania Law School, Phila., Pa. (Dec. 9, 1997); see also Timothy J. Treanor, Relief for Mandela's Children: Street Children and the Law in the New South Africa, 63 FORDHAM L. REV. 883, 893 n.67 (citing the 1994 conclusions of the Goldstone Commission of Inquiry into the Effects of Public Violence on Children that apartheid had been "uniformly and profoundly destructive" effects on children).
seek survival on the streets.\textsuperscript{138} Enforced separation and inequalities in safety, education, shelter and every other arena stunted the mental growth of children of all races and classes.

The struggle against apartheid engaged a generation of children as active combatants as well as passive victims.\textsuperscript{139} For those seeking to articulate a scheme of children's rights, the brutality of children's experiences under apartheid and children's status as freedom fighters provided a powerful motivating context. Albie Sachs, Justice of the Constitutional Court of South Africa, observed "[t]he greatest abuse to which South African children are subject today comes from the organized might of the state. Any charter of children's rights in a democratic South Africa has to take this fact as a starting point."\textsuperscript{140} In arguing for a child's right to play, Justice Sachs pointed to a history in which children's "school grounds are occupied by troops, when their courage is displayed not on the sports field but in the torture chambers of the police."\textsuperscript{141} In addition to those children jailed for political activism, large numbers of street children, who should have been served by a child protective system, were swept into criminal systems, often in the same facilities as adult offenders, and detained indefinitely for petty offenses.\textsuperscript{142} In his 1994 State of the Nation Address, President Mandela specifically highlighted the plight of street children and children in detention and committed national resources to meeting their needs.\textsuperscript{143} Children also played a direct role in the creation of a children's rights agenda during this transformational moment. In May and June 1992, the International Summit on the Rights of Children in South Africa brought together over two-hundred children between twelve and sixteen, representing all races and classes and all regions of South Africa. This congregation drew up and adopted a "Children's Charter of South Africa" and demanded the right to a children's council of representatives in any future governments. The Charter concludes: "Children will no longer remain silent about their

\textsuperscript{138} See generally Treanor, supra note 137, at 892-95.
\textsuperscript{139} See generally id. at 891-98 (describing the root causes and psychological tolls of the problem of street children in developing countries in general and South Africa in particular); UNICEF & NATIONAL CHILDREN'S RIGHTS COMM., CHILDREN AND WOMEN IN SOUTH AFRICA: A SITUATION ANALYSIS (1993).
\textsuperscript{140} SACHS, supra note 101, at 79.
\textsuperscript{141} Id. at 81.
\textsuperscript{142} See Treanor, supra note 137, at 909-10 (describing the treatment of children by the criminal justice system in apartheid South Africa).
\textsuperscript{143} See id. at 918 (citing Nelson R. Mandela, State of the Nation Address (May 24, 1994)).
rights, but will speak and even shout out about their needs and demands.\textsuperscript{144} In response to pressures for representation of children, a special Committee on Youth composed of children and adolescents was formed to represent the young in policy-making.\textsuperscript{145}

As an illustration of the birthing of children's rights, and of the process by which rights became more particularized during the transition from interim to Final Texts, consider Section 30 of the interim Constitution, found in Chapter 3, Fundamental Rights.

\textbf{Children}

30. (1) Every child shall have the right—

(a) to a name and nationality as from birth;
(b) to parental care;
(c) to security, basic nutrition and basic health and social services;
(d) not to be subject to neglect or abuse; and
(e) not to be subject to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health, or well-being;

(2) Every child who is in detention shall, in addition to the rights which he or she has in terms of section 25 [rights of detained persons], have the right to be detained under conditions and to be treated in a manner that takes account of his or her age.

(3) For the purpose of this section a child shall mean a person under the age of 18 years and in all manners concerning such child his or her best interest shall be paramount.\textsuperscript{146}

Section 30 of the IC far exceeds rights afforded to children under the U.S. Supreme Court’s interpretations of the U.S. Constitution, protecting not only “negative” or “first generation” rights but also “socio-economic” or “second generation” rights.\textsuperscript{147} Although rights to socio-economic benefits are gen-

\textsuperscript{144} International Summit on the Rights of Children in South Africa, The Children's Charter of South Africa, May 27 - June 1, 1992 in Eric Atmore, Submission to the Constitutional Assembly Theme Committee [visited Nov. 12, 1999] <http://www.constitution.org.za/form.html> (searching the entire collection with the search string “international summit on the rights of children”). The Children’s Charter includes all of the rights adults often include in their formulations, but the spirit and emphasis is different in many subtle ways, with a greater focus on children’s direct participation in decision-making.

\textsuperscript{145} See Vanessa De Jongh, The President's Award Committee [visited Nov. 12, 1999] <http://www.constitution.org.za/form.html> (searching the entire collection with the search string “Youth Committee”).

\textsuperscript{146} S. Afr. Const. of 1993 (IC), ch. 3, § 30.

\textsuperscript{147} See supra text accompanying note 26.
erally qualified in international instruments depending on available resources, Section 30(1)(c) has been interpreted by some South African scholars as having established a priority in favor of children: when government and the judiciary are confronted with competing claims to economic resources, children may claim a priority which the judiciary would be bound to apply in concrete cases. This section of the IC ultimately became Section 28 in the New Text. I will use underlining to indicate additional concepts or details not found in the earlier IC text.

**Children**

28. (1) Every child has the right—

(a) to a name and nationality from birth;
(b) to family or parental care, or to the appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that—
   (i) are inappropriate for a person of that child's age; or
   (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 [Freedom and security of the person] and 35 [Arrested, detained, and accused persons], the child may be detained only for the shortest appropriate period of time, and has the right to be—
   (i) kept separately from detained persons over the age of 18 years; and
   (ii) treated in a manner, and kept in conditions, that take account of the child's age:
(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

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148 See id. at 48.
(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years.\textsuperscript{149}

Section 30 and its successor Section 28 draw upon a number of comparative and international law sources, including "the African Charter on the Rights and Welfare of the Child . . . and, pre-eminently, the United Nations Convention on the Rights of the Child."\textsuperscript{150} The U.N. Children's Rights Convention is the most rapidly and universally accepted human rights document in the history of international law, having been adopted before its tenth anniversary by every nation save two: Somalia, which currently lacks a functioning government, and the United States of America.\textsuperscript{151} The enumeration of rights to name and nationality, to parental care, to social rights, to representation of counsel, and to legislative and judicial decisions that prioritize the interests of children, all bear a strong resemblance to principles of the UN Convention. Beyond that, the South African Constitution has other striking features including: the detailed rights accorded to children in detention, the specific provisions regarding "family care" for children separated from their parents, and the right to counsel at public expense for children not only in criminal, but also in civil cases.\textsuperscript{152} As Americans, we maintain idealized images of our own children as precious objects sheltered from adult cares. We balk at the notion of children's autonomy, seeing it as a threat to our own rights, and regard poor and especially incarcerated children as

\textsuperscript{149} S. AFR. CONST. of 1996, ch. 2, § 28.

\textsuperscript{150} CONSTITUTIONAL LAW, supra note 100, at 33-1.

\textsuperscript{151} Within four years of its adoption by the United Nations General Assembly, 136 nations had ratified the Convention and another 23 signed the convention. See Treanor, supra note 137, at n.146. Presently 140 nations have signed the Convention and 191 countries have become a party to the Convention. See United Nations, 11 Convention on the Rights of the Child (visited Oct. 19, 1999) <http://www.un.org/Depts/Treaty/final/ts2/newsfiles/part_boo1v_boo1iv_11.html>. UNICEF also reports that the United States has signed the treaty, but failed to ratify it, while Somalia has neither signed nor ratified it. See UNICEF, Status: The First Nearly Universally Ratified Human Rights Treaty In History (visited Sep. 28, 1999) <http://www.unicef.org/crc/status.htm>.

At latest report, Senator Jesse Helms, powerful Chair of the Senate Foreign Relations Committee, had notified Secretary of State Madeline Albright that he would fight any attempt to place the Children's Convention on the Senate's agenda. See David P. Stewart, Ratification of the Convention on the Rights of the Child, 5 GEO. J. ON FIGHTING POVERTY 161, 165 (1998) "In a letter dated May 1, 1997, echoing earlier statements of concern, Senator Helms . . . reiterated his request that the Convention not be sent to the Senate for its advice and consent . . . ." (citing Letter from Senator Jesse Helms, Chairman, Senate Committee on Foreign Relations, to Madeline K. Albright, Secretary of State [May 1, 1997] (on file with the Department of State)).

\textsuperscript{152} See S. AFR. CONST. of 1996, ch. 2, § 28(1)(b), (g), (h).
"other people's children," alien and dangerous, who are by definition "delinquents" and "criminals." While such attitudes permeate all societies that have historically been divided by class and color, the constitutional rhetoric of the new South Africa explicitly commits all South Africans to sustaining and protecting all children. Unlike American law, which provides for diluted Due Process rights for children, the South African provisions single out children in detention for heightened due process rights reflecting the unique role played by children who were front line fighters in the battle against apartheid.

B. Jurisprudential Specificity: Textualizing the Concepts of Horizontality, Suspension, Limitation and Interpretation

The South African experience led to the textualizing of jurisprudential concepts that the U.S. Constitution has left largely to judicial interpretation, including the fundamental topic of methods of interpretation. The interim Constitution's text, as noted earlier, resolved many of these issues explicitly. However, the IC was ambiguous on one crucial question: whether the Bill of Rights was binding only on government entities or whether it also bound private citizens. In American constitutional theory, rights, other than those stemming from the Thirteenth Amendment and certain very narrow exceptions to the Fourteenth Amendment, are generally interpreted as restraints on government, not on private action. In order to sustain a constitutional rights claim, the individual must show a causal connection between "state action" and harm to a constitutionally protected interest. South African scholars approach this issue with different terms and through a different lens. In the words of the Constitutional Court, "the term 'horizontal application'... indicates that those rights also govern the relationships between individuals, and may be invoked by them in their private disputes while 'the term 'vertical application' is used to indicate that the rights conferred on persons by a bill of rights are intended only as a protection against the legislative and executive power of the state in its various manifestations."

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154 See Dickson, supra note 100, at 548-49 (discussing whether the IC had any horizontal effect or intentions); BASSON, supra note 26, at 15-16.
155 See, e.g., Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (requiring state action to trigger the protection of rights under the Fourteenth Amendment, but finding that judicial enforcement of a private racially restricted covenant constitutes state action).
156 Delisa Futch, Du Plessis v. De Klerk: South Africa's Bill of Rights and the Issue
Lower courts and South African scholars were divided on whether the interim Constitution did or did not envision "horizontal application" of the various enumerated fundamental rights. In May 1996, the Constitutional Court, borrowing its analysis from the German Constitution's model, declined to find that rights under Chapter 3 of the interim Constitution must be given direct horizontal effects. The new text, however, appears to authorize horizontal application in certain situations. For example, Section 8(2) states that "[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right." Moreover, the 1996 Constitution also requires courts, in the absence of statutory law, to develop common law to give effect to fundamental rights. While the Court will certainly be called upon to "interpret" this language, and may yet interpret it narrowly, some observers see it as a significant strengthening of the Bill of Rights. Horizontality has major ramifications for developing emerging rights because it erodes the wall of separation between "public" and "private" and prompts critical scrutiny of relationships rooted in common law and tradition.

The 1996 Constitution also clarified provisions regarding the Interpretation and Limitation Clauses noted earlier in my discussions of the interim Constitution. The new section on interpretation reads as follows (changes from the interim Constitution indicated by underlining):

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum —

   (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

   (b) must consider international law; and

   (c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum

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158 See id. at 1011 ("After the Interim Constitution went into effect, South Africa's lower courts reached different conclusions on whether the Bill of Rights was horizontally applicable.").
159 S. AFR. CONST. of 1996, ch. 2, § 8(2).
160 Id. at ch. 2, § 8(3)(a).
161 See generally CONSTITUTIONAL LAW, supra note 100, at 10-35 to 10-42 (describing the potential to over-apply rights that are horizontally enforced and the effect that the limitations clause will have on this legislation).
must promote the spirit, purport and objects of the Bill of Rights.\textsuperscript{62}

These two changes are significant. The active form "must promote" replaces the more passive formulation "shall have regard to" in the IC version. While a right to dignity had been expressly protected in a section of the IC Bill of Rights, the New Text elevates dignity to a level on par with the key principles of equality and freedom. Scholars expect the Court to further clarify the content of "dignity", which, at its broadest, could be interpreted to encompass the entire range of human rights, including the socio-economic rights essential to achieving human dignity. The Constitutional Court has not gone so far, but in its landmark case \textit{S. v. Williams} it concluded that laws permitting the whipping of juveniles as punishment for criminal infractions violated the right to human dignity.\textsuperscript{163} In another landmark case, \textit{S. v. Makwanyane}, the Constitutional Court held the death penalty unconstitutional.\textsuperscript{164} In her concurring opinion Justice O'Regan explained:

\begin{quote}
The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in chap 3 . . . . [H]uman dignity is important to all democracies. In an aphorism coined by Ronald Dworkin, "Because we honour dignity, we demand democracy."\textsuperscript{165}
\end{quote}

The Limitations provision in the IC was also modified in the 1996 Constitution, and now reads:

36.(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and

\begin{footnotesize}
\textsuperscript{163} See 1995 (3) SALR 632, 657-58 (CC); see also \textit{CONSTITUTIONAL LAW, supra} note 100, at 17-8 (discussing \textit{S. v. Williams}).
\textsuperscript{164} See 1995 (3) SALR 391 (CC).
\textsuperscript{165} \textit{Id.} at 507, paras. 328-30 (O'Regan, J., concurring).
\end{footnotesize}
(e) less restrictive means to achieve the purpose.\textsuperscript{166}

The new text gives courts more explicit guidance regarding the factors to be considered in evaluating whether a limitation is "reasonable and justifiable." However, this reformulation significantly changed key parts of the 1993 text. First, missing from the new text is the concept that limitations could not "negate the essential content of the right in question."\textsuperscript{167} Second, section 36 of the new text omits the two-tier scheme of section 33 of the interim Constitution, in which certain rights could be limited only on a showing that the limitation was "necessary." The two-tiered formulation had provoked significant controversy. Some critics objected to the creation of a hierarchy of rights, and had suggested that this skated dangerously close to the American model of rational basis/strict scrutiny developed via judicial precedents.\textsuperscript{168} Critics observed that these American precedents had failed to bring clarity to U.S. law and would not provide a workable guide for South Africa, given the different histories and cultures of the two systems.\textsuperscript{169}

This Part has provided a thumbnail sketch of the process of creating a South African Bill of Rights and of how children were for the first time added to the list of rights-bearers. In the South African scheme, children are given a set of specially defined rights beyond those enjoyed by "everyone." It seems clear that children's rights are viewed as part of a transformative agenda. Many aspects of children's rights in South Africa can be traced to the participation of children in the transitional struggle to defeat apartheid and in the process of constitution-building that followed. As a result, children's rights are now explicit and justiciable, and children are empowered by procedural protections of their rights and by their inclusion in a detailed constitutional scheme which encourages purposive and holistic interpretations of those rights.

V. A COMPARISON CASE: DESHANEY V. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES

To illustrate the differences between the two constitutional


\textsuperscript{167} S. AFR. CONST. of 1993, ch. 3, § 33(1)(b).

\textsuperscript{168} See CONSTITUTIONAL LAW, supra, note 100, at 12-8 to 12-9.

\textsuperscript{169} See id. at 12-10 ("[T]he different histories of the countries and the arguably different philosophies underlying the respective Constitutions militate against adopting the American standards of review when analysing cases under the Limitations Clause.").
schemes as they address claims of children, consider the case of *DeShaney v. Winnebago County Department of Social Services*, decided in 1989 by the U.S. Supreme Court. I will describe first how it unfolded under U.S. constitutional principles and then how a similar case would play out under the RSA Constitution.

Joshua DeShaney, as a four-year-old child, had been brutally beaten by his father, suffering severe brain damage that left him profoundly retarded. The relief sought by his representatives was an award of damages against the County Department of Social Services charged with responsibility under state law for investigating and responding to allegations of child abuse. The hospital authorities and Social Services had temporarily detained Joshua after he was brought to a hospital emergency room with suspicious injuries, but had concluded they did not have sufficient evidence to detain him further. Winnebago Social Services assigned a social worker to make periodic visits to Joshua's home. Although the caseworker observed a growing list of alarming circumstances that clearly warranted removal, the social worker allowed the child to remain with his father. The constitutional claim was based on the substantive due process theory that the County's failure to protect Joshua DeShaney, despite evidence that he was being abused, deprived the child of liberty in violation of the Due Process Clause of the Fourteenth Amendment. The Court rejected this claim, first holding that the Constitution conferred no right to government protection against private violence. It also rejected Joshua's second argument, that in assigning a social worker to monitor his case the County had entered into a "special relationship" with Joshua, creating an affirmative duty to protect him from danger. Joshua relied on cases like *Youngberg v. Romeo*, in which the Court found that the substantive due process component of the Fourteenth Amendment required the government to provide a safe environment for inmates in a mental hospital. However, the

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171 I recognize that I will be treading on shaky ground in attempting to apply South African law, since constitutional and procedural concepts rarely translate seamlessly from one idiom to another. But perhaps the exercise will evoke a response from South African scholars more attuned to the nuances of their law than this outsider.
172 See *DeShaney*, 489 U.S. at 192-93.
173 Id. at 195.
174 See id. ("[N]othing in the language of the Due Process Clause itself requires the state to protect the life, liberty, and property of its citizens against invasion by private actors").
175 See id. at 197-200.
Court distinguished Youngberg and similar prisoners' rights cases as limited only to persons actually in the coercive physical custody of the State.\textsuperscript{177} This case was different, argued Justice Rehnquist, writing for the majority, because Joshua was not in state custody.

While the State may have been aware of the dangers Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all. . . . The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them. In defense of them it must also be said that had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due process Clause that forms the basis for the present charge of failure to provide adequate protection.\textsuperscript{178}

This brief excerpt reveals the highly contingent nature of the Court's perspective and of the public/private dichotomy on which it relied. In what sense did Joshua inhabit a "free world," since it was state law and state authorities that had placed him in the legally enforceable control of his abuser? Why does the Court assume there would be state action if the State removed the child from his father's custody, but not when the State returned him to the father's custody after his hospitalization?

In fact, Justice Rehnquist was correct that existing constitutional precedents would have provided Joshua's father with a justiciable substantive due process claim had the authorities removed Joshua from his father's care or declined to return him when his father brought him to the emergency room. Under current jurisprudence, the fact that intervention was in the best interest of the child is not sufficient to sustain it or to insulate the State from liability. Following parental rights doctrines laid down in cases like Santosky v. Kramer,\textsuperscript{179} the State must prove by clear and convincing evi-

\textsuperscript{177} See DeShaney, 489 U.S. at 200 (distinguishing Youngberg, 457 U.S. at 315-17, stating, "It is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty— which is the 'deprivation of liberty' triggering the protections of the Due Process Clause").

\textsuperscript{178} Id. at 202-03.

\textsuperscript{179} 455 U.S. 745, 753 (1982) (holding that the Fourteenth Amendment protects the fundamental liberty interests of natural parents in the "care, custody, and management" of their children).
dence that the child is at imminent risk of serious physical harm in order to remove him from his father's custody. State intervention in disregard of parents' rights—for example, gross negligence in verifying the facts of a report before intervening—will trigger a constitutional claim by the parent. After *DeShaney*, the imbalance between protecting the rights of children and the rights of parents is even more pronounced. American constitutional law maintains traditional disincentives for over-intervention and under-intervention is cost free, since the victim of the State's failure to act cannot state a justiciable claim. Passionate dissents from Justices Brennan and Blackmun made many of these points, and American constitutional scholars stretched to find creative arguments within the framework of American constitutional law that might provide a remedy for Joshua and others like him. Attempts to reconstruct constitutional law to recognize a child's substantive due process rights to bodily integrity and to cast these as positive rights to state protection from an abusive parent are invariably caught between the rock of "tradition" and the hard place of "state action." Birthing children's rights will not be easy. Opponents will point to American constitutional traditions that have long recognized parental rights over children, (including a parent's right to administer corporal punishment) and have given great weight to adults' rights of privacy and autonomy, while denying or diluting such rights when claimed by children.

The *DeShaney* case would be approached very differently under South African law. The text of Section 28(1) of the Constitution would provide a clear starting point, stating that "every child has the right . . . (d) to be protected from maltreatment, neglect, abuse or degradation." In interpreting this text, a judge must bear in mind the injunction in Section 7(1) and (2) that the "Bill of Rights is a cornerstone of democracy in South Africa" and that the "state must respect, protect, promote and fulfil the rights in the Bill of Rights." In addition, Section 39 mandates that:

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180 *See DeShaney*, 489 U.S. at 212 (Brennan, J., dissenting) (arguing that "inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it"); id. at 213 (Blackmun, J., dissenting) (arguing for a more "sympathetic" reading of the Fourteenth Amendment that "comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging"); see also Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 Harv. L. Rev. 1359 (1992) (arguing that the *DeShaney* case is more effectively addressed by the Thirteenth Amendment than by the Due Process Clause).


182 *Id.* at § 7(1) – (2).
(1) When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law and (2) when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

The term "dignity," as discussed earlier, is closely associated with notions of bodily integrity, and by singling out children as subjects of special concern, the Constitution suggests that "the spirit, purport and objects of the Bill of Rights" include a shifting of priorities towards protecting children as among the most vulnerable and powerless of the citizens who suffered under apartheid. A finding that state authorities have no duty of care towards children who are not yet in state custody, but whom the state specifically knows to be at risk, would negate the meaning of Section 28(1)(d), making it no different from other rights of bodily integrity accorded to all persons in state custody, including children. Not surprisingly, given its text, its context, and the wider purposes and spirit of the Bill of Rights, South African scholars have interpreted the right to protection from abuse as "aimed against executive or administrative action or legislation which renders children vulnerable to neglect or abuse." Thus a child in the position of Joshua DeShaney would succeed in a South African court.

The story would not end here, however, since Joshua would also have a protected right "to family care or parental care, or to appropriate alternative care when removed from the family environment." Under this formulation, the right to family relationships is conceptualized from the child's perspective as a right of the child. In balancing the child's dual rights to family care and state protection from abuse, the court is instructed by Section 28(2) that "a child's best interests are of paramount importance in every matter concerning the child." In civil cases involving removal under 28(1)(h) the child most likely would be entitled to an attorney at state expense, since substantial injustice would result to the

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183 Id. at § 28(1) - (2).
184 CONSTITUTIONAL LAW, supra note 100, at 33-8 (quoting Azhar Cachalla et al., FUNDAMENTAL RIGHTS IN THE NEW CONSTITUTION 102 (1994) and suggesting that a state actor must exercise "reasonable professional judgment" in investigating and acting upon evidence of abuse).
186 Id. at § 28(2).
187 Id. at § 28(1)(h) (mandating the assignment of a state funded legal practitioner in civil matters affecting children where "substantial injustice" would otherwise result).
child (and to his family) not only if the child were returned to
a dangerous environment, but equally if the child were
wrongfully separated from his parents for any significant
length of time.

Various "loop holes" might well allow a South African court
to limit Joshua's right to protection from abuse or to suspend
a finding of violation pending state attempts at remediation.
While these principles of limitation and suspension have
aroused serious concern, they do provide courts with alter-
natives that reduce incentives to give tortured interpretations
of the constitutional text in an effort to deny the very exis-
tence of a right.

Finally, what difference, if any, would the South African
language addressing horizontal application make to Joshua's
case? There are significant differences between the American
perspective on state action and the German principles on
which the South African drafters drew for their models. Ar-
guably, Section 8 means that private individuals have a duty
of protection analogous to that imposed on the state actors.
Under this interpretation, friends, neighbors, and "innocent
bystanders" would be transformed into what American stat-
utes call "mandatory reporters," legally obligated to report in-
cidents of abuse.

South African courts would also be obligated to transform
the common law of custody in order to give effect to children's
rights to protection from abuse and to have their best inter-
est considered paramount. Traditions rooted in parental
property rights would be discarded, despite their pedigree,
since the Constitution clearly aims to strike a new balance
that respects the rights of all persons to human dignity and
equality, including that of children.

VI. CONCLUSION

Both the American and South African experiences provide
cautionsary tales and constructive insights that may prove
useful to those who advocate the incorporation of children's
rights into the scheme of constitutional law. Bombarded by
attacks from domestic critics of "family rights," who see them
as a judge-made elitist contraption with no grounding in the
text of the document, it is heartening for American pro-
ponents of the doctrine to see how strongly and specifically the
expansive principles of family autonomy and privacy, gender
equality, procreational rights, and children's rights, so em-
battled here at home, are reflected in the most up to date of
constitutions.

The specificity of the South African text, one hopes, will
help to prevent the backlashes and judicial backsliding that characterize American experiences following periods of rights-building. In contrast to the U.S. Constitution, whose drafters left us wrangling endlessly over the legitimacy of interpretational models, the South African Constitution includes detailed instructions on how the text should be read and applied. While these provisions may not resolve all future interpretational dilemmas, at least they explicitly encourage judges to embrace opportunities for constitutional growth and to avoid the traps of excessive formalism.

In those transitional moments when a constitution is being created, its authors seek the most up-to-date version of human rights consistent with their own cultural life. At such times, the door is thrown open to explicit incorporation of emerging rights. In established constitutional schemes, such as that of the United States, recognition of emerging rights depends on a robust belief among judges and the people in the legitimacy of judicial interpretation. Judges must approach the written document as a “living” thing, not only open to interpretation, but positively designed to grow through judicial interpretation. Neither the amendment process nor the democratic process alone can provide meaningful avenues for growth and renewal when the emerging claims are those of isolated minorities or even of numerical majorities who have been systematically excluded from power.

I began this paper, as I begin my seminars on children’s rights, by noting that the United States Constitution nowhere mentions children. I was intrigued recently when one of my students told me I was mistaken, and pointed to the Preamble of the Constitution. “Doesn’t it say right here in black and white that its purpose is ‘to Secure the Blessings of Liberty to ourselves and our Posterity?’” I couldn’t help but smile, even as I formulated a Socratic rejoinder. Is the Preamble binding law? Or merely a guide to textual interpretation? What does the term “liberty” mean in this context: only those liberties contained in the text that follows the Preamble, or novel liberties undreamed of by its framers? What good is liberty to children, anyway? And who is this “posterity” of which the framers speak? Taken literally, it could mean the adult descendants of the ratifiers, our present day Daughters of the American Revolution and Society of Colonial Dames. If that narrow interpretation strikes you as absurd, explain how the framers possibly could have believed their “posterity” would include the children of African slaves and immigrants of every color and class. These quibbles aside, I would like to believe that my student got it right. The framers chose those words to instruct us in our duty to use the document they
created for posterity as well as for the specific ends they had in their limited field of view. They believed in liberty as a value in search of perfection, not as a static definition of existing rights. Under this interpretation, we must find a way, within the American constitutional scheme, to explore the concepts of liberty, equality, and dignity as applied to persons of all ages and capacities, and we will secure these blessings to all Americans, including our children.