

A CONSTITUTIONAL CALL TO ARMS

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Thank you very much, Dean. I appreciate your introduction.

I am so grateful to the University of Colorado Law School and the Byron R. White Center for the Study of American Constitutional Law for giving me the opportunity and honor of presenting the John Paul Stevens lecture this year. I thank the Hispanic Bar Association and the LGBT Bar Association for co-sponsoring this event. And, of course, how could I not thank the person who has been my sidekick all these years, my wife, Dorothy.

I want to acknowledge the presence of our chief judge in the circuit: Chief Judge Tim Tymkovich, who has been introduced. Tim and I are good friends, and I can't believe that he would be on a busman's holiday coming to the talk this evening, but thank you, Tim, for being here as well.

I knew Justice White pretty well. I met him around 1959, when he was working as the head of Citizens for Kennedy, when then-U.S. Senator John F. Kennedy was running for the White House. After I went on the court, because we shared a common love of fly-fishing, we would spend a bit of time each year when he was off in southern Colorado on the Rio Grande fishing. Let me say about Justice White: he was a modest guy with little to be modest about. When he got a call from President Kennedy to be appointed to the U.S. Supreme Court, he

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said “Why on earth are you doing that?” This was a case of the office seeking the man instead of the man seeking the office.

I didn’t know Justice Stevens very well. I met him after I came on the court. Both Justices truly supported and defended the Constitution, both physically through their military service and intellectually through their judicial service.

Justice Stevens dissented in the case of *Texas v Johnson*,¹ in which he somewhat enigmatically wrote that the majority was wrong and that bans on flag burning were permissible. Clearly, he was talking from his perspective as a veteran of World War II. His dissent is a great commitment to the principles of American liberty and freedom. The majority disagreed that his was the best way to express those principles, but that was his view.

In *Bush v Gore*,² Stevens authored a dissent saying that the nation suffered as a result of its loss of confidence in the judiciary as an impartial guardian of the rule of law.

In *Citizens United*, Stevens argued that the majority opinion rejected the “common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding”³

One of the nicest things said about Justice Stevens was Cliff Sloan writing that he was the greatest justice. He wrote: “Justice Stevens has steadfastly thought to enforce the rule of law even when the presidency hangs in the balance. No other justice has a comparable record of leadership in vigorously enforcing the rule of law against presidents in both parties.”⁴

In my talk today, I would like to focus on three things. One, the spirit of the American Constitution: the Ninth and Tenth amendments, which are almost never mentioned and almost always ignored. Two, our oath to support and defend the Constitution of the United States, and what that means with regard to challenges in contemporary society to constitutional norms and standards. And, I will conclude with a comparison to what happened in the Weimar Republic of Germany

1. 491 U.S. 397 (1989).

2. 531 U.S. 98 (2000).

3. 558 U.S. 310, 479 (2010) (Stevens, J., dissenting).

4. Cliff Sloan, *The Greatest Justice*, SCOTUSBLOG (June 1, 2010, 2:03 PM), <http://www.scotusblog.com/2010/06/the-greatest-justice/> [https://perma.cc/SBW5-7Q3H].

on the pretext of a national emergency through the rise of Nazism.

As to the first topic, the state of Virginia played a major role in the eventual adoption of a Bill of Rights.⁵ George Mason had written a Bill of Rights to propose to the Constitutional Convention and had relied on the Virginia Declaration of Rights.⁶ It was very controversial whether we should have a bill rights in the U.S. Constitution. George Mason's proposed declaration was voted down unanimously. That goes to say, it was not a *fait accompli* that we were going to have a bill of rights, because Alexander Hamilton and others had argued against it. They asked: "For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"⁷

James Iredell warned the North Carolina ratifying convention that "it would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up.' Such a list could too easily be misunderstood to mean that any right not listed was no longer (or never was) a [constitutionally protected] right."⁸ There was a fear that the Bill of Rights might actually endanger rights. According to Professor Mitchell Gordon, who wrote the article "Getting to the Bottom of the Ninth Amendment," the concern that a Bill of Rights might actually endanger rights was premised on the proposition that a written list of rights might be misinterpreted to mean that only the listed rights were to enjoy constitutional protection.⁹

Does that sound a bit familiar today? Justice Scalia and others advance what I will call a "rigid view" of the Bill of

5. J. Gordon Hylton, *Virginia and the Ratification of the Bill of Rights*, 25 U. RICH. L. REV. 433, 434 (1991).

6. *Id.*

7. THE FEDERALIST NO. 84 (Alexander Hamilton).

8. Mitchell Gordon, *Getting to the Bottom of the Ninth: Continuity, Discontinuity, and the Rights Retained by the People*, 50 IND. L. REV. 421, 428 (2017).

9. *Id.* at 428–29 ("This fear that a bill of rights might actually endanger rights was thus premised on the concern that a written list of rights might be misinterpreted to mean that only the listed rights were to enjoy constitutional protection. . . . Better to avoid the problem entirely, by making no list at all, than to invite disaster with a partial enumeration.").

Rights, essentially arguing that a limited view is the correct interpretation.¹⁰ That is contrary to the intent advanced in the founding debates and, guess what, precisely what the Founders' feared would happen.

Madison wrote the original text of the Ninth Amendment that was ultimately modified by the Select Committee of the House, which eventually changed the language to what it is now.¹¹ And that is as follows: "The enumeration in the Constitution of certain rights *shall not be construed* to deny or disparage others retained by the people."¹²

As a textualist, as many of us are,¹³ I had one of my clerks pull the definition of "disparage" at the Founding. According to Samuel Johnson's 1792 dictionary, it was defined as "to injure by comparison with something of less value."¹⁴ So, the concern was that the rights retained by the people not be treated as inferior to those identified in the Bill of Rights.

The Tenth Amendment, often cited as a federalism amendment, provides: "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."¹⁵ Note that even though the Tenth Amendment is often cited for its textual commitment to federalism—and the first portion of that amendment does indeed speak to the retained powers for the states—too often when cited, readers ignore the second clause

10. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) (noting the Ninth Amendment's "refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even farther removed from authorizing judges to identify what they might be"); *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring) ("I reject the proposition that the Due Process Clause guarantees certain (unspecified) liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty.").

11. 1 ANNALS OF CONG. 435 (1789) (Joseph Gales ed., 1834). Madison's original text read:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

Id.

12. U.S. CONST. amend. IX (emphasis added).

13. Elena Kagan, The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes (Nov. 18, 2015) ("We're all textualists now.").

14. SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (10th ed. 1792).

15. U.S. CONST. amend. X.

of that amendment, which places its foundation in the people.¹⁶ That reinforces the core principle that we Americans really and truly are a free people.

Plus, consider this: the Fourteenth Amendment, adopted after the Civil War, as you all know, extends the force of the Bill of Rights to the states.¹⁷ The Bill of Rights previously limited federal action, but the Due Process and the Equal Protection Clauses of the Fourteenth Amendment extended the Bill of Rights to protect citizens of the United States from unconstitutional state action.¹⁸ The Constitution thus covers all citizens of the United States, “subject to the jurisdiction thereof.”¹⁹

Scholars have long debated the meaning of these amendments. During his confirmation hearings, Robert Bork infamously referred to the Ninth Amendment as an “ink blot” defying judicial construction.²⁰ Some argue that the amendment is nothing more than a refutation of the concern of Madison that the inclusion of a Bill of Rights could be misinterpreted as expanding the scope of the federal government’s power. Others have argued that the Ninth Amendment is a recognition that we enjoy certain natural rights. (No doubt the “endowed” and “inalienable” rights referred to in the Declaration of Independence had to be fresh in the Framers’ minds. For our purposes tonight, and in synthesis, I will call the Ninth Amendment the “spirit and soul” of the Constitution.)

My former colleague, who was a judge on the Tenth Circuit and now is a professor at Stanford Law School, has argued that the Ninth Amendment does recognize natural rights, but that it is for “the representatives of the people, rather than members of the judiciary, to make the ultimate determination of

16. *Id.*

17. U.S. CONST. amend. XIV.

18. *Id.* For an explanation of the incorporation of the bill of rights through the Fourteenth Amendment, see, e.g., Kenneth Katkin, “*Incorporation*” of the *Criminal Procedure Amendments: The View from the States*, 84 NEB. L. REV. 397, 397–98 (2005) (explaining that “[f]rom 1932 to 1969, the United States Supreme Court ‘incorporated’ most of the criminal procedure provisions of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment”).

19. That clause could itself be the subject of a separate lecture on the treatment of Native Americans under the Constitution.

20. See, e.g., Glenn Harlan Reynolds, *Judge Bork’s Inkblot*, N.Y. TIMES (Sept. 12, 2005), <https://www.nytimes.com/2005/09/12/opinion/judge-borks-inkblot.html> [<https://perma.cc/9AH5-KP57>].

when natural rights should yield to the peace, safety, and happiness of society.”²¹

I’m not going to opine about the proper role of judges in interpreting the Ninth and Tenth Amendments. Those cases keep coming to us. But I do wish to underscore a point implicit in Professor McConnell’s view: that we the people, and especially those of us who become attorneys, have a duty to help define the scope and extent of those constitutional rights. We do it through litigation, we do it through the legislative process, or whatever will properly come before you as lawyers. It is our obligation as lawyers and citizens.

That brings me to the second point, and that is the oath that we take, the oath that you as lawyers take and that you students will be taking. The oath comes from Article VI, Section 3.²² It is an interesting place for the oath: next-door to the Supremacy Clause of the U.S. Constitution. That clause generally makes the Federal Constitution the supreme law of the land, and the oath clause nearby requires all members of the U.S. Congress to swear to the Constitution.²³ But it also requires, interestingly, all state officials, state legislators, and state executive and judicial employees to swear to support and defend the Constitution of the United States as their first obligation.²⁴ A lawyer’s oath to the Constitution stems from our obligation as officers of the court.

The question I address to you is: what is the role and meaning of the oath that you take as lawyers to support and defend the Constitution of the United States? Your oath as an attorney goes further than the requirement to support and defend the Constitution, as you also swear to “employ only such means as are consistent with truth and honor; [to] treat all those who you encounter with fairness, courtesy, respect, and [again, I stress] honesty; [and to] use your knowledge of the law for the betterment of society and the improvement of the legal system.”²⁵ That quote comes from the Colorado oath that you take as lawyers.

21. Michael W. McConnell, *The Ninth Amendment in Light of Text and History* (Stan. Pub. L. Working Paper No. 1678203, Sept. 18, 2010).

22. U.S. CONST. art. VI.

23. *Id.*

24. *Id.*

25. *Colorado Attorney Oath of Admission*, COLO. SUP. CT.: OFF. OF ATT’Y REG., <http://coloradosupremecourt.com/Current%20Lawyers/Oath.asp> (last visited Jan. 17, 2019) [<https://perma.cc/G7MA-BT9C>]. In full, the oath reads:

Our Constitution today faces challenges that are greater than any I've seen in my lifetime. That is, in my career as a lawyer, and in my career as a federal judge. I'm not going to go into those contemporary issues; you know them all; you read the press; you're on top of them. But the question is, as we hear daily news reports of attacks on the judiciary, the free press, challenges to our constitutional structure, the integrity of our law enforcement institutions, claimed declarations of national emergencies, etc.: What is a lawyer to do?

You as lawyers of the next generation are going to face challenges that my generation did not. How exactly should the First Amendment function? How should the First Amendment function at a time when foreign misinformation campaigns flood social media? In *United States v. Alvarez*, the Court held that there is no exception from First Amendment protection for false statements absent those few examples and categories where the law allows content-based regulation of speech.²⁶ In other words, the Court, through Justice Kennedy's plurality opinion, held that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation. Justice Breyer took a somewhat different view in his concurrence, where he said that the courts must provide breathing room for more valuable speech by reducing an honest speaker's fear that he might accidentally incur liability for speaking.²⁷ So, it's clear that the Court was trying to protect our rights as citizens to speak freely, but what happens when the misinformation becomes deliberate?

Madison was of the view that the newspapers had to play a preeminent role in American democratic society. Thomas Jefferson wrote that, "were it left to me to decide whether we

I will support the Constitution of the United States and the Constitution of the State of Colorado; I will maintain the respect due to Courts and judicial officers; I will employ only such means as are consistent with truth and honor; I will treat all persons whom I encounter through my practice of law with fairness, courtesy, respect and honesty; I will use my knowledge of the law for the betterment of society and the improvement of the legal system; I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed; I will at all times faithfully and diligently adhere to the Colorado Rules of Professional Conduct.

Id.

26. 567 U.S. 709, 719–20 (2012) (Kennedy, J., plurality).

27. *Id.* at 733 (Breyer, J., concurring).

should have a government without newspapers, or newspapers without a government, I would not hesitate a moment to prefer the latter.”²⁸

So, I suggest to you that lawyers have a duty to correct the record, as your oath mandates that you shall “employ only such means as are consistent with truth and honor.” And when a lawyer enters into public service, the oath doesn’t go away; it remains there. Your legal knowledge as students and your careful study of the Constitution will leave you uniquely suited to protect those rights that are “reserved to the people.”²⁹

There are other challenges, of course, and it is really quite surprising to me how many of these have not been addressed by the courts; a lawyer’s role to correct the record on truth and fact is imperative. Newspapers have long recognized, and I recognize from my time as the editor of a college newspaper, that there is a difference between fact and opinion. Journalism students are taught religiously to place facts in the front pages and opinions in the editorial pages. Of course, these distinctions are blurring with MSNBC, Fox, CNN; the media is preoccupied at any given time with expressing their take on a given point. It is almost impossible to distinguish between fact and opinion, between truth and fiction. Lawyers can play an important role considering that they are called upon—inherent in our legal profession—to distinguish between information and misinformation.

Back in the early 1970s, Dorothy and I were living in Alamosa, Colorado, as the Dean has said, and we were being integrated into the community. We volunteered to host a group of visiting Rotary Fellows, one group from England one year, and one group from Austria the next. So we were walking along the banks of the Rio Grande and this Austrian fellow asks me: “How long do you think that you Americans will be able to preserve a democracy?”

I thought it rather a naïve question because of our well-inculcated views of liberty and freedom in our form of government. I told him so. He said “No, no, I don’t mean that. Of course you believe all those principles. The German people did

28. Letter from Thomas Jefferson to Edward Carrington, Delegate to the Continental Congress (Jan. 16, 1787).

29. U.S. CONST. amend. IX.

too, but they lost it, and it seems to me that you could lose it as well.”

(Ben Franklin famously said, “You have here a [democracy] if you can keep it.”)³⁰ I had not thought much about that conversation with our Austrian fellow until much later. When we start looking at the erosion of democracy and the protection of democratic principles, it seems to me the over-polarization of American society, the growing hyper-partisanship of our elected officials, the excessive rhetoric of the D’s and the excessive rhetoric of the R’s, can become so aggressive that you sometimes wonder what can come of it.

Fortunately, as Americans, we have our Constitution. So I say, “whenever push comes to shove, resort to the Constitution.” It is a document that has protected and preserved this country for two centuries; it has led us through a civil war. (The South at the time, of course, was arguing that the reason they were engaging in the Civil War and withdrawing from the Union was because they wanted to protect the Constitution against Northern aggression. So, it is easy to wrap yourself in the Constitution, as the excuse for conduct without really thinking it through.) But if we sometimes despair, I think it is a good idea to reflect on our history.

I turn, then, to the final point of my talk, and that is the constitution of the Weimar Republic and the rise of Nazism. This history is probably why the Austrian chap asked me the question he did: Europeans had seen a liberal democracy collapse. The Weimar Constitution, which governed Germany during the period between World Wars, provided liberal protections to individuals, including the hallmarks of democracy.³¹ It protected freedom of religion, press, expression, assembly,

30. RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 1593 (1989). The actual exchange purportedly occurred as Benjamin Franklin left the Constitutional Convention of 1787, and was asked by one of Maryland’s delegates to the Convention, “[w]ell, Doctor, what have we got—a Republic or a Monarchy?” and replied, “A Republic, if you can keep it.” *Id.*

31. Bernd J. Hartmann, *The Arrival of Judicial Review in Germany Under the Weimar Constitution of 1919*, 18 *BYU J. PUB. L.* 107, 113 (2003) (“On July 31, they passed the Constitution, drafted primarily by Professor Hugo Preuss, which was published on August 11, 1919. It cherished the separation of powers and considered itself the paramount law. It also entailed fundamental rights, and proclaimed Germany’s new achievement, democracy.” (citations omitted)).

habeas corpus, and so on.³² Sound familiar? It's our Bill of Rights. But it had a flaw: Article 48 gave the president broad emergency powers that could be invoked in situations where "public security and order were seriously disturbed or endangered."³³

Though the president needed to be popularly elected, the president could dissolve the Reichstag at will under Article 25, and he could call for new elections, giving the president and the Chancellor great powers over the Reichstag.³⁴ Otherwise, parliamentary authority was absolute. It included the authority to delegate all powers to the Chancellor; it permitted parliamentary abdication.³⁵

But on February 28, 1933, the Reichstag fire occurred. One day after the fire, the German government suspended crucial civil liberties allegedly in response to the fire.³⁶ This was generally considered to have been carried out by the Nazis for the purpose of restricting civil liberties and imprisoning political

32. DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 5-6 (1994).

33. Article 48 provided that:

If public safety and order in the German Commonwealth is materially disturbed or endangered, the National President may take the necessary measures to restore public safety and order, and, if necessary, to intervene by force of arms. To this end he may temporarily suspend, in whole or in part, the fundamental rights established in Articles 114, 115, 117, 118, 123, 124 and 153 [of the Constitution].

RENÉ BRUNET, *THE NEW GERMAN CONSTITUTION* 308 (Joseph Gollomb trans., 1922). See also David Fontana, *Government in Opposition*, 119 *Yale L.J.* 548, 598 (2009) (explaining that "Hitler's Nazi Party, when still a minority party (but a part of the majority coalition), used the powers granted to several ministries to eliminate opposition and eventually repeal the entire Weimer Constitution itself") (citing A.J. NICHOLS, *Weimar and The Rise of Hitler* 164, 168-69 (4th ed. 2000)).

34. Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, 113 *YALE L.J.* 1341, 1361-62 (2004) ("The Weimar Constitution, however, appeared to give the Reich President several strategic advantages in any contest between presidential and parliamentary power. First, Article 25 gave the President the power to dissolve the Reichstag and call new elections, suggesting a superior democratic legitimacy in the President over that of the parliamentary majority.")

35. *Id.* at 1365 ("As a legal and constitutional matter at least, the enabling act was viewed as "apparently unexceptional" precisely because so many contemporaneous observers accepted, without examination or even reflection, the constitutional authority of the Reichstag to cede its most basic democratic function—the making of legislative norms—to the executive.")

36. INGO MULLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH*, 27-35, 46-47. (1991).

adversaries.³⁷ They suspended the right to habeas corpus, suspended the right to freedom of expression, freedom of the press, freedom to assemble, privacy of postal communications; they removed requirements for warrants to search private residences.³⁸ The Nazis blamed the communists for the fire. They used the fire to justify the imprisonment of communists, the suppression of the communist press, and eventually the imprisonment and suppression of all left-leaning parties.³⁹

The prior invocation of Article 48 paved the way for broader use,⁴⁰ and the Nazis then proceeded to remove certain rights of judicial review. As lawyers, I think that should send a chill up your spine. Although maybe some appealing to the Tenth Circuit think it might not be such a bad idea. In any event, before the Reichstag fire Germans had all those rights. A national emergency was declared, those rights: revoked.

Years prior to the Reichstag fire, President Hindenburg declared a state of emergency in Prussia,⁴¹ and the Nazis proceeded to do precisely the same after the fire. The German Supreme Court determined that the initial invocation of Article 48 was subject to judicial review, but accepted the government's finding of a genuine situation of emergency permitting a temporary subordination of the Prussian government to the national government.⁴² History and nature took their course and President Hindenburg died. At that point, the Chancellor, Hitler, used the opportunity to consolidate the power of the presidency and of the Chancellor unto himself.⁴³

There were only two remaining restraints after the Enabling Act, which was the legislation suspending the Weimar Constitution after the Reichstag fire: the president could

37. Stephan Landsman, *History's Stories, Stories of Scottsboro*, 93 MICH. L. REV. 1739, 1762 (1995) (book review) ("The trial's managers were also consciously attempting to respond to the work of a commission of inquiry that had convened in London and examined the case. The commission's findings, delivered one day before the start of the German trial, were starkly anti-Nazi.").

38. *Id.*

39. *Id.* at 1081.

40. Ellen Kennedy, *The Politics of Law in Weimar Germany* (Book Review) 77 TEX. L. REV. 1079, 1080 (1999) (book review).

41. *Id.* at 1079 ("The books reviewed here concern a notoriously hard case argued in the final months of the Weimar Republic. *Prussia v. Reich* turned on the constitutionality of President von Hindenburg's use of emergency powers against Prussia in July 1932 under Article 48." (citations omitted)).

42. *Id.* at 1080.

43. *Id.*

remove the Chancellor (but President Hindenburg was dead, so no chance), and the Enabling Act would have to be extended after four years, and then every two years thereafter. But this was a pure formality with the elimination of all non-Nazi or Nazi-aligned parties. And here's the part that I thought that we as lawyers should reflect on: as of August 14, 1919, judges in Germany took this oath: "I swear loyalty to the Constitution, obedience to the law, and conscientious fulfillment of the duties of my office, so help me God."⁴⁴

Our oath is:

I swear . . . that I will . . . support and defend the Constitution of the United States against all enemies foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter.⁴⁵

This Oath is not totally unlike the oath that the German jurists historically took.

As of August 20, 1934, the oath was changed. This was now the oath: "I swear I will be true and obedient to the Fuhrer of the German Reich, the people, and Adolf Hitler, observe the law and conscientiously fulfil the duties of my office, so help me God."⁴⁶

Coming back to my conversation with the Austrian fellow, I suggest, with the benefit of a little bit more reflection, now having practiced law for some time, and having been on the bench: what is the primary difference between us and them? What is the pivot point in the American model of democracy that prevents, hopefully will forbid and ever-prevent, this from happening to us?

The answer is that we have a constitution that was not passed by statute. We have a constitution that enshrines not

44. U.S. Holocaust Memorial Museum, Holocaust Encyclopedia, "Oaths of Loyalty for All State Officials," <https://encyclopedia.ushmm.org/content/en/article/oaths-of-loyalty-for-all-state-officials> (citing REICHSGESETZBLATT I 1419–20 (1919)).

45. 5 U.S.C. § 3331 (2018).

46. U.S. Holocaust Memorial Museum, *Oaths of Loyalty for All State Officials*, HOLOCAUST ENCYCLOPEDIA, <https://encyclopedia.ushmm.org/content/en/article/oaths-of-loyalty-for-all-state-officials> (last visited Jan. 19, 2019) [<https://perma.cc/AG6S-FVMQ>] (citing REICHSGESETZBLATT I 1419–20 (1919)).

only enumerated rights, but that incorporates through the Ninth Amendment what I repeat in many ways is the soul and the spirit of the Declaration of Independence: that is to say, that we are endowed by our creator with certain inalienable rights—life, liberty, and the pursuit of happiness.

So, yes, it is very difficult to define unenumerated rights. For example, the right to vote under the Constitution was long implied before it began to be fleshed out in the Fifteenth and later amendments. And it is difficult for us as citizens to protect those unenumerated rights, but if we are to continue to be the land of the free and the home of the brave, it is going to take us as lawyers, and you, students—forthcoming lawyers—to study the depth of these rights. To litigate when necessary to protect those rights. To speak as citizens in the protection of those rights. To be aware, very aware, when the citizenry deviates from Constitutional norms.

“Lock her up, lock her up, lock her up.” Those kind of chants are very worrying—not because they are addressed at the D’s, or that they may be addressed at the R’s—but because they threaten all of us, the A’s, we Americans. They threaten to dilute our constitutional rights and privileges as citizens. That is my call to arms: we must stand up as lawyers, we must stand up as judges, we must stand up as citizens to assure that the Constitution of this Republic, of this great country, continues not just for another couple of hundred years in the grand experiment of democracy, but indefinitely because that is what makes America the shining star. Thank you.