CHAPTER 2

Introduction to Constitutional Law

A. What Is Constitutional Law?

The Oxford English Dictionary defines a *constitution* as "the system or body of fundamental principles according to which a nation, state, or body politic is constituted and governed." It can be helpful to define *constitutional law*—at least as it is practiced in the United States—in three ways.

1. The Law That Governs the Government

A constitution controls how the government is constituted (its parts and their relationship to each other) and what it may do (its powers). In constitutional litigation, a government has taken some action—and a court is asked whether that action is permitted by the relevant constitution.

Because constitutional law governs the government, it generally does not govern the behavior of private persons or organizations. For example, the Fourth Amendment to **the US Constitution** does not allow the government to make an unreasonable search of your bedroom. If your neighbors make an unreasonable search of your bedroom, they have not violated the Fourth Amendment—although they might have violated other laws related to invasion of privacy or trespass.

Several terms convey the idea that a constitution governs the government but not private parties. *Public law* is a shorthand for laws that involve the government. Constitutional law is the most conspicuous form of public law, although other types of public law exist (including municipal law, administrative law, and tax law). Public law is distinguished from *private*

■ TERMINOLOGY

THE US CONSTITUTION: In this book, "constitution" (with a lowercase c) refers to the constitution of any state or nation. "Constitution" (with a capital C) refers to the Constitution of the United States of America.

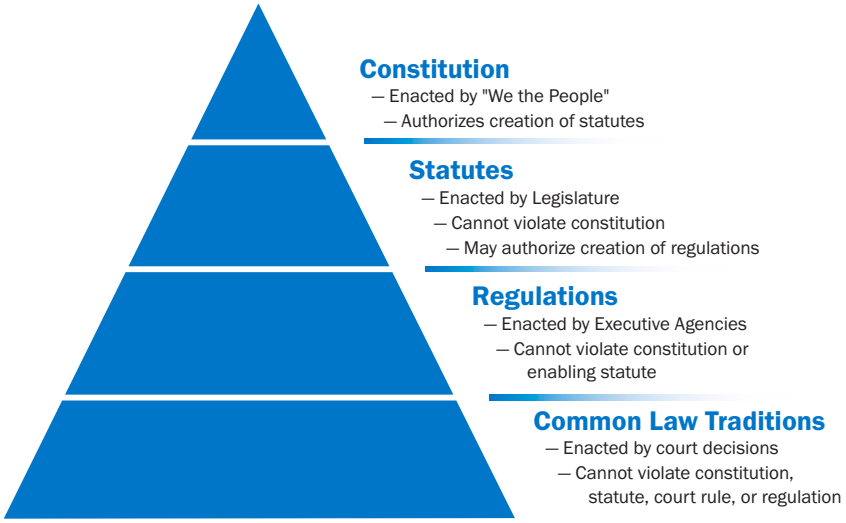
law, which regulates the interactions among individuals. Many of the standard topics covered in the first year of law school (including property, contracts, and torts) are examples of private law.

2. The Law for Making Laws

The government has power to create *laws* (legally binding rules). Indeed, the most important functions of any government are making laws and then enforcing them. Should there be a minimum wage? Should there be a tariff on imported steel? Should there be a speed limit on two-lane roads? Instead of directly answering such questions, most constitutions establish procedures for answering them. In other words, constitutions provide the law for making laws.

This pyramid represents sources of law that tend to appear in modern constitutional systems.

Hierarchy of Laws in a Hypothetical Government



Constitution. The constitution sits at the top of the pyramid. It is the supreme law for the jurisdiction; laws created elsewhere in the pyramid will be unconstitutional to the extent they contradict portions of the constitution. In most modern nations and states, the theory behind the constitution is that it represents the will of the people, who are the ultimate sovereigns. See Ch. 3.A.1.

Statutes. Most laws are found in statutes enacted by a legislature. The legislature has leeway to enact whatever statutes it wishes, so long as it follows the constitution's laws for law-making. A constitution may include both procedural and substantive rules for the legislative process.

- A constitution will include a set of *procedures* for making laws. For example, the US Constitution requires that any law be approved by both the House of Representatives and the Senate. Art. I, § 7, cl. 2. The Nebraska constitution, by contrast, calls for a unicameral legislature (having a single house), unlike the bicameral (two-house) federal legislature.
- A constitution may also limit the *substance* of legislation by specifying the types of laws the government may (or may not) enact and enforce. The US Congress might follow entirely proper legislative procedures to enact a law making it a crime to criticize the President, but the substance of that law would violate the Free Speech Clause of the First Amendment to the US Constitution.

The procedures for lawmaking found in the US Constitution have generated relatively little controversy. As a result, most of the material studied in this book involves constitutional limits on the substance of legislation.

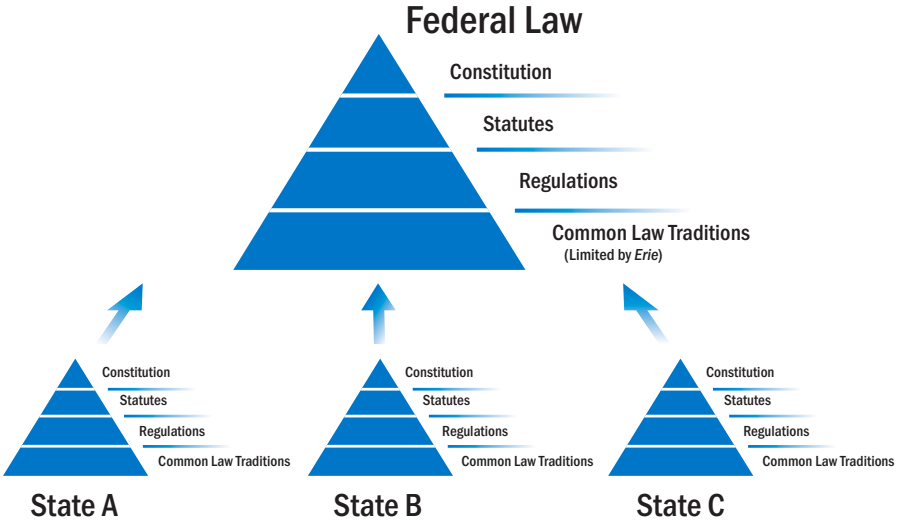
Regulations. Modern legislatures often delegate some law-making to administrative agencies. For example, the US Congress could create a Department of Education to oversee federal funding of schools. The statute creating the Department (usually known as an "enabling act" or sometimes an "organic act") might empower it to enact regulations having the force of law with regard to the use of those funds. If so, the enabling act could contain language establishing the agency's rules for making regulations (both procedural and substantive). An agency may not enact regulations that violate either its enabling act or the Constitution. Thus, if the Department of Education required recipients of federal funds to expel students who criticized the President, the regulation might violate the agency's enabling act as well as the Free Speech Clause of the US Constitution.

Common Law Traditions. Decisions by judges (collectively known as the common law) are an ancient source of legally binding rules. Since Roman times, it has been possible to sue a person in court for breaching a contract or committing a tort, even if no written constitutional provision, statute, or regulation says so. In common law countries like the US, common law traditions remain legally binding, unless (a) they are abrogated or overridden by duly enacted statutes or regulations, or (b) they are themselves unconstitutional. Thus, if a court decides, as part of its ever-evolving common law, to allow the President to sue students for their political criticism, the new tort could violate applicable statutes or regulations dealing with education law (if they exist) and would also violate the Free Speech Clause.

The rule from *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)—usually studied in Civil Procedure classes—prevents federal courts from creating federal common law traditions that would displace state law counterparts. As a result, common law traditions for most subjects are created by the state courts.

Under Art. VI, § 2 of the US Constitution (the Supremacy Clause), the Constitution and laws of the United States are "the supreme law of the land," so states are required to abide by federal law notwithstanding any state law to the contrary. As a result, any action by a state or local government would be invalid if it violates federal law. In the diagram below, a law created at any level of a state pyramid would be invalid if it violated law created at a higher level within the state or federal pyramids.

State and Federal Legal Hierarchies



Of all the potential conflicts between the various levels of legal authority, this book focuses on conflicts involving the top level of the federal pyramid: namely, whether an action of federal, state, or local government violates the US Constitution.

3. The Plan for Deciding Who Decides

Virtually any constitutional dispute could be phrased in terms of its results ("may the government do this?") or in terms of decision-making power ("who gets to decide what the government will do?"). Deciding who decides has huge ramifications, both for the present dispute and for similar disputes in the future.

The constitution of a hypothetical absolute monarchy would have a very short and simple plan for deciding who decides: The monarch decides everything. The US Constitution is far more complex, allocating decision-making authority among many different bodies. The Constitution "split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (Kennedy, J., concurring), releasing creative energy that might never find voice in an absolute monarchy.

Three "who decides" questions tend to arise most often in litigation involving the US Constitution.

Federalism: Levels of Government. The division of power between the levels of government is known as *federalism*. Some topics are decided exclusively at the national level by the federal government, such as immigration and naturalization. Others are decided exclusively at the state or local level, such as the traffic laws for local roads. Some involve concurrent decision-making, where the federal government may set minimum national standards that states may then supplement with additional laws. For example, a federal environmental law may make it illegal to discharge more than ten gallons of a toxic substance into a navigable waterway, and state law may forbid discharge of more than five gallons.

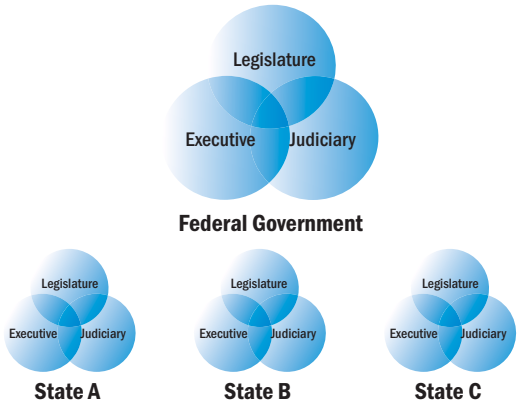
The text of the US Constitution expressly answers some questions involving the federal/state balance. For example, the federal government is allowed to coin money, Art. I, § 8, cl. 5, while the states are not, Art. I, § 10. But most federalism questions are open for interpretation. Whether a particular legal or social problem should be resolved by the federal government, the state governments, or both, is an eternal constitutional debate.

Separation of Powers: Branches of Government. Within a single level of government (national or state), the relevant constitution may assign specific decisions to different branches. For example, under the US Constitution, Congress may declare war, Art. I, § 8, cl. 11, but as the commander in chief of the armed forces, the President is responsible for tactical military decisions, Art. II, § 2. The President may be removed from office for treason, bribery, or other high crimes and misdemeanors, Art. II, § 4, but the decision is not for the Supreme Court to make: the removal will occur only if the House of Representatives votes to impeach (formally accuse) the President, Art. I, § 2, cl. 5, and the Senate thereafter finds that the President committed the accused wrongs, Art. I, § 3, cl. 6.

In addition to these expressly assigned roles, the US Constitution envisions a more general separation of powers, where "all legislative powers herein granted" are given to Congress, Art. I, § 1, "the executive power" to the President, Art. II, § 1, and "the judicial power" to the courts, Art. III, § 1. These terms are not expressly defined in the text, but as a general matter "legislative power" is the power to establish governmental policies, "executive power" is the power to execute (put into effect) those policies, and "judicial power" is the power to resolve disputes, including disputes arising from the policies or their execution. For example, the legislature could decide, by statute, that selling cocaine is a crime, but it could not decide that specified persons are guilty of selling cocaine and directly impose punishment on them. The executive—in the person of the prosecutor—investigates individual violations and files charges, and no punishment may be imposed until the judiciary resolves the dispute between the prosecutor and the defendant over the question of guilt. In the same way, the executive and the judiciary could not decide to punish people for selling cocaine in the absence of a statute defining the crime.

Separation of executive power from legislative power is primarily an American tradition. Most other modern democracies use a parliamentary system, where the executive is not independent of the legislature. In those governments, the prime minister or similar chief executive is selected by, and answers directly to, the parliament. The US Constitution allows state governments to adopt parliamentary systems, but as it happens all US states follow the federal government's three-branch system for separation of powers (although their chief executives are called "governors" instead of "presidents" and their legislatures are called "legislatures" or "assemblies" instead of "congresses"). The precise details of separation of powers may differ from one state constitution to another, but the basic concept remains consistent across American jurisdictions.

State and Federal Separation of Powers



Individual Rights. Much of the Constitution outlines the relationships among governmental actors, but some portions control the relationship between the government and individuals, assigning *rights* to individuals that the government may not abridge. Some rights can be viewed in terms of decision-making authority. The First Amendment to the US Constitution, for example, prevents the government from deciding for individuals which religion to practice, which books to read, and which candidates to support. These decisions are beyond the reach of the government altogether, which means they may be made by individuals for themselves.

Disputes over individual rights may also implicate federalism and separation of powers, because they suggest yet another question: who gets to decide who gets to decide? Imagine a state legislature makes it illegal to speak any language other than English in one's home. The legislature evidently believes that it gets to decide that question, but affected individuals may believe that the US Constitution gives that decision to them. Under the American tradition known as *judicial review*, see Ch. 4, the federal judiciary has the last word on how the US Constitution allocates the power to decide which languages may be spoken at home. Giving the last word to a federal entity, rather than to the state legislature, has implications for federalism. And giving the decision to the judiciary, rather than to another branch of the federal government, has implications for separation of powers. For

these reasons, how a judge feels about federal power in general, and judicial power in general, may affect how the judge feels about protecting individual rights.

B. Why Study Constitutional Law?

In most US law schools, Constitutional Law is a required course. It is important to study for at least two different reasons, one relating to the content of the material and another to the development of legal skills.

Content. All lawyers need at least a basic familiarity with constitutional law, no matter what their area of practice. Some lawyers have governmental entities as clients; those clients need to know how to work within the Constitution. All of the other lawyers will have clients who interact with the government; those clients need to know whether the government has violated the Constitution in its interactions with them. Even if your day-to-day practice does not involve regular work with constitutional law, full service to your private clients requires the ability to identify the most common constitutional problems when they arise.

In addition, knowledge of constitutional law is an important facet of informed citizenship. As a result, most Americans have a healthy interest in their Constitution.

Skills. Beyond its content, constitutional law is important for all law students because it emphasizes legal skills that may be different from the ones emphasized in other required courses.

The first set of skills involve the interpretation of legal texts that might be called broadly worded, open-textured, or even vague. Is death by lethal injection "cruel and unusual punishment?" Does a court provide "due process of law" if the judge hearing the case has benefitted from millions of dollars of favorable campaign advertisements financed by one of the parties? Is a criminal defendant's right to "assistance of counsel" violated if the attorney fails to inform the defendant of the immigration consequences of a guilty plea or conviction? To answer these and

How Precise Should a Constitution Be?

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similar questions, a court must do more than read the constitutional language in isolation.

The amount of specificity in a written law is sometimes described as the difference between comparatively specific *rules* and comparatively general *standards*. Consider two different approaches to writing a traffic code. A rule-based approach would develop a list of prohibitions whose meaning is unlikely to provoke much disagreement, such as "Do not drive faster than 50 miles per hour," "Keep your vehicle on the right side of the center line," "Turn on headlights after sunset," and "Do not pass a stopped school bus." The major benefit of precise rules is that they can be applied easily and reliably. So long as enough evidence is available, it is fairly simple to determine whether the driver was moving faster than 50 miles per hour. However, a full list of all the legal rules necessary to ensure traffic safety can become long, technical, and hard to remember. And no matter how detailed it is, it will run the risk of being incomplete. A rule-based traffic code written before the invention of mobile phones would not include a provision that said "Do not text while driving." The absence of a rule directly on point might mean that dangerous conduct is left unregulated.

A different approach to a traffic code might set forth a general standard, such as "Do not drive recklessly." The standard communicates the goal of the law in a few words that can be readily grasped and remembered. It also adapts to unforeseen circumstances without amendments. In a jurisdiction with a legally-binding standard against reckless driving, the government could take action against persons whose recklessness takes the previously unknown form of texting while driving. The texting driver could be charged with reckless driving, and it would be up to a jury to decide if the defendant's actions violated that standard. The adaptability of a standard comes at a cost, of course: it is flexible enough to reach novel situations, but it can be hard to predict how it will be interpreted by arresting officers, prosecutors, judges, and juries. Interpreting a broad standard as a method to decide a concrete legal dispute requires a type of reasoning that is different from the reasoning used to apply a precise rule.

Because both rules and standards have their uses, any complex legal system will include some of each. This means that any lawyer, even ones who do not regularly practice constitutional law, must learn how to work with standards. Transactional attorneys may need to interpret vague terms in a contract, deed, will, or trust. Attorneys in any field might need to interpret a vague statute or agency regulation. Constitutional law is an excellent subject for gaining experience with standards. The US Constitution includes some straightforward rules, but many of the great constitutional cases struggle with what *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943), called "majestic generalities." These include terms like "equal protection of the laws" or "commerce among the several states" that express ideas through broad and evocative terms.

Broad language is inevitable in a constitution that is dedicated, at least in part, to announcing general principles. As Chief Justice John Marshall stated in *McCulloch v. Maryland*, 17 U.S. 316 (1819), "we must never forget that it is a *constitution* we are expounding." By this, he meant a set of standards rather than a detailed code of rules. In theory, the Framers could have written more rules into the Constitution, and this might have resolved some issues that perplex us today. But that approach might have led to no constitution at all, if the Framers became deadlocked over matters that did not require immediate solutions. Setting aside tasks for another day is an important part of statesmanship, but it means that those of us who live in what the Framers considered the distant future must make interpretive decisions about how to apply constitutional standards.

Rules and Standards in the US Constitution

- Each state has two Senators
- President's term ends on January 20
- Treason conviction requires testimony of two witnesses to the same overt act, or a confession in open court

- No deprivation of life, liberty, or property without due process of law
- No abridgement of freedom of speech
- No unreasonable search and seizure

The second set of legal skills that are well-developed in a Constitutional Law class involve responding to change. The US Constitution is, in the grand scheme of things, a fairly new area of law when compared to truly ancient types of law like contracts, property, or torts. As a result, cases of first impression regularly arise with little precedent directly on point. Changes in constitutional interpretation are also likely to occur because legal decision-making based on standards is subject to disagreement; because eternal debates continue to resurface in novel settings; because the people deciding the cases change over time; and because the cases arise in contexts with ever-changing social, political, technological, and economic circumstances. The result is frequent change. Minimum wage laws were declared unconstitutional in 1923 but constitutional in 1937. Racial segregation was declared constitutional in 1896 but unconstitutional in 1954.

Any serious study of Constitutional Law requires learning about some decisions that have been overruled or abandoned. The story of why and how change occurred helps you understand today's law. And the ability to deal with future legal change is a skill that all lawyers need. No one studying law today can expect to have an entire legal career without experiencing any changes in law. Studying the shifts of the past helps prepare you for the shifts that are certain to arise in the future.

All this means that you may struggle dutifully to understand cases taught at one point in the course, and then you will need to struggle dutifully at a later

point in the course to understand the cases overruling them. Once again: This is not a bug, it's a feature.

C. Methods of Constitutional Reasoning

Deciding specific cases consistently with a broadly-worded standard is rarely a mechanical enterprise; it requires careful reasoning and good judgment. For the most part, the US Constitution does not declare that any particular methods of judicial reasoning are required, preferred, or forbidden. (The Constitution's only mention of interpretation appears in the Ninth Amendment: "The enumeration in this Constitution, of certain rights, shall not be *construed* to deny or disparage others retained by the people.") In an influential lecture, Prof. Philip Bobbitt identified six general approaches that courts often use when applying the Constitution's intentionally broad language. Philip Bobbitt, *Constitutional Fate*, 58 Tex. L. Rev. 695 (1980). He noted that the methods are not mutually exclusive, and often overlap:

> I would emphasize that no sane judge or law professor can be committed solely to one approach. Because there are many facets to a single constitutional problem and . . . many functions performed by a single opinion, the jurist or commentator uses different approaches as a carpenter uses different tools, and often many tools, in a single project. . . . [W]e expect the creative judge to employ all the tools that are appropriate, often in combination, to achieve a satisfying result. Furthermore, in a multi-membered panel whose members may prefer different constitutional approaches, the negotiated document that wins a majority may, naturally, reflect many hues, rather than the single bright splash one observes in dissents.

■ TERMINOLOGY

METHODS OF REASONING: The first letters of the six methods of reasoning described here (text, precedent, structure, history, consequences, and values) can be combined into a mnemonic device: "The Perfect Sundae Has Chocolate and Vanilla."

Mastering various **methods of reasoning** will help you be more persuasive as a lawyer in any setting where you need to flesh out the meaning of an ambiguous document, whether it is a constitution, a statute, a will, or a contract.

1. Text

The textual approach seeks to resolve a controversy by reference to the words found in the text of the written constitution.

Not all constitutions are written. For centuries, the British have taken great pride in what they call their "constitution," but this term does not refer to a single authoritative document. The British constitution is primarily a tradition, not a text. This tradition deals with the usual topics for constitutions, such as the methods for lawmaking (a parliament consisting of two houses), allocation of decision-making

power (assigning areas of responsibility between parliament and the crown), and a set of individual rights.

The US Constitution was one of the first world constitutions to take fully written form. A written constitution has the advantage of avoiding debates about what the constitution says. It does not eliminate debate about what those words mean, but the words cannot be ignored. Where the text allows for only one correct answer (senators must be "thirty" years old), we expect judges to enforce that answer. If the text does not seem to direct a single outcome (governmental takings of private property for public use require "just" compensation), we expect judges to reach results that are at least consistent with the text, even if not unambiguously commanded by it.

Careful textual arguments begin with the Constitution's choice of words. For example, the Eighth Amendment forbids excessive "fines." A lawsuit claiming that high tax rates violate the Eighth Amendment is in trouble from the start, because the text speaks about "fines," not "taxes." The context in which the chosen words appear will also be important. The ban on excessive fines appears in a sentence that also deals with the setting of bail and the infliction of punishment, suggesting a concern with the criminal process and not with raising governmental revenues. It may also be illuminating to consider how other portions of the Constitution use the same or different words. The word "fine" appears only in the Eighth Amendment, but the word "tax" appears in Art I, §§ 8–9, and in the Fourteenth, Sixteenth, and Twenty-Fourth Amendments. This contrast suggests that the Constitution envisions different meanings for "fines" and "taxes." The use of the word "tax" in multiple provisions might also mean that it has the same, or at least similar, meaning in each of them.

2. Precedent

The precedential approach considers how earlier courts resolved analogous cases.

Courts may issue rulings about the meaning of the Constitution only when necessary to resolve a "case" or "controversy" presented in the course of litigation. Art. III, § 2. Our common law litigation process, inherited from Britain, calls for courts to follow precedent. When a binding decision interprets the Constitution, later cases are expected to adhere to that interpretation.

The approach to precedent in constitutional cases is analogous to that found in legal areas dominated by judge-made common law traditions, such as contract, property, and torts. A court must synthesize a rule from earlier cases, separating holdings from dicta. It must then determine whether the earlier cases are on point or distinguishable. And it may consider whether the rule of those cases is so flawed that it should be limited or overruled, keeping in mind the societal benefits of legal stability.

Beyond these general similarities, however, an argument exists that a court should be more willing to overrule a mistaken constitutional interpretation than it would be to overrule a mistaken interpretation of a statute. The difference involves the relative difficulty of fixing a judicial mistake. If the Supreme Court misinterprets a statute, Congress can correct the problem through a majority vote changing the statute's language. But if the Supreme Court misinterprets the Constitution, changing the relevant language would require a constitutional amendment—a politically arduous process requiring two-thirds approval by both houses of Congress followed by ratification by three-fourths of the States. Art. V. Given the difficulty of amending the Constitution, this argument goes, it is preferable for the Supreme Court to fix its own mistakes when a later case presents the opportunity. (The argument in this paragraph is an example of reasoning from constitutional structure; see below.)

Whether courts are motivated by this structural reason, or from a more general impulse to get important questions right, the US Supreme Court has often overruled previous constitutional decisions. A full understanding of constitutional precedents includes both a "canon" of prominent cases to be followed and an "anti-canon" of prominent cases that are viewed as mistakes to be avoided. Even though some overruled cases are no longer good law, they are still discussed in court opinions and briefs, as a reminder of what the current law is not—or what it should not be.

3. Structure

The structural approach considers the structure of the government created by the Constitution.

The Constitution envisions a structure of interacting governmental institutions—state and federal, legislative, executive, and judicial. Even if the text of the Constitution does not explicitly resolve a particular question, the governmental structure created by the Constitution may suggest an answer to a dispute, especially disputes that seem to center on "who decides." If one result seems more consistent with the Constitution's structure for the government, this is a reason to favor that result. (Of course, questions about constitutional structure are not completely separated from questions about constitutional text, because the text tells us what the structure is.)

Structural arguments are most common in cases involving federalism (conflict between levels of government) and separation of powers (conflict among branches of government). A federalism example might involve a state law banning trucks over a certain length on its highways, even though longer trucks are allowed in neighboring states. This law will affect the flow of goods between states. The Constitution authorizes Congress to "regulate commerce among the several states," Art. I, § 8, cl. 3, and says nothing about the states' ability to regulate commerce. Yet

state laws that change or reduce the flow of goods across state lines could interfere with Congress's decision-making power over interstate commerce. The Supreme Court has determined that the overall structure of the Constitution requires some limit on states' ability to pass such laws, because otherwise the states could impede Congress's enumerated power to decide how interstate commerce unfolds.

Few people consider the textual, precedential, or structural methods of reasoning to be inherently improper. Unfortunately, they are not guaranteed to lead to unanimously agreed-upon results. When text, precedent, and structure do not resolve cases on their own, other methods of reasoning can provide helpful insight. But depending on when, how, and why they are used, the following methods can be controversial.

4. History

The historical approach considers past events—other than court decisions—to help resolve a contested constitutional question. Court decisions are excluded from this discussion because reasoning from precedent is so prominent in law that it is usually treated as its own category.

As Oliver Wendell Holmes wrote, in some instances "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345 (1921). When applying a legal text, events before, during, and after its enactment may all shed light on its proper interpretation.

(a) ***Before.*** Most legal texts are drafted as a response to events occurring in the world. Knowing the circumstances that motivated the drafters can help reveal the text's purpose. In addition, drafters will have at least some awareness of prevailing legal practices, and those background assumptions may have influenced what they wrote (and what they left out).

(b) ***During.*** This is commonly known as "legislative history"—what was said and done during the process of creating and voting on the text.

(c) ***After.*** The laws made pursuant to a constitution after its enactment may show how its users understood it over time, separate and apart from any court precedents.

An example of historical argument appears in *Marsh v. Chambers*, 463 U.S. 783 (1983). The plaintiff argued that the Establishment Clause of the First Amendment did not allow a state legislature to start its sessions with a prayer from a chaplain. A majority of the Supreme Court disagreed, relying almost exclusively on history. Sessions of the Continental Congress that ultimately signed the Declaration of Independence began with invocations by chaplains. So did sessions of the First Congress in 1789, the very same Congress that drafted and approved the Establishment Clause. Sessions of Congress have opened with

prayers by chaplains ever since, as have sessions of many state legislatures. This old and ongoing history convinced the majority in *Marsh* that the meaning of the Establishment Clause could not include a ban on legislative prayers.

Nearly everyone agrees that historical information can be useful when interpreting the Constitution, but there are major variations in emphasis beyond that general notion. Believers in "originalism" argue that today's judges should interpret the Constitution as it would have been understood at the time of its ratification—even if this means overruling post-ratification precedents, disregarding post-ratification societal changes, or creating unpleasant consequences. Opponents of originalism, sometimes described as supporters of the "living constitution" approach, argue that past practices are simply one source among many for constitutional interpretation, and that history is not dispositive. Most (but not all) modern-day originalists are self-identified legal and political conservatives. However, originalist-style arguments have been used at different times by people with varying political beliefs. And even people who are eager to draw lessons from history may disagree about what history tells us. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570 (2008) (majority and dissent disagree as to the original understanding of the Second Amendment).

5. Consequences

The consequentialist approach asks which interpretation of the Constitution will produce the best consequences.

Any interpretation of the Constitution will have consequences (for the current litigants and any future ones). All else being equal, most people would prefer an interpretation leading to good consequences than to bad ones. Arguments about the likely future impacts of a decision are sometimes called "consequentialist," "utilitarian," "pragmatic," or "prudential" arguments, or arguments based on "public policy." A less complimentary term would be "result-oriented."

Some people argue that consequentialism is inconsistent with the rule of law, because courts are supposed to decide cases according to pre-announced principles, regardless of the outcome. There are also problems in applying consequentialist arguments. We cannot always know what the consequences of a decision will be, and even when we can, we must decide what constitutes a good or bad result, and for whom. These value judgments raise questions about whether judges, as opposed to other actors, should be the ones to decide which consequences society must live with.

On the other hand, pre-announced principles are sometimes not precise enough to resolve a particular case. Since a judicial decision in either direction will create consequences, it may be reckless not to consider them. Tort law and criminal law tend to penalize people who fail to consider the consequences of their actions, so why should we direct judges to do what we forbid for others?

Finally, even if we frown on consequentialist arguments, it is virtually impossible to prevent judges, who are only human, from considering them.

6. Values

The values-based approach to constitutional interpretation asks what basic social values the Constitution reflects as national priorities, and then seeks to decide modern cases consistently with those values.

Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), invoked values to answer a question not explicitly resolved by the Constitution's text. The Twenty-Fourth Amendment prohibits poll taxes as a condition of voting in federal elections, but says nothing about state and local elections. Plaintiffs challenged Virginia's state poll tax as a violation of the Equal Protection Clause, which also says nothing specific about state-level poll taxes. The majority opinion in *Harper* touched upon many values in deciding that it was unconstitutional for a state to require payment of poll taxes as a condition for voting in state elections. These include our values relating to democracy, to expanding suffrage to formerly disenfranchised groups, to economic opportunity, and to dislike of wealth-based social stratification. These themes were woven subtly into the opinion, without being separately identified as explicit bases for interpreting the Constitution. But the recourse to shared values goes a long way to explaining the result.

Applying the Constitution in light of our national values has some of the same pitfalls as consequentialism. Can values ever override the message from text, structure, or precedent? Whose values matter? Who gets to decide what our values are? And if a case involves competing values, how do we choose among them? Originalists may argue that only history provides a reliable guide to national values. Judicial conservatives may argue that judges should consider only those values expressed in legislation. Legal realists may argue that it is unrealistic and misleading to pretend that judges are not influenced by their values, so that the public is better served by opinions that transparently reveal and discuss the role of values than by opinions that purport to avoid value judgments while actually making them. And still others may argue that neither society at large, the legal system, nor the Constitution is well served by judges who are blind to our values.

D. Constitutional Reasoning in Action: *Ingraham v. Wright*

Ingraham v. Wright, 430 U.S. 651 (1977), considered whether corporal punishment of public school students can constitute "cruel and unusual punishment" under the Eighth Amendment. Many different methods of reasoning are on display in the majority and dissenting opinions. When reading the case, focus on the types of arguments the Justices use in support of their respective conclusions.

ITEMS TO CONSIDER WHILE READING *INGRAHAM v. WRIGHT*:

A. *Constitutional decisions are the product of litigation arising from concrete disputes between parties and decided within a procedural posture. Here, what happened in the world that gave rise to a dispute between parties? Who sued whom? In what court? Who won below, and at what stage? Which issues were presented for appeal, and how were they resolved by the opinion you read?*

B. *Identify the methods of reasoning found in the opinions. It will be useful to make a chart mapping the arguments in each category.*

	MAJORITY	DISSENT
Text		
Precedent		
Structure		
History		
Consequences		
Values		

C. *Do the methods of reasoning point in the same direction? If not, how is the conflict resolved?*

Ingraham v. Wright,
430 U.S. 651 (1977)

Justice Powell delivered the opinion of the Court [joined by Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist].

This case presents questions concerning the use of corporal punishment in public schools: First, whether the paddling of students as a means of maintaining school discipline constitutes cruel and unusual punishment in violation of the Eighth Amendment; and, second, to the extent that paddling is constitutionally permissible, whether the Due Process Clause of the Fourteenth Amendment requires prior notice and an opportunity to be heard.

I

Ingraham v. Wright

Petitioners James Ingraham and Roosevelt Andrews filed the complaint in this case on January 7, 1971, in the United States District Court for the Southern District of Florida. At the time both were enrolled in the Charles R. Drew Junior High School in Dade County, Florida, Ingraham in the eighth grade and Andrews in the ninth. . . . Named as defendants in all counts were respondents Willie J. Wright (principal at Drew Junior High School), Lemmie Deliford (an assistant principal), Solomon Barnes (an assistant to the principal), and Edward L. Whigham (superintendent of the Dade County School System).

Petitioners presented their evidence at a week-long trial before the District Court. At the close of petitioners' case, the District Court granted [the defendants' motion for a directed verdict], and dismissed the complaint without hearing evidence on behalf of the school authorities.

Petitioners' evidence may be summarized briefly. In the 1970–1971 school year many of the 237 schools in Dade County used corporal punishment as a means of maintaining discipline pursuant to Florida legislation and a local School Board regulation. . . . The authorized punishment consisted of paddling the recalcitrant student on the buttocks with a flat wooden paddle measuring less than two feet long, three to four inches wide, and about one-half inch thick. The normal punishment was limited to one to five "licks" or blows with the paddle and resulted in no apparent physical injury to the student. School authorities viewed corporal punishment as a less drastic means of discipline than suspension or expulsion. . . .

Petitioners focused on Drew Junior High School, the school in which both Ingraham and Andrews were enrolled in the fall of 1970. . . . The evidence, consisting mainly of the testimony of 16 students, suggests that the regime at Drew was exceptionally harsh. The testimony of Ingraham and Andrews, in support of their individual claims for damages, is illustrative. Because he was slow to respond to his teacher's instructions, Ingraham was subjected to more than 20 licks with a paddle while being held over a table in the principal's office. The paddling was so severe that he suffered a hematoma requiring medical attention and keeping him out of school for several days. Andrews was paddled several times for minor infractions. On two occasions he was struck on his arms, once depriving him of the full use of his arm for a week.

The District Court made no findings on the credibility of the students' testimony. Rather, assuming their testimony to be credible, the court found no constitutional basis for relief.

[Sitting en banc, the Court of Appeals] affirmed the judgment of the District Court. The Eighth Amendment, in the court's view, was simply inapplicable to corporal punishment in public schools. Stressing the likelihood of civil and criminal liability in state law, if petitioners' evidence were believed, the court held that "the administration of corporal punishment in public schools, whether or not excessively

administered, does not come within the scope of Eighth Amendment protection." . . . The court refused to examine instances of punishment individually: "We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks."

We granted certiorari, limited to the questions of cruel and unusual punishment and procedural due process.

II

In addressing the scope of the Eighth Amendment's prohibition on cruel and unusual punishment, this Court has found it useful to refer to traditional common-law concepts and to the attitudes which our society has traditionally taken. So, too, in defining the requirements of procedural due process under the Fifth and Fourteenth Amendments, the Court has been attuned to what has always been the law of the land, and to traditional ideas of fair procedure. We therefore begin by examining the way in which our traditions and our laws have responded to the use of corporal punishment in public schools.

BIOGRAPHY

SIR WILLIAM BLACKSTONE (1723–1780) was an English judge and legal scholar who published an influential treatise titled *Commentaries on the Law of England*. American lawyers in the Framers' generation considered Blackstone to be a reliable encyclopedia of the common law concepts that were the starting point for the new states' own evolving bodies of common law.

The use of corporal punishment in this country as a means of disciplining schoolchildren dates back to the colonial period. It has survived the transformation of primary and secondary education from the colonials' reliance on optional private arrangements to our present system of compulsory education and dependence on public schools. Despite the general abandonment of corporal punishment as a means of punishing criminal offenders, the practice continues to play a role in the public education of schoolchildren in most parts of the country. Professional and public opinion is sharply divided on the practice, and has been for more than a century. Yet we can discern no trend toward its elimination.

At common law a single principle has governed the use of corporal punishment since before the American Revolution: Teachers may impose reasonable but not excessive force to discipline a child. **Blackstone** catalogued among the "absolute

Ingraham v. Wright

rights of individuals" the right "to security from the corporal insults of menaces, assaults, beating, and wounding," but he did not regard it a "corporal insult" for a teacher to inflict "moderate correction" on a child in his care. To the extent that force was "necessary to answer the purposes for which the teacher is employed," Blackstone viewed it as "justifiable or lawful." The basic doctrine has not changed. The prevalent rule in this country today privileges such force as a teacher or administrator reasonably believes to be necessary for the child's proper control, training, or education. Restatement (Second) of Torts § 147(2). To the extent that the force is excessive or unreasonable, the educator in virtually all States is subject to possible civil and criminal liability.

Although the early cases viewed the authority of the teacher as deriving from the parents, the concept of parental delegation has been replaced by the view—more consonant with compulsory education laws—that the State itself may impose such corporal punishment as is reasonably necessary for the proper education of the child and for the maintenance of group discipline. All of the circumstances are to be taken into account in determining whether the punishment is reasonable in a particular case. Among the most important considerations are the seriousness of the offense, the attitude and past behavior of the child, the nature and severity of the punishment, the age and strength of the child, and the availability of less severe but equally effective means of discipline.

Of the 23 States that have addressed the problem through legislation, 21 have authorized the moderate use of corporal punishment in public schools. Of these States only a few have elaborated on the common-law test of reasonableness, typically providing for approval or notification of the child's parents, or for infliction of punishment only by the principal or in the presence of an adult witness. Only two States, Massachusetts and New Jersey, have prohibited all corporal punishment in their public schools. Where the legislatures have not acted, the state courts have uniformly preserved the common-law rule permitting teachers to use reasonable force in disciplining children in their charge.

Against this background of historical and contemporary approval of reasonable corporal punishment, we turn to the constitutional questions before us.

III

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government. An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes. We adhere to

this long-standing limitation and hold that the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools.

A

The history of the Eighth Amendment is well known. The text was taken, almost verbatim, from a provision of the Virginia Declaration of Rights of 1776, which in turn derived from **the English Bill of Rights** of 1689. The English version, adopted after the accession of William and Mary, was intended to curb the excesses of English judges under the reign of James II. Historians have viewed the English provision as a reaction either to the "Bloody Assize," the treason trials conducted by Chief Justice Jeffreys in 1685 after the abortive rebellion of the Duke of Monmouth, or to the perjury prosecution of Titus Oates in the same year. In either case, the exclusive concern of the English version was the conduct of judges in enforcing the criminal law. The original draft introduced in the House of Commons provided: "The requiring excessive bail of persons committed in criminal cases and imposing excessive fines, and illegal punishments, to be prevented."

■ HISTORY

THE ENGLISH BILL OF RIGHTS: In the so-called Glorious Revolution of 1688, Parliament deposed the unpopular King James II in a bloodless coup. Parliament then offered the throne to William and Mary of Orange, so long as they agreed to respect "the rights of Englishmen." Many of these were then codified by Parliament as the Bill of Rights of 1689.

Although the reference to "criminal cases" was eliminated from the final draft, the preservation of a similar reference in the preamble indicates that the deletion was without substantive significance. Thus, Blackstone treated each of the provision's three prohibitions as bearing only on criminal proceedings and judgments.

The Americans who adopted the language of this part of the English Bill of Rights in framing their own State and Federal Constitutions 100 years later feared the imposition of torture and other cruel punishments not only by judges acting beyond their lawful authority, but also by legislatures engaged in making the laws by which judicial authority would be measured. Indeed, the principal concern of the American Framers appears to have been with the legislative definition of crimes and punishments. But if the American provision was intended to restrain government more broadly than its English model, the subject to which it was intended to apply—the criminal process—was the same.

At the time of its ratification, the original Constitution was criticized in the Massachusetts and Virginia Conventions for its failure to provide any protection for persons convicted of crimes. This criticism provided the impetus for inclusion of the Eighth Amendment in the Bill of Rights. When the Eighth Amendment was debated in the First Congress, it was met by the objection that the Cruel and Unusual Punishments Clause might have the effect of outlawing what were then the common criminal punishments of hanging, whipping, and earcropping. The objection was not

heeded, precisely because the legislature would otherwise have had the unfettered power to prescribe punishments for crimes.

Ingraham v. Wright

B

In light of this history, it is not surprising to find that every decision of this Court considering whether a punishment is "cruel and unusual" within the meaning of the Eighth and Fourteenth Amendments has dealt with a criminal punishment. See *Estelle v. Gamble*, 429 U.S. 97 (1976) (incarceration without medical care); *Gregg v. Georgia*, 428 U.S. 153 (1976) (execution for murder); *Furman v. Georgia*, 408 U.S. 238 (1972) (execution for murder); *Powell v. Texas*, 392 U.S. 514 (1968) (plurality opinion) ($20 fine for public drunkenness); *Robinson v. California*, 370 U.S. 660 (1962) (incarceration as a criminal for addiction to narcotics); *Trop v. Dulles*, 356 U.S. 86 (1958) (expatriation for desertion); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (execution by electrocution after a failed first attempt); *Weems v. United States,* 217 U.S. 349 (1910) (15 years' imprisonment and other penalties for falsifying an official document); *Howard v. Fleming*, 191 U.S. 126 (1903) (10 years' imprisonment for conspiracy to defraud); *In re Kemmler*, 136 U.S. 436 (1890) (execution by electrocution); *Wilkerson v. Utah*, 99 U.S. 130 (1879) (execution by firing squad); *Pervear v. Commonwealth*, 72 U.S. 475 (1867) (fine and imprisonment at hard labor for bootlegging).

These decisions recognize that the Cruel and Unusual Punishments Clause circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such. We have recognized the last limitation as one to be applied sparingly. The primary purpose of the Cruel and Unusual Punishments Clause has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes.

In the few cases where the Court has had occasion to confront claims that impositions outside the criminal process constituted cruel and unusual punishment, it has had no difficulty finding the Eighth Amendment inapplicable. Thus, in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), the Court held the Eighth Amendment inapplicable to the deportation of aliens on the ground that deportation is not a punishment for crime. And in *Uphaus v. Wyman*, 360 U.S. 72 (1959), the Court sustained a judgment of civil contempt, resulting in incarceration pending compliance with a subpoena, against a claim that the judgment imposed cruel and unusual punishment. It was emphasized that the case involved essentially a civil remedy[.]

C

Petitioners acknowledge that the original design of the Cruel and Unusual Punishments Clause was to limit criminal punishments, but urge nonetheless that the prohibition should be extended to ban the paddling of schoolchildren. Observing that the Framers of the Eighth Amendment could not have envisioned our present system of public and compulsory education, with its opportunities for noncriminal punishments, petitioners contend that extension of the prohibition against cruel punishments is necessary lest we afford greater protection to criminals than to schoolchildren. It would be anomalous, they say, if schoolchildren could be beaten without constitutional redress, while hardened criminals suffering the same beatings at the hands of their jailers might have a valid claim under the Eighth Amendment. Whatever force this logic may have in other settings, we find it an inadequate basis for wrenching the Eighth Amendment from its historical context and extending it to traditional disciplinary practices in the public schools.

The prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration. The prisoner's conviction entitles the State to classify him as a "criminal," and his incarceration deprives him of the freedom to be with family and friends and to form the other enduring attachments of normal life. Prison brutality, as the Court of Appeals observed in this case, is part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny. Even so, the protection afforded by the Eighth Amendment is limited. After incarceration, only the unnecessary and wanton infliction of pain, constitutes cruel and unusual punishment forbidden by the Eighth Amendment.

The schoolchild has little need for the protection of the Eighth Amendment. Though attendance may not always be voluntary, the public school remains an open institution. Except perhaps when very young, the child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.

The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner. In virtually every community where corporal punishment is permitted in the schools, these safeguards are reinforced by the legal constraints of the common law. Public school teachers and administrators are privileged at common law to inflict only such corporal punishment as is reasonably necessary for the proper education and discipline of the child; any punishment going beyond the privilege may result in both civil and criminal liability. As long as the schools are open to public scrutiny, there is no reason to believe that the common-law constraints will not effectively remedy and deter excesses such as those alleged in this case.

Ingraham v. Wright

We conclude that when public school teachers or administrators impose disciplinary corporal punishment, the Eighth Amendment is inapplicable. . . .

IV

[The methods used by Florida schools when imposing corporal punishment do not violate procedural due process.]

V

Petitioners cannot prevail on either of the theories before us in this case. The Eighth Amendment's prohibition against cruel and unusual punishment is inapplicable to school paddlings, and the Fourteenth Amendment's requirement of procedural due process is satisfied[.] We therefore agree with the Court of Appeals that petitioners' evidence affords no basis for injunctive relief, and that petitioners cannot recover damages on the basis of any Eighth Amendment or procedural due process violation.

Justice White, with whom Justices Brennan, Marshall, and Stevens join, dissenting.

Today the Court holds that corporal punishment in public schools, no matter how severe, can never be the subject of the protections afforded by the Eighth Amendment. It also holds that students in the public school systems are not constitutionally entitled to a hearing of any sort before beatings can be inflicted on them. Because I believe that these holdings are inconsistent with the prior decisions of this Court and are contrary to a reasoned analysis of the constitutional provisions involved, I respectfully dissent.

I

A

The Eighth Amendment places a flat prohibition against the infliction of "cruel and unusual punishments." This reflects a societal judgment that there are some punishments that are so barbaric and inhumane that we will not permit them to be imposed on anyone, no matter how opprobrious the offense. If there are some punishments that are so barbaric that they may not be imposed for the commission of crimes, designated by our social system as the most thoroughly reprehensible acts an individual can commit, then, *a fortiori*, similar punishments may not be imposed on persons for less culpable acts, such as breaches of school discipline. Thus, if it is constitutionally impermissible to cut off someone's ear for the commission of murder, it must be unconstitutional to cut off a child's ear for being late to class. Although there were no ears cut off in this case, the record reveals beatings so severe that if they were inflicted on a hardened criminal for the commission of a serious crime, they might not pass constitutional muster.

Nevertheless, the majority holds that the Eighth Amendment "was designed to protect [only] those convicted of crimes," relying on a vague and inconclusive

recitation of the history of the Amendment. Yet the constitutional prohibition is against cruel and unusual punishments; nowhere is that prohibition limited or modified by the language of the Constitution. Certainly, the fact that the Framers did not choose to insert the word "criminal" into the language of the Eighth Amendment is strong evidence that the Amendment was designed to prohibit all inhumane or barbaric punishments, no matter what the nature of the offense for which the punishment is imposed.

No one can deny that spanking of schoolchildren is "punishment" under any reasonable reading of the word, for the similarities between spanking in public schools and other forms of punishment are too obvious to ignore. Like other forms of punishment, spanking of schoolchildren involves an institutionalized response to the violation of some official rule or regulation proscribing certain conduct and is imposed for the purpose of rehabilitating the offender, deterring the offender and others like him from committing the violation in the future, and inflicting some measure of social retribution for the harm that has been done.

B

We are fortunate that in our society punishments that are severe enough to raise a doubt as to their constitutional validity are ordinarily not imposed without first affording the accused the full panoply of procedural safeguards provided by the criminal process. The effect has been that "every decision of this Court considering whether a punishment is 'cruel and unusual' within the meaning of the Eighth and Fourteenth Amendments has dealt with a criminal punishment." The Court would have us believe from this fact that there is a recognized distinction between criminal and noncriminal punishment for purposes of the Eighth Amendment. This is plainly wrong. Even a clear legislative classification of a statute as "non-penal" would not alter the fundamental nature of a plainly penal statute. The relevant inquiry is not whether the offense for which a punishment is inflicted has been labeled as criminal, but whether the purpose of the deprivation is among those ordinarily associated with punishment, such as retribution, rehabilitation, or deterrence.

If this purposive approach were followed in the present case, it would be clear that spanking in the Florida public schools is punishment within the meaning of the Eighth Amendment. The District Court found that corporal punishment is one of a variety of measures employed in the school system for the correction of pupil behavior and the preservation of order. Behavior correction and preservation of order are purposes ordinarily associated with punishment.

Without even mentioning the purposive analysis applied in the prior decisions of this Court, the majority adopts a rule that turns on the label given to the offense for which the punishment is inflicted. Thus, the record in this case reveals that one student at Drew Junior High School received 50 licks with a paddle for allegedly making an obscene telephone call. The majority holds that the Eighth Amendment

Ingraham v. Wright

does not prohibit such punishment since it was only inflicted for a breach of school discipline. However, that same conduct is punishable as a misdemeanor under Florida law, and there can be little doubt that if that same "punishment" had been inflicted by an officer of the state courts for violation of [the obscene phone call statute], it would have had to satisfy the requirements of the Eighth Amendment.

C

In fact, as the Court recognizes, the Eighth Amendment has never been confined to criminal punishments.[FN4] Nevertheless, the majority adheres to its view that any protections afforded by the Eighth Amendment must have something to do with criminals, and it would therefore confine any exceptions to its general rule that only criminal punishments are covered by the Eighth Amendment to abuses inflicted on prisoners. Thus, if a prisoner is beaten mercilessly for a breach of discipline, he is entitled to the protection of the Eighth Amendment, while a schoolchild who commits the same breach of discipline and is similarly beaten is simply not covered.

FN4 In *Estelle v. Gamble*, 429 U.S. 97 (1976), a case decided this Term, the Court held that "deliberate indifference to the medical needs of prisoners" by prison officials constitutes cruel and unusual punishment prohibited by the Eighth Amendment. Such deliberate indifference to a prisoner's medical needs clearly is not punishment inflicted for the commission of a crime; it is merely misconduct by a prison official. . . .

The purported explanation of this anomaly is the assertion that schoolchildren have no need for the Eighth Amendment. We are told that schools are open institutions, subject to constant public scrutiny; that schoolchildren have adequate remedies under state law; and that prisoners suffer the social stigma of being labeled as criminals. How any of these policy considerations got into the Constitution is difficult to discern, for the Court has never considered any of these factors in determining the scope of the Eighth Amendment.

The essence of the majority's argument is that schoolchildren do not need Eighth Amendment protection because corporal punishment is less subject to abuse in the public schools than it is in the prison system. However, it cannot be reasonably suggested that just because cruel and unusual punishments may occur less frequently under public scrutiny, they will not occur at all. The mere fact that a public flogging or a public execution would be available for all to see would not render the punishment constitutional if it were otherwise impermissible. Similarly, the majority would not suggest that a prisoner who is placed in a minimum-security prison and permitted to go home to his family on the weekends should be any less entitled to Eighth Amendment protections than his counterpart in a maximum-security prison. In short, if a punishment is so barbaric and inhumane that it goes beyond the tolerance

of a civilized society, its openness to public scrutiny should have nothing to do with its constitutional validity.

Nor is it an adequate answer that schoolchildren may have other state and constitutional remedies available to them. Even assuming that the remedies available to public school students are adequate under Florida law, the availability of state remedies has never been determinative of the coverage or of the protections afforded by the Eighth Amendment. The reason is obvious. The fact that a person may have a state-law cause of action against a public official who tortures him with a thumbscrew for the commission of an antisocial act has nothing to do with the fact that such official conduct is cruel and unusual punishment prohibited by the Eighth Amendment. Indeed, the majority's view was implicitly rejected this Term in *Estelle v. Gamble*, when the Court held that failure to provide for the medical needs of prisoners could constitute cruel and unusual punishment even though a medical malpractice remedy in tort was available to prisoners under state law.

D

By holding that the Eighth Amendment protects only criminals, the majority adopts the view that one is entitled to the protections afforded by the Eighth Amendment only if he is punished for acts that are sufficiently opprobrious for society to make them "criminal." This is a curious holding in view of the fact that the more culpable the offender the more likely it is that the punishment will not be disproportionate to the offense, and consequently, the less likely it is that the punishment will be cruel and unusual. Conversely, a public school student who is spanked for a mere breach of discipline may sometimes have a strong argument that the punishment does not fit the offense, depending upon the severity of the beating, and therefore that it is cruel and unusual. Yet the majority would afford the student no protection no matter how inhumane and barbaric the punishment inflicted on him might be.

The issue presented in this phase of the case is limited to whether corporal punishment in public schools can ever be prohibited by the Eighth Amendment. I am therefore not suggesting that spanking in the public schools is in every instance prohibited by the Eighth Amendment. My own view is that it is not. I only take issue with the extreme view of the majority that corporal punishment in public schools, no matter how barbaric, inhumane, or severe, is never limited by the Eighth Amendment. Where corporal punishment becomes so severe as to be unacceptable in a civilized society, I can see no reason that it should become any more acceptable just because it is inflicted on children in the public schools.

II

Ingraham v. Wright

[The dissenters disagreed with the majority's holding regarding procedural due process. Justice Stevens filed a separate dissent with additional discussion of that issue.]

Chapter Recap

A. Constitutional law is:

- The law that governs the government
- The law for making laws
- The plan for deciding who decides

B. Constitutional law deserves study both for its substance and because it teaches the lawyering skills of interpreting broadly-phrased legal standards and responding to legal change.

C. Lawyers use many methods to interpret open-textured terms in the Constitution, including:

- Text
- Precedent
- Structure
- History
- Consequences
- Values