# THE RIPPLE EFFECTS OF *GIDEON*: RECOGNIZING THE HUMAN RIGHT TO LEGAL COUNSEL IN CIVIL ADVERSARIAL PROCEEDINGS

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> "[L]et justice roll down like waters, and righteousness like an ever-flowing stream."[1]

## *I. INTRODUCTION*

A little over fifty-five years ago, the Supreme Court of the United States decided *Gideon v. Wainwright*.[2] The essence of *Gideon*'s reasoning was that in criminal cases, indigent defendants were entitled to justice. The *Gideon* Court acknowledged:

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure *fair trials before impartial tribunals in which every defendant stands equal before the law*. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[3]

The Court recognized that justice—that is, procedural fairness and equal treatment—required due process and equal protection for all.

*Gideon*'s justice rationale includes two interrelated concerns. First, as the Court put it, "fair trials before impartial tribunals"[4] (that is, procedural fairness or due process). *Gideon*'s second and related

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1. *Amos* 5:24 (New Revised Standard Version).
2. 372 U.S. 335 (1963).
3. *Id.* at 344 (emphasis added).
4. *Id.*

requirement was that "every defendant stand[] equal before the law."[5] In other words, justice entails equal treatment or equal protection for all. Procedural fairness and equal treatment are intertwined concepts. Both are central to realizing justice. They are embedded in the Due Process Clauses of the Fifth and Fourteenth Amendments as well as the Equal Protection Clause of the Fourteenth Amendment.

This Article contends that procedural fairness and equal protection require legal assistance of counsel for indigent civil litigants, especially in adversarial proceedings. As United States District Judge Robert Sweet argued in a speech to the New York Bar Association: "[W]e need a civil *Gideon*, that is, an expanded constitutional right to counsel in civil matters. Lawyers, and lawyers for all, are essential to the functioning of an effective justice system."[6]

Part II of this Article briefly recapitulates the facts and reasoning in Gideon's case. To illuminate constitutional bases for recognizing a civil right to counsel, Part II revisits *McCulloch v. Maryland*[7] because *McCulloch* articulates widely accepted American constitutional law interpretive approaches. In addition, Part II outlines several tools in *McCulloch*'s tool kit and applies them to the constitutional foundations for a civil *Gideon*—namely: the Fifth, Sixth, Ninth, and Fourteenth Amendments to the Constitution.

Furthermore, regarding the scope of the right to counsel in civil cases, Part II critiques the 2011 Roberts Court's overly restrictive decision in *Turner v. Rogers*.[8] Nevertheless, in light of *Turner*, the Article acknowledges the probable futility of initiating federal constitutional litigation to elucidate the broad parameters of indigent persons' human right to counsel—including legal counsel in civil proceedings. In fact, in light of the composition of the current Supreme Court, bringing such litigation now would likely be extremely counterproductive.

Given these practical constraints, Part III of the Article affirms the need for legislation to address the massive shortfall in legal

5. *Id.*

6. ABA Resolution 112A, Report to the House of Delegates at 7 (Aug. 7, 2006), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf (quoting Robert W. Sweet, *Civil "Gideon" and Justice in the Trial Court (The Rabbi's Beard)*, 52 REC. ASS'N B. CITY N.Y. 915, 924 (1997)) [hereinafter ABA Resolution 112A].

7. 17 U.S. 316 (1819).

8. 564 U.S. 431, 449 (2011).

representation available to indigent persons in the United States.[9] Specifically, this Part outlines and endorses provisions of ABA Resolution 112A—unanimously adopted by the ABA House of Delegates in 2006—urging federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody, as determined by each jurisdiction.[10]

In addition, Part III builds upon the theoretical argument outlined in Part II, by contending that the Framers of the Constitution of 1787 intended to protect human liberty on the basis of fairness and equality as evidenced by the words of the Declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That, to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.[11]

Thus, the Declaration literally states that the United States was established to secure liberty and equality for all.

Of course, the question arises, what did the Framers mean when they said that "all men are created equal"?[12] Did the Framers simply mean that all males like themselves were created equal? Did the Framers have a broader audience in mind? After all, evidence exists that, in practice, the Framers failed to live up to the Declaration's professed ethic of universal freedom and equality.[13] Thus, Professors Daniel Farber and Suzanna Sherry contend that:

> Eighteenth-century Americans meant many things by the term "equality." With Locke, they believed men were born

9. LEGAL SERVICES CORPORATION, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans*, June 2017, at 6, https://www.lsc.gov/sites/default/files/images/TheJusticeGap-Full Report.pdf [hereinafter *Justice Gap Report*]; ABA Resolution 112A, *supra* note 6.

10. ABA Resolution 112A, *supra* note 6, at 1.

11. THE DECLARATION OF INDEPENDENCE para. 2 (1776).

12. *See id.*

13. DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 14 (1990).

> equal because, in the most basic sense, none had any superior claim to rule over others. Despite its apparent breadth, this eighteenth-century egalitarianism was extremely limited. It did not lead many Americans to conclude that slavery was wrong. Nor did most American republicans extend equality to those who did not participate in the political process, including women, Indians, children, and—in some places at some times—those who lacked property qualifications for voting.[14]

On March 31, 1776, in a perceptive letter Abigail Adams wrote to her husband (and future president) John Adams stating among other things:

> I long to hear that you have declared an independency -- and by the way in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If perticuliar [sic] care and attention is not paid to the Laidies [sic] we are determined to foment a Rebelion [sic], and will not hold ourselves bound by any Laws in which we have no voice, or Representation.[15]

In short, a strong argument exists that the Framers' deeds were hypocritical. Moreover, the hypocrisy argument has support in the text of the Constitution, which among other things provided for importation of slaves and indentured servants until 1808[16] and effectively limited the franchise to males.[17]

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14. *Id.*; *see also* 1 SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE: PREHISTORY TO 1789 at 295 (1972) ("Did Jefferson think of blacks when he wrote, 'All men are created equal'? His subsequent career indicates that he did not; that in his view Negroes were not 'men.'"); PETER N. CAROLL & DAVID W. NOBLE, THE FREE AND THE UNFREE: A PROGRESSIVE HISTORY OF THE UNITED STATES 114–15 (3d ed. 2001) ("The principles of revolution, Jefferson explained, did not lurk in the intricate mysteries of constitutional law; they were not obscure or scholarly. Rather, they were intuitive, within the capacity of most people, and they legitimated bold acts in defense of 'life, liberty and the pursuit of happiness.'").

15. Letter from Abigail Adams to John Adams, 2 (Mar. 31, 1776), https://www.masshist.org/digitaladams/archive/doc?id=L17760331aa.

16. U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.").

17. U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall

If the hypocrisy argument is accurate, it suggests Framer duplicity. However, one might argue that while in practice some Framers had a limited vision of freedom and equality, at the very least, the Framers implicitly expected that legal decision makers would be a privileged class like themselves: upper-middle class and upper-class white males.[18] And that all such members of the privileged legal decision-making class would construe and apply the Constitution as the decision makers would want the Constitution to be construed and applied to themselves. In short, the Framers proceeded on the assumption that undergirding American law and society would be the basic norm commonly expressed as follows: "in everything do to others as you would have them do to you."[19] The one caveat would be who constituted the "others." A strong argument exists that the Framers embraced a not so Golden Rule which would require treating only a privileged few as you would wish to be treated.

At least two responses are appropriate in response to this line of attack. First, why not give the Framers the benefit of the doubt and presume that they were acting in good faith? For instance, there were abolitionists like Governeur Morris within the ranks of the Constitution's principal drafters who sought to achieve a wider vision of liberty and equality.[20] Indeed:

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have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."). Because the qualifications for holding office in the State Legislatures required in nearly all states that a person be male, women were effectively excluded from voting in federal elections.

18. *See* FARBER & SHERRY, *supra* note 13, at 14–15 ("The eighteenth-century republicans on both sides of the Atlantic expected that a 'natural aristocracy' would spring up to govern the country. Composed of those with extraordinary talent, the natural aristocracy would exemplify both virtue and restraint. They would put the good of the community before their own selfish interests and protect liberty from the selfishness of individuals and the corruption of governors. At the same time, since they would derive their pre-eminent role from natural talents rather than artificial distinctions, they would be in an ideal position to guide and govern the masses."); Laura A. Hernandez, *When the Wise Latina Judge Meets A Living Constitution—Why It Is A Matter of Perspective*, 17 TEX. HISP. J. L. & POLICY 53, 97 (2011) ("The framers were white, male landowners and as result, conferred all authority, such as the right to vote, to their brethren."); Ann M. Burkhart, *The Constitutional Underpinnings of Homelessness*, 40 HOUS. L. REV. 211, 240 (2003) ("The question whether to hold the convention had not been put to a popular vote, and the delegates were not chosen by the electorate, but by the state legislatures. Unsurprisingly, therefore, the constitutional delegates were virtually all members of the upper classes, and many had been born into their station in life. The uniformity of the Framers' economic status had a predictable impact on the Constitution.") (footnotes omitted).

19. *Matthew* 7:12 (New International Version).

20. WILLIAM HOWARD ADAMS, GOUVERNEUR MORRIS: AN INDEPENDENT LIFE xii (2003). During the constitutional convention, as the delegates debated the role of slavery in the United States, Morris stated:

> Fired with moral disgust, [Morris] foresaw more clearly than anyone the catastrophic results of incorporating slavery into the nation's political fabric. When a number of the exhausted delegates, including Hamilton, were prepared to give up and abandon the whole experiment of building a nation, Morris was ready to make the gamble that the people were, in the words of his Preamble, prepared "to form a more perfect union."[21]

Morris' work resulted in the Constitution's Preamble: "We the People of the United States, in Order to form a more perfect Union, establish Justice . . . and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."[22]

The Preamble encapsulates the Declaration's essence—the preservation of liberty for all. In light of these facts, it can be fairly contended that the Framers wrote a Constitution which purported to secure freedom and justice.

Secondly, the text of the Declaration itself is broad enough to encompass recognition of freedom and equality for all (universal justice). When the Declaration used the term "men" in the late eighteenth century, "men" often referred to all humankind.[23] An important theme in this essay is that the Constitution must be interpreted to achieve the Framers' goals of universal freedom and equality. That argument does not depend upon the flawed practical behavior of the Framers (and those of us who follow their footsteps). According to the Founders, America stands on the solid ethical and legal rock of unalienable, God-given, universal rights of freedom and

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> The admission of slaves into the representation when fairly explained comes to this: that the inhabitant of Georgia and South Carolina who goes to the coast of Africa and, in defiance of the most sacred laws of humanity, tears away his fellow creatures from their dearest connections and damns them to the most cruel bondages, shall have more votes in a government instituted for the protection of the rights of mankind than the citizen of Pennsylvania or New Jersey who views with a laudable horror so nefarious a practice.

RICHARD BROOKHISER, GENTLEMAN REVOLUTIONARY: GOUVERNEUR MORRIS, THE RAKE WHO WROTE THE CONSTITUTION 85–86 (2003).

21. *Id.* (quoting U.S. CONST. pmbl).

22. U.S. CONST. pmbl.

23. *See Man*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE, https://johnsonsdictionaryonline.com/man-noun/ (last updated Jan. 5, 2013). The first definition that Johnson attributes to man is "human being." *Id.* That primary definition notwithstanding, Johnson's second definition of man is "not a woman." *Id.*

equality.[24] The Framers created the Constitution to secure those rights. In practical terms, universal freedom and equality depend upon treating all others with respect—that is, as we wish to be treated.

Moreover, this more expansive vision of freedom and equality—treating all others with respect—emerged from the Second American Revolution. That Revolution was the American Civil War, which resulted in the destruction of chattel slavery and the creation of a new, amended American Constitution.[25] Central to the new Constitution is the Fourteenth Amendment, which specifies that every person in every state in the United States is entitled to have legal protection for her rights of Due Process and Equal Protection of the laws.[26] The Fourteenth Amendment, particularly its Equal Protection Clause, is an explicit statement of an implicit premise—namely, that in the interpretation and application of the laws, all persons are to be treated as legal decision makers themselves would wish to be treated.

Moreover, ABA Resolution 112A exemplifies the Framers' expressly articulated values of liberty and justice for all. The Resolution spells out the ABA's support for equitable access to justice for all persons.[27]

In this context, Part IV of this Article advocates a paradigm shift to accommodate a moral revolution. Recognition of a civil *Gideon* as part of the Constitution's promise of justice (procedural fairness and equal treatment) exemplifies such a shift in consciousness—a consciousness rippling beyond the scope of the law and encompassing interpersonal relations. Such a revolution begins with individual humans. The expansion of our individual worldviews comports with the urgent and necessary practical work of constructively transforming law as well as our society.

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24. THE DECLARATION OF INDEPENDENCE para. 2 (1776).

25. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863–1877 at 119–23 (1988) (discussing the Civil War, its impact on American society, and the limited steps towards equality for African Americans during Reconstruction); 1 SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE: 1789–1877 (1972); *see also* FARBER & SHERRY, *supra* note 13, at 389–485 (reviewing the legislative history and other relevant matters relating to the adoption of the Reconstruction Amendments as well as recognition of the right to vote for politically excluded groups like women).

26. U.S. CONST. amend. XIV, § 1.

27. ABA Resolution 112A, *supra* note 6, at 15–16.

## *II. SOME CONSTITUTIONAL BASIS FOR A CIVIL GIDEON*

### A. The Gideon Case

In *Gideon v. Wainwright*,[28] defendant Clarence Earl Gideon was accused of a felony, namely breaking and entering a pool room in Florida while intending to commit a misdemeanor.[29] Gideon requested that the state court appoint a lawyer to represent him. The state court denied his request and said that the court could only appoint lawyers to represent criminal defendants in capital cases.[30]

At trial, Gideon represented himself by making an opening statement, cross-examining witnesses, presenting witnesses, and in his closing argument, emphasizing that he was innocent. The jury convicted him, and Gideon was sentenced to a five-year prison term in the state penitentiary.[31]

Subsequently, Gideon filed a writ of habeas corpus in the Florida Supreme Court. The state supreme court denied Gideon's petition for relief.[32] On appeal to the United States Supreme Court, the Court appointed a lawyer to represent Gideon.[33] The Court also requested that counsel for both sides argue whether the Court should reconsider its holding in *Betts v. Brady*.[34]

The *Gideon* Court said that the facts of *Betts* were so similar to those in *Gideon* that if *Betts* were correctly decided, Gideon's claim would fail.[35] In analyzing *Betts*, the *Gideon* Court stated that the Court accepted "*Betts v. Brady*'s assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment."[36] The *Gideon* Court ruled that "the Court in *Betts* was wrong . . . in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights."[37]

28. 372 U.S. 335 (1963).
29. *Id.* at 336.
30. *Id.* at 337.
31. *Id.*
32. *Id.*
33. *Id.* at 338.
34. 316 U.S. 455 (1942).
35. *Gideon*, 372 U.S. at 339.
36. *Id.* at 342 (quoting *Betts*, 316 U.S. at 465).
37. *Gideon*, 372 U.S. at 342.

Writing for the Court's majority, Justice Black said that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."[38]

While *Gideon* expressly relied on the Sixth Amendment as applied to the states through the Due Process Clause of the Fourteenth Amendment, *Gideon* also specifically noted that the Constitution seeks to ensure that "every defendant stands equal before the law."[39] The Court emphasized that "[t]his noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."[40] Stated differently, the Court recognized that infused in the right to counsel in criminal trials is an implicit equal protection component. The *Gideon* Court did not elaborate upon the equal protection basis for its holding. The Court simply outlined an equal protection rationale as fundamental to its ruling. In criminal proceedings, *Gideon* recognized that fairness and equality under the law are interrelated, essential safeguards to protect individual liberty.

To be sure, *Gideon* dealt with the right to counsel in criminal proceedings. The Court said nothing about the constitutional basis for a right to counsel in civil proceedings. Accordingly, this Article considers the question of whether anything in the Constitution expressly excludes legal recognition and protection of a right to counsel in civil cases. To answer that question, the Article now turns to an analysis of relevant provisions of the United States Constitution.

### B. Constitutional Pillars Undergirding a Civil *Gideon*

First, this Article considers in more detail an appropriate methodology for interpreting the Constitution, especially relevant constitutional provisions supporting a civil right to counsel in adversarial situations. The Article then critiques *Turner v. Rogers*'[41] exceptionally restrictive articulation of the scope of the right to counsel in civil cases involving possible incarceration for nonpayment of child support.

38. *Id.* at 344.
39. *Id.*
40. *Id.*
41. 564 U.S. 431 (2011).

### *1. A Precis Regarding Holistic Constitutional Interpretation*

We confront the initial question of what this Article means when it uses the word "interpret." A working definition of "interpret" for purposes of this Article is drawn from the Oxford English Dictionary: "[t]o expound the meaning of (something abstruse or mysterious); to render (words, writings, an author, etc.) clear or explicit; to elucidate; to explain."[42] In plain language, in this Article,

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42. *Interpret*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/98205?rskey=L9XL2b&result=2&isAdvanced=false#eid (last visited Nov. 26, 2019) (available by subscription). Other theories of knowledge cover a broad spectrum including classical Greek thought as reflected in Plato's Theaetetus:

> **Socrates**: Now consider whether knowledge is a thing you can possess in that way without having it about you, like a man who has caught some wild birds—pigeons or what not—and keeps them in an aviary he has made for them at home. In a sense, of course, we might say he 'has' them all the time inasmuch as he possesses them, mightn't we?
> **Theaetetus**: Yes.
> **Socrates**: But in another sense he 'has' none of them, though he has got control of them, now that he has made them captive in an enclosure of his own; he can take and have hold of them whenever he likes by catching any bird he chooses, and let them go again, and it is open to him to do that as often as he pleases.
> **Theaetetus**: That is so.
> **Socrates**: Once more then, just as a while ago we imagined a sort of a waxen block in our minds, so now let us suppose that every mind contains a kind of aviary stocked with birds of every sort, some in flocks apart from the rest, some in small groups, and some solitary, flying in any direction among them all.
> **Theaetetus**: Be it so. What follows?
> **Socrates**: When we are babies we must suppose this receptacle empty, and take the birds to stand for pieces of knowledge. Whenever a person acquires any piece of knowledge and shuts it up in his enclosure, we must say he has learned or discovered the thing of which this is the knowledge, and that is what 'knowing' means.

THE COLLECTED DIALOGUES OF PLATO 904 (Edith Hamilton & Huntington Cairns eds., 1971). A nineteenth century English literature insight regarding the power to define the meaning of words gushes from Lewis Carroll's portrayal of Humpty Dumpty:

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
> "The question is," said Alice, "whether you *can* make words mean so many different things."
> "The question is," said Humpty Dumpty, "which is to be master—that's all."

LEWIS CARROLL, THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING-GLASS 251 (Martin Gardner ed., 2015) (1960). More recent erudite discussions on legal theory can be found in works by thoughtful scholars like Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641 (2013) and Professors Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599 (2019).

"interpret" means an attempt to explain as clearly and logically as possible what the words of a text mean. The particular text upon which the Article focuses is the Constitution of the United States of America. In this context, it is beyond the scope of this Article to parse and explore the innumerable permutations, nuances, and possible alternative explanations of "interpret." That could be the focus of many volumes. To reduce the ambiguity inherent in this language, this Article simply attempts to communicate sufficiently clearly what interpret means here.

With that said, the Article now considers how to best interpret the Constitution. To facilitate analysis, a brief review of some interpretation methods follows.[43] We begin with *McCulloch v. Maryland*,[44] a two-hundred-year-old constitutional law decision (a real "chestnut") that exemplifies several well-accepted devices often found in the methodological toolbox of an interpreter of the Constitution. The following overview is not meant to be an exhaustive discussion of constitutional interpretation. The Article simply offers a thumbnail sketch, which may help to illuminate the upcoming analysis of relevant constitutional provisions as well as the *Turner* case.

### *2. Interpretation Lessons from* McCulloch

In *McCulloch*, the United States government chartered a national bank to facilitate financial transactions on a federal level and to circumvent some parochial challenges associated with state banks.[45] After the creation of the national bank, the Commonwealth of Maryland subsequently passed legislation that imposed a $15,000 tax on non-Maryland banks doing business in Maryland. J.W. McCulloch, a federal bank employee, did not pay the Maryland state tax.[46] The Commonwealth of Maryland obtained a judgment to recover the state

43. *See generally* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISION MAKING 55–62 (7th ed. 2018); CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS NAMED AND UNNAMED (1997); PHILLIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (Oxford University Press 1982); Barnett & Bernick, *supra* note 42; Ronald Dworkin, *Natural Law Revisited*, 34 U. FLA. L. REV. 165 (1982).

44. 17 U.S. 316 (1819).

45. *Id.* at 317, 332–33.

46. *Id.* at 317–19.

tax.[47] On appeal to the United States Supreme Court, the Court unanimously overturned the state court decision.[48]

The *McCulloch* Court considered several approaches to constitutional analysis.

a. Precedent

The Court began by evaluating existing precedent. The Court emphasized that Congress had previously enacted legislation creating a national bank.[49] However, the Court said that Congress later allowed the legislation to lapse.[50] Once the legislation expired and the Bank ceased to exist, the nation suffered negative experiences because of the absence of a financial institution capable of funding vital national projects. Accordingly, Congress reestablished a national bank.[51] Regarding historical precedent, the Court stated: "The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation."[52]

b. Text and Structure

Not only did *McCulloch* appeal to precedent, but that case also discussed the interplay of constitutional text and structure (governmental architecture). For instance, the Court addressed the structural issue of whether the Constitution was a creation of the States or of the people. The Court's rationale included reliance upon the words of the Preamble: "*We the People* of the United States . . . do ordain and establish this Constitution for the United States of America."[53] The Court stated that in creating the Constitution, the people of the United States met in conventions and established a legal structure in which the federal constitution, laws, and treaties were

47. *Id.*
48. *Id.* at 437.
49. *Id.* at 354.
50. *Id.* at 353.
51. *Id.* at 325.
52. *Id.* at 401.
53. U.S. CONST. pmbl. (emphasis added). *See also McCulloch*, 17 U.S. at 403–04.

supreme.[54] Thus, *McCulloch* affirmed that constitutional power resides in the people.

According to *McCulloch*, the national government possessed the authority to create a national bank based upon the words of the Constitution and the structural relationship—that is, the governmental architecture—that the Constitution created between the central government and the states. *McCulloch* pointed out:

> Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. . . . [I]t may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.[55]

Thus, the Court concluded that the national government could establish a national bank because the Framers created a constitution that would authorize the national government to achieve ambitious national goals like regulating commerce and conducting wars.[56] Accordingly, the lack of specific constitutional language allowing the incorporation of a national bank was not fatal to the claim that Congress had power to create such a financial institution.

Again, appealing to the governmental architecture of the Constitution, *McCulloch* said:

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

54. U.S. CONST. art. VI.
55. *McCulloch*, 17 U.S. at 407–08.
56. *Id.* at 408.

> therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. . . . [W]e must never forget that it is a *constitution* we are expounding.[57]

c. Legislative History (and Precedent Again)

*McCulloch* countered the argument that Congress exceeded its authority because the Constitution did not expressly provide for the creation of a national bank. The Court responded to opponents' textual objections by returning to an analysis of precedent as well as other provisions in the text of the Constitution. Specifically, the Court reviewed part of the Constitution's drafting history and contrasted the Constitution with its predecessor, the Articles of Confederation. Unlike the Articles, the Constitution did not say that national governmental powers were limited to expressly enumerated powers in the Constitution. The Court said that "there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described."[58]

The Court focused attention upon the Tenth Amendment, which left out the word *expressly*. The Court explained the significance of omitting *expressly* as follows:

> Even the 10th [A]mendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly,' and declares only, that the powers 'not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;' thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument.[59]

57. *Id.* at 407.
58. *Id.* at 406.
59. *Id.*

The Framers could have written the Amendment as follows: "The powers not *expressly* 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." The Framers chose to omit "expressly" leaving us with the text as it exists now. The Tenth Amendment simply says: "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."[60]

d. A Holistic Interpretative Approach

The Court's analysis drew not only upon precedent, textual analysis, and structure, but also upon prudential concerns regarding how to read the text. According to *McCulloch*, constitutional interpretation must depend upon a "fair construction of the whole instrument,"[61] not upon cherry picking disconnected parts.

In addition, the Court emphasized that the Constitution's provisions are subject to differing interpretations, which may vary over time. "[T]he question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist."[62]

When Chief Justice Marshall said, "we must never forget, that it is a *constitution* we are expounding,"[63] Marshall recognized that constitutional texts must be read as judges read the common law—carefully examining the facts, precedent, text, structure, prudential concerns, and other relevant factors. Repeating for emphasis, the purpose of such analysis is to deduce "a fair construction of the whole instrument."[64]

In a similar vein, in his classic text on expounding human rights under the United States Constitution, Professor Charles L. Black, Jr. said: "The methods of law are not a closed canon. The problems they must solve are infinite and unforeseeable. The solutions will never have the quality of the Pythagorean Theorem; time may even bring the

60. U.S. CONST. amend. X.
61. *McCulloch*, 17 U.S. at 406.
62. *Id.* at 405.
63. *Id.* at 407 (emphasis in original).
64. *Id.* at 406.

conviction that some solutions, though confidently arrived at, were wrong, and must be revised."[65]

Professor Ronald Dworkin championed a similar approach. He suggested that judges should adopt a natural law informed methodology ("naturalism") in deciding cases, and that such an adjudicatory process could be analogized to writing a chain novel. Dworkin writes:

> [C]ommon law adjudication is a chain enterprise. . . . According to naturalism, a judge should decide fresh cases in the spirit of a novelist in the chain writing a fresh chapter. The judge must make creative decisions, but must try to make these decisions "going on as before" rather than by starting in a new direction as if writing on a clean slate. He must read through (or have some good idea through his legal training and experience) what other judges in the past have written, not simply to discover what these other judges have said, or their state of mind when they said it, but to reach an opinion about what they have collectively done. . . . Of course, the best interpretation of past judicial decisions is the interpretation that shows these in the best light, not aesthetically but politically, as coming as close to the correct ideals of a just legal system as possible. Judges in the chain of law share with the chain novelists the imperative of interpretation, but they bring different standards of success—political rather than aesthetic—to bear on that enterprise.[66]

Dworkin's approach resembles Marshall's in *McCulloch* in that Marshall emphasized:

> [The Constitution's] nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language.[67]

For Dworkin, judges should "interpret[] the political structure of their community . . . by trying to find the best *justification* they can find,

65. BLACK, JR., *supra* note 43, at 14–15.
66. Dworkin, *supra* note 43, at 168.
67. *McCulloch*, 17 U.S. at 407.

in principles of political morality . . . from the most profound constitutional rules and arrangements to the details of, for example, the private law of tort or contract."[68] For purposes of this analysis, in interpreting the Constitution, "the important objects," to use Marshall's words,[69] also can reflect what Dworkin calls "the political structure of [a] community."[70] Dworkin and Marshall both seek the best outcome given the structure of the legal system within which they are operating.

Dworkin's focus on "the best *justification* . . . in principles of political morality, for the structure as a whole"[71] means that interpretation of the Constitution must consider values like universal liberty and justice proclaimed in the Declaration of Independence. Specifically, it states: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[72] Likewise, the Constitution should be read to reinforce the Declaration's affirmation that the government is responsible for securing universal liberty and equality: "[T]o secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."[73]

In this vein, on January 1, 1861, a little over eighty years after the Declaration boldly trumpeted American values, Abraham Lincoln wrote a New Year's Day note to himself as he prepared to assume the presidency of a fracturing Union. In the following words, Lincoln summarized the relationship between the Declaration's proclamation of freedom and the Constitution's protection of liberty:

> There is something back of these, entwining itself more closely about the human heart. That something, is the principle of "Liberty to all"—the principle that clears the *path* for all—gives *hope* to all—and, by consequence, *enterprize*, and *industry* to all.
>
> . . .

68. Dworkin, *supra* note 43, at 165.
69. *McCulloch*, 17 U.S. at 407.
70. Dworkin, *supra* note 43, at 165.
71. *Id.*
72. THE DECLARATION OF INDEPENDENCE para. 2 (1776).
73. *Id.*

> The assertion of that *principle*, at *that time*, was *the* word, "*fitly spoken*" which has proved an "apple of gold" to us. The *Union*, and the *Constitution*, are the *picture* of *silver*, subsequently framed around it. The picture was made, not to *conceal*, or *destroy* the apple; but to *adorn*, and *preserve* it. The *picture* was made *for* the apple—*not* the apple for the picture.
>
> So let us act, that neither *picture*, or *apple* shall ever be blurred, or bruised or broken.[74]

Again, the apple of gold—in Lincoln's words "liberty to all" or universal freedom—lies at the heart of American constitutional law. It is central to why we have a constitution—a powerful picture protecting the apple. The primary goal of the Constitution is to establish a nation of liberty and justice for all.[75]

Such an approach has global implications. For example, in a similar international key, the Constitution of the Republic of South Africa expressly incorporates a human-rights-friendly approach into its interpretive framework. Section 1(a) of Article 39 of the South African Constitution states: "When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom."[76] Thus, in South Africa, political morality, democracy, human dignity, equality, and freedom must all be central to constitutional interpretation.

Last for our purposes, but certainly not least, the Constitution provides for separation of powers among three co-equal branches. Thus, interpreters also need to consider how other branches of the government have comprehended the particular constitutional provision(s).[77] To facilitate unity of purpose in promoting the public interest, governmental decision makers in each branch should give due

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74. Abraham Lincoln, *Fragment on The Constitution and Union*, TEACHING AMERICAN HISTORY (Jan. 1, 1861), https://teachingamericanhistory.org/library/document/fragment-on-the-constitution-and-union/.

75. *See* U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.").

76. CONST. OF THE REPUBLIC OF S. AFR. art. 39(1)(a).

77. BREST, *supra* note 43, at 55–62(citations omitted).

deference to how other branches articulate the Constitution whether through legislation, judicial decision, or executive administration.

The modalities[78] of constitutional analysis, which the Article has just outlined, are not exhaustive. They represent some, though not all, of the interpretive tools used to give meaning to the Constitution.[79]

With that caveat, the Article now considers relevant constitutional provisions regarding a right to court-appointed counsel in civil adversarial cases. We begin with the Sixth Amendment, and then evaluate in turn the Fifth, Fourteenth, and Ninth Amendments. Following that analysis, the Article critiques the *Turner* decision.

### *3. Relevant American Human Rights Provisions and Their Interpretation*

#### a. The Sixth Amendment

We begin with a textual analysis of the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."[80] The Sixth Amendment does not say that the right to the assistance of counsel is limited *only* to criminal prosecutions. Nor does the Amendment expressly limit itself *exclusively* or *solely* to criminal prosecutions. The Framers could have said: "In *only* Criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense." Or "*solely* in Criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense." Likewise, they could have stated, "*exclusively* in Criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense." While the Framers were free to expressly limit the Sixth Amendment right to counsel only, solely, or exclusively to federal criminal prosecutions, the text does not unequivocally do so.

On the other hand, it is certainly true that *one possible* interpretation of the Sixth Amendment is that the Amendment applies only, solely, and exclusively to criminal prosecutions. In the recent case of *Turner v. Rogers*,[81] involving an indigent civil defendant in a civil

78. *Id.* at 55.

79. Dworkin, *supra* note 43, at 166. *See generally* JOHN BELL & GEORGE ENGLE, CROSS: STATUTORY INTERPRETATION (2d ed. 1987); BLACK, JR., *supra* note 43, at 14–15.

80. U.S. CONST. amend. VI.

81. 564 U.S. 431 (2011).

contempt child custody proceeding, the Court said that "the Sixth Amendment does not govern civil cases."[82] We will come back to a more complete analysis of that overly restrictive judicial gloss of the Sixth Amendment momentarily.

In the meantime, this Article argues that a better approach to understanding the Sixth Amendment would be to read the Sixth Amendment as part of a whole fabric of human rights' protection woven into the Constitution itself. With that, we turn to an evaluation of the Due Process Clauses of the Fifth and Fourteenth Amendments.

b. The Fifth and Fourteenth Amendment Due Process Clauses

The Constitution's broad protection of human rights includes the Fifth Amendment's Due Process Clause, which says that "No person shall be . . . deprived of life, liberty, or property, without due process of law."[83] The Amendment contemplates that each person has a right to Due Process—that is a fair process—in all circumstances where the person is in jeopardy of losing her life or freedom or property. Again, the text is key. The words of the Fifth Amendment literally embrace both criminal and civil federal cases.

The same is true of the Fourteenth Amendment's Due Process Clause, which applies to the States. The Amendment says that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[84] The Fourteenth Amendment is silent regarding whether its Due Process Clause applies only to civil cases, criminal cases, or both.

Ratified three years following the close of the American Civil War, the Fourteenth Amendment's Due Process Clause was designed to alleviate the oppression of African Americans subjected to Black Codes and other nefarious legal devices fashioned by ex-confederates and their sympathizers who sought to create conditions as close to slavery as possible.[85] For instance, in 1873, in the *Slaughter-House Cases*,[86]

82. *Id.* at 441.

83. U.S. CONST. amend. V.

84. U.S. CONST. amend. XIV.

85. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863–1877, at 119–23 (1988); 1 SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE: 1789–1877 (1972); VA. WRITERS PROGRAM OF THE WORK PROJECTS ADMIN. OF THE STATE OF VA., THE NEGRO IN VIRGINIA 226 (1940). Much of this analysis of the Reconstruction cases is excerpted from JONATHAN K. STUBBS, *Epilogue*, *in* THE MEMOIRS OF HON.

decided eight years after the end of the War, the Court analyzed the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution. The Court stated:

> [N]o one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[87]

By saying that the Constitution safeguarded the rights of African Americans, the Court took a giant step forward compared to the *Dred Scott*[88] decision, which had said that blacks had no rights that whites were bound to respect.

Nevertheless, even though the Fourteenth Amendment conferred national citizenship to formerly enslaved persons, the *Slaughter-House* Court contended that the national rights of citizens were extremely limited. For example, national citizenship rights encompassed the right to petition the government to change its policies, to have the assistance of the national government if the citizen were in trouble on the high seas or with a foreign government, and to move freely from one state to another. In contrast to puny national citizenship rights, the *Slaughter-House* Court said that the states controlled most meaningful rights of citizenship.[89] In this respect, the *Slaughter-House* Court's analysis was problematic because throughout the post-Civil War South, state governments were increasingly dominated by ex-confederates hostile to African Americans exercising their freedom on equal terms with whites.

In *Strauder v. West Virginia*,[90] decided seven years after *Slaughter-House*, the Court charted a more human-rights-friendly interpretive path. The Court struck down a West Virginia statute that limited jurors

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HENRY L. MARSH, III: CIVIL RIGHTS CHAMPION, PUBLIC SERVANT, LAWYER 190–98 (Jonathan K. Stubbs & Danielle Wingfield-Smith eds., 2018).

86. 83 U.S. at 43–44, 71.
87. *Id.* at 71.
88. Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856).
89. 83 U.S. at 79–80.
90. 100 U.S. 303, 305–06 (1880).

to white men who were at least twenty-one years of age.[91] Regarding the appropriate approach to constitutional interpretation, the *Strauder* Court stated that the Fourteenth Amendment

> *is to be construed liberally, to carry out the purposes of its framers*. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States. . . . It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment [while prohibitory] contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.[92]

Despite the text of the Fourteenth Amendment and the *Strauder* Court's constructive modes of clarifying its meaning, in later cases the Court read the Fourteenth Amendment too narrowly. For example, three years after *Strauder*, in the *Civil Rights Cases*,[93] the Court retreated from the Constitution's promise of liberty and justice for all. More specifically, in the Civil Rights Act of 1875, Congress outlawed race discrimination against blacks in public theaters, inns, as well as on railroads. In the *Civil Rights Cases*, the Supreme Court ruled that much of the Civil Rights Act was unconstitutional.[94]

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91. *Id.* at 305.
92. *Id.* at 307–08 (emphasis added).
93. 109 U.S. 3 (1883).
94. *Id.* at 24–25. The opinion of the majority reflected the mentality of many members of the white general public. Such persons equated changes in the law with a practical transformation of the human condition which African Americans lived. The Court stated:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special

The Court interpreted the Fourteenth Amendment to apply only to "state action," and then so narrowly defined state action that it would have been easier for the proverbial "camel to go through the eye of a needle"[95] than for a person of color to prove unconstitutional race discrimination—especially in public spaces. The Court subverted the Amendment to allow race discrimination to flourish in most areas of American civic life.[96] The Court's interpretation of the Amendment shackled Congress' ability to limit race discrimination in public settings.[97] In short, ensuring that African Americans received the same treatment as white folks—the real meaning of equal protection of the laws—was, for the Court in *The Civil Rights Cases*, simply going too far.

Justice Harlan spoke eloquently against the decision of the majority to gut the rights of the newly freed blacks:

> [T]he national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the masters of fugitive slaves. If fugitive slave laws . . . whereby the master could seize and recover his fugitive slave, were legitimate exercises of an implied power to protect and enforce a right recognized by the Constitution, why shall the hands of Congress be tied, so that—under an express power . . . to enforce a constitutional provision granting citizenship—it may not, by . . . direct legislation, bring the whole power of this nation to bear upon States and their officers, and upon such individuals and corporations exercising public functions as assume to abridge, impair, or deny rights confessedly secured by the supreme law of the land?[98]

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> favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.

*Id.* at 25.

95. Matthew 19:24 (New International Version).

96. *The Civil Rights Cases*, 109 U.S. at 46.

97. *Id.* at 60.

98. *Id.* at 53. In fact, instead of reaching out a helping hand to the downtrodden, the Court molded the meaning of the Fourteenth Amendment to benefit the rich and powerful. For example, three years later, in 1886 in *Cty. Santa Clara v. S. Pac. R.R. Co.*, the Court concluded unanimously that under the Fourteenth Amendment railroads were persons. Less than twenty years after the Fourteenth Amendment was ratified to protect the human rights of former slaves, the *Southern Pacific Railway* Court extended human rights guarantees to railroads. According to the Court, the Fourteenth Amendment entitled railroads to equal protection of the laws. *See* Cty. Santa Clara v. S. Pac. R.R. Co., 118 U.S. 394 (1886).

Approximately a dozen years after *The Civil Rights Cases*, a human rights test case that went terribly wrong was initiated by Homer Plessy, a fair-skinned African American.[99] According to court records, Plessy looked like a white person. Plessy wanted to have the local Louisiana segregation statutes overturned because they violated the Fourteenth Amendment's provision that every person in the United States is entitled to equal protection of the laws. Plessy was arrested for riding in the whites-only section in a Louisiana railway car.[100]

Plessy filed suit challenging the local segregation statutes. In an eight-to-one decision, the United States Supreme Court ruled against him. The Court held that the state's statutes were *not unreasonable*.[101] The Court said that if the segregation statutes discriminated in a demeaning manner, the problem was primarily in the minds of blacks who chose to look at the statutes in that way. The majority stated:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[102]

Based on this tortured logic, the Court ruled that the segregation statutes did not violate the Fourteenth Amendment's Equal Protection Clause.

In his dissent, Justice Harlan argued that the real impact of the segregation statutes was that blacks were perceived as being so debased and inferior that they were not free to associate with white citizens:

> Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the

99. Plessy v. Ferguson, 163 U.S. 537, 538 (1896).

100. *Id.* at 538–39. At least one account of Plessy's arrest states that Plessy identified himself by saying to the streetcar conductor: "I have to tell you that, according to Louisiana law, I am a colored man." *See* HARVEY FIRESIDE, SEPARATE AND UNEQUAL: HOMER PLESSY AND THE SUPREME COURT DECISION THAT LEGALIZED RACISM 1 (2004).

101. *Plessy*, 163 U.S. at 550–51.

102. *Id.* at 551.

> seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.[103]

Section 5 of the Fourteenth Amendment conferred upon Congress plenary authority to alleviate color- and caste-based discrimination: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[104] As the Court recognized two hundred years ago in *McCulloch v. Maryland*,[105] the Constitution is a document "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[106]

Accordingly, in cases like *Plessy*, the Court could have upheld Congress' plenary power and expounded the Constitution on a case-by-case common law basis to blaze a freedom trail for vulnerable members of American society. Through a liberal interpretation and application of the substantive provisions of Section 1 of the Fourteenth Amendment—specifically the Privileges or Immunities and Equal Protection Clauses as well as Section 5—liberty and justice for all could have been more fully realized. Instead, the Court effectively barricaded the logical jurisprudential path for expounding American human rights law. The Court's hostile interpretative analysis led to unfortunate consequences for race discrimination victims as well as the broad landscape of American human rights jurisprudence.

When the Court abdicated its responsibility to protect the constitutional rights of societal outcasts, the Court confronted an important theoretical and practical problem: how to protect the human rights outlined in the Bill of Rights from oppressive state laws and policies. The Court's response to its previous missteps was the creation of what Professor Charles Black called the "incorrigibly self-

103. *Id.* at 560.
104. U.S. CONST. amend. XIV, § 5.
105. 17 U.S. (4 Wheat.) 316, 415 (1819).
106. *Id.* at 415.

contradictory" doctrine of substantive due process.[107] In practice, the courts have used this doctrine to buttress the conclusion that most of the provisions of the Bill of Rights apply to the states via the Due Process Clause of the Fourteenth Amendment.[108] Professor Black summed matters up in these words: "The 'due process' clause is being made to carry the load that would far more naturally have been assigned to the 'privileges and immunities' clause of the Fourteenth Amendment, jointly with the two 'citizenship' clauses in that Amendment."[109] Professor Black's analysis neatly synthesizes the results of the Court having painted itself into a proverbial jurisprudential corner.[110]

So far, the Article has contended that to protect liberty and justice for all, read the text of the Constitution as *Strauder* mandated—"*liberally.*"[111] Such an approach should be adopted by members of each branch of government—executive, legislative, and judicial—as well as the general public.

And what, if anything else, furnishes the constitutional mandate for such an interpretation approach? So glad you asked: that is the essence of what the Framers required in the Ninth Amendment to which we now turn.

### c. The Ninth Amendment

The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[112] The text of the Ninth Amendment contemplates that in the United States, individuals have rights which are not enumerated in the Constitution. The Constitution mandates that unenumerated rights are to be recognized and protected to the same extent as the enumerated rights outlined elsewhere—for instance, in the preceding eight Amendments.[113]

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107. BLACK, JR., *supra* note 43, at 91; *see generally id.* at 87–106 (discussing the validation of substantive rights through the "substantive due process" clause).

108. *See* Gideon v. Wainwright, 372 U.S. 335, 341 (1963); BLACK, JR., *supra* note 43, at 91.

109. BLACK, JR., *supra* note 43, at 93. *Gideon* did not apply the Sixth Amendment right to counsel to the States through the Equal Protection Clause of the Fourteenth Amendment either, but rather through the Due Process Clause.

110. *Id.*

111. Strauder v. West Virginia, 100 U.S. 303, 307 (1880).

112. U.S. CONST. amend. IX.

113. *Id.*

As argued previously, Chief Justice Marshall as well as Professors Black and Dworkin illuminate proper interpretation of constitutional texts, particularly where the Framers have structured the Constitution to accomplish broad goals like providing a mechanism to finance national projects (*McCulloch*)[114] or protecting the rights of persons previously enslaved and tormented in barbaric circumstances (*Strauder*).[115] Repeating for emphasis, as Chief Justice Marshall said in *McCulloch*:

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

*McCulloch* dealt with the scope of national governmental power. A similar interpretive approach is necessary to facilitate another important governmental objective: protecting individual liberty. A miserly interpretation of the human rights provisions of the Constitution simply will not do. As Professor Black presciently said:

> There is a myth that lawyers must think small, even meanly, or lose the aura of professionalism. As in all other matters, we should think at the level of magnitude proportioned to the problem. Insistence on thinking small veils the largest facts from view. If we are to have a true *system*, a productive system of human rights, we have to commit ourselves to thinking large. If we are to take seriously the noble words of our past, we must pronounce them with emphasis and without apologetic hesitation. After all, in doing this we risk a good deal less than being hanged, drawn, and quartered.[117]

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114. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

115. *Strauder,* 100 U.S. at 307.

116. *McCulloch*, 17 U.S. at 408.

117. BLACK, JR., *supra* note 43, at 36; *see also* BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT: A CALL FOR LEGISLATIVE AND JUDICIAL RECOGNITION OF RIGHTS UNDER SOCIAL CONDITIONS TODAY 53 (1955) ("[T]he Ninth Amendment is a living and growing philosophy. It was intended and has been interpreted as part of a living and growing Constitution. The Magna Carta has not been restricted by English law to the rights of Englishmen as they existed in 1215 on the field at Runnymede. In the same manner the natural rights of Americans should not be static and fixed as

Accordingly, the Constitution should be interpreted to facilitate (and not frustrate) universal freedom and justice. An appropriate methodology would include, but not be limited to, the following steps:

1. Analyze the facts of each case carefully;

2. Review precedent;[118]

3. Carefully evaluate the words of the text as well as how a particular decision would impact the existing constitutional structure;[119]

4. Identify the values ("principles of political morality")[120] espoused in the Constitution and Declaration of Independence;

5. Expound the meaning of the text in the way in which common law judges decide cases; and

6. Ultimately, in resolving legal disputes, make the type of decision that treats all others as you would like to be treated if you were in their situation.

Having argued for a human-rights-friendly method of constitutional construction, this Article now shifts attention to an evaluation of the Court's decision in *Turner v. Rogers*.[121]

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of the date of the adoption of the Constitution and the Bill of Rights"); *cf.*, KURT T. LASH, THE LOST HISTORY OF THE NINTH AMENDMENT 82 (2009) ("The text of the Ninth Amendment prevents interpretations of enumerated rights that negatively affect the unenumerated retained rights of the people. Neither unduly narrow nor excessively broad interpretations of enumerated rights violate the Ninth Amendment as long as the fact of enumeration is not relied upon to suggest the necessity or superiority of enumeration. It is possible to use the Ninth as implied or indirect support for general theories of broad—or narrow—constructions of enumerated rights, but these secondary theories depend on the original meaning of the Ninth Amendment. Because the historical record suggests a state-protective understanding of the amendment, the Ninth ought *not* to be used in support of broadly interpreted restrictions on the retained rights of the people in the states."). *Contra* DANIEL FARBER, RETAINED BY THE PEOPLE 44 (2007) ("The proposal that became the Ninth Amendment was not paired with the future Tenth Amendment. It was not about federalism; it was about individual rights. Those individual rights belonged to the same genre as free speech (in the proposed Bill of Rights) or the ban on ex post facto law (in the original Constitution). Explicitly listing rights had advantages, in terms of both reassuring the public and stimulating judges to come more readily to their defense. But Madison had done as much as he could to communicate that the listing was not exclusive.").

118. *McCulloch*, 17 U.S. at 437.

119. BLACK, JR., *supra* note 43, at 1–40.

120. Dworkin, *supra* note 43, at 165.

121. 564 U.S. 431 (2011).

### *4. The Case of Michael Turner*

Michael Turner was a noncustodial parent in South Carolina who owed child support. A South Carolina state court ordered him to pay the arrearages. When Turner failed to obey the court order to pay, the state judge found Turner in civil contempt of the court's order. The state court imposed a term of imprisonment upon Turner for one year or until he discharged his debt.[122]

While incarcerated, Turner obtained pro bono legal assistance and argued that in the civil contempt proceeding, he had a right to the assistance of legal counsel. Turner further contended that the state had denied him the right to assistance of such counsel. The South Carolina state courts ruled against Turner.[123] He appealed to the Supreme Court of the United States.

The *Turner* Court began its analysis by pointing out that "the Sixth Amendment does not govern civil cases."[124] The *Turner* Court also acknowledged that "[t]his Court has decided only a handful of cases that more directly concern a right to counsel in civil matters. And the application of those decisions to the present case is not clear."[125] After reviewing pertinent cases, the *Turner* Court concluded that its prior cases "had found a right to counsel 'only' in [civil] cases involving incarceration, not that a right to counsel exists in all such cases."[126]

As to the facts in *Turner* itself, the Court applied the following analytical framework:

> [W]e consequently determine the "specific dictates of due process" by examining the "distinct factors" that this Court has previously found useful in deciding what specific safeguards the Constitution's Due Process Clause requires in order to make a civil proceeding fundamentally fair. As relevant here those factors include (1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest

122. *Id.* at 437.
123. *Id.* at 438.
124. *Id.* at 441. The constitutional exegesis of the present Court is due great respect. However, as previously stated, the text of the Sixth Amendment does not say that the right to assistance of counsel only, exclusively, or solely applies to criminal prosecutions. Moreover, the Fifth and Sixth Amendments should be interpreted as mutually reinforcing and complementary rather than exclusive and potentially at odds.
125. *Id.* at 442.
126. *Id.* at 443.

> with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement[s]."[127]

The Court said that Turner's interest in remaining free from incarceration "argues strongly for the right to counsel that Turner advocates."[128] Indeed, Turner was indigent and faced—and served—jail time.[129] Nevertheless, Turner failed to persuade the Court that fundamental fairness required appointment of state-funded counsel. Instead, the *Turner* Court focused upon the circumstances of Rebecca Rogers, the mother of Turner's child. The Court emphasized that Rogers was unrepresented by legal counsel. Because Rogers (like Turner) was unrepresented by a lawyer, from the Court's perspective, the appointment of counsel for Turner

> could create an asymmetry of representation that would "alter significantly the nature of the proceeding." Doing so could mean a degree of formality or delay that would unduly slow payment to those immediately in need. And, perhaps more important for present purposes, doing so could make the proceedings *less* fair overall, increasing the risk of a decision that would erroneously deprive a family of the support it is entitled to receive. The needs of such families play an important role in our analysis.[130]

The Court also argued that less stringent measures could ensure fundamental fairness, including an accurate determination of whether an indigent defendant could pay child support.[131] The Court suggested that such procedures encompassed advance notice to a defendant that the ability of defendant to pay would be a key issue in the tribunal's decision, appropriate forms to elicit information regarding defendant's economic status, and an opportunity to be heard as well as to present evidence.[132]

In these circumstances, the *Turner* Court held that

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127. *Id.* at 444–45 (citations omitted).
128. *Id.* at 445.
129. *Id.* at 438–39.
130. *Id.* at 447 (citations omitted).
131. *Id.* at 446.
132. *Id.* at 447–48.

> the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year). In particular, that Clause does not require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings).[133]

In essence, in civil contempt child support cases, *Turner* holds that the defendant does not automatically have a right to court appointed counsel where: (1) his failure to pay will subject him to incarceration, (2) the custodial parent or guardian is not represented by a lawyer, and (3) adequate process protections exist to ascertain whether the indigent individual can pay.[134]

Applying its due process test to the facts of *Turner*, the Court nonetheless vacated the decision of the South Carolina Supreme Court, which had denied relief to Turner. The Supreme Court noted that the South Carolina state courts had failed to conduct a proper inquiry regarding whether Turner had the capacity to pay his back child support.[135]

Writing for a four-person dissent, Justice Thomas agreed with the majority that the Sixth Amendment's protection of the right to counsel does not apply to civil cases.[136] However, Justice Thomas argued that if the majority's view of the right to counsel is correct, then the Due Process Clause of the Fourteenth Amendment would "render the Sixth Amendment right to counsel—as it is currently understood—superfluous."[137] That is the Fourteenth Amendment would apply to all criminal proceedings, just as the Sixth Amendment does, as well as to civil cases. Justice Thomas concluded that:

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133. *Id.* at 448.
134. *Id.*
135. *Id.* at 449.
136. *Id.* at 450 (Thomas J., with Scalia, J., dissenting, and Roberts, C.J., with Alito, J. joining in Parts I-B and II of the dissent).
137. *Id.* at 452.

> The majority is correct, therefore, that the Court's precedent does not require appointed counsel in the absence of a deprivation of liberty. . . . But a more complete description of this Court's cases is that even when liberty is at stake, the Court has required appointed counsel in a category of cases only where it would have found the Sixth Amendment required it—in criminal prosecutions.[138]

While the entire *Turner* Court (majority and dissent) agreed that the Sixth Amendment is inapplicable to civil cases,[139] the better view is that the Sixth and Fourteenth Amendments should be read synergistically to protect individual rights in state legal proceedings. This is how you can apply both Amendments in state proceedings. We begin by reimagining *Gideon*'s facts:

A New *Gideon* Fact Pattern

> 1. Gideon was convicted of breaking and entering a pool room with intent to commit a misdemeanor. In Florida, that was a felony. Accordingly, Gideon was subject to criminal prosecution which jeopardized his liberty.
>
> 2. Assuming that when Gideon broke into the pool hall that Gideon damaged the pool hall owner's property, a court could compel Gideon to pay restitution. To make the pool hall owner whole, restitution payments would result in Gideon being deprived of some of his property.
>
> 3. Assuming further that Gideon killed someone while breaking in, Gideon might be charged with a capital offense. In that case, Gideon's life would be at stake.

In this reimagined scenario, as in the original case, Gideon would face criminal proceedings. Accordingly, the Sixth Amendment would apply. Nonetheless, the Fourteenth Amendment should be read as furnishing additional protection for the right to counsel because in the amended scenario, Gideon has so much at stake: his life, liberty, and property. In such circumstances, rather than making the Sixth Amendment superfluous, the Fourteenth Amendment should be

138. *Id.* at 455 (citation omitted).

139. *Id.* at 441 (majority opinion); *id.* at 451 (Thomas J., with Scalia, J., dissenting, and Roberts, C.J., with Alito, J. joining in Parts I-B and II of the dissent).

interpreted as a supplemental human rights insurance policy. That is, the Constitution leaves nothing to chance in the criminal law context. In other words, while the Framers of the Sixth Amendment placed the right to counsel in a prominent place in the Constitution's architecture, the Framers of the Fourteenth Amendment provided secondary human rights insurance coverage. The Sixth and Fourteenth Amendments establish a comprehensive, sturdy fortress securing individual freedom including the rights to life, liberty, and property.

But that is not the end of the story. The text of the Fourteenth Amendment applies not only to state deprivation of human life but also human liberty and human property. The Fourteenth Amendment says that "[n]o state shall . . . deprive any person of life, liberty or property without due process of law . . . ."[140] Individuals' property and their liberty can be adversely affected in criminal and in civil cases. Literally, the Amendment applies to all circumstances (civil and criminal) in which a state could deprive a person of life, liberty, or property.

The *Turner* decision is an example. Michael Turner went to jail, and he had to pay child support out of his own material assets. So, the Fourteenth Amendment's text, read liberally to protect human freedom,[141] applies to civil cases too. Perceived from this constitutional perch, the Framers devised sturdy constitutional safeguards to promote and protect national values central to the establishment of the United States: universal freedom and equality espoused in the Declaration of Independence.[142]

In this context, there is a compelling reason why the Due Process Clause could and should be read to require appointed counsel for Turner, his wife, and his child. Both parents and their child have basic human needs at stake: (a) Turner's liberty and property; (b) the child's human material necessaries; and (c) the wife's need of financial resources to care for the child. The *Turner* majority's cramped reading of the Constitution reduces the scope of human freedom for indigent persons like Turner nearly to a pittance—a subsistence level of governmental protection. The Court holds basically that if the custodial parent or guardian does not have a lawyer, neither should the indigent defendant; even if the defendant, like Turner, may wind up in jail.

140. U.S. CONST. amend. XIV, § 1.
141. Strauder v. West Virginia, 100 U.S. 303, 307–08 (1880).
142. THE DECLARATION OF INDEPENDENCE para. 2 (1776).

How easy is it for a person sitting in jail to interview for employment, obtain a job, and earn enough money for child support? Indeed, how can one seriously argue that in child support or custody hearings, the best interests of the child require that neither parent have a lawyer? That is the practical effect of *Turner*. If the custodial parent is unrepresented, the non-custodial parent is not entitled to a state-appointed lawyer either. And what about the poor child? Does anyone in this indigent family have a constitutionally protected right to counsel when liberty and property are implicated? *McCulloch* teaches courts (and other readers of the Constitution) to engage in "expounding" the Constitution so as to achieve rather than frustrate the goals of a great nation.[143] Should not great nations seek universal liberty and justice?

The Article now sketches and affirms substantive proposals contained in ABA Resolution 112A[144] setting forth the parameters of a right to counsel for indigent persons in specified civil adversarial proceedings, namely those in which basic human needs are at stake.

## *III. ABA RESOLUTION 112A: AN OVERVIEW*

Justice Rutledge eloquently articulated treasured national values when he declared: "Equality before the law in a true democracy is a matter of right. It cannot be a matter of charity or of favor or of grace or of discretion."[145]

However, in August 2006, the ABA House of Delegates (the ABA House) acknowledged a sordid fact:

> Not only has equality before the law remained merely a matter of charity in the United States, but that charity has proved woefully inadequate. The lesson from the past 130 years is that justice for the poor as a matter of charity or discretion has not delivered on the promises of "justice for all" and "equal justice under law" that form the foundation of America's social contract with all its citizens, whether rich, poor, or something in between.[146]

143. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 408 (1819).
144. ABA Resolution 112A, *supra* note 6, at 15.
145. *Id.* (quoting Justice Wiley Rutledge).
146. *Id.* at 16.

Put another way, the ABA House recognized that in the United States, equality before the law is an illusion. Accordingly, the ABA House unanimously adopted Resolution 112A urging:

> federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.[147]

The ABA House of Delegates unanimously specified what basic human needs meant:

> [A]t least the following: shelter, sustenance, safety, health and child custody.
>
> • "Shelter" includes a person or family's access to or ability to remain in an apartment or house, and the habitability of that shelter.
>
> • "Sustenance" includes a person or family's sources of income whether derived from employment, government monetary payments or "in kind" benefits (e.g., food stamps). Typical legal proceedings involving this basic human need include denials of or termination of government payments or benefits. . . .
>
> • "Safety" includes protection from physical harm, such as proceedings to obtain or enforce restraining orders because of alleged actual or threatened violence whether in the domestic context or otherwise.
>
> • "Health" includes access to appropriate health care for treatment of significant health problems whether that health care is financed by government (e.g., Medicare, Medicaid, VA, etc.) or as an employee benefit, through private insurance, or otherwise.

147. *Id.* at 1.

> • "Child custody" embraces proceedings where the custody of a child is determined or the termination of parental rights is threatened.[148]

ABA Resolution 112A recognized that a civil right to counsel was not necessarily limited to basic human needs: "Powerful common law, constitutional, and policy arguments support a governmental obligation to ensure low income people are provided the means, including lawyers, to have effective access to the civil courts."[149] In fact, two years before adopting Resolution 112A, the ABA had elucidated the civil right to counsel in its amicus brief in *Tennessee v. Lane.*[150] The *Lane* case involved denial of due process rights to two individual plaintiffs who had greatly diminished access to courts because the plaintiffs suffered paralysis resulting in their confinement to wheel chairs. In *Lane*, the ABA amicus brief recognized that too often, courts were (and are) constructed without elevators, ramps, and other features to enable all persons to participate in proceedings. In those circumstances, the ABA brief contended that:

> [W]hen important interests are at stake in judicial proceedings, the Due Process Clause requires more than a theoretical right of access to the courts; it requires *meaningful* access. . . . To ensure meaningful access, particularly when an individual faces the prospect of coercive State deprivation through the judicial process of life, liberty, or property, due process often requires the State to give a litigant affirmative assistance so that he may participate in the proceedings if he effectively would be unable to participate otherwise.[151]

Thus, while for practical considerations, Resolution 112A calls for an incremental approach beginning with the most pressing human needs, the Resolution also recognizes that access to justice extends beyond guaranteeing protection of basic human needs. In other words,

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148. *Id.* at 13. *See also* ABA Family Law Section Standards of Practice for Lawyers Representing Children in Custody Cases (May 2, 2003), https://www.americanbar.org/content/dam/aba/images/probono_public_service/ts/standards_of_practice_for_lawyers_representing_children.pdf (including suggested criteria to decide when counsel should be appointed for children in custody cases).

149. ABA Resolution 112A, *supra* note 6, at 6.

150. Brief for the American Bar Ass'n as Amicus Curiae Supporting Respondents at 2, *Tennessee v. Lane*, 541 U.S. 509 (2004) (No. 02-1667).

151. ABA Resolution 112A, *supra* note 6, at 3.

the Resolution also is based upon a broader articulation of American values going back to the Declaration of Independence and encapsulated in five words: liberty and justice for all.[152]

For the reasons set forth in Part II, at the very least the Constitution provides protection for the right to counsel for indigent persons in civil adversarial proceedings.[153] Indigent litigants facing deprivation of liberty or property in civil cases have no less freedom to defend themselves than do materially affluent participants in such proceedings.

Moreover, according to the Legal Services Corporation's (LSC's) 2017 Justice Gap Report, indigent civil litigants have an immense unmet need for legal representation. The 2017 Justice Gap Report outlined the parameters of the "justice gap," that is the "difference between the civil legal needs of low-income Americans and the resources available to meet those needs."[154] The 2017 Report found that over sixty million Americans live below the federal poverty line.[155] Based on survey data, in 2017, 86% of legal problems reported by such individuals were unmet.[156]

Further, four out of every five low-income individuals with legal problems do not even seek professional legal assistance.[157] Many indigent individuals don't know where to start seeking resources. Others might not recognize that their situations require legal assistance. And yet others simply opt to try and handle the dilemmas themselves using whatever resources are available (for instance, informal advice from family and friends).[158] In short, only 20% of low-income individuals with legal difficulties seek expert legal assistance. Of those 20%, nearly 90% report receiving no help or inadequate help.[159]

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152. *Id.* at 2.
153. *See supra* pt. I.
154. *Justice Gap Report*, *supra* note 9, at 6.
155. *Id.*
156. *Id.*
157. *Id.* at 28.
158. *Id.* at 33.
159. *Id.* at 6. Another way of looking at matters is this: if only 20% of low-income individuals needing expert legal assistance seek such assistance, then that means the other 80% are very unlikely to receive such expert legal help. To compound matters, if nearly 90% of those who do seek help report receiving no or inadequate help, that suggests that only 10% of the 20% seeking assistance might be receiving adequate aid. Since 10% of 20% is 2%, one wonders whether only 2% of indigent individuals needing legal assistance wind up satisfied with the help that they received.

To make matters worse, the Justice Gap Report estimates that nearly 70% of indigent persons will have at least one significant legal problem in the course of a year.[160] In fact, the majority of low-income persons will have multiple legal problems. At least 55% of such individuals will have at least two challenges. Indeed, some sub-populations, like veterans and victims of recent episodes of domestic violence, report significantly higher incidences of legal difficulties. For impoverished veterans, 71% of households confront legal challenges.[161] Distressingly, over 97% of households with recent domestic violence victims wrestle with such difficulties.[162]

And what are examples of such challenges? They run the gamut from child support enforcement (as in *Turner*);[163] to denial of veterans[164] or social security benefits;[165] to housing eviction;[166] and fending off creditors who are often seeking payment for health-related bills incurred by uninsured or underinsured individuals.[167] Some persons are homeless and others only half a step from being so.[168]

One astounding Justice Gap Report statistic follows: during 2017, an estimated 1.7 million legal problems were brought to Legal Services Corporation grantees for resolution, but "these estimated 1.7 million civil legal problems represent less than 6% of the total civil legal problems faced by low-income Americans."[169] Stated differently, nearly 95% of indigent Americans' legal problems are not addressed by legal aid organizations. In practical terms, the Justice Gap Report suggests that as many as twenty-eight million legal problems confronting indigent individuals go unmet by organizations offering legal aid.[170] How many of the twenty-eight million legal problems are resolved by lawyers not affiliated with legal service institutions? The answer is not clear. But the daunting need for services is evident.

The upshot of all of this is that the needs of the materially disadvantaged members of American society are enormous. Justice

160. *Id.* at 7.
161. *Id.* at 49.
162. *Id.* at 52.
163. *Id.* at 23.
164. *Id.* at 24.
165. *Id.*
166. *Id.* at 38.
167. *Id.* at 22.
168. *See id.* at 21.
169. *Id.* at 40.
170. *Id.* 1.7 million is 6% of 28.3 million.

Rutledge's stirring affirmation notwithstanding, in the United States, liberty and justice for all remains, to put it mildly, an elusive goal. One wonders whether when it comes to meaningful access to justice, the situation of materially impoverished persons in the United States is like that of African Americans following the Civil War. African Americans looked forward to a "new birth of freedom"[171] and viewed the Thirteenth, Fourteenth, and Fifteenth Amendments as places of legal refuge from legal oppression. African Americans instead discovered, painfully and frequently, that the promises of refuge were merely "splendid baubles, thrown out to delude those who deserved fair and generous treatment at the hands of the nation."[172] Often that is the way it is with indigent individuals in civil legal proceedings.

To give a practical example, suppose that a landlord refuses to comply with his obligations under the Department of Housing and Urban Development's Section 8 Program. If the landlord subsequently seeks to evict a senior citizen on a fixed income who has no legal representation, the senior citizen and her grandchildren are likely to suffer homelessness.[173] Lack of legal counsel can be a matter of living in a safe environment, on the street, or not at all.

Something is wrong with this picture. Resolution 112A was simply a practical, incremental step toward the wider imperative of meaningful access to civil legal proceedings.[174] In some respects, the ABA Resolution represented the ABA House of Delegates' attempt to construct a firm foundation for protecting the human rights of materially indigent persons in civil cases. But in the context of the human right to counsel for indigent persons in civil cases, to paraphrase Robert Frost, America yet has "promises to keep, and miles to go before [we can] sleep."[175]

Part IV of this Article briefly appeals to readers to consider a paradigm shift to address the pressing needs of individuals who are materially indigent.

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171. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) (transcript at http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm).

172. The Civil Rights Cases, 109 U.S. 3, 48 (1883) (Harlan, J., dissenting).

173. *See Justice Gap Report*, *supra* note 9, at 25.

174. *See* ABA Resolution 112A, *supra* note 6, at 6.

175. Robert Frost, *Stopping by Woods on a Snowy Evening*, POETRY FOUND., https://www.poetryfoundation.org/poems/42891/stopping-by-woods-on-a-snowy-evening (last visited Feb. 3, 2020).

## *IV. THE CHOICE: A MORAL REVOLUTION OR AN IMMORAL CATASTROPHE*

> [I]f we are to have peace on earth, our loyalties must . . . transcend our race, our tribe, our class, and our nation; and this means we must develop a *world perspective*. No individual can live alone; no nation can live alone. . . . [W]e must either learn to live together as brothers [and sisters] or we are all going to perish together as fools.[176]

Dr. Martin Luther King, Jr. recognized that we are all in this life on earth *together*. King accurately perceived that the alternative to living together as a peaceful human family would be that "we are all going to perish together as fools."[177] King died fighting for the rights of all humans—especially persons like Clarence Earl Gideon who found themselves at the bottom of the social hierarchy. At King's death, he was marching with sanitation workers in Memphis and on his way to lead a Poor People's Campaign in Washington, D.C.[178] King knew that America could never achieve its greatest potential unless all people were able to exercise their human rights to the maximum extent possible. Maximizing human potential is easier when people know, as well as are able, to defend and exercise their human rights.

And that is where lawyers come in. As the LSC has documented, tens of millions of Americans do not have access to affordable legal services. Accordingly, those individuals are stymied in enjoying constitutionally protected freedoms.[179] On a daily basis, without the guidance and protection that a lawyer can furnish, such individuals are deprived of what ABA House Resolution 112A refers to as "basic human needs."[180] The ABA Resolution said:

> [W]hen parties lack counsel in civil proceedings . . . to insure that justice is done in cases involving pro se litigants, courts must struggle with issues of preserving judicial neutrality (where one

176. MARTIN LUTHER KING, JR., *A Christmas Sermon on Peace*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR., 253, 253 (James M. Washington ed., 1990) (emphasis added).

177. *Id.*

178. Olivia B. Waxman, *What Happened to Martin Luther King Jr.'s Last Campaigns*, Apr. 2, 2018, TIME, (sub. req.), https://time.com/5221565/martin-luther-king-last-campaign/.

179. *Justice Gap Report*, *supra* note 9, at 16 (finding that "[m]ore than 60 million Americas have family incomes below 125% of the Federal Poverty Level").

180. ABA Resolution 112A, *supra* note 6, at 7.

> side is represented and the other is not), balancing competing demands for court time, and achieving an outcome that is understood by pro se participants and does not lead to further proceedings before finality is reached. Meantime large numbers of pro se litigants lose their families, their housing, their livelihood, and like fundamental interests, losses many of them would not have sustained if represented by counsel.[181]

What situation does Resolution 112A describe? Could it be the quintessential exemplar of a deprivation of liberty and property without due process of law?

More to the point, why does this ongoing national nightmare for millions of Americans continue unabated? Perhaps it is in part because we as humans are often blinded by our own narrow-minded thinking. Dr. King gave a telling practical example based on his experience conversing with the white jailers who wanted to talk with him about race while they had King locked up in a Birmingham jail. King stated:

> [W]e got down one day to the point—that was the second or third day—to talk about where they lived, and how much they were earning. And when those brothers told me what they were earning, I said, "Now, you know what? You ought to be marching with us. You're just as poor as Negroes." And I said, "You are put in the position of supporting your oppressor. Because through prejudice and blindness, you fail to see that the same forces that oppress Negroes in American society oppress poor white people. And all you are living on is the satisfaction of your skin being white, and the drum major instinct of thinking that you are somebody big because you are white. And you're so poor you can't send your children to school. You ought to be out here marching with every one of us every time we have a march."[182]

King saw what his jailers did not: that they were all "brothers" in similar circumstances who needed to unite in the struggle for justice for all.

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181. *Id.* at 10.

182. MARTIN LUTHER KING, JR., *The Drum Major Instinct*, *in* A TESTAMENT OF HOPE, *supra* note 176, at 264. The speech is also available online. Martin Luther King, Jr., The Drum Major Instinct, Sermon at the Ebenezer Baptist Church of Atlanta (Feb. 4, 1968) (https://kinginstitute.stanford.edu/king-papers/documents/drum-major-instinct-sermon-delivered-ebenezer-baptist-church).

ABA Resolution 112A also recognizes that in America we are all part of a national community—all in it together—and that if the legal system is to retain legitimacy, the system must be made to work well for everyone. In this vein, Resolution 112A presciently notes that "the perception the courts do not treat poor people fairly has consequences for the system itself."[183] As California Chief Justice Ronald George recently observed, "[E]very day the administration of justice is threatened . . . by the erosion of public confidence caused by lack of access."[184] Indeed, as King affirmed in his Letter from Birmingham Jail, "Injustice anywhere is a threat to justice everywhere."[185]

That is why in the United States, it is in our national self-interest to ensure access to liberty and justice for all. This necessity is made more urgent when we recognize that failure to do so can unleash powerful centrifugal forces that can rend America asunder. Such destructive impulses erupt when persons lose hope. And in a global context in which international competitors or adversaries attempt to disrupt national elections[186] as well as steal the private information of millions of citizens,[187] why would policy makers add to America's vulnerabilities by effectively barring the doors of justice to millions? The denial of access to justice can only have deleterious impacts on America's societal stability and progress.

So, the questions are: If not now, when will liberty and justice for all roll on like waters? And when will the moral revolution—the paradigm shift in human consciousness needed to effect constructive societal change—burst forth? The answers lie within each human breast.

183. ABA Resolution 112A, *supra* note 6, at 10.

184. *Id.* (citing Chief Justice Ronald George, State of the Judiciary Speech to California Legislature, 2001).

185. MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, *in* TESTAMENT OF HOPE, *supra* note 176, at 290.

186. Robert S. Mueller, III, Report on the Investigation into Russian Interference in the 2016 Presidential Election, (Mar. 2019), Vol. I at 1.

187. *See, e.g.*, *All Things Considered: One Year After OPM Data Breach, What Has the Government Learned?* (Nat'l Pub. Radio broadcast June 6, 2016) (transcript and audio at https://www.npr.org/sections/alltechconsidered/2016/06/06/480968999/one-year-after-opm-data-breach-what-has-the-government-learned). Hackers possibly associated with the Chinese government were suspected of being involved. *Id.*